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PARLIAMENTARY DEBATES
(HANSARD)

# HOUSE OF LORDS
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*ORDER OF BUSINESS*



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# House of Lords

*Tuesday, 15 January 2013.*

*2.30 pm*

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

## Introduction: The Lord Bishop of Coventry

*2.38 pm*

*Christopher John, Lord Bishop of Coventry, was introduced and took the oath, supported by the Bishop of Exeter and the Bishop of Birmingham, and signed an undertaking to abide by the Code of Conduct.*

## Introduction: Lord Williams of Oystermouth

*2.43 pm*

*The right reverend and right honourable Rowan Douglas Williams, lately Archbishop of Canterbury, having been created Baron Williams of Oystermouth, of Oystermouth in the City and County of Swansea, was introduced and took the oath, supported by Lord Griffiths of Fforestfach and the Lord Framlingham, and signed an undertaking to abide by the Code of Conduct.*

*Lord Hardie took the oath.*

## Thames Tideway Tunnel
*Question*

*2.48 pm*

*Asked By* ***Lord Berkeley***

To ask Her Majesty's Government what will be the costs to the consumer of the Thames Tideway Tunnel.

**The Parliamentary Under-Secretary of State, Department for Environment, Food and Rural Affairs (Lord De Mauley):** My Lords, for Thames Water's 13.8 million domestic sewerage customers, the tunnel is estimated to have an average maximum annual impact on bills of £70 to £80 at 2011 prices. This includes the cost of financing the project. The exact profile and duration of the cost to customers continues to be analysed. Spread over several decades, bills could gradually be affected from 2014-15, with the maximum impact estimated from around 2019.

**Lord Berkeley:** I am grateful to the Minister, and glad that they are still looking at the finances. Does he agree that if Thames Water had paid a reasonable dividend appropriate to a utility for the past 12 years and Macquarie Bank had not taken £48 million a year on management fees, this project could have been funded out of Thames Water's assets without any extra charge on the customers? Will he therefore instruct the regulator Ofwat to look at all this again—to look at alternatives such as a sustainable drainage system—so that customers can perhaps get a reduction in their fees rather than this horrendous increase?

**Lord De Mauley:** My Lords, Ofwat has ensured that the regulatory ring-fence in Thames Water's licence was tightened following its acquisition by Macquarie. The ring-fence licence conditions on Thames Water already include a condition requiring Thames Water to ensure that its dividend policy will not impair the company's ability to finance its functions. As for alternatives to the tunnel, studies have looked at all kinds of alternatives over the past decade but none has shown a viable cheaper solution that would simultaneously address the current sewer overflow problems within a decade, deliver value for money and meet environmental objectives.

**Lord Stoddart of Swindon:** My Lords, this project has been known about for decades, I imagine, but over the past 10 years Thames Water has paid out £3.5 billion to shareholders. Should it not have known that that sort of money should have been saved to provide this essential ring system in London? Why should every customer of Thames Water pay for this project? Would it not be better if Thames Water did not pay any dividends for the next 10 years at the rate that they paid in 2012, and that covered the whole of the cost of the new project?

**Lord De Mauley:** What an interesting suggestion, my Lords. The standard model in the water sector is for customers to pay the financing costs of the company's capital expenditure on underground assets together with a charge to reflect expenditure required to keep them in a serviceable state. I do not think that we would find investors if we were not able to finance it in this way.

**Lord Stoneham of Droxford:** My Lords, over the past two years Thames Water has paid out £650 million in dividends and £100 million in management fees. Can the Minister assure the House that Thames Water is not simply a private equity vehicle designed to save tax for its overseas investors at the expense of London customers and UK taxpayers, who are supposed to stump up for its infrastructure investment?

**Lord De Mauley:** Yes, my Lords; Thames Water pays its tax. All UK companies are allowed to claim capital allowances when they spend on capital investment programmes. Tax relief is allowable against the capital expenditure incurred with the aim of encouraging investment by companies. Water and sewerage companies have significant capital programmes in comparison with their revenues. They therefore benefit from tax allowances proportionately more than others. HMRC remains vigilant in ensuring that companies operating within the UK pay the tax they are legally obliged to pay.

**Lord Bradshaw:** Does my noble friend believe that the people who privatised our utilities expected that within 10 years they would be in the hands not only of foreign administrations and foreign countries but actually of the Governments of those countries? We have denationalised here and renationalised from abroad. Surely the regulator should get a lot tougher on these people who are making absolute fools of people who have to subscribe increasing sums to the maintenance of essential services.

**Lord De Mauley:** My noble friend makes a fair point, my Lords, but we believe in free capital markets.

**Lord Harris of Haringey:** My Lords, does the answer to the noble Lord, Lord Bradshaw, mean that the Government are indifferent to the extent of foreign ownership of our critical national infrastructure? Are they indifferent to the possible implications of that?

**Lord De Mauley:** No, my Lords, we are not indifferent; we take these things very seriously. As I say, however, we believe in free access to our capital markets.

**Lord Lea of Crondall:** My Lords, has the noble Lord seriously considered whether he has given adequate answers to all the questions that have been asked in the last five minutes? Will he write, and put in the Library, a full letter on the considerations in the Government's mind about where we go from here on all these matters?

**Lord De Mauley:** I cannot think of anything that I would like to expand upon but I will look at the record and if there is anything, of course I will write.

**Lord Bowness:** My Lords, I apologise to my noble friend for not giving him advance notice of this question. My understanding is that properties not connected to mains drainage do not pay sewerage charges. By analogy, are those properties within the Thames Water area which have no physical benefit from this proposal actually liable to pay the charges, or should there not be the equivalent of what used to be described as differential precepts? I declare an interest as somebody who lives in a property that may be in that kind of position.

**Lord De Mauley:** My Lords, my understanding is that those who are not connected and not currently paying sewerage charges will not pay this charge. If that is not correct, I will write to my noble friend.

**Lord Knight of Weymouth:** My Lords, I, too, live in a property that may be affected by the construction of the tunnel and I, too, have not given advance notice of my question to the Minister.

Although I see no other option but to proceed with the project, I agree with my noble friend Lord Berkeley that the huge cost to the consumer is of great concern. How will the Minister ensure that, in the interests of consumers, there is proper parliamentary scrutiny—in this House and in the other place—of the cost, which may well rise, and of the funding vehicle, which has now, by ministerial answer, been guaranteed by the taxpayer?

**Lord De Mauley:** That is a fair point. Anything that needs to come to Parliament will, of course, do so. If there is anything else that the noble Lord and I think it would be appropriate to debate, we will put it up for debate.

## NHS: Liverpool Care Pathway

*Question*

*2.56pm*

*Asked By* ***Baroness Knight of Collingtree***

To ask Her Majesty's Government what procedures will be adopted in carrying out the NHS inquiry into the Liverpool Care Pathway announced on Monday 26 November 2012.

**The Parliamentary Under-Secretary of State, Department of Health (Earl Howe):** My Lords, as we announced today, the noble Baroness, Lady Neuberger, has been appointed to oversee the review of the Liverpool care pathway and is currently determining its procedures. The review will examine how the Liverpool care pathway is used in practice, and will look in particular at the experience of the Liverpool care pathway by patients, families and health professionals, as well as considering the role of financial incentives in its use. It will report by the summer.

**Baroness Knight of Collingtree:** My Lords, there will be very much satisfaction at the appointment of the noble Baroness concerned as chairman. Does my noble friend agree that this inquiry was set up following the receipt of more than 1,000 complaints from relatives of patients who had been put on the Liverpool care pathway, and that the Government are not ignoring their complaints, as those about Stafford were avoided some time ago? Is it acceptable that, out of 130,000 people who die yearly on the pathway—everyone who is put on it—only half are told that they are being put on it and neither they nor their relatives are allowed to know or complain that that is the case?

My noble friend the Minister is very widely respected for his fairness. Will he now consider attending a meeting sponsored by five Peers and a Bishop and addressed by two professors, two consultants and patients' representative, to hear the case against what is going on?

**Earl Howe:** My Lords, I am grateful to my noble friend for her endorsement of the appointment of the noble Baroness, Lady Neuberger, whom the whole House greatly respects. She is right that after seeing recent criticisms in the media and having received a great many letters in the department, the Minister of State for Care and Support, my honourable friend Norman Lamb, held a meeting at the end of November with patients, families and professionals, both supporters and opponents of the Liverpool care pathway. At that

meeting, he announced his decision that there would be an independent chair to oversee a review of the experience of the pathway. However, it is important to emphasise that the pathway itself has not been called into question but, rather, how it is being used. My noble friend is right to draw attention to the concerns around the lack of engagement with patients and their families, which is often a feature of the complaints received.

**Lord Walton of Detchant:** My Lords, does the Minister accept that the principles of the Liverpool care pathway, when precisely defined and carefully applied at the right time and in the right circumstances, make an invaluable contribution to the care and passing of individuals with terminal illness? In light of the circumstances referred to by the noble Baroness, does he further accept that the unfortunate recent publicity has been the result of circumstances in which those principles have been misinterpreted and misapplied?

**Earl Howe:** Yes, my Lords. The LCP, if I may use the abbreviation, is internationally recognised good practice as a framework for managing care for people in their last few days or hours of life. It was created as a way of bringing hospice-style care into hospitals and helping staff who may not be palliative care specialists to provide appropriate care to allow people to die in comfort and with dignity. However, we have consistently made clear in guidance for implementation that the pathway cannot replace clinical judgment and it should not be treated as a simple tick-box exercise. I am afraid that, from the complaints that have been received, that sometimes appears to be what has happened.

**Baroness Browning:** My Lords, I, too, welcome the appointment of the noble Baroness, Lady Neuberger; I am sure that we all have confidence in her as chair of this review. Can my noble friend confirm that the terms of reference will specifically make sure that a direct comparison is made between what is appropriate in terms of the expertise and continuity to be found in the hospice movement and the rapid changes of staffing, including bank staff used in general wards of general hospitals?

**Earl Howe:** I am grateful to my noble friend for drawing attention to a very important point. It has always been emphasised in connection with the LCP that to ensure that it is used properly it is important that staff receive appropriate training and support, and that relevant education and training programmes are always in place. In view of the degree of staff turnover to which my noble friend refers, I am confident that the noble Baroness, Lady Neuberger, will have that fact in her sights.

**The Lord Bishop of Exeter:** My Lords, does the noble Earl agree that if there is to be full confidence in what is undoubtedly a useful clinical tool that has helped many thousands of people to experience better care in the last hours and days of their life, non-clinical priorities in the use of the pathway, especially financial priorities, must be eradicated, and every patient should be treated solely according to their needs? Does he further agree that it would be far better to link CQUIN payments to staff training in the use of the pathway, rather than the numbers of patients being placed upon it?

**Earl Howe:** My Lords, once again, I am sure that the noble Baroness, Lady Neuberger, will wish to look at that very issue. The CQUIN payment framework that the right reverend Prelate mentioned was designed to incentivise good practice, and the LCP is considered internationally to be best practice. In one sense, it is therefore logical that the two should be combined. It is equally important for me to emphasise that the Department of Health has not attached any set financial targets to the LCP; on the other hand, some commissioners in the NHS have introduced local incentives. The way in which those incentives have been applied should be the subject of close attention.

**Baroness Jolly:** My Lords, the Liverpool care pathway is widely used, but some care providers choose to use a slightly different pathway. Will my noble friend confirm that all similar pathways will be included in the inquiry led by the noble Baroness, Lady Neuberger?

**Earl Howe:** I will be happy to speak to the noble Baroness about that. I was not aware that she had that in mind. I do not think that there would be an objection on anyone's part if she did, but it will really depend on the extent to which there is widespread concern about the use of those other pathways.

## Health: HIV Strategy for England

*Question*

*3.04 pm*

*Asked By* ***Lord Collins of Highbury***

To ask Her Majesty's Government what plans they have to publish a cross-departmental HIV Strategy for England, in line with the Political Declaration made at the United Nations General Assembly in 2011.

**The Parliamentary Under-Secretary of State, Department of Health (Earl Howe):** My Lords, tackling HIV remains a priority for the Government. We believe the way forward is to develop a framework that covers both HIV and broader sexual health issues. We therefore plan to publish a policy document on sexual health and HIV shortly.

**Lord Collins of Highbury:** I thank the Minister for that response. One issue that is obviously of big concern is testing. Half of the people diagnosed with HIV are diagnosed late. With the commissioning of HIV testing being highly fragmented under the new NHS arrangements in England, how will the Government ensure that HIV testing recommendations from NICE and the British HIV Association are implemented consistently across the country?

**Earl Howe:** My Lords, the new commissioning arrangements will allow each commissioning organisation to play to its strengths and will mean better services for patients. Local authorities will be able to link sexual health provision into other public health provision and other services such as family support and social care. HIV treatment is complex, specialist and expensive. That is why the NHS Commissioning Board will commission the NHS to provide treatment. During the White Paper consultation there was wide support for that. The key will be for local health and well-being boards and Public Health England to have a role in supporting integration at a local level to make sure that the commissioning of services is joined up in all parts of the country.

**Lord May of Oxford:** My Lords, the Minister will undoubtedly be familiar with the relatively recent and very thoughtful Select Committee report from this House urging specific measures aimed at reversing the regrettable rise in the incidence of new infections of HIV. Already one of those measures has been mentioned; not all of them are highly technical. Some of them address the fact that, in several studies, young people today show themselves to be much less well informed about sexually transmitted infection than in the past. Could the Minister assure me that these underlying problems outlined in that report will be taken account of in the proposed cross-departmental strategy and if not, why not?

**Earl Howe:** My Lords, the noble Lord is right to draw attention to the need for targeted prevention messages in this area. Following a competitive tender last year my department awarded the Terrence Higgins Trust a contract worth £6.7 million for three years. Known as HIV Prevention England, the programme targets gay men and African communities, the groups that remain the most at risk of HIV in the UK. That work includes promoting HIV testing through the Think HIV campaign; primary prevention messages, which we must get to the right audiences; and developing the evidence base on what works in HIV prevention. That DoH programme, I emphasise, is in addition to work funded by the NHS and local authorities.

**Baroness Hussein-Ece:** My Lords, the Minister will be aware of the links between HIV and tuberculosis, and of how important it is that when we talk about HIV we also talk about TB. Are there any plans in the strategy that is mentioned to include TB, given that cases of both HIV and TB are on the rise?

**Earl Howe:** My noble friend is absolutely right to mention the connection between HIV and TB. The complexities that arise from comorbidity of that order are fully taken account of in the approach taken by both the health service and local authorities to the testing and treatment of HIV patients. The individuals attending a TB clinic are offered and recommended an HIV test as part of their routine care. This is applicable to all patients irrespective of age. NICE has issued guidelines which recommend the use of a specialist test for people with HIV, and if the test is positive a clinical assessment will be performed to exclude TB and consider treating latent TB infection.

**Baroness Gould of Potternewton:** My Lords, is the Minister aware of a recent study undertaken on behalf of the British HIV Association on the relationship between women with HIV and domestic violence, which shows that half the women interviewed have shared a lifetime of what is called intimate partner violence—IPV? In the light of that evidence, can the Minister indicate what action is being taken by government to raise awareness of this very serious level of violence against women with HIV and, secondly, whether there will be any routine screening to find out the level of IPV among these women? Furthermore, does he agree that if we had a national strategy for HIV, surely issues such as this and things such as unemployment, as well as other areas, could be taken into account?

**Earl Howe:** My Lords, the noble Baroness raises an extremely important issue about violence against women. There is a great deal of activity in my department designed to bear down on that and I should be happy to write to her about it. On the issue that she specifically alluded to at the end of her question, we think that, as most HIV is transmissible sexually, it makes much more sense to build that dimension into a sexual health strategy which embraces not only HIV but all transmissible sexual conditions.

**Baroness Masham of Ilton:** My Lords, is the Minister aware that there are many commissioning bodies for various aspects of HIV, such as CCGs, a commissioning board, local authorities, community nurses and voluntary organisations? Does he therefore agree that it is most important to have some strict guidelines and a strategy so that there is not a muddle?

**Earl Howe:** The noble Baroness makes a very good point. I can tell her that the sexual health policy document, which we will be publishing shortly, will set out our plans for improving sexual health generally, as well as our plans for offering support to women facing unwanted pregnancy. It is an important document. It is crucial that we take the time to get it right and make it clear that, as she points out, all the commissioners in the system need to work together with the benefit of advice not only from the commissioning board but from local health and well-being boards at a local level.

## NHS: Reconfiguration of Services

*Question*

*3.12 pm*

*Asked By* ***Lord Hunt of Kings Heath***

To ask Her Majesty's Government what the implications are for the future reconfiguration of NHS services in the light of the decision by the Office of Fair Trading to refer the proposed merger of hospitals in Dorset to the Competition Commission.

**Lord Hunt of Kings Heath:** My Lords, I beg leave to ask the Question standing in my name on the Order Paper and refer noble Lords to my health interests in the register.

**The Parliamentary Under-Secretary of State, Department of Health (Earl Howe):** My Lords, patients' interests must remain the paramount consideration in any NHS reconfiguration, including merger. We expect the competition authorities to consider the costs and benefits of proposals and to make a final decision based on the balance of impact on patients.

**Lord Hunt of Kings Heath:** My Lords, the noble Earl will recall that the Health and Social Care Bill was amended to emphasise the importance of the integration of services. This merger was designed to integrate services and to provide a higher quality of care in the hospitals concerned. Does he recognise that this intervention by the OFT, which knows virtually nothing about the health service, will send a signal throughout the National Health Service that the ideology of competition is graded as being more important than either the integration of service or the quality of service? Can we expect the Government to send a signal to the OFT that it should desist? Otherwise, this will cause great concern in the National Health Service.

**Earl Howe:** My Lords, the referral of this merger proposal by the OFT to the Competition Commission is not at all a result of the measures brought in by the current Government; it is a result of the provisions of the Enterprise Act 2002. Even if there had been no Health and Social Care Act last year, we would have found ourselves in this situation. This is the very first time that a proposed merger of two foundation trusts has raised competition issues and there is no doubt that the OFT would have had an interest whatever the situation. In the Act we avoided double jeopardy, whereby the Co-operation and Competition Panel, set up by the previous Administration, might have determined its view on this merger and then there would have been a second-guessing process by the competition authorities. We have avoided that and that is very positive. Aspects of this merger obviously impact on patients and patient choice, and it is right, in the judgment of the OFT, that scrutiny should be given to the matter.

**Lord Marks of Henley-on-Thames:** My Lords, will my noble friend confirm that before the decision was taken to refer the proposed Dorset merger to the Competition Commission Monitor's advice was obtained by the OFT, as it should have been pursuant to Section 79 of the 2012 Act? Is it right that in giving that advice Monitor's duty was to have regard to the quality of healthcare services? If that is right, is this not an example of this part of the 2012 legislation working in precisely the way it was designed—putting patient care at the heart of decision-making in this difficult area of hospital mergers?

**Earl Howe:** I am grateful to my noble friend and I can give the confirmation that he seeks. Monitor's advice was sought and obtained by the OFT. He is quite right that that it is one of the benefits from the Health and Social Care Act. In situations of this kind we expect Monitor and the NHS Commissioning Board to engage with the Competition Commission on FT mergers but before that with the OFT because Monitor, as a health-specific regulator, has the insight into the considerations that bear most closely on the interests of patients.

**Lord Winston:** My Lords, does the noble Earl agree that, whatever the explanation, the involvement of the OFT suggests an increasing privatisation of the health service? Given that the health service so often does not cost out individual treatments per patient very successfully, that raises the issue of competition between private providers in such areas as this. Would the noble Earl be kind enough to comment on that?

**Earl Howe:** I do not agree with the noble Lord. Competition issues arise within the health service and the matter in the noble Lord's Question is specifically a health service issue. There are, of course, competition issues involving the independent sector and the charitable sector as well but that is not the focus here. It was the previous Government who recognised the benefits of competition for patients. Our attitude to it is very pragmatic. The key objective for commissioners is to ensure that patients receive the best possible services irrespective of whether they are from the public, voluntary or private sectors. It is for commissioners working with patients to decide where competition is appropriate. It is a means rather than an end in itself.

**Lord Rea:** There have been recent press reports that Monitor has heard requests from private sector providers of NHS services to be exempt from corporation tax. Can the Minister say what the view of Monitor is on this and what its decision is likely to be?

**Earl Howe:** I am aware of that issue. It is very much in the sights of Monitor as it conducts the fair playing field review which, as the noble Lord will remember, was the product of an amendment proposed by the noble Lord, Lord Patel of Bradford, and passed in your Lordships' House. The report that will ensue from that commitment by the Government will be published later this year and I am quite sure it will embrace the point mentioned by the noble Lord.

## Business of the House

*Motion on Standing Orders*

*3.19 pm*

*Moved By* ***Lord Hill of Oareford***

That Standing Order 40 (*Arrangement of the order paper*) be dispensed with on Thursday 17 January to allow the motion standing in the name of Baroness Hollis of Heigham to be taken before the motion standing in the name of Lord Smith of Leigh.

**The Chancellor of the Duchy of Lancaster (Lord Hill of Oareford):** I beg to move the Motion standing in my name on the Order Paper.

**Lord Forsyth of Drumlean:** My Lords, there are reports in the blogosphere that the Prime Minister has suspended Cabinet collective responsibility for the purposes of the Boundary Commission matters. Does this apply to consideration of the remaining stages of the Bill, following the extraordinary spectacle of Liberal Ministers voting against the Government's measure last night?

**Lord Hill of Oareford:** My Lords, I assume that my noble friend meant to raise that question on the second Motion standing in my name. We are still on the first Motion. For the convenience of the House, I can take the matter early. The situation is that the Prime Minister and the Deputy Prime Minister, as leaders of their respective parties, have agreed that they will take different positions on this issue. That is in line with the approach that they have taken on a number of other specific issues. It does not affect collective responsibility for all other matters. Due to the specific agreement on this issue, it does not offend the doctrine of collective responsibility.

*Motion agreed.*

## Business of the House

*Motion on Standing Orders*

*3.20 pm*

*Moved By* ***Lord Hill of Oareford***

That Standing Order 46 (*No two stages of a Bill to be taken on one day*) be dispensed with on Wednesday 23 January to allow the remaining stages of the Electoral Registration and Administration Bill to be taken that day.

**The Chancellor of the Duchy of Lancaster (Lord Hill of Oareford):** I beg to move the second Motion standing in my name on the Order Paper.

**Lord Forsyth of Drumlean:** My Lords, as we are now on the correct Motion, perhaps I could ask my noble friend this question: when he says that it has been agreed that the Prime Minister and the Deputy Prime Minister will differ as regards collective responsibility, is that solely limited to the issue of boundaries, or does it apply to the remaining stages of this Bill?

**Lord Hill of Oareford:** I do not think that I have a huge amount to add to the first answer that I gave to my noble friend. The Prime Minister and the Deputy Prime Minister have taken their respective positions and that does not offend against the principle of collective responsibility. That issue will now move forward.

*Motion agreed.*

## Prisoner Voting

*Motion to Agree*

*3.21 pm*

*Moved By* ***Lord Hill of Oareford***

That it is expedient that a joint committee of Lords and Commons be appointed to consider and report on the draft Voting Eligibility (Prisoners) Bill presented to both Houses on 22 November 2012 (Cm 8499).

*Motion agreed, and a message was sent to the Commons.*

## Disabled Persons' Parking Badges Bill

*Third Reading*

*3.21 pm*

*Bill passed.*

## Public Service Pensions Bill

*Committee (2nd Day)*

*3.22 pm*

*Relevant document: 10th Report from the Delegated Powers Committee*

***Clause 5 : Pension Board***

*Amendment 43*

*Moved by* ***Lord Newby***

**43:** Clause 5, page 3, line 39, leave out subsection (7)

**Lord Newby:** My Lords, this group of amendments is concerned with the recommendation of the noble Lord, Lord Hutton, that each public service pension scheme should have an advisory group.

**The Deputy Chairman of Committees (Baroness Anelay of St Johns):** My Lords, we are joined seamlessly at the hip—my noble friend Lord Forsyth will be pleased. On this occasion, I hope that noble Lords will feel it right to leave the Chamber quietly so that the aficionados of the pensions Bill can continue with their work.

**Lord Newby:** My Lords, as I was saying, this group of amendments is concerned with the recommendation of the noble Lord, Lord Hutton, that each public service pension scheme should have an advisory group. Although these have always been dealt with administratively, we have listened to concerns raised in another place and proposals from stakeholders. As a result, we have decided to make these groups plain on the face of the Bill.

Amendment 45 introduces a new clause to require scheme regulations to establish a scheme advisory board. The central purpose of the scheme advisory board will be to consider and advise on the desirability of future changes to the schemes. The board will advise the responsible authority on any matter that it asks the board to consider, whether wide-ranging or focused on a single issue. The board's role will supplement,

rather than replace, the role of other persons and bodies in responding to consultations under Clauses 11, 19 or 20.

The scheme advisory boards may play an additional role in the locally administered police, fire and local government schemes. In those schemes, the board may also advise the scheme managers and pension boards when such advice is requested or on their own initiative. Subsection (2) provides that the board can advise them on the effective and efficient administration of the scheme, any connected scheme and any pension fund that relates to them.

This amendment is in light of proposals that employer and employee representatives have put forward in respect of the local government scheme in England and Wales. While the precise role will be a matter for scheme regulations, we envisage that the locally administered schemes will want to provide for the advisory board to offer central support to scheme managers. That advice is likely to cover matters such as best practice and ensuring consistent approaches to the management of the schemes.

The advisory board will identify policy and operational issues that need to be resolved, either by better practices at a local authority level or perhaps through changes to scheme regulations or guidance. In turn, the advisory board will be able to advise the relevant parties on how changes should be made to improve the management and administration of the schemes and their pension funds. For example, there will almost certainly be an advisory board role to agree and advise on the interpretation of the legislative requirements—potentially around co-commissioning of expert advice and systems—and the co-ordination and co-commissioning of services. It is likely that, for the funded local government scheme, it will monitor fund performance across the pension funds. The employer and employee representatives in that scheme envisage a role to support scheme managers and pension boards to improve fund management across the scheme. These amendments allow for that.

The scheme advisory board will not have a separate role in advising the scheme managers and pension boards in the nationally administered schemes. That is not needed in those schemes. Unlike the locally administered schemes, the scheme manager and responsible authority will be the same person. Importantly, the amendments maintain a clear separation between the advisory board's policy role and the scheme manager and pension boards' responsibilities for the management, administration and governance of the scheme. The noble Lord, Lord Hutton, highlighted the importance of this separation of roles in his report.

Finally, the amendment requires that scheme advisory board members must not have a conflict of interest that could prejudice the way they undertake their role. This does not prevent a scheme member, or an employer or employee representative, being a board member. Those are not interests that would prejudice the way they undertake the role—indeed, they are instead interests that support such an undertaking. I commend these amendments to the Committee.

**Baroness Donaghy:** My Lords, I want to speak to Amendment 45. The Local Government Association and the relevant unions welcome this amendment as it ensures an effective separation of responsibilities for boards at local level and at national level, as was required. While it is a positive step, a concern for the LGA and the unions is the scope of the role of the board as contained in the amendment, particularly the nature of the advice which the scheme advisory board can offer. The current wording of Amendment 45 restricts this advice to that of desired changes to the scheme. The LGA and unions believe that the introduction of a scheme advisory board offers the potential for advice, not only on scheme changes but also other areas including scheme governance, technical advice and cost management. Will the Minister comment on this?

**Lord Hutton of Furness:** My Lords, I briefly add to the welcome that my noble friend has given to this amendment. I am very pleased the Government have brought forward this amendment; as the Minister has said, it is in line with my report and its recommendations and so I welcome it unreservedly.

I have one question that the Minister may be able to answer; I hope he will forgive me for being a little technical. I have noticed there is a different definition of conflict of interest in his new clause to that in Clause 5. The definition in Amendment 45 does not include any membership of a connected scheme; is that a deliberate change in the definition or does he have further thoughts about the matter?

*3.30 pm*

**Lord Newby:** My Lords, on the noble Baroness's question about the broader scope for the local authority scheme, I direct her to subsection (2) of Amendment 45, which states:

> "Where the scheme manager of a scheme mentioned in subsection (1) is a local authority or a committee of such an authority, the regulations may also provide for the board to provide advice (on request or otherwise) to the scheme manager or the scheme's pension board in relation to the effective and efficient administration and management of … the scheme".

That goes beyond simply the scheme content. It relates to the way that the scheme is run as well. There is already a much broader role in respect of the local authority scheme than for the nationally administered schemes.

I hope that the noble Lord, Lord Hutton, will not mind if I write to him to answer his question.

*Amendment 43 agreed.*

*Amendment 44 not moved.*

*Clause 5, as amended, agreed.*

*Clause 6 agreed.*

*Amendment 45*

*Moved by* ***Lord Newby***

**45:** After Clause 6, insert the following new Clause—

"Scheme advisory board

(1) Scheme regulations for a scheme under section 1 which is a defined benefits scheme must provide for the establishment of a

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board with responsibility for providing advice to the responsible authority, at the authority's request, on the desirability of changes to the scheme.

(2) Where the scheme manager of a scheme mentioned in subsection (1) is a local authority or a committee of such an authority, the regulations may also provide for the board to provide advice (on request or otherwise) to the scheme manager or the scheme's pension board in relation to the effective and efficient administration and management of—

(a) the scheme and any statutory pension scheme that is connected with it, or

(b) any pension fund of the scheme and any connected scheme.

(3) A person to whom advice is given by virtue of subsection (1) or (2) must have regard to the advice.

(4) The regulations must include provision—

(a) requiring the responsible authority—

(i) to be satisfied that a person to be appointed as a member of the board does not have a conflict of interest, and

(ii) to be satisfied from time to time that none of the members of the board has a conflict of interest;

(b) requiring a member of the board, or a person proposed to be appointed as a member of the board, to provide the responsible authority with such information as the authority reasonably requires for the purposes of provision under paragraph (a).

(5) In subsection (4)(a) "conflict of interest", in relation to a person, means a financial or other interest which is likely to prejudice the person's exercise of functions as a member of the board (but does not include a financial or other interest arising merely by virtue of membership of the scheme).

(6) In this Act, a board established under this section is called a "scheme advisory board"."

*Amendment 45 agreed.*

*Amendment 46*

*Moved by* ***Lord Eatwell***

**46:** After Clause 6, insert the following new Clause—

"Pension policy groups

(1) The Treasury shall make directions providing for the establishment of a pension policy group for each scheme established under section 1.

(2) The pension policy groups will consider and advise on proposals to make significant changes to scheme regulations.

(3) Treasury directions under subsection (1) shall establish a single pension policy group relating to all schemes for local government workers."

**Lord Eatwell:** My Lords, this also refers to administrative matters concerning particular pension schemes. The amendment would implement my noble friend Lord Hutton's recommendation that pension policy groups should be established for each scheme at national level. To quote my noble friend's report, he said that,

"even if all schemes have a pension board in future, there will still be a need for separate pension policy groups to consider at national level major changes to scheme rules".

Many schemes already have such groups or bodies at national level, such as the National Health Service and Civil Service pension scheme governance groups, the teachers' pensions committee, the Police Negotiating Board, the Firefighters' Pension Committee and so forth. Part of the role of these groups would, as my noble friend recommended, be to ensure that information about key proposals for change and related costs are publicly available. It is very important to maintain confidence in these proposals to ensure good relations with scheme members and the smooth implementation of any changes.

My noble friend's report also notes that these existing bodies were often established as part of the consultation and negotiation machinery for handling pensions as an element of a remuneration package, and have member and employer representation as appropriate. The appropriateness of member representation would, we hope, be taken into account if this amendment is accepted and pension groups established.

When this issue was considered in another place, the Minister replied to my honourable friend Mr Chris Leslie, who put forward a similar amendment. Mr Sajid Javid said:

"We will give further consideration as to whether it would be necessary or appropriate for the Bill to provide for a scheme-level group for the local government scheme in England and Wales".—[*Official Report*, Commons, Public Service Pensions Bill Committee, 22/11/12; col. 453.]

It was on the basis of that commitment by the Minister in the other place that my honourable friend withdrew his amendment.

I would like to hear from the Minister this afternoon the nature of the consideration given by the Government, which the Minister in another place committed the Government to, and why they have not brought forward their own amendment to place the position of pension policy groups in the Bill. After all, if the advisory measures that we have just passed are administrative measures and are in the Bill, these are also essentially administrative measures, as Mr Javid pointed out, and surely they should be in the Bill as well. I beg to move.

**Lord Whitty:** I fully support the amendment put down by the Front Bench. However, with regard to the arrangements for the Local Government Pension Scheme, would it not have been better if the Government had set out in one place the totality of the arrangements that were intended for the local government scheme, rather than attempt yet again to generalise the provisions to cover most of the public sector schemes? It is probably too late for the Government to do that; in which case, I hope that they will support my noble friend's amendment.

**Lord Newby:** My Lords, I am genuinely confused. In our view, Amendment 45 establishes pension policy groups. I do not know what the noble Lord's Amendment 46 will do that our Amendment 45 does not. What is the function of his groups that goes beyond the functions of our scheme advisory board? In tabling this amendment, we thought that we had done exactly what my colleague in another place suggested, which was to take it away and bring forward proposals that did what the noble Lord wanted. My view was that our amendment not only does what the noble Lord wants but goes rather further, in providing for the scheme advisory board to advise the responsible authority on any proposed change in the scheme regulations, not just significant changes.

**Lord Eatwell:** Perhaps I might respond to the point that the noble Lord has just made. I think that he is being a bit obtuse. Amendment 45 refers to an advisory board to be established for each scheme; it does not refer to general national boards, which would cover a range of schemes that may be within a particular area of concern. This is a different animal. If he thinks that it is the same, it would have been enormously helpful if he had made it clear when he introduced the amendment, which he failed to do.

As I read this, the scheme advisory board refers only to defined benefits schemes. We know that there a small number of defined contribution schemes. Why are they left out? Amendment 45 also states that:

"Scheme regulations … must provide for the establishment of a board",

which suggests a board related to each scheme, not the overall national bodies referred to in Amendment 46.

**Lord Newby:** Perhaps I may quote the noble Lord's Amendment 46:

"The Treasury shall make directions providing for the establishment of a pension policy group for each scheme".

That is what Amendment 45 says. What is the difference?

**Lord Eatwell:** Perhaps we are arguing over the definition, but it seems to me that the whole issue of the policy boards was that they were national boards. If we look at the actual boards that have been established, they are national boards, which have a national overview. If that is what was meant by Amendment 45, I am very happy. However, it would have been enormously helpful if the Minister had said so when introducing his amendment.

**Lord Newby:** I apologise to the noble Lord. There is no doubt in my mind that when government Amendment 45 says:

"Scheme regulations … must provide for the establishment of a board",

for each scheme, that is the same definition of "scheme" as in Amendment 46. I am sorry if I did not make that clear to the noble Lord. I made in error the assumption that it was relatively straightforward.

*Amendment 46 withdrawn.*

### *Clause 7 : Types of scheme*

*Amendment 47*

*Moved by* ***Lord Eatwell***

**47:** Clause 7, page 4, line 25, at end insert—

"(3A) A scheme under section 1 which replaces a defined benefit scheme may only be established as a defined benefits scheme."

**Lord Eatwell:** My Lords, we come now to a series of amendments that have a common theme. We are all aware that the nature of the new structures defined in the Bill will involve a significant change in the terms and conditions of employees in the public sector and, to be frank, in many cases a deterioration of those terms and conditions. The Bill is the outcome both of the careful consideration made by my noble friend in his report and of the negotiations between the Government, the Local Government Association, the trade unions and so on, which reached a deal. What is extraordinary about the series of clauses we are about to consider is that one side of the deal has been put in the Bill—that is, the Government side—while the positions gained by the trade unions in the negotiations have been left out. Instead, those are supposed to be covered by the Government's declaration that they have no intention of changing things. The Minister at the Dispatch Box can say quite happily that everything will be all right, even though this is a Bill which is intended to last for 25 years and no Administration can bind their successors.

Amendment 47 is characteristic of the problem to which I have just referred. The Government promised to provide public sector workers with defined benefit pension schemes in the form of career average pensions. That was the position put in place so skilfully by my noble friend. The striking thing is that the Bill does not honour that commitment because in Clause 7 it provides that schemes created under the Bill can be defined benefit, defined contribution or,

"a scheme of any other description".

The only restriction on the type of scheme is that it cannot be a final salary scheme, and that of course was the important gain made by the Government in the deal. Where is the gain for the other side? This greatly undermines the security and confidence that public sector workers can have in their pension provision as they will know that this Bill allows the Government to renege on their promise to replace final salary schemes with career average defined benefit schemes. This amendment merely puts the Government's promise on a statutory footing.

Noble Lords may think that I am exaggerating the concern that workers may feel about the possibility of the Government reneging on their side of the deal, but let me refer to the speech made by the noble Lord, Lord Newby, at Second Reading where he says that,

"although the Government have absolutely no intention to change the basis of the schemes, it makes sense for a piece of legislation which we hope has a long life itself to allow flexibility in the future if there are unforeseen changes".—[*Official Report*, 19/12/12; col. 1585.]

It does not make sense to create a structure in the Bill that could result in a reneging by one significant side of the deal which has been made on people's pensions for the next 25 years. If, at some future stage because of changes in economic circumstances, pressures on the public purse or whatever it might be, it became necessary to rethink the position established by my noble friend in his report and say, "I am afraid that because of changes in the world, we cannot even maintain career average defined benefit schemes", it is not appropriate that the removal of career average defined benefit schemes could be done just on the nod.

It is surely important that if that were to happen the Government of the day should come back to Parliament and say that circumstances have changed and that they have to make another major change to public

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service pensions. When a Minister stands up and says that they have no intention of doing so, the immediate thought is that they are going to do it. As the Government have received the agreement of all parties to the change in the structure of defined benefit schemes, they should keep their part of the deal and have in the Bill that the removal of a defined benefit scheme will result in its replacement by a newly designed one. I beg to move.

*3.45 pm*

**Lord Newby:** My Lords, this issue has been debated in another place on a number of occasions. There is a technical problem with the amendment over the concept of "replacing schemes", which is pretty difficult to express in law. The key thing here is not the drafting but the principle that is raised by the amendment.

I am pleased to be able to add my assurances to those of the Chief Secretary and the Economic Secretary in another place. The Government have no—zero—intention of replacing the defined benefit schemes that have been negotiated with different scheme designs. Officials and members' representatives have worked very hard to ensure that these reforms are sustainable. I am confident that they will last for a generation. The Government would not have invested so much time and energy in developing and legislating for the mechanisms in the Bill if we were intending to do anything other than retain defined benefit schemes. It is not the case that these mechanisms could be amended on the nod. If any future Government wanted to move away from the current defined benefit system, they would have to go through the procedures in Clause 20.

However, that is not really the point. As I have made clear, there is no possibility of this Government wanting to replace the defined benefit schemes that we have worked so hard to develop. We therefore feel that this amendment is unnecessary and I hope that the noble Lord, Lord Eatwell, will withdraw it.

**Lord Eatwell:** My Lords, that is extraordinary. The noble Lord, Lord Newby, has simply reinforced the argument that I made. We are expected to accept assertions about intentions in the future and that that is to be enough to cover this particular circumstance. I accept that there may be difficult technical issues in drafting but that is not the point, as the Minister himself said.

The point is that those members who have given up their final salary defined benefit schemes, and reached a deal that agrees to the Government implementing career average defined benefit schemes, should have confidence in the Government keeping their part of the deal. It should not just be the Minister standing here and this Government but Governments stretching over the next couple of decades doing this. That confidence would rest in the commitment to maintaining a defined benefit structure.

What I hear from the Minister is an unwillingness to do that. All he will do is say, "I will give assurances". How can he give an assurance for someone standing at that Dispatch Box, whoever it may be, in 10 years' time? He cannot, so the point of this amendment, ill drafted though it may be, is to ensure that any Government of the day changing the status of pension schemes for so many of the public servants who make our lives worth while and secure would have to come back to Parliament with primary legislation to change the nature of the scheme. I did not hear any commitment on the part of the Government to do any such thing and to include such security in their pension provision for those who serve us so well. I shall look at the drafting, but we shall certainly return to this on Report. I beg leave to withdraw the amendment.

*Amendment 47 withdrawn.*

*Clause 7 agreed.*

***Clause 8 : Revaluation***

*Amendment 48*

*Moved by* ***Lord Whitty***

**48:** Clause 8, page 5, line 5, at end insert—

"( ) Where the change is negative, the order shall specify a zero increase."

**Lord Whitty:** My Lords, I beg to move Amendment 48 and I support Amendments 49 and 50, which are in this group.

I appreciate that the Minister is a bit pained about this, but the need for this amendment is exactly the area to which my noble friend has just referred. There is distrust out there. In respect of this amendment, the distrust was blown out of all proportion by the sudden decision to replace RPI with CPI. I know that for those who run schemes it is quite a useful change as it has put funding on an easier basis, but for millions of pensioners it has reduced their pension expectations and caused considerable distress. What I am addressing here is the continued anxiety that the Government may once again change the terms on which it is based.

This amendment relates to the agreement to which my noble friend referred within the local government scheme between the local government unions and the LGA, which the DCLG and, by implication, the Treasury greatly welcomed. At the moment, the provision in this amendment is the understanding carried forward from the previous scheme in that agreement, which is not reflected in the Bill. Without the amendment, Clause 8 appears to allow the Treasury to change the revaluation again, more generally, from the CPI to another index that may in future be created by the Treasury. That would significantly alter the scheme costs and funding and the likely benefits for pensioners and future pensioners. The scheme design proposal in the agreement between the LGA and the trade unions clearly specifies that the revaluation of pensions shall use the CPI. In setting this revaluation, careful consideration was also given to the value of the accrual rate to be used and to the overall scheme design. In other words, it was a balanced package. The overall cost of the scheme contained that balance and should it change again, clearly those arrangements fall.

These designs were put forward to the employers and were agreed with the unions. There was a vote of union members and a whip around local government employers and, in the circumstances, there was

overwhelming support for that agreement. The apparent ability, if we do not adopt this clause, of the Treasury to introduce changes in those arrangements and, in specific terms, to impose a decrease, in certain circumstances, in the accrued pension without consultation or agreement with those affected would seriously undermine the basis of that agreement. One of the benefits—undeserved, in one sense—of the Government's approach to public service pensions in general was that it forced local government employers and unions to work out what they wanted for the long term. They have done so, and the Government endorsed that agreement. Part of that agreement is that there should be no such reduction and no change away from the CPI. Without provisions similar to those which my noble friend has moved and which are also included in very specific terms in this amendment, the issue of distrust will continue.

This is a relatively simple amendment, but I suspect from the puzzled look on the Minister's face that he did not even think that the Bill, as it stood, would have allowed a negative adjustment, but it does; while the agreement between the unions and the LGA does not. I therefore hope, for clarification and for some reduction in the degree of distrust out there, that the Minister will be prepared to accept this amendment. I beg to move.

**Lord Eatwell:** My Lords, my noble friend Lord Whitty has reinforced the issue that I raised in the discussion of the previous amendment. The Government seem to be content to make a deal and then put only their gains in the Bill and cover everything else by declaration of intent. Revaluation is absolutely central to the maintenance particularly of a career averaging scheme. A career averaging scheme requires a structure of revaluation whereby past earnings are revalued to take account of inflation, and earnings related to earlier years of pensionable service will be subject to revaluation year on year—over a very considerable timeframe now that we are looking at a career average as opposed to a final salary scheme, where revaluation is a rather simpler process.

As it stands, the Bill makes this extraordinary statement with respect to revaluation:

> "For the purposes of making such an order the Treasury may determine the change in prices or earnings in any period by reference to the general level of prices or earnings estimated in such manner as the Treasury consider appropriate".

In other words: any way they like. It does not refer particularly to RPI or CPI; it can just be any way they think appropriate.

The amendment tabled in my name and that of my noble and learned friend Lord Davidson would simply require the Treasury to act reasonably in determining the system of revaluation or the particular index structure that it identifies. This imports into the Bill the objective test of acting fairly. If the Treasury plans to be unreasonable and unfair, I would be grateful if the Minister would tell us. It seems to me that the very least we can ask is that the Government—not just this Government but future Administrations—should act reasonably in their selection of a particular index or revaluation scheme. That is the purpose of Amendment 49, which is grouped with the amendment moved by my noble friend Lord Whitty.

Amendment 50 is, if you like, a belt-and-braces amendment. If the Minister were to accept that the Treasury will act reasonably, we would be quite happy to withdraw this amendment. If there is an arbitrary and unreasonable change in the methods of revaluation, the House has to approve such a change by an affirmative resolution. That is the sort of belt and braces standing behind this notion of reasonableness. However, if the Minister is content to say that the Treasury will act reasonably—which also imports, I am advised, the notion of acting fairly—we will be content to withdraw Amendment 50, which is there in case the Treasury is going to be unreasonable and unfair.

*4 pm*

**Baroness Donaghy:** My Lords, I support this group of amendments. Lest my noble friend Lord Whitty and I are accused of running or producing the local government show, I want to deal with the Civil Service pension scheme in relation to this subject. According to the First Division Association, the current wording of the Bill does not reflect the discussions with the unions on revaluation, and seeks to extend the Treasury's control far beyond that which is necessary and prudent. In the light of the FDA and others v the Secretary of State for Work and Pensions and others in 2012, there is no need for this clause to be in primary legislation, as it is better suited to the scheme regulations that will lay down the parameters for each distinct scheme. There is no similar clause setting out the terms of the indexation of pensions in payment, even though that element is consistent across all schemes.

Fundamental to the agreement reached with the Civil Service was the understanding that, as with indexation of pensions in payment, revaluation would never be negative. If the relevant index was negative, as has been the case in recent history, the figure of zero is used and there are no increases or decreases applied. This is vital to the confidence of pension saving. Just as pensions in payment should not fall from one year to the next, a principle held by successive Governments, so pensions being accrued should not similarly be reduced. That reflects existing practice.

The FDA was not informed at any stage that the Government intended to deviate from that approach in the new scheme, and to do so now would be a fundamental challenge to the agreement. The continued inclusion in the Bill of a provision allowing negative revaluation to occur could have a profound effect on member behaviour, and specifically opt-outs. Scheme members are likely to react to an announcement that their whole pension is to be revalued downwards as a result of a negative figure for the consumer prices index in September; their response is likely to be one of mass opt-out. This is a hugely counterproductive approach for the Treasury to take on the pretext of share and risk, and the cost of management mechanisms already accounts for inflation—yet the Treasury wants additional cost to be accepted by members through this provision, which puts participation at risk.

**Lord Newby:** My Lords, the amendment proposed by the noble Lord, Lord Whitty, raises the important question about how negative growth should be treated in these new schemes. For the revaluation of active

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members' accruals each year the Treasury will lay an order which will establish the changes in earnings or prices. Scheme regulations will then use these changes when applying the revaluation mechanism that they decided on in their proposed final scheme designs. This approach mimics the current arrangements for the indexation of public service pensions in payment; it allows for the agreed scheme-specific variations, but also ensures that the underlying growth measures are transparent and consistent.

