



Call for input on contemporary forms of slavery as affecting currently and formerly incarcerated people: Submission to the Special Rapporteur on modern forms of slavery

The Institute for Crime & Justice Policy Research at Birkbeck, University of London, is engaged in an international comparative research project, ‘Unlocking Potential: towards effective, sustainable, and ethical provision of work opportunities for prisoners and prison leavers’.¹ The project examines work done by prisoners in the UK, Brazil and the USA. It seeks insights into how norms, values, and policies surrounding prison work are understood by practitioners, policymakers, prison monitors, and the businesses and other partners that provide work in prisons. This submission draws on findings from our research.

To date, our work has consisted of a literature review and research on international and national law and policy on prison work; and over fifty semi-structured interviews with individuals who have knowledge of prison work in these countries. We have published a briefing: ‘Labouring Behind Bars: assessing international law on working prisoners’;² and a separate Appendix with a more detailed, fully referenced discussion of relevant international provisions.³ In June 2024 we will publish briefings on prison work in law and practice in the UK, USA and Brazil. We aim, via forthcoming fieldwork (May – August 2024), to produce case studies of prison work conducted in these countries, which will reflect focus group discussions with prisoners doing a range of work activities, and with staff of prisons and other organisations directly involved in work programmes.

We provide responses only on questions within the scope of our project (as indicated below).

A) Exploitation of currently incarcerated people

1a. Legislative, regulatory frameworks

The UK

Having ratified both ILO Forced Labour Conventions, the UK can lawfully compel sentenced prisoners to work, provided the work is “supervised and controlled [by] a public authority” and prisoners are not “hired to or placed at the disposal of private individuals, companies, or associations”.

For each of the UK’s three sub-jurisdictions, prison law derives from the respective Prison Acts and from secondary legislation (Prison Rules) created pursuant to those Acts. Regarding the purposes of

¹ More information, including our research questions, can be found at:
<<https://www.icpr.org.uk/theme/prisons-and-use-imprisonment/unlocking-potential>>

² At: <https://www.prisonstudies.org/sites/default/files/resources/downloads/labouring_behind_bars.pdf>

³ At:
<https://www.prisonstudies.org/sites/default/files/resources/downloads/labouring_behind_bars_appendix_w eb_final.pdf>

prison work, the Prison Rules for England & Wales and Northern Ireland require that work should be “useful”; in Scotland, work should aim to improve “morale, attitude, and self-respect” and “prospects for [...] successful resettlement” after release.

The USA

The 13th Amendment to the US Constitution abolished slavery and involuntary servitude, *except* as punishment for a crime. Because of the exception, prison administrators—except in states which have abolished it in their state constitutions—can implement compulsory prison work at their discretion. Work is therefore mandatory in most American prisons, and the failure to work if directed to do so is a disciplinary offence which can result in sanctions, including the loss of property or earned privileges, confinement to cells, and the loss of contact with family.

The US has ratified only one of the ILO’s Forced Labour Conventions.⁴ This means it has committed to abolish forced or compulsory labour only if it is imposed for as punishment in five specified circumstances,⁵ not in *any* circumstances.

Neither US federal nor state law directs clear aims or purposes for prison work.

Brazil

Brazil has ratified both ILO Conventions. Brazil’s Constitution outlaws use of forced labour as a punishment. Provisions in the Penal Code⁶ and federal case law require that a prison sentence should punish, deter, and also resocialise. The Penal Execution Code⁷ requires every sentenced prisoner to work to the extent of their capacity and aptitude, stating that ‘work must have an educational and productive purpose’ as a ‘condition of social dignity’. The allocation of work, and its remuneration, are listed as specific *rights* of all prisoners alongside essentials such as food and communication with the outside world.

The Penal Code stipulates that prison regimes be classified by security level, and structured to serve the overarching aim of resocialisation. Sentenced prisoners should progress through (up to) three separate regimes—closed, semi-open and open. Which regime a prisoner is in is highly determinative of whether they will work and what kind of work they will do. Closed regime prisoners are held in maximum or medium security facilities. Semi-open regime prisoners are required to work or attend supervised training or education during the day, either on- or off-premises, but return to the prison at night. The open regime requires prisoners to attend courses, work, or engage in other authorised activities unsupervised, and to stay in hostels outside working hours.

