Response to Reviewing and Authorising Continuing Segregation & Temporary Confinement in Special Accommodation - Amendment to Policy set out in PSO 1700

by Her Majesty's Chief Inspector of Prisons

Introduction

1. I welcome the opportunity to submit a response to the Amendment to Policy set out in PSO 1700 Reviewing and Authorising Continuing Segregation & Temporary Confinement in Special Accommodation.

2. Her Majesty's Inspectorate of Prisons (HMI Prisons) is an independent inspectorate whose duties are primarily set out in section 5A of the Prison Act 1952. HMI Prisons has a statutory duty to report on conditions for and treatment of those in prisons, young offender institutions (YOIs) and immigration detention facilities. HMI Prisons also inspects court custody, police custody and customs custody (jointly with HM Inspectorate of Constabulary), and secure training centres (with Ofsted).

3. HMI Prisons coordinates, and is a member of, the UK's National Preventive Mechanism (NPM) the body established in compliance with the UK government's obligations arising from its status as a party to the UN Optional Protocol to the Convention Against Torture (OPCAT). The NPM's primary focus is the prevention of torture and ill treatment in all places of detention. Article 19 (c) of the Protocol sets out the NPM's powers to submit proposals concerning existing or draft legislation.

General comments

4. The document contains a number of constructive proposals and in particular I welcome measures to improve governance of segregation. I would welcome further emphasis in the document on procedures for effective reintegration, to ensure due attention to the difficulties some prisoners may face returning to the main prison or other setting from segregation.

5. The new policy increases to six weeks, for adult prisoners, the length of time before segregation decisions need to be reviewed by someone outside of the prison. Given this and the increasing body of evidence about the harm often caused by isolation, the internal safeguards for reviewing segregation must be robust and invite challenge, including through the Independent Monitoring Board (IMB). HMI Prisons would expect the internal procedural safeguards to operate with a greater degree of rigour because of the increased length of time before decisions are escalated outside the institution. I encourage the National Offender Management Service (NOMS) to set out clearly in this document that all instances of segregation should be proportionate to the legitimate objective for which they are imposed, and for the shortest time necessary.

6. In line with international human rights standards[1] HMI Prisons would consider any prisoners physically isolated for more than 22 hours a day to be in solitary confinement, and where this lasts for more than 15 consecutive days, this would be considered prolonged solitary confinement).

7. The remainder of this response deals with specific points of policy and principle which arise in the text of the draft document.

Specific comments

8. Paragraph 2.4 - Composition of review boards

It is right that a Healthcare representative and/or member of the Mental Health In-Reach Team must be present. However, we often see representatives who are not clinically qualified attending reviews, with only a written report about the person.. It should be specified that this is *a healthcare professional with clinical competence to judge whether a person is, in health terms, fit to be segregated.*

I also suggest that, in view of the evidence of deterioration in mental health after 14 days, any SRB more than 14 days after initial segregation should be attended by a qualified mental health professional.

9. Paragraph 2.5 – Independence of decision-making

'The Chairperson at the 72 hour Board and the first 14-day Review Board must be a different person to the person who authorised initial segregation other than in exceptional circumstances. Exceptional circumstances might include where there is no other operational manager who is able to Chair the SRB within the timescales.'

The rotation of operational managers in segregation review boards may provide rigour and a fresh perspective on decisions, but I do not consider this to be a guarantee of 'independence'.

I consider the definition of 'exceptional circumstances' too broad. It should be clear that all efforts should be made for an operational manager different to the person who authorised initial segregation to attend a SRB. An operational manager with previously arranged commitments that would be inconvenient but not impossible to cancel or be absent from might consider him/herself 'unable' to chair the SRB according to the current wording, which sets the threshold too low.

10. *Paragraph 2.6*. The Offender Manager is specified as one person who should be at the SRB where appropriate. I recommend you consider adding the Offender Supervisor as an alternate, where the Offender Manager is unable to attend.

11. *Paragraph 2.7, 'The following must also attend SRBs for young people as appropriate'*. *'As appropriate'* gives a great deal of discretion to the Chair as to who is 'appropriate'. I suggest that the people mentioned should attend unless a) no one occupies this role for the young person in question or b) attendance is impossible, or c) attendance is judged inappropriate by a suitably qualified professional.

