

The Responsibility of Prisons for Securing the Rights of Modern Slavery Survivors: Prison as a Safe House?

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There has been little attention to the issue of modern slavery in the prison context,¹ beyond literature on the exploitation of prisoners as cheap labour, whether by States directly or through private sector actors.² It may, therefore, appear surprising that not only people convicted of trafficking, but also survivors of modern slavery, are sometimes imprisoned. While anecdotal evidence suggests that this is not a rare occurrence, little is known about the numbers of modern slavery survivors in prison or the treatment they receive.

The University of Essex, the International Organisation for Migration in the UK (IOM UK), and Hibiscus Initiatives conducted a joint research study in 2022 and 2023.³ The research sought to bridge this knowledge gap.⁴ It is the first comprehensive study examining the extent to which the treatment of modern slavery survivors in UK prisons is compatible with the international and domestic standards of protection enshrined in the European Convention on Human Rights (ECHR), the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), and relevant UK legislation. The

research coincided with the publication of Modern Slavery Guidance for foreign and British nationals located in adult prisons by His Majesty's Prison and Probation Service (HMPPS).⁵ This timing allowed researchers to gain initial insights into the operationalisation of the HMPPS Guidance and capture any changes and potential improvements in the treatment of modern slavery survivors in prisons already happening in practice.

The findings of this research are underpinned by the core premise that prisons, like all other public authorities, are bound by human rights obligations enshrined in international and domestic law.⁶ These obligations include protective duties towards everyone in their care including survivors of modern slavery. Guidance and policy developed by prison administrations in devolved jurisdictions are therefore expected to assist prisons in the UK to discharge these obligations. Still, as the research has found, even when such obligations are embedded in the existing guidance, there may be numerous challenges to discharging them at the practical level.

The article discusses the following issues pertaining to the role and responsibility of prisons for securing the

1. Modern slavery is used as an umbrella term throughout this report. It covers practices prohibited under Article 4 ECHR (slavery, servitude, forced and compulsory labour, and human trafficking) and is used interchangeably with human trafficking. This is an understanding expressly used in the Modern Slavery Act 2015.
2. University College London. (2023, 3-4 July). International Workshop on "The Labour and Social Security Rights of Captive Workers" - the papers of the workshop will be published in 2024. For practices in the US, see Hoffer, S. (2022, 2 February). *Involuntary Servitude: How Prison Labor Is Modern Day Slavery*. Harvard Political Review.
3. IOM has been working to combat human trafficking for over 25 years across the globe and has assisted over 100,000 victims. IOM UK has worked on human trafficking and modern slavery since 2011 through activities such as capacity building, research and data analysis and direct assistance to victims. Hibiscus was founded in 1986 to support marginalised migrant women trapped in the immigration and criminal justice systems to rebuild their lives. It provides welfare, advice, advocacy, volunteering and mentoring for women in prisons and reintegration assistance and practical and emotional support for people in detention and those released from immigration removal centres.
4. While this article focuses on providing insight into these specific themes, a more detailed and complete presentation of the overall findings of this research is available in the project report. See Jovanović, M., Burland, P., Topp, V. & Fluhr, F. (2023). *Tackling the blind spot of the UK anti-slavery regime – The role and responsibility of prisons in securing the rights of modern slavery survivors*. Modern Slavery and Human Rights Policy and Evidence Centre.
5. HMPPS (2023). *Modern Slavery Guidance for prisons in England and Wales*. Ministry of Justice.
6. United Nations Office of the High Commissioner for Human Rights (2005). *Human Rights and Prisons: Manual on Human Rights Training for Prison Officials*. New York.

rights of modern slavery survivors. Section I considers the prevalence of survivors of modern slavery in prison and reasons why they might end up there. Section II discusses the relevant legal and policy frameworks and human rights obligations of prisons, particularly under the ECHR. Section III elaborates on the key challenges in identifying and supporting survivors of modern slavery in prison arising out of the empirical research. Section IV subsequently questions the capacity of the HMPPS Guidance to tackle all the challenges facing prisons in protecting survivors of modern slavery in their custody. The article finally concludes (Section V) by reflecting on the question of whether the National Referral Mechanism (NRM; the UK's framework for identifying and supporting survivors of modern slavery) is the most suitable means of identifying and supporting those survivors in prison.

I. Prevalence of Modern Slavery Survivors in Prison

Survivors of modern slavery may end up in prison for different reasons. In some cases, there is a clear nexus between an individual's status as a survivor of modern slavery and their involvement in criminal offending, raising questions about whether their imprisonment is justified. Notably, cases of criminal exploitation — when a trafficked individual is compelled to commit criminal offences — was the second most frequently reported type of exploitation in the UK in 2022.⁷ In such cases, the non-punishment principle would apply, which means that these survivors of modern slavery should not be prosecuted and punished for their illegal conduct, as it has been committed as a direct consequence of the trafficking.⁸ Hence, these survivors of modern slavery should not be in prison in the first place. In other cases, there may not be a direct link between an individual's status as a

modern slavery survivor and the criminal offence committed and as such, culpability cannot be extinguished through the non-punishment principle.⁹ This means that there may well be cases where it can be justified to imprison survivors of modern slavery.

