



HOUSES OF PARLIAMENT

Joint Committee on Draft Modern Slavery Bill

Oral evidence: [Draft Modern Slavery Bill](#), HC [1019], Thursday
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Members present: Mr Frank Field (Chairman), Baroness Butler-Sloss, Baroness Doocey, Baroness Kennedy of Cradley, Lord McColl of Dulwich, Lord Warner, Fiona Bruce, Fiona Mactaggart, Sir John Randall and Mrs Caroline Spelman

Questions [149-194]

*Witness: **Riel Karmy-Jones**, Barrister, Red Lion Chambers, examined.*

Q149 Chairman: Welcome to the Joint Committee. Would you identify yourself for the record? Then Elizabeth will begin.

Riel Karmy-Jones: My name is Riel Karmy-Jones. I am a criminal practitioner, a barrister, practising out of 18 Red Lion Court Chambers in London.

Q150 Baroness Butler-Sloss: You do quite a lot of prosecuting, don't you?

Riel Karmy-Jones: I do quite a lot of prosecuting, yes.

Q151 Baroness Butler-Sloss: We very much need your help as to whether or not the cutting and pasting of the existing sections of three or four Acts into the new Bill is what is wanted. I have a series of questions for you to answer. We have had criticism by other witnesses, particularly Peter Carter whom I am sure you know, who thinks that we should bin the first clauses. We are concerned about whether the existing wording of these offences is sufficiently clear and simple for the prosecutors, the judges, the jury and obviously for survivors. Are they sufficiently broad and clear for the prosecution of such cases, particularly where victims

have been subjected to multiple types of exploitation? Where do you go from there?

Riel Karmy-Jones: I obviously come to it from a practitioner's point of view. I am not an academic and not someone who is particularly widely read in terms of all the European conventions and the various definitions there are. I have obviously read them, but I am not as au fait with them as someone like Peter Carter, who specialises much more in this than I do. From a practical perspective—

Q150 Baroness Butler-Sloss: That is why we want you.

Riel Karmy-Jones: I think the wording is simple enough. There might be some problems in terms of the potential for overlap between what is currently clause 1 and clause 2. Clause 1 should potentially be extended to exploitation as well. I have a concern about the definition of exploitation within the Bill, which applies, it seems, to the trafficking element but not to the slavery, servitude and forced or compulsory labour element. There are cases where you can fall between the two of them.

Q152 Baroness Butler-Sloss: The second question very much follows from what you are saying. Should the substantive Bill have a broad definition of slavery, human trafficking and exploitation?

Riel Karmy-Jones: I think it should have a broad and clear definition. I am not sure it is there yet. At the moment, there are the beginnings of a definition in terms of trafficking, which applies to section 2: "a person is exploited" in the following ways, and then in subsection (2) of clause 3, you have: "The person is a victim of behaviour...which involves the commission of an offence under section 1." But potentially there could be exploitation in terms of section 1 that is differently defined from the exploitation that is defined and appears to reflect section 2. I do not know if that is clear, but from a practitioner's point of view I can see that there could be difficulties for a judge summing up; for example, when you have a case where the trafficking side is not proven but the exploitation or servitude side is proven, you might fall between the two offences.

I wonder if we don't sometimes get a little too hung up with this element of transportation. I appreciate that the word "trafficking" reflects a lot of the European conventions, and that has its uses; it is important to make it clear that there are no borders for this type of offending. In my experience in criminal trials, quite often the defence try to run a defence of, "Well, they wanted to come and they were not trafficked for the purpose of exploitation." That is what you have to prove, but the exploitation took place later. If you are charging an offence of trafficking,

you have to prove that the intention to exploit occurred before the trafficking took place.

I appreciate that it is not a question at this stage of completely and necessarily redrafting, but I would put that in. We get too hung up on the idea of the movement being the offence. The true gravamen of these offences is what is done to them here. In my view, it would be better to have one count of slavery, servitude, forced compulsory labour and exploitation, to which an aggravating feature might be trafficking. The movement of someone out of their own country into a country where they do not speak the language and where their identity documents are taken away is really a form of exploiting them. It can be an aggravating feature of the actual offence, which is their treatment when here, rather than being the offence itself.

This happened in the last trial I had, where the defence tried to argue that the intention was not formed and it just happened later; that it was all agreed to—it was a sham marriage, and she wanted to come over for a sham marriage. They said it was not exploitation because her life was being made better, and it was only once she got here that things went terribly wrong, so therefore the defendant should not be convicted.

Q153 Baroness Butler-Sloss: How much over-emphasis is there at the moment, do you think, on intention rather than the fact of what is happening to the person who has been trafficked or enslaved?

Riel Karmy-Jones: There is quite a lot of emphasis on it, particularly as the offences are framed in that way; it is trafficking with the intention to exploit. There is a lot of emphasis on it.