As the noble Lords have pointed out, this approach allows for the growth measure to be negative. I am not looking bemused because I did not realise that that was the case; we have never sought to hide that fact. Before explaining the rationale behind this, I should point out that brief periods of negative growth are unlikely to impact significantly upon the total value of any pension, in much the same way that brief periods of unusually high growth would not. After all, pensions are built up over a long period. I should remind the Committee that negative growth is exceptionally rare. It is not the case that in recent times the preferred index has been negative; the CPI has never been negative. The Committee should also be aware that this clause impacts only on those scheme members who are in employment, building up their pensions. It does not impact at all on pensions in payment.

However rare negative growth might be, if scheme members can benefit from the upside risk of revaluation—which they will, since there are no plans to cap revaluation rates—it would be unfair, in our view, for them to be shielded from any potential downside risk. Furthermore, by imposing a revaluation floor, scheme costs would rise and could lead to a breach of the cost cap set out in Clause 11. This is because previous scheme valuations based on standard, long-term growth assumptions would have essentially underestimated the cost of future accruals. If this were the case, it would be likely to lead to an increase in members' contributions or a reduction in the scheme accrual rate. This would be unfair to anybody reaching pension age when positive growth returns. Their benefits would have been reduced to pay for those people who benefited from the revaluation floor.

It is only right that public servants receive their defined benefit pensions so that they can plan properly for their retirement. However, there is no logic in going beyond this by protecting their accruing benefits from any brief periods of deflation before their pensions come into payment. I believe the approach of directly tracking growth—with no caps or floors—is the fairest way forward. As I have said before, the noble Lord, Lord Hutton, described the idea of an indexation floor as an "asymmetric sharing of risk". We agree. It is fair to say that the Local Government Pension Scheme does not specify, as the noble Lord, Lord Whitty, implied, that there will be no decrease possible within the scheme rules. My understanding is that it says that the basis of revaluation would be CPI.

Another point was raised about legislating for the measure. I am now coming on to the amendment of the noble Lord, Lord Eatwell, about whether we should legislate for a specific measure and whether the Treasury is being given too much discretion. It has obviously been the case within the last generation that the basis of measuring prices has changed: it has changed from the RPI to the CPI. Our expectation is that the CPI would continue for a very long time, but these things sometimes change and we therefore believe that the best way of dealing with it is in primary legislation. Incidentally, I am not implying that if the measure changed, the pensions would change. It would simply be that the scheme rules would have to reflect any new measure that came into general use.

Moving on to Amendment 49, it is worth re-emphasising that the annual revaluation will set out the general changes determined by the Government's preferred measure, which is CPI at the present time. As I said, it is necessary to give a limited amount of discretion to the Treasury to determine the measures, but we do not believe that this is going to be a likely or common thing. It is apparent from the wording of the clause that the estimates of changes must be made in a reasonable and appropriate manner. Any attempt to exercise this discretion in such a way that did not produce accurate and appropriate estimates, with reference to a reasonable index of prices or earnings, could be challenged by scheme members. Any decision which is not reasonable—even without this amendment—could be challenged by judicial review and struck down by the High Court, so we do not believe that this amendment would change the position or provide any additional protection to members.

**Lord Eatwell:** I have listened very carefully to what the Minister had to say. Of course, my amendment does not in any way restrict any necessary flexibility in the future in adjusting the manner in which revaluation takes place. However, it would—if I may use the term—sensitise the Treasury when making decisions of this sort to be aware that it is required to act in a reasonable and fair manner.

At the moment, the expression in the Bill provides the Treasury with such a carte blanche—

"estimated in such manner as the Treasury consider appropriate"—

that not even the words "reasonably" or "fairly" appear in the Bill. All we were trying to do was to avoid any rounds of judicial review over these matters and instead to ensure that when Treasury officials look at the calculation of an index—whether they are moving to geometric means or whatever they are doing—they consider very carefully whether this would be deemed reasonable in the public domain. The Minister himself has used the expression "reasonable and fair" in referring to what the Treasury will do, so surely this amendment has either no effect or a positive effect. We may disagree about whether it has no effect or a positive effect, but it does no harm and reinforces what the Minister has said. Surely, he would regard that as a good thing.

**Lord Newby:** My Lords, this question of putting "reasonable" into the Bill came up in a number of contexts on the Financial Services Bill. It would be perfectly possible to spatter this Bill, that Bill and every Bill with "reasonable". The view that we took then, and which I take now, is that, of course, the Treasury always operates in a fair and reasonable way, but because it already has a broad legal obligation to do so it is simply unnecessary to put it into the Bill.

**Lord Whitty:** My Lords, I thank the Minister for that. I am very glad that he is not bemused. Regrettably, his certainty and clarity in at least part of what he said does very little to assuage anxiety about the possible undermining of this scheme. Indeed, he has just said that the CPI is the preferred index at present. We have only had the CPI for 10 minutes. That reminds me of one partner in a long-standing relationship referring to the other as "my current boyfriend". The Minister's comments raise alarm, anxiety and uncertainty to an even greater extent than I presumed would be the case when we started this debate. I do not think that the noble Lord has answered that question.

On the question of whether past practice in the local government scheme has had a special provision for having a floor or negative valuation, certainly there has been no negative downward movement. When the new agreement was reached, the presumption was that that would not be the case in this measure either. Whether I need a clause on the front page of primary legislation is arguable. Nevertheless, it would have been helpful to seek an assurance that that understanding between the employers and the trade unions would stand. However, I will read the rest of what the noble Lord says. Meanwhile, I beg leave to withdraw the amendment.

*Amendment 48 withdrawn.*

*Amendments 49 and 50 not moved.*

*Clause 8 agreed.*

*Amendment 51*

*Moved by* ***Lord Whitty***

**51:** After Clause 8, insert the following new Clause—

"Basis of valuation

(1) Within six months of the passing of this Act, the Government shall establish a review body to assess the appropriateness of current methods of valuation of a pension scheme's liabilities and assets, and, if appropriate, to recommend changes that provide a broader base of valuation.

(2) The review body shall report within 18 months of the passing of this Act."

**Lord Whitty:** My Lords, unfortunately, I have lost my notes at this point. I would describe this amendment as a probing amendment but it is actually more of a kite-flyer. It raises a very basic issue about how pensions are valued.

At the moment, certainly in relation to the local government scheme and probably others, a pension scheme has to be revalued every three years, which is a fairly substantial exercise based on all sorts of actuarial presumptions working out the value of the current assets, the value of future flows into and out of the scheme, and making an estimation of the future liabilities of the scheme. Those future liabilities can stretch over 80 years or so for future pensioners and, depending on the nature of the scheme, their dependants. Given that, it is important that it is properly reflected in the way in which that evaluation is carried out.

*4.15 pm*

This amendment suggests that we should look again at the basis for that evaluation. The reason for that is very specific and relates to the valuation of long-term future liabilities. Because of the need to provide absolute, copper-bottomed certainty in the wake of the Maxwell crisis, the actuarial profession got around to finding the safest possible way of discounting future liabilities. It ended up using the current rate on gilts, which is now the norm for all public sector schemes and most private ones.

Noble Lords will know that, in the wake of the financial crisis, the current yield on gilts is close to zero. That has a serious effect on the way in which schemes are seen, particularly by commentators outside the pensions area. The pensions press and financial press delight in looking at particular schemes and rating them in terms of what is often, but erroneously, called the solvency ratio. They rate a scheme in terms of whether it is 120% funded, in which case we can all relax, or it is 60% funded, in which case we all get the jitters, or it is somewhere in between.

The use of those ratios also gets turned into something else. Commentators on a scheme look at the difference between the discounted future liabilities and the current assets and describe it as a gap. Sometimes the gap is very large and causes significant alarm, not only to the trustees of the scheme but to the employers, who look at it and think that a major increase in their contributions will be required fairly soon, and to the beneficiaries and potential beneficiaries, who say, "This scheme looks very dodgy, I might as well withdraw my money". In that sense, it is a misleading interpretation of the situation. Unfortunately, as a result of the alarm caused by this, some private sector schemes have closed or closed to future entrants or seriously curtailed benefits, and this largely explains the reduction in the number of large private sector schemes. In reality, in any normal sense of the word solvency, income is unlikely to be exceeded by outgoings for at least the next 20 years in most of these schemes; any company viewed in those terms would be said to be solvent.

I am not arguing just about the way in which we rerate liabilities but about all the bases on which we value schemes. This point was made in the debate on the Queen's Speech by the noble Lord, Lord MacGregor of Pulham Market. He blamed it all on quantitative easing and, in a sense, he was right. He claimed that the two tranches of quantitative easing effectively knocked £300 million or so—at a stroke—off the value of private and public pension schemes. Actually, nothing had gone wrong with those schemes: the liabilities had not increased, the potential beneficiaries were not going to live any longer and the investment strategies of the schemes' trustees were not actually performing any worse than they previously were, although other factors might have reduced the value of the assets at the same time. Actually, the notional way in which they discounted had hugely increased the liabilities and had therefore made the scheme appear unviable.

**Lord Flight:** I thank the noble Lord for giving way. Perhaps I might suggest that the real cause of the trouble is the IFRS accounting standards that require

[LORD FLIGHT]
companies to disclose pension liabilities discounted at government gilt yields. That, in turn, has made companies pay contributions to cover the resulting alleged deficits. As the noble Lord points out, that has led companies to close their final salary schemes and to the false rate of interest resulting from QE. However, the real problem has been the uncritical acceptance by Governments of both persuasions of what I believe to be profoundly wrong IFRS accounting standards.

**Lord Whitty:** I thank the noble Lord for that intervention. I had not expected to agree with him this afternoon, particularly on subsequent amendments, but I agree with him on that issue. It is important to recognise that the acceptance of those accountancy standards is causing the problem. That is why the noble Lord, Lord MacGregor, in the speech to which I referred, suggested that the Bank of England, government actuaries and the accounting profession sat down and looked at those assumptions. Slightly more tangentially, the Treasury Select Committee in another place has also touched on this point.

I am suggesting that the Government take the initiative whereby, once the Bill is passed by this House in whatever form, they set up a review looking at whether the present conventions and the way in which these public service pensions are assessed are correct—although there is a wider application—and whether we are getting a seriously misleading impression that has a detrimental effect. As the noble Lord said, there has been a devastating effect on large numbers of private sector providers.

The amendment would have no effect on the rest of the Bill but would give the Government a lever to look at the issue again and provide for expert assessment, which, given that the newly formed schemes are not coming in until 2014, could come into place before the first revaluation of those schemes. I hope that the Government will take this matter seriously and have a look at it. I certainly hope that the House and anyone involved in looking at public and private pension schemes will recognise that this is a serious problem. I beg to move.

**Lord Newby:** My Lords, perhaps I might start by saying that the Government take the issue seriously, and it clearly is serious. However, I wish to set out the ways in which different public servants' pension schemes are, and will be, valued when the Bill comes into effect.

As noble Lords are aware, the majority of the main public service schemes are unfunded. There is no pot of assets that can be valued; future benefit payments are paid out of general tax revenue. They need to be valued in a different way from funded schemes. It is important that these schemes are valued to ensure that contributions paid reflect the costs of employing staff. The Government therefore carry out valuations of unfunded pension schemes to determine the level of contributions. This is done using a number of assumptions and methodologies that adapt to changing circumstances and improvements in the method. These valuations will also be used to set the level of the employer cost cap. The assumptions used in these valuations take account of the risk profile faced by government in providing pension benefits. The valuations can therefore be different from those used by typical private sector funded schemes, where the primary purpose of valuations is to provide security to member benefits.

However, the Local Government Pension Scheme is in a different position. As has been discussed, it is a funded scheme, with benefits paid out of one of 89 different LGPS funds in England and Wales. These funds, as we have discussed many times in our consideration of the Bill, are individually managed. Valuations of the funds perform a similar function to those in unfunded schemes by assessing whether fund assets will be sufficient to meet liabilities, and setting the contribution rates to be paid into the funds. This valuation process is managed at the local level and is dealt with in greater detail in Clause 12.

The amendment would place a statutory obligation on the Government to appoint a body to carry out a review of the way in which valuations are carried out in the public service schemes. This is unnecessary for either the funded or unfunded schemes. Under Clause 10, Treasury directions will set out the details of how valuations of unfunded schemes will be carried out. The Treasury will be obliged to consult the Government Actuary before these directions are made, to ensure that they are fit for purpose. The Treasury has also committed to involving other stakeholders, such as public service employers, scheme actuaries and trade unions, when considering the approach to valuations.

Turning to the funded schemes, the Bill already provides for a greater level of scrutiny of LGPS fund valuations. Clause 12 specifies that employer contributions to these funds must be sufficient to ensure the solvency of the funds, which is an existing feature of the regulations. The clause also requires that contributions are set at a level that will ensure the long-term cost efficiency of the scheme. This is a new provision, which aims to prevent employers deferring the payment of any costs needed to meet the long-term liabilities. The clause will ensure that local fund managers take this approach. It requires an independent review of each fund's valuation and the employer contribution rates that result from it. These reviews will result in a report covering all the LGPS funds, which will be made public.

The Government intend to publish a single report for the local government scheme in England and Wales. This will allow straightforward comparisons to be made across each of the 89 funds in the scheme. This new and enhanced level of scrutiny will provide a consistent basis for assessing the assets and liabilities of all LGPS funds, improving their transparency and management of these funds.

In addition, the scheme advisory board proposed by Amendment 45, which we have just debated, may also oversee and advise on the management of pension funds in the local government schemes. These boards will play a role in ensuring that the schemes—and individual LGPS funds—are well managed. As such, there will be an ongoing role for pension boards in the scrutiny of pension fund management and valuations.

Under the existing provisions in the Bill, there are a number of ways in which we can achieve what the noble Lord, Lord Whitty, seeks to achieve. I will go away and look again to make sure that I am not

missing anything or whether we do need a belt and braces. I am not sure that we would do it in the way that the noble Lord suggests and I am not sure that we need to do it, but this is definitely a serious issue. The Government want to make sure that nothing in the Bill means that we cannot take that initiative if we decide to do so anyway. I will go away and look at it again. If I think there is anything further that I can usefully say, I will write to the noble Lord, but I am not absolutely guaranteeing the letter.

**Lord Whitty:** My Lords, I am very grateful to the Minister. I am glad that the Government see this as a serious issue and I am grateful to him for setting out what will be the procedure and structure of valuation in the future, specifically for the LGPS and more generally. I should have said at the beginning that my comments were primarily related to funded schemes, but of course post-2014 will bring a lot of the other public service schemes closer to being fully funded schemes—not quite in most cases. This means that the ratio between liabilities and assets and their correct valuation will be an important issue for all funded defined benefits schemes.

My amendment was to allow the Government at some future stage to look at the way in which these schemes would in future be assessed. I do not disagree with the mechanism but, as the noble Lord, Lord Flight says, some of the presumptions and the passive acceptance of the accounting conventions could mean that the schemes looked seriously underfunded, when in practice they were not. There may be other problems with the conventions and it would be wise for the Government to undertake this review whether of not it is seen as part of this Bill. I think it is something that the Government need to deal with.

I am grateful to the Minister for indicating that he is prepared to look at this again, and I think that in some contexts the Government will need to do so. Meanwhile, I beg leave to withdraw the amendment.

*Amendment 51 withdrawn.*

*4.30 pm*

### *Clause 9 : Pension age*

*Amendment 52*

*Moved by* ***Lord Eatwell***

**52:** Clause 9, page 5, line 18, after "age" insert "or deferred pension age"

**Lord Eatwell:** My Lords, this group of amendments deals with various issues associated with pension age and the way it is adjusted relative to movements in the state pension age.

First, perhaps I may speak to Amendments 52, 55 and 57. These are minor amendments tabled to address what we see as a drafting anomaly. If it is not an anomaly, it would be very helpful if the Minister could explain why. The exemptions outlined in Clause 9(2) refer only to a person's normal pension age, not to their deferred pension age. We believe that this means that the exemptions will apply only to active members of pension schemes and not to those who have moved on from their occupation and are classified as deferred members. In another place when this point was raised, time ran out, as it tends to there, and the Minister did not address this question at all.

I now turn to much more substantial amendments. Amendment 56 would insert a caveat with respect to changes in pension age. It says that such changes would not apply to members of a public service pension scheme who would be exempted from the operation of subsection (1) as a result of a scheme-specific capability review—in other words, those who do not come just within the broad categories of the fire and rescue services, a police force or the Armed Forces. There would be a scheme-specific review looking at the necessary capabilities of workers within a particular scheme. After all, some public sector workers not covered by the broad categories in Clause 9(2) have physically demanding jobs and it would not be appropriate to increase their pension age in line with the planned increases in the state pension age. For example, we could refer to mental health nurses, who occasionally have to physically restrain patients, and paramedics might also be considered.

However, what is really important with respect to the examples I have just given is that capability reviews are already under way. In fact, the Department of Health is undertaking the working longer review in relation to the NHS. This will make recommendations about the appropriateness of certain NHS staff working beyond the age of 65. However, the Bill does not exempt any NHS staff from the state pension age link; nor does it make any provision for the findings of a review—including the working longer review, which is now under way—to be taken into account, even though the review has not yet published its conclusions. Therefore, effectively the Bill makes this aspect of that review redundant, and the people working on it might as well just pack up and go home because the Bill effectively excludes any recommendation that they might make with respect to changes in the pension age of specific workers in the NHS. Amendment 56 would insert a caveat into Clause 9 so that a change in pension age would not apply to members of public service pension schemes who should be exempted from the operation of subsection (1) as a result of a scheme-specific capability review.

In another place the Government rejected this review on the basis that the amendment would create confusion and uncertainty. Why it would do that when you have specific capability reviews I am at a loss to understand. Secondly, the reason that certain professions are excluded is not just because of physicality but because they perform a specific public function. Again, that could clearly be undertaken and expressed in the terms of reference of a capability review, wherever that might take place. In this case the Government really have to think very carefully again. They set up the working longer review. They recognise that, in some specific cases not covered by the generality of Clause 9(2), there are cases where the link to state pension age should not be made and yet the Bill does not provide the means of incorporating the results of appropriate reviews.

[LORD EATWELL]

I shall now speak to Amendment 59 which is also in this group. This refers to a recommendation made by my noble friend Lord Hutton in his review that the link between the state pension age and the normal or deferred pension age should be kept under review and should be reviewed regularly. The report recommends:

"The Government should increase the member's Normal Pension Age … in most schemes so that it is in line with their State Pension Age".

That, after all, is one of the key themes of this Bill. Then the report says,

"However, the link between the SPA and NPA should be regularly reviewed to make sure it is still appropriate, with a preference for keeping the two pension ages linked".

Therefore, it should be reviewed in the light of circumstances. This Bill is implementing one half of my noble friend's recommendation and leaving out the other half for a regular review.

A regular and independent review into the state pension age link would help to ensure that public service schemes remain sustainable if life expectancy is rising or whatever happens to it. One of the great mysteries of academic life is that one would expect demographers always to be incredibly accurate because they have such a range of data. They know how many people have been born in a particular year and they should be able to look forward to what will happen. However, one learns that demography is a very inexact science and demographers make—and admit that they do—a lot of mistakes and their circumstances change. After all, their profession would die if they did not have new things to worry about as the world changes. We need the possibility of a regular review of the link with the state pension age so we can ensure that members are being treated fairly and that the funding of the schemes, where they are funded, and the provision for non-funded schemes fit within the framework of the Government's finances.

In another place the Government recognised the recommendation of the noble Lord, Lord Hutton, and said they expected reviews to be undertaken as and when future changes to the state pension age are announced—so they expect it to happen. However, it was not necessary to put it in the Bill as the Government will in due course make announcements about the review process, which is not desirable as it would restrict flexibility. How does it restrict flexibility? This is one of those blanket excuses, like "it is unnecessary". It does not restrict flexibility at all; it just says, as the Government have conceded, that it would be desirable to have a review whenever the normal pension age is changed.

I have a particular question for the Minister in this respect. Suppose there is a review and it finds that the link is not working and something has gone wrong. What would happen then? Without having the review on the face of the Bill, it seems to me that the Government would have to return with primary legislation. Therefore, we are increasing the flexibility of the Bill by removing that threat to the flexibility of the operation of the Bill as a whole. I beg to move.

**Lord Kennedy of Southwark:** My Lords, I speak to Amendment 53 which is in my name. When the noble Lord responds to this group, I hope that he will be able to give the Committee some assurances in respect of the Government's understanding of the special situation that firefighters find themselves in. They put their lives at risk on a regular basis to help and to protect members of the public and their property. I also hope that the noble Lord will confirm that he accepts and understands fully that maintaining high levels of fitness is crucial for firefighters and that there is evidence that, as we get older, cardio-respiratory fitness declines over the whole population. Therefore, asking firefighters to work until they are 60 in these front-line roles is not sensible and not safe for firefighters or the public.

I would like the noble Lord to comment on the review that has been undertaken by Dr Williams and his committee on the normal pension age for firefighters. The committee and Dr Williams were appointed by the previous Fire Minister, Mr Bob Neill, the Member for Bromley and Chislehurst in the other place. Let us be clear that the Department for Communities and Local Government's document *Firefighters' Pension Scheme: Heads of Agreement* in 2012 includes a requirement for the national pension age to be subject to regular review, informed by research carried out by the firefighters' pension committee. I think that the Bill, coming at this time and relating to firefighters, has pre-empted the review, and that seems odd to me.

These decisions are really important and should be informed by evidence-based research, so I want to understand how the Government will use the research that they commissioned to inform the decisions that they make and the proposals that they will bring before Parliament.

*4.45 pm*

**Baroness Donaghy:** My Lords, I shall speak to Amendment 54. At Second Reading I referred to ambulance service staff. I am hoping for the inclusion of ambulance service staff in the protected uniform services section of the pension regulations. I propose that the Bill should refer to ambulance service staff providing 999 responder services as opposed to referring to particular occupational groups such as paramedics, as there is a large number of non-registered ambulance staff who provide 999 responder services and registered paramedics who fulfil administration and managerial roles.

It is well documented that the main cause of ill-health retirement in the ambulance service is muscular-skeletal injuries and mental and behavioural disorders. These occupational hazards are not limited to staff working in paramedic grades and above but can be experienced by all staff providing 999 responder services. In addition, as a cost-saving measure, many ambulance services have created new support roles for 999 staff. Although the level of clinical intervention is different from that of a registered paramedic, their exposure to hazards and highly distressing circumstances remains the same. You have only to walk through the town centre of practically anywhere in the UK on a Saturday night to know that. They should be exempt from working longer.

The current NHS job evaluation scheme recognises these occupational hazards in job profiling for ambulance service staff. All ambulance grades that provide 999 responder services receive the same job evaluation

level on the factors that contribute most to ill-health retirement. For example, an ambulance practitioner at the bottom of the *Agenda for Change* band 4 and an advanced ambulance practitioner on the top of band 6 score the same job evaluation level on physical effort, emotional effort and working conditions despite there being a difference of 19 pay points between these two jobs. The factors that heighten the risk of ill-health retirement remain the same.

In 2008, NHS Pension Scheme research indicated that the average retirement age in the NHS was 63, while in the ambulance service it is estimated that only one in 100 front-line staff reach normal retirement age. Staff working in the ambulance services are four to six times more likely to retire on the grounds of ill health compared with the rest of the NHS. A UNISON freedom of information request has shown that between 2008 and 2011 the average age of ambulance staff retiring on the grounds of ill health was 52. Muscular-skeletal injuries and mental and behavioural disorders—for example, post-traumatic stress disorder—represent more than 50% of the reasons for ill-health retirement. For that reason I believe that ambulance service staff providing 999 responder services should be included in these regulations.

**Lord Sharkey:** My Lords, I rise to speak in support of Amendment 56. I also have great sympathy for Amendment 54 in the name of the noble Baroness, Lady Donaghy. As the noble Baroness has so eloquently said, the working conditions and physical requirements of ambulance service staff who are 999 responders are very similar to those of the other exempt categories. However, the problem may be that there are quite a few other occupations whose members feel there is an equally strong case for inclusion within the exempt categories. Some of these occupations were discussed when this issue was debated in the Commons. I have heard Northern Ireland prison warders and staff in secure psychiatric institutions mentioned in this context and I know there are other claimants, too.

It is obviously very difficult to make judgments about which groups, if any, should be included alongside the uniform groups recommended by the noble Lord, Lord Hutton. I am not at all certain that it would be appropriate to add one particular category to those groups without considering, in detail, the claims of the other groups. That is not to say that there are no other groups that should be exempted from the standard state retirement age. In fact, I am personally convinced of the case put forward for ambulance service staff who are 999 responders. I think a sensible approach to this is contained in the amendment of the noble Lord, Lord Eatwell, to which he has spoken so forcefully. It is surely sensible to give the Secretary of State the power by order to include other occupations in the exempt groups if he thinks the case has been objectively made and thoroughly examined by a scheme-specific capability review.

A very similar, or perhaps even identical, clause to that of the noble Lord, Lord Eatwell, was put forward by Chris Leslie in the Commons. I have read *Hansard* carefully and the Government's response did not seem entirely convincing. I am glad that our different rules of procedure in this House will enable the case for Amendment 56 to be put once more and I am glad that the Minister will have the opportunity to reply in full. I hope that when he does reply he will find himself in sympathy with Amendment 56.

**Baroness Wall of New Barnet:** My Lords, I, too, would like to support in particular Amendment 53 and to some degree Amendment 54, especially with regard to the front-line staff in the ambulance service. I am sure the Minister is aware that in the private sector the task of the job and the onerous nature of that task is always directly related to age regarding how pensions are dealt with. Very often there is mood music around that says the public sector wants to be treated differently from elsewhere. As I know from my work with ICI, there were always certain jobs that were absolutely prescriptive in the task of the job and the risk of the job being associated with the age of individuals. We are really asking for that responsibility to be taken by employers in that context.

**Lord Newby:** My Lords, although these amendments all have a common theme, they are quite specific, so I will start with Amendments 52, 55 and 57. It is important to note that the link between the normal pension age and state pension age in most schemes is not the only provision in the Bill which is designed to manage the longevity risk. The link between the deferred pension age and state pension age in all schemes is just as important. This link is universal, with no exceptions. It therefore applies to former members of the police, firefighters and Armed Forces schemes with deferred pensions in those schemes.

There are two reasons why the Government have not extended the exemption from the state pension age link for these workforces to apply to the deferred as well as their normal pension ages. First, it would not be fair to other former public servants whose deferred benefits would not be payable until state pension age. We have been clear that exceptions to normal pension age have been made for police officers, firefighters, and members of the Armed Forces because of the unique nature of the work they do, which we value very much. Once police, firefighters and Armed Forces personnel leave their jobs and no longer carry out those unique duties, there is, in our view, no justification for them to be able to take their deferred benefits earlier than anyone else.

Secondly, there would be cost implications. As we are all aware, increases in—

**Lord Eatwell:** Perhaps I may deal with that first point about leaving the scheme. I accept that in the case of somebody becoming a police officer at the age of 20 or 21 and leaving at 25 the noble Lord has a good case. But let us suppose that the police officer leaves at the age of 55. Is the case the same? Here is someone who has worked in a physically onerous profession for all that time—34 years, let us say. He has moved to another job because an opportunity has come up but he has performed that physically onerous task for a considerable time, which will have had an effect on his overall well-being. Would it not therefore

[LORD EATWELL]
be reasonable in that case for the deferred pension age to be the same as for those who stay on for just a few years more?

**Lord Newby:** My Lords, the noble Lord gives an example. I was literally just about to give another example. I will come back to his example. My example concerns a former police officer who leaves service aged 35 to work as an office-based local government worker for the rest of their career. It is by no means an unusual or impossible example. Should their police pension still be available, unreduced, at 60? That is the question, particularly when a local government colleague sitting at a nearby desk must wait until the state pension age to take his or her full pension. Surely the answer can only be no. The strength of that argument is greatest if someone left the police after a year aged 22 and is weakest if they left it aged 59. I agree with that. The argument is not exactly the same at every age.

However, in looking at this, the noble Lord, Lord Hutton, recommended that we should go to the provision that we have indeed gone to, which is that all deferred pensions are payable in full from the state pension age. If we were to move towards what the noble Lord suggests, we would have an extremely complicated position where there were grades of deferment, if you like. We wanted first of all to have a relatively simple approach. We have followed the recommendations of the noble Lord, Lord Hutton, and we think that we have come up with a sensible, practical solution. We understand the argument, but we have deliberatively taken the view that deferred pension age should be the same as normal pension age.

On Amendment 53 in the name of the noble Lord, Lord Kennedy, the noble Lord was asking about the position of firefighters and the Williams review, and where we had got to with that. The starting point, as we know, is that firefighters continue to have their normal pension age at 60, as set out in the new Firefighters' Pension Scheme in 2006. The Williams review of the normal pension age recognised that, as long as firefighters maintain their physical activity levels and adopt a healthy lifestyle, there is no reason why they cannot maintain operational fitness levels until the age of 60. The report does not call for a change in the normal pension age. However, as the report recommends, firefighters who wish to retire early will continue to be able to do so from 55, with an actuarial adjustment to their pensions. There were other detailed recommendations within the Williams review and the Government are still considering them.

**Lord Kennedy of Southwark:** I thank the noble Lord. I will not press him further on this. He is right: the review has just come out and we are in the middle of debating the Bill. However, would the Minister agree to meet with representatives of the Fire Brigades Union and me between now and Report? The Williams report raises a number of issues that have a direct bearing on this, and further discussion is important.

**Lord Newby:** My Lords, I am always willing to meet the noble Lord. However, I will do so on the basis that we are not reopening the whole of the scheme. The Williams review has made it clear that there is no reason why the retirement age should not be 60. That, certainly, is not up for discussion. If there are other issues around it we can discuss those, although my initial view is that it is highly unlikely that anything else he is discussing would require amendments to primary legislation, although it may require amendments to the scheme rules. On that basis, I am very happy to have a meeting.

The next amendment in this group is Amendment 54, tabled by the noble Baroness, Lady Donaghy. It looks at further exemptions from the state pension link. We have set the current exemptions in line with historical precedent and the Hutton review. There are no other groups that are currently recognised in such a way through their normal pension age provisions as the three set out in the Bill. In fact, as a result of the previous Administration's reforms, new employees in all other groups of public servants already have a normal pension age of 65. This includes ambulance service staff under the most recent changes to the NHS scheme, which were agreed to by unions.

As we are all aware, this Bill seeks to rationalise provisions across the public services, not to add further diversity. We are trying to move away from the general inconsistencies in the current schemes, which lead only to unfairness for subsections of particular workforces. That is not to say that we do not recognise the physical nature of the work that is carried out by groups such as ambulance service staff, or the risks attached to that work. The schemes introduced under Clause 1 have been developed very carefully with this in mind. They follow extensive discussions with members, trade unions and other member representatives to ensure that they best meet the needs of all members of each scheme. This includes ambulance service staff in the development of the NHS scheme. It would be wrong to reopen those negotiations—not least because, as my noble friend Lord Sharkey alluded to, there are many groups with degrees of stress in their job that are greater than those in others. We could spend a vast amount of time assessing afresh all those groups. Over the years that work has been done and it has led to the schemes we have now. It was also looked at again by Hutton. I am therefore extremely unwilling to start a long process of looking at a raft of groups when they have been considered before. I understand only too well the stresses and strains faced by 999 responders, but other groups face stresses and strains as well. As I say, we have decided that the three groups which are already exempt from the normal retirement age provisions are the only ones that we believe are in a distinctly different category from any others.

Amendment 56 also relates to this issue, but the difference from this amendment is that it would allow any group to be exempted from the state pension age link should a capability review recommend it. Presumably that would mean that the pension ages for these groups would be set out in secondary legislation. I have just explained why I do not agree with the spirit of the amendment. The link was a key feature of the Hutton report and was a cornerstone of the constructive discussions we held with unions and member representatives over the course of 18 months. The outcome of those discussions was the proposed final

scheme designs, including the universal retirement age link which the Bill honours in full. We have no plans to reopen those designs, although we have made it clear that we will review the link to the state pension age as and when future changes to the state pension age are announced. The DWP White Paper published yesterday says that we intend to hold a review every five years, so the link will be reviewed when a review is announced.

The Bill as it stands takes a sensible future-proof approach to review the provisions when it is most appropriate to do so; that is, when there are other pension age changes that affect public servants. Naturally, those reviews will take into account any evidence submitted by interested parties—

**Lord Eatwell:** I understand what the noble Lord is saying, but can he tell us what the status of the working longer review in the NHS is?

*5 pm*

**Lord Newby:** The noble Lord has an uncanny ability to ask me a question as I am getting to the relevant paragraph. I was about to say that the capability reviews are not reviewing the pension age link. They are considering the implications of working longer in the light of increased longevity and looking at how people are deployed as they move towards retirement. There is no question of these capability reviews reaching the conclusion that people should retire earlier as a block; rather they say, "If there are professions which have a significant physical component, how can we make sure that, as people move towards retirement age, the proportion of their work which has a significant physical element is reduced?". A simplistic approach is to say, "Why can we not have firemen doing desk jobs from the age of 55?". It is not as simple as that because there are not enough of those jobs, but that is the basic thought process we are going through in the reviews.

This is a challenge not just for public sector workers, but for the whole of society. People are living longer and the pension age is going up. Some people who are doing physical work will not be able to maintain the same degree of intensity at the age of 67 as they could at 47 or 27. As a society, how do we deal with this? What sort of mechanisms can we put in place to enable people to work towards a later retirement age in a way that avoids their facing undue stress?

To take an extreme example that does not cover the public services, I have a number of lawyer friends in their early 60s. Traditionally, solicitors in big firms would be forced out at that age because they were not earning as much as they did when they were 40. A very welcome development is that partners, with the encouragement of their firms, are thinking about what they can do that does not necessarily mean that they are expected to generate the profits and income that they did 20 years before, and in this way they can keep their expertise. That is at a different level from the public sector but it is still entirely welcome. The working longer reviews, about which we are talking here, look at exactly that kind of thing for people in the public sector. It is not about pension age but about how to ensure that we manage people who, as they move into their 60s, may not be able to work at the same intensity as they did when younger.

Finally, I turn to Amendment 59 regarding the reviews of the pension age provisions in the Bill. The Government have made a clear commitment to undertake these as and when future changes to the state pension age are announced. These reviews will look at, among other things, whether the provisions remain appropriate in light of scheme members' longevity. This will ensure a consistent cross-government approach to all pension age policy and follows the recommendation by the noble Lord, Lord Hutton, that the provisions should be kept under review.

The state pension age review process that I have mentioned should mean that the core principle of this amendment, to ensure the public service pension age provisions continue to track appropriately changes in members' longevity, will happen automatically. The work on state pension age reviews is still in its early stages. Yesterday the DWP published a White Paper that proposed a review every five years. We are still at a consultation stage and it may be that we move on from that but I do not know.

It would be premature at this point to seek to lock down the details of the reviews for public service pension ages. The state pension age reviews will obviously apply to more than just the pensions established in the Bill. It is therefore important that the Bill does not restrict the flexibility to design those reviews. Even though the reviews are not in the Bill, this does not restrict the powers to change the pension age provisions. Changes to state pension age will require primary legislation, so any consequent changes to this Bill could be made in at the same time.

Furthermore, it would be misleading to put reviews in the Bill and give the impression that these provisions may be continually changed when that is not the intention. The Government believe that we have appropriate provisions at the moment and we do not plan to change them. It is important that these are made clear to members so that they can plan for their retirement. I therefore urge the noble Lord to withdraw the amendment.

**Lord Eatwell:** My Lords, I note the comments in general of the noble Lord, Lord Newby, and I am grateful for the support of the noble Lord, Lord Sharkey, for Amendment 56 in particular. This strengthens the position of those administering public service pensions by incorporating the notion of a specific capability review and therefore providing a standardised mechanism across the various sectors in public service. These could be utilised both to include groups in the exemption and, indeed, to confirm that groups should not be included in it.

The examples given by the Minister, of changes in working practices among his lawyer friends, indicate just the sort of thing that a capability review would take into consideration. It is regrettable that he has dismissed this in rather a cavalier manner, by just saying that it would make the thing too complicated. People's lives are complicated. People lead very different lives, and we need a degree of flexibility to take account of those differences that they encounter. Simply having a one-size-fits-all approach to the public services, which is the case in the Bill—with the exception, of course, of the uniformed services, which we discussed

[Lord Eatwell]
earlier—does not seem to future-proof the Bill, a factor that the Government are so continuously concerned with. What will happen is that some real anomaly will appear; it will become a scandal and suddenly a matter of major press interest. You can just imagine the sort of the thing: for example, some elderly ambulance worker being unable to assist a prominent celebrity in distress. You can imagine how the tabloids would go for that. Or it could be a much more serious scandal. Being able to perform capability reviews would provide a degree of flexibility, which is exactly what future-proofing this sort of legislation really means.

The Government are being a bit blinkered over this. They are standing on the podium of simplicity, but simplicity does not always make for true effectiveness. However, I am sure that the noble Lord, Lord Sharkey, and I will return to this on Report. I beg leave to withdraw the amendment.

*Amendment 52 withdrawn.*

*Amendments 53 to 57 not moved.*

*Amendment 58*

*Moved by* ***Lord Eatwell***

**58:** Clause 9, page 5, line 38, at end insert—

"(4A) A person's normal or deferred pension age under a scheme under section 1 will not change by operation of this section unless 10 years' or more notice of the change has been given."

**Lord Eatwell:** This is another amendment dealing with the issue of retirement age, but here it is a question of giving notice of a change in retirement age. The essence of this is that if people are aware a significant time in advance that their retirement age is going to change, then they have the opportunity of making provision for that change. If it is only a few years before the date at which they retire, it is much more difficult for them to change their circumstances or their arrangements in the light of the changed pension age.

This amendment is necessary because the Bill links the normal or deferred pension age in public service pension schemes to the state pension age and the state pension age can be changed in law with no protection for those approaching retirement. The Government have recently imposed changes to the state pension age when they gave women in their 50s only six years' notice of an increase. I think that was excessively short. That meant that women in those circumstances had a relatively short time to make adjustments in their circumstances appropriate to the new change in the pension age that they face.

This amendment would ensure that if the Government were again to act in this arbitrary manner with respect to an increase in the state pension age it would not have a similar rapid knock-on effect for public service pensions. When the noble Lord, Lord Turner, carried out a review of state pensions for the previous Government, he recommended that a 15-year notice period be given before changing the state pension age, and the Pensions Policy Institute, which also looked at this with some care, recommended a 10-year period. During the Second Reading debate in another place, a Conservative Member, Mr Richard Graham, the Member for Gloucester, said:

"The Bill also protects everybody who is within 10 years of retirement, which is very important for so many of our constituents who are in their 40s and early 50s".—[*Official Report*, Commons, 29/10/12; col. 114.]

Unfortunately, this Conservative Member had actually got it wrong because there is no such protection in the Bill for those within 10 years of retirement. Given that he was a Conservative Member, perhaps he had had some whispers from the Front Bench that there was an intention to include such a provision and this was left out by an oversight. So now we are giving the Government the opportunity to rescue their omission. Providing that the Government are not planning to increase pension ages with less than 10 years' notice, they surely can have no objection to this amendment.

*5.15 pm*

Once again looking at its consideration in another place, the Minister in the Commons said that it was correct to consider changes that will impact people's lives, and therefore there should be appropriate transitional protections. For example, members who were within 10 years of their normal pension age on 1 April 2012 will see no change, so that is a transitional arrangement where the number of 10 years has been incorporated. Unfortunately, the Minister was not willing to take into account the need to give people adequate time to adjust to changing circumstances by making this a general condition. Possibly that was a mistake, perhaps a slip or omission, which the Government can now take the opportunity to correct with this amendment. I beg to move.

**Lord Newby:** My Lords, we agree with the underlying concept of this amendment that the pension age for those close to it should not change without sufficient notice. When normal and deferred pension ages change, there must be consideration of how such changes will impact on all those who are most affected. However, I hope I have made it clear that a key pillar of the Bill is the clear link that it will provide between the normal pension age and the state pension age. The DWP's White Paper on state pension reform, published yesterday, sets out that future changes to the state pension age will be subject to a 10-year notice period. It therefore follows that the normal pension age changes will be subject to the same minimum notice period while the link remains in place. Therefore, from the noble Lord's point of view, fortunately this amendment is unnecessary.

**Lord Eatwell:** I think that the Minister is right.

*Amendment 58 withdrawn.*

*Amendment 59 not moved.*

*Amendment 60*

*Moved by* ***Lord Newby***

**60:** Clause 9, page 6, line 9, leave out from "1995" to end of line 13

*Amendment 60 agreed.*

*Clause 9, as amended, agreed.*

*Amendment 61*

*Moved by* ***Lord Eatwell***

**61:** After Clause 9, insert the following new Clause—

"Fair Deal

A member of a public service pension scheme is entitled to remain an active member of that scheme following—

(a) the compulsory transfer of his contract of employment to an independent contractor; and

(b) any subsequent compulsory transfer of his contract of employment."

**Lord Eatwell:** My Lords, this is part of the deal that was made between the Government, the local authorities and the trade unions in putting together the agreement that was reached following the report by my noble friend Lord Hutton. It is a part on which the Government seem to be reneging. I really think that this is very important. This so-called fair deal amendment will ensure that a member of a public service pension scheme who is compulsorily transferred from his contract of employment to an independent contractor will be entitled to remain an active member of that scheme; and, indeed, if there is any subsequent compulsory transfer of his contract of employment, he could still remain a member of that scheme. This was a key part of the agreement reached with public sector employees and their representatives—this notion of a fair deal for outsourced workers. It would ensure that all public service workers compulsorily transferred would stay as active members.

As I say, the Chief Secretary to the Treasury confirmed the Government's commitment to the new fair deal in July, in a Written Statement. He said:

"I can … confirm that the Government have reviewed the fair deal policy and agreed to maintain the overall approach, but deliver this by offering access to public service pension schemes for transferring staff. When implemented, this means that all staff whose employment is compulsorily transferred from the public service under TUPE, including subsequent TUPE transfers, to independent providers of public services will retain membership of their current employer's pension arrangements.".—[*Official Report*, Commons, 4/7/12; col. 54WS.]

Where is that promise on the face of the Bill? This is a promise that the Chief Secretary to the Treasury made, but it now seems to have evaporated. Where has it gone? As it stands, the Bill is very one-sided in how it reflects the negotiated agreement. The Government are happy to include the size of the agreement which suits them—for example, the requirement that no schemes are final salary schemes—but are not forthcoming with their corresponding promises made to public sector workers.

The Minister has repeatedly said that the Government's word is adequate for protection of workers, and that government promises do not need to be enshrined in legislation. But if we take what the Chief Secretary to the Treasury said, surely the public would be rather bemused that that promise was made in terms and it has now evaporated. It is not there—where is it on the face of the Bill?

One issue to which we have continuously referred is that of the future-proofing of the Bill. Future-proofing does not mean not sticking to a deal or not making coherent commitments; it means having a degree of flexibility over major changes in circumstances discussed and agreed by the parties to the agreement. It does not mean just leaving part of the agreement out, as seems to be the case here.

Given the Statement from the Chief Secretary to the Treasury, I feel that this amendment could have been moved by him, and indeed I move it on his behalf.

**Baroness Donaghy:** My Lords, I support my noble friend Lord Eatwell on this important amendment. This was a key part of the national agreement between employers' unions and the Government. In the local government scheme, which is a funded scheme, employers choosing to withdraw from that scheme could leave substantial costs relating to future fund income to be paid by the council tax payer. Information is already coming in that some higher and further education employers, and recently an academy school, are seeking to find ways in which to get around their obligations to provide the local government pension scheme for support staff. We should bear it in mind that those jobs are often low paid and part time. We should also remind ourselves that having an occupational pension will make sure that those people are self-sufficient when they retire and do not become dependent on the state. So it is in all our interest that these schemes are upheld.

The news that we are hearing is that shared services companies are being created, or that people are attempting to create them, as a way of getting round the obligations that they entered into by allowing their staff to remain in the local government pension scheme. I remind the Minister that, as I am sure he is aware, a big drift away by employers could undermine all the schemes.

**Lord Newby:** I thank the noble Lord for moving this amendment on behalf of my colleague, the Chief Secretary. I am sure he will be very pleased when I tell him that he did so. The Government are completely committed to the fair deal policy and to its reform. Commitments have been made, both in this House and in the other place, to ensure that members of the schemes who are compulsorily transferred to independent contractors can retain membership of those schemes.

The noble Lord asked about the provisions in the Bill that are relevant to achieve this. Clause 26 will extend access to the existing civil service pension scheme to allow those members who are compulsorily transferred out to stay in the scheme. Clause 22 will allow scheme regulations to make provisions for pensions for other employees who would not otherwise be members of the scheme. The policy will be delivered via the contracts made with independent providers. This will ensure that members of the schemes will be entitled to accrue future benefits through the scheme after the first tender and any subsequent retendering.

There are specific reasons why the proposed amendment cannot be accepted. The Government are currently considering when and how the new fair deal policy will be implemented. We are also consulting on how the new fair deal should be applied to those who have already been transferred out of the public sector under the old arrangements. It would be premature to put something on the statute book while this work is under way.

[Lord Newby]

The amendment also captures the Local Government Pension Scheme. We have been absolutely clear that the principles of the new fair deal policy should apply to the reformed Local Government Pension Scheme, but the policy has always operated differently in that scheme. The Department for Communities and Local Government will bring forward detailed proposals in due course; again, in our view it would be premature to legislate while this work is under way. However, if the noble Baroness, Lady Donaghy, has some specific instances which she can show us of how the current arrangements might be being subverted, we would obviously look at exactly what is going on and how we might deal with that. My guess is that the most effective way of doing it would not necessarily be via this amendment. Obviously, however, because we are committed to the principle, if that principle is being undermined, we would want to look at how that is happening and what we could do to stop it. With those comments, I hope the noble Lord would feel able to withdraw his amendment.

**Lord Eatwell:** My Lords, I looked carefully at Clauses 22 and 26 and they seem to be enabling clauses. They enable members who are compulsorily transferred to retain their membership of a public sector scheme, but they do not ensure that they will. That is the import of our Amendment 61. It seems to me that it was also the import of the Chief Secretary's Statement. He said very clearly that following transfers, those members "will retain membership". He did not say that they "may" or "could", or that "facilities will be made available for them to", but that they "will" retain membership. The Bill certainly does not make that provision.

The noble Lord also said that considerations are under way to find a means of implementing the Chief Secretary's promise in an appropriate manner. I must say that it would have been a jolly good idea if that had been done before we got to this stage of the Bill, but people are busy and I understand that. Let us hope that this is resolved by Report, so that the Government can then bring forward the results of those considerations in the form of an appropriate amendment in order to keep their fair deal promise. They have made the promise, and we want to see that promise in the Bill—as, I presume, do they—in an appropriate form. If those considerations could be expedited over the next couple of weeks, we look forward to considering an appropriate fair deal amendment on Report. In the mean time, I beg leave to withdraw the amendment.