12. *Paragraph 2.9 – Timing of SRBs*

[1] United Nations Commission on Crime Prevention and Criminal Justice (2015), 'The Mandela Rules' (E/CN.15/2015/L.6/Rev.1),

'The purpose of this initial SRB is to determine whether or not the prisoner needs to remain segregated. The SRB must examine the initial reasons for segregation and make an assessment of the prisoner's behaviour since then; the risks the prisoner poses on normal location; the risks posed to the prisoner by others within the prison; his or her ability to cope with segregation and to set out a strategy for the future management of the prisoner with the aim of achieving his or her safe return to normal location as soon as is practicable.'

Segregation should be on the basis of risk – the recent judgment made this clear. 'His or her ability to cope with segregation' sounds like a subjective judgment, except insofar as it is already covered by the healthcare assessment. I suggest instead a reference to the risk of harm to the prisoner through continued segregation.

13. *Paragraph 2.11 – Subsequent SRBs*

'The SRB Chairperson may decide to review segregation before any 14 day period expires. More frequent reviews may be necessary depending on the circumstances of the case and particular attention should be given as to whether a review needs to take place prior to the expiration of the 14 day period in the case of vulnerable prisoners.'

This does not make clear whether anyone other than the SRB Chair can trigger an additional review, earlier than 14 days after the previous SRB. I suggest adding that an operational manager may determine at any time that a review is required because of changed circumstances or evidence of a change in risk.

14. *Paragraph 2.13 – IMB attendance at SRBs*

It is important that the role of the IMB, as the only independent member of the review board able to provide scrutiny and challenge from an independent viewpoint, is given priority, and its significance emphasised. It is to be welcomed that 14-day reviews must be scheduled for when an IMB member can attend. I recognise the pressure which this time-limited requirement places on the IMB as well as the prison, especially in some establishments where they are short of members. NOMS cannot of course place any obligations on IMBs; but governors should develop good collaborative working with IMBs in order to make it possible for SRBs to take place with an IMB member present.

15. *Paragraph 2.14 – Prisoner attendance at SRBs*

'Any communication difficulties which may be associated with learning disability or a specific learning difficulty or limited English should be taken into account throughout and appropriate support provided.'

I suggest that provision of professional interpretation should be required where it is not clear that the prisoner has a sufficient grasp of English to understand what is said and to make their own representations.

16. *Paragraph 2.15 – Prisoner attendance at SRBs*

'Prisoners may only be completely excluded from attending an SRB where specific safety concerns exist (e.g. where there are concerns that the prisoner may be violent towards the Board). In such circumstances, the prisoner must be given the opportunity to make representations to the SRB in some other way such as through a member of staff or in writing using the form OT029 at Annex D3.'

The presence of any concerns that the prisoner may be violent is too high a bar. In some cases, as in adjudication, there is a risk of violence which is manageable by placing officers near to the prisoner. The present wording creates a presumption of non-attendance if there

is any risk of violence. I suggest that the reference should be to evidence of a risk of violence which is not likely to be containable by provision of a staff escort.

17. *Paragraph 2.19, with 2.29-33 – Role of the IMB*

    'Where the IMB member cannot attend the SRB and cannot dial into teleconference facilities, then they must be afforded the facility to review the segregation paperwork and provide their views to the governor or Chairperson who authorised the decision to segregate when they are next in the establishment'

    This gives a very limited role to the IMB member. I suggest adding that if the IMB member reviewing the papers believes after discussion with the SRB chair that there is clear evidence of an unreasonable decision, the Chair of the IMB may request a further review at the earliest opportunity, with an IMB member present.

    Paragraph 2.29 begins: 'Where the IMB member has a concern that the proper process has not been followed or that the decision is irrational in the light of information available to the SRB ...'

    This appears to refer to an SRB where an IMB member has been present. If it also refers to cases where an IMB only reviewed the paperwork after the SRB, that should be made clear (it would make our suggested change to 2.19 unnecessary).

    Paragraph 2.30 moves from '*the IMB member'* to '*the IMB's objections'* in 2.31. If the objections in question are to be taken as the view of the IMB as a body, it may be helpful for the original IMB objection to be countersigned by the Chair of the IMB; although this is a matter for the IMBs.