Q154 Baroness Butler-Sloss: Could you see a situation where it would be better to have a count in the indictment of exploiting, without necessarily having to go into the intention of bringing them in or whatever else it might be?

Riel Karmy-Jones: Yes. I think you can. Sometimes the difficulty with it is that there are a number of other offences in the calendar of criminal offences that deal with it. People are occasionally worried about an overlap, say, with offences that deal with people with learning difficulties, or those who are children. Providing a count of exploitation was included—that is not to say in the absence of slavery, servitude or forced compulsory labour, but in addition to—you could have as an aggravating feature that one of the ways in which they were exploited was that their liberty was taken from them, not in kidnapping but their self-will, if you like, which is really what it comes down to, as part of the process of bringing them and putting them into the servitude or position of exploitation in this country.

Q151 Chairman: That is wonderfully clear, thank you. That is very helpful.

Q155 Fiona Mactaggart: Interestingly, some jurisdictions have harbouring and receipt, and so on, not just trafficking. Do you think that would deal with the problem?

Riel Karmy-Jones: It would certainly help. In a lot of these cases, there are family groups that bring in individuals, even from their own community. The last one I did, just before Christmas, was a Roma Gypsy Slovakian group that brought in another Roma Gypsy woman who was homeless and very much on hard times. She was very ill-educated. There were members of the family who undoubtedly must have known about it, and undoubtedly exerted some control over the victim, but it was quite hard to get them, because we had very little evidence about what they had actually done. In some instances, it has come down to harbouring, exerting an element of control over or receiving. It would be quite helpful to have something like that.

Q156 Fiona Mactaggart: Thank you. One of the ways in which human trafficking is defined in clause 1 of the Bill is by referring to article 4 of the European convention, which is the prohibition of slavery and forced labour. Interestingly, when I read article 4, it states: "No one shall be held in slavery or servitude" or "be required to perform forced or compulsory labour," and then says the things that forced labour isn't.

Riel Karmy-Jones: Military service and so forth.

Q157 Fiona Mactaggart: Exactly, yes. As a prosecutor, have you had difficulty in defining what servitude or forced labour is in front of the courts? It seems to me that one of the problems we are facing here is that there tends to be a belief that slavery is ownership of another person, but you know from these cases that it is very often a different form of control over another person exerted in a whole range of ways.

Riel Karmy-Jones: Yes, I have. I did a case that I think you are aware of—the Zlate case—which involved a Romanian group. They had a little girl, and we had issues in that case around precisely what they had asked her to do—to serve at table, to wash dishes and things like that—and was that a form of servitude or was it simply asking her to be a member of the family and to do the things that they expected others to do?

In terms of article 4, I am a bit mixed on how much it really helps. It seems to me that article 4 may not be the right article to include there. In principle, it is useful to have one of the European definitions—either from

the Palermo protocol or something else—but article 4 itself does not seem to me to add very much to what is already in the clause.

Q158 Fiona Mactaggart: You would be happier to have the Palermo definition?

Riel Karmy-Jones: Yes, I think that might be more helpful. Article 4 largely just repeats what you have, and then says “but it is not military service.” One can imagine—for instance, in a terrorist case—that if the terrorism has arisen out of some form of slavery, servitude or compulsive labour, it could be argued that the terrorism was just some kind of military exercise and therefore justifiable. It could cause all sorts of complications in front of a jury.

Q152 Can I add one thing about clause 1?

Q153 Chairman: Please.

Q154 Riel Karmy-Jones: I may have it wrong, but at the moment I think you only have consent in relation to clause 2. I think consent is an issue for clause 1 as well, because you do have people occasionally who are brought up in a position of servitude and know nothing else, and so effectively could be seen to be consenting to their condition.

Q159 Mrs Spelman: How can we ensure that the definitions in the Bill are sufficiently broad to tackle the ingenuity of the traffickers, who are constantly finding new and quite obscene reasons to traffic and exploit people? You mentioned sham marriages, but there is also the harvesting of organs and people trafficked for blood transfusions. Quite frankly, I do not think we have the capability amongst us to think of the next horrible thing that they will come up with. How do you craft the Bill sufficiently robustly to be able to reach forward rather than play catch-up with the strategy of the traffickers?

Riel Karmy-Jones: It is almost impossible to think you will ever be able to include every possible form of trafficking. As you say, there are more and more cases. If it is not an organ that is being taken, it is blood or tissue or something that can be used in some way—maybe stem cells. The only thing I imagine you can do is to keep it wide by saying “includes the following,” and have an inclusive list, and have as the last point “any other form that the court sees fit,” or something along those lines. I am not a draftsman. You keep it open-ended, and there is power to amend as time goes on. Every few years, new things come along, and perhaps amendments would need to be brought into it, or there will be a development of it through case law, as there is at

the moment with other types of offences. That is the only thing that I can suggest.