1b. Types of work performed

The UK

Data published for England & Wales are incomplete and describe only prison industries jobs (rather than the far more commonly undertaken jobs supporting prison functioning, such as cleaning and catering). Official data show that numbers working in industries jobs grew from 10,500 prisoners in

⁴ Abolition of Forced Labour Convention, 1957 (No. 105). The federal government has declined to proceed with ratification of the 1930 Convention, because to do so would bring compulsory work in privately-operated prisons into legal jeopardy. See US Council for International Business, ‘Issue Analysis: U.S. Ratification of ILO Core Labor Standards’

⁵ Those set out under art. 1 of the 1957 Convention.

⁶ Código Penal 1940

⁷ Lei de Execução Penal 1984

2014/15 (12.2% of the prison population), to 12,500 in 2019/20 (15.5% of all prisoners). On average, the prisoners worked a 27-hour week over this period. Official contracts data show that, between 2018 and 2021, over three quarters of prison work contracts by value covered “general assembly and packing”, “recycling”, or “laundry” work.

England & Wales data also describes work done by prisoners on day release.⁸ An average of 305 did this form of work in 2011/12—around 0.4% of the then prison population. Types of work done by this category of prisoners include warehousing, distribution, recycling, horticulture, retail and catering: providers are usually companies but sometimes charities or hybrids.

There are no data for working prisoners in Northern Ireland or Scotland.

The USA

A 2022 estimate by the American Civil Liberties Union (ACLU), based on a nationally representative prisoner survey, put the proportion of prisoners who performed some kind of work in prison in 2016 at approximately 65%.⁹ Of these, around 80% performed tasks supporting the functioning of prisons—for example, janitorial work, cleaning, catering, prison maintenance, and the like. The ACLU estimated that a further 8% performed public works assignments outside prison walls, for example groundskeeping or janitorial work for states and municipalities. 6.5% worked in state-owned prison industries, around 2.0% in work-release programmes mandated by the sentence, 2.2% in agriculture, and just 0.6% in private-sector prison industries.

Brazil

Undermining the effectiveness of measures aimed at progressive preparation for release and resocialisation, including through a right to work for sentenced prisoners, is Brazil’s relentless prison population growth. This has led to severe overcrowding and a chronic shortage of prison places in all three regimes. The open regime envisioned by federal law is largely defunct:¹⁰ there are very few hostels, and most prisoners are released instead into ‘residential custody’—a system of conditional freedom and (often) electronic monitoring, accounting for around 20% of the sentenced population.¹¹ Even progression from closed to semi-open regimes is sometimes substituted by release to ‘residential custody’, owing to the lack of space in semi-open facilities.

For these reasons, work engagement is relatively low in Brazilian prisons. According to national official statistics aggregated by a federal body, SENAPPEN, as at June 2023, the number of prisoners in physical custody reported as working was 154,531—around 24%.¹² SENAPPEN’s data show considerable variation by state. Maranhão state (in the northeast) currently has top ranking with 64% of prisoners reportedly working, compared to 34% in Santa Catarina and under 20% in São Paulo (both in the more prosperous southeast). Prison population composition goes some way to

⁸ The scheme is called Release on Temporary Licence, or ‘ROTL’ and has not been implemented in Northern Ireland or Scotland.

⁹ American Civil Liberties Union, ‘Captive Labor: Exploitation of Incarcerated Workers’ (American Civil Liberties Union 2022) <https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf> . This figure covers only those imprisoned in state and federal *prisons*, not those held in *jails* (which generally hold pre-trial or short-sentenced populations), juvenile facilities, or immigration detention.

¹⁰ A Nunes, *Comentários à lei de execução penal* (Grupo Gen-Editora Forense 2016)

¹¹ ‘Dados estatísticos do sistema penitenciário (SISDEPEN)’ (Secretaria Nacional de Políticas Penais) <<https://www.gov.br/senappen/pt-br/servicos/sisdepen/sisdepen>>

¹² That is, excluding people still subject to a sentence of imprisonment but who are in ‘residential custody’, most likely having progressed to the open regime stage.

explaining the variation: fewer prisoners work in states where (as in São Paulo) greater proportions of prisoners are unsentenced. Also significant is the type of prison: higher rates of work engagement are often seen in semi-open facilities incorporating agricultural or industrial colonies, but these do not exist in all states.

