Guidance on

DISCIPLINARY HEARINGS

Scottish Prison Service

Chief Executives Office
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INTRODUCTION

This guidance is intended for use by those reaching decisions on alleged breaches of discipline under the Prisons and Young Offenders Institutions (Scotland) Rules 2011. The guidance is primarily for those who conduct such Disciplinary Hearings, (but it also contains advice applicable to others, and in particular to prison officers in relation to the bringing of disciplinary charges against prisoners.

The Guidance contains elements which are mandatory. Should the guidance not be followed there is an increased risk that any disciplinary outcome could be quashed. Those conducting Disciplinary Hearings should exercise caution when departing from the Guidance.

The references in this guidance to Governor should be interpreted to mean the same as that in the Prisons and Young Offender Institutions (Scotland) Rules 2011.

1. THE DISCIPLINARY SYSTEM

Purpose of the Disciplinary Hearing

1.1 An adjudication is a culmination of the internal prison disciplinary procedure. Its main purpose is to investigate allegations of breaches of discipline in accordance with Part 11 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 and any amendment thereof (hereinafter referred to as "the Rules"), and to impose an appropriate punishment where such allegations are found to be proven beyond reasonable doubt. Its' procedures therefore apply to all prisons and prisoners, and to young offenders institutions in exactly the same way.

General principles

1.2 A Disciplinary Hearing is not a criminal court. However, like a criminal court, its' purpose is to enforce a code of conduct, namely Part 11 of the Rules, by ascertaining in a particular case whether that code has been broken, and if it has, to impose an appropriate punishment. There are certain rules of procedure and general principles which it has to follow. Although the adjudicator, like a judge, is the master of how he or she conducts the proceedings, decisions can be overturned if the adjudicator breaches those rules and principles. The rules of procedure applicable to Disciplinary Hearing are those set out in Part 11 of the Rules and this guidance: the general principles are those of legality, reasonableness and natural justice, which are summarised in Annex 1 to this guidance.

2. ROLES AND RESPONSIBILITIES

The Adjudicator

2.1 The role of the adjudicator is to inquire into a report of alleged events and to decide whether there has been a breach of discipline in terms of rule 111 and Schedule 1 of the Rules. He or she must ascertain the facts and must be prepared to question, in a spirit of impartial inquiry, the prisoner, the reporting officer and any witnesses. In other words, the adjudicator has an active role at a Disciplinary

Hearing. It is the adjudicators' duty to ensure that all relevant evidence is presented at the Disciplinary Hearing before reaching a conclusion as to whether or not the charge has been proven beyond any reasonable doubt (see rule 113(13)). Generally in the event that the adjudicator cannot reach a decision based on the evidence presented by staff and the prisoner, they must find the prisoner not guilty. However in exceptional cases the adjudicator may adjourn the Disciplinary Hearing for further evidence to be provided (Rule 113(4) (b)).

2.2 The requirement to apply a criminal standard of proof beyond reasonable doubt derives from case law (in which it was also found that a prisoner was entitled to be legally represented in the Disciplinary Hearing if certain criteria applied). The requirement is found in rule 113(9).

2.3 Case law does not oblige the Disciplinary Hearing to adopt court procedures or apply the criminal rules of evidence. So, for example, adjudicators do not need to have corroboration to satisfy themselves that a charge has been proven beyond reasonable doubt.

2.4 Adjudicators must act fairly and justly. An adjudicator is responsible for their own procedure and the parts of this guidance that deal with the procedure during Disciplinary Hearings are advisory. However, if they depart from the guidance and in doing so, compromise fairness and justice, their decisions will be at risk of challenge through the appeal procedure or judicial review.

2.5 It is unlikely that an adjudicator would be seen as biased simply because of previous knowledge of a prisoner's behaviour. Adjudicators may frequently have a considerable knowledge of the background of a particular prisoner. They should not assume that this general background knowledge is something which makes it desirable for them not to continue with a Disciplinary Hearing on a particular charge.

Who may adjudicate and when?