Q160 Mrs Spelman: Would that be robust enough in a court of law to withstand a legal challenge—"any other practice that the court sees fit"—or would that be established by case law?

Riel Karmy-Jones: I think it would end up being established by case law. Instead of referring to the court, you could say that it includes "engaging in any other form of exploitation." There are things, although I cannot think of one at the moment.

Q161 Chairman: Might you come back to us on that?

Riel Karmy-Jones: Yes. I will have a think and I will come back to you on it, if I can think of a frame of words.

Chairman: Thank you.

Q162 Baroness Doocey: I would like to talk about child exploitation offences. Do you think there is a need for a separate section or separate clauses on child exploitation? If you do, what would those clauses look like?

Riel Karmy-Jones: The reason I think people raise the question of child exploitation is largely to get around the issue of consent; as in sexual cases, there is no burden to deal with whether or not a child can consent. The first step is that if you include in the clauses, as you have for part 2, a reference to its being irrelevant whether there is any consent, it will obviate that concern.

While I think there is room for an offence of exploiting children in the forced labour context, problems arise over separate offences that pertain specifically to children—for example, when the age of the child is not easily determined and you end up relying on age assessments, which I have done in some of the Nigerian trafficking cases. In one in particular, we had a girl who had been age-assessed as about 14, but she had had four children. The photographs of the children showed them to be aged up to eight. The reality was that she did not know how old she was. She said, "Yes, I have had four children but I don't know dates. I don't know when they were born. When I left, the youngest was this big and the others were taken away from me, so I don't know how old I am. I have been told I may be 14 or 15."

There was a huge issue at the trial around her age. With the best will in the world, age assessments are not very well carried out. My concern is that, if you have a separate clause or offence that specifically relates to children, you force the prosecution to get into the position of proving the age of the child. Often the people who are trafficked are victims for a

reason; because they come from a community or a background which does not necessarily have birth certificates. They have very unstable backgrounds. It causes a hurdle that the prosecution find very difficult to get over.

Q163 Baroness Doocey: What about the case of younger children? I am thinking of children of about 10 years of age who are forced into domestic servitude. Do you still think there is no need for separate clauses on that?

Riel Karmy-Jones: I think there is room for it, if I can put it that way. It can be covered in the main offence by its becoming an aggravating feature, and perhaps in sentencing guidelines, which would inevitably follow, by its having a higher sentencing starting point, as you do with some of the sexual offences where you are dealing with anyone under the age of 13, or anyone deemed to be under the age of 13. In that way, you take the deeming of age out of the jury's hands and leave it in the judge's hands. The judge can then potentially decide whether he accepts that the victim is under the age of 14 or 15 for the purposes of the sentencing exercise, bearing in mind that he has seen all of his or her evidence; he has seen everything. You take it away from a jury. They may not be sure; they always have the thing of not being sure about it. That is my only concern about it. As I said, there is room for it, but it would need to be very tightly drafted. For example, we have children who are working in sweatshops, or stores which produce clothing, at minimum wages—when I say that I mean nothing wages.

Q164 Baroness Butler-Sloss: Would you look at clause 3 of the Bill and sub-clause (6). It has the rather odd word “young” in it. Could you express a view about it? It says: a “person who uses or attempts to use the person...having chosen him...for that purpose on the grounds that...he...is mentally or physically ill or...is young.” You are going to have to prove choice, aren't you? And I do not know what “young” means.

Riel Karmy-Jones: “Young” is difficult because there are people who are young in spirit and mind.

Q155 Chairman: There certainly are.

Riel Karmy-Jones: I would like to think that. Again, it is an aggravating feature, but I agree that “young” is far too wide. It needs to be “a child under the age of 18.”

Q165 Baroness Butler-Sloss: You would have to prove that the person had been chosen for that reason, and I think that would be very difficult.

Riel Karmy-Jones: Yes.

Q166 Baroness Kennedy of Cradley: I want to ask a couple of questions about our desire to protect the victims of slavery. A few options have been suggested to us about how you end the prosecution of victims who have been determined as victims of slavery by the state, such as immunity from prosecution or additionally a statutory defence. It has also been suggested that it should be incumbent upon the CPS to prove that someone is not a victim of trafficking or slavery. What is your view on that? Which option do you favour, and do you have any options you would like to suggest?

Riel Karmy-Jones: First of all, the prosecution of victims is a problem that frequently comes up in criminal trials; the fact that they have been prosecuted for an immigration offence. It is a difficult hurdle for us as prosecutors to deal with, even if the victim has effectively had her conviction overturned by the Court of Appeal. Even if the jury come to hear about that, the jury are going to make their own mind up and are not going to be bound, and they shouldn't be bound, by a decision made by another court somewhere else. It is definitely a problem.