The types of work offered, and whether prison-work partnerships are formed mainly with public or private sector organisations, also vary regionally. Unlike São Paulo and Santa Catarina, Maranhão is poor and not highly industrialised. Very few companies use prison labour and most prison work is for the public sector, for example, producing school uniforms and desks for the state education department or manufacturing paving stones for urban areas.¹³ Santa Catarina, by contrast, is highly industrialised, and private companies engage substantial numbers of imprisoned workers.

1c. Working conditions, wages and deductions

The UK

Only in Scotland do the Prison Rules *entitle* prisoners to payment for work,¹⁴ but in practice, work is paid throughout the UK. In England & Wales, the minimum rate set by policy is £4 per week, or £2.50 for prisoners for whom work is unavailable.¹⁵ In Scotland, the minimum is £5 per week according to a 2012 policy;¹⁶ the Northern Ireland Prison Service does not publish rates. UK prison work is therefore paid well below the national minimum wage of £11.44 per hour for workers aged 21 and over,¹⁷ with one exception: work done by prisoners on day release in England & Wales, for which employers pay at least the minimum wage to the Prison Service; although the law allows prison governors to make deductions of up to 40% from the net (i.e. post-tax) wage. Though the amount and purpose of these deductions are constrained by statute, they are discretionary and are not always made.¹⁸

Earned incentive schemes for UK prisoners include opportunities for working prisoners to earn higher pay, and the best-paid work is available preferentially to prisoners with higher earned privilege classifications.¹⁹ Participation in work is secured more through incentives than sanctions. Work is the only way to pay for basic goods or phone credit for prisoners who have no outside financial support. In law, however, work is compulsory: prisoners can be penalised for not working, unless they are held pre-trial, past the statutory retirement age, or certified as unfit.

¹³ Secretaria Nacional De Informações Penais (SENAPPEN), 'Relatório de informações penais (RELIPEN) - 1º semestre 2023' (SENAPPEN) 2023) 47ff <<https://www.gov.br/senappen/pt-br/servicos/sisdepen/relatorios/relipen/relipen-1-semester-de-2023.pdf>>

¹⁴ The Prisons and Young Offenders Institutions (Scotland) Rules (SSI 2011 No. 331) r 81(2)

¹⁵ HM Prison & Probation Service and Ministry of Justice, 'Paying Prisoners for Work and Other Activities (PSO 4460)' <<https://www.gov.uk/government/publications/paying-prisoners-for-work-and-other-activities-pso-4460>>

¹⁶ Matthew Maycock and Daniel McGregor, "'I Do Enjoy the Work, but I Think the Wages in the Jails Are Shocking": Analysing Prisoner Wages as a Pain of Imprisonment Using Foucault's Artifice' [2023] *Incarceration* <<http://journals.sagepub.com/doi/10.1177/26326663231170767>>

¹⁷ Correct as of April 2024: see 'National Minimum Wage and National Living Wage Rates' (GOV.UK) <<https://www.gov.uk/national-minimum-wage-rates>>

¹⁸ The Prisoners' Earnings Act 1996 specifies what purposes deductions may be made for; for further detail on implementation, see HM Prison & Probation Service and Ministry of Justice, 'Prisoners' Earnings Act 1996 (PSI 76/2011)' <<https://www.gov.uk/government/publications/deducting-money-from-prisoner-wages-psi-762011>>

¹⁹ The Prison Rules (SI 1999 No. 728) (n 37); The Prison and Young Offenders Centre (Amendment) Rules (Northern Ireland) (SI 1995 No. 264) (n 37); The Prisons and Young Offenders Institutions (Scotland) Rules (SSI 2011 No. 331) (n 38)

The USA

Federal and state law do not consistently apply the international human rights standards requiring working hours and health and safety protections not to be worse than those in the wider economy,²⁰ and in practice, protections are few. Prison workers do not enjoy most federal and state law employment protections, including the right to a minimum wage and a 40-hour working week,²¹ the right to associate and form trade unions,²² the right to decline dangerous work,²³ and the right to protection against occupational hazards.²⁴