Regardless of the reasons why survivors of modern slavery are imprisoned, reports suggest that the presence of modern slavery survivors in UK prisons is not a rare phenomenon and deserves particular attention due to their vulnerability. There are no official figures on the number of modern slavery survivors currently in prison in the UK. However, despite the lack of available data and official statistics, the issue has already been acknowledged by key actors. For example, the importance of

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considering this group has been recognised by First Responder Organisations (FROs), who are authorised to refer potential modern slavery survivors to the National Referral Mechanism (NRM), and His Majesty's Inspectorate of Prisons in England and Wales.¹⁰ In addition, there have been legal challenges on the application of the non-punishment principle concerned with the imprisonment of modern slavery survivors.¹¹ Furthermore, several organisations, including the Council of Europe Group of Experts on Action against Trafficking in Human Beings

(GRETA),¹² identified examples of modern slavery survivors being imprisoned, usually in the context of the non-punishment principles.¹³ A request for judicial review submitted by the Anti Trafficking and Labour Exploitation Unit (ATLEU) in 2021 marked an important turning point in bringing attention to the protection of survivors of modern slavery in prison. Following this, HMPPS published the Modern Slavery Guidance for prisons in England and Wales in 2022, and introduced a Single Point of Contact (SPOC) for Modern Slavery model in every prison.¹⁴

7. Home Office (2023). *Official Statistics, Modern Slavery: National Referral Mechanism and Duty to Notify Statistics UK*. London.
8. Jovanović, M., & Niezna, M. (2023). *Non-Punishment of Victims/Survivors of Human Trafficking in Practice: A Case Study of the United Kingdom*. Council of Europe.
9. The non-punishment principle does not provide survivors of modern slavery with blanket immunity from prosecution and punishment. See footnote 8: Jovanović & Niezna (2023); ECtHR (2021). *VCL and AN v the United Kingdom*. Application nos 77587/12 and 74603/12.
10. See footnote 8: Jovanović & Niezna (2023).
11. Criminal Cases Review Commission. (2023, 27 June). *Modern Slavery Victim's Drug Conviction Quashed Following CCRC Referral*.
12. GRETA monitors compliance of the State Parties with ECAT.
13. GRETA (2016). *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Denmark, Second Evaluation Round*. Council of Europe.
14. Home Office (2024). *Modern Slavery: Statutory Guidance for England and Wales (under s 49 of the Modern Slavery Act 2015 and Non-Statutory Guidance for Scotland and Northern Ireland)*. London.

The research conducted for this project represented the first opportunity for the newly instated SPOCs to be consulted on their experiences and knowledge of survivors of modern slavery in prison, and share their views on the ongoing operationalisation of this new Guidance. Research participants, including SPOCs but also other stakeholders,¹⁵ echoed the sentiment that the true scale of this issue was likely larger than known.¹⁶ For example, 20 out of 50 SPOCs (40 per cent) who participated in a survey for this research were aware of at least one case of a prisoner with an NRM referral, and 33 (66 per cent) SPOCs said that there was a high likelihood of unidentified survivors of modern slavery being present in their prison.

Overall, the research identified a significant likelihood of underreporting on this issue due to numerous barriers to disclosure.¹⁷ In addition, the absence of systematic information sharing between authorities in charge of victim identification and prisons was observed to contribute to prison staff seemingly being unaware of a survivor's status, even when the individual had been referred to the NRM prior to being in prison.¹⁸ These challenges to victim identification, which is a precondition to their receipt of support, are discussed further in section III.

II. Legal and Policy Framework on Modern Slavery and Human Rights Obligations of Prisons

The nature and scope of the Human Rights obligations of States towards survivors of modern slavery

The UK's obligations towards modern slavery survivors stem from international and regional human rights law, notably the ECHR, which is part of the British law by virtue of the Human Rights Act 1998, and the ECAT.¹⁹ Under Article 4 ECHR and Article 10 (2) ECAT, States have an obligation to identify and protect all survivors of modern slavery, without exception and without discrimination. This obligation under human rights law is binding on all public authorities, including prisons, irrespective of the way States choose to organise their national mechanism for the identification and protection of survivors.²⁰ It is triggered by a 'credible suspicion' (reasonable grounds to believe) that a person is a victim of modern slavery.²¹ Notably, discharging this obligation does not depend on a victim's report — 'the authorities must act of their own motion once the matter has come to their attention.'²² However, if an individual does raise a claim of being a victim of modern slavery, the European Court of Human Rights (ECtHR) requires that such claims 'as a whole were taken seriously'.²³

The obligation to protect victims, or potential victims, is not unlimited. The appropriate measures required from national authorities must be within the scope of their powers and must not be interpreted to impose 'an impossible or disproportionate burden' on them.²⁴ Nevertheless, it must be acknowledged that Article 4 ECHR is one of the 'absolute' or unqualified rights in the Convention. This means that it does not allow for any limitations or balancing protections for reasons entailing broader public interest, and that it

