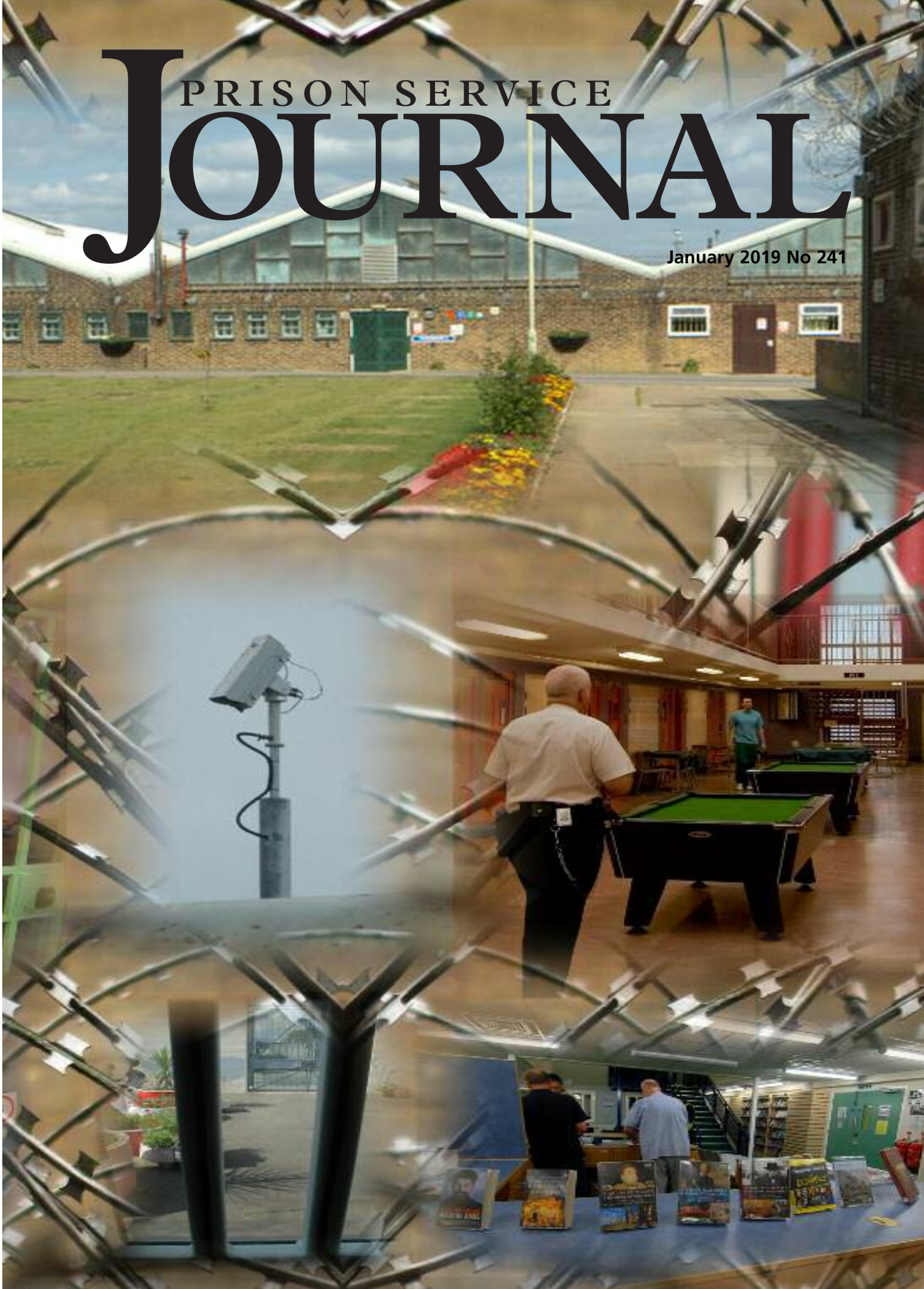

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Prison 'rules' and the use of restraints on terminally ill prisoners[1]

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Introduction

This article will consider how prison 'rules' help staff address particular concerns about the appropriate use of restraints on terminally ill prisoners during hospital escorts. The issue is particularly pressing given that in recent years the rate of deaths in prison custody resulting from natural causes has increased steadily, from 1.11 per 1,000 prisoners in 2007 to 2.15 per 1,000 in 2017, when 62 per cent of the 295 prisoner deaths were established to be from natural causes.[2] In both 2016 and 2017, 61 per cent of these deaths occurred in hospitals, hospices or nursing homes outside of the prison,[3] in situations where decisions about the use of restraints are required. Getting the decisions right for terminally ill prisoners is a matter of decency, but it is also subject to scrutiny, especially in light of the 2007 High Court ruling known as the Graham judgement. More than ten years on, the Prison and Probation Ombudsman continues to be critical of the misapplication of restraints on prisoners who have subsequently died. This article will seek to explain why the guidance and instructions given to prison staff in the relevant Prison Service Instruction may actually serve to confuse the decision-making process with regard to the use of restraints.