    The use of the word 'irrational' here contrasts with PSO 1700 (section 6), which provides that the role of the IMB is to 'to be satisfied that a reasonable decision has been reached by the Review Board'. This is defined as reasons which are 'rational and understandable'. For consistency, I suggest using the word 'reasonable'.

18. *Paragraph 2.20* – I welcome the list of principles for clear language in explaining the justification of segregation to the prisons.

19. *Paragraph 2.22: 'If, on medical or psychiatric grounds, it is felt necessary to withhold information where the mental and or physical health of the prisoner could be impaired […]'*. This does not specify who can judge the validity of such grounds. I suggest expanding to 'on medical or psychiatric grounds certified by a suitably qualified professional'.

20. *Paragraph 2.22*: '*where the source of the information is a victim, and disclosure without their consent would breach any duty of confidence owed to that victim, or would generally prejudice the future supply of such information*.' The word 'generally' invites over-broad interpretation of this ground for withholding information. Omitting the word 'generally' would be an improvement.

21. *Paragraph 2.25 – Caring for Prisoners Segregated*

    I suggest that it would be helpful, and more conducive to defensible practice, that there should be some description of what, in general terms, can be considered an adequate range of monitoring, support and intervention measures to provide suitable care for those in segregation. In particular, the response to signs of deteriorating mental health or raised risk of self harm should include not merely placing on an ACCT, but a review of segregation – bringing the SRB forward, in effect – to determine whether in this new situation, exceptional circumstances justify continued segregation (see Annex C.3)

It should be made explicit in paragraph 2.25 that prisoners on ACCT should only be segregated under exceptional circumstances, with an explanation of the meaning of the term 'exceptional circumstances'. HMI Prisons inspection evidence over many years underscores the importance of emphasising that only exceptional circumstances can justify a prisoner on an ACCT being segregated.

22. *Paragraph 2.26 – Segregation for more than 30 days*

'Prisoners segregated for a continuous period of more than 30 days must have a care plan completed detailing how their mental well being is to be supported.'

Paragraph 2.3 says that 'Evidence suggests that 14 days is the point that some prisoners may start to suffer adverse effects of segregation'. I suggest that 14 days, not 30, should accordingly be the trigger date for a care plan. (This also applies to Annex C. 2)

23. Paragraph 2.28 – Appeals

Although there may be no formal appeal process in statute, segregation is such a severe measure that reliance on the relatively long-drawn-out complaints process alone may be less than just. An operational manager carries out a 'governor's round' each day, speaking with each prisoner. It is legitimate that a prisoner should be able to challenge the reasons for their segregation during that conversation, and that the operational manager should have a duty to verify whether the prisoner has, for example, provided any new evidence not considered in the initial decision to segregate or at the SRB. A check of the paperwork will normally suffice, but if the operational manager is in any doubt, there should be a process for re-examining the matter.

24. Paragraph 2.35 – Monitoring of the use of segregation

Rule 45 data should be analysed separately for good order or discipline on the one hand, and own interest on the other hand, as well as in aggregate. Further, the number of prisoners segregated on Rule 53/58 should be analysed. HMI Prisons inspections often find many prisoners segregated, pending adjudication who return to normal location after the adjudication hearing. Scrutiny of the legitimacy of use of this form of short-term segregation is necessary as well as for longer periods.

25. *Paragraph 2.37 – Monitoring the use of segregation*

'The monitoring of use of segregation is required to 'identify and investigate trends, for example, where the segregation of BAME prisoners is disproportionate to their representation in the general prison's population'

This statement is positive and could be further strengthened if the analysis focused on those with protected characteristics, for example where the segregation of BAME prisoners is disproportionate. A similar point applies to Annex E, on contents of the SMARG report.

'identify individual prisoners whose cases may need scrutiny. For example, prisoners who have spent more than 3 months in continuous segregation; prisoners who may have spent relatively short, but frequent periods in segregation; prisoners in the segregation unit on an open ACCT or in ACCT post-closure phase; prisoners segregated despite medical recommendations to the contrary.'