15. Research participants included prison staff, but also other stakeholder groups including survivors of modern slavery who had previously been in prison, legal experts, and staff from First Responder Organisations (FROs) and support agencies.
16. Specifically, this was referenced in the SPOC Survey and Stakeholder Interview 12 (Forensic Psychologist, England), Stakeholder Interview 26 (HMPPS SPOC, England), and Stakeholder Interview 29 (HMPPS SPOC, England). For detailed findings of the SPOC survey see footnote 8, Jovanović & Niezna (2023).
17. Barriers to disclosure referenced by research participants included a lack of privacy in the prison environment, a sense of mistrust in authorities among survivors of modern slavery, and a lack of awareness among both prison staff and survivors themselves. These are explained in greater detail in the project report see footnote 8, Jovanović & Niezna (2023).
18. SPOC Survey and Stakeholder Interview 25 (Solicitor, England) and Stakeholder Interview 28 (HMPPS SPOC, Wales).
19. When explaining and elaborating the obligations imposed by Article 4 ECHR which prohibits slavery, servitude, forced labour, and human trafficking, the European Court of Human Rights (ECtHR) draws heavily on the provisions of ECAT. See ECtHR (2010, 7 January). *Rantsev v Cyprus and Russia*. Application No 25965/04 § 285; ECtHR (2017, 30 March). *Chowdury and Others v Greece*. Application No 21884/15 § 110; ECtHR (2017, 17 January). *J and Others v Austria*. Application No 58216/12 § 106.
20. Council of Europe (adopted 1950, entered into force 1953, 3 September; amended by Protocol 3, entered into force 1970, 21 September; Protocol 5, entered into force 1971, 20 December; Protocol 8, entered into force 1990, 1 January; Protocol 11, entered into force 1998, 1 November). European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) article 4; Council of Europe (adopted 2005, 16 May; entered into force 2008, 1 February). Convention on Action against Trafficking in Human Beings (ECAT), articles 10, 12, and 13. For a discussion of obligations arising out of the ECHR and ECAT respectively, see Jovanović, M. (2023). *State Responsibility for 'Modern Slavery' in Human Rights Law: A Right Not to Be Trafficked*. Oxford University Press; Jovanović, M. (2023). *Legal Analysis of the Human Rights Compatibility of the Modern Slavery Clauses in the Illegal Migration Bill* (Clauses 21-28). Modern Slavery Policy and Evidence Centre. See also footnote 9 (VCL and AN v United Kingdom, 2021) § 153; footnote 19, *Chowdury and Others v Greece* (2017) § 110.
21. ECtHR. (2022, 31 August). Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour. paras 60 and 69.
22. See footnote 21: ECtHR (2022); ECtHR. (2012, 13 November). *CN v the United Kingdom*. Application no 4239/08 § 69; footnote 19, *Chowdury and Others v Greece* (2017) § 116; footnote 19, *J and Others v Austria* (2017) § 107; ECtHR (2021, 7 October). *Zoletic and Others v Azerbaijan*, Application no 20116/12 § 185.
23. See footnote 19: *J and Others v Austria* (2017) § 110-111.
24. See footnote 22: *Zoletic and Others v Azerbaijan* (2021) § 188.

cannot be derogated from, even in times of emergency.²⁵

The non-punishment principle, which applies to survivors of modern slavery who have been compelled to commit criminal offences, is enshrined in Article 26 ECAT and is further reflected in a number of other international instruments, as well as in British law.²⁶ It requires States to provide for the possibility of not prosecuting or punishing victims of human trafficking for their involvement in unlawful activities when such an involvement had a 'relevant nexus' with their experience of being trafficked.²⁷ While this provision does not provide immunity from prosecution, punishment, or even imprisonment, sentencing survivors to prison does not disqualify them from simultaneously holding victim status and accessing the protection guaranteed to any survivor.

In other words, States must also protect survivors who have committed criminal offences because international obligations do not provide a basis for excluding such individuals from protection. The only situation when States would be justified in denying protection is when a person has claimed the survivor status illegitimately.²⁸

Modern slavery in UK law and policy

The UK has given effect to its international obligations pertaining to modern slavery through the Modern Slavery Act (MSA) 2015 that applies in England and Wales, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 (Northern Ireland), and the Human Trafficking and Exploitation Act 2015 (Scotland). These pieces of legislation are

accompanied by the Modern Slavery Statutory Guidance ('Statutory Guidance') on identifying and supporting victims of modern slavery for professionals and public authorities who may encounter potential victims, and/or who are involved in supporting them.²⁹ The Statutory Guidance has been continuously updated — with the most recent amended version dating from February 2024 — and represents a blueprint for the victim identification process in the UK.³⁰

One of the hallmarks of the UK modern slavery regime is the National Referral Mechanism (NRM) — a mechanism designed to identify and support survivors of modern slavery. Adult survivors identified through the NRM in England and Wales are entitled to

Government-funded support through the Modern Slavery Victim Care Contract (MSVCC). Such support includes accommodation, material assistance, financial support, translation and interpretation services, information and advice, as well as to access to legal aid for immigration advice, medical care and counselling, and assistance to return to their home country if they are not a UK national.