Difficulties in comprehending what is required in a given situation are not unusual within the prison service, as Loucks (2000) indicates:

> *Regulations governing the minutiae of prison life often represent an impenetrable bureaucracy. In order to uncover management policy, one has to unravel layers of rules upon rules (p6)*[4]

The sheer bulk of rules and regulations governing prison life leads Liebling and Maruna (2005) to observe with regard to prisoners that 'it is difficult to know all the rules, much less comply with them' (p105).[5] Arguably the same could be said for prison officers and other prison staff. The rules, regulations and guidelines in place within the prison service, Liebling and Maruna (2005) argue, require subjective interpretation, with the use of staff discretion leading to inconsistencies and arbitrariness in how rules are implemented. Liebling, Price and Shefer (2011) suggest that discretion has become an intrinsic part of a prison officer's role as a result of a 'never-ending flow' of regulations (p138).[6]

Prison and Probation Ombudsman on the Use of Restraints

In his 2013 publication, Learning from PPO Investigations—End of Life Care,[7] the Prison and Probation Ombudsman identifies a number of challenges presented to prisons by deaths from natural causes. These include the difficulties originating in prison architecture that is often ill-suited to the needs of frail prisoners, the importance of establishing an end of life care plan when a diagnosis is terminal, the need to facilitate the involvement of prisoners' families where appropriate, the requirements for timely applications for compassionate release when desirable, and the importance of risk assessments in decisions about the use of restraints (PPO, 2013).

Whilst not all deaths from natural causes are predictable, a terminally or seriously ill prisoner may need to be taken to outside hospital, as an out-patient or in-patient, several times in the weeks or months preceding their death. The use of handcuffs, escort chains or, very exceptionally, body belts, is routinely reviewed by the Prison and Probation Ombudsman

1. This paper is based on analysis conducted as part of an ongoing PhD using ethnographic methods to look at how deaths from natural causes in prisons impact on prison regimes, culture and relationship and how the responses of prison regimes and personnel to dying prisoners are determined.
2. Ministry of Justice (2017). *Deaths in prison custody 1978 to 2018*. [Online]. Ministry of Justice, UK. Available at https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-march-2018 [Accessed 14 September 2018].
3. Ibid.
4. Loucks, N. (2000). *Prison Rules: a working guide*. London: Prison Reform Trust.
5. Liebling, A. and Maruna, S. (2005) *The effects of imprisonment.* Cullompton: Willan.
6. Liebling, A., Price, D. and Shefer, G. (2011) *The prison officer.* 2nd edn. Cullompton: Willan.
7. Prison and Probation Ombudsman for England and Wales (2013). *Learning from PPO Investigations End of Life Care.* London: Prison and Probation Ombudsman.

after a death. The long-term difficulties experienced by prisons in complying with the requirements are apparent in the PPOs report, where the ombudsman says:

> *While a prison's first duty is to protect the public, too often restraints are used in a disproportionate, inappropriate and sometimes inhumane way.*[8]

In reviewing 214 foreseeable deaths from natural causes between 2007 and 2012, the PPO highlights that in 20 out of 170 cases where restraints were considered, no risk assessment was conducted, and in 30 out of 158 cases risk assessments were not subsequently reviewed. The PPO is referring to deaths from natural causes in prison that occurred after the 2007 Graham judgment and these cases illustrate a failure of the prison service, in the opinion of the PPO, to fulfil the requirements placed on them by that judgment. The report, whilst being the most recent summary from the PPO on the issue, is now dated. However, many prisons will be familiar with the recommendation which continues to appear regularly in PPO reports published following deaths, to the effect that in the future:

> *The Governor and Head of Healthcare should ensure that all staff undertaking risk assessments for prisoners taken to hospital understand the legal position on the use of restraints and that assessments fully take into account the health of a prisoner and are based on the actual risk the prisoner presents at the time.* (PPO)[9]

Taking a small but more current sample, of the 61 deaths that occurred in the first 6 months of 2017 for which the PPO had published reports by September 2018 this paragraph appears in the reports for two fifths of the cases (25 instances). There were fewer cases, only 8, where the PPO stated they were satisfied that the use of restraints was appropriate.