In answer to the question, I think in a sense there should be two limbs. I am looking at what I was sent as your question 6, which I think is the one you are dealing with.

Q156 Chairman: We changed the order.

Riel Karmy-Jones: But it is the one about the process—the various options suggested to end the prosecution of victims.

Q157 Baroness Kennedy of Cradley: Yes.

Riel Karmy-Jones: There should be some process of identifying a victim as a victim. In my view, it should not be carried out by the Crown Prosecution Service, because they have a potential conflict of interest as their purpose is also to prosecute people. If there is a positive finding by a properly put-together group, there should be no prosecution. I know you have an anti-trafficking commissioner, so perhaps it could be going through his or her office and taking evidence from officers who are involved in the investigation. But if there is no positive finding, you should still allow the person the defence. It is a two-limb approach. If there is no positive finding they can be prosecuted, but they should still be allowed to run it as a defence before a jury.

It is open to the prosecution to say thereafter—for example, in relation to other things, not immigration matters but offences that someone claims to have committed at the behest of traffickers or those who have enslaved them—that those offences were not committed by reason of the

trafficking, and to have it go through a court process. That is probably not as clear as I would have liked, but it is quite difficult.

Q167 Baroness Kennedy of Cradley: Positive definition, no prosecution.

Riel Karmy-Jones: Positive definition, positive finding.

Baroness Kennedy of Cradley: By a body.

Riel Karmy-Jones: In relation to the immigration offences, no prosecution. In relation to other offences that may have been committed as a result of servitude, again it comes back to the guidance in L and M—a policy decision I suppose—as to whether or not it would be appropriate to prosecute them in those circumstances. But if they are prosecuted the defence should remain open to them.

Q168 Baroness Kennedy of Cradley: You would only not prosecute on the immigration offences. If you have been forced to work in a cannabis farm, you would still pursue that.

Riel Karmy-Jones: I think it depends on the gravamen of the offences—for example, murder. I am not convinced that even trafficking should ever be a defence to a homicide offence. I am not convinced that it should ever be a defence to some of the terrorist offences. In those circumstances, the regular defences might run. It is very difficult to say, if someone thinks that their child is being tortured, that they would not have recourse to that.

Q169 Baroness Kennedy of Cradley: How would you legally draw the line between what you thought was grave enough and what you did not?

Riel Karmy-Jones: There has to be positive proof. It is difficult because you have to think of a factual scenario. If someone is found or recovered in a cannabis factory, and at the same time as they are watering the cannabis plants that is part and parcel—that is the reason why they have been brought into this country, or that is how they have been exploited, I think that should not be prosecuted separately if there has been a positive finding that they have been enslaved or trafficked. If, however, the offence is something that they have committed on their own, outside and away from the confines of the trafficking and it is more than a minor offence, so it is not just theft or shoplifting but perhaps an indictable-only offence that finds some bracket for it—

Q170 Chairman: What about Alicia's point about whether the CPS should prove that somebody is not a victim of slavery?

Riel Karmy-Jones: In a sense, if you say that the CPS should prove that someone is not a victim, that is what they have to do if it is raised as a defence. In those circumstances, the prosecution deal with it in other cases. You have to prove that the defence is not there. I do not have a difficulty with that in a trial context. I do have a difficulty with it in the context of identifying the victim as a trafficker in the first instance.

Q171 Fiona Mactaggart: I can think of cases where children who have been found watering plants in the way you described become the exploiters; they progress up the management tree, as it were. What is your view in those cases, because it is clear that they have been groomed into criminality? Do you think that they should be prosecuted? When do you think a law could protect them?

Riel Karmy-Jones: I have not thought of that before. Instinctively, I think there comes an age when you have to take responsibility for your own actions. In the same way as paedophiles have often been abused themselves, that is not necessarily any excuse for perpetrating those crimes upon others. In fact sometimes, on the contrary, although one can be sympathetic and so on, it is potentially an aggravating feature, because they of all people know the wrong that they are doing. It may be that there should be a reference to what age or stage they have reached, and what level in the organisation they have reached, before you completely disregard their own criminality.

Q172 Sir John Randall: One of the things we are looking at is recompense to victims, and also the crime agency. Do you have any views on how we could make POCA—the Proceeds of Crime Act—more effective in getting the assets?

Riel Karmy-Jones: I do not know how we could make POCA more effective in getting the assets. Trafficking is a scheduled offence anyway. The reality is that many traffickers are very good at hiding their assets. Their assets are often abroad, so it is quite difficult to get them. You have to have cross-border arrangements and lots of letters of requests to go and assess property that they hold abroad. There could perhaps be an element of compensation involved. You have to be rather difficult, because you do not want to give anything to the defence to suggest that the victims have a motive for creating their story of trafficking.