Referrals to the NRM are completed by one of the designated FROs which include all police forces, local authorities, specific charities and NGOs, and immigration authorities within the Home Office. At present, the prison services of England and

Wales, Scotland, and Northern Ireland are not FROs. The Statutory Guidance nonetheless stipulates that prisons 'have responsibility for identifying and supporting victims [of modern slavery] and raising awareness of this crime amongst prisoners/individuals in detention and staff'.³¹

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25. The term 'absolute rights' refers to rights contained in articles 2, 3, 4(1) and 7 of the ECHR. See: Jacobs, Ovey & White. (2017). *The European Convention on Human Rights* (7th edition, p. 219). Oxford University Press.

26. Section 45 of the Modern Slavery Act 2015; Human Trafficking and Exploitation (Scotland) Act 2015 s 8; Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 s 22.

27. For a discussion of what may constitute such relevant nexus between the victim's experience of trafficking and his or her offending which triggers the application of the principle see footnote 8, Jovanović & Niezna, 2023.

28. See footnote 21: ECAT article 13 (3); Council of Europe. (2005, 16 May). *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*. CETS 197. para 173.

29. See footnote 14: Home Office (2024).

30. There is further Guidance from the Crown Prosecution Service for public prosecutors in in England and Wales for situations where suspects in criminal cases are suspected of being victims of modern slavery. See Crown Prosecution Service. (2022, 6 July). Modern Slavery, Human Trafficking and Smuggling, Legal Guidance, International and Organised Crime. Similar guidance has been embedded in the Lord Advocate's instructions to prosecutors in Scotland and in the Policy for Prosecuting Cases of Modern Slavery and Human Trafficking in Northern Ireland. See Crown Office & Procurator Fiscal Service. (2021, 25 August). Lord Advocate's Instructions for Non-Prosecution of Victims of Human Trafficking. (2021, 25 August). See also Public Prosecution Service for Northern Ireland. (2022, 26 May). Policy for Prosecuting Cases of Modern Slavery and Human Trafficking.

31. See footnote 14: Home Office (2024) paragraphs 4.32, 8.5, 12.69, and 12.70.

Human rights obligations of prisons

The rights of prisoners have been discussed extensively by the ECtHR and other international bodies.^{32 33} The ECtHR has developed abundant case-law determining the nature and scope of prisoners' rights under the ECHR and the duties of domestic authorities regarding the treatment of prisoners. It has reminded States that imprisonment does not lead to a loss of the rights guaranteed under the ECHR and expressly ruled that 'persons in custody are in a vulnerable position and authorities have a duty to protect them'.^{34 35} Similarly, the Office of the UN High Commissioner for Human Rights published the Manual on Human Rights Training for prison officials, where it noted that: 'prison officials are at the forefront of human rights protection on a daily basis, experiencing them and putting them into practice; respecting them and enforcing their respect'.³⁶

Not only are prisons required to safeguard the human rights of prisoners, but it can be argued that prisons have a 'heightened duty of protection'.³⁷ Accordingly, the ECtHR has taken the stance that in certain cases, an imprisoned person may need enhanced protection due to the particular vulnerability of their situation, and because they are entirely under the responsibility of the State.³⁸ Notwithstanding this unequivocal position on the role of prisons in human rights protection, there has been little international guidance on how prisons ought to discharge obligations arising out of the prohibition of modern slavery. The ECtHR case law on Article 4 ECHR has focused solely on concerns related to labour exploitation and the rights of working prisoners, but there has been no discussion elaborating on positive obligations of prisons to identify and protect survivors of modern slavery.

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Despite that lacuna, there is little doubt that prisons as public authorities are bound by the entire spectrum of human rights obligations.³⁹ This means that positive obligations arising out of Article 4 ECHR, especially the obligation to identify and protect every victim of human trafficking and modern slavery, equally apply in a prison setting. A State's duty to protect modern slavery survivors, especially in prisons, can furthermore be derived from case law on Article 3 ECHR, which protects against torture, inhuman or degrading treatment, or punishment, and has been frequently invoked in the context of prisons. When it comes to obligations arising out of this right, the ECtHR noted that:

[I]t has been the Court's constant approach that Article 3 imposes on States a duty to protect the physical well-being of persons who find themselves in a vulnerable position by virtue of being within the control of the authorities, such as, for instance, detainees or conscripted servicemen.⁴⁰

Prisons are expressly bound by 'positive obligation to adequately secure the physical and psychological integrity and well-being of [prisoners]'.⁴¹ This is the ECtHR's consistent approach towards rights contained in Article 2 (right to life), Article 3 (prohibition of torture), and Article 4 (prohibition of slavery) which are considered to enshrine 'one of the basic values of the democratic societies making up the Council of Europe'.⁴² It is therefore beyond doubt that prisons have an obligation to identify and protect prisoners who are modern slavery survivors, or who are at risk of being subjected to human trafficking and exploitation.