2.6 Rule 113(1) gives authority to adjudicate to the Governor of an establishment. For the purposes of this rule, the Governor is defined as the Governor-in-Charge, the Deputy Governor or any authorised Unit Manager. Where none of these is present, the most senior officer who is present in the establishment may conduct the Disciplinary Hearing (but as a matter of practice should only do so if he or she has been assessed as competent to do so) within the time limits specified in rule 113(1). The Governor should be aware of all Disciplinary Hearings conducted in the establishment and should take reasonable steps to ensure there is consistency of approach and equity of treatment. Where there is evidence to suggest that there are inconsistencies or inequity of treatment, the Governor, should consider what steps are required to address this. This may include conducting Disciplinary Hearings personally and as frequently as he or she deems necessary to enable him or her to set the standards for the establishment.

The Reporting Officer

2.7 Rule 111 states "An officer must inform the Governor in writing immediately where he or she-(a) becomes aware, or suspects, that a prisoner has committed a

breach of discipline: and (b) decides to charge the prisoner under rule 112. Not all suspected breaches of discipline will result in formal charge. The officer must only report a suspected breach of discipline when he has decided that the prisoner should be formally charged.

2.8 Where a charge is to be brought, the reporting officer is responsible for framing the charge, preparing the charge document and submitting it to the Governor as soon as possible. Serving notice of the charge on the prisoner is the responsibility of the Officer under rule 112(2) (a). The serving of the notice of the charge on the prisoner need not be done by the reporting officer.

2.9 Once a prisoner has been charged, it is the responsibility of the reporting officer to identify and produce evidence in support of the charge. The reporting officer must be present should the prisoner or the adjudicator consider it necessary. Where the reporting officer is present he or she should present the case. The reporting officer should identify any witnesses to the alleged offence and may, if called, question any witnesses called by him or the prisoner.

2.10 In the exceptional circumstances where a prisoner is legally represented (see Rule 113(9)), a solicitor may also be required to be present to provide advice to the adjudicator as necessary at a Disciplinary Hearing. It will be the role of the respective solicitors to advise and assist in the presentation of the case for and against the prisoner(s).

3. CHARGING AND PRELIMINARIES

3.1 Rule 111 requires that “An officer must inform the Governor in writing immediately where he or she, decides to charge the prisoner under rule 112.” This and succeeding references to the Governor in the context of disciplinary proceedings are subject to the definition in rule 2.)

3.2 Rule 112, envisages that where a prisoner is to be charged, the charge should be brought only when the officer concerned believes that there is sufficient evidence.

Charges

3.3 The only charges which may be brought are those specified in Schedule 1 to the Rules. Any charge which is not consistent with Schedule 1 will have to be dismissed.

3.4 Under rule 112(2) charges must be brought as soon as possible and, except in exceptional circumstances, within 48 hours of the discovery of the alleged offence. There must be a minimum of two hours between the charge(s) being served and any Disciplinary Hearing (rule 112(2)).

3.5 The charge must be made in writing. The charge document is of fundamental importance in any disciplinary proceedings and great care must be taken in framing it. Advice should be sought from a line manager if there is any doubt as to how the charge should be prepared. It should specify the paragraph of Schedule 1 allegedly

breached. Where the breach is of paragraph (31) (attempts to commit, incites another prisoner to commit, or assists another prisoner to commit or attempt to commit, any of the foregoing breaches), the charge should also specify the related paragraph of Schedule 1. It should provide sufficient detail in the narrative to enable the prisoner to see precisely *how* the relevant paragraph is alleged to have been breached. The charge document should not contain any evidence, such as a statement by the reporting officer that he or she saw the alleged breach take place, since this would result in the adjudicator seeing evidence before it was led in the Disciplinary Hearing. To do so would be a breach of the *de novo* principle. The *de novo* principle requires that the adjudicator conduct the Disciplinary Hearing without being prejudiced by evidence that is not presented in the Disciplinary Hearing. In general a charge document may not be changed in the course of a Disciplinary Hearing.

3.6 Minor details relating to non-material factors in the charge document may be amended by the adjudicator at the Disciplinary Hearing, provided that the amendment does not result in any injustice or unfairness to the prisoner. The prisoner must be told of any amendment made.