Q173 Sir John Randall: In Italy—I do not know whether it is because of their experience with the mafia—they freeze the assets on arrest and then hold them there to see what happens at the trial. Do you think that would be workable? Would it be a good idea?

Riel Karmy-Jones: I think it would, but again, many of the traffickers' assets are kept abroad, in eastern Europe or in Nigeria. They do not keep them here—in my type of trafficking and slavery cases. It would be less applicable here, but I think it would be a good thing to freeze the assets, as you do in fraud cases. You could apply the same principles. In terms of protecting the victims, as I say, you could have some portion of those assets being distributed back to them at the conclusion, so that they have something to set up with afterwards. Victims are not well cared for in principle after they give evidence.

Q158

Q174 Chairman: Riel, thank you very much indeed.

Riel Karmy-Jones: May I just make a couple of comments? I think there is something missing from the Bill, in that there should be a process similar to a section 41-type process in relation to sexual offences, whereby the crimes a victim commits at the behest of the trafficker should only be admissible in the trafficking trial by leave of the judge, so that that is dealt with. The judges should be consulted as part of this process. I do not know whether you have done that, but I know, for instance, that the judge on my last case, Michael Topolski QC, did an awful lot of work and research on this, and would be very happy to offer views.

Q159

Q175 Baroness Butler-Sloss: He would have to have the approval of the Lord Chief Justice.

Riel Karmy-Jones: Yes, I understand that. I imagine that in this instance it might not be impossible for him to get that. Another thing that has been suggested to me is that judges should be approved before being allocated these trials. I think that is right. They are very sensitive matters and they require a great deal of care and understanding. Perhaps judges should receive training before being nominated and approved. The judicial colleges could become involved in that. You are dealing with very vulnerable victims who are not able to express themselves and who sometimes require intermediaries. I think that would go a long way to help the trials, where victims are giving evidence for days and days.

Q160 Chairman: That is very helpful. Riel, thank you very much.

Riel Karmy-Jones: My pleasure.

Examination of Witness

Witness: **Professor Jean Allain**, School of Law, Queen's University, Belfast, examined.

Q176 Chairman: Welcome to the Joint Committee. Would you identify yourself for the record?

Professor Allain: My name is Jean Allain. I am a Professor of Public International Law at Queen's University, Belfast.

Chairman: Thank you for coming.

Q177 Lord McColl of Dulwich: Why do you recommend that the definition of slavery found in the 1926 slavery convention should be included in the Bill?

Professor Allain: First and foremost, I would say that the reason it should be included is that there are international obligations that flow from not only the 1926 convention but also the 1956 convention and the 1998 Rome statute for the International Criminal Court. In the first two instances, the UK took the lead in drafting those conventions and in seeing those conventions through. The 1926 definition itself was drafted by Robert Cecil—Lord Cecil of Chelwood—and in many ways it is a living legacy of his that this definition persists. The UK took the lead.

Secondly, states agree that this is the international definition. It is included in a number of countries. Most recently, last July, France incorporated the definition into its legislation. There is legal certainty in the 1926 definition. There is a lot of rhetorical inflation around the notion of slavery—that slavery is here and there—yet in legal terms we have to ensure that there is legal certainty in a court of law and that we have brackets around the notion of slavery; that it is a crime which is exceptional and should be treated as such. As a result, we should have brackets around it, so that not only prosecutors know with some certainty going in that they will get a prosecution on the way out, but that it also allows for the rights of the accused to be respected and for them to know the charges against them. It also allows judges to apply the law properly. Finally, it allows the general public to know what is and what is not slavery.

It also provides an opportunity in a context where the European Court of Human Rights has not been very strong in giving forward guidance as to what slavery means. In that context, we have an opportunity to include in this Bill the 1926 definition, which has contemporary resonance, and which has proven itself to be very robust in the sense of, in the Australian context, finding a lot of prosecutions where this exceptional crime transpires. From those reasons flow my recommendation for the definition itself. That definition is somewhat opaque, but I will help to unpack it.

The definition is “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” It sounds at first instance as if you need to own somebody. The brilliance of

Viscount Cecil's definition is in the legal elements of it: status or condition. Status is a legal status. It deals with the issues of chattel slavery—slavery of old—which no longer exists today in all jurisdictions, so how do we deal with it in a context where you no longer can legally own another person? How can there be a crime? If you think about it in the sense of drugs—heroin—you cannot legally own a kilo of heroin, and yet we have prosecutions all the time for what is de facto ownership. The definition talks about status, but it also talks about condition: the condition of finding somebody. This is the context of contemporary slavery. You find yourself in the condition of being enslaved.

The other part of the definition talks not about a right of ownership but about exercising the powers attaching to the right of ownership. What does this mean? I had the opportunity to undertake a two-year long survey, with about 20 other individuals and experts, on property law in contemporary slavery and in historical slavery. We took our lead from Anthony Honoré, who at 92 years old remains Regius Professor Emeritus at Oxford. More than 50 years ago, he set out what the powers attaching to the right of ownership are. That article has become part of the canon of common law.