32. See footnote 21: ECtHR (2022).

33. See also Hein van Kempen, P. (2008). Positive obligations to ensure the human rights of prisoners: Safety, healthcare, conjugal visits and the possibility of founding a family under the ICCPR, the ECHR, the ACHR and the AfChHPR. In P. Tak, & M. Jendly (Eds.), *Prison policy and prisoners' rights: The protection of prisoners' fundamental rights in international and domestic law*. Wolf Legal Publishers.

34. ECtHR. (2002, 12 March). *Paul and Audrey Edwards v United Kingdom*. Application No 46477/99 § 56.

35. See footnote 21: ECtHR (2022).

36. See footnote 6: UN OHCHR (2005), paragraph 11.

37. UN General Assembly. (2006, 5 September). *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*. UN Doc A/61/311. para 51.

38. ECtHR. (2010, 14 September). *Florea v Romania*. Application No 37186/03 § 50.

39. See footnote 6: UN OHCHR (2005), paragraph 24.

40. ECtHR. (2011, 20 June). *Premniny v Russia*. Application no 44973/04 § 73.

41. See footnote 4: *Premniny v Russia* (2011) § 90.

42. See footnote 19: *Rantsev v Cyprus and Russia* (2010) § 283.

Shifting awareness of the role of prisons in addressing modern slavery

Recent developments suggest that a more intentional inclusion of prisons in the regime designed for addressing modern slavery is beginning to take shape. For example, in its third evaluation report for the UK, GRETA expressly referred to prisons by noting that 'insufficient attention is being given to the issue of trafficking among the prison population', although it did not elaborate any further on what sufficient attention would entail.⁴³ The evaluation report also mentioned that 'prison officers are not First Responders and they need clear guidance and training in this respect'.⁴⁴ Still, the report failed to acknowledge that there is currently no international guidance on the adequate role of prisons in identifying and supporting victims or provide instruction on how responsibilities of prisons in the UK could be discharged.

In addition, GRETA's new questionnaire for the fourth evaluation round on the implementation of ECAT by the State Parties from June 2023, includes for the first time a direct reference to identification of modern slavery survivors in prisons. Question 23 of the questionnaire asks: 'What measures are taken in your country to identify victims of trafficking in human beings (THB) in immigration detention centres and prisons?'⁴⁵ It remains to be seen how GRETA will engage with provided answers and the extent to which its reports will offer guidance to States on developing the role of prisons in tackling modern slavery.

In addition to the absence of international guidance, comparative review of other domestic jurisdictions revealed that States generally do not provide specific instruction to prisons on how to identify and protect survivors of modern slavery nor do they publish data on their numbers. While there are efforts to identify and support survivors of modern slavery in immigration detention, national action plans to combat modern slavery and human trafficking in most jurisdictions do not address the identification or support of survivors of modern slavery in prisons. Exceptions identified are Italy, Austria, and the US which mention prisons in their anti-trafficking policies, although these are not comprehensive.⁴⁶ Accordingly, the 2022 HMPPS Modern Slavery Guidance for Prisons in England and Wales, and ongoing efforts to develop further overarching HMPPS guidance for Prisons,

Probation, and Youth Custody services in England and Wales, represent a unique and innovative attempt to address this issue in a comprehensive way.

III. Key Challenges in Identifying and Supporting Survivors of Modern Slavery in Prison

The HMPPS Modern Slavery Guidance is an important first step towards a greater recognition of the role of prisons in safeguarding the rights of survivors. In practice, however, its implementation may be impeded by resource and capacity constraints and the fact that the situation of unfreedom, inherent to the prison environment itself, can mimic the experience of modern slavery and may be detrimental to survivors' recovery from trauma.⁴⁷ The challenges prisons face in discharging their international obligations towards survivors of modern slavery emerging from research findings can be categorised along the key areas of identification of survivors in prison and subsequently the provision of adequate and timely support to survivors who are in prison.

Identification of modern slavery survivors in prison

Identification of survivors of modern slavery is a prerequisite for them accessing assistance and support guaranteed by international and domestic law. A major obstacle to identifying survivors of modern slavery in prison is an apparent lack of systematic information sharing between different actors involved in the NRM process and prisons. As a result, prisons are often left unaware of survivors in their care, even when an individual may have previously been identified. Several SPOCs reported cases in which they only became aware of an individual in their prison being a survivor when an NRM decision was received, or when a prisoner directly shared this information.⁴⁸ This is in stark contrast to the approach to information sharing taken for other safeguarding issues, for example regarding people with experience of care, or those with mental health concerns.⁴⁹

Beyond information sharing, survivor identification is further impaired by a frequent lack of awareness among prison staff about modern slavery indicators and avenues for making referrals. Additional challenges to identification are related to the prison environment

43. GRETA. (2021). *Evaluation Report United Kingdom, Third Evaluation Round, Access to Justice and Effective Remedies for Victims of Trafficking in Human Beings* (paragraph 172). Council of Europe.