This is a very useful set of requirements for scrutiny of individual cases. I would also suggest that the SMARG data includes the number segregated on Rule 53/58 as there tends to be little scrutiny of initial segregation; we often find high numbers on 53/58 who do not end up being segregated after the adjudication.

26. *Paragraph 3.3 – Prisoner transfers*: This commitment is very welcome, as data has not previously been collated about the small minority of prisoners segregated for lengthy continuous periods in successive establishments, and clarity on this matter will enable appropriate action to be taken.

27. *Paragraph 4.1 – Provisions for children aged 15-17*

    The provisions for children are identical in all key respects to those for adults, except that the respective timescales are halved. I would strongly suggest that this presupposes treatment of children as smaller adults; and that a separate approach to the removal from association of children would be appropriate, drawing on professional perspectives on the specific risks and needs in relation to children. Principles of good practice could be drawn, for example, from better practice in some Secure Training Centres and Secure Children's Homes.

    The developmental needs of children, as well as general issues of health and well-being, are different and likely to be harmed by isolation; for example, in a recent inspection a senior health professional from CQC was very concerned about the potential consequences of vitamin D deficiency in separated children. The evidence considered at the DDC Review, for example (4.6) should include monitoring of their access to the full range of entitlements of exercise and education.

    In particular, I suggest that consideration be given to requiring authorisation from a senior manager, external to the establishment, after 10 days rather than 21 days. I note that the amendments to the Prison and YOI Rules laid before Parliament on 3rd September 2015 make authorisation by the Secretary of State a legal requirement only after 42 days, and I hope that consideration will be given to making the YOI Rules consistent with the lower threshold in this guidance and which I propose. I also consider reintegration planning from the start to be essential, in the exceptional cases where children need to be segregated.

28. *Paragraph* 5.2 – *Special Accommodation*

    'Non-compliance is not, in itself, sufficient to justify Special Accommodation unless that non-compliance represents an immediate and serious risk of harm to the prisoner themselves, to others, to property or to the good order of the establishment.'

    The paragraph twice refers to 'the good order of the establishment'. This statement requires clarification as if a prisoner is shouting loudly in a way that hinders or presents a risk to the good order of the establishment, I do not consider this sufficient reason to place the person in special accommodation. It is not clear why 'the good order of the establishment, without violent or refractory behaviour, is sufficient to justify Temporary Confinement under this Rule.

    On its own, risk of harm to self should not result in use of special accommodation – instead it should be an absolute last resort.

29. *Annex C. 1 (a) – The initial reason for segregation*

    'The initial reason for the prisoner being segregated is an important element of defining what behaviour/attitudes need to be addressed before the prisoner may return to normal accommodation.'

    The initial segregation may arise from other factors than the person's own behaviour or attitudes, for example segregation in the prisoner's own interest. This consideration applies at other points in this Annex.

30. *Annex C. I (d)*: *"not raising voice at any person for the next 7 days"*: The significance of a raised voice varies with culture, personality and situation. It might be preferable to replace with a less problematic example, such as not causing any damage to property for the next 7 days.

31. *Annex C. 1 (e) – Rewards or incentives to be awarded or removed*

    "The Review Board may feel that the prisoner has failed to meet or make any effort to meet the targets set at the last review. In such cases, the Board may decide to remove privileges or elements of the segregation regime that the prisoner currently has."

    This amounts to a punishment for not complying. Punishments should not be given by the SRB, but by an adjudication, while any reduction of privileges should be under a properly regulated IEP scheme, without which it would be arbitrary. Arbitrary removal of privileges as a motivating factor is not acceptable. This does not preclude instances in which access to certain things may be withdrawn at any time on the basis of evidenced risk.

    "A decision to remove a radio should be given careful consideration and should not be taken lightly. Further consideration should be given to the period of time the radio is removed and any changes in the behaviour/mental health the removal may have on the prisoner."

    Even prisoners on basic regime are permitted a radio; so that if a radio is removed from a segregated prisoner it takes their regime below the level of a basic regime. Because of the severity of this decision to remove, or delay replacement of a radio, that decision should be made by an appropriately senior manager within the establishment such as duty governor/duty director. The reasons should be recorded, and the decision kept under review.

32. I hope that you find this information useful and should you require anything further, please do not hesitate to contact me.

Nick Hardwick 29 October 2015
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