Q161 Chairman: Might we just pause for a moment? We have looked at your submission. I am slightly worried that we are going to lose valuable time. We have some specific questions. Ian, would you like to follow up on this?

Q178 Lord McColl of Dulwich: Do you think the definition is sufficiently clear and simple for modern use? Does it cover things like forced labour?

Professor Allain: I think it is sufficiently clear. The Australian experience tells us that you can get prosecutions. Does it cover forced labour? My approach is to say that slavery is exceptional. It may in some instances cover forced labour where someone controls another person and then uses them. It can cover a number of different types of what we might call modern forms of slavery, but in a court of law what I am more interested in seeing is not what you may call something—what the form is—but what the substance is.

Q179 Chairman: I don't think you've actually answered the question. Does it cover it?

Professor Allain: Yes. What I am saying is that in certain instances it might cover forced labour, but it would cover it in a situation, as we heard earlier, of a sweatshop where people are locked in and where they do not have any control over what they can or cannot do. The awkward thing about forced labour is that it has a very long arc. Forced

labour, as it is defined by the ILO, can be as little as a manager saying to somebody, "If you don't accept less than the minimum wage, you're fired." That meets the definition of forced labour. If you go to the other extreme of the arc, it is someone putting a gun to somebody's head and saying, "If you don't work then I will kill you." To me there is a long arc. The definition of slavery will catch it when it is severe enough that it meets what is in essence the definition of slavery, so in other words—

Q180 Lord McColl of Dulwich: What about exploitation for blood transfusion, sham marriages and things like that?

Professor Allain: Again, if you want to give clarity in the legislation and some forward guidance, enumeration of the forms gets you into this dangerous trap of having to add all these things. Part of the beauty of sticking with the notion of slavery is that, for instance, with sham marriages you are not trying to deal with them as sham marriages; you are asking, "In this specific situation, does this sham marriage equate to, or raise to the level of, having somebody enslaved?" It may well be in that case.

Q181 Baroness Butler-Sloss: We are now in the year 2014. We are looking at the wording of 1926 with a concept of the right of ownership, which it seems to me does import elements of property law. There are three points I wanted to make to you for your help.

First, what about the police, the prosecutors and the jury? How are they going to understand, in a domestic servitude case, a prostitution case or a begging case, as examples, the wording of rights of ownership as appropriately covering those sorts of questions? You said that the definition is relevant and acceptable internationally. In this country, we are bound both by the European convention of the Council of Europe and also by the European directive. We know that the Commission does not recognise the word "slavery;" they look to "human trafficking." We have to bring into this Bill that which is recognised within Europe, even though it may be something that will not be the same as that in Australia. How do you see this? It seems to me that this is perhaps a trifle arcane, if I may say so Professor, for 2014.

Professor Allain: The question was, in the case of domestic servitude or begging or prostitution, how would you understand slavery in a court of law? How would you explain it?

Q162 Chairman: Within your terms of reference.

Q182 Baroness Butler-Sloss: Within the right of ownership. How would the police see it? I am looking at the various groups, from the

police who are picking somebody up as a trafficker, to the prosecutor, the judge and the jury, in this sort of wording.

Professor Allain: The approach is: how do you explain it in the sense of the definition? In essence, in property, when we try to understand what it means to own something, it is about control. In the context of contemporary enslavement, it is about control. It is not about buying or selling. The very substructure of property law is about control. You cannot buy or sell something unless you control it. In that context, the judge has to inform the jury that what you are looking for in a case of contemporary slavery is control tantamount to possession. Did you treat this person as if they were a piece of property? What does this mean? Once you control that person, you can buy or sell them. You can use them; you can manage them.

Q183 Baroness Butler-Sloss: Could I interrupt you on that? I read with great interest your slavery definition written by you and Kevin Bales. Going to guideline 2—"The Exercise of the Powers Attaching to the Right of Ownership"—you say, "In cases of slavery, the exercise of 'the powers attaching to the right of ownership' should be understood as constituting control over a person in such a way as to significantly deprive that person of...individual liberty, with the intent of exploitation" and various other things. Why don't you go directly to that? People would understand control and deprivation of liberty, but the right of ownership seems to me too arcane. Why don't you go to control?

Professor Allain: What we sought to do in the Bellagio-Harvard guidelines was to unpack that understanding. My thought in the first instance is that we are not trying to reinvent the definition of slavery. What we are trying to do is to demonstrate it by unpacking it and using what is internally consistent in the law. If you were to approach that as a judge or a lawyer, you would say it is about ownership. You want to be internally consistent with the law, but at the same time—

Q184 Baroness Butler-Sloss: Professor, I need to tell you that I used to be a judge. Although I did not try very many criminal cases, I did try some with juries. I would find it enormously difficult to explain to a jury the rights of ownership, whereas I would not find it difficult to explain to them that control is deprivation of liberty, and so on. It may be that in 1926 that was okay, but I really do press you on whether it is appropriate in 2014.