44. See footnote 43: GRETA (2021), paragraph 265.

45. GRETA. (2023). *Questionnaire for the Evaluation of the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, Fourth Evaluation Round, Thematic Focus: Addressing Vulnerabilities to Trafficking in Human Beings*. Council of Europe.

46. For a more detailed analysis of comparative State practice see footnote 4, Jovanović et al. (2023).

47. Stakeholder Interviews 12 (Forensic Psychologist, England) and 25 (Solicitor, England); Survivor Interview 02.

48. SPOC Survey; Stakeholder Interviews 26, 28 and 43 (HMPPS SPOC, England) and 46 (NIPS, Northern Ireland).

49. Stakeholder Interview 37 (HMPPS SPOC, England).

itself, which inhibits survivors from disclosing their experience. For example, the lack of privacy in prison was mentioned as a reason why survivors did not feel comfortable disclosing their experience of modern slavery.⁵⁰ This is further exacerbated by a sense among some survivors — particularly those who had previous negative interactions with authorities in the criminal justice system — that even if they did disclose, they might not be believed.⁵¹

A statement of one research participant, a solicitor working with survivors of modern slavery in England, illustrates these concerns particularly well. Namely, they noted that the prison environment:

[I]s recreating the environment that survivors are regularly kept in — so it is particularly detrimental. In my experience, victims of trafficking are often suspicious of authorities, having been taught by their traffickers that if they're found by the authorities that they will be detained and removed, and that is then also happening. So it is actually putting into action the threats by their traffickers in the first instance, but also the detention context is particularly detrimental for our clients. It's recreating a lot of what they've gone through, and the evidence that we get regularly from medical practitioners is that survivors who have experienced abuse and trauma experience a profound loss of their sense of safety and security, and a reliably safe environment is a prerequisite for recovery. That really is the main part of how prisons re-traumatise survivors.⁵²

Provision of support and assistance to modern slavery survivors in prison

In addition to challenges concerning victim identification, a further challenge to protecting survivors of modern slavery in prisons concerns the

nature of support available in prison, compared with support available to survivors outside of prison. Namely, survivors in prison who receive a positive NRM decision are not entitled to receive support services available through the Home Office funded Modern Slavery Victim Care Contract (MSVCC) (managed by the Salvation Army and sub-contractors) while in custody. Instead, the HMPPS Modern Slavery Guidance states that 'where a potential or confirmed victim is within a prison, the existing services within the establishment will provide access to support services as required'.⁵³ These services, however, are often subject to resource constraints and not designed to meet the specific and unique needs of modern slavery survivors — an issue which becomes particularly apparent when considering

access to safe, secure, and appropriate accommodation and access to mental health support.

In the community setting, access to safe, secure, and appropriate accommodation, as required by Article 12 ECAT, is provided through the MSVCC. In the prison setting, accommodation is naturally provided by the prison establishment. The HMPPS Modern Slavery Guidance states that when considering the location of a survivor, prison staff should conduct a Cell Sharing Risk Assessment (CRSA) and 'consideration should be given to alternative accommodation such as a single cell if available, a

different location within the establishment, or a different prison if appropriate.' The HMPPS Guidance further stipulates that:

[P]rison staff should regularly check if victims of modern slavery are at risk of sharing accommodation or being in proximity to any alleged perpetrators of modern slavery in a sensitive manner, and be aware that victims may be reluctant to provide information about risks to them.⁵⁴

While the requirement to conduct a CRSA on its face meets the obligation from Article 12 ECAT, the ability of prisons to provide single-cells in practice

50. Stakeholder Interview 18 (NGO, England).

51. Survivor Interview 4; Stakeholder Interviews 26, 31, 32 (HMPPS SPOCs, England).

52. Stakeholder Interview 25 (Solicitor, England).

53. See footnote 5: HMPPS (2023); further, a three-page modern slavery guidance for prisoners produced by HMPPS explains that '[d]uring your time in prison, the existing services will provide you with access to support as you need it'.

54. See footnote 5: HMPPS (2023).

remains dependent on availability at a time when prisons are almost completely at full capacity.⁵⁵ Specific risks related to accommodation, notably the risk of further exploitation of survivors in prison, were highlighted by several research participants.⁵⁶

In addition to the challenges with providing adequate and safe accommodation in prison, the research findings point to the lack of specialised mental healthcare support. Survivors interviewed for this research, as well as organisations supporting survivors, pointed to the lack of a trauma informed approach and raised concerns that the support available could not adequately address the complex mental health needs stemming from experiences of exploitation.⁵⁷ It was further noted that those mental healthcare resources which do exist may be overburdened due to the high demand for such services among the general prison population.⁵⁸ In practice, this means that survivors may not be able to access the support to which they are entitled due to resource constraints in prison, the reality that existing services are not designed to meet the unique needs of modern slavery survivors, and the fact that availability of services varies greatly between different establishments.