R (on the application of Graham and another) - v - Secretary of State for Justice

More than ten years on from the Graham judgment, it is perhaps surprising that prison governors and directors are still struggling to implement the judge's findings. The case, R (on the application of Graham and another) v Secretary of State for Justice,[10] was taken by two prisoners who were handcuffed for out-patient and in-patient hospital treatment. It considered whether the use of restraints was an infringement of article 3 of the European Convention on Human Rights which states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment'.[11] In his judgment, Judge Mitting found that:

> *The unnecessary use of handcuffs on a prisoner who is receiving treatment, whether as an in-patient or an out-patient, at a civilian hospital is capable of infringing art 3 in two respects: either because it is inhuman or because it is degrading, or both. The use of handcuffs to guard against an adequately founded risk of escape or of harm to the public in the event of escape does not infringe art 3.*

While a prison's first duty is to protect the public, too often restraints are used in a disproportionate, inappropriate and sometimes inhumane way.

Key to his judgement was the notion that restraints should only be used if the risk of escape, or of harm to the public occurring if the prisoner did escape, had been adequately assessed and was well founded. It is the routine use of handcuffing, without an assessment of individual risk, which the judge found likely to be unlawful. Whilst recognising that 'these are matters of fine judgement', the judgment suggests that the assessment should include:

> *the crime for which the prisoner has been sentenced; his previous history of offending; his category as a prisoner; his prison record; his fitness; in appropriate cases, information*

8. Prison and Probation Ombudsman for England and Wales (2013). *Learning from PPO Investigations End of Life Care*. London: Prison and Probation Ombudsman. p5.
9. This paragraph appears in various PPO fatal incident reports. Prison and Probation Ombudsman (2017, 2018). *Fatal Incident reports.* [Online]. Prison and Probation Ombudsman, UK. Available at: https://www.ppo.gov.uk/document/fii-report/ [Accessed 18 September 2018].
10. *R (on the application of Graham) v Secretary of State for Justice* [2007] All ER (D) 383.
11. Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13*. [Online] European Court of Human Rights, France. Available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf [Accessed 17 November 2017].

about the ability or willingness of others to facilitate his escape, and no doubt many other factors.

These criteria, and others, are now found in section 6.7 of Prison Service Instruction 33/2015,[12] discussed below. With regard to situations where it would be impossible for the prisoner to escape, the judge found that handcuffing him would be unlawful and a breach of article 3 of the ECHR:

A dying prisoner, properly assessed as posing a risk of escape when fit, and a risk of violence to the public were he to escape, could properly contend that handcuffing him during his dying hours was nonetheless an infringement of his right not to be treated inhumanely or in a degrading manner.

The implementation of the Graham Judgement

R (Graham) v Secretary of State for Justice is referred to in a key Prison Service Instruction: PSI 33/2015, which is concerned with arrangements for external escorts. In the Executive Summary to this, it is stated that the Prison Service Instruction (PSI) 'incorporates clarifications and updates to policy introduced by way of the following documents' amongst which is listed the note from the Head of Security Group to Governing Governors about the Graham judgment, issued on 14 April 2014.[13] The intention of this PSI is clearly to ensure the more appropriate use of restraints on seriously and terminally ill prisoners, in line with the Graham judgment. A review of this document, however, highlights one potential explanation why prisons continue to be criticised in PPO reports after a death from natural causes for the inappropriate use of restraints. It is clear that contradictions exist within the document, specifically between what is mandatory (usually indicated in PSIs by italic text, or highlighted in a shaded box) and what is merely advisory, guidance or examples of good practice.

The intention of this PSI is clearly to ensure the more appropriate use of restraints on seriously and terminally ill prisoner, in line with the Graham judgment.

PSI 33/2015—the presumption of the use of restraints

With regard to risk assessments and the use of restraints on terminally and seriously ill prisoners who are not Category A, PSI 33/2015 mandates that the prison's management is responsible for ensuring a risk assessment is completed to determine whether to use restraints on an escort, including in an emergency.[14] However, the likely outcome of any risk assessment is pre-empted elsewhere in the PSI, including in the next paragraph,[15] which makes it compulsory that:

under normal circumstances, all external escorts will comprise at least two officers and the prisoner will have restraints applied. This also applies to Category D/open prisoners on external escort in circumstances where ROTL is deemed inappropriate.