Professor Allain: Ultimately, what we are trying to get at is about control: what does it mean when you have control over somebody? We tried in the Bellagio-Harvard guidelines to stay as close to being internally consistent with the definition in its property paradigm. From that perspective, if you are looking at domestic servitude, begging or

prostitution, you are looking for control. Did one person control that other person to the extent that the person had no choice, that they lost their liberty and were forced to do things as a result of having lost this control? That is the first of your questions.

If I can turn to the second, with regard to international obligations, primarily with regard to the directive and the definition of trafficking, you will know that the definition of trafficking has three elements. The last element is about exploitation. It includes slavery in that as one of the types of exploitation. From that perspective, the way I see trafficking is, in a sense, an ancillary crime like conspiracy for instance, because you are getting at the exploitation. The crime is the movement of a person so as to commit slavery, forced labour and so on.

I do not think there is a conflict between the two. I think there is a reason why, as is set out in the Bill, you have these crimes that have been brought into the Bill—slavery, servitude and forced labour—but then they also attach to this notion of those types of crimes transpiring in the context of a situation of trafficking, but not only in a situation of trafficking. They can happen independently of it.

Q163 Chairman: Professor, might we now try and take your argument from another angle?

Q185 Fiona Bruce: Do you think there should be a freestanding offence of “exploitation”? I note, for example, that you say control would be with the intent of exploitation. I am a little bit concerned that you might have a whole series of individuals through whom this person passes. Not all of them would have the intent to exploit in the way that might be necessary to prove this. Could you expand on that?

Professor Allain: I have had the opportunity to look into all jurisdictions of international countries and the way in which they have implemented the notion of exploitation within their domestic system. There are very many different elements or examples of the type of exploitation that states have used.

I have come around to the notion of exploitation because, to some extent, it is definitional. States have gone out and said, “This is exploitation, this is and this isn’t.” The directive goes another way. It says that, if you move anybody against their will and so on—the second element—to commit any crime, then that would constitute trafficking. If you are transported against your will and forced to beg or forced to commit any type of crime, this is what the directive allows for. From that perspective, it seems to me that there may be movement beyond the 28 states of the European Union. You have another 10 states that have this wide ambit, to say that any movement against one’s will for a criminal activity will constitute trafficking. Exploitation is left open to the law.

Q186 Fiona Bruce: Just to press you on that, do you think there is a benefit in having a freestanding offence, so that you can capture the very wide and possibly even as yet unanticipated type of activities that could occur?

Professor Allain: I think so. I have had the opportunity to think about exploitation quite a bit, and what it means, because I have often been asked what it is. There are numerous examples. I have gone back to a philosopher's writing on it. In essence, the philosopher says that exploitation is simply when A takes advantage of B. The way I would measure that advantage is to allow the law to determine what it means to take advantage of something. If it is illegal, it is exploitation; if you are forcing somebody to do something illegal, you are taking advantage of that person. That person would not normally do it.

Q187 Fiona Bruce: I think you have answered the question, but to press you for a very short answer, you have indicated that you think there would be benefit in having a freestanding offence of exploitation.

Professor Allain: I think so. We often see that criminality is very innovative. We do not know what will transpire, but in that context a wide open notion of exploitation would allow us to capture things in the future.

Q188 Baroness Doocey: Still on exploitation, do you think there ought to be a separate clause, or separate clauses, to deal with child exploitation?

Professor Allain: It is clear that with regard to trafficking, consent is vitiated when it comes to children. I must say that I have not thought too much through the process of whether children should be treated specially beyond this. From my perspective, if you are capturing the essence of forced labour, servitude and slavery, it seems to me that, if you then remove the consent element of it when it comes to children, you are capturing the exceptional nature of these crimes while also ensuring that, in a context where children are involved, there is that added element of protection. I do not want to venture beyond that, because I have not thought through it enough to feel confident in being able to give an answer.

Q189 Sir John Randall: When we are looking to see what we can do with the definition, do you think there is legislation in any other countries that we should be looking at for inspiration?

Professor Allain: As far as slavery is concerned, Australia has had since 2008 its equivalent of the UK Supreme Court. Its highest court made a determination in Tang, and from that you have had more than 20 appeals on prosecutions. It is clear that prosecutions are taking

place at ground level. If you want to consider trafficking, Moldova has the widest ambit of possible types of exploitation in its legislation, but at the same time it leaves the possibility that something may be left out.