*Amendment 61 withdrawn.*

*5.30 pm*

### *Clause 10 : Valuations*

*Amendment 62*

*Moved by* ***Baroness Donaghy***

**62:** Clause 10, page 6, line 20, at end insert "and Treasury directions would not apply to individual Local Government Pension Scheme funds"

**Baroness Donaghy:** My Lords, in moving Amendment 62, I wish to speak also to Amendment 65. Clause 10 sets the Treasury powers to dictate to the individual public service schemes how they are to conduct their valuations and the assumptions, data and methodology they should use. I seek to clarify two issues through amendment to the wording of this clause.

The first issue, contained in Amendment 62, is that the Local Government Pension Scheme in England and Wales consists of 89 funds. Each fund appoints its own actuary and agrees with that actuary the assumptions and methodology most appropriate to its specific fund. Funds vary significantly in their size, demographics and proportion of active contributing members to retirees and those who have left with deferred pensions. It would be unworkable for the Treasury simply to impose central assumptions on individual funds.

The Local Government Pension Scheme regulations already set out when funds have to undertake valuations, while control of fund valuations is set out in Clause 12. Therefore, I seek to amend Clause 10(2) to make clear that these valuations do not apply to the Local Government Pension Scheme, as the Government have already acknowledged. The Bill states:

"Such a valuation is to be carried out in accordance with Treasury directions".

I want Amendment 62 to amend the subsection so that,

"Treasury directions would not apply to individual Local Government Pension … funds".

The second issue, in Amendment 65, is that the assumptions, methodology and data used in scheme-wide valuations will determine the cost of the scheme. To ensure that the assumptions used in scheme valuations are robust and appropriate will require the input of scheme pension boards and scheme managers, which is why I seek to amend Clause 10(4). I beg to move.

**Lord Eatwell:** My Lords, my noble friend Lady Donaghy has identified a considerable problem with cost control as expressed in Clause 10—the valuations section of the cost control part of the Bill. My noble friend's amendment is very direct and clear with respect to the Treasury directions that she would like to see. My Amendment 63 takes a somewhat more ameliorative and subdued approach to dealing with this problem. However, it would ensure that Treasury directions are tailored to each local government fund and would therefore be much more accurate, rather than the possibility of a single set of directions being expected to apply to 89 local government funds which have significantly different characteristics. After all, each local government fund has its own assets and investment strategy. Different employers are involved and, crucially, most of the funds have different demographics. This means that each valuation needs to take into account the individual characteristics of those funds.

Considerable concern has been expressed about Clause 10 by well informed persons who are much better informed than me. For example, Alison Hamilton, the chair of the local government committee of the Association of Consulting Actuaries, said:

"Clause 10 certainly gives me cause for concern. … It is very important that the valuation takes account of the local demographics, and the local investment of the assets backing those pension

funds. I attended a meeting where the Bill team tried to give some sort of reassurance that the valuation would be carried out as a one-size-fits-all under Treasury directions. That was not intended for the local government pension scheme. I would like the Committee to explore that and get something drafted".—[*Official Report*, Commons, Public Service Pensions Bill Committee, 6/11/12; col. 169.]

Similar concerns have been expressed by the National Association of Pension Funds. I will not repeat what it said as it echoes what was said by Ms Hamilton.

When faced with this argument in the other place, the Government acknowledged that there was merit in it and stated that the Treasury would,

"take into account the individual nuances and features of the various … schemes",—[*Official Report*, Commons, Public Service Pensions Bill Committee, 13/11/12; col. 347.]

when setting directions. They felt that the clause already allows enough flexibility for directions to take account of the differences between schemes. However, our amendment simply states what the Government's intention apparently is—that the Treasury directions should not be based on, or be rigidly bound by, but should take into account,

"the individual nature of each of the different funded schemes".

That is in accord not only with what is obviously sensible practice, according to the views of experts, but with what Ministers claimed in another place was their intention.

**Lord Whitty:** My Lords, I strongly support Amendment 62 and the other amendments that have been spoken to. I have a simple amendment in this group—Amendment 64. Clause 10(4) states:

"Treasury directions … variations and revocations … may only be made after the Treasury has consulted the Government Actuary".

My amendment probably reflects my general suspicion of the Treasury, which is deplorable, as the Minister is indicating. Nevertheless it is shared by many in the pensions industry and beyond. I would have thought that it should be agreed with the Government Actuary's Department that the Treasury or that department should come to an accommodation on what the basis for the variations, revocations and directions should be.

I accepted the Government's argument that in relation to other sorts of consultation—for example, consultation with stakeholders—regrettably, agreement, or certainly consensus, is not usually the outcome. However, as regards an issue relating to the basis of valuation between the Treasury and the Government's own actuary, surely the Bill should state that those provisions are agreed rather than that the Treasury may act after what may be quite a superficial consultation with the GAD. I hope that that was the Government's intention anyway but I wish to make the position clear through my amendment. I hope that the Government will agree to it.

**Lord Newby:** My Lords, the Bill makes provision for pension scheme valuations across all the public service schemes. These will be carried out in accordance with Treasury directions to ensure that valuations are carried out on a clear and consistent basis.

Amendments 62 and 63 seek to clarify how Clause 10 will apply to the valuation of the individual funds in the local government pension scheme or to disapply the provisions of the clause to those valuations. The Government are well aware of the concerns referred to by the noble Lord, Lord Eatwell, and other noble Lords who have spoken, that this clause will be used by the Treasury to impose inappropriate valuation assumptions on individual LGPS funds. The amendments would ensure that this could not happen by removing these funds' valuations from the scope of the clause or requiring the Treasury to take account of the nature of individual funds when making directions.

I hope that I can reassure noble Lords that these amendments are not necessary. First, the Government have no intention of making directions relating to the valuations of individual LGPS funds. This commitment has already been made in this House and in the policy paper published by the Treasury in November 2012, copies of which are in the Library. Secondly, Clause 10 needs to be read in the light of the Bill as a whole. It is clearly intended to deal with valuation at the scheme level, as can be seen from Clause 12, which makes provision for valuations at the level of individual pension funds. While that clause would provide for greater oversight of the local fund valuations, it will not mandate how they are to be carried out. Accordingly, we do not think that Amendment 63 is necessary.

In relation to the Local Government Pension Scheme, Clause 10 will be used only—I repeat, only—to set directions of how the model fund, an aggregation of the scheme costs at the national level, will be valued. We need to do that for the operation of the cost-control mechanism at a scheme level in LGPS but it will not directly affect the contributions paid into individual funds.

Turning to Amendment 64, Clause 10 already requires that the Government consult with the Government Actuary before making directions on scheme valuations. That amendment would add an additional requirement that the Government Actuary agrees the directions rather than just being consulted. The intention is to ensure that these directions form a sound basis for the scheme valuations and the Government, of course, support this aim. However, the Government cannot accept this amendment, as it does not achieve this aim and has unwelcome consequences.

The aim of the Government Actuary's Department is to be,

"a highly valued principal provider of actuarial analysis and advice to all parts of the UK Government and other relevant UK and overseas public bodies".

The highly valuable, actuarial advice that it provides is independent and professional and this aim would be compromised by the amendment. If this change were made, the Government Actuary's decisions would inevitably influence the policy on valuations and he could come under pressure to determine elements of the directions themselves. This would fundamentally compromise his position as a truly independent adviser. This is not an outcome which anyone, including the Government Actuary, wants to see.

Amendment 65 highlights the importance of Treasury directions that will be made under Clause 10. These directions will set out the detail of how valuations of

[Lord Newby]
public service pension schemes should be carried out. Everybody has agreed that these valuations are of vital importance given their implications on both employer contributions and the employer cost cap. As such, all scheme stakeholders will need to be involved as the valuations are developed. However, the statutory consultation requirement that would be imposed by this amendment is unnecessary. I can reassure the Committee that we will seek to discuss these directions as they are developed. All stakeholders, including scheme managers, their actuaries, pension boards, and member representatives, will be given the opportunity to participate in this process.

I hope this reassures the noble Baroness that the consultation of scheme managers and pension boards that she has proposed will be carried out without the need for Amendment 65 and that she will feel able to withdraw the amendment.

**Baroness Donaghy:** I thank noble Lords who have participated in this debate. There is a certain irony, particularly on Amendment 65. This was a very mild response to the Minister's reply at Second Reading when I, like the noble Lord, Lord Whitty, asked for the agreement of the Government Actuary's Department. He commented then that it did not wish to participate in what would be seen to be a political event, but wanted to maintain its independence. Amendment 65 was at attempt to recognise the reality of that and write in the involvement of scheme managers and scheme boards as a mild substitute. I am still sorry that the Minister is not willing to include that. However, until I have had a chance to study the official record of the Minister's reply, I beg leave to withdraw the amendment.

*Amendment 62 withdrawn.*

*Amendments 63 to 65 not moved.*

*5.45 pm*

*Amendment 66*

*Moved by* ***Lord Whitty***

**66:** Clause 10, page 6, line 33, at end insert—

"( ) This section does not apply to the fund valuations of the Local Government Pension Scheme."

**Lord Whitty:** My Lords, Amendments 66 and 70 propose the exclusion of LGPS funds from the aspects of the Bill covered by Clauses 10 and 11 because those aspects are primarily related to the unfunded schemes. Clause 10 attempts to impose criteria commonly determined by the Treasury on valuations of all schemes covered by the Bill. Amendment 66 will clarify that Clause 10 is intended to apply to scheme level valuations only, thus preventing future misunderstandings, particularly in relation to the 89 different local government schemes. Without the amendment, there is a lack of clarity around the impact of fund valuations which are included in the Treasury's scope within Clause 10. This lack of clarity surrounds the apparent inclusion of both local fund valuations and the national, notional model fund valuation under the control of Treasury regulations.

Individual fund valuations are currently undertaken by fund actuaries under parameters set out in different scheme regulations and assumptions are agreed with the individual fund. It would be a marked change if such valuations were to come directly under Treasury control. If it is intended to include only the notional model fund in the Treasury's scope, this clause will need to be amended to prevent any further misunderstandings. There are concerns that the assumptions, data and models to be used as directed by the Treasury would not reflect what is currently being used at fund level, thus also undermining the validity of national modelling of costs. The easiest way out of this dilemma is to exclude the LGPS from the operation of those aspects of Clause 10.

Clause 11, which we will discuss later, covers the employment cost cap. The LGA and the trade unions involved in local government believe that this clause should be amended so that we again embed the agreement, reached by employers, unions and Governments, for a separate cost-management process. That agreement ensures that the principal stakeholders of the scheme are responsible for the control of cost management. There is concern that, as it stands, Clause 11 gives the Treasury discretion over how the cost cap is set. This could mean that there would be nothing to prevent the Treasury setting the cap in such a way that it would be easily exceeded, resulting in an increase of employee—and probably employer—contributions or a decrease in benefits. Amendment 70 would make this clear because it would exclude the funded local government pension schemes and funds from the effects of this clause and would better reflect the agreement, supported by the Government, that exists within the LGPS scheme. I beg to move.

**Lord Newby:** My Lords, I will start with Amendment 66. As previously discussed, the Bill makes provision for pension scheme valuations to be carried out in accordance with Treasury directions. This amendment seeks to clarify that the clause does not apply to valuations of the Local Government Pension Scheme. It would ensure that Treasury directions on valuations would not affect these valuations, which are carried out at the local level. In that respect, it would have a very similar effect to Amendment 62.

The arguments discussed under that amendment also apply here and Amendment 66 is unnecessary. I hope that the Government's previous commitments, which I have just repeated, have made that clear. The Government simply do not intend to make directions affecting the valuations of individual LGPS funds. Alternative provisions for oversight of these valuations are made elsewhere in the Bill. The amendment is not needed.

Amendment 70 seeks to provide a specific exclusion for the LGPS from the employer cost-cap provisions in Clause 11. A robust cost-control mechanism, on a statutory basis, is still required for the LGPS, even though it is a funded scheme. Clause 11 should apply to the LGPS, as with any other scheme. The Government have had extensive discussions with the Local Government

Association and the local government trade unions on this issue. As a result of these discussions, and to reflect the unique position of the LGPS as a funded scheme, the Government will give additional flexibility to the LGA and the trade unions in the management of scheme costs. The full details of these additional flexibilities will be finalised in consultation with key stakeholders and then enacted via the Treasury directions made under this clause and in the scheme regulations.

However, it is vital that the Government maintain a statutory backstop to provide reassurance to the taxpayer that action will always be taken if the cost of the scheme becomes unsustainable. This backstop, which will sit behind the cost-control arrangements that I have described, will apply in the same way as in other schemes. If the costs of accruing LGPS benefits, as measured at a national level by GAD's model fund, rise or fall by more than two percentage points, action will be required to bring costs back to the level of the cap, as in any other scheme. The requirement to consult on the action to be taken, with a view to reaching agreement, will apply as in any other scheme. If agreement cannot be reached, scheme regulations will set out a default action to be taken, as in any other scheme.

The cost-control mechanism is a key part of delivering good and sustainable pensions that will last for a generation. Without it, there is a risk that costs will once again spiral out of control and leave us with the choice of looking for higher contributions from, and lower benefits for, members or shunting the extra costs unfairly onto the taxpayer. Given these considerations, I hope that the noble Lord will feel able to withdraw or not move both amendments.

**Lord Whitty:** My Lords, as regards Amendment 66, I am pleased that the Government are prepared to be explicit in their assurances that they do not intend to set directions in relation to individual local government funds. If I understood the Minister clearly, the situation is to some extent similar to that in Amendment 62. A statement that "the Government do not intend" is not a copper-bottomed guarantee, as we know. Nevertheless, I suspect that it is as far as we will get in our consideration of the Bill, and I therefore thank him for that.

As regards Clause 11 on the employer cap, it is clear that in whatever circumstances there needs to be cost control. The point that I am making is that within the local government schemes it is the responsibility of their governance to ensure that cost control applies. There is a Treasury engagement with the national notional scheme and other provisions oblige the Treasury to ensure that the schemes do not get out of control, as the Minister indicated. In fact, the local government scheme has not got out of control. There have been occasions when individual funds' investment policies have been less than ideal, which have led to short-term problems, but in no period has the local government scheme, which has operated for decades, got out of control.

Given the ongoing governance of individual schemes and the new provisions that we have just agreed in relation to the national scheme, there is little likelihood of the scheme getting out of control in any case. It is therefore otiose for the Treasury to be able to impose individual employer contribution caps in the crude way in which it may need to do so in relation to unfunded schemes that have historically—on the odd occasion and possibly now—got out of control. I regret that the Government do not recognise that. We will discuss employer caps in more general terms in a moment, but I should have thought that it would be less trouble to the Treasury, and would make it clearer that the responsibility to ensure that cost controls operate rests fairly and squarely on the shoulders of the stakeholders in the local government schemes, if they were exempted from the ability of the Treasury to impose its own cost controls.

However, that is clearly not the road that the Government are prepared to go down. I will therefore not press Amendment 70 and beg leave to withdraw Amendment 66.

*Amendment 66 withdrawn.*

*Clause 10 agreed.*

### *Clause 11 : Employer cost cap*

*Amendment 67*

*Moved by* ***Lord Eatwell***

**67:** Clause 11, page 7, line 10, at end insert—

"(4A) Treasury directions under subsection (3) may only be made after consultation with the persons or representatives of the persons who appear to the Treasury to be likely to be affected by the employer cost cap."

**Lord Eatwell:** My Lords, as my noble friend Lord Whitty said, we turn to the general issue of employer cost caps. There is no doubt whatever that a cost cap is an appropriate measure with which we agree, as a means of ensuring that schemes are managed in a cost-efficient way. However, the way in which the cost cap is set is of crucial importance, not least because Clause 11(7) allows a scheme's regulations to reduce members' benefits or increase their contributions to meet a target cost for the scheme. How the cost cap is set is therefore important.

What does Clause 11 say? It states that the cost cap will,

"be set in accordance with Treasury directions".

That is all. There is no requirement for the Treasury to consult or to relate cost considerations to any other set of criteria or measurement. The Treasury therefore has the widest possible discretion on how the cost cap could be set. This means, as my noble friend Lord Whitty suggested with respect to local government schemes—but it is true with respect to schemes in general—that there is nothing to prevent the Treasury setting the cap in such a way that it is easily exceeded, thus triggering the sort of reduction in benefits or increase in contributions anticipated in Clause 11(7).

All that the amendment seeks is to say, "Look, if you are going to change the cost cap, you should consult the people to whom this is being done, the people actually running the schemes, and you may find a degree of information that you otherwise did not have. You may find that measures can be taken, perhaps with mutual advice, to reduce the costs and

[LORD EATWELL]
bring them more into line with what is deemed appropriate". The failure to consult on even the imposition of cost caps is a serious matter that reduces trust in the overall management of the scheme—and particularly in the Treasury's role in the management of the scheme. All that the amendment says is, "Okay, the Treasury still has the role of setting the cost cap but it should at least consult before changing the cost cap or setting it in the first place".

A point about this arose from our discussions in Committee on 9 January, when the noble Lord, Lord Newby, referred to the extension of Treasury regulations specifically to Scotland. He sought to reassure the Committee that the Treasury really was going to stay at arm's length, as it has done in the past, and would not impose any rules on the Scots. They would have the opportunity, as they have now, to manage the details of their scheme, subject to this ultimate backstop in the sky that will never be used. I therefore ask the Minister specifically whether the cost-cap regulations, as set out in Clause 11, will apply in Scotland—in particular, to local government pension schemes. If they do, and there is no requirement for consultation, there is trouble ahead. This amendment will not only bolster the Government's position with respect to the confidence with which their changes to public sector pension schemes are received, but will also secure the Government's position with respect to any amendments to the cost cap in Scotland. I beg to move.

*6 pm*

**Lord Newby:** My Lords, we absolutely share the intention of the noble Lord, Lord Eatwell, behind this amendment. As I hope I can demonstrate, we have already made adequate provision in the Bill and in the way we are behaving to reassure him.

The first general point is that the Government set out general principles of consultation which will apply to Treasury directions, as to any another legislation. We have discussed these pension reforms extensively with all stakeholders and we will make clear commitments to do so in the future. These consultations will cover the cost cap and the details will be discussed with representatives for all the schemes via the normal scheme governance rules.

The key point is the existing provision in the Bill for consultation on the level of the cap in each scheme as part of the consultation on scheme regulations. The details of the cap will be set out in the scheme regulations, which will be subject to the consultation requirements contained in Clause 19, which states:

"Before making scheme regulations the responsible authority must consult such persons (or representatives of such persons) as appear to the authority likely to be affected by them".

As with any other scheme changes, we are required by the Bill to consult on the cost cap.

The noble Lord asked whether the cost-cap regulations would apply to Scotland. The answer is yes, it would. The cost cap is clearly a reserved matter and the details about it would work, which are covered by the scheme regulations, are in exactly the same position as all the other provisions of the regulations that will apply to Scotland as they do to the rest of Great Britain, but not Northern Ireland.

**Lord Eatwell:** My Lords, I wish the Minister well in his negotiations with the Scottish Government in this respect. I recognise the general issue of the regulation set in Clause 19, but it is of such importance, as I will illustrate when we come to Amendment 68, that it would be of particular relevance to have the notion of consultation included at this point. However, I will elaborate that argument when I turn to Amendment 68. In the mean time, I beg leave to withdraw Amendment 67.

*Amendment 67 withdrawn.*

*Amendment 67A*

*Moved by* ***Lord Flight***

**67A:** Clause 11, page 7, line 24, at end insert ", in accordance with guidelines to be provided by HM Treasury"

**Lord Flight:** My Lords, my five amendments to Clause 11 and one to Clause 20 are about fleshing out how the cost-control mechanism will work. I should like to make the point up front that I well understand the sense of the Government endeavouring to achieve broad agreements with the public sector trade unions in a territory which is thus long term. I pay tribute to the honest broker work done by the noble Lord, Lord Hutton, in examining the territory in such detail.

There is a third party in addition to public sector employees and the Government, which is self-evidently the taxpayer. With pay-as-you-go pensions, the theoretical actuarial deficit or surplus is essentially irrelevant—no doubt, the wrong rate of interest is used anyway in discounting the liabilities—as is, in a way, the percentage of GDP as a cost. As long as we have a pay-as-you-go system, what matters is the cash flow deficit which other taxpayers have to cover. As I pointed out last week, it was quite surprising to see the OBR forecasting a cash deficit of £15.4 billion by 2016-17. Subsequent to that calculation, the OBR, in its report of 12 December, pointed out that expected longevity is six years longer than the assumptions made when the figures I have just quoted were produced. That implies at least an additional £7 billion of cash flow shortage. As thing stand, from 2016-17 onwards there will be a cash deficit of some £22 billion or £23 billion per annum to be financed by other taxpayers. That is not satisfactory and it certainly follows that there needs to be a cost cap that functions and can deal with all possible options if costs get further out of kilter.

As it stands, the Bill does not cover costs effectively. Most of the key points will be in subsequent regulations. Clause 11 provides a legal framework for the system of cost controls but with virtually no details. It appears to give the Treasury greater future flexibility and control if, for example, there is a change in the inflation index. It is unclear what will happen if no agreement is reached in the areas that are set out in Clause 11 to achieve agreement.

The details of the cost cap mechanism are yet to be agreed. The Treasury has published a more detailed document, which establishes an employer cost cap in public service pension schemes. In a way it is that document that we should be discussing as it has more detail in it. The Treasury has also published an actuarial

valuation of public service pension schemes. The actuarial valuation is of less fundamental importance. However, it is that which drives the cost cap mechanism, so it is important in that context.

The Bill specifies that all schemes must set a cap expressed as a fixed percentage of pensionable pay but it does not define what the percentage might be. It is difficult for the legislation to be costed at present and it is somewhat inadequate to be reviewing the Bill without knowing the percentage caps that will be recommended. There are no details as to what will happen if there is no agreement to any required cost adjustments and there is no specific regard to the cash flow deficit that is being achieved. The HM Treasury paper establishes an employer cost cap in principle. It sets out the mismatch between the contribution rate which employees pay and the rate controlled by the cap, but that, too, has not been addressed. The Treasury paper provides that the cap mechanism deals only with cost changes relating directly to active members and not to deferred or pensioner members or to cost increases arising from other forms of charge.

In a sense, my amendments are not of huge significance but they endeavour to put a few more clothes on the arrangements. Amendment 67A would provide the principle that, if no agreement was reached once a cap was exceeded, the guidelines provided by the Treasury would need to be applied. Amendment 67B would provide for the cap to include increases in pension payments if cost cuts were required. As with the private sector in many circumstances, it would introduce an element of fairness whereby pensioners would share some of the pain if the funding had reached the stage where the deficit was so great that it had to be cut back.

Amendment 69A would require an affirmative Commons procedure if reductions in pensions in payment were proposed. Given the lack of detailed prescription, Amendment 70A would provide for how the cost cap should operate. It would require the Office for Budget Responsibility to publish periodic appraisals of employer cost cap arrangements, quadrennially for unfunded pay-as-you-go schemes and triennially for funded local government schemes. It would also require the publication of the schemes' valuation reports. The key is requiring the reporting of the annual cash flow shortfall for the next five years, with comparisons between the Independent Public Service Pensions Commission's projections for benefit payments as a percentage of GDP and the actual anticipated percentage of GDP. Obviously, the point here is that if GDP growth is a lot less than expected or hoped, which is proving to be the case, that will alter that figure. The GDP figure is important as projections are based on better GDP growth reducing the overall cost of public pensions as a percentage of GDP.

Amendment 71A would remove any government responsibility—that is, taxpayer responsibility—for financial support for any local government pension scheme. I hope that this is not necessary but there could be a potential financial liability for trustees—the Minister has a trustee role—if a local government scheme were in trouble.

The Bill does not refer to the ongoing constitution of local government pension schemes or specific regulation thereof. The Local Government Pension Scheme's national standards boards feature in the consultation but have not been picked up in the Bill.

Finally, Amendment 118A adds "pensions in payment" as a protected element in relation to a scheme for which proposals for retrospective change may be made by the responsible authority. I have said that I think that is a fair point if such extreme measures are needed.

The bottom line is straightforward. If the cash flow deficit becomes an unacceptable burden on other taxpayers, there are only four ways—or a mixture of four ways—in which it can be controlled. One is obviously through an increase in employee contributions, but the sort of increase required is, I think, too large for this to be practical as a sole solution. A second is reducing the accrual of pension rights, on which Clause 11 focuses. The next is reducing pensions in payment, to which two of my amendments relate, and the fourth is increasing the pension age. Although that is addressed elsewhere in the Bill, it is not specifically addressed as one of the ways of controlling costs. The Treasury paper on the employer cost cap does not make any specific reference to reducing pensions and it excludes any impact of cost increases from other sources.

I hope that the Minister will respond that my amendments are not necessary and that empowering the Treasury to do anything covers virtually everything. However, I am quite surprised that the deal that has been done comes before both Houses with the sort of cash flow deficit that it has at a time when it seems obvious that public spending will in due course need to be cut significantly more than it has been or the public finances will be in a complete shambles. Adding £23 billion per annum to public expenditure through the cash subsidy of public sector pensions seems to be a pretty tall order. Although I understand the position and interests of members of public sector pension schemes, I repeat that I am surprised that we have not arrived at a proposal which is, in essence, cash neutral.

*6.15 pm*

**Lord Whitty:** My Lords, I am afraid that I cannot really support the noble Lord, Lord Flight, in these measures. I point out to him that they are internally inconsistent and, indeed, contradictory. On the one hand, Amendment 71A effectively removes all responsibility from the Government in relation to any potential, unlikely though it may be, default on the Local Government Pension Scheme.

**Lord Flight:** That amendment is intended to remove any financial liability, not to remove any obligation to get it dealt with.

**Lord Whitty:** Just so, my Lords, but the legitimacy of the Government being able to lay down the detailed criteria which his other amendments and indeed many of the Government's stipulations in the Bill provide in relation to the local government scheme relies on the fact that everybody assumes that the local government scheme has the Government as its underwriter of last resort and that therefore that underwriter has the right to intervene in what is otherwise the equivalent of a

[LORD WHITTY]
private scheme between private institutions; namely, local government and private trade unions. They are not central government creatures. They have certain statutory responsibilities but they are separate entities. Therefore, the legitimacy of the Treasury in any sense making directions, stipulations and interventions, as the Bill provides and as the noble Lord's other amendments would consolidate or take further, depends, so far as concerns the local government scheme, on that implicit underwriting. It is hoped that it would never be called upon. Nevertheless, it is there in the background. The situation in relation to the other schemes is different, but Amendment 71A relates specifically to the local government scheme and I think that it is contradictory to everything else that the noble Lord was advocating and much of what the Minister is advocating.

**Lord Newby:** My Lords, I agree with the noble Lord, Lord Flight, about the need to keep the ballooning cost of public sector pension schemes under control. That is one of the key features of this Bill. The challenge, which I will come to in a minute, is that it is not straightforward, or indeed possible, to turn the tap off in pensions as you can in some other areas of expenditure.

I think everybody agrees that the cost cap is one of the key elements of these reforms and in order for it to be credible and robust we must ensure that costs will always be adjusted if the cap is breached. This can be done in a number of ways. While it would be preferable if all stakeholders were agreed on the way to do it, we have to allow for the possibility that agreement might not be reached. Clause 11 therefore specifies that scheme regulations must set out the steps to be taken to achieve the target cost if there is no agreement; there simply has to be a default adjustment.

The amendment seeks to strengthen this requirement by specifying that this element of scheme regulations must be in accordance with guidelines provided by the Treasury. This would ensure that the default action mandated in scheme regulations would be more consistent across schemes. I understand my noble friend's intention in this amendment but it is simply unnecessary. Clause 3 sets out that the majority of scheme regulations made under the Bill require the consent of the Treasury before they are made. This requirement for Treasury approval will provide the assurances my noble friend is seeking because it covers the cost cap. He said in relation more generally to the cap that, for all the schemes, cash flow was more important than theoretical deficits and surpluses. At one level it is, but valuations of the theoretical surpluses or deficits are needed in the unfunded schemes because we have to plan how the Government will meet the cash-flow costs of the schemes over a long period going forward.

The intention behind Amendments 67B, 69B and 118A is to allow pensions already in payment to be altered, should action to adjust the costs of the pension schemes be required as a result of the employer cost-cap mechanism. In theory, this is one of the ways in which you constrain the costs. Unfortunately for the noble Lord, the Government cannot accept these amendments. Amendment 67B would allow pensioners' accrued benefits to be reduced to reduce the cost of the scheme. As the Government have made clear, both in this House and in the other place, we are committed to protecting accrued benefits. Indeed, I hope to bring forward amendments on Report which entrench that view.

There are also significant legal hurdles to altering pensions in payment. In law, pensions in payment are owned by pensioners in exactly the same way as other possessions. Article 1 of Protocol 1 of the European Convention on Human Rights protects these possessions from any interference by the Government that is not only lawful but proportionate. We agree with that provision. Any Government attempting to alter pensions in payment would face a serious risk of legal challenge from pensioners arguing that their possessions should not be taken away in favour of protecting active members in employment from cost control. This would make it very hard for this amendment to work in practice even if we thought it was a good idea, which, sadly for the noble Lord, we do not.

Legal difficulties aside, it is right that those benefits that have already been paid for cannot be reduced. The ability to provide retrospective changes of this nature would mean significant uncertainty for all members of the schemes and potentially destroy any trust in them.

**Baroness Noakes:** Can the Minister clarify what he is referring to when he says that not being able to adjust existing accrued rights would also affect increases in pensions that were already in payment? One way of using the amendment proposed by my noble friend would be to constrain future increases through whatever indexation is in use at the time. Would it not be sensible for the Government to have that available to them for getting cost control? It is different from saying that you reduce the number of years accrued or the absolute amount of an accrued pension.

**Lord Newby:** It is, but I think that the same considerations apply. The employee or former employee in effect has a pension contract, which says that he or she is making a payment into a scheme; the employer is making a payment into a scheme and certain payments flow from that. Whether we are talking about rates of accrual or any other component of an agreed pension scheme, my understanding is that retrospective reductions—however they are done; even if we are not talking about a reduction but a freeze, it is a reduction of the implied or explicit rights already in the scheme—would fall foul of the legal issues I raised as much as any other component of the scheme.

I think that I had just about got to the end of what I was going to say on that amendment. Turning to Amendment 70A, I understand my noble friend's intention in providing for an independent assessment of the operation of the cost-cap mechanism, and for transparency around the cost of public service pensions. However, the Government cannot accept this amendment. The role of the OBR is to improve the accountability of the Government by examining the state of the public finances and the long-term impact of government decisions. While it has a clear remit to analyse the long-term sustainability of the public finances, it has

full independence in determining how to fulfil this obligation. The Government cannot specify that the OBR provides any specific data or analysis.

However, as my noble friend alluded to, much of the data that would be required under this amendment is already provided by the OBR. The OBR's economic and fiscal forecasts, produced twice a year, have included a forecast of public sector pension payments and contributions over a five-year period. Indeed, the noble Lord referred to some of the figures it produced in November. For noble Lords who have not had the opportunity to look at them, I refer them to page 146 of the OBR's *Economic and Fiscal Outlook* produced in December.

My noble friend's amendments would also include provision for the OBR to pass judgment on the effectiveness of the cost-cap mechanism. This would change the role of the OBR. It is not a policy-based organisation and must be seen as impartial and independent. For the OBR to be seen to advocate or arbitrate on policies would draw it into political debate and could undermine this independence. If you allow the OBR to start giving advice or arbitrating on policies across the piece, that would completely undermine the role set for it. For that reason, policy on the cost cap, and public service pensions more broadly, must remain the responsibility of the Government.

Amendment 71A seeks to prevent the pension liabilities of local authorities falling to the Government. I should start by highlighting that the Secretary of State for Communities and Local Government is not a trustee of the pension scheme. Rather, the Secretary of State is the person who may make regulations to establish the scheme. Local authorities are responsible for managing and administering both their own budgets and the Local Government Pension Scheme. The authorities, not the Minister, are responsible for their liabilities under the scheme. Legislation requires local authorities to establish and manage pension funds and then set the appropriate level of employer contribution rates to ensure that those funds are able to meet the liabilities of the scheme. In addition, the new requirements in Clause 12 of the Bill will provide additional scrutiny of LGPS fund valuations. There are, of course, safeguards in place.

**Baroness Noakes:** What the Minister is saying is very helpful. Can he say explicitly that what the noble Lord, Lord Whitty, said—about there being a broad assumption that the Government stood behind local authority pension schemes—is wrong?

*6.30 pm*

**Lord Newby:** My Lords, I shall write to the noble Baroness if I get this wrong—and the noble Lord, Lord Whitty, will shake his head or nod depending on whether or not I get it right—but I think that the responsibility for meeting obligations under local authority pension schemes falls to taxpayers within the local authority areas covered by the schemes.

**Baroness Noakes:** The point that the noble Lord, Lord Whitty, was making was not to dispute the basic legal position but to say if that were defaulted upon, there is an assumption underpinning these schemes that the Government stand behind them. That is why I asked the Minister to clarify his view of that.

**Lord Newby:** I will be very happy to write to the noble Baroness about it but the whole purpose of the cost cap is to ensure that we do not get into that mess. Given the experience of the noble Lord, Lord Whitty, in this area, I am very reassured by his confidence that the local government schemes will not get into this mess. The reason why the cost cap covers local government schemes is that, however unlikely it is, we feel that we need a method of dealing with them in this extremely unlikely eventuality.

**Lord Whitty:** My Lords, I think we all hope that it is an extremely unlikely eventuality and I genuinely believe that it is an extremely unlikely eventuality. Standing behind this is a slightly theological but nevertheless psychologically important matter. I suspect you cannot find it anywhere in statute but, as the noble Lord, Lord Newby, says, the ultimate responsibility of any failure of a local government scheme would rest, in some context or other, on taxpayers, and it therefore becomes the Government's responsibility. I hope that the noble Lord can write to me as well, and perhaps to other colleagues in the House. I expect it will be quite a difficult letter to write.

**Lord Newby:** We look forward to that intellectual exercise. I think that I had just about dealt with Amendment 71A. Amendment 118A, to my mind, is grouped with Amendments 67B and 69A. They all relate to the same point about being able to constrain payments. All the considerations that apply to Amendment 67B and 69A apply to Amendment 118A as well.

**Lord Flight:** My Lords, the Minister has done a pretty effective job in removing the practicality of my amendment. I will just make the point about pensions in payment. I accept the argument that a contract is a contract, but for new people joining the public sector, a term of their employment could be that their pension right includes the possibility that, if their pension arrangements were in a mess, their pension could be reduced. In the case of an existing contract, I grant that it cannot be removed.

To the extent that it is possible, there ought to be broad similarity between what happens in the private sector and what happens in the public sector. Obviously, in the private sector, if a final salary scheme gets into a mess and the employer cannot finance the deficit, even though it goes to the Pension Protection Fund, people will not necessarily continue to get their full pensions with inflation increases and so forth. I think it is worth looking at seeking to design a scheme that is reasonably fair on both sides. I beg leave to withdraw the amendment.

*Amendment 67A withdrawn.*

*Amendment 67B not moved.*

*Amendment 68*

*Moved by* ***Lord Eatwell***

**68:** Clause 11, page 7, line 26, at end insert ", provided that they do not have the effect of reducing members' accrued benefits"

**Lord Eatwell:** My Lords, we return to the issue that I anticipated in my remarks a few moments ago, of the relationship between the cost cap and the benefits to be received.

I remind the House that Clause 11(7), in referring to the cost cap, says that the steps taken in conditions where the cost cap is not met,

"may include the increase or decrease of members' benefits or contributions".

Clause 11(7) is entirely unqualified in that respect. It could lead to an increase or a decrease in benefits. As currently drafted, there is absolutely nothing to prevent accrued benefits from being reduced. Indeed, one of the main concerns of the noble Lord, Lord Hutton, about the Bill, which he expressed in written evidence, is that it does not offer proper protection for accrued rights.

Interestingly enough, there is a Treasury paper on the issue of the employer cost cap. On page 6 of that paper it says:

"There is no intention to make changes to benefits already accrued via the cost cap mechanism".

The very statement that there is no intention to reduce accrued benefits demonstrates that the clause as drafted includes the possibility of the reduction in accrued benefits. As we all know, in politics, the phrase "we have no intention" means "we are going to do it in due course".

Surely the Minister can have no objection to this amendment, as he has promised that the Government will not reduce any accrued benefits. What is more, this amendment would not change the Bill in any way that is detrimental to the Government. It would be of enormous benefit, providing millions of public service workers with the confidence that the accrued benefits of their pensions are safe. After all, the Government may declare that they have no intention of using Clause 11(7) to reduce accrued benefits but, as we have said several times this afternoon, it cannot bind future Administrations. If the Minister really wants to ensure that accrued rights are safe, why not include this amendment in the Bill so that if the cost cap were ever to be used to attack accrued benefits, any future Administration would have to come to Parliament to amend the legislation?

I stress that this is not a repeat of our discussion about retrospection in Clause 3(3)(c). This is a different issue. It speaks specifically to a statement that benefits might be reduced and does not qualify which benefits might be reduced. It would be enormously helpful to the Government if they accepted this amendment and made it clear that not only do they have no intention but that they intend to legislate to ensure that members' accrued benefits are not reduced, let us say, unintentionally by the cost cap coming in to exercise its role in maintaining efficiency in the provision of pensions. I beg to move.

**Baroness Donaghy:** I will speak briefly in support of my noble friend Lord Eatwell. I think I said at Second Reading that the issue of accrued benefits is a deal-breaker as far as the negotiations are concerned. It is about keeping one's word. Enshrining this in the Bill would do a huge amount to reassure public servants, particularly those in Scotland who have not yet been properly consulted. I believe that if a public servant sat down and did an audit of all the discussions that we have had on Committee days one and two, they would see the Government's unwillingness to put in the Bill all the areas in those agreements, saying, "No, we do not think that this, this or this needs to go in" and so on. I realise that this Bill is a legal framework but we are talking about the confidence that people can have in their pensions in the future.

We should not forget that it is not only Governments that can opt out of these things; individuals will make assessments about their own benefits and welfare and future, and it is very important for all our sakes that we maintain some kind of stability in this turmoil. If I can use a pun, the accrued failure of the Government to put any real assurances in the Bill might be viewed in a negative light by a lot of people who are very involved in this debate.

**Lord Newby:** My Lords, I will respond first to the noble Baroness, Lady Donaghy, before returning to the specific issue raised by the amendment. The vast bulk of the provisions that will affect people are not in the Bill; they are under the schemes. I have circulated the draft Civil Service scheme, an extremely long and detailed document that has in it most of the things—the headlines—that people will look at in determining whether they think the pensions they will get are fair and reasonable. I hope that those who worry that the Bill does not cover a lot of the things that they want covered can be reassured, as I have sought to reassure the House, that in the vast bulk of cases these points will be in the regulations, which obviously have the same force as the Bill.

With regard to Amendment 68, I will not repeat at great length that we have no intention to do what the amendment seeks to prevent. I do not need to refer the noble Lord, Lord Eatwell, to the Treasury paper because he has read it. I do not need to remind people about the UK and European legislation that would limit the Government's freedom to do what the amendment prevents because I have already done so. What I will say is that we are committed to giving further consideration to the protection of accrued benefits, of all sorts, in all circumstances. I plan to have amendments to that effect ready for Report; they will cover this point along with accrued benefits, so I hope that is a reassurance to the noble Lord.

**Lord Eatwell:** My Lords, I am grateful to the Minister for that. Of course, he made that commitment at the previous day of Committee when we were discussing the whole issue of retrospection. I am delighted to hear that the amendments he will bring forward—relatively soon, I hope, so that we will have the opportunity to examine them carefully before we discuss them on

the first day of Report—will also cover this particular eventuality. On the basis of that assurance I beg leave to withdraw the amendment.

*Amendment 68 withdrawn.*

*Amendment 69*

*Tabled by* ***Lord Eatwell***

**69:** Clause 11, page 7, line 30, leave out "negative" and insert "affirmative"

**Lord Eatwell:** My Lords, this is again a belt-and-braces amendment. If the Government had not made a commitment to protect accrued benefits in an appropriate way, including benefits in general as referred to in Clause 11(7), we would want any change in the cost cap and the consequences of such to be considered on the basis of an affirmative Motion. Given that the Minister has made a commitment to bring forward amendments to deal with the issue of accrued benefits I will not move Amendment 69.

*Amendment 69 not moved.*

*Amendments 69A to 70A not moved.*

*Clause 11 agreed.*

*6.45 pm*

***Clause 12 : Employer contributions in funded schemes***

*Amendment 71*

*Moved by* ***Lord Newby***

**71:** Clause 12, page 8, line 20, leave out subsection (8)

*Amendment 71 agreed.*

*Clause 12, as amended, agreed.*

*Amendment 71A not moved.*

*Amendment 72*

*Moved by* ***Lord Newby***

**72:** Before Clause 13, insert the following new Clause—

"Information about benefits

(1) Scheme regulations must require the scheme manager for a scheme under section 1 which is a defined benefits scheme to provide benefit information statements to each person in pensionable service under the scheme in accordance with this section.

(2) A benefit information statement must include—

(a) a description of the benefits earned by the person in respect of his or her pensionable service, and

(b) such other information as Treasury directions may specify.

(3) The information included in a benefit information statement must comply with such requirements as Treasury directions may specify.

(4) A benefit information statement must be provided—

(a) no later than the relevant date, and

(b) at least once in each year ending with the anniversary of that date.

(5) The relevant date is the last day of the period of 17 months beginning with the day on which scheme regulations establishing the scheme come into force.

(6) A benefit information statement must be provided in such manner as Treasury directions may specify."

**Lord Newby:** My Lords, Amendment 72 delivers on the Government's commitment to come forward with an amendment to require scheme members to be provided with information about their pension benefits. Amendment 83, in the name of the noble Lord, Lord Eatwell, is also in this group and is based on an amendment, tabled in another place, which we believe is not quite right for a number of reasons. I hope the noble Lord will be satisfied that Amendment 72 is an appropriate alternative.

The new clause will apply to each public service pension scheme made under Clause 1 of the Bill and, by virtue of Amendment 137, all new public body pension schemes. It requires that every active member of the schemes must be regularly provided with information about the pension benefits they have earned. The clause allows for this to be done in a number of ways, including via electronic media. The first statement must be provided within 17 months of the new schemes coming into effect and at least annually thereafter. Like me, noble Lords may wonder why 17 months has been chosen as the period in the amendment. The reason is that 17 months would take us to September of next year, which would mean that scheme members would have this information before they needed to submit their tax return. This is relevant only to high-end earners, who may need to take account of the contributions going into their schemes for tax purposes. This period will ensure that the schemes have the correct infrastructure in place to carry out this commitment. They can, of course, provide statements earlier where they are ready.

In developing the clause we have been mindful of the obligations that already apply to all occupational pension schemes, including the public service schemes. Regulations made under Section 113 of the Pension Schemes Act 1993 set out various information requirements. These are known as the disclosure regulations and include requirements to provide deferred members with information about the benefits they have earned up to the point at which they leave the scheme. As this legislation already requires information to be provided to those members, it would not be appropriate for our amendment to address them. The disclosure regulations also require defined benefit pension schemes to provide information to active members, but only upon request. The effect of our amendments will be to require each of the public service pension schemes to go further than this. Once they are up and running, information will automatically be provided to all active members at least once a year.

The disclosure regulations specify the information that all schemes must provide on request, how it may be provided and certain detailed points about how it must be calculated. Our policy is for the new benefit statements provided under this clause to be produced to the same standards. Rather than mirror the requirements of the disclosure regulations in the Bill, our amendment provides for Treasury directions to

[Lord Newby]
specify the information that must be provided to members. We have taken this approach because we are mindful that the disclosure regulations themselves may change over time and we will want the public schemes to keep in step. In fact, the regulations governing the disclosure of information in occupational pension schemes are currently under review. We have set out a commitment to consult on those provisions later this year.

We propose to retain parity between the Bill provisions and the disclosure regulations wherever appropriate. It is important that members are given consistent and complementary information about their pension scheme benefits. This approach is also consistent with that we have taken elsewhere in the Bill in extending the role of the Pensions Regulator to the public schemes. The Pensions Regulator will also have a role in overseeing the provision of benefit information to members of the public schemes.

Amendment 86 adds annual benefit information to the list of matters that the regulator will issue guidance on. Amendments 84 and 87 also include the new clause in the areas that the regulator will oversee and on which they can take enforcement action should schemes fail to comply with their duties. The amendments meet the commitment that we made on making information available and I hope that noble Lords will agree with them.

**Lord Eatwell:** My Lords, I listened carefully to what the noble Lord had to say and I am cognisant that this is a response to the arguments made in another place by my honourable friend about the disclosure and availability of information. My Amendment 83, which is in this group, also seeks to enhance communication to members. I will not go into in any great detail the argument about why that should be done because the noble Lord has already said why it should be done. But I would be grateful if he could set out what are deemed to be the deficiencies of Amendment 83 so that I have the opportunity to study his arguments between now and Report.

**Lord Newby:** My Lords, the main difference between the two is that the noble Lord's amendment sets out what information would be included in the benefit statement. We are saying that we wish the information to mirror the disclosure regulations that apply to private sector schemes. These will change from time to time. They have improved over the years and become less opaque. They may change again and we want the information that people under public sector schemes receive to keep up with what is, if not the gold standard, the best practice under those regulations.

We will provide information that mirrors the regulations, which may change. The noble Lord's amendment is very prescriptive about what the information is. I have not gone through it to see what it misses, if anything, beyond what we are planning, but I hope that when he reads what I have said he will find that we are covering rather more than he wants covered and enabling a certain amount of flexibility to meet best practice.

*Amendment 72 agreed.*

***Clause 13 : Information***

*Amendment 73*

*Moved by* ***Lord Davidson of Glen Clova***

**73:** Clause 13, page 8, line 26, leave out subsection (1) and insert—

"(1) The Treasury shall make directions requiring the scheme manager or responsible authority of a scheme under section 1 to publish scheme information.

(1A) The Treasury may make directions requiring the scheme manager or responsible authority of a scheme under section 1 to provide scheme information to the Treasury."

**Lord Davidson of Glen Clova:** My Lords, this amendment makes it a requirement for the Treasury to make directions for the publication of scheme data. It retains the permissive nature for Treasury directions in respect of data that are for the Treasury's own use.

In his report, my noble friend Lord Hutton condemned the data presently available for public sector pension schemes. His report stated that,

"the Commission has concluded that at present the availability of such data is at best patchy: some key data is not available, at least not publicly. This needs to be improved".

My noble friend Lord Hutton stressed the need to improve the quality and accessibility of scheme data so that comparison can be made between schemes and individual administrators. With better data, comparison could be made in respect of administration costs, membership profiles and, for the 89 funded local government pension scheme funds that manage more than £150 billion worth of assets, with a return on investments, which noble Lords will doubtless consider rather important.