3.7 A Disciplinary Hearing can determine only whether the charge as brought is proven beyond any reasonable doubt (rule 113(13)). If there is insufficient evidence to support the charge that has been alleged, it must be dismissed. If, however, it becomes clear at the Disciplinary Hearing that the prisoner's behaviour may have amounted to a lesser, or to a different offence, the prisoner may be charged with that offence provided that this is done as soon as possible and that, save in exceptional circumstances, it is still within 48 hours of discovery of the breach of discipline. It would not necessarily invalidate the proceedings if in the course of the Disciplinary Hearing the adjudicator decided to bring the new charge, but it would be preferable not to do so and to follow the whole procedure in Part 11 of the Rules afresh, out with the Disciplinary Hearing. The subsequent Disciplinary Hearing should be before a different adjudicator, who comes to the Disciplinary Hearing afresh (*de novo*).

3.8 The charge should be served on the prisoner at least two hours before the Disciplinary Hearing is due to begin and, as a matter of good practice, this should be done by someone other than the reporting officer. In some cases it may be appropriate that the charge be served the day before the Disciplinary Hearing. In others, for example where serious indiscipline is involved, it may be preferable for operational reasons that matters are dealt with quickly and the Disciplinary Hearing proceeds as soon as the two hours' notice has expired. As a matter of good practice, the prisoner should be invited to sign a receipt for the charge document, giving the date and time of service. If the prisoner refuses to sign the receipt, service should be witnessed by another officer (not the reporting officer). A written record should be kept of when and by whom the charge document was issued to the prisoner in case it is lost or destroyed.

3.9 Where an adjourned Disciplinary Hearing is being resumed, the prisoner need not be given formal notice of the resumption if a date and time for the resumption were made known to the prisoner at the time of the adjournment. In any other case the prisoner must be given at least two hours' notice of the resumption. A fresh copy of the charge document need not be served on the prisoner unless evidence is to be

presented against him or her from witnesses who were not named on the original charge, in which case an amended document must be served on the prisoner at least two hours before the adjourned Disciplinary Hearing is due to recommence.

Separate offences

3.10 More than one charge may be laid in respect of alleged breaches of discipline arising from a single incident, provided that the alleged breaches of discipline are separate and that the charges do not duplicate each other. If the evidence supports it, the prisoner may be found guilty in each case. If the prisoner appears to have been charged twice for the same act, he or she cannot be found guilty of both offences. So a prisoner who swears at an officer, for example, should not be charged twice with being disrespectful (Schedule 1(10)) and using abusive or insulting words (Schedule 1(4)). Similarly, continuing charges are to be avoided, for example a prisoner who at 08.00hrs refused to obey an order to go to work and is charged with a breach of discipline (Schedule 1(12)) should not be charged with a separate offence if ordered to do the same thing at 09.00hrs.

Applicability of the Rules

3.11 A prisoner can be charged with a breach of discipline under the Rules only if the Rules apply to him or her at the time of the act or omission which allegedly constitutes a breach of discipline. The Rules apply to a prisoner where a court has decided that he or she should be lawfully detained in a prison. The Rules should not ordinarily be considered to apply to any alleged breach of discipline in a court room as it is within the competence of the Sheriff to deal with the matter. Should the Sheriff not deal with any alleged breach of discipline, the Rules should be considered to apply. Charges cannot be brought if the prisoner has been, or is to be, dealt with by the court for the conduct constituting the alleged disciplinary offence.

3.12 Breaches of discipline committed in another prison or during transfer are dealt with in rule 116. The Rules enable the receiving establishment to hear charges of a breach of paragraph (27) of Schedule 1 whether or not the prisoner was in their custody at a time when the drug might have been administered, provided that the prisoner was detained in a prison throughout the period during which the administering might have been done.

Interpreters

3.13 If a prisoner who is charged with an offence has difficulty in understanding English, the prisoner should be given assistance by staff or, if necessary, an interpreter. Any costs incurred in employing an interpreter should be met by the establishment.

Self-harm

3.14 Disciplinary charges should not be brought in respect of acts or preparations for self-harm. This applies equally to repetitive acts of self-harm. SPSs' response to self-harm or attempted self-harm must be to look to the care of the individual prisoner as its priority. If early signs of a tendency to self-harm are overlooked or met with a

punitive response, the risk of eventual tragedy may be increased. The threat of punishment should not form part of the strategy for dealing with such behaviour. Where an adjudicator is satisfied that the prisoners' behaviour is manipulative in nature and there is no vulnerability on the part of the prisoner, it would be appropriate to conclude the Disciplinary Hearing.