I will very quickly mention a number of types of exploitation which I have seen repeatedly in looking at the legislation from various states: begging—but we have it in the EU directive. Illegal adoption comes up quite often. There is servile and forced marriage. Servitude would catch servile marriage. Those definitions are very precise, but there might be place for legislation around forced marriage.

Q190 Sir John Randall: Which countries have those things?

Professor Allain: I could send that to you, to outline what those states have.

Q164 Sir John Randall: Thank you.

Q191 Chairman: Can I take you back to the Australian example? Are you saying that because the Supreme Court made a particular ruling it has triggered 20 appeals?

Professor Allain: At least 20 appeals, yes. In the lead-up to this decision, Australia had incorporated the 1926 definition into its legislation. There was uncertainty, but the court gave a finding—a decision, a judgment—in which the lead opinion set out the nuts and bolts of the application. The second opinion was more of a philosophical approach, thinking about slavery as being the antithesis of liberty, of freedom. That decision sets a good tone as to the manner in which to think about and approach the issue of slavery. In the context of Australia, that has resulted in a number of prosecutions.

I have not gone beyond the appellant level, but it is clear that the issue is being tried successfully. From that perspective, there is no problem with the 1926 definition in the Australian context. I would say that, with France introducing that very definition into its legislation recently, there is the sense that, for a very long time, the definition was not utilised but it was caught up in an unwillingness—let's say—of states to deal with it in the ways we are seeing at the moment. There is a push beyond the UK to consider issues in a criminal context and not necessarily a human rights context. We are seeing a movement of states introducing into their legislation the definition itself and also provisions regarding slavery more generally.

Chairman: That is very helpful.

Q192 Mrs Spelman: Taking the example of Australia, it is interesting that Australia looks quite rigorously at child marriages and the

problem that people who come from a society in which that is acceptable do not realise their lack of liberty until they come to a society where that is not the norm, and then find no way of attaining the liberty that other people in the host nation enjoy. What you have just described as that philosophical divide between liberty and a lack of liberty is something that underpins that Australian view, isn't it?

Professor Allain: Yes, I think you are correct. For me one of the beauties of the definition is that you avoid issues of culture, religion and inset prejudices and so on. You have a definition that does not say "forced marriage," so you may be able to avoid this as being forced marriage because there are religious connotations around it. But then you look at the substance of the situation. In this case, was this person too young to consent? Is this person currently in a situation where they cannot leave? Are they in a situation in which somebody controls them to the extent that they have no say in it?

Again, let me emphasise that slavery should be considered as quite exceptional. Part of the reason why we find ourselves discussing the definition of slavery is that for a very long time slavery was used because it is visceral. It was used to attach itself to different things. As a result, if you attach it to more and more instances, it does not mean anything. What we are trying to do, it seems to me, is to recapture the essence of it in a way that in a court of law you can hold somebody responsible for enslavement.

Q193 Fiona Mactaggart: You have focused consistently on the issue of consent, and you said that slavery is a very special status. It strikes me that what we are seeking to do in this Bill is something more than what you are talking about. We are seeking to find a way of effectively prosecuting trafficking, which is the means rather than the mode. If you look at the Palermo protocol, it says quite clearly that the consent of a victim of trafficking in persons to the intended exploitation as set forth should be irrelevant because the means is so exploitative. I think you are arguing something slightly different. We would be anxious about going down the road that you are, and thus narrowing the circumstances in which we can effectively prosecute gross exploitation. Can you address that issue?

Professor Allain: In a sense, the emphasis has been on slavery. For me there is a clear distinction in slavery versus trafficking. Slavery is part of the types of exploitation that are meant to be dealt with in the context of trafficking, but they are also stand-alone crimes. It is very difficult to deal with trafficking if you don't unpack the actual crimes at the end of that process—the types of exploitation.

Consent is irrelevant when it comes to prosecuting—to the person who commits the crime—but the question can be asked, in the sense of trying

to establish to what extent this person had control when you ask about consent of the victim. From that perspective, I do not necessarily see it as being contradictory.

In trying to deal with trafficking, you open up the possibility for different types of crimes at the end of it. You have certain crimes that have been legislated in 2008, in the Coroners and Justice Act, which have never been part of the make-up of the UK, but we are starting not only to see it but maybe to recognise it as having existed. For me, what has to be emphasised is that trafficking is a process in which someone finds themselves exploited. We should then establish in concrete terms what type of exploitation that is, in legal terms, and also allow for the possibility that it is separated from trafficking. It is true that the Bill itself is focused around trafficking, but at the same time it seeks to focus on and to bring into the fold of the Bill clear, precise and stand-alone provisions dealing with slavery, servitude and forced labour.

Q194 Chairman: Professor, thank you very much indeed. You made an offer when John was questioning you and we would be very grateful for that. Thank you very much for coming.

Professor Allain: Thank you very much for your time.