Comparison, as in many areas, allows good practice and permits weak performance to be identified. Once identified, rectification may then be put in place in relation to that performance. It also enables good practice to be distributed throughout the various funds. In terms of accessibility, my noble friend Lord Hutton recommended that data be published as far as possible to common standards and methodologies and collated centrally. Currently, there is no central, publicly available depository of information.

Clause 13(1) of the Bill is permissive and thus fails to ensure that the Government will implement any changes to the current system for collating public service pension scheme data. Given the importance of full and reliable data in assessing the performance of public sector pension funds, that is not a desirable position.

Amendment 74 would replace the permissive language of "information may relate" with the compulsory language of "information shall include". Over the decades, the argument about "may", "maybe", "must" and so on in context has been a fruitful source of income for many lawyers, and I declare my interest as a lawyer. However, in trying to get clarity in this important area, I suggest that the option that means either you do it or do not do it should be replaced with a mandatory position. The permissive nature of the language is not adequate in this area. My noble friend Lord Hutton in his

report was very clear that current pension scheme data were not adequate—in his words, "at best patchy"—and some key data were not publicly available.

The report stresses that data should enable the assessment and scrutiny of performance, viability and key facts associated with the different schemes. This cannot be done unless the data are placed in the public domain. I suggest that the Bill should ensure that key data are published and not merely list types of data that the Treasury "may" include should it decide to make directions under Clause 31.

The Minister has frequently referred to flexibility and in many areas that is very useful, but in certain other areas such as this it can be termed, in my noble friend Lord Hutton's phrase, patchy, which is undesirable in this area. The amendment does not set out to establish every detail of the information to be published but to provide a framework for information requirements.

In Amendment 75 there is an effort to specify that scheme information should include full valuation reports. Again, my noble friend Lord Hutton's report specifically stated that full valuation reports should be published by our public service pension schemes, yet they are not mentioned in the types of scheme information in Clause 13(3). Without the publication of full valuation reports, comparison between schemes, as noble Lords will immediately appreciate, becomes very difficult. Proposed new subsection (3A) would allow the Treasury to require scheme information to be published to common standards to make it easier to collate. That in turn would help better comparisons between schemes. This is a permissive amendment.

Amendment 76 would require the Office for Budget Responsibility to report at regular intervals on the long-term impact of public service pension schemes. As my noble friend Lord Hutton stressed, there is a need for fiscal policy to take account of the sustainability of public service pension schemes. In that regard, I assume that the view is entirely common. For fiscal policy to be properly informed in relation to the cost of future and past pension promises, there needs to be accurate and independent analysis of the long-term impact of public sector pension schemes on public finances. That is why my noble friend Lord Hutton recommended that the Office for Budget Responsibility should provide a regular published analysis of the long-term fiscal impact of the main public service pension schemes, including the Local Government Pension Scheme. This amendment would ensure that fiscal policy is better informed, and that policymakers and the public are more regularly and reliably informed about the cost of public service pension schemes. Again, one assumes that that is a common objective on all sides of the House.

The Minister in another place said that the amendment was unnecessary, given that the Office for Budget Responsibility already has a responsibility to examine and report on the sustainability of public finances. From this side we suggest that this amendment be accepted, because it facilitates the understanding of the various trends and developments that may take place within the economy that have an impact on fiscal policy, which in turn can have an impact on pension matters. I beg to move.

*7 pm*

**Lord Newby:** My Lords, as the noble and learned Lord, Lord Davidson of Glen Clova, has said, in his final report the noble Lord, Lord Hutton, set out the need for improved transparency of information concerning the public service pension schemes. His report highlighted the range of information that is currently published, including data published by the Office for National Statistics, the OBR, the Treasury and the schemes themselves. However, as he explained, despite this range of data there is no centrally collated information that allows the total impact of the schemes to be readily assessed. Also, differences in the presentation and underlying methodologies and assumptions hamper comparisons between the schemes and, for local government, the funds within them.

Amendments 73 to 75 seek to ensure that Treasury directions require scheme information to be published and specify what that information must include. This is distinct from the current permissive drafting of Clause 13. Greater transparency is absolutely essential if we are to invite analysis and debate on the performance of the schemes. I can reassure the noble and learned Lord that we are committed to improving the information that is made available. It is our intention to use a central direction to ensure that such publications are helpful and consistent across the schemes, and to set out what information will be available—which I think goes a long way towards what the noble and learned Lord is seeking to achieve.

Amendment 74 seeks to require that all information set out in Clause 13(3) is published. However, that list is not intended to be a fixed or exhaustive list of the matters that schemes will be required to publish. Rather, it is intended to set out the core areas of scheme information that the detailed requirements will be built around. The list provides a starting point. The Government are committed to greater transparency, but it is fair to say that there is more work to be done to identify what information should be published, what common methodologies and assumptions should underpin it, and how best to collate or co-ordinate its publication. Once we are doing it on a more systematic basis, we will also want to change or amend the information that is published in the light of comments that are made. I do not necessarily think that even the Treasury will get it absolutely right first time so it would not be helpful to determine a mandatory list now, when information requirements will undoubtedly change as a result of comments made on our first attempts, and over time.

I hope that I can assure the noble and learned Lord that Amendment 75 is not necessary. Clause 13 already allows for Treasury directions to require information to be provided in a particular format. That is the key. Further, Clause 13(3) is not exhaustive, and already allows for schemes to be required to provide or publish full scheme valuation reports.

Finally, I turn to Amendment 76. The OBR already includes the impact of public service pensions in its spring and autumn *Economic and Fiscal Outlook* reports and in its July *Fiscal Sustainability Report*. The OBR's role is established by the Budget Responsibility and National Audit Act 2011. Section 4 of that Act places

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a duty on the OBR to consider and report on the fiscal sustainability of the public finances, of which the public service pension schemes clearly form a significant part. As we discussed on an earlier amendment, the OBR has already started doing this. The report it produced at the time of the Pre-Budget Report in December does exactly, I think, what the noble and learned Lord is seeking to achieve. The OBR clearly intends to carry on doing that, so that amendment is not necessary either. I urge the noble and learned Lord to withdraw this amendment.

**Lord Davidson of Glen Clova:** I am grateful to the Minister for his clarification on a broad number of areas. One is gratified to discover that we are ad idem in terms of our objectives. I will consider what has been said by the noble Lord and I congratulate him, again, on the openness of Her Majesty's Treasury to change, which is always useful. I will reflect on what has been said and will seek to withdraw this amendment.

*Amendment 73 withdrawn.*

*Amendments 74 to 76 not moved.*

*Clause 13 agreed.*

***Clause 14 : Records***

*Amendment 77*

*Moved by* ***Lord Newby***

**77:** Clause 14, page 9, line 5, leave out from "State" to end of line 8

*Amendment 77 agreed.*

*Clause 14, as amended, agreed.*

***Clause 15 : Regulatory oversight***

*Amendments 78 to 81*

*Moved by* ***Lord Newby***

**78:** Clause 15, page 9, line 15, leave out "Part 1 of"

**79:** Clause 15, page 9, line 18, leave out "that Part of"

**80:** Clause 15, page 9, line 19, leave out subsection (3)

**81:** Clause 15, page 9, line 25, leave out "subsections (2) and (3)" and insert "subsection (2)"

*Amendments 78 to 81 agreed.*

*Clause 15, as amended, agreed.*

*Amendment 82*

*Moved by* ***Lord Davidson of Glen Clova***

**82:** After Clause 15, insert the following new Clause—

"Review of standards of administration

(1) Within six months of the day on which this Act is passed, the Treasury shall commission an independent review into the standards of administration in public service pension schemes and how those standards could be improved.

(2) The Treasury shall lay before Parliament the report produced by the review as soon as reasonably practical after the report has been published."

**Lord Davidson of Glen Clova:** This amendment would require Her Majesty's Treasury to commission an independent review into the standards of administration in public service pension schemes. I refer again to my noble friend Lord Hutton's report, recommendation 22 of which expresses the desire that:

"Government should set what good standards of administration should consist of in the public service pension schemes based on independent expert advice. The Pensions Regulator might have a role, building on its objective to promote good administration. A benchmarking exercise should then be conducted across all the schemes to assist in the raising of standards where appropriate".

The proposed new clause implements this recommendation by ensuring that the Government will receive independent advice on how standards of administration can be improved in public sector schemes. It also ensures that independent review will be publicly accessible, so that its implementation may be scrutinised and the recommendations easily accessed and implemented by schemes that wish to do so.

The Bill makes provision for the regulator to issue codes of practice at paragraph 14 of Schedule 4, but we say that this provision does not require the regulator or another independent expert to carry out, first, a review and then set out clear principles regarding good administration in public sector pension schemes. Were that to be done, it would, of course, enable these codes to be informed. An independent review would identify areas for improvement in the inevitable drive for better administration. As well as identifying best practice, it could inform future codes of practice and look at the possibility of streamlining and combining the administrative functions of schemes. In his report, my noble friend Lord Hutton observed that the commission,

"received suggestions and evidence from a number of commentators that public service pension schemes offer scope for streamlining and combining of their administrative functions".

It is suggested that via this amendment one could examine ways in which the Local Government Pension Scheme in particular might benefit from economies of scale. It follows, therefore, that there is potential for sharing administrative costs and services, and creating broad contracts. I beg to move.

**Lord Newby:** My Lords, we have already taken steps in the Bill to ensure the effective and efficient administration of public service pension schemes. Until now, the schemes have been exempt from much of the legislation that applies to the governance and administration of other occupational pension schemes, but through Schedule 4 we are significantly extending the administration requirements on public service pension schemes. I would not necessarily commend Schedule 4 as it is extremely detailed, but to this extent I would do so because it sets out how we are changing the current arrangements by extending the administration requirements.

The schedule also extends the role of the independent Pensions Regulator in regulating the governance and administration of public service schemes, bringing it

into line with the regulator's role in regulating all other occupational pension schemes. As the noble and learned Lord has pointed out, the regulator will issue codes of practice relating to the responsibilities of public service schemes and be able to enforce compliance where schemes do not meet the requirements of the legislation. We are also taking steps to improve the transparency of the schemes and their governance by introducing pension boards, as we have discussed, as well as scheme advisory boards. Taken together, our changes will deliver the commitment to establish and monitor standards of administration in the public schemes.

The burden of the noble and learned Lord's amendment is that before the codes can be introduced you need to have a review, and indeed he talked about an independent review. We think that we have dealt with the point about independence by the fact that the regulator is independent. Further, you cannot produce codes without reviewing what is already there. You do not simply sit down with a blank sheet of paper and not look at what already exists in terms of best practice elsewhere in the industry. Our expectation is that the Pensions Regulator will of necessity have to review existing best practice before it can produce its own codes. For those reasons, we think that the amendment is unnecessary. We think that we are going to do what the noble and learned Lord is seeking to achieve, but we do not need a belt-and-braces approach in the form of further cover in the Bill to ensure that it actually happens.

**Lord Davidson of Glen Clova:** Again, I am obliged to the Minister for his clarification. However, if this side has a prejudice it is that it is always better to be better informed. I will reflect on the Minister's words to see whether what he has said matches our common objective. Once again, I respectfully seek leave to withdraw the amendment.

*Amendment 82 withdrawn.*

*Amendment 83 not moved.*

***Schedule 4 : Regulatory oversight***

*Amendment 84*

*Moved by* ***Lord Newby***

**84:** Schedule 4, page 27, line 15, after "information)" insert ", (Information about benefits) (information about benefits)"

*Amendment 84 agreed.*

*Amendment 85*

*Moved by* ***Lord Davidson of Glen Clova***

**85:** Schedule 4, page 29, line 36, leave out "may" and insert "shall"

**Lord Davidson of Glen Clova:** This amendment would provide that the regulator must issue codes of practice by changing the permissive expression "may". As I said earlier, when one comes across this language, one is always presented with an option either to do it or not, and plainly in this context it is not an enabling use of the word "may". It does not suggest "shall", so we suggest in this amendment that "shall" would be the better way of proceeding. That is because the desirability of codes of practice must be common, given what the Minister has already said.

As it stands, Schedule 4 allows but does not require the Pensions Regulator to issue codes of practice for public service pension schemes. Under the schedule, these codes of practice would include guidance in relation to the exercise of functions and standards of conduct and practice. Plainly, the intention of these codes is to bring about high standards of scheme governance and administration. We say that there should be a clear requirement that the codes are produced by the Pensions Regulator rather than leaving this as a potentially permissive provision. I believe that the Minister in another place said that this amendment was not necessary, but we take the opposite view in that it introduces a compulsitor on the regulator to make these codes of practice clear to all.

I should say immediately that there are many aspects of Schedule 4 that this side welcomes, specifically the requirement in paragraph 19 that pension board members must have appropriate knowledge and understanding to enable them properly to exercise their functions, and the requirement for public service schemes to establish internal controls, as set out in paragraph 21. However, we are concerned that the regulator is not obliged by this Bill to produce codes of practice for public service schemes. I beg to move.

*7.15 pm*

**Lord Newby:** My Lords, it would be an interesting little exercise to look at how many hours of your Lordships' time is spent debating across the Floor of the House whether to use "may" or "shall", and vice versa. In my view, they are certainly too many.

As we have just debated, Schedule 4 sets out the new role for the Pensions Regulator in providing regulatory oversight of the administration and governance of public service schemes. A key part of that new role is to issue codes of practice. These codes set out in more detail the legal requirements on schemes and how to fulfil them. The regulator already issues codes of practice for private sector schemes and the drafting in this Bill closely mirrors the drafting in the Pensions Act 2004. These amendments would turn the overarching power for the regulator to issue codes of practice into a duty.

Proposed new Section 90A(2), set out in paragraph 14 of Schedule 4, already imposes a duty on the regulator to issue codes of practice in relation to the 11 matters listed in that provision. This sits under the broader power in proposed new Section 90A(1) to issue codes of practice in relation to the exercise of functions under pensions legislation and the standards of conduct of those exercising these functions. The result is that as currently drafted, the regulator will already be under an obligation to issue codes in relation to certain areas of pensions legislation. The power in new Section 90A(1) allows the regulator to issue codes on other areas in addition to those already required by new Section 90A(2).

New Section 90A(2)(j) provides, as does existing Section 90 of the Pensions Act 2004 on which this provision is based, for the Secretary of State for Work

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and Pensions to add to the list of matters in relation to which codes of practice must be issued. I can therefore assure noble Lords that the regulator will be obliged to issue codes of practice for the public service schemes. These are a key part of implementing the independent oversight and regulation of public service schemes, as recommended by the noble Lord, Lord Hutton.

Amendment 91 in this group relates to codes of practice in Northern Ireland. However, those provisions are all proposed for deletion by Amendment 90, which has already been debated. However, on the main point, I hope that with the reassurances I have given, the noble and learned Lord will feel able to withdraw the amendment.

**Lord Davidson of Glen Clova:** If the Minister is surprised at the amount of time spent by this Chamber in debate on the potential differences between "may" and "shall", perhaps he should reflect on the decades that are spent in court having to consider and implement what this House and the other place have actually traduced. I am endeavouring to reduce by a few decades debate in the pensions area on the use of "must" or "shall" instead of "may".

It is clear that the Government accept that there is a duty for the codes of practice and we welcome that. The difference between us is how far these codes of practice must go. The Minister takes the private sector as the comparator. Sometimes it might be an idea for the public sector to aspire to a slightly higher standard. However, given that no doubt difficult proposition for the coalition Government, I beg leave to withdraw this amendment.

*Amendment 85 withdrawn.*

*Amendments 86 to 90*

*Moved by* ***Lord Newby***

**86:** Schedule 4, page 30, line 27, at end insert—

"( ) the discharge of duties imposed under section (Information about benefits) of that Act (information about benefits);"

**87:** Schedule 4, page 31, line 7, after "information)" insert ", (Information about benefits) (information about benefits)"

**88:** Schedule 4, page 32, leave out lines 28 and 29

**89:** Schedule 4, page 32, line 31, leave out from "Act)" to end of line 33

**90:** Schedule 4, page 33, line 5, leave out from beginning to end of line 2 on page 39

*Amendments 86 to 90 agreed.*

*Amendment 91 not moved.*

*Schedule 4, as amended, agreed.*

***Clause 16 : Restriction of existing pension schemes***

*Amendment 91A*

*Moved by* ***Lord Davidson of Glen Clova***

**91A:** Clause 16, page 9, line 34, leave out subsection (1) and insert—

"(1) New scheme regulations made under sections 1 and 3 shall replace existing schemes' current regulations and shall take effect on the amendment date.

(1A) Following the implementation of new scheme regulations under subsection (1), benefits shall only be provided in accordance with those new regulations."

**Lord Davidson of Glen Clova:** Amendment 91A and the other amendments in the group are designed to address the concerns with Clause 16, in particular relating to the Local Government Pension Scheme, as it allows for the closure of each of the 89 funds that make up the LGPS.

Our concern is that allowing closure could have a number of unintended consequences. It was mentioned in Committee that local government schemes are exempt from Section 75 of the Pensions Act 1995, so "closure" would therefore not trigger debts under that section. But that is by no means the only risk of the use of the operative word, "closure".

There are thousands of employers in local government pension funds, each of which has individual admission agreements governing the terms of the employer's participation in the fund. Those agreements are not necessarily in standard form, meaning that there are potentially thousands of different admission contracts. It is likely that at least some of these agreements will set out various powers for the local authority in the event of closure, including the power to collect a debt from the employer equal to its share of the scheme's deficit. This could put a massive strain on participating employers and has the potential to put some of them out of business.

The Minister in the other place assured the House that the Government will not close the Local Government Pension Schemes but, respectfully, this misses the point that the Bill allows local authorities to close their funds and the Government cannot prevent them doing so. For their own reasons, local authorities may wish to close schemes in order to crystallise debts from certain employers. The Government have insisted that the word "closure" be used in Clause 16 but this does not in fact mean closure. We suggest that this might be approached differently, to avoid this explanation.

Closing a pension fund means that there are no longer any active members in the scheme but that the scheme continues. However, the Government insist that in the context of Clause 16, "close" does not mean "close". Rather, it means that no benefits will be provided under the scheme. That is what I understand the position to be.

As Clause 16 is currently drafted, the word "closure" is not given the different meaning that the Government contend. Clause 16(1) provides that,

"no benefits are to be provided under an existing scheme ... after the closing date".

That is not sufficient to change the word "closure" from its accepted meaning in pensions law.

If the Government want the word "closure" to have this different meaning, they should explicitly define this in the Bill. These amendments would ensure that schemes do not close but that they are amended. It is suggested that "amendment" is by far a better way of proceeding than continuing with the word "closure". These amendments are designed to achieve the Government's desired aims, which we share, but prevent what we suspect would be the unintended consequences that could arise if the Bill continues to allow "closure".

Amendment 91D is new and provides that the closing date for a Scottish scheme is 1 April 2016. This is to address the fact that administration of the scheme in Scotland is more complex and that more time will be needed. The Bill requires that existing schemes are closed on 5 April 2015. This means that Scottish local government pension schemes have to be renegotiated and scheme regulations drafted. There has to be consultation, approval by the Scottish Parliament and then administrative implementation. This may be achievable in England, because negotiations over the schemes have been concluded and significant work has been undertaken on scheme regulations, as we have already heard. Sadly, this is not the case in Scotland as until this Bill there was no necessity to do so.

A new Scottish Local Government Pension Scheme was implemented as recently as April 2009. The focus was to implement the cost sharing and other provisions of that new scheme. This Bill imposes the principle of the English-negotiated solutions, which were not sought in Scotland.

Two years may seem enough time for the Scots to sort themselves out, but the reality is somewhat different. If one works back from April 2015, the timetable is as follows. At least a full year is required to implement the scheme administratively, which includes software changes; that, I gather, is a minimum period. At least a further year is required to undertake the legal process, including the drafting of regulations, public consultation, ministerial approval and the laying of regulations in the Scottish Parliament. This is based on Civil Service estimates, approved by a Scottish Minister. It is not simply a construct by this side of the House.

That timeframe leaves about two months for initial union consultation with members, negotiation with stakeholders, and then consultation with members and other stakeholders—councils, admitted bodies and so on—about heads of agreement. Pension negotiations, as the Minister will immediately accept, are complex and require extensive data that take a long time to produce. Agreements also require an equality impact assessment, which takes time too.

This timetable assumes that stages progress smoothly, with no significant difficulties. However, as in England, not everything in Scotland necessarily proceeds smoothly—in fact, in Scotland it is possibly less so. Making changes to the Scottish Local Government Pension Scheme is significantly different to doing the same to the English scheme. So far it has taken about a year for the Scottish scheme to catch up with its English counterpart. The last major change in England was in 2008 and 2009 in Scotland. An amendment that delayed implementation in Scotland until 5 April 2016 would therefore have the support of the trade unions, of the Scottish local authority body, COSLA, and of Scottish Ministers. I beg to move.

**Lord Newby:** My Lords, before I turn to these amendments I would like to notify the Committee of a development with regard to certain Scottish pension schemes.

The regulations made for local government, police or firefighters' pension schemes in Scotland must follow the framework set by this Bill. However, Clause 3 does not require the Treasury to consent to them before they are made. This reflects existing devolution arrangements. The Chief Secretary sought to agree a mechanism to ensure that both Governments were kept appropriately informed of any changes to these regulations, or factors affecting them with the Scottish Government. This would have operated via a non-binding memorandum of understanding.

However the Scottish Government have now informed the Treasury that they do not consider there to be a need for such a memorandum. I can assure noble Lords that these schemes will not operate in a vacuum. Existing agreements will continue to apply to these schemes, and we will continue to support the Scottish Government in making these regulations fair and sustainable.

*7.30 pm*

**Lord Davidson of Glen Clova:** Will the Minister briefly elucidate the reasons that the Scottish Government have given for why they do not consider that consent is required? If the Minister cannot do that immediately, I would be happy for him to write to me.

**Lord Newby:** I think I will have to write to the noble and learned Lord. I am very happy to do so.

I shall return to the amendments and start with Amendment 91D regarding the Scottish scheme. I heard what the noble and learned Lord said about the Scottish Government being unable to implement the reformed schemes in the 27 months available, but the Scottish Government have at no stage asked a Minister for a delay to the implementation of the schemes, and we think there are very good reasons for avoiding a delay.

A delay in implementing the reforms would, for example, result in hundreds of millions of pounds of additional liabilities being accrued in the Scottish schemes. These additional costs would have to be met from the Scottish budget at the expense of Scottish jobs and services. Furthermore, a delay would disadvantage Scottish public service workers on lower and middle incomes by prolonging the period that they will continue to subsidise the pensions of high flyers. I am sure that the noble and learned Lord does not think that that is desirable. The only thing I would say by way of general comment is that it has been clear since the point at which this legislation was introduced that it would apply to Scotland and how it would apply to Scotland. My right honourable friend the Chief Secretary has written repeatedly to the Scottish Government about what is going on in England and how we are making progress, and therefore there is no objective reason why the Scottish Government should not be absolutely marching in lockstep with the Government in London in terms of producing the scheme rules. We think that the time has come for the Scottish Government to get their skates on, and we do not believe that there should be a delay in Scotland for the reasons that I have given.

**Baroness Donaghy:** As the Minister knows, I am extremely concerned about equality of consultation on this issue. Can he say objectively if the same applies to local government employers and all public servants in Scotland and that they are equally in step and are fully involved?

**Lord Newby:** I am afraid I cannot because it is not the responsibility of the London Government. We do not seek to micromanage what is happening in Scotland or to follow every minute of what the Scottish Government are doing in relation to these things, not least because if we did, we would be excoriated by the Scottish Government for interfering in Scottish affairs. These are Scottish affairs and I am afraid we cannot second-guess every bit of discussion that is going on in Scotland. It would make us extremely unpopular for no benefit because we are not responsible for the way those scheme negotiations are progressed.

I shall move to Amendments 92A and 93A. Concerns were raised in another place about the closing dates as originally drafted. Although I am confident that the dates as drafted would have worked as intended, to address the concerns echoed here, and following discussions with each of the schemes about their planned timetable for reform, the Government have tabled Amendments 92 and 93 to revise the closing dates. I hope that noble Lords feel that their concerns have therefore been addressed.

On Amendments 91A, 91C and 93B to 93G, I shall attempt to address noble Lords' concerns relating to the extent and effect of the closure of the existing schemes. Taken together, these amendments seek to provide for the replacement of the existing regulations in order to make these reforms. This would mean that the new scheme regulations made under Clause 1 would have to provide for both accrued rights prior to reform and new service after reform with different rules pertaining to each. That would be unnecessarily complex and inefficient.

The Bill already enables new and existing arrangements for each workforce to be managed and administered together by virtue of Clauses 4 and 5. The new and existing schemes will have the same scheme manager and the same pension board. From the perspective of a scheme member, their existing and new pension benefits and the administration of their pensions will be seamless. I hope I can also reassure noble Lords that there is no need to place in the Bill any requirement to legislate for the new schemes. The Government have made a number of commitments in this House, in another place and elsewhere to enact the schemes in accordance with the relevant heads of agreement.

I realise that a number of concerns have been raised in another place about the use of the phrase "closing date". We have given lengthy reassurances that these words have only the meaning that can be attributed to them in the context of the clause; that is, that they close the schemes to future accrual only. This was the subject of the correspondence between the Economic Secretary, the shadow Financial Secretary and the chair of the Local Government Association which I circulated to noble Lords a couple of weeks ago in which we sought to minimise confusion about the use of the word "close". Government Amendments 111 to 114, to which we will come later, have been drafted to achieve that. I hope that noble Lords can now put their minds at rest on the subject.

We have been clear that our intention is to simplify and consolidate the existing legislation relating to the provision of pensions to public servants. In future, public service pension schemes will be made under the powers in the Bill. These amendments, as drafted, would not allow for such consolidation. Although I know what the noble and learned Lord was seeking to achieve, I hope he will understand why I cannot accept his amendments.

**Lord Davidson of Glen Clova:** I am obliged to the Minister. I remind him that when I referred to Scotland, I said that things do not always seem to move smoothly there. There certainly seems to be a different understanding on this side about what Scottish Ministers, who I take to be the Scottish Government, have expressed by way of a view in relation to timing. As I said, things do not always move smoothly north of the border.

If my learned friend the Minister—he may be learned for all I know and may be my friend—wishes to avoid unpopularity in Scotland, perhaps I may suggest that he refrains from suggesting that the Scottish Government move in lock step with the UK Government and that they get their skates on. In any event, I hear what he says, and we will perhaps return to this in due course when we are both better informed.

In relation to closure, the Minister described possible confusion between the Economic Secretary and his shadow. It may be that this is in effect a difference of approach. I suspect that we will return to this on Report, but at this stage I beg leave to withdraw the amendment.

*Amendment 91A withdrawn.*

*Amendments 91B to 91D not moved.*

*Amendment 92*

*Moved by* ***Lord Newby***

**92:** Clause 16, page 10, line 2, leave out "1 April" and insert "31 March"

**Lord Newby:** My Lords, Clause 16 provides that no person may accrue further benefits in the existing pension schemes after a given date. However, while this is referred to as "the closing date", it is important to note that this does not mean that these schemes will be closed or wound up on that date. They will continue to exist to pay the benefits accrued up until the closing date, and beyond that date for those who are eligible for transitional provisions.

Although the closing dates as originally drafted would have worked as intended, they were a cause of concern in another place. To address these concerns, and following discussions with each of the schemes about their planned timetable for reform, Amendments 92 and 93 will revise the closing dates. Therefore, for local government workers in England and Wales, the closing date is 31 March 2014, and for all other schemes the closing date is 31 March 2015.

Amendments 111 to 114 are designed to minimise the potential for misinterpretation regarding how the Bill will affect the current schemes. Perhaps I may reiterate what was made clear in another place. There will be no subsequent crystallisation of liabilities when the Bill closes the current schemes to future accruals.

To provide further clarity on this point, these amendments will remove references to schemes that are closed and instead signpost to the clauses that restrict the build-up of future accruals in the schemes. I beg to move.

**Lord Davidson of Glen Clova:** There was initially a spark of hope that these amendments might have addressed the question of closure. That spark has died. However, I hear what has been said. I will confine myself to saying that we may return to this matter on Report.

*Amendment 92 agreed.*

*Amendment 92A not moved.*

*Amendment 93*

*Moved by* ***Lord Newby***

**93:** Clause 16, page 10, line 4, leave out "5 April" and insert "31 March"

*Amendment 93 agreed.*

*Amendments 93A to 93G not moved.*

*Amendment 94*

*Moved by* ***Lord Newby***

**94:** Clause 16, page 10, line 28, leave out from "Wales" to end of line 30

*Amendment 94 agreed.*

*Clause 16, as amended, agreed.*

***Schedule 5 : Existing pension schemes***

*Amendments 95 and 96*

*Moved by* ***Lord Newby***

**95:** Schedule 5, page 39, line 8, leave out paragraph 2

**96:** Schedule 5, page 39, line 28, at end insert—

"Exception: benefits payable to or in respect of a holder of a devolved office."

*Amendments 95 and 96 agreed.*

*Amendment 96A not moved.*

*Amendments 97 to 102*

*Moved by* ***Lord Newby***

**97:** Schedule 5, page 40, line 7, leave out paragraph 18

**98:** Schedule 5, page 40, line 13, leave out paragraph 20

**99:** Schedule 5, page 40, line 19, leave out paragraph 22

**100:** Schedule 5, page 40, line 24, leave out paragraph 24

**101:** Schedule 5, page 40, line 33, leave out paragraph 27

**102:** Schedule 5, page 40, line 35, at end insert—

"27A A scheme under section 48 of the Police and Fire Reform (Scotland) Act 2012.

Exceptions: injury benefits and compensation benefits."

*Amendments 97 to 102 agreed.*

*Schedule 5, as amended, agreed.*

*Clause 17 agreed.*

***Schedule 6 : Existing injury and compensation schemes***

*Amendments 103 to 110*

*Moved by* ***Lord Newby***

**103:** Schedule 6, page 41, line 25, leave out paragraph 2

**104:** Schedule 6, page 41, line 35, leave out paragraph 6

**105:** Schedule 6, page 42, line 5, leave out paragraph 8

**106:** Schedule 6, page 42, line 11, leave out paragraph 10

**107:** Schedule 6, page 42, line 15, leave out paragraph 11

**108:** Schedule 6, page 42, line 23, leave out paragraph 14

**109:** Schedule 6, page 42, line 25, at end insert—

"14A A scheme under section 48 of the Police and Fire Reform (Scotland) Act 2012.

Specified benefits: injury benefits and compensation benefits."

**110:** Schedule 6, page 43, line 11, leave out paragraph 23

*Amendments 103 to 110 agreed.*

*Schedule 6, as amended, agreed.*

***Clause 18 : Final salary link***

*Amendment 111*

*Moved by* ***Lord Newby***

**111:** Clause 18, page 10, line 41, leave out "which are closed under section 16" and insert "to which section 16(1) applies"

*Amendment 111 agreed.*

*Clause 18, as amended, agreed.*

***Schedule 7 : Final salary link***

*Amendments 112 to 114*

*Moved by* ***Lord Newby***

**112:** Schedule 7, page 43, line 17, leave out from "scheme" to "(the" in line 18 and insert "to which section 16(1) applies or a scheme to which section 28(2) applies"

**113:** Schedule 7, page 43, line 38, leave out from "scheme" to "("the" in line 39 and insert "to which section 16(1) applies or a scheme to which section 28(2) applies"

**114:** Schedule 7, page 44, line 7, leave out from "after" to "("the" in line 8 and insert "the date referred to in section 16(1) or 28(2) to an existing scheme to which section 16(1) applies or a scheme to which section 28(2) applies"

*Amendments 112 to 114 agreed.*

*Amendment 115 not moved.*

*Schedule 7, as amended, agreed.*

***Clause 19 : Consultation***

*Amendment 116 not moved.*

*Clause 19 agreed.*

*House resumed.*

## Arrangement of Business

*Announcement*

*7.45 pm*

**Baroness Anelay of St Johns:** My Lords, there appears to have been what is, to me, an extraordinary misunderstanding about an agreement in the usual channels about the process by which we would deal with business today. I had anticipated that on this Bill my noble friend Lord Newby would be proceeding beyond Amendment 92 and that group, and that we would be going to 10 pm; this was the agreement very clearly set out. This was the process on this particular Bill but I understand that, despite discussion with me personally this afternoon, when I went through the procedure, what I thought was a careful explanation by me was misunderstood. Therefore, the opposition Front Bench finds itself in a difficult position and believes that it is unable to proceed with further amendments on this Bill.

There are, from time to time, misunderstandings about matters of business. This one has surprised me, but it is a matter that one just deals with and this House likes to proceed in a businesslike manner. Therefore, unexpectedly, we are in a position where the Bill will now stop for today. The remainder will conclude on Monday, although clearly it could have progressed much further tonight. Instead, there is a bonus for those who are now taking part in a very interesting Question for Short Debate. The only people for whom it is not a bonus, I regret to say, are the noble Lord asking the Question for Short Debate and the Minister responding, whose speaking times remain the same. My quick bit of maths as I rushed out of the Chamber leads me to believe that it would now be in order that the QSD goes to one and a half hours, since it is the last business, and that therefore, apart from the opening speaker and the Minister, every other speaker, including the opposition Front Bench spokesperson, is allowed seven minutes instead of four.

## Prisoners: Work Programmes

*Question for Short Debate*

*7.47 pm*

*Asked By* ***Lord Carlile of Berriew***

To ask Her Majesty's Government what opportunities for re-training for prisoners will be provided by the newly developed policies for work in prisons; and how such work programmes will be commissioned.

**Lord Carlile of Berriew:** My Lords, I feel as though I have won a very small lottery this evening, and I am very pleased that we will have an extended time to deal with what I believe is the important issue of work in prison. I welcome, too, the significant interest in this debate, not least from the noble Lord, Lord Myners, who recently succeeded me as the president of the Howard League for Penal Reform, which I welcome very much. I regret that my noble friend Lady Hamwee is indisposed tonight and will not be speaking in this debate.

I mention the Howard League not least because it is the only organisation, as I understand it, ever to have run a real free-standing business inside a prison; that is, a business paying the rate for the job and with the prisoners wishing—though failing—to pay tax. Because of bureaucratic obstruction—I anticipate that the noble Lord, Lord Myners, may say a little about this later—it proved impossible to run it as a true business.

In my capacity as a lawyer and as a politician, I visited a very large number of prisons over a great many years. If you visit any prison, you will of course find prisoners doing some work. It may be a bit of gardening, some cleaning or some good or indifferent training courses. Some do contracted work. There are in fact about 100 firms that are contracted through NOMS to engage prisoners in work. However, that work goes to some 9,000 prisoners only—less than 12% of the prison population. Even for those who work, the average number of hours of work in 2010 was 11.8 hours per week, which hardly equates to a working week, and they were paid an average of £9.60.

Prison has several functions, including the protection of the public and retribution. Surely an important function is to release a human being who can live in the real world, which may be a confusing place for someone who left it several years earlier. Former prisoners need to be able to survive—therefore, they need money. Absent earnings in some cases, or in many cases, they will steal to survive. They need to pay rent for decent accommodation. Otherwise, prison may unfortunately provide their softest option for warmth and sustenance. Believe me, there are more than a few prisoners who have chosen prison as the most comfortable place to live. Prisoners need activity, otherwise idle hands may return all too swiftly to the twin devils of acquisitive and violent crime.

The advantage of work for prisoners while they are in prison is that when they become ex-prisoners and obtain jobs with their acquired skills, they can obtain not merely activity and earnings. Work involves other people, and working with other people includes the companionship, discipline and, above all, the self-respect that almost all regular work gives, whatever its nature. The benefits of work in your Lordships' House require no advocacy.

Most male prisoners—shockingly, more than half—did not work in the year before they entered custody. That is a depressing figure, particularly because there is a correlation between that figure and crime. An even sorrier tale is that in 2009, of those leaving prison, 27% of men entered work, which means that more than seven out of 10 men did not get jobs when they left prison; and 13% of women entered work, which means that nearly 90% of women did not obtain jobs when they left prison. If you look at schemes that have been run abroad, particularly in America, you will find that former prisoners employed by good managers, who provide high-quality training, become extremely enthusiastic and reliable workers. That is surely to be encouraged. The cost-benefit analysis is self-evident. But the fact that seven out of 10 men and nine out of 10 women leave prison without a hope of a job is in truth the narrative leading to the prison revolving door.

There is an unanswerable case for work, especially for longer-term prisoners serving three years or more. I look forward to hearing the Minister's response to that point. For such longer-term prisoners, there would be time to train them and the opportunity to teach them new skills. Many prisoners are much brighter than their pre-imprisonment qualifications would suggest. I recall going into a cell not many years ago where a young man showed me his maths GCSE A* certificate. When I asked him what he was proposing to do, he said, "I'm going to be a maths teacher, sir. I'm going to take maths A-level and go to university". He was obviously very talented at, and loved, mathematics. When I asked him how he had done in mathematics at school, he said, "I never went to school, sir". There is one single example from my own experience of someone who could be greatly upskilled in prison and be given the opportunity to have not just a job but a real career.

My suggestion to the Government is that if real work is to be brought into prisons, prisoners should earn the going rate for that job, thus avoiding the criticism that by doing such work they would undercut other producers. If a real effort were made to bring contractors into prison to provide work, they would come and provide that work. They would know, after all, that their workforce would at least turn up every day, or in most cases, anyway. The prisoners would pay tax—why not?—and national insurance, make payments towards a pension, contribute towards their families, earn something that is entirely free—namely pride—and, above all, be much fitter for release. In return for their work, they could be allowed privileges and extra purchases and, as the Howard League has suggested, there could be a levy on their earnings to compensate victims.

Mr Kenneth Clarke announced in May last year, as Lord Chancellor, the Government's One3One initiative. That is welcome but there is precious little sign of it bearing fruit. I am sure that the House would be interested to know what is being done. There is no sign of a proactive approach by the Department for Business, Innovation and Skills, for example, or from other parts of the statutory sector, to bring One3One to effect.

In the couple of minutes remaining, I want to add something about new prisons. The cause of fitting prisoners for the world outside and putting them to employed work depends on a number of factors. It depends on giving them work that provides some meaning for their future lives and on them being able to maintain a relationship with their families while they serve their sentences. I read with dismay the repeated proposal, which comes from any Government, from time to time, that a Titan prison should be built to replace some smaller prisons. A Titan prison would give rise to the usual government procurement problems; it would almost certainly cost a few hundred million pounds more than was estimated. There would be very serious security issues, which would force the authorities to break it down into a number of smaller prisons within a prison. There would be potential staffing problems for a massive establishment, particularly if it was on the sites that have been trailed in the media this week. It would be less likely to produce a Titan than a Titanic, and it is a voyage that sound penal policy should and could do without. I invite my noble friend, when he replies to this debate, to make it clear that at worst a Titan prison is just a thought, and that it is far yet from being a proposal.

*7.57 pm*

**Baroness Stedman-Scott:** My Lords, I congratulate the noble Lord, Lord Carlile, on securing this debate. I declare an interest in that I am a chief executive of Tomorrow's People and try to work with some of the people that the noble Lord spoke about to make sure that they secure sustained employment.

It will come as no surprise to anyone here that I believe wholeheartedly that acquiring skills, undertaking training and being prepared for employment during any stay in prison—most importantly, on leaving prison—is critical if we are to ensure that people are supported and helped to secure sustained employment and to stop reoffending.

I would like to speak in support of the newly developed policies for work in prison. The focus of my contribution to this debate is on the benefits to prisoners and ex-offenders, rather than on the commissioning process. The objectives speak for themselves—of prisoners on a working week of 35 to 40 hours, their day focused on routine and work, with the economic benefits to them of being paid and having a wage and some control, in a very controlled environment, as well as the economic benefits to the prisons themselves. There should be links to business—getting businesses involved in this work is very important—and, of course, the creation of jobs through businesses and their supply chains.

Education, training and equipping prisoners for the world of work is very important. The noble Lord, Lord Carlile, referred to somebody who wanted to be a maths teacher after being in prison. I suggest that there are many people in our prisons who are very clever in ways we wish they were not, but if that were channelled in the right direction they could become exemplary employees, contributing to society while securing qualifications during the process.

While all of these objectives are good, I suggest that, for those who are responsible for the programme, it should not be seen as a two-part, two-section approach—something that happens in prison and then something that happens when you come out. For me, the journey that prisoners would take while working in prisons should be seamless. From day one when they start work, it should be part of their journey into sustained employment. Therefore, it is not just about securing the skills to work or to be involved in a business; it is about getting them ready for that time when they leave prison and—we hope, if the links with business are as they should be—they will continue to work for that business or supply chain. The other things that should be put in place are a network of support and somewhere to live so that all the things that would burden them on release are completely taken away. It would be reliant on their becoming good employees, adding value to the business and being what I would call economically independent.

There are examples around the world of work of a similar nature. If you look at this country, we have Timpson—a terrific organisation. We have probably

[Baroness Stedman-Scott]
all had our shoes repaired, keys cut or dog tags engraved by it. It has its academies in prisons and employs these people when they leave prison—people who are forever grateful to have had the opportunity to realise their destiny. We all know about the national grid service: this, too, is a great thing.

I have been particularly struck by a project I have seen in America called Delancey Street, which is a programme to stop people reoffending and make sure that they achieve their potential. They themselves run real businesses which trade for profit and do not rely on the Government for any money. It is a true inspiration; there is a four-star restaurant which is well worth patronising. It also has a car service that drives executives around—from companies such as Gap—and is paid for its service. It also has a removal company, which is quite remarkable because it is paid to remove things from people's houses and put them somewhere else. I have to tell noble Lords that its first customer was Getty; he was moving and the people did not turn up with the removal van, so this lady—Mimi Silbert, who started this up and is about four feet tall and a human dynamo—went over and said, "My boys will move you". He had no choice and she guaranteed that nothing would be stolen—maybe broken, but that was it. It is now the biggest removal company on the west coast of America, trading for profit. Moreover, it owns a Christmas tree plantation, where it sells all its trees to people in San Francisco. The customers pay a premium because they know where the profits are going. It is absolutely true that Delancey Street got the contract to decorate Tiffany's.

I believe this is a tremendous thing for us to be doing. It is commercially sound, economically sensible, professional in every sense and shows a commercial compassion that we so need in this country.

*8.03 pm*

**Lord Wills:** My Lords, I, too, congratulate the noble Lord, Lord Carlile, on securing this debate on this important subject. He has set out the issues compellingly and I do not want to rehearse them here again or go over the ground set out so well just now by the noble Baroness, Lady Stedman-Scott.

I want to focus my remarks on the difficulties that small voluntary organisations face in making a contribution to the important work that is the subject of this debate, particularly if these organisations are offering activities that do not fit within conventional models of the work that prisoners do. I want to illustrate this through the experience of Fine Cell Work, a charity with which members of my family have been involved for some years. Fine Cell Work is a social enterprise that trains prisoners in paid, skilled, creative needlework; it is taught and supported by volunteers from the Embroiderers' and Quilters' Guilds. The prisoners are paid for their work, which is then sold around the world. The pieces are high-quality craftwork, interior design commissions and heritage pieces for organisations such as the V&A, English Heritage, Tate Modern and the National Gallery. Fine Cell Work has had great success in the 17 prisons where it currently works.

Craftwork in prison has been shown to help prisoners develop the more constructive and disciplined aspects of their personalities as they learn new skills and support their families with the money that they earn. It connects inmates to wider society and gives them hope for their future. This is exactly the sort of work that NOMS should be supporting. Apart from everything else, through the combination of work in cells and in studio workshops, it enables prisoners to do practical, skilled vocational work in a 50-hour week—which I think is unprecedented in prisons—with a focused link to employment opportunities on release. It is significant that 80% of the work of Fine Cell Work is done in cells. At a time when budget cuts are leading to more time being spent in cells, it means that prisoners can continue to learn skills that will make them more employable with minimal cost and supervision.

However, because this work does not fit within recognised categories, it has faced real obstacles in realising its full potential. Many prison managers still call it "hobby work" in spite of the professionalism of the products and its commercial success. More than £200,000 worth of goods are sold annually. Prisons have been reluctant to support the training side of the work by seconding education staff to support the charity's volunteers. To reinforce the prisoners' sense of achievement and encourage their rehabilitation, their skilled production work should be accredited, but the volunteers are not qualified to deliver accredited training on their own.

Fine Cell Work's ability to progress has been obstructed by such lack of support and the difficulties it faces in meeting bureaucratic criteria. This is an innovative, small social enterprise but if it is to expand, it needs to work in partnership. It is not a normal business because 70% of its income comes from grants and donations, and it is discounted as a factor in rehabilitation because the very specific NOMS methodology makes it impossible to prove that Fine Cell Work on its own prevents reoffending. Therefore, in this new world, can the Minister say what NOMS can do to safeguard such unorthodox training and rehabilitation programmes over and above work regimes that generate revenue for prisons? What will NOMS do to help small organisations such as this provide the evaluation data that NOMS rightly requires to enable it to make judgments on what sort of providers it wants to operate in prisons? What must small, hard-pressed organisations such as Fine Cell Work provide from their own slender resources? What can NOMS can do to facilitate partnerships between small organisations such as Fine Cell Work to enable them to achieve the critical mass they need to meet the requirements of the Ministry of Justice?

I hope the Minister will recognise the threat that the failure to nurture small organisations poses to creativity and innovation in these programmes. I hope he recognises that, over and over again, experience under this Government and the previous Government has shown that the default option of delivering public services by commissioning large organisations—whose main talent has often been only to comply with the bureaucratic procurement criteria of central government—has failed all too often to produce value for money. If we are to get value for money, and if we are to pioneer new approaches to delivering public services, we need these

innovative, small organisations to flourish. They have a vital role to play in delivering public services, but to do that work they need a system in place that encourages them to do so and does not place unnecessary obstacles in their way. I hope that the Minister, in his response, can reassure your Lordships' House on all these points.

*8.09 pm*

**The Lord Bishop of Liverpool:** My Lords, although I am very sorry that we shall not be hearing from the noble Baroness, Lady Hamwee, this evening, I am delighted to follow the noble Lord, Lord Wills, not least because one of my Christmas presents this year was an embroidered cushion from Fine Cell Work. It has attracted lots of comment as it has pride of place in my study. I am very grateful for this opportunity to commend the excellent work about which we have already heard.

This is a timely debate as old prisons are closing and new prisons are opening. Our old prisons were built on monastic lines with cells modelled on monastic cells so that prisoners would be encouraged to contemplate their crime, and reform. While we should never lose sight of that purpose, the architecture of new prisons should reflect the evidence that training and work programmes for prisoners can be transformative in rehabilitating offenders. Therefore, my question to the Minister is: will the architecture of new prisons reflect this aspect of government policy?