The following paragraph[16] makes it mandatory for a risk assessment to indicate what type of handcuffing is required, but does not suggest the option of no handcuffs being used. The use of restraints is further established as the 'norm' in this paragraph in non-italicised text which states that 'normal practice is for male Category B and E-List prisoners to be double cuffed while on escort'.[17] Similarly, non-italicised text later in this PSI[18] says that 'the minimum standard escort strength is two officers or more, with restraints applied to the prisoner in all but exceptional circumstances'. The assumption demonstrated by these paragraphs, both mandatory and advisory, is that a risk assessment will always find the use of restraints to be appropriate. There is no clear definition of what constitutes 'normal' or whether this includes terminally and seriously ill prisoners.

There are some exceptions to 'normal' that are made explicit. In the same PSI, it is mandatory to have personal approval from HMPPS Chief Executive before handcuffing a tetraplegic or paraplegic prisoner,[19]

12. NOMS Agency Management Board (2015). *National Security Framework, External Escorts – NSF, External Prisoner Movement, Reference PSI 33/2015.* [Online]. Ministry of Justice, UK. Available at: https://www.justice.gov.uk/offenders/psis/prison-service-instructions-2015. [Accessed 17 November 2017].
13. Ibid, 1.2.
14. PSI 33/2015, Paragraph 5.3.
15. Ibid, 5.4.
16. Ibid, 5.5.
17. Ibid, 5.5.
18. Ibid, 6.5.
19. Ibid, 5.6.

suggesting that this should be exceptional rather than routine. Other possible circumstances where handcuffs will not normally be used are given, in non-italicised text, in the next paragraph and include transfer to open prisons and when prisoner's mobility is 'severely limited, for example due to advanced age or disability unless there are grounds for believing that an escape attempt may be made with external assistance'.[20] However, there is no specific mention of the circumstances of a prisoner at the end of life. Any suggested or mandatory exceptions are qualified by the following paragraph, which is mandatory and reminds the reader of the importance of risk assessments in these cases:

> *the relevant circumstances must be fully addressed in the risk assessment and the officer in charge must make a written report to the Governor on return to the prison if it was necessary to use handcuffs on the prisoner and set out why the handcuffs were used.* [21]

There is more clarity around life-threatening situations, where two paragraphs[22] make it mandatory for restraints to be removed immediately and the duty governor informed as soon as possible afterwards. Examples are given, in italics, of circumstances such as an emergency necessitating the use of defibrillation equipment, where escorting staff are mandated to comply with medical professional's requests for restraints to be removed. In such circumstances, it is stated[23] that restraints 'must be re-applied as soon as it is clinically safe and reasonable to do so' and elsewhere, in non-italic text, there is a reminder that the responsibility for the removal of restraints when requested on medical grounds remains with the prison.[24] Further italicised text[25] deals with emergency admissions, stating that risk assessment can be delayed but must be completed within 24 hours, but again making a presumption in favour of the use of restraints, specifying that in the interim 'restraints must be used unless there are medical objections from a qualified medical professional.'[26] These provisions suggest that expected hospital admittances are 'normal' circumstances in terms of the earlier paragraphs[27] where the use of restraints is presumed.

PSI 33/2015—the presumption of individual risk assessments

In contrast, PSI 33/2105 also includes three paragraphs[28] which use italics to indicate that risk assessments are mandatory for the use of restraints. These paragraphs are in a section dealing explicitly with hospital escorts. Paragraph 6.11 requires that risk assessments are reviewed regularly, in light of changes to the prisoner's condition or physical surroundings, and that escorting staff must bring such changes to the attention of prison management as soon as possible. Paragraph 6.17 states that 'decisions reached must be proportionate to the risks posed in individual cases and supported by fully completed risk assessment documentation'. This is amplified by paragraph 6.18, which mandates that medical opinion should be part of the assessment process and that staff undertaking the risk assessment must ensure that:

- The restraint by handcuffs of a prisoner receiving chemotherapy, or any other life saving treatment, must be justified by documented security considerations.[29]
- Each decision must be properly considered, taking account of all relevant information, and be proportionate to the risks involved.
- A fresh risk assessment must be conducted for each escort and when/if the prisoner's condition changes in order to establish: the level of restraints to be used during transportation to and from the hospital, and; the level of restraints to be used during the prisoner's stay in hospital including consideration of the withdrawal of restraints altogether where lifesaving treatment is being administered, taking into account information supplied by healthcare professionals; the circumstance under which close family and relatives may be allowed to visit the prisoner.