These challenges are further exacerbated by the fact that as prisons are currently not themselves FROs, they are dependent on external FROs to make NRM referrals, who may too be lacking capacity and resources, leading to delays in the referral process. In light of these challenges, it is questionable whether the NRM is the most adequate mechanism for identifying and supporting modern slavery survivors in the prison context.

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IV. The HMPPS Modern Slavery Guidance: A Step in the Right Direction but Guaranteed Protection Must be Practical and Effective

As previously acknowledged, there is a noticeable absence of international guidance on how prisons should implement their obligations to identify and protect survivors of modern slavery. Against this backdrop, the recent HMPPS Modern Slavery Guidance for prisons in England and Wales represents a turning point in bringing attention to this issue and attempts to address many concerns identified in Section III.

For example, the Guidance makes several references to the same barriers to disclosure that also emerged from the findings of this empirical research, including trauma related reluctance to disclose, distrust of authorities, and coercion and fear.⁵⁹ It also stipulates that 'staff working in prisons should be professionally curious and alert to signs of modern slavery when engaging with prisoners' and provides a list of signs which may be indicative.⁶⁰ It further states that 'where modern slavery is suspected an authorised FRO makes a referral to the NRM' while noting also that 'as HMPPS is not a FRO, prisons should ensure that FROs are facilitated to complete referrals to the NRM'. Significantly, the Guidance

instructs prison staff to record 'all information, actions and referrals (...) on NOMIS case notes, and information shared between relevant prison departments as needed.' This is an important starting point towards more systematic information sharing within the prison system. In contrast, however, information sharing between different agencies within the criminal justice system seems to continue to be

55. Ministry of Justice (2023). *Prison Population Figures*. London. The prison population in July 2023 for England and Wales was 86,602. This was 99% of the total operational capacity of 87,573. In conversation with HMPPS leadership it was noted however that 'even though prisons are nearly full to capacity, most prisons are made up of single cells rather than doubles. If an individual is made a high cell share risk than they will be given priority to get a single cell. Usually there are many opportunities to move a low risk CSRA individual into a double cell to accommodate a high-risk individual who needs a single cell. The only time it wouldn't be possible would be if every single cell in the prison was accommodating high risk individuals which would be very unlikely.'

56. For further detail on the perception of research participants regarding the risks related to the provision of accommodation in prison, see footnote 4, Jovanović et al. (2023), pages 44-45.

57. Katona, C., Witkin, R., Robjant, K., & Shapcott, R. (2015). *Addressing Mental Health Needs in Survivors of Modern Slavery: A Critical Review and Research Agenda*. Helen Bamber Foundation and The Freedom Fund; Dang, M., Bradbury-Jones, C., Thomas, S., Rinaldi-Semione, J., Wright, N., Brotherton, V., Esiovwa, N., Barrow, J., & Johannes, K. (2023). *Placing survivors' wellbeing on the policy and evidence map*. Modern Slavery and Human Rights Policy and Evidence Centre.

58. Criminal Justice Joint Inspection. (2021). *Criminal justice system failing people with mental health issues – with not enough progress over the past 12 years*. London.

59. See footnote 5: HMPPS (2023).

60. See footnote 4, Jovanović et al. (2023), 'Good Practice' section which indeed identified that good practice in prisons around the issue of modern slavery was primarily *ad hoc* and stemming from the commitment and motivation of individual prison staff rather than being implemented in a systematic or institutionalised manner.

done on an ad hoc rather than systematic basis — inherently limiting the ability of prisons to be aware of and identify survivors in their care. It is clear, therefore, that the Guidance represents an important first step in addressing many of the challenges identified through this research.

It must be emphasised that while many provisions of the HMPPS Modern Slavery Guidance follow the letter and spirit of international human rights instruments, they have not yet been fully implemented in practice. This may in part be due to the fact that the Guidance is still relatively recent, and has not been fully operationalised across the prisons in England and Wales. For example, awareness and training sessions, as envisaged in the Guidance, need to be provided to all staff which takes time and requires continuous efforts. Nevertheless, certain challenges, including the lack of specialist support, result from more systematic and structural issues related to insufficient resources and the difficult nature of the prison environment for modern slavery survivors. This may result in a gap between the recognition that modern slavery survivors in prison are legally entitled to protection and specialised support, and the ability of prisons to actually provide such support in practice.

Without specially allocated resources, and facing significant pressures on the existing services due to overcrowding and resource and staff shortages, prisons are likely to be unable to meet the unique needs of survivors of modern slavery, whose vulnerability may be further exacerbated in the prison setting. This in turn risks undermining the commitment to universal and unconditional protection of survivors as enshrined in international law, neglecting a particularly vulnerable category of people, who are at risk of being subject to further exploitation.⁶¹ Therefore, unless these structural concerns are addressed, survivors in prison are likely to remain

unable to access the same level of support as those in the community setting.