Some states offer more protections against injury than others: California is among the states which allow prisoners to claim from workplace injury compensation schemes, whereas Texas explicitly excludes prisoners from *all* protections under its Labor Code, including this one.²⁵

Prison work in seven states, all in the South, is almost or entirely unpaid.²⁶ In Texas, for instance, the only incentive for working comes via ‘good time credits’: reductions in sentence length which accrue for each day of work, at different rates depending on the prisoner’s “conduct, obedience and industry”.²⁷

In states where prison work is paid, wages are well below prevailing minimum wages. Structured incentive schemes apply as in the UK. Arizona, for instance, classifies jobs as “unskilled”, “semi-skilled” and “skilled”, determining wages according to a matrix which cross-references the job with the prisoner’s classification in an incentive scheme.²⁸ Similar arrangements are specified by state laws across the US. The full range of incentives is not available to all: for example, prisoners in California who are serving life sentences cannot earn remission credits,²⁹ and exclusions based on offence type are common.

Brazil

Working prisoners must be paid no less than three-quarters of the national statutory minimum wage, currently 1,212 reais per month.³⁰ Deductions can be made for reparation or restitution for victims; family support; and to reimburse state expenses in maintaining the prisoner. Prisoners may access what is left to meet personal expenses in prison, with any remainder transferred to them on release.

²⁰ Nelson Mandela Rules (n 13) r 101

²¹ U.S. Department of Labor, ‘Wages and the Fair Labor Standards Act’ (U.S. Department of Labor, no date) <<https://www.dol.gov/agencies/whd/flsa>>

²² Tryon P Woods, ‘Review of From Black Power to Prison Power: The Making of Jones v. North Carolina Prisoners’ Labor Union’ (2013) 47 Law & Society Review 455

²³ ‘Workers’ Right to Refuse Dangerous Work | Occupational Safety and Health Administration’ <<https://www.osha.gov/workers/right-to-refuse>>

²⁴ Occupational Safety and Health Administration, ‘Standard Interpretation: OSHA Does Not Have Jurisdiction over State Employees or Inmates’ (United States Department of Labor | Occupational Safety and Health Administration, 16 December 1992) <<https://www.osha.gov/laws-regs/standardinterpretations/1992-12-16-1>>

²⁵ Texas Labor Code § 501.024

²⁶ The states are: Alabama, Arkansas, Florida, Georgia, Mississippi, South Carolina, Texas.

²⁷ Texas Gov’t Code § 498.003

²⁸ Arizona Department of Corrections, Rehabilitation & Reentry, ‘Department Order 903: Inmate Work Activities’ para 2.3 <<https://corrections.az.gov/sites/default/files/documents/policies/900/0903.pdf>>

²⁹ California Penal Code § 2933

³⁰ Because of past periods of rampant inflation, salaries in Brazil are expressed not as fixed annual sums, but as multiples of the minimum wage (*salário mínimo*). Nearly two-thirds of Brazil’s working population earn two ‘minimum salaries’ or less. The current minimum salary corresponds to around US\$245 per month, as at March 2024.

A further entitlement—and, given the uneven implementation of the minimum prison wage (see further below), probably the main incentive for working—is sentence remission. Prisoners in closed or semi-open regimes are entitled to remission of one day off their sentence for every three days worked.³¹

The law excludes working prisoners from national employment law in most respects, but prison working conditions must be safe and hygienic. Prisoners are required to work for between six and eight hours per day, excluding Sundays and public holidays; but those engaged in maintaining prison establishments may have to work different hours. Refusal to work can result in sanctions, including being held in isolation or denied progression to a less secure regime. In practice, however, the scarcity of work and competition for assignments means this rarely happens.

Prisoners who work in the closed regime must either do so inside the establishment, or on public works projects outside it (e.g. building roads or public hospitals, in which case the work can be managed by private entities on state contracts).

Federal, state and municipal governments may contract with the private sector to establish workshops, including as necessary to maintain the prison itself. The provision of labour to any private entity requires the prisoner's express consent.