In my capacity as Bishop to Prisons and in the process of making a series of programmes for BBC Radio 4 last year called "The Bishop and the Prisoner", I have observed closely two retraining and work programmes: the Clink and the Timpson workshops, about which we have already heard. In both cases, training of the prisoners is done on the job, skilling them for future employment.

The Clink is a high-quality, West End-style restaurant created inside a prison, with professional chefs training prisoners to cook and serve paying clients. Two restaurants are already established in our prisons and a further eight are planned. Of the 35 prisoners who have been through the Clink and released, 29 have found jobs and only three have reoffended. Those are remarkable statistics. If those statistics are replicated in the planned further eight prisons, the Government must surely take note of the success of this programme. I have not only seen the statistics, I have tasted the food—I suppose that I ought to declare an interest. I have also met the prisoners without any staff being present and have seen the impact of this programme on their lives in improving their self-esteem and raising their aspirations.

The Timpson workshops, to which the noble Baroness referred, operate in three prisons at the moment. These prisoners learn to repair shoes and as they learn they are paid for their improving productivity as they gain more competence. The brilliance of these schemes is that when they leave prison, the best get jobs in the Timpson business. In other words, the job in prison is the pathway to employment on the outside. It is a great incentive for these offenders to work and retrain. I have listened to prisoners in these workshops and seen how acquiring a skill for the first time is transformative of their outlook and prospects.

I underline the fact that this is all to the credit of NOMS. The noble Lord, Lord Carlile, has visited many prisons and so have I. It is clear to me that the determining factor in each prison is the visionary outlook of the governor. These schemes have benefited from the enthusiastic endorsement of the governors of the prisons concerned. Although Mr James Timpson, who provides much of the dynamism for these projects, says that from time to time his experience of getting NOMS to be more commercial is a bit like asking the North Korean Government to run Disneyland—to use his phrase—I am sure that NOMS will take that in the spirit in which it is offered. However, that comment highlights the fact that there is great scope within NOMS for a visionary governor to come alongside Fine Cell Work as well as the commercial enterprises and to use these to the benefit of offenders and to address the Government's hope of reducing reoffending. Will the Minister engage the visionaries behind these and other projects in the design of prisons so that transformative training and work can be at the heart of prisons, both physically and metaphorically?

*8.15 pm*

**Lord Myners:** My Lords, it is a pleasure to follow the right reverend Prelate in this debate secured by the noble Lord, Lord Carlile. It is a timely debate in the context of the Government's announcement last week of planned changes to the prison estate and to post-release supervision and support. I look forward to the Minister's response. I know that he has taken an active interest in prisons. He told me that he has recently visited Peterborough prison, where no doubt he had the opportunity to see, among other things, the excellent initiatives being developed there by Social Finance under the chairmanship of Bernard Horn and the leadership of David Hutchinson. I declare my interest as the successor to the noble Lord, Lord Carlile, as president of the Howard League for Penal Reform.

As the noble Lord, Lord Carlile, said, some prisoners are paid for doing chores but it is a derisory sum. It is pocket money; in fact, it is less than the average pocket money paid per week to teenagers. It does not constitute employment or a meaningful preparation for release. Prison may, necessarily, have a punitive element but it should not deny the dignity of prisoners. It should focus instead on preparing offenders for a return to the community in an economically and socially purposeful and productive manner.

For many prisoners, life behind bars is sluggish and boring. Too little time is spent on education and helping them to develop the skills necessary to overcome what, for many of them, have been chaotic and painful life circumstances. As the noble Lord, Lord Carlile, noted, and I saw in a recent visit to Brixton prison, there is a great wealth of talent in prison. There are prisoners who want to stop lives of crime and re-establish productive lives which are no longer chaotic, but we are failing them in not taking as much action as we could to prepare them to return to the community and not be drawn back into offending and a life of crime. I found it painful to listen to two extremely bright prisoners who had the right motivation but were desperate about what was going to happen on their release

[LORD MYNERS]
because they did not feel in any way prepared to walk out through those gates and back into a safe, secure and hopeful life.

One of the most productive things prison can do is to prepare offenders for the world of regular and paid work. For some of them, this might be the first opportunity in their lives to develop work skills that can be applied in the formal economy. The way to get good outcomes—for prisoners and society—from the time spent in prison, is to provide a life-changing opportunity rather than the current practice, prevalent in so many prisons, of the prison being a warehouse or even worse.

I therefore urge the Government to focus their resources and ability to mobilise employers, to seek ways to create opportunities for prisoners to be gainfully employed, earning a fair wage and paying tax, and to provide the opportunity for prisoners to make a contribution out of their earnings to their families. Many of them feel that the link with their partners, wives, husbands and children is completely broken. I endorse the observation made by the noble Lord, Lord Carlile, about Titan prisons, which will inevitably increase the distance of travel between a prisoner and his family. If the Government want to reflect on this, I suggest they look at the views expressed by Mr Dominic Grieve, who, when he was shadow Justice Secretary, demolished the proposals for Titan prisons made by the Government of which I was a member.

We want to provide effective linkages between prisoners and their families. Through paid employment at a competitive and fair rate, prisoners will be able to make monetary contributions to their families, which will make them feel a continued link, a responsibility and a sense that they have retained their dignity, rather than the current conventional practice in which the conceit of treating a prisoner's partner as a single parent ignores any opportunity for continuing economic linkage between the prisoner and their family. We want to seize the opportunity to allow prisoners to learn transferable employment skills that will reduce the risk of reoffending, to their own benefit and that of the community.

This is not going soft on prisons or prisoners. It makes assuredly good economic and social sense. It reduces the risk of a vicious circle. Providing training and work is a very real way of breaking that circle. Paid work creates additional motivation and fosters a sense of near-normality. In so doing, we might be making a positive step to address the desperation of prisoners released with little support and little prospect of employment in the formal economy because of the absence of any training or working experience during the period of their imprisonment.

There are, of course, practical issues. What is the right rate for the job? How do employers have access to the prison estate? How do we ensure the continuity of service that a business will require? These challenges can be overcome if everybody has the will to do so. The right reverend Prelate has referred to the importance of the governor. I would also emphasise the importance of ministerial activity and leadership. I read in the *Sunday Times* Mr Steve Hilton's views on how difficult it was for Ministers to make change. I urge the Minister to take a personal interest in this area. Can he get together with other Ministers, including in the Department for Business, with employers and trade unions—we will hear in a moment from my noble friend Lady Dean—and with other agencies like the Howard League to see if he can place his mark on this particular area and be the Minister who changed the way in which prisons operate in preparing people to return to the economy as effective workers?

*8.22 pm*

**Lord Addington:** My Lords, I congratulate my noble friend on bringing this subject forward. Whenever we discuss, do any work on or pay attention to the subject of prisons, we are always struck by how repetitive the problems are, both for the people concerned and for those of us who have been talking about them over time.

Generally speaking, you take into prison someone who is an educational failure and has usually finished their education—at their own decision, or that of their group—at the age of about 14. They commit a series of petty offences and most are on a roundabout of increasing but short-term sentences. They usually finish their offending pattern by the age of about 35. By that time, they have no work pattern, they have broken down several family relationships, and the best that they can expect is a life on benefits. That is a depressing scenario on which there is absolutely no disagreement in this debate. I agree with the suggestions that have been made by my noble friends and everyone in the House who has spoken on this; getting people into a pattern of work is probably the most important thing that can happen to them. If we are to try to achieve any form of preparing people for adult life, that is a very good way forward.

One of the things that initially attracted me to this debate was the problem of getting training and qualifications for that group of people. In the debate and my preparations for it, I realised that the idea of providing the activity and experience of work—particularly given what the noble Baroness, Lady Stedman-Scott, has said—is a positive step forward because this group is probably one of the most difficult to train. What attracted me initially to the activity within prisons, and led to my ongoing interest in it, was the incredibly large number of people there with special educational needs, particularly dyslexia. My interests in dyslexia have been broadcast far too often in this Chamber.

Most of the assessments reckon that 50% of the prison population are within the dyslexia spectrum. The lowest figure that I have seen is 30%, and that was on an assessment of a group of 300. Assessments could not be carried out on 200 of them because they were too violent. Why does that not surprise anyone who has worked in this area? It is for the simple reason that if you have to admit that you cannot do the basic functions of reading and writing, you are going to resent someone who presents you with something on which you are going to be tested. You might not be dyslexic; you might just be stupid in the way that you have always been told.

I could give examples from my life, such as the discovery that my daughter could spell better than I could when she was seven. This is something that

I never thought I would do but I recommend to noble Lords a programme on channel Five about Shane Lynch. I do not know if the House of Lords has a large following of the band Boyzone, but he is one of its members. He made a moving and articulate programme about someone who is dyslexic going through the problem of having to admit, "What if I am not dyslexic? What if I am thick? What if I have failed?". This was someone who had a soft landing. He was going to get involved in the garage that his father ran and that was his way forward. The music opportunity came along and he went off there. However, that very successful, rich and well known person was literally terrified at the thought that he might actually just be stupid in the way that people had told him, or in the way that he had assumed he was. In our prisons, we have people who have gone through the justice system for whom the idea of picking up a pencil and writing in public is a humiliating and painful experience. You have to reach them.

Recent government publications now mention special educational needs and take that idea on, but the one place that you cannot get this group of people into is a classroom—not unless you drive them there with whips and guns. For them, it is a frightening place where you reaffirm an unpleasant experience. It is quite obvious, once you think about it. Dyslexics are not the only group affected; you will find an overrepresentation of people with ADHD, Asperger's and head injury. People who cannot communicate do not handle the criminal justice system well.

I recommend a document, *Dyslexia Behind Bars*, which is the result of a study run by someone I saw in Chelmsford prison that initially looked at head injury and dyslexia. Here, successful intervention was achieved, primarily by developing and training mentors to go in, speak to a prisoner on an equal level and communicate. Once you have that level of communication, other things become possible. Formalised training and help become possible, but only once you have established that degree of communication. The formalised classroom will not achieve this because people will not use it.

I hope that the Government will embrace the Chelmsford project because I presented a copy of the report to my noble friend Lord McNally, in the company of my noble friend Lady Hamwee, who is much missed. It describes how, when you go in and talk to people on their own level because they trust you, you can begin that communication process. If you are going to strive for formal qualifications in the modern world, you generally have to pass a written test or know how to say why you should get help with that test. In both cases you need information.

I hope that when the Minister replies he will pay attention to the very high number of people in prison who need help with accessing all forms of formalised training and, indeed, with filling out benefit forms when they leave. If we do not pay attention to this, we will create more trouble.

*8.30 pm*

**Baroness Uddin:** My Lords, I am most grateful to the noble Lord, Lord Carlile, for bringing this matter before the House in a most poignant manner. It gives me an opportunity to share my experience of working with Kazuri, a social enterprise working to re-house female ex-offenders and women who have suffered domestic violence.

I had the privilege recently to launch Kazuri's report in the House, attended by grass-root practitioners and campaigning organisations, as well as NOMS and the Ministry of Justice. There were more than 80 individuals present. The meeting was addressed by the human rights lawyer, Imran Khan, and the barrister and legal specialist, Flo Krause, as well as by Julia Gibby, who had also prepared evidence to the Justice Committee's inquiry on women in the criminal justice system.

There are 4,133 women in prison and, staggeringly, 224 of them are Muslim. The report calls for a dismantling of the existing female estate, saying it has no relevance to the needs of women in prison. I commend the report to the House and hope that many noble Lords will take the opportunity to read it, as it makes a harrowing case about the level of misogyny against women in prison. Women serving the end of their sentences at an open prison were surveyed by Kazuri, which identified consistent gaps in provision in training and educational opportunities.

In the current climate of privatisation of public services, the recent probation service announcements and the building of yet more Titan prisons, women are punished far more heavily in prisons that lack trained staff. Kazuri's report states that underfunded privatised education and resettlement departments are ill equipped to facilitate resettlement and rehabilitation.

We must ensure that there is no further replication of the Work Programme, which has not been a successful example of large private sector companies working with the smaller social enterprises and charities, which walked away. I hope that the Minister will say how the Government intend to work with smaller companies and organisations to deliver more ethical and appropriate services, where large-scale organisations and providers have thus far failed.

It is alarming that, according to the charity Women in Prison, 87% of women who are serving custodial sentences have been victims of violence. According to the Chief Inspector of Prisons, HMP Holloway, which I have visited, no longer offers any courses in understanding domestic violence for the women prisoners.

While the Government are making strides generally to bring violence against women to a higher level on the policy agenda, this must be reflected in the prison estate. If women are not empowered to deal with the impact and long-standing trauma of prison, they will be released and simply fall back into cycles of abuse and—inevitably—crime, to which the noble Lord, Lord Carlile, has eloquently referred.

As a Parliament committed to rooting out violence against women, we cannot leave women in prison out of this equation. Interestingly, the noble lord, Lord McNally, in response to a Question from my noble friend Lady Corston, agreed to yet another review when asked whether custodial care and offender management should be organised to meet gender-specific requirements. The Corston report is the most comprehensive review of women in the criminal justice system. It seems perverse that this universally accepted

[Baroness Uddin]
framework to look at the needs of women across the raft of ministries and statutory duties appears to have been sidelined by this Government.

I respectfully submit that the time for reviews is over. There have been numerous reports on and reviews into the plight of women in the criminal justice system, and I urge Her Majesty's Government to look at the wealth of evidence collated by the Justice Committee as a result of its recent inquiry. Kazuri's submission to the Justice Committee says that more women than men lose their homes and children as a result of their incarceration, and that more children and public services are affected in profound ways by the incarceration of women. Some 17,000 children suffer every year because their mothers have been placed in custody. Will the Minister say how the Government intend to tackle the disproportionate inequalities faced by women in the criminal justice system?

I submit that the eradication of inequality is not synonymous with treating everybody equally. This is both disingenuous and deeply flawed. It is disingenuous because it gives supremacy to a concept that few would be hard pushed to criticise—namely, upholding the prima facie eradication of inequality—without actually and actively giving weight to evidence and outcomes. It is also deeply flawed because the criminal law and indeed equalities law do not require that criminal offences, maximum penalties and the principles of sentencing should be the same irrespective of the sex of the offender.

When it comes to women offenders, we know what needs to be done. Small alternatives to custody units, intensive therapeutic interventions and the increased use of community-based sentences have all shown tremendous results in reducing reoffending in women and are far less expensive. Can the Minister tell me and the House what we are waiting for and when the directive will be announced to make the seemingly obvious happen?

*8.36 pm*

**Baroness Dean of Thornton-le-Fylde:** My Lords, I join other noble Lords in thanking the noble Lord, Lord Carlile of Berriew, and congratulating him on obtaining this debate this evening. Had he been here, the late Lord Corbett of Castle Vale would certainly have been one of the participants. Over his 34 years in Parliament, both in the other place and here, prison reform was at the top of his agenda. Indeed, one of his many successes in that area was introducing his Private Member's Bill guaranteeing anonymity for victims of rape. Over the years, the issues that he raised were not very popular, so it is encouraging this evening to listen to and participate in this debate, which is being approached by every speaker in a compassionate but very realistic way. Debates on this subject have not always been like that.

Prison, I am told, is about retribution and reform, but all too often the end result is the brutalisation of the individuals who are incarcerated. Sometimes they come out much more bruised and damaged than when they went in. The area of this debate that I should like to concentrate on is work and being paid for work.

When people go to prison, they sit around and do nothing for hours and hours, yet on their release we expect them to come out as whole human beings. Part of life is having self-esteem and feeling that we have a role to play in society. If a prisoner has a family, he or she wants to be able to hold their head up in that family and say, "I have paid the price. I want to pick up the strands of being part of the family and move forward". Yet, as we have heard from the noble Lord, Lord Carlile, their chance of employment is very low. Work does not come naturally. It is about discipline; it is about getting up; and it is about contributing and feeling that you are doing something worth while. If in prison you come out with just over £9 for any work you get—and that is not £9 an hour but a week—the message is that what you are doing is not worth while. You are not a worth while person; you are in prison; you have offended against society; you are not even worth a half-decent payment or, in too many cases, any kind of training at all.

These are some of the reasons why the trades union movement supports this proposal very strongly. Prisoners work and prisoners get paid. Can the Minister be very clear about the Government's approach and their policy and strategy going forward? We know that it cannot be resolved overnight. Trade unions would support prisoners being paid a decent wage. The national minimum wage is the obvious benchmark, as we do now have a benchmark. Any employer outside employing someone at below the national minimum wage can be prosecuted.

Work does not have to be done in the prison. It can be done outside under supervised control. It can be in the industrial scene, in the agricultural world or in a whole range of areas. It is at least trying to equip someone when they leave prison to be able to hold their head up and say, "I have had some training. I know what work is; I have done it, I have been paid for it, and I am now ready to take my place in society,".

The Howard League statistics show that something like 30,000 male adult prisoners have long-term sentences. I just cannot conceive what it must be like to be a human being incarcerated for a long time in prison, with nothing to do or whatever work I am doing to be such a low grade that it is regarded as menial. Yet maybe I have the intelligence and ability, with some training. to do better. To then come outside and try to pick up the strands is an almost impossible task.

This debate this evening is an important one. It is probably one step down a long road but certainly there is no reason why the outcome cannot be very constructive. Of course, that depends almost entirely on the answer from the Minister this evening. I urge him to give us as much encouragement as possible and to set out just what the Government's policy is in this area.

*8.42 pm*

**Lord Beecham:** My Lords, I join all other previous speakers in congratulating the noble Lord, Lord Carlile, on securing the debate and on opening it so eloquently and so fully. The European Convention on Human Rights proclaims the right of citizens, including prisoners, to have access to education and to vocational and continuing training. That is at the forefront of what

the noble Lord has been discussing tonight. In fairness to the Government, it is something to which they have now addressed their minds. I welcome also their commitment to rehabilitation, while not necessarily agreeing with all the methods, including payment by results, which they propose to use.

However, it is quite clear—and the noble Lord, Lord Carlile, effectively referred to this—that the biggest contributing factors to avoiding reoffending are if prisoners and ex-offenders have a home and a job to go to. Between them, those factors make something like a 50% difference to their chances of avoiding reoffending. It is interesting that a report from the Prison Reform Trust, *Out For Good*, demonstrates that one-third of prisoners with a home to go to also had a job to go to, which was three times as many as those without a home to go to. There is clearly a correlation there. One-quarter of those leaving prison enter a job on release but a survey of prisoners shows that half of them felt that they needed help to get a job. Equally, half lacked the skills required for no less than 96% of jobs, so there is a clear gap that has to be filled in their interests and in the interests of the community at large.

As my noble friend Lord Myners pointed out, sustaining links with family and employers is also key to reintegrating prisoners into the community and increasing significantly their chances of avoiding reoffending. I join with my noble friend Lord Myners and the noble Lord, Lord Carlile, in being extremely doubtful about the proposal to build vast prisons. They may be a very long way from centres of communication, from people's families and from potential employers. That is not likely to contribute to the ready access to employment that one would hope to see.

However, it is not only the building of prisons that causes problems but the transfer of prisoners between different establishments. The National Audit Office pointed out that a third of training courses and the like in prisons are not completed, of which half are due to prisoners being transferred. It also pointed out that learning records are often lost when prisoners are transferred. Timpson and other organisations do valuable work with prisoners, but if they are involved and prisoners are transferred, again there is a potential break.

Of course, there are low levels of literacy and numeracy among prisoners. However, I note that Ofsted no longer judges the effectiveness of learning, skills and work in prison. I wonder why that is so and whether the Government should not look again at the issue and encourage Ofsted to become involved in carrying out precisely that kind of assessment. It seems to fall within its province.

In the past, when Ofsted reported, it found that only 15 out of 24 prisons had a satisfactory record on training and that there were too few links with employers. There was also a view formed by the Education and Skills Committee in the House of Commons that not enough is done for more able offenders. The estimates of the proportion vary quite considerably but a significant number of offenders have qualifications or the ability to obtain qualifications and, on being surveyed, they often feel that they are not given sufficient support in maximising their potential. The Education and Skills Committee expressed doubts about that. Again, it would be interesting to know what, if anything, the Government have concluded about that and whether they would seek to improve matters.

As we have heard, work does not necessarily need to be carried out within the prison establishment. It can be, and often it is helpful to be, outside in the community, in workplaces, or with voluntary organisations. I join my noble friend Lord Wills in encouraging the Government to promote the role of the voluntary sector and social enterprises in developing the skills and assisting not only in training but in employment.

In terms of employment, I wonder whether the Minister would be able to indicate the current thinking of the Government about how bringing contractors into prisons might work. There are already some in prisons but if that is to be developed, will the Government ensure that those employers are not able to undercut their competitors in the marketplace, for example, by paying very modest amounts either to the Government or indeed to the prisoners? I hope that the Government will recognise the force of the argument of the noble Lord, Lord Carlile, that a proper wage should be paid and that certainly some of it should be taken to compensate victims of crime. We all know the story of prisoners leaving prison with a very limited amount of money, whereas, as the noble Lord, Lord Carlile, has pointed out, they could be allowed to retain some, which would assist their reintegration into society on the basis that they had actually earned the money while in prison.

Have the Government looked at the report produced by the Prison Reform Trust, *Time Well Spent: A Practical Guide to Active Citizenship and Volunteering in Prison*? What responses have the Government had in terms of not just the employment side but the relationship and developmental sides of non-employment skills, which can clearly help people gain employment in the marketplace? The Minister may not be able to respond to all of these questions across the Dispatch Box tonight; perhaps he would write in due course. However, what has happened about the mandatory work placement programme that was announced in the document on employment support for prisoners, published last year? Given the general low level of performance of the Work Programme, has this had the anticipated impact on prisoners?

Finally, there are one or two points raised by the Prisoners Education Trust. Having surveyed a number of prisoners, it discloses that many felt they were unable to give a specific label to their learning difficulties, when they had them, because they had not had a proper screening or official diagnosis. It also noted that BME respondents achieved fewer qualifications in prison than white respondents. There was a request for increased access to computers and a wide range of books and materials to help prisoners with their learning. I do not know whether the Government have considered this document as a whole. Perhaps in due course the Minister could indicate whether they have done so and whether they are prepared to look at the issues raised, which clearly could contribute to meeting the important

[LORD BEECHAM]
demand and requirement for assisting people to emerge from prison with skills, experience and a capacity to reintegrate into society. In particular, it would help them into a way of life which will diminish the chances of reoffending.

*8.51 pm*

**Lord Ahmad of Wimbledon:** My Lords, I join noble Lords in paying tribute to my noble friend Lord Carlile for securing this debate and for his work with the Howard League. Its stewardship is in good hands as my noble friend hands over to the noble Lord, Lord Myners. I look forward to working with him on new initiatives. As the noble Lord, Lord Myners, pointed out, I am relatively new to this role but I have had the opportunity to visit a prison and have been looking into the initiatives. I shall share my thoughts on those over the next few minutes.

I welcome the opportunity to talk about prisoner work. I believe it is a key factor in ensuring that we deliver significantly less reoffending. Last week, the Government published proposals for transforming the rehabilitation of offenders, reinforcing the commitment to bring major change in the way we tackle reoffending. We acknowledge the contribution that businesses and community and voluntary organisations make in supporting the work of prisons and probation services. The noble Baroness, Lady Uddin, and the noble Lord, Lord Wills, mentioned some of these and I will come on to talk about specifics in a moment. The proposals will provide more opportunities for a payment by results model to generate innovation from our partners in mentoring and supporting prisoners to lead law abiding lives. Their success much depends on finding and holding down a job. I welcome the words of the noble Lord, Lord Beecham, and associate myself with his concluding remarks.

In a Ministry of Justice survey carried out in 2010, 68% of prisoners reported that having a job would be important in helping them to stop offending. Some 13% reported that they had never been in paid employment. Work in prisons provides a rich environment for learning and qualifications and our current thinking places a strong focus on identifying labour market needs in the areas into which prisoners will resettle and designing the learning and skills curriculum to reflect this. Employability training will be paramount during the year leading up to release to ensure that prisoners have the best possible opportunity of finding work.

My noble friend Lord Carlile mentioned various statistics. In looking at some of the figures, I was startled to read that 58% of newly-sentenced prisoners regarded themselves as having been regular truants while in the education system. Some 40% were excluded from school and 46% left school with no qualifications. That is the challenge which lies ahead.

It is not just about vocational training. We know that lots of prisoners lack basic numeracy and literacy. I saw it myself when I visited Peterborough. That acts as a major barrier to employment. We have therefore introduced a greater emphasis on assessing and addressing a prisoner's literacy and numeracy skills when they first come into custody. Included within this is provision for foreign national prisoners for whom English may not be their native tongue. English language skills are about empowering people and empowering prisoners to become productive citizens when they leave prison. English language skills will not only be important for them in the labour market but also in helping them successfully to integrate within the prison environment, communicate with prison staff and participate in programmes that support their rehabilitation.

We have also increased opportunities for prisoners to take up apprenticeships and work is in progress to increase apprenticeship opportunities for prisoners through release on temporary licence and potentially in prison work areas. For example, four prisoners from Springhill prison are being released on licence to undertake land-based apprenticeships working on a 90-acre patch of Forestry Commission land near Henley-on-Thames.

On traineeships, the Government published a discussion paper last week. Traineeships will provide a new opportunity to help young people aged between 16 and 24 develop the skills and attitudes that employers look for. We would like traineeships to be available to prisoners, supporting them into apprenticeships and other opportunities at a later stage. We are still in the design stage, but the government discussion paper suggested three core elements: a focused period of work preparation training, including areas such as CV writing, interview preparation and job search; a substantial, high quality placement to give the young person a chance to develop workplace skills and prove themselves to an employer; and English and maths for those who have not achieved a GCSE grade C or equivalent. The availability of high quality work placements will clearly be an issue for prisoners. We would welcome ideas about how such placements might be made available. Indeed, I invite all noble Lords to contribute to this process.

Several noble Lords, including my noble friend Lord Carlile and the noble Baroness, Lady Dean, talked about prisoners being idle. I come from a family where sitting idle was not an option; going out to work was. We must create those conditions for prisoners as well. We must do that by engaging them in the world of work. Work itself is rehabilitative, as many noble Lords have already said. But in my own brief experience of talking to prisoners, it is not just about the skills. It is about learning to get to work on time and the expectation that you are accountable and responsible not just for yourself but for the work that you do. It is the expectation that you will work a full day and then build leisure and other activities around your work, as we have all learnt to do over many years. It is about the ability, importantly, to work as part of a team taking and giving responsibility and following instructions. We must increase the opportunities for work within all prisons, and we are doing this.

We are looking to work closely with businesses as well. I was touched by my noble friend Lady Stedman-Scott's personal experience of working constructively with local and national businesses. We need to make it as simple as possible for our commercial partners to join in. This will support UK industry, enable growth and offer opportunities to deliver work in the UK, which may currently be offshore due to economic constraints and labour shortages.

Prisons are increasingly structuring their regimes to accommodate longer working hours; for example, by moving recreation activities to evenings and providing for prisoners to eat lunch in work areas. This has helped to increase the number of hours worked by prisoners and the number of prisoners working the average length of a working week across the prison estate.

The right reverend Prelate raised the issue of new prisons. I fully concur with his experiences and I assure him that any new prison will be designed to provide sufficient activities for those in custody to ensure that we get the best out of prisoners for their constructive benefit for the future.

As well as engaging prisoners in delivering production and service work there are substantial numbers of prisoners who work within prisons, as we all know, to keep them running—serving meals, in maintenance and cleaning. Indeed, I have seen that for myself. Many more prisoners participate in a broad range of activities to tackle their particular needs, including addressing thinking skills, anger management and so on and so forth.

The noble Lord, Lord Beecham, drew particular attention to training shortfalls. The important thing is that this is not a one-size-fits-all for every prisoner. We need to identify prisoner training needs and prisoner abilities as soon as they enter the prison environment so that they can live productively with tailored programmes suited to them.

If I may touch on the issue of tax and salaries, are prisoners paid for undertaking schemes? Certainly, prisoners who work outside the establishment in paid jobs pay national insurance and tax, while prisoners who are employed inside the prison are exempt from national minimum wage legislation. There are added elements, but in view of the shortage of time, I will write to noble Lords specifically on the issue of pay and tax.

However, as many noble Lords have mentioned, we cannot stop at the prison gate. This was a point well made by the noble Lord, Lord Myners. We want to ensure that offenders are better supported on release. Those prisoners who are eligible to claim jobseeker's allowance are now immediately referred to the Government's Work Programme. Work Programme providers are also encouraged to work with prisoners prior to their release, together with a number of other local partners, including Jobcentre Plus, the National Careers Service and education providers, who are all working collaboratively across clusters of prisons between which prisoners often transfer, to share information and drive this work.

We also mentioned different innovations in prisons. As I alluded to earlier, when I visited Peterborough prison, I was very impressed with its post-release support service, where ex-prisoners can call into a centre outside the gate, to receive help, information and support. The new reforms that we are proposing will look for and allow similar schemes to be replicated across the country.

My noble friend Lord Addington talked about dyslexia and learning disabilities. *Making Prisons Work* calls for a new focus on assessing and then addressing the needs of those with learning difficulties or disabilities. Again, referring to my personal experience in Peterborough, I learnt about issues such as resistance in the classroom. The classroom environment was created within the prison to help prisoners, but not in an intimidating way, to ensure that there was one-on-one training. Peer mentors are also very effective, involving prisoners who understand and have been through those experiences and share them. Most important is the element of trust; I saw that working well in Peterborough. I am sure that other prisons across the country replicate similar schemes.

The noble Lord, Lord Wills, talked about Fine Cell Work. I have read with interest about the work of that particular initiative. I assure him that I would be quite happy to put Fine Cell Work in touch with officials of NOMS; I am keen to learn more about this service. Indeed, as I was leaving Peterborough I was handed a pair of cufflinks made by the Jailbirds initiative, which are quite quaint. I should have worn them for this debate, but perhaps I will wear them another time. I assure the noble Lord, Lord Wills, and the noble Baroness, Lady Uddin, who made reference to the particularly notable feature of Women in Prison, that we are also reviewing the women's estate to ensure that it is organised as effectively as possible to meet gender-specific needs, including learning and development activities.

My noble friend Lord Carlile and the noble Lord, Lord Myners, touched upon the whole issue of Titan prisons. It is a bit of a scary term in itself. I assure both noble Lords that no decision has been taken on the potential size of any new prison. The Secretary of State has announced a review to examine the feasibility of constructing a new prison.

Let me assure your Lordships' House that this is a very important issue. In my short time in charge of this brief, I have committed to seeing that we make progress, and I believe that noble Lords across the Chamber have much to offer in this respect. I would encourage them and I look forward to working with them. Our rehabilitation revolution is being supported by other initiatives such as the provision of more support and challenge to get prisoners off drugs, building on the success of the drug recovery wings and a review of the Incentives and Earned Privilege Scheme. I will continue to welcome all views, as will the Secretary of State, on taking forward this important policy initiative. Perhaps I may close by using his words when he launched the *Transforming Rehabilitation* consultation:

> "Transforming rehabilitation will help to ensure that all of those sentenced … are properly punished while being fully supported to turn their backs on crime for good—meaning lower crime, fewer victims and safer communities".—[*Official Report*, Commons, 9/1/13; col. 19WS.]

Those are sentiments which I am sure will resonate across your Lordships' House.

*House adjourned at 9.04 pm.*

# Grand Committee

*Tuesday, 15 January 2013.*

*3.30 pm*

## Defamation Bill

*Committee (3rd Day)*

*Relevant documents: 7th Report from the Joint Committee on Human Rights, 8th Report from the Delegated Powers Committee, 9th Report from the Constitution Committee*

**The Deputy Chairman of Committees (Lord Colwyn):** My Lords, if there is a Division in the House, the Committee will adjourn for 10 minutes. This is the Grand Committee on the Defamation Bill, and we are resuming debate on Amendment 23A. The noble Baroness, Lady Hayter, moved the amendment, the Question was put, and the noble Lord, Lord Ahmad, adjourned discussion after about 50 minutes. We are now going to discuss Amendment 23A, which says:

"Page 3, line 21, leave out 'a website' and insert 'an electronic platform'".

However, I know that the noble Lord, Lord Browne, wishes to say something before we start.

**Lord Browne of Ladyton:** My Lords, I am very grateful to your Lordships for allowing the possibility of raising an issue that is not related to the group that we are presently discussing, but which is directly relevant to an issue that we thought we had perhaps put to bed, in terms of this Committee's deliberations, on the previous occasion. To my surprise, on about 10 January, it was reported on the BBC that Rutland County Council, taking advantage of the general powers that have been granted to it by Section 1 of the Localism Act 2011, intended to sue for defamation three of the members of the council. This was extensively reported on the BBC and locally in the Rutland area. Happily, the Rutland County Council, to the edification of everyone interested in this, has published the legal opinion on which it based this intention on its website.

Without going into the detail, it appears that the council's lawyers have advised it that Section 1 of the Localism Act has repealed the judgment of the House of Lords in Derbyshire County Council v Times Newspapers Ltd by granting a power for local authorities, in these circumstances, to behave as if they were individuals. I have no idea whether that is right or wrong; but whether in fact that has happened ought to be explored before we close our deliberations in Committee on this Bill. I merely draw this to the attention of Members of the Committee, in particular to the Minister, with the request that he has this matter investigated and reports back to us before we conclude our deliberations. In the mean time, I will ensure that all the information I have managed to glean over the past couple of days is sent electronically to the Minister's private office. I do not intend to say anything further.

**Lord Lester of Herne Hill:** Assuming it is permissible for me to do so, I will say in response—because I was involved in the case—that I do not agree with Rutland at all, for reasons that I will go into hereafter, if necessary.

**The Minister of State, Ministry of Justice (Lord McNally):** My Lords, the reason I buried my head in my hands is that the noble Lord, Lord Lester, explained before the Committee started that ill health was going to prevent him from intervening very often in our proceedings today—a resolution that lasted all of five seconds. I am grateful to the noble Lord, Lord Browne, both for the intervention and for drawing this to my attention. I will have the matter examined and report back to the Committee.

**The Deputy Chairman of Committees:** We now resume debate on Amendment 23A.

### *Clause 5 : Operators of websites*

*Debate on Amendment 23A resumed.*

**Lord Faulks:** My Lords, in addressing the group that includes Amendment 23A, I have had a chance to reflect on the issues raised by these amendments and to read in *Hansard* the speeches made in the debate before we adjourned for the Christmas Recess. This has led me strongly to support the amendments—or most of them—in this group, if not to go further. I emphasise that I am in sympathy with this Bill, in particular with the raising of the bar to prevent trivial defamation actions. I would also like a limit on the right of corporations to sue, as we discussed on a previous group. I favour the amendments to the Reynolds defence, and the protection of peer-reviewed statements in scientific and academic journals as provided by Clause 6.

However, I have real difficulties with Clause 5, which we are currently debating. It seems to be taken almost as given by those in favour of libel reform that website operators should be in a special position and separate, say, from book publishers or newspapers. The reasons for this are said to be that website operators will generally act only as a conduit and have little control over content, and that liability for defamation potentially is inimical to free speech.

Parliament does not often have an opportunity to intervene in the law of libel and, as I am sure noble Lords will agree, it is most important that we get the law right, particularly when what we decide now may not be reviewed, except by the courts interpreting the provisions of the statute, for many years to come. That particularly is a heavy responsibility where courts all over the world are currently struggling to deal with the interrelationship of the law of defamation and the operation of the internet, and it is especially challenging to us to attempt any form of future-proofing.

In his very helpful speech to the Committee, my noble friend Lord Allan of Hallam, told us that e-mail is not the communication mechanism of choice for young people—they much prefer instant messaging-type applications—and that a whole new range of communication services are coming into the market. It is reasonably well known that young people do not read newspapers much. Therefore, we are potentially considering the law in relation to what is going to be the most prevalent form of communication.

[Lord Faulks]

In its report on the Defamation Bill, the Constitution Committee of your Lordships' House states:

> "We consider that, as a matter of constitutional principle, the relevant provision should be to the greatest extent possible on the face of the Bill, so allowing full legislative amendment and debate. Moreover, only by seeing the proposed obligations to be imposed on operators will Parliament be able to consider whether the regime proposed is fit for purpose".

Much in the current Bill is left to regulation but even that which is already provided for by Clause 5 causes me difficulties. It is plainly in the interests of website operators that there should be a special defence. They are an extremely powerful lobby with, as the noble Lord, Lord Triesman, pointed out on the previous occasion, the capacity to generate very significant profits.

As a member of the committee which last year considered the draft Communications Data Bill, I had the opportunity to see and hear from the representatives of the industry and to hear the very cogent and forceful advancement of their commercial advantages and disadvantages which might lie in the form of any future legislation. In particular, internet service providers were very reluctant to store any information which was not commercially useful to them, albeit that it might help the security services or the police to catch criminals. By the same token, they plainly do not want to have to face defamation actions and have the administrative inconvenience of trying to prevent defamatory material being published at all—if published is indeed the correct word, which is currently the subject of much judicial doubt.

I wonder whether our response to such large commercial organisations, although I appreciate that not all are large, would be the same if they were producing oil or manufacturing on a large scale, and we were told that it was inconvenient and potentially costly to provide a meaningful remedy to those who suffer from a company's activities.

My noble friend Lord Allan talked about the democratisation of free speech but I am not convinced that much of the careless dissemination of rumour or innuendo that takes place can properly be defended on free speech grounds. Why does a substantial commercial company not have any obligation to take appropriate steps to either prevent or limit the publication of defamatory material or—and I stress this point—take out insurance in respect of those rare circumstances in which they will be sued for defamation?

The cost of an insurance premium would simply be a business cost and would mitigate the potential unfairness of depriving someone of a remedy who has been defamed. Will this open the floodgates? The law, as it presently is with the Defamation Act 1996 and the 2002 electronic communication regulation, provides some protection. But I an unconvinced that there is or will be a great wave of litigation brought against website operators. If the Bill becomes law, it will be only for serious defamation that anyone can sue at all. Furthermore, they must have the funds to do so. If in fact a website operator responds quickly to a complaint, broadly in the way envisaged under the Bill, it will limit the damages and thus deter a potential claimant from bringing proceedings at all.

Let me give an example of a defect in the provisions as they currently stand. Say that you were a teacher who had been accused of being a paedophile and that that was placed on a website. Particularly in the current climate, this would probably cause irreparable damage to your life and career, even if the allegation was wholly unjustified and subsequently withdrawn. However, provided that the website operator responded in the way envisaged under the Bill, you would have no remedy at all. Those few complainants who have serious complaints should be able to bring a claim, even if it causes some inconvenience and expense to the website operator, who will simply have to bear the cost. It almost certainly will have broader shoulders than the potential claimant.

I am far from convinced that we should be giving website operators a special defence. I look forward to hearing the Minister's justification of that defence and to his answer to the amendments, although I notice that there is a government amendment to which we will come in due course. At present, I am sorry that my noble friend Lord Phillips is not going to pursue the clause stand part debate. There are a number of anomalies that we could point out—there may always be anomalies—but it is a particular anomaly, for example, that someone can sue for slander if the publication is limited to one person but will not be able to sue effectively in the circumstances envisaged here.

I know that the Minister is a great fan of the Human Rights Act. I wonder whether the provision will satisfy analysis in the courts, either here or in Strasbourg, in terms of an Article 8 right. I am of course aware of Article 10, but it seems to me that if I were that hypothetical teacher or someone in that situation, I would be relying on Article 8, regardless of this defence, to outflank the provisions on defamation. I have experience of cases where courts have held that remedies under the Human Rights Act exist independently of any rights under common law or under statute.

I regard the provisions as unsatisfactory, requiring greater explanation. I fear that, unless we provide a great deal more detail to deal with some of the difficulties which will be encountered, we will make bad law.

**Lord Mawhinney:** My Lords, part of my role in this Committee has been, as accurately as I can, to reflect the evidence and testimony that was given to the Joint Committee. I feel the need to repeat that process this afternoon.

Lest I be accused of being unduly biased, we had representatives of modern technologies come to give evidence, including one Member of this Committee. We heard the arguments, in particular, from those who run websites and are operators and might conceivably be the focus of defamation proceedings. A number of your Lordships present today were members of Joint Committee, so I can always be corrected if my memory fails me. I think that it would be fair to say that, overall, the evidence we got was that websites ought not to be beyond the reach of the law. This may or may not be a democratisation of free speech—whatever that means. Certainly, anybody and everybody can now get themselves a worldwide audience, which did not used to be the case. Whether that is a compelling

argument for saying that such people will no longer be bound by the restraints of defamation is an entirely different matter.

*3.45 pm*

The Committee was quite clear that the law of defamation should apply in the modern electronic media just as it does elsewhere. That, if I may say so, was the easy bit—easy relative to exactly how you make this happen. Cases were made that questioned whether we want to hold to account women—it tended to be women in terms of the evidence that we heard, but I am not seeking in any way to be pejorative about that—who could not sleep and who were pouring their hearts out on a website in the middle of the night. Were we supposed to take all of that legally seriously? The Committee said, "Yes, we ought to take that legally seriously, just as we would every other manifestation on the website".

That led us on to the problem about what happens when something is posted if we do not hold the website operator to legal account. The noble Lord, Lord Allan, will know, and will no doubt be pleased to know, that we shied away from holding the operator, in the first instance, legally responsible. However, we could not find a way to say that it had no responsibility at all, as though it was a postman delivering something from A to B, who wrings its hands and says, "It's got nothing to do with us, guv". There was, therefore, a responsibility.

We turned, therefore, to the victim in this situation. Something scurrilous that is put on a website travels around the world very quickly. We heard claims such as "Well, give us a week or two to take it down", but the answer was no. A week or two can damage reputations beyond any means of redress or solution. We therefore made our recommendations. I would like, on behalf of the Joint Committee, for this Committee to understand that we believe that people are legally responsible for what they say in whatever forum they say it, and that you cannot be excused defamation in any forum because you happen to be an expert on a medium that is electronically new and modern.

We shied away, therefore, from the encouragement the noble Lord, Lord Allan, gave just before Christmas, that this was where it will be at in the future, and e-mails are a thing of the past, or, as I believe he said, largely restricted to the work environment. We did not believe that that was part of the brief that we are asked to consider by the Government. It is not our job to second-guess how people will wish to communicate.

I read an interesting story in a newspaper in the past seven days, which said that a month or two ago we were all pronouncing the death of books, and the Kindle was the thing. Now, all of a sudden, people are buying books again. I should declare an interest in that my family gave me a Kindle Fire at Christmas. It was interesting that three months ago no one would brook any interference with the assertion that books were on the way out, and the Kindle was the future. Now, however, the number of books being sold is on the rise again.

I will stop short of making any comment about what is happening to Kindle, because I do not know enough to say something on the record that I would want to be asked to defend in the future. But it is relevant to what the noble Lord, Lord Allan, told us. It is not the job of this Committee to second-guess how people are going to communicate with each other in the future—or, in some cases perhaps, even whether they are going to communicate with each other; rather it should be concerned with the principles that cover that which is defamatory, with the redress and with the speed of redress that should be available.

I agree with the noble Lord, Lord Faulks. My heart does not beat faster in sympathy with large companies operating websites on the grounds that they are the poorest of the poor. There are remedies that they can have that every other business in the country can have even if it is in a different area, and we need to bear that in mind as well.

I say to my noble friend the Minister that this clause was always likely to be the most difficult. He recognised that because he did not offer a draft clause for the Joint Committee to consider; it was one of those "consultation" things. We could all benefit from some clarity from him today, not because the Government are not being helpful and constructive—they are—but because this is going to be difficult to get right. There will be amendments on Report and there may be amendments at Third Reading, but it would help enormously if, starting with today's amendments, the Government could give us as much clarity as they feel they can on these specific amendments and as a guide to how those principles that I have enunciated should be made to work in the real world.

**The Earl of Erroll:** My Lords, as I was about to say when Christmas interrupted, I should like to talk about the amendments. We have Clause 5 stand part coming up later, so, rather than having a general ramble around the subject, I thought that it might be worth trying to stick to the amendments, because they are interesting.

I look at the clause from the point of view of trying to make it practical and making the system work. This set of amendments is very useful. Replacing "website" with "electronic platform" in subsection (1), as Amendment 23A proposes, will be helpful, because the remarks with which we are concerned will not always be carried exclusively on a website. What is a website? Is a Twitter feed coming to your mobile telephone a website or not? There may or may not be a website driving part of it. There are things that will not be caught by the provision.

That leads me on to the problem of definitions, because everyone is using the words to mean different things. What exactly is a website operator? Some of the stuff that we are looking at here applies to what I would regard as an ISP, an internet services provider, or a CSP, a communication service provider. To them, the "mere conduit" defence, which is in EU law, can apply, because they are not moderating stuff; they are just channelling the information as it flies through the wires. However, they at certain points become something else, because they might also be providing other services. For example, they may be hosting websites but they may not be operating them. What is their liability? Do they need to take down stuff? Are they regarded as a website operator? The websites are operating on their

[The Earl of Erroll]
hardware and they would probably be capable of taking down defamatory material. Is the website operator the person who is managing the website? Is it the person providing content into the website? Where do the designers and the people who are to do bits of it come in? I ask those questions because we need at some point to clarify who will be responsible for doing what when it comes to taking things down or—here I go straight to Amendments 25A and 25B—being expected suddenly to put up a response to a notice of complaint alongside whatever is on the website.

My daughter is a graphic designer who has designed a couple of websites for organisations. They do not permit feedback on their website, and although I cannot see where that might happen, something might come up. However, if the organisation wanted to modify that website and allow that, there is no way in which they could do it without going back to her and her programmer to provide the facility to do so. These things are not quite as easy as just putting a bit of type into next day's newspaper. Particularly if it is a large organisation, some of these things will require a whole raft of change management, interfacing with a programmer and things like that. The practicality of this whole thing is the issue.

I can see exactly what they are getting at. It is a good idea in certain cases. One might try to make it mandatory, particularly for sites which are permitting and expecting feedback from the public. The noble Lord, Lord Lucas, made a good point: we must not kill live feedback from the public about things that are going on. That is where the internet can be hugely powerful, to inform one about what you want to do. I use eBay a lot when I want to trade with someone and do business with them, and we rely on that feedback.

There is a good point but we must be practical about it. Something we have to remember is that when we talk about websites, we are not talking about three, four, five, a dozen, 20 or 50 large operators. There are half a billion websites globally, and the number is growing. There are about 100 million UK websites and growing—my figures are probably well out of date by now. It is on that sort of scale, yet most of our comments are being applied to a few large operators. Okay, they have huge profits, et cetera, but these laws will apply also to the small guys: the ones who will have to take stuff down immediately because they do not dare risk falling foul of some law, particularly if a large company pushes them into it. You can stifle the small business and the innovator very easily by having such laws. A small or medium-sized organisation or a person with a little bit of money has no recourse to the law because they cannot afford to go to the law. You have no protection, and must realise that in life—whether it is criminal or civil law, you cannot afford it.