V. Concluding Remarks: Is the NRM the Best Mechanism for Supporting the Survivors of Modern Slavery in Prisons?

It was noted previously that support available to survivors of modern slavery in prison falls outside of the auspices of the MSVCC. Coupled with the challenges of referring survivors to the NRM due to the fact that prison services are not a FRO, this raises the question of whether the NRM system should be considered as the most appropriate means for providing support to the survivors of modern slavery in prison. It is also important to emphasise that the NRM is a system based on consent, and that there are numerous reasons why a survivor in prison may choose not to consent to a referral. These could include, for example, fears to disclose their survivor status due to threats from people involved in trafficking, fears that an NRM referral could delay or otherwise negatively affect an ongoing asylum claim, or mistrust in the system due to previous negative experiences with authorities.

Furthermore, any efforts to strengthen the identification and provision of support to modern slavery survivors in prison through the NRM framework are undermined by recent legal developments, such as the passing of the Nationality and Borders Act (NABA) in 2022⁶² and the Illegal Migration Act (IMA) in 2023.⁶³ In particular, Section 63 (3) NABA originally provided that a non-British national whom the authorities suspect to be a survivor of modern slavery may be disqualified from protection on public order grounds if that person had received a custodial sentence of 12 months or longer. Section 29 of the IMA goes further by placing a duty on the competent authority (rather than a possibility) to disqualify such an

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61. Stakeholder Interview 18 (NGO, England); and United Kingdom. (2022, 6 July). *R (ATLEU and QW) v Secretary of State for Justice*. Claim Nos CO/3171/2021 and CO/3171/2022.

62. Nationality and Borders Act 2022 (2022 c. 36) (NABA).

63. Illegal Migration Act 2023 (2023 c. 37) (IMA).

individual from protection and now applies this ‘public order disqualification’ contained in Section 63 (3) NABA to those given a custodial sentence of any length. This is contrary to international law currently binding in the UK, which allows only a limited exception from protective obligations on public order grounds.⁶⁴ Such an exception must be narrowly interpreted, requires an individualised assessment, and the burden is on a State to prove the need for such a restriction in each individual case, instead of relying on a sweeping statutory provision.⁶⁵ It is difficult to predict how the new legislation will affect recent efforts within English and Welsh prisons to improve the identification and support of potential, or identified, victims of modern slavery.

Accordingly, even though the HMPPS Modern Slavery Guidance represents a crucial move towards developing a comprehensive and tailored approach to identifying and supporting survivors of modern slavery in prison, it fails to account for the exclusion from support of those who may fall outside of the formal NRM framework — either because they do not wish to be referred to the NRM or because they are not eligible for such referral due to being subject to public order disqualification. In addition, even for those whose survivor status has been formally recognised through the NRM, adequate and specialised support in prison may not be available because the Government funding allocated for such support does not currently extend to prisons. These findings suggest that the prison context calls for a unique approach to supporting survivors, which may require establishing a distinct *sui generis* system of protection in order for prisons to comply with international obligations — irrespective of the formal role of prisons within the NRM framework.

Whether or not such a *sui generis* system tailored to the prison environment could be a feasible approach requires further consideration and a particular focus on the role of prisons in protecting against re-victimisation, both within and outside prison establishments. In that context, despite numerous challenges related to identifying and supporting survivors in prisons, it has

been suggested that custodial settings could indeed be a place of refuge for them. Thus, a 2020 study by Hestia suggested that ‘in the absence of safe spaces, and in the face of new unknowns, victims are more likely to return to their exploiters’, which sometimes means that ‘rather than releasing suspected victims of criminal exploitation, it might be safer to place them in immigration detention or in custody.’⁶⁶ The study quotes a senior police officer saying:

It is an ironic form of safeguarding, that we have victims that we take into custody because it gives them a small amount of time in which to think, in which to disclose victim status while they're at a detention centre or prison. Then we can manage them effectively.

It may therefore be pertinent to explore further the idea of prisons as ‘safe houses’ and their role in protecting against further exploitation and re-victimisation. This responsibility would be in line with another express obligation established under international human rights law — a forward-looking obligation to prevent modern slavery (in addition to a backward-looking duty to identify and protect those who had already been subject to it). The HMPPS Modern Slavery Guidance already contains instructions concerning the bail, transfer, and release of prisoners, which take into account the need for advanced planning, coordination, and communication with support organisations in order to ensure continuous access to support and prevent re-trafficking.

These findings show that it is of critical importance to continue refining the HMPPS Modern Slavery Guidance for prisons in England and Wales, and develop similar guidance for prisons in Scotland and Northern Ireland, in order to build capacity of the prison staff across the UK to meet their obligations under the ECAT and ECHR. Such guidance should in particular specify the nature of, and way of accessing, support available to those who are not formally within the NRM system.

64. See footnote 20: ECAT article 13(3); footnote 21, Jovanović (2023); GRETA (2023). *Written Evidence Submitted to the Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill (IMB0024)*. Council of Europe.

65. Jovanović, M. (2024, forthcoming). *Is ‘Public Order Disqualification’ of Victims of Modern Slavery and Human Trafficking from Protections Guaranteed in Domestic and International Law Lawful? Legal Analysis of Section 63 of the Nationality and Borders Act 2022 and Modern Slavery Statutory Guidance*. Modern Slavery Policy and Evidence Centre.