As with the regime progression laws, prison population growth has rendered many of the federal law rights, purposes, and protections for working prisoners largely inoperative. When the Penal Execution Code was passed in 1984, the country's total prison population stood at around 88,000. Today, it exceeds 840,000.³² Investment and staff recruitment have not kept pace with numbers. As a result, the first priority for many prisons—especially larger, higher-security facilities—is containing unrest, violence and criminality, rather than providing work to prisoners.

Official data show that many working prisoners receive either no pay, or less than the statutory minimum mandated by law. As at June 2023 over 67,000 prisoners (or 43%) received only sentence remission for working. 26,300 were paid an amount below the legal minimum, while just over 34,000 earned above this level.³³ Again, state-level variation is significant: in Maranhão 74% of working prisoners received no remuneration, only remission; in Santa Catarina and São Paulo the proportion was far lower, at 10% and 12% respectively.

[1d. Alternatives: not answered.]

1.e Labour before conviction or sentence.

Broadly speaking, the evidence from official data shows very little provision of work to this category of detainees in any of the countries we are researching; experts we have interviewed have confirmed this.

1.f Private business involvement, supervision by state authorities

Based on our research to date, we have not encountered evidence of non-compliance with ILO rules on the need for state supervision in these circumstances: but as explained above, we have not yet undertaken fieldwork.

³¹ The same applies to prisoners who engage in educational or training activities.

³² ICPR, 'Brazil | World Prison Brief' (World Prison Brief) <<https://www.prisonstudies.org/country/brazil>> : this includes prisoners under 'residential custody'.

³³ 'Dados estatísticos do sistema penitenciário (SISDEPEN)' <<https://www.gov.br/senappen/pt-br/servicos/sisdepen/sisdepen>>

Section 2. Exploitative labour practices?

For most working prisoners in all three countries, wages are far below the statutory minimum wage, which appears exploitative, most strikingly where (as in some American states, and parts of Brazil) no wage is paid.

In the USA and Brazil, much prison work functions to subsidise state institutions: for example, where prisoners perform maintenance tasks and reduce operating costs, or produce goods and services for public-sector consumption, or allow states and municipalities to use cheap or free labour on public works projects. This may also be seen as exploitative. As regards prison labour for private companies, this forms a very small proportion of the work actually done by prisoners in the countries we are researching. It has been clear for some time that the ILO's requirement that prisoners providing prison labour to non-state entities must receive remuneration 'approximating' a market wage is openly ignored by some member states, suggesting reform is needed.³⁴

[Sections 3-5 fall outside the scope of our study]

Section 6. Recommendations towards eliminating labour exploitation

It is difficult to organise economically productive work in prisons, while also sustaining commitments to unforced labour and meaningful preparation for release. There are inherent security and administrative challenges, and anything more than low-skilled work presupposes the political will to invest the resources necessary to address prisoners' typically low educational attainment, and their histories of social exclusion.

Consideration of appropriate reforms must pay attention to these custodial realities *alongside* current forms of exploitation, particularly through low pay. A principled debate would usefully focus on questions such as:

- a. How should work by prisoners be rewarded, considering that human rights standards on imprisonment require 'equitable remuneration' without defining this?
- b. How closely should prisoners' wages reflect rates of pay for similar work outside prison? What (if anything) can justifiably be deducted?
- c. Should prisoners serving longer sentences be offered remission in lieu of wages, for example when work is in short supply and, for policy reasons, may be prioritised for those nearer to release?
- d. How can current levels of involvement of non-public sector parties in provision of prison work opportunities be expanded, while sustaining a commitment to ethical practices, particularly around fair pay?
- e. Is there a case for business and voluntary sector codes of practice for engagement in prison work, to provide more clarity and detail on how to interpret and apply the international normative framework in a way that promotes resocialisation, safeguards basic rights, and protects against exploitation?

³⁴ See Faina Milman-Sivan and Yair Sagy, 'On the International Labour Organization and Prison Labour: An Invitation to Recalibrate' (2020) 159 International Labour Review 505.

We plan to use the findings from our research to advance understanding in the complex topic of prison work and we will engage with stakeholders in addressing questions such as those outlined above, and formulating recommendations for reform. We are at the Special Rapporteur's disposal if any questions arise on this submission or on our wider project.

Institute for Crime & Justice Policy Research, Birkbeck

11 April 2024