Amendment 24 on associates: yes. Subcontractors and lots of other people are involved, and they probably need to be drawn into it. The amendments of the noble Lord, Lord Lucas, are both very sensible, particularly the business about a moderator. Nowadays, these things are so large that you cannot track everything, so I like his amendments to be made. On his Amendment 25ZA, people will need the assistance of the operator to find things out.

Amendment 25 of the noble Lord, Lord Phillips, suggests that you must be reasonable, otherwise, where do you stop trying to check things? Surely you can only ask someone to act reasonably in trying to find something out. We have this issue coming up in the modifications to copyright law coming up tomorrow in the Enterprise and Regulatory Reform Bill. Part of the reason for some of the British Library issues there is that it cannot "reasonably" find out, for instance, who is the copyright holder for some works. In some cases, you cannot reasonably find out who did something on the internet. It is not practical to do so.

Amendment 29 on the defence being defeated by malice makes a good point. If something is deliberately malicious, or in bad faith, it is quite right that that should be excluded from defences.

All I really want to say is that we must worry about practicality. The difference between the internet and normal printed media is scale and its global reach. If we are not careful, we may end up doing things which apply only to websites where the computers are subject to UK law. The easy way around it is to locate everything outside the UK. That will kill UK business, and we are seeing that in certain other things. People are just relocating overseas because it is easier than dealing with compliance with UK law. It may seem reasonable and all for the greater good of humanity, but the trouble is that in this global environment it is easy to move overseas, and you cannot block people from doing that.

I like most of these amendments. The only thing is that Amendment 25A and 25B are not practical in their current form. They would have to be restricted to websites which had a particular intention and were designed in that way.

*4 pm*

**Lord Lester of Herne Hill:** My Lords, first, perhaps I may say how glad I am that Sir Brian Neill is with us now, having recovered, and how sorry I am to have told the Minister that I was not well, as it enabled him to attempt to curtail me. On these amendments, it is extremely difficult for one country to deal with these problems on its own within its own legal system, since, by definition, we are dealing with the world wide web. Secondly, it is a question of getting this right. The Government are right to say that they are going to deal with this by regulations rather in the Bill, and that there will be full consultation on that. Thirdly, it is a question of a balance. In view of what we have heard already, I thought that one might think of the other side of the coin; namely, that unless we get the balance right there will be interferences with free speech which ought not to be there.

Mumsnet has written to my noble friend Lord McNally about this and its approach is interesting. Although it welcomes the Government's efforts to reform the law, it is concerned with Clause 5 having a "significant chilling effect" on free expression. It states:

"Although internet businesses would be able to benefit from new defences, the practical outcome of the procedure as it stands will be that the vast majority of complained-of posts will continue to be taken down upon receipt of a complaint".

Mumsnet then goes into how that will be and how it will be intimidated. It says:

> "As with most major internet companies, Mumsnet is a responsible organisation that has no wish to be associated with abusive or serious defamatory comments. We have always acted promptly to remove abusive or defamatory posts once they are brought to our attention, and we will continue to do so … However, we feel that legislators have yet to fully appreciate that the problem, for companies such as ours, does not lie with seriously abusive or defamatory posts; our decision to remove those, once we are made aware of them, is easy and swiftly acted upon. The difficult cases are almost always relatively low-profile, and involve claims which—while they may be potentially damaging for the claimant—represent the truthful, non-malicious opinion or experience of members of the public. We feel it is unfair and onerous, in cases such as these, to expect Mumsnet administrators or members of the public to act as legal specialists, attempting to assess whether the complained-of material might be able to benefit from any of the defences in the Bill. We also feel that it is in no way unjust or unduly burdensome to expect the claimant—who, after all, will be in possession of the facts—to provide a minimum degree of information to support his or her assertion that the material is defamatory or unlawful",

and so on. That is the other side of the coin, which one needs to be clear about. When we come to my separate amendment, I shall address why we need to raise the standard a bit on the word unlawful.

**Lord Ahmad of Wimbledon:** My Lords, as the debate, albeit part two of the debate that we started before Christmas, has indicated again, there are wide-ranging opinions. Let me first set out that the Government agree that it is about getting this right and getting the balance right. This is an evolving area and it is important that we discuss these matters fully. My noble friend Lord McNally and I are listening carefully and intently to the arguments being made. It has never been the intention, nor should it be, that websites should be beyond the reach of the law. My noble friends Lord Mawhinney and Lord Faulks asserted that perhaps that is what this clause is trying to do. On the contrary, it is not.

My noble friend Lord Mawhinney made the point about being beyond reproach, and that what is said on the web is instantly translated and is, as we all know, retranslated and retweeted, wherever that may go. However, to draw a comparison with the printed media, while there is a source available, there are times when a story is printed on the front page of a newspaper and gets picked up on the internet. When that story is shown not to be correct, the retraction is quite limited. In the same way, I suggest that the damage is done. Too often, what is remembered is the headline which struck when the news broke, how it broke and the sensationalism behind that news story. It is not just about the website, although I concur with my noble friend in saying that the website is something which can sometimes go beyond the limits of the person who is hosting it, and the person who initially posted it, because it is replicated elsewhere.

I will take each amendment in turn. I doing so, I will pick up the various points that have been made by noble Lords and comment appropriately. First, it is absolutely right that the law on defamation should apply in relation to online as well as offline material. The Government's proposals would enable claimants to take action against the poster of the material, the person responsible for making the defamatory statement, rather than the website operator. However—and this is a crucial point—the operator will still be liable if the operator is shown not to have followed the process which is designed to enable that to happen. That is a crucial point.

My noble friend Lord Faulks suggested that websites are being given protection beyond other media channels. Let me be absolutely clear: the defence for such websites only applies where website operators are not the ones who post the statement. The closest parallel might be a letter to an editor which the paper chooses to publish: it is not automatic.

Amendment 23A seeks to provide for the Clause 5 defence to apply to other "electronic platforms", rather than simply "websites", that have defamatory material posted upon them by third parties. The purpose of Clause 5 is to provide a defence to website operators that host third party content over which they exercise no editorial control. We chose to focus on this specific category of service providers because, as the noble Earl alluded to a moment ago, it is about definitions. How do you define things? My own background in business dictates that when I saw the words "electronic platform", I saw them from the perspective of the world of financial services, in which it often alludes to banking platforms, which are slightly more limited than websites.

I also undertook during the summer break—apart from visiting Australia as I informed noble Lords I would—to look up definitions. How do you define an "electronic platform"? The varying degree of definition not just of electronic platforms but of platforms themselves is interesting. There is no consistent application one can put in.

Looking to the development of the world wide web, the word "website" emerges from that. The noble Lord, Lord Browne, made the point that we are living in an evolving and ever-changing world. As we are looking at this issue, as crucial and sensitive as it is, I am sure that we will return to this in the years to come.

The noble Baroness, Lady Hayter, also talked about DPP guidance on criminal prosecutions. We are certainly looking at the DPP's guidance, but we can see nothing in our proposals that would be likely to conflict with that guidance specifically.

It is not clear what "electronic platform" in Amendment 23A is intended to cover. As I have said, it has been suggested that the term "websites" is too narrow and risks not capturing new technologies in this fast-changing marketplace. We can debate and discuss which term is more appropriate, but I go back to the words of the noble Lord, Lord Browne: we live in a changing world. If in further discussion in Committee or at Report a form of technology is brought to our attention that is akin to a website and serves the same purpose in hosting third-party content, and a suitable form of words can be found adequately to describe that in legislation, the Government are open to considering that point further.

Amendment 23B would mean that a website operator who complied with Clause 5 would have a defence only against a claim for damages in defamation. As Clause 5 stands, the website operator will have a complete defence provided that he complies with the

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new process. As noble Lords will know, damages are by far the most common remedy in defamation proceedings, and it is difficult to see what difference the amendment would make in practice. It appears unlikely that claimants would bring a claim for a remedy other than damages. The Clause 5 process will provide a quick and cheap means for a complainant to establish contact with the poster of the material and secure take-down. Should legal proceedings be necessary, action can be brought against the poster. In the event that such a claim succeeds, damages would be payable by the poster, and Clause 13 enables the court to order the website operator to remove the material. We therefore do not consider that the amendment is necessary.

Amendment 24 seems to stem from concern that a website operator will use associates to post defamatory material on their sites, knowing that they can hide behind the Clause 5 defence. The Government are not persuaded that there is a significant risk of that happening. The noble Earl also referred to practical issues. However, in the event of such a situation, the claimant would be able to pursue an action against the individual poster and would not be left without a remedy.

In addition, there is the obvious difficulty in respect of establishing what is an association. For example, who would qualify as an associate of the website operator and how would the claimant be expected to prove that association? Conceivably, an associate of the website operator could post something defamatory without the website operator's knowledge. In such cases, it would seem entirely inappropriate to prevent the website operator from relying on a Clause 5 defence, provided, of course—I come back to the point I made earlier—that the operator had followed the Clause 5 process.

Amendment 24A, tabled by my noble friend Lord Lucas, would mean that a website operator would not lose their defence if they had moderated the statement or had made or suggested alterations to the content. We do not believe that the amendment would be appropriate. Subsection (10) already makes clear that an operator would not lose the defence simply by reason of the fact that they moderated statements posted on the site by others. That will ensure that operators are not discouraged from moderating their sites in a responsible way. However, the amendment would go further and allow them a defence if they moderated in a way which changed the content of the statement. In practical terms, this could mean that an operator who changes the statement in a way which made it—dare I say?— defamatory, or makes the defamation worse, would be protected. I fully accept that that is not my noble friend's intention.

I believe that my noble friend Lord Phillips seeks by Amendment 25 to add clarity. However, we do not believe that the amendment is necessary. I shall explain why. The Government's view is that subsection (4) already provides that test. For the purposes of subsection (3)(a), it is possible for a claimant to identify a person only if the claimant has sufficient information to bring proceedings against the person. As such, the Government's view is that the insertion of "reasonably" would not make it any clearer, because it is clear from the clause as it stands.

*4.15 pm*

Amendment 25A would require a website operator who wished to rely on a Clause 5 defence to publish a notice of complaint against the material complained of within seven days of receipt of the complaint. The amendment also provides that, if the website operator failed to post a notice within the set time period, it would forfeit this defence, and would be able to rely only on the standard defences available to the primary publisher.

As I believe the noble Baroness, Lady Hayter, said, this reflects an amendment tabled by Her Majesty's Opposition in the other place. It seems to be based on the recommendation of the Joint Committee on the draft Bill, but goes beyond it in certain important respects. Under the terms of the amendment, where website operators failed to meet the requirements of the new provision, they would not only be unable to rely on the new Clause 5 defence, but would also be prevented from relying on any other defence that currently exists in relation to secondary publishers; for example, under the e-commerce regulations and Section 1 of the Defamation Act 1996. This would result in a very serious lessening of the protection potentially available to website operators.

I will add that when we indicated and responded to the Joint Committee's report, and indeed, in Committee in the other place, issues of practicality were also raised. When Ministry of Justice officials met internet organisations following the publication of the Joint Committee's report, those organisations identified significant practical and technical difficulties with the proposal relating to the posting of a notice of complaint alongside defamatory material. The noble Earl spoke a few moments ago about the technical matters relating to this.

For example, the content complained about might be embedded within a number of different sites, which would make it unclear who should be responsible for attaching the notice, where exactly it would be placed, and how it would be transferred across to subsequent sites on which the material might appear. I sometimes use the Twittersphere. You can take a news item, put it on your own Twitter page, and your own tweet is subsequently picked up and posted elsewhere. The practical issues around this need to be considered.

I alluded earlier to the fact that Ministry of Justice officials met website operators to whom they gave our opinion, which I have shared with the Committee. I accept that many noble Lords may be sitting back and saying, "Well, they would say that". However, the Government's concerns have been clear since our response to the Joint Committee in February and, as yet, no one has been able to point to any specific evidence to suggest that those concerns are not warranted. On that basis, I am afraid that the Government cannot support this amendment. However, in the spirit of the debate, and in the spirit which my noble friend Lord McNally has shown constantly throughout this Committee, if there are examples, we will certainly examine them and welcome their input to this particular debate.

Amendment 25ZA, in the name of my noble friend Lord Lucas, would provide for the defence to be defeated if the claimant could show that, among other things, it was not possible for him to identify,

"with the assistance of the operator",

the person who posted the statement. I will clarify this process. This provision is intended to focus on the need for the claimant to show that they had been unable to identify the poster before they sent the notice of complaint to the website operator. Clause 5(3)(a) details this.

Amendment 25B, in the name of the noble Baroness, Lady Hayter, would add to the list of matters which may be included in regulations under Clause 5(5). It proposes that regulations may require website operators to set up and publicise a designated email address to receive notices of complaint, and may require posters of defamatory material to release their identities to website operators and complainants.

I will speak to the first part of this amendment. The note which my noble friend Lord McNally sent to Members of this House on 10 December indicated that website operators will be encouraged to set up and publicise a designated email address for this purpose as a matter of good practice. We believe that it will be in website operators' interests to set up a system for receiving complaints. Having a designated e-mail address, or an online complaint form, will assist in ensuring that notices of complaint are sent to the right place to enable them to be processed promptly and efficiently, otherwise operators could be at risk of losing the Clause 5 defence by failing to adhere to the time limits for processing a complaint. It is our view that this provides an adequate incentive to website operators to have a designated address for complaints and that nothing would be gained by forcing them to take a particular approach.

In relation to the second part of the amendment, the note also indicated that in responding to a notice of complaint, where the poster of the material refuses to agree to the removal of the material complained of, it would be open to him to indicate that he did not wish his identity and contact details to be released. The amendment would enable regulations to require the poster to release the details to both the complainant and the website operator.

The enabling powers in Clause 5 are currently focused on the actions that a website operator must take. Failure to comply with the process results in the website operator forfeiting the defence. This addition concerns actions that the poster must take. It is not clear what penalty would follow a failure to do so. If the intention is that the website operator would potentially become liable if the poster failed to provide details of their identity, this would not only give no incentive to the poster to comply but would also be unfair to the operator, who is not in a position to know which party is in the right.

On the more substantive point, though, the amendment would also enable the complainant to pursue proceedings against the poster without the need to seek a court order for the identity and contact details to be released. This would remove protection from posters who have a valid reason for wishing to remain anonymous, such as whistleblowers. I know that this point was raised in Committee before Christmas, and my noble friend Lord Lucas also referred to it. The Government do not consider that this would be appropriate. While we agree, and this is important, that anonymity should not be used as a cloak for making abusive or untrue statements, there are legitimate reasons for a person posting material anonymously or under a pseudonym, and for not wanting his identity to be disclosed.

Under the system that we are proposing, the poster would be required to provide his name and contact details to the website operator. If he refused to do so, the posting would have to be taken down for the website operator to retain the Clause 5 defence. However, if the poster provided his contact details but indicated that he did not wish those details to be released to the complainant, the website operator would be required to inform the complainant of this. If the complainant then wished to take further action, he would be able to seek a court order for the website operator to release the name and contact details that it had in relation to the poster.

**Lord Phillips of Sudbury:** Does my noble friend have any comprehension of just what that last process would require from the complainant—the time that it would take and the costs that would be incurred in getting the court order to reveal the identity of the poster? In reality, that puts an absolutely impossible barrier against anything like a reasonable remedy for the complainant.

**Lord Ahmad of Wimbledon:** As I alluded to in my opening comments, this is about getting the balance right. If there were such a case, and I totally accept that there are issues that would arise here, there would be a cost element to this process. At the same time, there are many occasions when a balance must be struck on this, whether we are looking at professional websites or websites where people often post under a pseudonym and may be posting for good reasons of safety and security to protect themselves. That being said, though, I hear what my noble friend has said. I assure him again that we continue to consult with stakeholders across the board on the contents of such regulations and have sought their views on the practicality aspect of this new process. As I have said, this is something that we are looking at, and any suggestions that are made are looked at and discussed. I am sure that we will return to this, if not in Committee then on Report.

As I have said, we are looking at the issue of whistleblowing and the necessity at times to protect confidentiality, and setting that against the very arguments that have just been put forward by my noble friend. We feel that Clause 5 strikes the right balance. As my noble friend Lord Lester said earlier, there are two sides to the coin. The process set out in Clause 5 provides a quick and easy way for the claimant to obtain the necessary detail where the poster has no objection to providing it, but then places responsibility back on the claimant to secure a court order where the poster is unwilling to share the detail. This broadly reflects the position that applies in relation to anonymous material published offline. Where a claimant is unable

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to identify the author of a defamatory statement, and in the offline context does not wish to pursue the publisher, they can seek a court order for release of that information by whoever is in possession of it.

Amendment 26A would make a drafting amendment to Clause 5(4), replacing "was" with "is". I can understand why this amendment has been brought forward, but I hope that I can reassure the noble Lords on this point. When the clause refers to posting, it is the act of posting with which we are concerned. No matter whether the posting stays up or comes down, that act has happened in the past, so it is our view that "was" is the most appropriate word. The amendment however raises important questions about what a website operator's responsibility should be where a posting has already been removed. We are seeking views as to the content of proposed regulations and will take that issue away and consider it alongside the responses that we receive.

Finally, Amendment 29, in the name of my noble friend Lord Phillips, provides that a Clause 5 defence be defeated in cases where the claimant can prove malice by or on behalf of the website operator. The Clause 5 process requires the website operator to act in accordance with the process and entirely neutrally. It is difficult to foresee circumstances in which a website operator who complied with the Clause 5 process could do so maliciously. If it is the poster who is acting with malicious intent on behalf of the website operator, the claimant will still be able to bring proceedings against the person responsible for posting the statement. Therefore, we do not see what an amendment such as this would add to the clause.

**Lord Mawhinney:** My noble friend started by saying that it was Government's policy to achieve a balance and he repeated that as he made his way through the amendments. It was mildly ironic that he followed immediately after the noble Lord, Lord Lester of Herne Hill, who read a rehash of Mumsnet evidence to the Joint Committee and finished by saying that he was doing it just to ensure balance.

On the one hand, as has been made clear, lots of organisations are saying, "Free the shackles; let us do this and that; there should be no, or minimum, restriction". We know who is arguing for freedom to defame. On the other hand, there will be lots of individuals who find their reputations tarnished or trashed, and they will have no organisations standing up for them. Will the Government therefore argue for the individuals whose reputations are at stake to ensure that the end point is balanced? If not, how do they envisage balance, when you have got Goliath on one side and not even a mini Goliath on the other?

*4.30 pm*

**Lord Ahmad of Wimbledon:** I thank my noble friend for his intervention, although my recollection of the David and Goliath story is that David ended up winning. Divine intervention is always something that one should bear in mind.

Coming back to the point raised by my noble friend Lord Mawhinney about clarity and balance, as my noble friend—and indeed the whole Committee—recognises, this is a difficult area. I reiterate that the Government want to get this right and we are still taking views, as we are in this Committee, on this area. We are consulting stakeholders, as I have already said, on the content of the regulations provided for under Clause 5 and have extended the deadline for responses in this respect to 31 January. I reassure my noble friend Lord Mawhinney, whose guidance and mentoring I always welcome, that this is about ensuring that, when it comes to issues of defamation, those people who have been proven to have fallen victim are properly protected and that recourse is available. However, the balance of that has to be in ensuring that there is not too much of a burden on website operators. In some cases, as has been illustrated by other noble Lords, it is something that is, at times, beyond their control. What is important is to ensure that website operators follow the appropriate process. That said—

**Lord Mawhinney:** I thank my noble friend but encourage him to edge slightly closer to answering my question. He said a very interesting thing: that we are consulting with stakeholders and, indeed, have extended the time for consultation. That actually makes my point. The stakeholders are on one side of the argument, and the individual whose reputation is at stake is on the other side of the argument. The consultation is not even balanced. That causes, I think, concern to a number of noble Lords in this Committee. It certainly does to me, and I would like to know what constitutes balance in the mind of the Government. Incidentally, I will just throw in that we are going to have plenty of opportunity shortly to debate this Government's theological position, and perhaps my noble friend would take a little advice: I would not go there if I was him.

**Lord Ahmad of Wimbledon:** Theology is always one to park, but, as a man of faith—and as a fellow man of faith—I take my noble friend's guidance on that. The point I am making is about stakeholders—those people who are looking at this issue. Yes, it involves website operators, but the point of this clause is that it is not the website operators doing the defaming, it is the person who has written the statement. That is the person who should be held accountable and responsible. Where the website operators' obligations come in is whether they have followed the process as detailed in Clause 5.

Coming back to the point about balance that my noble friend made, this is not just about talking to website operators but about talking as well to people who represent claimants, to ensure that those people who represent the body that feels it may be subject to such actions are also heard and that their case is also made. However, I am sure that my noble friend would agree with me that, if we started consulting every single individual who may or may not be concerned on an individual basis with this, our Committee would continue for a very long time. Nevertheless, as I have alluded to several times—and I repeat the point again—in speaking to all these amendments it is important for me to place on record that the Government are aware of the pace of change in internet and electronic communications. Even as perhaps one of the younger

Members of your Lordships' House, I remember in my professional life when the internet first came alive. Things are changing by the minute, and the pace of change is somewhat beyond even my comprehension. There are innovations in electronic communications and, as I have indicated in all my responses, in particular in response to Amendment 23A, we have an open mind in respect of terminology. In addition, we believe that putting the details of the Clause 5 process in the regulations provides greater flexibility to adjust aspects of the new procedure should that prove necessary as technology develops.

**Lord Faulks:** I am grateful to the Minister for giving way; he has been patient and has had to deal with a lot of amendments. He was dealing a little while ago with Amendment 29 in the name of my noble friend Lord Phillips of Sudbury. I understood his answer to be that he could not conceive of circumstances in which an operator of a website could be malicious, and this amendment was therefore not necessary. However, operators of a website are given an admittedly qualified privilege by Clause 5 which puts them in exactly the same position as those in other fields of the law who have a qualified privilege, the defence of which is defeated by malice. Is it not therefore inconsistent that such a remedy should not be available in the terms of this amendment? It may not happen very often, but that is no reason for it not existing at all.

**Lord Ahmad of Wimbledon:** I hear what my noble friend says. Perhaps we can refer to this matter; he makes a valid point. As he rightly acknowledges, we would not see this issue occurring on a regular basis, but I will certainly reflect on his comments on this.

A variety of amendments has been tabled. On "balance", I suppose it depends how you define the word. However, in seeking to bring the Bill forward, and particularly with this clause, the Government are seeking to strike the right balance. We continue to listen, hear and consult with all parties on both sides of the coin. We are working to ensure that something practical and workable, which protects those who are subject to such actions, comes out of this process.

**Lord Lucas:** My Lords, I was encouraged by my noble friend's response, and by his batting at the subsequent bowling. It is clear that we are both aiming in the same direction and that, given the expertise of his colleagues and the good will of the Government, we may get somewhere interesting. I would be grateful if he would allow me to come in for a meeting with officials, preferably before the end of January if that is his consultation deadline, to pursue some of the practicalities; a nod will do on these occasions.

We should be more robust in talking to website operators about right of reply. This is merely a question of tweaking a few lines of code. It may be inconvenient for people to do it, but it is essentially practical. It is such a fundamental thing, given the way in which views, opinions and statements travel now that one should be able to attach a reply to it and deal with it robustly in that way. To have a statement with a reply available to people as soon as they pick something up is a powerful thing in the internet world. That is has not been provided for is merely that it has not been coded. It is essentially not impossible under any circumstances with any website if people put their mind to it. It will not happen immediately, but it should certainly happen within a year if that is a requirement. I would be chary about accepting excuses on that.

There is something to be said for looking at different arrangements for statements about real persons as opposed to statements about businesses. Picking up on the points made correctly and forcefully by my noble friend Lord Faulks, if someone is accused of something which goes to their person, that cannot be allowed to hang around for seven days, or even seven hours, without being dealt with. It should not be within the policies of any reputable web operator that such statements are allowed on their website. These things belong in the hands of the police if there are real accusations. It should not be part of our view of electronic media that it is there to give currency to that sort of statement, whether true or not.

On the other hand, we must be powerful in allowing people to make statements about businesses or the way in which people do business, and to allow website operators to be robust in their defence of people who have made those statements on their websites. As Mumsnet said, the easy answer is to take down. The only way to defeat that easy answer is to make very clear and very practical the responses that are available to the website operator so that they can have certainty in knowing whether a comment is sensible and that the law allows them to stand by it. That is what I want to pursue with the Minister when we have our meeting. On the point about maliciousness, we are talking about a lot of little website operators and not just the big guys, and there are some very malicious ones out there.

**Lord Ahmad of Wimbledon:** I would of course be happy to arrange a meeting. The benefit of being in the Moses Room is that your officials are right behind you, and I am sure that they have noted it as I have.

**Baroness Hayter of Kentish Town:** My Lords, as in December I wished the Committee a happy Christmas, maybe now that the Minister is back from Australia I can wish the Committee a happy new year. I thank the Minister not only for coming back from Australia to address us but for his response. I thank also everyone who has spoken, particularly my noble friend Lord Triesman and the noble Lords, Lord Phillips of Sudbury, Lord Lucas, Lord Faulks and Lord Mawhinney, for their support. I am grateful also for the contributions of the noble Lord, Lord Lester, and the noble Earl, Lord Erroll. I am sure that the noble Lord, Lord Mawhinney, does not need reassurance that his summary of the Joint Committee was, as always, spot on and symptomatic of what he did in that committee, focusing straight in on the victim, who often has no recourse to law.

There is a view that somehow the web is less serious than the printed word, but when I was learning my journalism, I was told, "Remember that today's

[Baroness Hayter of Kentish Town]

newspapers are tomorrow's fish and chips wrappers". Actually, some printed words are so ephemeral that the web is more serious rather than less serious.

I am still not quite sure what the Minister thinks is a website. Perhaps he will tell us in a moment whether Facebook is a website, whether a Tweet is a website and whether our Lords blog—which I recommend to you all—is a website, because it would be useful to know.

Given that we are in the slightly unusual position of having previously adjourned in the middle of an amendment and having the *Hansard* for part of it, perhaps I might quote what the noble Lord, Lord Phillips of Sudbury, said on 19 December. He said:

"The disparity of arms between claimant and defendant is nowhere more vivid than in relation to the web operators, many of which are huge multinational companies. They do not do this for fun—they are not like a village notice board. They do it for profits, and mighty big profits … They are the Goliath in the defamatory relationship … and … their impunity is not justified in terms of freedom of speech".—[*Official Report*, 19/12/12; col. GC568.]

That is really the nub of what we are talking about. Along with the noble Lord, Lord Mawhinney, I cannot agree with the view of the noble Lord, Lord Allan of Hallam, that, with the web, we are talking just about private speech in a public space. We are talking about a publication, whether it arrives on your iPad, on a laptop or on something else. The issue of anonymity arises more frequently on a website than it does in a publication, which is perhaps why we concentrate on it, but if what the Government are suggesting—the 72 hours, the seven days and then going to court—is accepted, everyone who wants to defame will just go anonymous. Why should they not just go anonymous, knowing that they will basically be beyond the reach of the law?

Some of our amendments to which the Minister has referred are fairly uncontroversial. I would have thought that the "electronic platform" proposal is surely worthy of consideration. We may not have got it right, but I hope that what we have at the end is robust even if it is done by attached guidance. However, I will concentrate on two of these amendments.

*4.45 pm*

I will first mention Amendment 29, which is not in our name, on malice. As has just been said, this gives website operators quite a defence. However, where peer-reviewed journals are quite rightly being given some privilege, Clause 6(6) says that:

"A publication is not privileged by virtue of this section if it is shown to be made with malice".

If, therefore, that sort of phrase is good enough under Clause 6, it should possibly be good enough here, if it does not apply to all defences.

I will concentrate on Amendments 25A and 25B, which are about what would happen when someone is defamed and wants to take action. They are about putting the defamed person in touch with the author. We agree with the Minister that we do not want the middle person to be there, but we want the defamed person to get in touch with the author so that they can deal with this outside. To ask for that does not somehow undermine the freedom of the press, for which, as I said in December, many have fought, and some have lost their lives. Freedom of speech, however, is about our being able to speak to power, or to business, not to allow anonymous destruction of someone else's reputation.

Other Members of the Committee may have heard what I received yesterday via the Libel Reform Campaign about trolling, which also mentioned the use of anonymity on the web. They put that forward to refute what I said in December. Let me be absolutely clear: I have nothing against pseudonyms or anonymity. I do not use it; I do not call myself "Sexy Sue" or "Dishy Diane" or any of the other names that I gather are used by people who want to be anonymous. I do not disguise my identity, but I am quite happy that people should do so, as long as there is some other way of getting hold of that person if they defame someone else. That is the key. We are not seeking to outlaw anonymity per se, but we do not want someone to hide behind that, and this is a matter of importance.

For those who were not in the Chamber on Friday, I will take a moment to quote from the noble Baroness, Lady Hollis, who was speaking in the debate on the Leveson report. She has, as everyone on the Committee will know, been the victim of a gross intrusion into her family's privacy at a very difficult time. However, it was not simply about an intrusion into privacy, but about lies. This Bill is about covering that kind of mischief: things that are not true. The noble Baroness, Lady Hollis, called for a cultural revolution in the press. She gave an example from her own experience:

"An article in one newspaper contained 28 supposed facts. It was quite a lengthy piece that went over two or three pages. It included photographs of people and places. Of those 28 facts, just two were correct. The others were fabricated and sensationalised. But this information was repeated by other journalists again and again in the same and in different newspapers. None of these journalists checked their information. They simply"—

I am getting to the important words—

"took it from the internet, reordered it, changed the emphasis and called it an exclusive".—[*Official Report*, 11/1/13; col. 402.]

The noble Baroness was talking there about untruths, and the role of the web in perpetuating those untruths.

We cannot shrug this off as ephemeral stuff that is too hard to restrain or too unimportant to haunt its victims. It clearly haunted the noble Baroness and her family, and she wants an answer to her own "victim test", as she puts it. Will those who post things clean up their act and move towards a position of trust again? What she said shows that we cannot simply separate the printed from the e-publications, because these are part and parcel of the way we now communicate.

There are three sorts of mischief which we as a society seek to stop on the web. One is criminal—whether this is racism, child abuse, or incitement to terrorism. The second is privacy, which Lord Justice Leveson's energy is going into, and which covers truth, and how far that should go. The third is defamation—in other words, untruth—which occurs when someone assaults another person's reputation, sometimes with devastating results. We know of the deaths of young people who have been badly hurt by that.

We need to do something to make people stop to think before they set about destroying someone else's reputation. Our amendments are about putting the person who has been defamed in touch with the person who wrote the material. They are about having quick access to the author of that defamation. I cannot accept that someone should just be encouraged to have a portal, as I think the noble Lord, Lord Allan, said, rather than an e-mail address, a way to get in so that they can make that complaint as easily as possible. They should be required to do so. On asking people to give their name, address and contacts to the host, we met Yahoo last week. It had no particular problem with that. It has been said that that has been challenged, but Yahoo did not come up with a host of practical problems.

The noble Lord, Lord Lucas, rightly said in December that a website should not be forced to take down a comment just by the threat of a defamation action, as the action should be against the person posting the comment, not against the website. We agree, but that can happen only if the website does its bit to unite the claimant with the author.

As I said when I moved the amendment, we heartily support a free press but, as the Leveson debate has shown and as my noble friend Lord Stevenson said in the House on Friday, a free press must be a responsible press. It must expose the abuse of power but also not abuse its own power. That is the balance that we need to strike on the web. When the Libel Reform Campaign lobbied us on the amendment, it was because it wanted a free press, and it considered the web as part of that. If we want to see the web as part of a free press, it must accept its responsibility and not abuse its own power.

We are simply seeking to get someone who is defamed closer to the person who wrote the material, and asking the host to enable that. Although I will withdraw the amendment now, I think that the Government have a little further to go to facilitate what we want, which is the quickest putting together of the person who wants to take an action and the true person against whom they should take it, which is the author—unless the author is to be anonymous and the host says, "You are a whistleblower". That is fine, but then the host stands in their shoes. On that basis, I beg leave to withdraw the amendment.

*Amendment 23A withdrawn.*

*Amendments 23B to 25B not moved.*

*Amendment 26*

*Moved by* ***Lord Lester of Herne Hill***

**26:** Clause 5, page 4, line 2, at end insert "and unlawful"

**Lord Lester of Herne Hill:** My Lords, the amendment is grouped with Amendment 27 in the names of by the noble Viscount, Lord Colville and the noble Lord, Lord Allan, to which I shall also speak.

My amendment is at least easy to understand. It would simply add the words "and unlawful" on page 4, so that the notice of complaint under Clause 5(6) would require the complainant to specify a name, set out the statement concerned and explain why it is defamatory of the complainant—and, I would add, "and unlawful"—and then specify where on the website the statement was posted and contain such other information as may be specified in regulations.

Amendment 27 is much more prescriptive. I will not develop that argument because it is not my amendment, but Members of the Committee will notice it sets out in some detail what it is that the complainant is required to explain. Looking at the two amendments, mine is much less prescriptive than Amendment 27, although that does not make it necessarily better. The amendment gives effect to the recommendation of the Joint Committee on Human Rights, on which I serve, that,

"the threshold for a Clause 5 notice should be elevated to 'unlawful', which would also ensure consistency with the E-Commerce Directive and the Pre-Action Protocol for defamation".

The committee noted that the Government said in response that they were,

"concerned that to adopt the higher threshold would overcomplicate the process",

because,

"requiring complainants to provide details of why they consider the posting to be unlawful, rather than just defamatory, would make it more difficult for a layman to make a complaint without first having sought legal advice, and would add to the cost and difficulty involved".

The Government sought to distinguish,

"between the purposes of the E-Commerce (EU Directive)"—

which uses the word unlawful—and Clause 5, so as to seek to "justify" the apparent "inconsistency".

Under article 19 of the e-commerce directive, a website operator acting as an intermediary hosting material is potentially liable once notified that a statement is unlawful, as it would be under my amendment. By contrast, a website operator is not liable under Clause 5, provided that it does not post the defamatory material. The Government say that the website operator acts merely as a middleman or go-between and does not need to consider the merits of the complaint in order to protect itself from liability. However, the Joint Committee on Human Rights concluded that:

"We are not satisfied with the Government's distinction in this matter. We think there is a real risk that website operators will be forced to arbitrate on whether something is defamatory or lawful, and will to readily make decisions on commercial grounds to remove allegedly defamatory material rather than engage with the process. As drafted, Clause 5 risks removing material from the internet, which, although it may be defamatory, may be lawful if a relevant defence applies. Material which is lawful may be suppressed because website operators are served with such notices".

The Libel Reform Campaign supports this amendment, which allows me to make an apology to both the noble Lord, Lord May of Oxford, and to it. Last time in Committee, I became grumpy when the noble Lord, Lord May, appeared, on its behalf, to suggest that the "responsible publication" defence in Clause 4 was not good enough. I think there was a misunderstanding. I have now received the briefing from the Libel Reform Campaign and realise that it supported the amendments being made to Clause 4 and that the remarks of the noble Lord, Lord May, were not intended to say

[Lord Lester of Herne Hill]
anything other than that. Because of the sensitivity of the matter, I thought it right to make that clear at this stage.

I am trying to keep this brief, and not succeeding very well, but I should also add one other point. I need to quote the Ministry of Justice's consultation on the Clause 5 regulations—the regulations, not Clause 5 as it is—because it seems inconsistent with the Government's position on my amendment. It says, at paragraph 9, that:

"We propose that the following should be included in a notice of complaint (this is a combination of what is already listed in clause 5, and other points that we think should be in the regulations)".

Here the Ministry is telling us what they think should be in the regulations. It has,

"the complainant's name and a means of contact … specific information to direct the operator to where the post can be found on the website … the statement complained of together with an explanation of how the statement is defamatory of the complainant, including (as appropriate) details of any factual inaccuracies or unsupportable comment within the words complained of",

and then other matters as well.

The Government apparently have it in mind that the regulations will require quite a lot from the complainant. I agree with that, but I am troubled that unless my amendment inserting the phrase "and unlawful" is accepted, the draft regulations will go further than is permitted by Clause 5. Although that sounds very technical, it is quite important to ensure that that is not so. It does not seem to be enough that the complainant can simply say that the complaint is defamatory. All that "defamatory" means is that the complainant is saying that it is not true and it affects reputation. That does not seem to me enough—and it does not seem to the Government to be enough, considering their view of the regulations—for that to trigger responsibility on the website operator. At least the complainant should have thought about whether it is not merely harming reputation but also in some way unlawful. This does not have to be done with great legal analysis, but there should be some such indication.

**Lord Browne of Ladyton:** I do not wish to interfere with the noble Lord's attempt to be brief. Will he consider the observations that he has made, which he draws from paragraph 9 of the consultation document of which we have all been sent a copy, in the context of the words of the Bill itself—in particular, the words of Clause 5(6)(b) which require that the complainant in the notice, among other things,

"sets out the statement concerned and explains why it is defamatory".

Would that not be a basis for a set of regulations that expand on it in the way in which this paragraph sets out?

**Lord Lester of Herne Hill:** My Lords, that may be so, in which case I made a false point on that. However, my main point is that it is not enough—and the regulations seem to accept this, in draft—to simply say that it is defamatory. It must in some way indicate that it is unlawful. That is probably common ground in the way in which I read the draft regulations. If that is so, and that is what we are told in our reply, it may well be that my amendment will not be necessary.

In my attempt to be brief, I appear to be arousing too much interest. I give way to my noble friend.

**Lord Phillips of Sudbury:** I think I know what my noble friend means in the distinction between what is defamatory and what is unlawful. However, it would be helpful to be clear with the Committee what distinction he sees between "defamatory" on the one hand "unlawful" on the other.

**Lord Lester of Herne Hill:** I am sure my noble friend Lord Phillips understands that I am speaking clothed in the majesty of the Joint Committee on Human Rights as well as my personal view. That committee and its advisers came to the view that simply saying "defamatory" was not good enough. All that "defamatory" means is that there is a false statement which is seriously harmful to the reputation of the claimant, whereas "unlawful" means that one also looks at what the Bill defines as unlawful and what the defences are. We are attempting to make that as clear as possible. Therefore, the complainant, in order to invoke this whole procedure, ought to do something more. It seems as through the draft regulations are aimed in that direction. I beg to move.

**The Deputy Chairman of Committees (Viscount Simon):** Before I propose Amendment 26, perhaps I may ask noble Lords to curtail their enthusiasm in asking questions before the amendment has been proposed.

**Viscount Colville of Culross:** Clause 5 is very welcome as it recognises the huge problems facing both complainants and defendants in libel cases with the introduction of the internet and its increasingly important position, as we have all discussed, in the arena for the dissemination of information. I want this amendment to build on the amendment put forward by the noble Lord, Lord Lester. I hope that Amendment 27, in the names of myself and the noble Lord, Lord Allan, will expand the discussion and set out the criteria for the definition of "unlawful".

I am acutely aware of the ability of the internet to cause great damage to an individual's reputation, as we have seen with the dreadful case of libel committed against Lord McAlpine, who has sued against many people who defamed him on Twitter. It is easy to focus on the high profile and serious cases such as that of Lord McAlpine and not on the many thousands of other libel complaints about online material where the distinctions between fact and opinion are more difficult to ascertain. We do not hear about these cases because, when in doubt, the website operators' practice has been, in far too many cases, simply to remove the materials.

Smaller websites, such as Mumsnet and news and business blogs supported by WebPress, both of which support this amendment—indeed, they are not Goliaths, as the noble Lord, Lord Mawhinney, suggested—do not have the knowledge and capability to give their complaints proper scrutiny; nor do they have the legal resources to fight libel action and risk liability. The safest thing for them and many other internet intermediaries is just to take down the postings, which

I believe would be damaging to free speech. It is therefore very important that Clause 5 strikes the correct balance between the right to protect the reputation of the individual and the freedom of expression on the internet. I want the notice of complaint procedure to be a cheap and easy means of striking this balance.

In Committee on the Defamation Bill in the other place, the Government rejected an amendment rather along the lines that I am putting forward today on the basis that it would be too onerous on claimants to have to consider the potential defences to defamation. The Joint Committee on Human Rights acknowledges this argument but considers the risk of website operators simply removing the material, rather than engaging in a proper analysis on the merits, as being too great.

The Government are correct to worry about whether claimants can be expected to understand the subtleties of libel defences, honest opinion and qualified privilege, and should not be forced to take legal advice in order to put forward the initial notice of complaint. However, complainants should at least be able to address the factual matters relevant to the complaint, including stating why any comments are unsupportable and why the claimant is likely to suffer serious harm. I want all the conditions to reach the threshold for the notice of complaint to be on the face of the Bill. Surely, if claimants are required first to check the Bill and then the regulations to find out what to put in the notice of complaint, as Clause 5(6)(d) suggests, it will only complicate matters.

I hope that the sub-paragraphs in my amendment will allow claimants to state basic factual information within their knowledge in relation to their complaint without having the need for lawyers. Paragraph (e)(i) under Amendment 27 asks the complainant why the allegations against them are defamatory. This already exists under Clause 5. Factor (ii) asks the complainant to state why the statement complained about is "inaccurate or untrue". This addresses the possible defence of truth.

Factor (iii) asks the complainant to state why "any opinion" in the words complained of is "unsupportable". It also might play in favour of the complainant because it asks them to provide any evidence to show that the comments in the posting are unsupportable. That would enable website operators to have some regard to the available defences of truth and honest opinion. This simply requires that the complainant provides factual evidence and so not have to get into a legal debate about whether the words complained of are statements of fact or comment.

Factor (iv) seems to be in line with the spirit of the Bill outlined in Clause 1, which ensures claimants should show that "serious harm" has been done to their reputation. It also fits with the interim guidelines put forward by the DPP on 19 December, which suggest that prosecutors should proceed against authors on social media only if the communication is more than offensive, shocking, disturbing, or satirical, or is more than the expression of unpopular or unfashionable opinion about serious or trivial matters, or banter or humour, even if distasteful to some or painful to those subjected to it.

The noble Baroness, Lady Hayter, suggested that Amendment 4 was a better way of dealing with this issue of seriousness. My concern is that that amendment is about commercial bodies, and not all comments on a site such as Mumsnet will be against commercial bodies; they might be against authors or experts in a field. It seems wise to have a seriousness threshold included in the notice of complaint.

In December last year I expressed my concerns to the Minister about the criteria for the notices of complaint. They are addressed in paragraphs 8 and 9 of the Ministry of Justice consultation sent out last week. I am grateful to the Minister for having included three of these factors from my amendment in subsection 9. However, I am concerned, as the noble Lord, Lord Lester, suggested, that the two paragraphs might add to the confusion over the difference between the words defamatory and unlawful. Paragraph 8 sets out what are called the core elements to be included in the notice of complaint, which are the same as those stated in Clause 5(6) of the Bill, which will raise them to a defamatory standard. Paragraph 9 goes on to state that the regulations have the option of looking at other factors, including the three that I have suggested, which would make them unlawful. Surely this would only compound the confusion between UK and EU standards, which I have already expressed.

I move on to factor (f) of my Amendment 27. I gather that there is a technical problem, and that it should in fact be in subsection (7), so it is perhaps more of a probing amendment. I will, in any case, put it forward for the Committee to consider. It will make provision for a procedure whereby a complainant, a website operator or an author who wants to dispute whether the contents of a notice of complaint under subsection 3(b) have met the requirements of subsection (6). This is meant to deal not with serious allegations of libel, which will have to end up in court, but with grey areas of more trivial cases.

After all, the notice of complaint will only contain the information provided by the complainant. The website operator or author could have reasons to question these contents; for instance, where there is a dispute about whether the original posting is defended by fair comment or is a statement of fact.

The Ministry of Justice, in its consultation paragraphs 23 and 24, explains what will happen if the author refuses to give full contact details to the operator. In that case, the website operator will be required to take the posting down, if it is to rely on this Clause 5 defence. This will leave them in much the same position as they are now—needing to remove large amounts of potentially non-defamatory material in order to avoid liability.

Paragraph 24 suggests—and the noble Lord, Lord Phillips, picked up on this—that if the complainant wishes to take further action, he will need to seek a Norwich Pharmacal Order for the website operator to release the identity and contact details that it has in relation to the author. My concern, and that expressed by the noble Lord, Lord Phillips, is that this order can cost at least £3,000 in legal fees and may not deliver the identity of the author in the end. The complainant could end up with an IP address through the broadband

[Viscount Colville of Culross]
provider, but that will not guarantee that the identity can be uncovered. It might in fact be necessary to get another Norwich Pharmacal order to trace the IP address through a further website, which may turn out to be an internet café, the email of which may be mickeymouse@hotmail.com. The complainant would then be out of pocket and still unable to contact the author.

Commercial sites such as TripAdvisor, as well as non-commercial websites such as Mumsnet, support this suggested procedure, as do commercial platforms like WordPress, which host small blogging sites, covering a wide range of subjects, some of which I hope your Lordships would regard as being in the public interest, such as news from Nigeria, advice on spare car parts and even which baby lotion to use. Many of these small websites and blogs cannot afford lawyers to defend a libel action, but would like to have a legal view on a disputed notice of complaint from a legal authority.

This procedure would also benefit the complainant, who would then be able to use the declaration by the master or a procedural judge, if it is in their favour, to deal with the problem of anonymous internet users repeatedly reposting the same material on other websites once the original website operator has decided to take it down. However, the noble Lord, Lord McNally, in his letter to me last month, and the noble Baroness, Lady Hayter, in her speech of 19 December, expressed concerns that the procedure would allow any author to hide behind anonymity by claiming that they were whistleblowers, while placing an extra burden on the complainant to fund the procedure. I want to emphasise that the procedure would be a means for dispute resolution about the contents of the notice of complaint, and one which could be initiated by the claimant, the author or the website operator. I hope that this goes some way to mitigating their concerns.

I am not a lawyer, I am just a journalist, but I am advised that the new procedure could simply latch onto the present masters' application procedure on the Queen's Bench Division of the High Court. There could be a new section to the Queen's Bench Division website with simple, procedural guidelines and copies of the standard form application and draft declaration for the claimant. The claimant could fill out the form, provide a copy of his notice of complaint and explain why it needs the Clause 5 criteria. That could be put before a master, who would decide whether to grant the declaration that the Clause 5 criteria have been met. Claimants would not need to lodge hard copy documents with the courts, as under the existing application procedure.

The master could ensure not just that the claimant had complied with the requirements of Clause 5 but that the claim met the basic requirements of a libel claim: that the words are defamatory, likely to cause serious harm and have no obvious defence. I ask noble Lords to consider my amendment favourably.

**Lord Morris of Aberavon:** My Lords, I make a brief intervention. I listened very carefully to what the noble Lord, Lord Lester, said, in moving his amendment, but I need a little further assistance. I am not quite clear about his purpose. I do not think that he specified—I was listening as best I can—the distinction that he makes between a statement which is defamatory and a statement which, additionally, might be unlawful. The danger I see, if they have the same meaning, is that the courts will look at the provisions very carefully and regard them as otiose. What purpose is intended? Does it create an additional burden on the complainant? When he makes his representations under the clause, will the complainant have to define in what way the statement is unlawful? Perhaps we could have assistance on that score.