This latter provision of the PSI is clearly in keeping with the Graham judgment, and if followed could be expected to be deemed by the PPO in their review of the case to have led to the appropriate use of restraints on a prisoner who has subsequently died. Its clarity is, however, weakened by the paragraphs[30] discussed in

20. Ibid, 5.7.
21. Ibid, 5.8.
22. Ibid, 5.9 and 6.14.
23. Ibid, 5.9.
24. Ibid, 6.14.
25. Ibid, 5.12 and 6.5.
26. Ibid, 5.12.
27. Ibid, 5.4 and 5.5.
28. Ibid, 6.11, 6.17 and 6.18.
29. The specific inclusion of chemotherapy in this paragraph may reflect the references to this particular treatment in the Graham judgement, where one of the claimants was a prisoner who had received chemotherapy.
30. Ibid 5.4 and 5.5.

the previous section which imply that the use of restraints will be the 'norm', without emphasising the requirement for an individual and dynamic risk assessment in all cases. The underlying message of the Graham judgment is further obscured by text in parts of paragraph 6.17 and 6.18 not being in italic font, specifically that in paragraph 6.17 which recognises the sensitivity of the circumstances around a hospital escort for a prisoner diagnosed as seriously or terminally ill:

> *Such circumstances require sensitive handling to ensure that the needs of security are balanced against the clinical needs of the prisoner*

and that in 6.18 which states there is a:

> *need to make a distinction between the risk of escape and the risk of harm to the public posed by a prisoner when fit, and those risks posed by the same prisoner when suffering from a serious medical condition.*

Were these provision to be mandatory, they would arguably enhance the PSI's compliance with the Graham judgment.

Conclusion

Reviewing the relevant PSI in this way makes apparent the difficulties prison staff face when basing decisions about the use of restraints on terminally and seriously ill prisoners on the instructions and advice this document provides. PSI 33/2015 contains inconsistencies and mandatory actions that could lead to contravening the Graham judgment. It is striking that in a presentation at a recent conference, the Deputy Ombudsman reported that high security prisons were performing better than other prisons with regard to the appropriate use of restraints on terminally and seriously ill prisoners.[31] He attributed this to them having conducted internal reviews of their own procedures and ensured that input from healthcare staff as to the condition and escape risk of the prisoner is included in risk assessments. In contrast he gave as an example of poor practice the case of a Category C prison where restraints were used on an 80 year old lower limb amputee who was in a wheelchair and required treatment at an outside hospital.

There are of course other possible explanations as to why high security prisons are performing better, in the opinion of the ombudsman, with regard to the appropriate use of restraints. Firstly, separate guidance exists for the use of restraints on Category A prisoners,[32] meaning that staff working in these settings are less reliant on PSI 33/2015, even when considering the use of restraints for other categories of prisoners receiving medical treatment outside the establishment. Secondly, a disproportionate number of deaths from natural causes occur amongst prisoners in high security establishments (13.2 per cent of deaths from natural causes in 2012 to 2016, compared with approximately 7 per cent of the prison population).[33] Put simply, high security prisons are getting more practice, and receiving more feedback from the PPO, on the use of restraints on terminally ill prisoners. Thirdly, as part of an ongoing study,[34] examples of how high security estate prisons have changed practice have been found. This has included a security department in a high security and long-term prison working with their healthcare colleagues to ensure that the medical staff know what restraints look like, and so can make better informed contributions to the risk assessments for escorts to external hospital. It has also involved the development of new written protocols, following criticism from the PPO in specific cases, to ensure adequate individual risk assessments always occur.

A case could be made for revising PSI 33/2015 to remove ambiguity and improve compliance with the Graham judgment. However, further research is necessary to assess to what extent prison staff actually use these documents when making such decisions. Being less reliant on the PSIs, for example through initiatives in some prisons to review practice, establish clear in-house protocols and ensure informed input from prison healthcare staff, may already be assisting better decision-making with regard to the use of restraints than reliance on PSI 33/2015. As yet, the extent to which this is happening is purely anecdotal and revealed only through the PPO investigations which follow a death in prison custody from natural causes.

31. Pickering, P. (2017). Investigation of Deaths in Custody – Trends and Themes. Unpublished presentation at 'Death in Punishment Conference'. 25-26 October 2017. Sheffield.
32. PSI 09/2013.
33. These figures are derived from Ministry of Justice (2017). *Deaths in prison custody 1978 to 2018.* [Online]. Ministry of Justice, UK. Available at https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-march-2018 [Accessed 14 September 2018] and data on operational capacity available from Ministry of Justice. *Prisons in England and Wales*. [Online]. Ministry of Justice, UK. Available at http://www.justice.gov.uk/contacts/prison-finder [Accessed 14 September 2018].
34. See note 1.
35. Robinson, C., 2017. Personal interview. Part of ethnographic data collection for PhD Thesis. 20 October 2017.