**Lord Marks of Henley-on-Thames:** My Lords, I shall speak in broad support of the sentiment behind Amendment 27 in the names of the noble Viscount, Lord Colville of Culross, and my noble friend Lord Allan, but first I address Amendment 26, which I support as a bare minimum. I also address the point put by the noble and learned Lord, Lord Morris, to my noble friend Lord Lester. I think that my noble friend understated the position on what is defamatory and what defamatory means. As I have always understood it, a statement is defamatory if it causes the necessary damage to reputation. It may then be that under existing law, a defence of justification can be mounted which shows that the defamatory statement is justified as true. That does not stop the statement being defamatory, but it stops the statement being unlawful. In other words, it starts off as defamatory—I see learned agreement on the other side of the Room—and then one looks at the question of defences.

It follows that without the word "unlawful" in paragraph (b), the requirement that that the complaint,

"sets out the statement concerned and explains why it is defamatory of the complainant",

goes only half way and is nowhere near enough. I echo the sentiments expressed by my noble friend Lord Mawhinney about the view of the Joint Committee on the Bill and the topic: the purpose of whatever procedure we adopt is to give some protection, as far as is practicable, to persons defamed on the internet and, on the other side, to impose some responsibility on website operators, without ensuring that an operator is stuck with liability for all the material posted on his site.

I strongly supported, and indeed took some part in formulating, the notice and takedown procedure for material from unidentified authors proposed in our report, with the possibility of an operator securing a leave-up order for material that, although it was from an unidentified author, nevertheless the operator believed ought to stay up—for instance, in the case of whistleblowers. The Government have opted for a different procedure, and it is right that that procedure draws the correct distinction that we drew between the posts of identifiable authors, who can then be identified and sued, and anonymous material. Whatever system we have, though, it is important that there should be some quick and cheap option that levels the playing field between complainant and author or operator. The detailed notice of complaint as envisaged by Amendment 27, as the noble Viscount, Lord Colville, has explained, is a satisfactory first step.

I appreciate that it can be said that, subject to the point made by the noble Lord, Lord Lester, the word "unlawful" is required, but regulations could be made within the ambit of "defamatory and unlawful" that would expand upon the requirements for a detailed notice of complaint. However, I suggest that it is better that, rather than being left to regulation, the broad contents of the notice of complaint should be spelt out in statute. I say that because one of the purposes of the Bill, as we saw it in the Joint Committee, was to make the law as accessible as possible so that anyone could look up what procedures would be required by looking at the Act. By effectively leaving the requirements for a notice of complaint to delegated legislation, the simplicity of accessing the statute and accessing law on the internet is reduced.

It would then be necessary to add to the requirements for a detailed notice of complaint, something like Amendments 25A and 25B, proposed by the noble Lord, Lord Browne of Ladyton, and the noble Baroness, Lady Hayter, in the previous group. I, too, was pleased to see that the Minister's response to those amendments show at least some flexibility or promise thereof. We would then have the beginnings of a system to ensure that, where defamatory material was posted by an operator, the detailed process of complaint would get some publicity because the notice of complaint would be put on the website by the operator. That would offer some partial protection to the person defamed. I applaud the suggestion that if the operator then fails to put up such a notice of complaint, which he can do, he must take his chances and accept that he is made liable to be sued by the deprivation of the Clause 5 defence.

I reiterate what has been said: neither the proposed system nor any system that we could possibly devise would be perfect, for the simple reason that my noble friend Lord Lester mentioned earlier today—namely, that we are trying to formulate a local response to an international phenomenon. However, I suggest in answer to some of the defeatism—the Minister was defeated up to a point in his earlier reply—there is no reason to give up on the problem because the system is not perfect, and therefore do nothing. It is worth doing all that we can, I suggest, for two reasons. The first is that we can ensure fairness in respect of posts that are subject to our jurisdiction. The second, I suggest, is that by what we introduce in legislation, we can set an example of best practice for website operators elsewhere.

I would like to say a word or two about civil procedures that would be appropriate either under Amendment 27, under Clause 5 or under the regulations. I suggest that it is essential that any such procedures we adopt respond fully to the point made by my noble friend Lord Phillips of Sudbury that the procedures that involve going to court can be very expensive. The answer from the noble Viscount, Lord Colville, that this can be dealt with in the ordinary way before Masters is a partial answer only, because those of us who have attended before Masters, and have prepared interim applications before Masters and district judges in other cases, know that they themselves can be very expensive indeed.

What we envisaged on the Joint Committee was a quick and cheap paper-based or internet-based procedure, with specialist district judges simply looking at the case presented to them on paper and making a decision. Those specialist judges would give their decision, but it would of course be only a holding position, because action would be deferred. However, it is not right to introduce, by what we do now, a whole new level of expensive procedure in respect of internet actions, which, from the McAlpine case, we know can sometimes result in £5 awards or £5 settlements over a very large number of cases. Those cases need to be kept small, simple, quick and cheap.

**Lord Allan of Hallam:** My Lords, I remind the Committee of my earlier declaration of interest that I work for Facebook, which is a reasonable-sized website operator. In supporting the amendment that I and the noble Viscount, Lord Colville, have tabled, I first wanted to set out that we all have a common goal here, whichever side of the debate we are coming from. In a sense, it has been divided into sides, but I think that there is one common objective: unlawful defamatory material should be swiftly removed from wherever it should appear, whether in print media or on the internet. At the same time, there should be minimal collateral damage to content that is not unlawful. We want content that is lawful to stay up and people to be able to share it with each other, and content that is unlawful to come down. It is a simple objective, and both Amendments 26 and 27 are trying to take us towards that.

Amendment 27, in particular, is crafted in the context where we have people who are prepared to use any legal tools that we make available in ways that we did not perhaps intend, and will use them maliciously. There is no doubt that tools that are made available for people to request take-downs of internet content are used, and will be used, by people who are seeking to interfere with the freedom of speech of others. We must make sure that we have crafted the tools in such a way that we minimise that possibility, as well as maximising the opportunity for people to get content taken down that should be taken down. The objective is that 100% of the requests made through this process should result in the right form of action and that that action should be swift. I think the amendment, by specifying in more detail the form which the notice should take, is aimed to create what one might call a well formed notice. A well formed notice that has all the necessary information will be able to be acted on swiftly by the recipient of that information—in this case, the website operator—and the solution can be reached more speedily.

**Lord May of Oxford:** This is possibly a stupid point, and it may reveal my misunderstanding, but as I look at this—I said this during our first Sitting—there are occasions, particularly in the scientific sphere, when the intent is correctly defamatory, where one is saying, "This is wrong", "This is dishonest" or, "This experiment has been faked", and the like. Much of the wording of this assumes that if it is harming you, then you have rights, as it were, to stop the harm. However, I can think of lots of examples where the intention is deliberately and properly defamatory.

**Lord Allan of Hallam:** I think that the noble Lord, Lord May, is correct. If I understand the intent of the amendment of the noble Lord, Lord Lester, it is precisely to address those circumstances where, again, somebody who intends to create a defamatory statement that is lawful is not prevented from doing so. For that reason, I support Amendment 26 as well.

In setting out the various criteria that we have included in Amendment 27, I hope that these will also address similar concerns, in that they will require the complainant to go into a little more detail about why their complaint constitutes unlawful content as opposed to simply content that they do not like. The reality today is that people will simply fire off a letter to a website operator, saying, "I allege that this is defamatory", with very little more detail than that. It is very hard then for the website operator to act swiftly, which we all want, and to guarantee fairness, which I think that we also want, between the two parties involved.

*5.30 pm*

The noble Earl, Lord Erroll, mentioned scale, which is important when we come to talk about the internet. It is not an excuse; unlawful content remains unlawful content wherever it is. I think that everyone—certainly everyone from the responsible part of the internet sector—agrees that unlawful content should be dealt with swiftly; that is not a reason not to address things. However, scale is relevant, because a large volume of complaints is coming through now that a large volume of material is being published.

The world was a lot simpler in the days when you had four TV channels and five daily newspapers—I am reminded that we once had two TV channels—and they did not broadcast or publish 24 hours a day. Monitoring that content and dealing with complaints was a much more straightforward procedure; the scale was simply of a different order. Now that we have a greater magnitude of content being produced, the number of complaints, or potential complaints, is significantly different from before. I would not cry crocodile tears for the operators or support defamatory content being allowed to stay up simply because of scale, but we need to focus on having a process that works in the context of content being produced and distributed on the global scale that we now see.

The process should allow the operator to make a decision that is swift and fair to the complainant and the owner of the content. I say again that we are talking in Clause 5 not about content that the operator owns; the copyright—or however you want to define it—on a blogging site or similar site quite properly belongs to the person who created and posted that content. The operator has a responsibility to be fair to its customer—the person who has posted and owns that content—and to the complainant. Including within the posted notice the additional information set out in Amendment 27 can allow us or help us to get to a resolution which is both swift and fair.

The noble Viscount, Lord Colville, set out some interesting reasoning for having a process where, when there is a dispute, we can seek some form of alternative dispute resolution mechanism. When we think of the scale of complaints that we are potentially dealing with these days, we see that a proportion of them could be resolved through fairly painless and cheap legal processes, but where anything short of a legal process may be insufficient. It leaves people ill informed and unable to make what would otherwise be a fair and swift decision. Amendment 27 is intended to get us towards decisions that are swift and fair to all parties. Amendment 26 is also a very sensible way to address the issue quite properly raised by the noble Lord, Lord May; that is, that people will make fair comment which is potentially defamatory but is not unlawful. I do not think that any of us wants to interfere with that reasonable comment, particularly in the context of scientific debate and other arguments that people may conduct.

**Lord Phillips of Sudbury:** My Lords, I persist in seeing this Bill from the point of view of the little man. Others tend to see it more from the point of view of web operators—I refer not only to my noble friend who has just spoken. One has constantly to bear in mind the hardest case. Unless we get it right for the hardest case—that is, a person of few means but a reputation that he or she cherishes who is grotesquely, viciously, maliciously and intentionally libelled—and unless there is some protection in this measure against the web spreading it at rapid rate across the world, we will not have done our job properly.

I strongly support Amendment 26, although I wonder whether my noble friend thinks that the lay person would find the clause easier to understand if it said "unlawfully defamatory" rather than "defamatory and unlawful". However, that is a small point.

On Amendment 27, I was most grateful to the noble Viscount, Lord Colville of Culross, for what he said about the cost problems of a Norwich Phamarcal application. It is a great tribute to his fair-mindedness that he made that point. I tried to make it when responding to the Minister, who dismissed my earlier amendments. We have had a case in my office just recently in which there were four separate applications to the High Court to get at the identity of the defamer. Each time, it has led on to another anonymous name, and another and another. I think that the client has now given up, but the costs are in excess of £12,000. We cannot allow that state of affairs to persist, but I must move on, as that relates to other amendments.

The only point that I will make on Amendment 27 is that I have a certain anxiety about paragraph (f), which says that the regulations,

"may make provision for a procedure whereby a complainant can obtain from the court a declaration that his notice of complaint under subsection (3)(b) has met the requirements of this subsection".

That is couched in discretionary terms—the regulations "may". If the Government take this up in the regulations, it must remain discretionary. To force every person to lodge a notice of complaint through a High Court procedure—albeit before a master and albeit, as my noble friend Lord Marks suggests, a special procedure—would in my view simply be impractical for the vast majority of individuals. They will not get near it. It is terribly easy for us lawyers to forget how formidable and forbidding it can be—

**Viscount Colville of Culross:** I emphasise that this must be a voluntary process. I said that this was a probing suggestion for people to talk about. It should be voluntary and the ability to use the procedure should be open to all parties.

**Lord Phillips of Sudbury:** I simply wrap up my point by saying that I am anxious about having this paragraph in the amendment, because I think that it could give the wrong idea to those who have to interpret it in future. I would be wholly against a way of lodging a complaint that involved a formal legal process, even of a stripped-down kind, if I can call it that, because it would, I suggest, make remedy more or less impossible for the vast majority of people.

**The Earl of Erroll:** I shall make a couple of comments about Amendment 27, particularly after the remarks of the noble Lord, Lord Phillips of Sudbury. Given the expense of trying to track someone down on the internet and finding out who is who, it will be impossible to identify absolutely reliably everyone who logs on. Unless we put a chip inside everybody and log that, it will not work. There are too many ways of concealing who you are. The banks have enough trouble with their "know your client" procedures, so what kind of trouble will an internet service provider have? It is not realistic to be able to nail down identity over the internet at the moment in the way that some people think that you can.

The point about expensive resolution led me to think about what the noble Lord, Lord Allan of Hallam, said about alternative dispute resolution. The website operator needs somehow to know whether to take something down. If a claimant is not willing to reveal who they are, there may be a public interest reason for it to stay up and there may be support from other places for its staying there. Nominet is operating a successful service for alternative dispute resolution on domain name conflicts. Otelo—the Office of the Telecommunications Ombudsman—also works terribly well in resolving disputes in an inexpensive way. In fact, the industry in each case bears the costs and it is not expensive. I wonder whether it would be worth exploring that.

Amendment 27 is interesting because it could provide some of the information that would be the framework on which a judgment could be made. For instance, a website operator could apply and say, "We would like to know", through the alternative dispute service. Personally, I think that going through the courts every time would be far too expensive for all the small organisations and ordinary people trying to defend themselves against something malicious that was online.

I was amused by the concept of whether or not regulations could be used maliciously. That is an interesting concept and it probably has wings, as well as legs. There is an old saying that regulations are for your enemies, and it is amazing how maliciously you can use them.

**Lord Faulks:** My Lords, because of my general opposition to this clause, it is obvious that I would also oppose these very well meaning and well articulated suggestions of a mode of complaining by someone who feels that they have been defamed on a website. The debate has thrown up the fact that the industry is in the process of developing a response to this new problem, and I respectfully suggest to your Lordships that that is where the development should come from, not by means of legislation—we are bound to get it wrong and to be out of date. Rather, it calls for a response to a developing situation. If a code of practice is developed that provides an appropriate response, that will deter people from suing, certainly for anything other than the most serious defamations.

As for the amendment put forward by my noble friend Lord Lester, I entirely understand it and the fact that he wears his cloak from the JCHR. If there is to be such a procedure, however, it is asking quite a lot of an individual to make some form of assessment as to, first, whether it is defamatory and, secondly, whether it is unlawful. That would involve them reviewing possible defences: whether or not it was justified, which is an absolute defence; whether or not there was qualified privilege; whether there was responsible publication. That is a considerable series of hurdles for someone to overcome before deciding on and setting out the nature of their complaint.

On the alternative dispute resolution, of course I understand what animates that. It is very easy to sit around in a committee of any sort and suggest that something can be done quickly, cheaply and easily. The reality, of course, is that there are short cuts even within the current framework. People can get preliminary rulings on meaning and whether something is capable of being defamatory within the existing mechanism. I fear that what is suggested may sound like a good idea but may in fact simply be superorgative. It may add to what is already there and not provide the sort of cheap alternative mechanism that plainly is desirable. I respectfully suggest that the amendment should not be pursued.

**Lord Lucas:** My Lords, I support what my noble friend has just said. Having listened to the various alternatives, I think that the idea of having to involve the courts is just going to freak out any website operator, particularly those who deal in any volume. You are asking for some sort of cheap way to get to a judgment that is essentially expensive because there are a lot of things to be considered.

I think that the right answer to this, as my noble friend just said, lies in giving really good guidance to the courts and to website operators as to what is protected under the Bill and what is not. That comes back to points that I made under previous clauses. I do not understand what is going to be protected under the Bill; what is going to be regarded as fair comment; what is going to be required in terms of the person making the complaint or statement stating the basis on which they have made it; or the references to "fact" that creep in, which is something that you as a website operator know that you can never establish. As my noble friend said earlier, we all have insurance to cover those things. I am sure that the same applies to Facebook as it does at the bottom end, which I occupy. That insurance is not vastly expensive and is available on sensible terms from sensible insurers. As long as you

[LORD LUCAS]
have reasonable systems to ensure that you are doing your best not to publish things for which you may be sued, you are protected.

*5.45 pm*

However, in deciding what it is reasonable to do, one could do with a much better answer than, "Spend £1,000 with your lawyer". We could do with something provided by the Government to say, "This is what we mean by the sort of comment that we expect you to be able to produce", and that my writing in to say that the food and service was absolutely terrible is all right, as long as I actually had a meal in the place. On a practical basis, what do I have to establish to feel comfortable in myself that I am not risking ending up on the wrong side of a court case, to make it possible for me to make an informed judgment? As someone who is keen to publish when I can and to preserve people's right to publish and be heard, I am prepared to go some way, but that does not include trotting off to the wrong end of a lawyer's bill. I want some real support from the Government, some practical guidance as to what the Bill will allow me to publish and what will get me into trouble—not just the mechanics, which still leaves me at the mercy of the earlier clauses, not knowing what they mean.

**Baroness Hayter of Kentish Town:** My Lords, perhaps I may slightly correct the noble Viscount, Lord Colville of Culross, who I think said, "I am not a lawyer, I am just a journalist". At the risk of upsetting a lot of other people in the Room, I do not think that he has that the right way round. The Bill is for you who write and we who read what you write or produce on television.

I thank the noble Lord, Lord Allan of Hallam, for clarifying that Facebook is indeed a website, which answers my earlier question. I use his words: we want swift removal of defamatory material with minimum collateral damage to lawful material. We may have to come back to that again at the end of the Bill's proceedings. We can call it the Allan test and see whether we meet it.

I still have a problem with the question that my noble and learned friend, Lord Morris of Aberavon, raised earlier, which is about the distinction between lawful and defamatory. I found the evidence to the Joint Committee on Human Rights by Professor Phillipson on this compelling. Clearly, the whole of the committee did not, and I am not a member of the committee. The issues I want to raise are not legalistic but more about ethics and fairness, although I thank my colleagues, who have provided me with a little more legal background.

I want to go into a couple of cases which may be akin to what the noble Lord, Lord Faulks, mentioned on an earlier amendment about a teacher. I give two case studies. First, there is an Ofsted report on a school, and the local website reveals an affair between the head teacher and a parent, which is going on, but the evidence for it was found by Ofsted in its study, so it is a breach of privacy, because it was found by inspection and was then given without permission to the website. It then seems, under the privacy work being done by Leveson, that a case could be taken. Secondly, there is a separate case, where there is an Ofsted report on a school and a local website reveals an affair between a head teacher and a parent; however, it turns out not to be true.

If I have understood the difference with this higher hurdle, if what the noble Lord, Lord Lester, says is true, before the parent could take an action for defamation, they would have to know whether it was more than just untrue and bad for their reputation; they would also have to ask themselves, "Well now, was it in the public interest because the other party was a head teacher and therefore there could be a public issue?". Or perhaps there is a defence because the claim was incredibly well researched and the head teacher was having an affair with a different parent, also called Smith, in the same street, and it was just a small technical error that caused the confusion, so it was responsible journalism. A hurdle is being asked for where that the parent, the claimant, would have to go and do some legal homework to try to think through what the defences were that the person who had written the untrue thing about them could put up against their action before they could actually start a claim—by which time their spouse would have left them. In fact, it would probably be better if the affair were true, because then they could get an action on privacy.

That brings me to a comment made by the noble Lord, Lord May. He seemed to be suggesting that as soon as you say something nasty about someone, it is defamatory. That is not my understanding. If I call him a rotten scientist, that is seriously defamatory, but if he calls me a rotten scientist, it is so patently true that it cannot be defamatory. I am not sure that some of the examples given would actually be defamatory; if you say that someone has been forging their research results and they have been, that is not defamatory because it is not untrue.

**Lord May of Oxford:** Many of the more celebrated cases in the libel tourism that has generated all this activity, such as the £1.5 million spent by the journal *Nature* in defending a plainly factual but defamatory statement about an Asian journal that was created simply to publish the papers of the sponsor, are of just that character. The statement were plain fact, but the action brought in this country by people outside it cost huge sums of money. The action involving Simon Singh was another example. What he was saying was plainly factual but was defamatory; it was intended to be so in every meaningful sense, and properly so. Somehow we keep losing sight of this in the legal elegances.

**Lord Marks of Henley-on-Thames:** I trespass on the noble Baroness's time by giving another simple contemporary example. If I had said during his lifetime that Jimmy Savile was a horrible paedophile, that would have been seriously defamatory. Had I had access then to the information that we have now and he had sued me, I could have justified that. It therefore would have been defamatory but not unlawful. It is as simple as that.

**Baroness Hayter of Kentish Town:** It has to be substantially true, actually; he had only to be a bit of a paedophile, had you had the information there.

The point that I am trying to make is that the person making the claim knows whether or not it is true. I know that I am a rotten scientist, and therefore to be able to make the claim I would have to try to find some evidence that I was a brilliant one, which might be a bit difficult. Asking someone to have to argue through the defences of the person against whom they want to take the action before they can start a case, if I have understood the amendment right, would create a higher hurdle for stuff on the web than for printed material, because the clause refers only to the web.

**Lord Lester of Herne Hill:** The noble Baroness has misunderstood. Clause 5 is not about whether you can bring a claim. It states:

"This section applies where an action for defamation is brought against the operator of a website".

It is intended to allocate responsibility between the alleged victim and the website operator, and to decide when the website operator has some kind of duty to keep up because of free speech or to take down, and what information must be provided under the e-commerce directive regulations and under the Bill. It is not asking a whole lot of questions as some kind of new barrier. It is about a proper procedure balancing. I hope that that is clear.

**Baroness Hayter of Kentish Town:** That is clear, but it still seems to be a higher barrier to take action against an operator of a website than you would have against the editor of a newspaper. The amendment only covers operators of websites, unlike the rest of the Bill. According to Judge Eady,

"a person would need to know something of the strength or weakness of available defences",

in order to know whether it was unlawful before going ahead. That seems a higher hurdle to ask a claimant to go through than if they were taking an action for something else. That may be what is wanted, but if so, we need to be very clear that this is a higher hurdle for a claimant in the case of operators of websites than for any other action for defamation. It seems to tilt the balance very much against the claimant being able to take any action in that case.

With regard to Amendment 27, which would add the list, the issue is the one that my noble friend Lord Browne raised at the beginning: whether this adds anything to Clause 5(6)(b), which states that, in taking an action, the complainant, in addition to giving their name, must set out,

"the statement concerned and explains why it is defamatory".

That would go through points such as, "Well, it is untrue, it harms my reputation and it was published in a form that people could read". Again, I wonder whether, having got rid of the long list that we had in Clause 4—because that was a box-ticking exercise, or feared to be one, about what was in the public interest—we are now doing exactly the reverse and trying to specify all the things that we have taken out of Clause 4. That seems to run counter to the idea of a very simple Bill, albeit that guidelines or regulations may go with it. Although there is nothing in the requirements that seems unacceptable, I am not sure that, having now made the other part so clear and simple, we want to put another list back in this part of the Bill.

Other noble Lords have discussed going to a Master, but in addition to the complications of that, and the costs, I also have worries about the timing. Again, in two or three weeks—I do not know how quick it would be—some things on the web will have gone around and been taken up. My major issue is whether the Committee is absolutely sure that it does want a different hurdle against website operators such that one has to go through all the defences that someone could have before being able to start an action. At the moment, we are not persuaded of that.

*6 pm*

**Lord Ahmad of Wimbledon:** My Lords, I thank all noble Lords who have taken part in this detailed debate. Arguments have again been presented to show both sides of the coin. Amendment 26, in the name of my noble friend Lord Lester, would require a claimant to set out in a notice of complaint why the statement complained of was not merely defamatory but also unlawful.

Our clear aim in bringing forward the Bill is, as the noble Baroness, Lady Hayter, has said, to make the law on defamation clearer, cheaper and easier for the ordinary citizen to use. It is perhaps reasonably easy for an ordinary person to understand and explain why a statement may be regarded as defamatory; it is quite another for the same person to explain, without recourse to legal advice, how that could be deemed unlawful. That arguably would involve a thorough knowledge of the law, both statute and common, and a rebuttal of the various defences that might be available to the person making the statement. The aim is to avoid putting lawyers rather than the parties at the heart of the argument. For those reasons, the Government are opposed to the amendment.

That said, we of course share the concern of those who argue that complainants should give some explanation as to why they think a statement is defamatory. The note that we have provided to the House on the content of the regulations makes clear that, where appropriate, complainants should, in a notice of complaint, provide details such as the meaning attributed to the words complained of and why they are defamatory, including any factual inaccuracies or unsupportable comment. This reflects the wording in the defamation pre-action protocol in relation to the contents of a letter before a claim, and we believe that this is an appropriate level of detail to expect complainants to provide.

Amendment 27, in the names of the noble Viscount, Lord Colville, and the noble Lord, Lord Allan of Hallam, has two purposes. First, it seeks to place in the Bill, as the noble Baroness, Lady Hayter, suggested, a number of requirements that a complainant's notice of complaint should meet. As I indicated in speaking to Amendment 26, we share the concerns of those who argue that complainants should have to give some explanation as to why they think a statement is defamatory of them. I have explained the level of detail that we

[Lord Ahmad of Wimbledon]
think is reasonable to expect a complainant to provide in order to enable the poster of the material to understand the basis of the complaint.

As I have also said, we believe that to require a claimant to go further and prove that the statement was unlawful would make it more onerous and difficult for a layman to make a complaint without first having sought sound legal advice, nor do we see how it would be in the interests of website operators, who would also have to seek legal advice, and could end up in litigation over the validity of notices that they chose to reject.

My noble friend Lord Marks talked about the need for as much detail as possible to be put in the Bill so that people can readily understand what is required. We believe that the regulations are the appropriate way to deal with the issues of detail within the framework established by Clause 5. However, we will ensure, after listening to the debate as well, that detailed guidance is published prior to the commencement of any new provisions to assist complainants, posters and website operators in understanding and following the new process.

The second part of Amendment 27 would allow the Secretary of State to make a provision in regulations for a procedure whereby a complainant can obtain from the court a declaration that his notice of complaint is valid—namely, that it meets the requirements of subsection (6). It has been indicated with regard to amendment that the procedure would also be available where either the poster of the material or the website operator wishes to apply for such a declaration.

I referred to the contribution made by the noble Viscount, Lord Colville. I agree with him that the whole purpose of Clause 5 is to provide a simple, quick, cheap and effective means for the complainant to request the removal of potentially defamatory material and for the poster to engage with this request for removal and stand by his posting if he wishes to do so. It was suggested that the Norwich Pharmacal process may not be effective in securing the necessary information on the poster. We propose in the consultation that the poster should be required to provide the full legal name and contact details, including their postal address. If they fail to do so, the website operator would have to take the material down. This, we believe, should help to ensure that the Norwich Pharmacal process enables the complainant to obtain sufficient information to enable him to bring proceedings against the poster.

As several noble Lords have noted, the system that Amendment 27 proposes would seem to require complainants to go to court at the outset, prior to making a complaint, to obtain a court declaration that their notice of complaint is valid. Presumably, any complainant who did not have such a declaration would not have their complaint processed by the website operator. It is unclear to us how this procedure could be adapted to deal with applications by posters or website operators, and at what stage these would be made. In any event, and as the noble Baroness, Lady Hayter, has mentioned, this additional process is likely to add unnecessary cost, delay and burden for the individual. In at least some cases, we believe that posters will be content for their statements to come down. Under this system, complainants would have to incur the time and expense of going to court irrespective of the attitude of the poster. Additional burdens would be created for the court system. The proposed amendments do not strike a fair and appropriate—we come back to that word again—balance between the interests of freedom of expression and complainants' rights to reputation.

I concur with many of the points made by other noble Lords, including my noble friend Lord Faulks, and hope on the basis of the explanation that I have given that noble Lords will not press their amendments.

**Lord Lucas:** My Lords, my noble friend has got his answer to Amendment 26 completely wrong, particularly so far as website operators are concerned. I do not care a fig about knowing whether a comment is defamatory; it is obvious that "The food was filthy" is defamatory. What I want to know is whether I can publish it or whether the restaurant says, "No such meal was served on that evening" or "We know this fellow from before and he has been completely unreasonable on other occasions" or gives us some reason that the comment is fair. It is absolutely crucial that Amendment 26 is accepted. Just to know that something is defamatory gives you no information and you can see that with your own eyes; it is obvious. What is not obvious is why it is unlawful. In order to take a reasonably robust attitude to standing between a complainant and the person who has made the posting, and who may well quite reasonably wish to be shy, not least because they think that they have sinned against some large corporation that will skin them in the courts if they are identified, I would want as a website operator, as I imagine other website operators do, too—certainly, those to whom I have talked do—to be in a position to stand behind something that we consider to be fair comment. We need to know why the complainant thinks that it is unlawful. We all know why it is defamatory.

**Lord Brown of Eaton-under-Heywood:** My Lords, it may be a response to the noble Lord, Lord Lucas, to say that while there is of course a distinction between what is defamatory and what is illegal, it is not necessarily for the complainant to dictate why it is illegal. Thought might perhaps be given to making a regulation under Clause 5(3)(c) that put on the operator who sought to invoke this defence the need to say why, notwithstanding that the statement was defamatory, it was none the less lawful to publish it. That might be a better way of achieving the balance than putting, as other noble Lords have recognised, the often financially onerous burden on the complainant to anticipate and meet in advance the several defences that may or may not be urged as justification for the publication.

**Lord Ahmad of Wimbledon:** The noble and learned Lord makes a valid point, which we shall certainly consider.

**Lord Lester of Herne Hill:** My Lords, I am grateful to everyone who has taken part in this brief debate and particularly to the Minister for his reply, with

which I do not agree and will have to come back at a later stage to explain in more detail why.

I should like to talk about the wider world, because what we are debating today will be of interest not only in this country but in Beijing and Washington DC. Noble Lords will probably understand that in the United States, on the one hand, the extreme position is adopted that there is absolute immunity, subject to malice, for website defamation. You cannot sue an American website operator under federal statute law, state statute law or common law in the United States. On the other hand, in China you have the opposite position, and the same is true in the former Soviet Union. In China in particular, the great firewall of China and the Chinese intranet prevent proper access to an uncensored website within China. Noble Lords will have read what happened last week, deplorably.

In Europe, we have a compromise. We have the e-commerce directive, which has a notice and take-down procedure in general terms. We have to obey EU law. We have e-commerce directive regulations. The balance is put in very broad terms and can be fleshed out in various ways, but it does not allow either an absolute immunity on website operators, American style, nor does it allow the extraordinary regulation by the state that obtains in the People's Republic of China.

Curiously, the noble Lord, Lord Faulks, suggests that we do not need any law on this at all. That will make the noble Lord, Lord McNally, smile, if he remembers that when we discussed all of this many months ago, he quite rightly said that we have to try to clarify the internet position and we cannot just duck it; we need to have reasonable legal certainty in order to include it in the Bill. He was right, and it was quite right of the Government to seek to do that. It is extremely difficult, which is why most of this will have to be done by way of regulations and not in statute.

The burden of proof in all defamation cases under English law will remain upon the defendant. We have not adopted the Sullivan rule in this country and put the burden of proof on the claimant. The defendant therefore starts off and finishes with having the burden of proving the various defences. All that we are considering is what is appropriate for a complainant to have to provide to the website operator. The great problem is that the website operator—if it is Google, Yahoo! or Amazon, or a newspaper with a website—has no commercial interest in keeping matter that is in the public interest on the website if they are threatened with litigation or, worse, "unreasonably".

Suppose, for example, that Google were to make serious allegations of corruption in the state of Ruritania, and someone from the state of Ruritania then complained about it being on the web. Google would have no commercial interest in maintaining that very important public-interest statement on the web, especially if it was going to be faced with multiple claims to take down without any obligation on the complainant. We are therefore trying to find a balance in a way that we protect free speech by not encouraging unnecessary take-down, while at the same time providing effective remedies to the serious victims of violations of reputation on the net.

The reason I do not agree with the Government's present position is not just an argument about whether or not it is compatible with the e-commerce directive to leave out the word "unlawful". It is also because the Government give the game away in indicating that the regulations that they are proposing will, in effect, do precisely what the words "and unlawful" will—or, as my noble friend Lord Phillips suggested, "unlawfully defamatory"; that would do perfectly well. However, there must be something more than a simple statement that something is defamatory.

I am sure that we will need to come back to this, because it is very important and difficult. I am not dogmatic about a solution. I beg leave to withdraw the amendment.

*Amendment 26 withdrawn.*

*Amendments 26A and 27 not moved.*

*6.15 pm*

*Amendment 28*

*Moved by* ***Lord McNally***

**28:** Clause 5, page 4, line 8, leave out from "section" to "House" in line 9 and insert "may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each"

**Lord McNally:** My Lords, I do not in any way want to provoke the Committee, but I am pleased to see that my noble friend Lord Lester is leaving, due to the stimulus of the debate.

**Noble Lords:** Oh!

**Lord McNally:** No, I do not want him to stay; I really think that he should go back to his sickbed, although his recovery during the course of the debate was significant. He said, "This short debate" but I humbly refer the Committee to the fact that our two debates today on a single clause of the Bill, which we have still not yet completed, have taken us two hours and 40 minutes in a 17-clause Bill, of whose Committee stage we are on day three of four.

**Lord May of Oxford:** This gives us some idea of why legal costs are so high.

**Lord McNally:** I hope that *Hansard* noted that comment from a sedentary position and the general approval from the non-lawyers in the Committee for that observation.

At some stages during those debates, as a non-lawyer, I thought of John Wilkes, the famous radical. When he was about to publish his newspaper, the *North Briton*, he was asked by a French acquaintance, "Is the press free in your country?". "I am about to find out," said Wilkes. I think, having listened to this debate, that in some respects the internet is going to find out whether or not it is free. My noble friend Lord Mawhinney asked me where we were with regard to balance. It is not a question of balance between right and wrong, but the debates that we have had today show that there is a balance.

[LORD MCNALLY]

One of the great things about continuity in this House is that I was on the pre-legislative scrutiny committee that looked at the Communications Bill, where we deliberately advised against trying to legislate for the internet. On reflection, I think that we were right. My noble friend Lord Phillips said that he was on the side of the little man. On reflection, one of the greatest boons to the rights of the little man over the past decade or so has been the worldwide web and its freedoms. While I hear the passion and the righteous indignation of those who have been defamed and hurt, we as a Committee have to be careful not to overlegislate something that on the plus side has some considerable benefits for the little man.

That was a complete abuse of procedure, because I am moving a government amendment of some simplicity. It was also because I am wracked by guilt: at one point during the debates, the noble Baroness, Lady Hayter, helpfully sent me a note saying, "Are you on holiday?". The truth is that when we were setting out who was going to handle what, I thought, "Clause 5 will be a nice snappy debate, since my noble friend Lord Ahmad—although he is learning disturbingly fast—should be given some experience of Bill-handling". Little did I realise that he was going to have such a baptism of fire.

Amendment 28 provides for the affirmative resolution procedure to apply to the scrutiny of the regulations to be made under Clause 5 of the Bill, rather than the negative resolution procedure as the Bill currently provides. That is in the light of views put forward on this issue by the Delegated Powers and Regulatory Reform Committee, the Joint Committee on Human Rights and others. The affirmative procedure will ensure that the regulations receive more thorough parliamentary scrutiny. I hope that, as such, it will be acceptable to this Committee and to the House. I beg to move.

**Lord Lucas:** My Lords, I am very grateful to my noble friend for that explanation. Our noble friend Lord Ahmad has been doing a superb job, and I have been immensely impressed. I had assumed that my noble friend Lord McNally was silent because he was serving time in the penalty box after voting against the Government yesterday.

**Lord Browne of Ladyton:** My Lords, those of us on this side of the Committee welcome this amendment because it follows the advice and recommendation of the Delegated Powers and Regulatory Reform Committee and the advice of the Joint Committee on Human Rights, but mostly because an amendment—identical in effect if not in words—was moved by my honourable friend Rob Flello in Committee in the House of Commons and was rejected by the Government. The reason given by the then Minister Mr Djanogly was that:

"The Government consider that the detailed and technical nature of the proposed regulations, and the fact that they will govern procedural issues, means that the negative resolution procedure is more appropriate, and provides the appropriate level of parliamentary scrutiny".—[*Official Report*, Commons, Defamation Bill Committee, 21/6/12; col. 122.]

That sentence, in itself, argued for why that was exactly the wrong procedure for these regulations. I am pleased to see that the Government have accepted that that was the case and have now welcomed this provision into the Bill.

Having listened to the debate on Clause 5, I do not share the level of guilt that the noble Lord has for having had his colleague deal with it. I am delighted that my noble friend Lady Hayter has agreed to do this. She is well equipped for the job and, indeed, has much greater experience than I have in your Lordships' House, which makes her better equipped for this complicated part of the Bill than I am.

I believe that the most important part of Clause 5 will be the consultation on the regulations, which everyone who has come to lobby me about this part of the Bill seems to be a part of. I understand that the noble Lord, Lord Lucas, may well become part of this consultation process. Maybe it is time for all of us to become part of this consultation process, because looking as I do now, in the light of the discussion that has taken place in your Lordships' Committee, at the 26 paragraphs of this consultation document, I would like to have my say about what should be in these regulations.

It might be helpful if some process was set in place so that those from all the various interests that are represented in your Lordships' Committee who have shown an interest in this Bill could have an active role in a process of discussion in respect of these regulations. Otherwise, I suspect that at some stage in the progress of this Bill—perhaps on Report—we may find ourselves timetabling insufficient time for the debate that will ensue in relation to Clause 5.

**Lord Lester of Herne Hill:** I agree with that.

*Amendment 28 agreed.*

*Amendment 29 not moved.*

*Debate on whether Clause 5, as amended, should stand part of the Bill.*

**Lord Phillips of Sudbury:** My Lords, the clause stand part debate notice is in my name and that of the noble Lord, Lord Browne of Ladyton, and the noble Baroness, Lady Hayter of Kentish Town. I consulted them when we last considered the clause—it seems aeons ago. The feeling between us was that, in view of the extended consideration of Clause 5—we have had two and three-quarter hours today and I think that we had an hour or two last time—it might be appropriate not to debate the Motion given that so many aspects to Clause 5 need further consideration.

Clause 5 is central to the Bill and, as my noble friend Lord McNally just said, the little man is liberated as well as in jeopardy. I am the first to accept that, but a great deal more thought needs to be given to it and I see no point at this juncture in debating whether the clause should stand part of the Bill, because it is at the heart of the Bill. I suggest that those of us who feel that we need to consult the Ministers and their team do so. I entirely concur with what the noble Lord,

Lord Browne, said about the consultation, because the regulations will themselves be at the heart of the Bill, in a way that they rarely are. If some formal means could be found to enable the Committee to look at a preliminary draft of the regulations, that might be appropriate and helpful to all.

*Clause 5, as amended, agreed.*

*Amendment 30*

*Moved by* ***Lord Mawhinney***

**30:** After Clause 5, insert the following new Clause—

"Unattributed website content

The Secretary of State shall publish guidance for the operators of websites designed to ensure that unattributed material is not published on any website."

**Lord Mawhinney:** Conscious of the time, I shall give a quick summary of what the Joint Committee decided by way of stimulating thought on this particularly tricky issue. I think that it is fair to say—I suspect that my noble friend Lord McNally will agree—that this is the single most difficult issue in the whole Bill: what you do about those who post on the internet anonymously? We have already had a considered view from the noble Lord, Lord Phillips of Sudbury, and the noble Earl, Lord Erroll, pointing out the costs attached and how difficult or, perhaps, impossible, it is to identify people who are anonymous.

The committee was given a lot of evidence from people who ran websites saying, "Leave us alone". We heard evidence from newspaper editors saying, "Leave us alone". We heard evidence from academics saying, "Don't leave us alone". We heard very little evidence from individuals crying "Help!", but that is what we thought we were empowered to do. We were quite clear about posting on the web. If the name is attached, the law should apply and be pursued. Notwithstanding the self-evident self-interest of some people who gave evidence, we thought that if we know who has done it, they should be held to account for what they did. We did not get into the detail that the Committee has got into, nor should we, but that was the basic position.

When it came to anonymous contributions, everybody told us, "There is nothing you can do about it; it is a world wide web; they could be anywhere. The website could be attached to another website, buried in a third website, ad infinitum. It cannot be handled legally, period. Forget it, Joint Committee, and move on".

We came to the view that it was pretty difficult to handle this from a legislative point of view. We did not want to engage in argument with those who kept telling us that. On the other hand, we were not willing to just forget about it. Two ideas surfaced. One of them is incorporated in the amendment, which is, in effect, a probing amendment. One way to deal with anonymity would be to rule it out: to say that you can take part only if you are willing to say who you are. That would be a relatively simple solution. I can hear some of the arguments against it even as I stand here, but that does not negate the fact that it is at least an option for the Government to consider.

*6.30 pm*

The other option, which is not in the amendment but, for all I know, might appear on Report, was to say that there is no legal redress for anonymity. Therefore, why do we not change the culture and legislate in a way that says that if it is anonymous, it cannot have any legal force? Over a period of years, the culture would change to the point where if someone says something on the web and puts their name to it, it is believable, it is actionable or it is in play. However, if something appears and there is no name attached to it, culturally over a period of time, we might say that we do not have to take any account of that because it is anonymous. I think it was the committee's view that, given the need to offer some protection to whistleblowers, it would be easier to find a way to protect them within an overall structure rather than to try to legislate.

Those two issues got most attention in our committee. I have made it clear that this is a probing amendment to put those issues on the table for the Government to think about and for other noble Lords to comment on if they wish. At this stage, the committee was not seeking to persuade the Government specifically but it was anxious that the Government should not simply follow those who say, "Leave us alone; it's worldwide; it's totally impossible; walk away". Perhaps, ultimately, your Lordships will come to the view that the decision has to be to walk away. But we thought that some other issues should be explored before that decision was reached. I beg to move.

**Lord Allan of Hallam:** My Lords, I am glad that the noble Lord, Lord Mawhinney, said that this was a probing amendment and I will speak to it in that spirit. It needs a response to clarify the concerns that there might be on behalf of the noble Lord, Lord McNally's "little man" who uses the internet if we were ever to go down a route where there were these broader requirements for people always to identify themselves when speaking across the internet. As I read the amendment, there would be an absolute requirement for people in the United Kingdom always to identify themselves if they wished to avail themselves of internet platforms.

We need to bear in mind the key concepts in the context of other areas where government has quite rightly identified a need to be able to detect wrongdoing on the internet and to go after those who are carrying out that wrongdoing, whatever form it may take. Those are the basic concepts that we think about when considering the right to privacy and the necessity of proportionality. We certainly should not have a counsel of despair; we should try to identify people and make them own their own content in the circumstance of an allegation of defamation. I think that we are agreed across the Committee about that basic principle of trying to connect the people who have a complaint with those who have made that speech.

I certainly would not hold to a counsel of despair that says, "This is impossible". In most cases, people can be identified. Most of the cases that we will be dealing with will be arguments between people who are identified and known to each other and who have an issue around whether the speech that one has made

[Lord Allan of Hallam]
about the other is unlawful and defamatory and whether one of them wishes to take some action over that. In some of the cases that we have seen recently and that people have quoted, such as the Lord McAlpine case, it is clear that there has been an ability to identify and go after the principal people complained against.

When we think about those who genuinely are going to be able to hide behind anonymity, we are talking about a minority of instances. That is why I ask whether the test of requiring everyone to identify themselves whenever they speak would be a proportionate response to what will be a relatively small set of circumstances and whether it is necessary to do that.

Where I certainly have some sympathy, and we have had some reference to this already in today's debate, is with regard to the cost of getting orders to disclose identity details. Again, we should be clear that those who provide internet services need some form of judicial authority to be able to disclose people's personal data. I hope that we would all agree on the basic principle that it would be inappropriate for a service provider to disclose personal data about an individual simply on request; there has to be some kind of process that enables that release to be lawful and to be lawfully made. However, the current circumstances, as we have heard today, make that very expensive.

There is probably a lot of mileage that we could cover in terms of using legal processes that require the disclosure of data to narrow down the cases that we are talking about, where someone is genuinely and maliciously hiding behind anonymity, but I consider, as I referenced earlier, that those cases will be very much a minority. When we consider the measures that we should take in response, we should bear in mind that they should be proportionate and not do something excessive to deal with that tiny minority of problematic cases.

**Lord Lester of Herne Hill:** The Libel Reform Campaign is strongly opposed to this amendment but I shall not elaborate on what it says about it. I want to draw attention to one thing that may not have occurred to some Members of the Committee, which is how this debate will be regarded in Beijing. In Beijing, they have precisely this kind of amendment in their extraordinary firewall regulations because what they most want to do is identify political dissidents of one kind or another and then go after them for violating their internet regulations. This is exactly what they have and want to maintain, and if we give it any currency at all, they will use the fact that the United Kingdom has done so, even though our context is entirely different and we are not doing it to persecute dissidents and so on. I suggest that we should be very careful, in the lawmaking that we are indulging in now, to think about the transnational implications.

**Lord Phillips of Sudbury:** My Lords, I hear what my noble friend Lord Lester of Herne Hill has just said, and it is a very strong point. None the less, we have to legislate for our own circumstances. I come back to the point that we cannot leave the Bill in a state where individuals can be grotesquely, viciously and intentionally defamed, where huge platforms—website operators—can grow rich in allowing that to happen with total impunity and with no possible remedy for the individuals concerned. That cannot be right. I am reminded slightly of some of the arguments about the banking sector and the banks that are "too big to fail". We cannot get into a mentality where website operators are too big to pay. We have never had a satisfactory answer for why website operators could not take out comprehensive insurance so that, if they were sued by individuals because of the defamations of those who post on their platforms, they could pay up in the normal way.

I have great sympathy for the way in which the noble Lord, Lord Mawhinney, put his case for Amendment 30, not least because we are all grappling with fiendish and unprecedented problems with no easy answer. Generally, I come down on the side of saying that nobody should have the right to defame others—in a way, incidentally, that will travel further and faster than any other system of publication in the history of the world—and be able to say, "Ooh, no, you can't reveal my name; that's a breach of my human rights". There is another breach of human rights involved in defamation—indeed, it is worse because the defamer is doing it intentionally. I am, of course, taking the worst case. If you have to place in juxtaposition the vicious defamer on the one hand and on the other the possibility that that defamer's particulars may have to be revealed by the website operator in the process of complying with our new legislation, I am afraid that I have to come down on the side of the person who has been defamed.

**Lord Lucas:** My Lords, speaking again as a web operator, I do not know any way of establishing a person's identity just because they are posting. One could establish a web identity, but that may have a very fuzzy relationship with any individual. If someone posts, gives me an e-mail address and I verify that e-mail address, that is about as far as I can get. However, I think that we can reasonably insist on that. If we are offering website operators the protection of this Bill against being sued for what is posted on their sites, we can ask them at least to have verified a web identity. We can ask that they take some steps to have a method of communication with this person and do not just allow straightforward anonymous postings. Then, something put up on the net should come from someone with whom the website operator knows that they have an established means of communication. Whether or not that works, is fake or just ends in silence, I do not think you can ask the website operator to determine. But you can at least make them take the first step.

**Lord May of Oxford:** This is a sensitive and difficult issue but I find myself in agreement with the noble Lord, Lord Lester, and others that the downside of doing this outweighs the upside. However, it was also my impression—which may just reveal that I did not understand what was going on—that quite a significant recourse is already given by what we were discussing under Clause 5.

**Lord Phillips of Sudbury:** Not if the complainant does not know the name of the author of the posting.

**Lord May of Oxford:** No, but they complain to the people who should not have allowed it to be posted. That is my understanding, which means there is a responsibility—

**The Deputy Chairman of Committees (Lord Brougham and Vaux):** Order.

**Lord May of Oxford:** I apologise. I forget the curious thing that you must stand up, thus rendering the microphone less effective. Be that as it may, I thought that there was some recourse and a real encouragement to the person running the thing not to permit really bad behaviour, because there is that recourse against the person who owns the website.

**Lord Phillips of Sudbury:** With respect, there is no recourse against the person who runs the website if they take the posting down. However, by that time, the damage to the complainant will have been done and will have reverberated around the world—and there will be no redress.

**Lord May of Oxford:** Did I misunderstand the part of Clause 5 that said there was a responsibility on the owner of the website not to permit outrages of the kind that the noble Lord just referred to? If there is, can you not sue?

**Lord Phillips of Sudbury:** I am afraid that the noble Lord did misunderstand.

**Baroness Hayter of Kentish Town:** This is an interesting one, particularly in respect of the use of the word "unattributed", as opposed to "anonymous". It seems to signify that you are looking at attribution, which may be to a group or something like that, and that it is about trying to find out who was responsible for this without necessarily naming them; I mean that it is about method, not necessarily the actual name. We are interested in the Government's response to this, because it clearly highlights an ongoing view that what we do not want from the Bill—any more than we want what the noble Lord, Lord Lester, is afraid of—is to give a signal that the more anonymous the better.

**Lord McNally:** My Lords, I am grateful for this debate. The more I listen to it, the more I realise that we are, consciously, going into unknown territory. As I said previously, we are taking a different approach from that we took 10 years ago with the Communications Bill, when the Government of the day, and Parliament as a whole, took the view that the internet should be left free for us to get the full benefits. Within the judgment of history that was probably the right thing to do. It allowed the massive growth of initiative and new companies and services, and the liberating effect I referred to for the individual citizen.

The most hopeful thing that I have heard today, because I respect his knowledge of this sector, is my noble friend Lord Allan's comment that we should not follow a counsel of despair. That gives me great encouragement. There are, as has been said a number of times, those who say that the internet is beyond any single parliament or jurisdiction to control, and it is a global phenomenon that will just roam free. I do not believe that there are any man-made institutions which cannot be brought within the realm of governance, particularly democratic governance.

We face balances and different arguments. I have been in debates where the whistleblower has been the hero. The noble Lord, Lord May, has pointed out that, quite often when talking or trying to criticise, it is the powerful vested interests—not just the internet companies—that will try to close down criticism by intimidating the means of that information being disseminated. I am determined to try and get this right, but I am aware that we are going into areas where there are upsides and downsides to whatever we do.

I know of my noble friend Lord Phillips's lifelong commitment to defending the rights of the little man, but I fear overlegislating in this area. We are just emerging from a debate in which it was suggested that our libel laws have become a bonanza for lawyers. I am worried that, in the concern to deal with some of the problems that have been raised, we might create another bonanza for lawyers. I sincerely believe that the contribution of lawyers to this debate has been extremely helpful, but I ask for time to study this debate in *Hansard*. As my noble friend Lord Phillips said, we have spent nearly five hours on this clause, and rightly so. It is the one in which we are going into untested territory. I want to see how it stands up to the criticisms that have come from both sides.

Amendment 30 goes much wider than issues of defamation, and is therefore beyond the scope of the Bill. It relates to broader issues concerning how the internet could and should be regulated. However, even if this new clause were to be limited only to defamatory material, it has been suggested that there has always been a tradition of being able to publish comment under pseudonyms or anonymously. My noble friend Lord Mawhinney has suggested that we should try to build some change in that culture, so that people are willing to put names to their criticism, and that that is a way forward. However, the practice is widespread. Like my noble friend Lord Lucas, I quite often go on to sites about hotels and restaurants where you get the most insulting comments about the levels of service, and sometimes they are very helpful when you are making your decision. It is also true that in the vast majority of cases it is entirely unproblematic; the hotels and restaurants live with the good and the bad, and leave it to common sense.

My noble friend Lord Mawhinney said that this was a probing amendment. It has produced strong arguments on both sides. I would like to study this issue. I also take the point about the consultation. The paper that noble Lords have received is not going to be very different from the consultation, but I understand the point made by the noble Lord, Lord Browne of Ladyton, that he would like to join the game as well. I am going to look at what we can do in that respect.

It is obvious that we have to get this into better shape by Report. We have only four or five months until the end of this parliamentary year and, at the

[LORD MCNALLY]
pace that we are going, we will need every day of that. I will take this amendment away in the probing spirit in which it has been moved; indeed, I will take the whole debate away. I have already agreed bilateral discussions on specific issues of concern with a number of colleagues, but I will see if there is some other way of bringing together a fuller debate on the contents and direction of the guidance. In that light, I hope that my noble friend will agree to withdraw his amendment.

**Lord Mawhinney:** My Lords, I thank my noble friend for his helpful response. I would like to start where he finished. I particularly welcome the fact that he said that after he had given it serious consideration, he would produce something relatively definitive by Report. That is absolutely right, and it is extremely helpful. If I have learnt anything about this issue, it is that if we get it right in one go, we will be lucky rather than seriously impressive. That means something reasonably definitive on Report, which would allow for a second bite of the cherry at Third Reading, were that to prove necessary. I welcome what he has said, and I encourage him to continue with that thought.

We have had an interesting debate. I am grateful to my noble friend Lord Phillips; part of our experience as a committee was that it was hard to find people to identify with the little man. The organisations were well organised, powerful, articulate and pressured, so part of our work was always to try for the elusive balance that we have talked about today. He has helped us enormously, as did the suggestion from my noble friend Lord Lucas about some sort of intermediate step, and I hope that he will think further on that.

I admit to being surprised that the Joint Committee should have taken China into consideration, and I apologise to those who feel that we were too constricted in our view. I have never been called a little Englander, nor even a little Irelander, so I apologise. I understand the point that my noble friend Lord Lester, was making, but I have to be honest and say that this is complicated enough without worrying what other countries are going to use as an excuse if and when we come to a judgment. That is not meant to be in any sense a little Englander type of comment.

At the end of the day, people's reputations are on the line. We have already established that the cost of trying to get behind anonymity or lack of attribution goes against one of the principles of the work that the Joint Committee did, the work of which is shared by Members on all sides of this Committee. I thank my noble friend for his response and I beg leave to withdraw my amendment.

*Amendment 30 withdrawn.*

### *Clause 6 : Peer-reviewed statement in scientific or academic journal etc*

*Amendment 31*

*Moved by* ***Lord Hunt of Chesterton***

**31:** Clause 6, page 4, line 14, after "journal" insert "or on a website edited and controlled by a chartered professional or learned body (a "recognised website")"

**Lord Hunt of Chesterton:** My Lords, that was the first time I have moved an amendment, so I hope you will excuse me.

This is an important amendment in an important Bill, particularly for scientists, engineers, doctors and writers, who approached me to take up the issue, particularly regarding the internet when used in a rather specialised way by these organisations. I have met many engineering and science institutions, whose membership comes to around 450,000 people, and on whose behalf they speak. I was also contacted by the coalition of Sense About Science, the Penn Club and the Index on Censorship.

This Bill offers legal protection, and in this clause there is emphasis on the peer-review process, which as a scientist and former editor I am very familiar with. I am also familiar with the fact that many scientists and engineers who are involved in public debate use the internet. The internet that they use is regulated by the institutions involved. We are talking about a much narrower brief; I do not know whether these people count as "little people" as mentioned by the noble Lord, Lord Phillips, but they are pretty important people and there are quite a lot of them.

This clause refers to the words "scientific or academic", and I understand from earlier discussions that this includes engineers, medics and technologists. The amendment proposes that the privilege enjoyed by peer-reviewed articles should be extended to websites controlled and edited by chartered organisations and professional bodies. It attempts to build upon the current system, which is practical and financially supported.

The Institution of Civil Engineers, of which I am an honorary fellow, having studied engineering as a student, and the Institution of Structural Engineers have highly regulated websites on which people can make comments about, for example, a structure such as a bridge or some machinery. Those comments are then edited very vigorously, they talk to their lawyers so that they will not be defamatory or cause any difficulty and then they put the comments on their website, so it is a highly controlled system. They would welcome a clause along these lines, because they would then spend less time talking with their learned friends and would perhaps save money. They feel that this clause would put what they already do into practice or into a legal framework, which is a good way to proceed.

Some noble Lords have said in discussions this afternoon that we do not need this because it happens already. This is an example where things are happening already but they could work better and more effectively. Some people wrote to me from some institutions to say, "We're not doing this very much; this would enable us to provide a better service to our members, who are very worried about a slightly increasingly litigious world".

I will go through the clauses and will read each clause, as that will make it easier to understand. Clause 1 as amended would read:

"The publication of a statement in a scientific or academic journal or on a website edited and controlled by a chartered professional or learned body (a 'recognised website') is privileged if the following conditions are met".

In a sense, some of the work has been done for this Parliament by the Privy Council procedure of providing chartering to professional bodies. Some of these professional bodies, of course, may be in considerable conflict with other professional bodies. The chiropractors, for example, are now a chartered body, and not all other scientific bodies are entirely in agreement with what they do. Nevertheless, this could still be within that framework.

The first condition, as we read this,

"is that the statement relates to a scientific or academic matter".

"Scientific", as I commented, includes engineering, technological and medical matters. If my amendments were accepted, subsection (3) would read:

"The second condition is that before the statement was published in the journal or on the recognised website an independent review of the statement's scientific or academic merit was carried out by … the editor of the journal or recognised website, and … one or more persons with expertise in the scientific or academic matter concerned".

If my amendments were accepted, subsection (4) would read:

"Where the publication of a statement in a scientific or academic journal or on the recognised website is privileged by virtue of subsection (1), the publication in the same journal or recognised website … is also privileged if"—

and then there are three conditions, the third of which is added by my amendment—

"the assessment was written by one or more of the persons who carried out the independent review of the statement; and … the assessment was written in the course of that review"—

and—

"the assessment was written by one or more persons with expertise in the scientific or academic matter concerned and was approved by the editor of the journal or recognised website".

As I understand it from these institutions, this is all quite a rigorous process. Subsections (5) to (8) are also modified in that way.

This amendment is in the spirit of the clause, but it would extend it and would certainly be very much welcomed by these institutions.

**Lord May of Oxford:** I agree with all of this. It is very good and I want to do something, if I am allowed, that is probably improper. There are two issues in Clause 6 that I would like to have clarified, but I did not see the need to put down an amendment merely to raise the issue. Clause 6(6) says:

"A publication is not privileged by virtue of this section if it is shown to be made with malice".

Am I correct that the word "malice" has a fairly explicit legal meaning? Anybody familiar with the academic world will know—

**Noble Lords:** Oh!

**Lord May of Oxford:** I can give the Committee many examples. One that does not reflect directly on me was during the GM controversy, when there was an experiment by Pusztai that claimed to show that GM foods killed rats. The Royal Society did a review of it that said that these experiments were so flawed,

"in many aspects of design, execution and analysis",

that no conclusion could possibly be drawn. I have a sneaking sympathy for poor Mr Pusztai. He was a sad but well intentioned little man who did silly things. I am sure that he felt that that quote was malicious. I would like to be reassured that there is a legal sense to "malice" that means "consciously unkind", as it were. If these amendments had been in place, *Nature* would have saved £1.5 million fighting a simple case.

When Clause 6 says,

"relates to a scientific or academic matter",

I take it that that means that, by definition, everything in the journals is of a scientific or academic matter. Often they will be opinionated editorials about issues of interest to the academic community. I thought that I would raise those issues rather than trying to grab someone afterwards.

**Lord Mawhinney:** My Lords, I support the amendments of the noble Lord, Lord Hunt of Chesterton. Were I surrounded by the Joint Committee, it would be in agreement with my wanting to do so. I say to the noble Lord and, indeed, to my noble friend that the definition of "recognised" may need to be examined a little further and tightened just a little more, not least bearing in mind the point that the noble Lord, Lord May, has just made, but that is relatively straightforward. The principle seems to be a good one, in line with what we in the committee produced, and I commend the noble Lord.

**Lord Lucas:** My Lords, I am slightly sad that this privilege should not be extended to the *Daily Mail*, if one can imagine how that would work. I am concerned that the definition of "journal" should be wide enough. There are a lot of what might be called open-access journals now, rather than just the ones that are paid for, and I find them much more useful because I can actually get to read what is in them rather than being asked to pay £20 a time to see if what is in there is of interest to me. As the amendments point out, there are a number of websites that serve very similar functions, where intense discussions take place.

Even with regard to the Bill, how much does the word "journal" cover? Would it include *Scientific American*, for instance, or similar publications? At what point does something stop being a journal and start being a magazine or a publication that is ineligible under this part of the Bill?

**Lord Browne of Ladyton:** My Lords, I support the direction of travel that the amendment proposes, but this is not yet a complete process. Let me explain. I had the benefit of a long engagement with the noble Lord, Lord Hunt, in the early stages of the evolution of this amendment, and I gave him my views on this issue, which were quite strong. My understanding was that the purpose of the early amendment that was put to me was to create an environment in which there could be a debate or dialogue on an issue of controversy, in the public domain and in a moderated fashion, but which would attract privilege.

I expressed my concerns to him about that as an idea, and I summarise them in this fashion: while I agree that there needs to be the sort of debate among

[Lord Browne of Ladyton]
scientists, technical people and academics that the noble Lord, Lord May, robustly describes regularly to us, to the benefit of our deliberations, I am not entirely sure that it is in the interests of everyone who is affected by that for it be taking place in public. To give an example off the top of my head, if someone had concerns, based on good technical analysis and engineering understanding about the braking system of a mass-produced motor vehicle, then if I were a shareholder in that firm I would be very unhappy if that debate took place in the public domain before it was settled. I would be equally unhappy if we as legislators allowed that public debate to have privilege, because one could guarantee that no one would buy that motor vehicle while that debate was taking place and it could ruin a business. I am sure that others can think of many other examples that would be entirely inappropriate. So I have reservations about that.

However, if the amendment is not seeking to generate that sort of debate or a forum for that sort of debate and to allow it to attract privilege, and I do not hear that it is, there is now an interesting evolution of the peer-reviewed statement in scientific and academic journals that Clause 6 was designed to create the opportunity for, and to allow there to be privilege. It could properly reflect the changing, modern environment that we live in, where there is the possibility that the organisations that have been given this role, if they all accept it, could provide an opportunity for healthy debate and discussion—an appropriate point in the public domain that would aid academic consideration, and which would aid technical and scientific discussion. I have a number of problems with that and I do not think that we should conclude our debate on this issue at this stage. I hope that the Minister will approach this in the way in which he approached Clause 5 and say that the Government will take this away and think about it.

My understanding of Clause 6 is that it depends on the fact that what is published in scientific or academic journals—they could be e-journals—is entitled to privilege because it is peer reviewed. It does not reach the public, a wider audience, until a controlled discussion has taken place among those people qualified to do so. People who work at that level in a discipline are used to reviewing each other at peer level. We have significant confidence in them. Those of us who do not have the expertise in particular disciplines rely on them heavily as regards what, for example, the BMJ, will allow to be published.

If another institution, or a set of institutions—for example, the institutions identified by these amendments—is willing to take on the responsibility of that level of peer review before it allows these statements to be published, I am entirely in agreement. If that generates a controversial debate, we should consider whether that debate started by a peer-reviewed assessment should attract a level of privilege. I do not know whether other Members of the Committee will share my view that this is a really interesting idea but that it needs a lot more work. I am not in a position to do that significant amount of work but the one question that I ask the noble Lord, Lord Hunt, is: what is the equivalent of this addition of peer review? We on these Benches could not support a view on an issue of controversy, which potentially could be defamatory, being exercised in a privileged environment just because it is a view held among technically gifted people, scientists or academics. I think that it could be just as damaging.

**Lord Mawhinney:** Listening carefully to what the noble Lord, Lord Browne, has said, would it be fair to summarise that he is saying that further work needs to be done on the definition of the word "recognised"?

**Lord Browne of Ladyton:** With respect to the noble Lord—I am always anxious to agree with him because of the role that he played in relation to the formation of this area of policy—it may be my fault, although I am not sure whether it is my accent or the content of what I am saying. Perhaps I have not explained myself well enough.

The noble Lord's summary is part of my concern, although I have a broader concern. In the light of the hour and the amount of time that we have already spent on this matter, and the fact that I suspect that we will find time to get back to this in more detail—perhaps offline, as it were, from the Committee—I will not lay out all the detail of my concerns about this. I have a number of them and that is one of them. My fundamental concern is that there is a hurdle to overcome before publication in the clauses as drafted: peer review. I am not entirely sure that, if we expand it into statements that are published on websites belonging to those other institutions, those statements will have the same imprimatur of peer review before they are published. If we can find a way to do that, I would be happy to support the proposal but it is complicated.

*7.15 pm*

**Lord Bew:** My Lords, I thank the noble Lord, Lord Hunt of Chesterton, for putting forward this amendment, and I am very sympathetic to his efforts. However, the noble Lord, Lord Browne of Ladyton, has asked one question and I will ask two questions in the same vein. This is just for reassurance, because I think that we understand that there could be great benefit from this amendment, and a powerful case has been made.

First, the noble Lord knows this world and the world of academic journals. Is he sure that the person editing a website for a chartered professional association is necessarily of the same calibre as the person editing a peer-reviewed academic journal? The second question is related, and perhaps more profound: is he sure that there is the same requirement for qualified privilege as there is in certain areas for academic journals, where there clearly is a severe chilling effect? The questions are in the same vein as those posed by the noble Lord, Lord Browne, but are in the vein of a very sympathetic interest in the proposal that the noble Lord has put to us. He is quite right to say that he is speaking entirely in the spirit of Clause 6. I would like to have a little more reflection on the detail.

**Lord May of Oxford:** It is perhaps a little more complicated than some people think. I am not sure that people understand that some journals are purely

electronic. Some of the major journals—PLOS ONE, for example—are online, while most of the conventional, older journals offer an option to publish additional material electronically. More than half the journals are run by the same learned societies that the noble Lord, Lord Hunt, is talking about, so it is not a juxtaposition of things that you can physically hold up and others. It is a seamless continuum, and the spirit of this definitely needs some refining to make central what has been said so clearly: that the issue is peer review.

**Lord Mawhinney:** My Lords, I will chip in again. When I responded to the amendment from the noble Lord, Lord Hunt of Chesterton, I said that it was subject to further work being done on the definition of recognition. I know that the noble Lord, Lord Browne, said that he was talking about something different, but I think that he and I are basically saying the same thing. In light of this further conversation, I say to the noble Lord, Lord Hunt, that if his amendment is saying that the existing people become the judge and jury for their own individual production, then I am not sure that that is in keeping with the spirit of what the Joint Committee said.

A redefinition, or indeed a definition, of "recognised" has to have some element of other people endorsing the view of those who want to produce. I encapsulated that in referring to a clearer definition of "recognition". The noble Lord, Lord Browne, and I are probably saying much the same thing, and I hope that those who spoke to the noble Lord, Lord Hunt, recognise that being in a learned society is not in itself sufficient. There has got to be further definition of the word "recognition". However, subject to that, which does not seem to me to be an insurmountable problem, I still welcome the amendment.

**Lord Phillips of Sudbury:** My Lords, I strongly support this group of amendments in the name of the noble Lord, Lord Hunt. I am sure that all the academics at the University of Essex, of which I am chancellor, would be cheering on their stools if they could hear this.

I just have one question for my noble friend Lord McNally, which may seem rather an odd one. This is all built around scientific or academic journals. That seems an odd pairing to me because I would have thought that most scientific journals were academic journals, although not vice versa. If there is to be a careful consideration of the terminology in the amendment tabled by the noble Lord, Lord Hunt, which I think is necessary and indeed essential, the Minister might consider whether or not "scientific or academic" is the happiest wording, as if one excluded the other.

**Lord McNally:** My Lords, the more that I hear about academia from the noble Lord, Lord May, and about the law from other Members, I am glad that I am in such a straightforward profession as politics.

This debate, again, has been extremely helpful. I worry, as I think a number of contributors have, that if the concept of "journals" includes those online, there is a question of how and where it stops. That is why we have tried to consult on this issue. It is interesting that when the legislation was first put forward by my noble friend Lord Lester, he did not make any provision for the protection of scientific journals, but particular concerns were expressed about the impact of the threat of libel proceedings on scientific and academic debate. We therefore believe that the addition to the general protections offered by the Bill of a specific defence of peer-reviewed material is appropriate. Other aspects of the Bill and work associated with it, such as the serious harm test and actions on cost protection, will also help to support free speech in these areas.

Let us be clear: right from the start, I wanted to provide protection for genuine academic and scientific debate. I have to say to my noble friend Lord Phillips that "academic and scientific" is a term that is generally understood—it does not mean the *Beano*. People know one when they see one. Within that, there is also the important context that we are looking for genuine peer review, which, again, is understood. I worry, as I think the noble Lord, Lord Bew, does—I will also be interested in the response from the noble Lord, Lord Hunt, to the specific questions—that we must not push the envelope too far on this, otherwise we will run into some of the problems that the noble Lord, Lord Browne, raised. We are right to be cautious.

As I say, the issue featured prominently in our discussions with the scientific community. We also held discussions with the editors of all the key journals to ensure that appropriate conditions were attached, so that the clause applied only where responsible peer-review process was used. We shared the relevant aspect of the clause with those editors to confirm that this was achieved.

Amendment 31 would extend the defence to peer-reviewed material on

"a website edited and controlled by a chartered professional or learned body".

We are concerned that this would make the defence too widely available. We believe that it is important to ensure that only bona fide publications with appropriate procedures are given the protection of the new defence. That is why we have focused the clause on scientific and academic journals, where there is a well established process for peer review. I can confirm that the existing clause would cover peer-reviewed material that was published by such a journal in an electronic form. However, a potentially wide range of bodies may fall within the categories proposed by the noble Lord, and we are concerned that this would extend the defence into areas where peer review is not a common practice. That may lead to the defence being available in instances where it is more likely that the peer-review process will not have been applied sufficiently robustly.

The other substantive amendment in this group, Amendment 35, would privilege any assessment of a peer-reviewed statement's scientific or academic merit if it was written by one or more persons with expertise in the scientific or academic matter concerned and was approved by the editor of the journal or website. This would appear to be aimed at extending the defence to statements such as replies to or commentaries on peer-reviewed material without the requirement that

[LORD MCNALLY]
they themselves be peer-reviewed. Again, we consider that this would extend the scope of the defence too widely.

I was asked a couple of specific questions. The noble Lord, Lord May, was worried about the meaning of "malice". We would expect courts to use the same test as applied in other forms of qualified privilege; that is, a defendant would forfeit the defence if they could be shown to have acted with ill will or improper motive. On the points made by my noble friends Lord Phillips and Lord Lucas about the term "scientific and academic journal", we believe that the term is widely understood and that a definition of "journal" is unnecessary.

I think that I have covered the points raised; indeed, I think that some of the most pertinent questions were addressed to the noble Lord, Lord Hunt, who may take the opportunity to make a brief reply. However, as the noble Lords, Lord Browne and Lord Mawhinney, invited us to do, we will look at this matter. As I said in discussion with the noble Lord, Lord May, I genuinely want to get this legislation right for the scientific and academic community; indeed, it is one of the most important challenges for the legislation. I am certainly willing to examine whether we have got our definitions and our scope exactly right, and I welcome the debate that the noble Lord has provoked with his amendment. I ask him to withdraw.

**Lord Hunt of Chesterton:** I thank noble Lords for their very constructive response. I want to emphasise the respective memberships of the institutions which wrote to me. The Institution of Civil Engineers has 80,000 members; the Institute of Physics has 45,000 members; the Institution of Chemical Engineers has 35,000 members; the Institution of Mechanical Engineers has 100,000 members; the Institution of Engineering and Technology has 150,000 members; the Royal College of Physicians has 30,000 members; and the Institution of Agricultural Engineers has not so many.

I have published papers in the scientific literature and for those institutions, and I can tell your Lordships that the standard of refereeing in most of our engineering institutions is extremely high. There are excellent scientific journals, but there are an awful lot of scientific journals with peer review in them that are pretty poor. That is why I was surprised that the clause as originally drafted set no quality level for the journals; no quality level has been supplied. It is not as if these are journals of institutions. The quality level that I want to introduce for the websites—"chartered"—is a great deal higher than is the case for the journals.

**Lord May of Oxford:** Some of the journals.

**Lord Hunt of Chesterton:** Some—I apologise to the noble Lord, Lord May.

This is an extremely rigorous process, so I do not recognise the notion of dilution suggested by the noble Lord, Lord McNally. This is not a free-for-all. If one civil engineer writes a letter to a journal about, let us say, a bridge, it is an extremely serious matter. This is now done regularly without many court cases, but it would be better if it were in the legal framework. We would be building on an established tradition.

However, time has been running on. I am appreciative of the Minister's constructive response. I should like to talk to the drafters, and I hope that this matter will come back. I beg leave to withdraw the amendment.

*Amendment 31 withdrawn.*

*Amendments 32 to 38 not moved.*

*Clause 6 agreed.*

*Committee adjourned at 7.30 pm.*

# Written Statements

*Tuesday 15 January 2013*

## Benefits
*Statement*

**The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud):** My honourable friend the Minister for Pensions (Steve Webb) has made the following Written Ministerial Statement.

The Welfare Reform Act 2012 contains provisions for the abolition of the discretionary Social Fund scheme and the post of the Social Fund Commissioner. The provisions about community care grants and crisis loans will be commenced on 1 April 2013 and the provisions about the Social Fund Commissioner's post will be commenced on 1 August 2013.

The budgeting loan scheme will however remain in place for claimants in receipt of existing legacy benefits until they migrate to universal credit.

There will be no change to how budgeting loans are to be delivered. In relation to requests for reviews, claimants who are dissatisfied with the outcome of an initial decision will still be able to ask for a review in the first instance by Jobcentre Plus.

The Independent Review Service, which carries out second-tier reviews, will be closed at the same time as the Social Fund Commissioner's post is abolished. Arrangements have therefore been put in place for the office of the Independent Case Examiner to undertake a second-tier review for claimants who remain dissatisfied with their budgeting loan decision.

## Council of Europe: UK Delegation
*Statement*

**The Chancellor of the Duchy of Lancaster (Lord Hill of Oareford):** My right honourable friend the Prime Minister has made the following statement.

The honourable Member for Hornchurch and Upminster (Angela Watkinson) has been appointed as a full member of the United Kingdom Delegation to the Parliamentary Assembly of the Council of Europe in place of the honourable Member for North East Hertfordshire (Oliver Heald).

The honourable Member for Heywood and Middleton (Jim Dobbin) has also been appointed as a full member in place of the honourable Member for Newport West (Paul Flynn), who becomes a substitute member.

The right honourable Member for Chesham and Amersham (Cheryl Gillan), the honourable Member for Bromley and Chislehurst (Robert Neill), the honourable Member for Cardiff North (Jonathan Evans), the honourable Member for Bolton North East (David Crausby) and the honourable Member for Halifax (Linda Riordan) have been appointed as substitute members in place of the honourable Member for East Surrey (Sam Gyimah), the honourable Member for Devizes (Claire Perry), the honourable Member for Hastings and Rye (Amber Rudd), the honourable Member for Stockport (Ann Coffey) and the honourable Member for Bolton South East (Yasmin Qureshi).

Baroness Wilcox and Baroness Buscombe have been appointed as substitute members in place of Lord Ahmad of Wimbledon and Lord Boswell of Aynho.

## Energy: Fuel Poverty and Green Deal
*Statement*

**The Parliamentary Under-Secretary of State, Department of Energy and Climate Change (Baroness Verma):** My right honourable friend the Minister of State for Energy and Climate Change (Greg Barker) has made the following Written Ministerial Statement.

On 19 October 2012, DECC launched a competition for local authorities to bid for £40 million of funding to deliver projects to reduce fuel poverty, help kick-start Green Deal delivery and help consumers to save money on energy bills through collective switching. Organisations were able to submit stand-alone bids for one of the funds, or joint bids across two or all three of the competitions.

DECC received a fantastic response, with bids received from the majority of local councils in England either for funding for individual projects or as part of regional based applications. All three elements of the competition were heavily oversubscribed. In response, we have been able to allocate £46 million to the fund.

*£31 million to help vulnerable householders keep warm this winter*

DECC has been able to increase the funding available for the fuel poverty element so that we can support 61 outstanding projects, helping 169 local authorities across the country improve the thermal efficiency of homes in their area. This money will be targeted at low income and vulnerable households, helping them cut their energy costs and keep warm this winter and in the future, by installing efficient heating systems and insulation.

In addition to this funding, Government are making sure the most vulnerable households get direct financial help from their supplier. Over 1 million pensioners will get £130 off their fuel bills this winter as part of the Warm Home Discount scheme, with the wider scheme helping around 2 million households overall this year. And direct from the Government, all pensioner households under 79 will get £200 winter fuel payment this winter and those over 80 will get £300—these payments will be paid out to an estimated 12.7 million older people in more than 9 million homes.

*£10 million to kick-start Green Deal Pioneer Places projects*

The Green Deal, the coalition's exciting new, innovative plan to help households in Britain improve their homes and save on energy bills, goes live this month. For an introductory period, householders taking out a Green Deal will also be eligible for a cashback incentive. Householders who use the Green Deal to make improvements such as loft insulation, solid wall insulation and new heating systems will qualify. Packages could be worth over £1,000.

To help kick-start the Green Deal, funding has been awarded to 40 successful bids for Green Deal projects covering over 150 English councils. The money

will be used for Green Deal household energy efficiency assessments, whole house retrofits to demonstrate the benefits of energy efficiency, and local events and other activities to raise awareness of the Green Deal. This Pioneer Places scheme builds on the £12 million investment already being channelled into seven Green Deal low carbon cities, announced last September, enabling even more areas to benefit.

*£5 million to set up collective switching schemes—Cheaper Energy Together*

Money has also been awarded to 31 successful bids under the Cheaper Energy Together scheme, covering 94 local councils and eight third sector organisations in England, Scotland and Wales. Collective purchasing and switching is an innovative way for consumers to group together (through a trusted third party) and use market power to negotiate lower energy bills.

A press notice has been issued today including a link to a list of those projects that are to receive funding. A list of the successful projects has been placed in the Libraries of the House.

## Energy: Nuclear Reactors

*Statement*

**The Parliamentary Under-Secretary of State, Department of Energy and Climate Change (Baroness Verma):** My honourable friend the Minister of State for Energy (John Hayes) has made the following Written Ministerial Statement.

I am today making a Statement to the House to let honourable Members know that I have asked the UK's independent nuclear regulators, the Office for Nuclear Regulation and the Environment Agency, to conduct a generic design assessment of the advanced boiling water reactor (ABWR).

This is the nuclear reactor design by Hitachi-GE Nuclear Energy Ltd, which Horizon Nuclear Power intends to use in the new nuclear power stations that it proposes to build at Wylfa in Anglesey and Oldbury in Gloucestershire.

In October I welcomed Hitachi's purchase of Horizon Nuclear Power and the confirmation that it intended to proceed with Horizon's investment in Wylfa and Oldbury. This showed the willingness of international companies to invest in the UK's low-carbon energy future and the confidence of the market in the Government's proposals on regulatory reform of the electricity market.

The Government welcome all such investment. However, the nuclear industry in the UK is rightly subject to a regulatory regime to ensure safety, security and the mitigation of any potential environmental detriment. Generic design assessment is now an established feature of our regulatory regime and, as I told the House in December after the completion of the GDA process for the AREVA European pressurised water reactor (EPR), it has shown itself to be an excellent process for rigorous and transparent nuclear regulation.

I am therefore pleased to be asking the regulators to assess the ABWR through GDA. The application is an exceptional one. It is an application for GDA of a reactor design which has already been in operation elsewhere in the world, and it follows the purchase by the vendor and designer of the intended operator of two sites which have been determined in the nuclear national policy statement as potentially suitable for the deployment of new nuclear power stations, and the purchase of the sites themselves.

I therefore think we are right to conduct a separate exercise for this design. This does not rule out a further round of GDA covering other reactor designs which might be built in the UK and we intend to hold such a round at a future date to be determined by market developments and regulatory resources.

As with previous such assessments, the full cost of GDA will be charged to the requesting party which submits the design for assessment.

## EU: Insurance Mediation and Investment Products

*Statement*

**Lord Deighton:** My honourable friend the Economic Secretary to the Treasury (Sajid Javid) has today made the following Written Ministerial Statement.

The Government have opted in to the European Commission's proposals for a directive of the European Parliament and of the council on insurance mediation (recast) (IMD 2) and proposal for a regulation of the European Parliament and of the council on key information documents for investment products (KIDs).

The Commission's objective in revising the IMD is to improve regulation in the retail insurance market in an efficient manner. The proposals for IMD 2 aim at ensuring a level playing field between all participants involved in the selling of insurance products and at strengthening policyholder protection.

The KID proposals aim to improve pre-contractual disclosure and the comparability of packaged retail investment products for consumers. They will do so by obliging manufacturers to produce a comparable and standardised disclosure called a KID, and requiring distributors to provide the KID before the sale.

Both sets of proposals currently include provisions on alternative dispute resolution which impose requirements on the UK's civil justice system, in terms of the operation of limitation periods and the availability of interim remedies. On this basis the Government consider that the JHA opt-in protocol applies and that the UK can therefore choose whether to opt in.

The Government believe that in view of the wider significance of these proposals it is in the UK's interests to participate, therefore we have opted in.

## Pensions: National Employment Savings Trust (NEST)

*Statement*

**The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud):** My honourable friend the Minister for Pensions (Steve Webb) has made the following Written Ministerial Statement.

Later today the Government will publish a response to the consultation document *National Employment Savings Trust (NEST): Proposals for amendments to the NEST Order*.

In addition, the Government intend to lay the National Employment Savings Trust (Amendment) Order 2013 before Parliament later today. Subject to the approval of both Houses, this is scheduled to come into effect from 1 April 2013.

The amending Order will ensure that NEST's statutory framework is updated to reflect current automatic enrolment requirements and to ensure that NEST continues to operate efficiently for the employers and members who use it.

I would like to thank the organisations who responded to the consultation. I will place a copy of the Government's response in the House Libraries, which will also be available on the department's website: http://www.dwp.gov.uk/consultations/2012/.

## Police: Remuneration

*Statement*

**The Parliamentary Under-Secretary of State, Home Office (Lord Taylor of Holbeach):** My right honourable friend the Secretary of State for the Home Department (Theresa May) has today made the following Written Ministerial Statement.

This Statement is about police pay and conditions. It provides the Government's response to the Police Arbitration Tribunal's findings on the recommendations in the final report of Tom Winsor's Independent Review of Police Officer and Staff Remuneration and Conditions.

On 27 March last year I laid a Statement to respond to Tom Winsor's final report of the review of remuneration and conditions for police officers and staff, in which I announced that I was directing the Police Negotiating Board to consider proposals relating to pay for police officers in England and Wales as a matter of urgency.

The Police Negotiating Board did not reach agreement on some important proposals in the final report, and these were referred to the Police Arbitration Tribunal. The tribunal has now provided its recommendation and reasons, which I received on 6 December. The tribunal considered eight recommendations from the Winsor final report. The tribunal accepted one recommendation in its entirety, accepted three proposals with modifications and did not approve one other. The tribunal recommended that three related recommendations around compulsory severance should be the subject of further discussions in the Police Negotiating Board. I have today placed a copy of the Police Arbitration Tribunal report in the House of Commons Library.

I am grateful to the tribunal for its careful consideration of these important issues. I have now considered the tribunal's report thoroughly and I have decided to accept its recommendation and I am minded to implement the package of reforms it has put forward.

These reforms build on the changes we implemented following part 1 of the review, which I announced in a Statement on 30 January last year. They continue our programme to modernise police pay and conditions so that they are fair to both officers and the taxpayer. They include measures to retarget pay to reward contribution, increase local flexibility and make important structural changes to enable further reform.

The tribunal deferred proposals around compulsory severance for further negotiations. These will be considered alongside other longer-term proposals I have asked the Police Negotiating Board to consider by July 2013.

We remain committed to the review's principles and objectives, in particular to modernising management practices and to developing the vital link between pay and professional skills. The development of the skills agenda is an essential part of both modernising pay and conditions and of our wider programme of police reform and developing professionalism. This is something that the College of Policing will take forward in the context of the timescales recommended in the Winsor review.

Existing police pay and conditions were designed more than 30 years ago, which is why we asked Tom Winsor to carry out his independent review. Police officers and staff deserve to have pay and workforce arrangements that recognise the vital role they play in fighting crime and keeping the public safe and enable them to deliver effectively for the public. These reforms support the objectives I set out in the review's terms of reference to:

use remuneration and conditions of service to maximise officer and staff deployment to front-line roles where their powers and skills are required;

provide remuneration and conditions of service that are fair to and reasonable for both the public taxpayer and police officers and staff; and

enable modern management practices in line with practices elsewhere in the public sector and the wider economy.

In reaching this decision, I have had regard to a number of vital considerations, including:

the review's three key objectives as set out above;

the tough economic conditions and the Government's wider economic objectives, which include reduction of the deficit and the challenging but manageable reduction in Government funding to the police over the Spending Review period;

the need to maintain and improve the service provided to the public, taking account of a strong desire from the public to see more police officers and operational staff out on the front line of local policing and also recognising that there are less visible front-line roles that require policing powers and skills in order to protect the public;

the particular front-line role and nature of the office of constable, including the lack of a right to strike;

the Government's wider objectives for police reform, including developing professionalism in the police and the creation of the College of Policing, the introduction of police and crime commissioners, the reduction of police bureaucracy, and collaboration between police forces and with other public services;

the Government's wider policy of pay and pensions in the public sector, and its proposals on long-term pensions and reform of the police;

the review's analysis of the value of officer's remuneration and conditions, as compared to other workforces;

parallel work by the police to improve value for money, including collaboration with the private sector; and

the impact of the recommendations on equality and diversity.

The Government's reform programme is working: crime is falling and public confidence is high. It is imperative that the police are able to benefit from these further reforms as soon as possible, and I will therefore immediately begin the process of amending the police regulations and determinations to implement the tribunal's recommendation, including making any necessary consequential and ancillary changes.

# Written Answers

*Tuesday 15 January 2013*

## Asylum Seekers: Children

*Question*

*Asked by* ***Baroness Lister of Burtersett***

To ask Her Majesty's Government what assessment they have made of the impact of the asylum system on children's development. [HL4401]

**The Parliamentary Under-Secretary of State, Home Office (Lord Taylor of Holbeach):** No formal assessment has been made of the impact the asylum system has on children's development. However, the UK Border Agency is fully committed to safeguarding and promoting the welfare of children in the UK under Section 55 of the Borders, Citizenship and Immigration Act 2009.

Local authorities also have due regard to the need to safeguard and promote the welfare of asylum-seeking children, offering the same level of support and protection as to children who are UK nationals.

## Atos Healthcare

*Question*

*Asked by* ***Lord Lipsey***

To ask Her Majesty's Government, further to the answer by Lord Freud on 26 November 2012 (*Official Report*, col. 3) that "the number of complaints against Atos is running at 0.57%, which compares, for example, with a figure of 3.5% for complaints about doctors to the General Medical Council", what was the basis for that comparison. [HL4396]

**The Parliamentary Under-Secretary of State, Department for Work and Pensions (Lord Freud):** As stated in my letter of 12 December, which has been placed in the Library, the figure of 0.57% relates to the number of complaints received by Atos, taken as a percentage of the total number of assessments carried out by Atos during that time. The GMC figure of 3.57% relates to the number of complaints made against doctors, specifically 8,781, against 245,903 doctors on the register. I am grateful for the opportunity to clarify the matter.

## Electoral Registration

*Question*

*Asked by* ***Lord Roberts of Llandudno***

To ask Her Majesty's Government which bodies in (1) Wales, (2) Scotland, and (3) Northern Ireland, are responsible for ensuring that every eligible young person has the opportunity to register to vote in advance of elections and referendums. [HL4273]

**Lord Wallace of Saltaire:** Government, politicians, political parties, electoral administrators and others in society all have a role to play in encouraging people to register to vote. The UK Government set the overall policy framework for electoral registration and are committed to ensuring that it is as easy and convenient as possible for people to register to vote.

In Great Britain, electoral registration officers in local authorities have specific duties to take all necessary steps to maintain the electoral register under Section 9A of the Representation of the People Act 1983 (as amended). In Northern Ireland, registration is the responsibility of the Chief Electoral Officer, who is a statutory officeholder appointed by the Secretary of State for Northern Ireland. The registration objectives for the Chief Electoral Officer for Northern Ireland are set out in Section 10ZB of the Representation of the People Act 1983 (as amended). All electoral registration officers are also under a duty under Section 69 of the Electoral Administration Act 2006 to encourage participation by electors in the electoral process.

The Electoral Commission also has a role in promoting registration, providing guidance to EROs on electoral administration, and providing a performance standards framework within which the performance of EROs in registering people can be assessed.

## Employment: Parent Passports

*Question*

*Asked by* ***Lord Taylor of Warwick***

To ask Her Majesty's Government what assessment they have made of the viability of the parent passport concept, in the light of their planned legislation on parental leave. [HL4460]

**The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Viscount Younger of Leckie):** The parent passport concept is a voluntary arrangement that aims to highlight the individual needs of parents, especially fathers, to employers, to ensure that parents are given the support and flexibility they need in order to manage the demands of parenting.

The department has not considered this concept when developing the proposals for shared parental leave or the extension to the right to request flexible working. The introduction of shared parental leave aims to give eligible parents greater choice and flexibility over how they manage the childcare of a baby during the first months of its life. Extending the right to request flexible working aims to encourage all employees and employers to utilise the benefits that flexible working brings, both to the employee in balancing their work and private lives and the employer through increased staff productivity, reduced staff absence and reduced staff turnover.

While the proposals on flexible working and shared parental leave have not been developed with this passport in mind, I think that a voluntary scheme such as this can only support the benefits that we intend to deliver through these policies, by encouraging open communication between employer and employee.

## Employment: Religious Faith

*Question*

*Asked by* ***Lord Warner***

To ask Her Majesty's Government what arrangements are in place to monitor the adverse impact on people affected by any discriminatory employment practices of organisations with a declared religious ethos. [HL4440]

**The Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills (Viscount Younger of Leckie):** Government collect data in relation to the number of claims which go through the employment tribunals. The Equalities and Human Rights Commission is the relevant regulator and has the power to investigate if it believes there are particular issues with organisations with declared religious ethos.

## Energy: Green Deal

*Question*

*Asked by* ***Lord Vinson***

To ask Her Majesty's Government whether they intend to include voltage optimisation in the Green Deal and other carbon dioxide and energy reduction schemes. [HL4393]

**The Parliamentary Under-Secretary of State, Department of Energy and Climate Change (Baroness Verma):** DECC has engaged closely with the voltage optimisation industry over recent months, and has commissioned the independent SAP Scientific Integrity Group, which reports to the government contractors working on the standard assessment procedure (SAP), to review evidence from industry and other sources on the efficacy of voltage optimisation as an energy-efficiency measure. We look forward to the views of the expert group to enable us to determine whether voltage optimisation is included as a measure in the Green Deal.

## Immigration and Asylum Act 1999

*Question*

*Asked by* ***Baroness Lister of Burtersett***

To ask Her Majesty's Government why they are yet to make a decision on an uprated level of asylum support under Sections 4 and 95 of the Immigration and Asylum Act 1999 for the year 2012–13. [HL4402]

**The Parliamentary Under-Secretary of State, Home Office (Lord Taylor of Holbeach):** There is no statutory obligation to carry out an annual review, or make an annual announcement. There are no current plans to change asylum support rates. However, we will continue to keep them under review.

## Justice: Age of Criminal Responsibility

*Question*

*Asked by* ***Lord Dholakia***

To ask Her Majesty's Government what comparisons they have made between the age of criminal responsibility in the United Kingdom and that in each country of Europe. [HL4039]

**The Minister of State, Ministry of Justice (Lord McNally):** Many European countries have a higher minimum age of criminal responsibility than the UK. However, it can be misleading to make comparisons between countries as the youth justice systems and supporting social systems vary greatly across Europe. It is for individual countries to make a decision based on their own circumstances and procedures. We believe that the age of criminal responsibility in England and Wales accurately reflects what is required by our justice system.

## Public Sector: Procurement

*Question*

*Asked by* ***Lord Beecham***

To ask Her Majesty's Government what steps they are taking to encourage government departments and agencies, and the wider public sector, to share services and procurement with local authorities. [HL4369]

**Lord Wallace of Saltaire:** As part of the *Civil Service Reform Plan*, the Cabinet Office has been leading the implementation of the next generation shared services (NGSS) programme. The NGSS programme concentrates on central government, but we will commence dialogue with local authorities in due course.

The Government Procurement Service (GPS) is also working with a number of buying organisations across the public sector to drive procurement savings and improve efficiency. It has signed memorandums of understanding (MoUs) with local authority buying organisations.

## UK Border Agency

*Question*

*Asked by* ***Lord Roberts of Llandudno***

To ask Her Majesty's Government how they are ensuring consistency of decision-making between the various regional offices of the UK Border Agency. [HL4132]

**The Parliamentary Under-Secretary of State, Home Office (Lord Taylor of Holbeach):** The UK Border Agency is ensuring the consistency of decision-making through the application of consistent rules, guidance and operational policy, enabling caseworkers and decision-makers to make clear, consistent and correct decisions. Adherence to these rules will be tested through an ongoing programme of assurance and compliance.

## Visas

*Question*

*Asked by* ***Lord Storey***

To ask Her Majesty's Government how many (1) tier 4 (general), (2) tier 4 (child), (3) student visitor, (4) child visitor and (5) prospective student, visa applications have been outstanding for more than six months. [HL4032]

**The Parliamentary Under-Secretary of State, Home Office (Lord Taylor of Holbeach):** The number of applications unresolved for six months or more as at December 2012 are:

| *Endorsement* | *Unresolved (more than 6 months) 192* |
|---|---|
| Tier 4 General | 192 |
| Tier 4 (Child) | 10 |
| Student Visitor | 337 |
| Child Visitor | 373 |
| Prospective Student | 1 |

These data are based on internal UK Border Agency Management information, which is provisional and subject to change.

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# ALPHABETICAL INDEX TO WRITTEN ANSWERS



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