Preliminaries to the Disciplinary Hearing

3.15 If the prisoner or his or her legal representative asks for a copy of the statements to be submitted in evidence so as to prepare a defence or mitigation, these should be supplied at public expense. Essentially, this requirement relates to any documentary evidence including statements of any person which it would be intended to rely upon to prove the charge. In practice it is unlikely that these statements will be more than the reporting officer's statement and the statement of any other witness. Arrangements should be made by a member of staff not conducting the Disciplinary Hearing, who should also provide names of any witnesses to the incident which the prisoner may not know. Copies should also be provided of any statements made or other material discovered in the course of investigation unless there are compelling grounds for not producing them. Such grounds are that:

- It is personal or sensitive data; or
- The release would prejudicial to the security or good order of the prison; or
- Prejudicial to the health and safety of any person.

Where the information is personal or sensitive data, consideration should be given to releasing redacted documents.

3.16 Where a prisoner asks to interview prisoners or other witnesses who may have relevant evidence, the adjudicator should allow such interviews if the adjudicator judges it reasonable and the witnesses are willing. In considering such a request, the adjudicator should presume that those proposed to be interviewed could have relevant evidence unless there are clear grounds to the contrary. Such interviews should take place within the sight of an officer, but outwith hearing unless to do so would be prejudicial to the security or good order of the prison or the health and safety of any person. The officer supervising the interview must not be the reporting officer, the adjudicator or any other officer who may be called to give evidence at the Disciplinary Hearing. The officer supervising must not disclose the nature of the discussion unless it presents a risk to the security or good order of the prison or the health and safety of any person or unless there is a clear intention to defeat the ends of justice. In these circumstances the interview should be terminated. Where the potential witness is coming from outside the establishment, visits for the purpose of such interviews are not to be treated as being visits in terms of rules 63 or 64.

3.17 A prisoner may be removed from association pending a Disciplinary Hearing only in accordance with the provisions of Rule 95. Removal from association pending a Disciplinary Hearing should not be a matter of routine.

4. REQUESTS TO SEEK LEGAL ADVICE

4.1 A prisoner who asks during the course of a Disciplinary Hearing to consult a solicitor should be allowed to do so. Where, after a charge has been laid, the prisoner says he or she has not had reasonable time to contact their solicitor; the adjudicator may adjourn the Disciplinary Hearing where reasonable. The prisoner should be advised of the date it is proposed to resume the Disciplinary Hearing. If by then the prisoner has not asked for or received advice, the Disciplinary Hearing may proceed. A prisoner should be provided with reasonable assistance to obtain the contact details of a solicitor.

5. REQUESTS FOR ASSISTANCE OF A FRIEND

Considering requests for assistance

5.1 A prisoner who wishes to be assisted at the Disciplinary Hearing by a friend , may have such a person present if the adjudicator thinks that this is appropriate, having due regard to amongst other things the criteria detailed in paragraph 6.4 below.. The decision and the reason(s) for the decision must be recorded.

5.2 Requests for assistance may be made at any point in the Disciplinary Hearing. Circumstances during the Disciplinary Hearing may also persuade an adjudicator to reverse a decision to refuse assistance. Granting assistance at a later stage will require an adjournment and where evidence has been lead, the adjudicator should consider whether a new Disciplinary Hearing, with a different adjudicator, will require to be arranged (see chapter 9 and the *de novo principle*).

5.3 The prisoner may ask for assistance from a friend if legal representation is refused. It is the prisoner's responsibility to nominate such a person who must be willing to act in the role. Adjudicators must consider such requests afresh, independently of any decision to refuse legal representation.

5.4 For all *"prisoner's friend"* requests there is a further requirement that anyone agreed should be both readily available and a suitable person. Both are matters for the adjudicator's judgement. If a prisoner asks for the assistance of a fellow prisoner, a member of their family or a friend from outside the prison, the request should be given proper consideration, although it may subsequently be refused. If the prisoner nominates a solicitor as a "*prisoner's friend*", the latter could accept only the role of "*prisoner's friend*" and not that of legal representative

5.5 A *"prisoner's friend"* role derives from case law and is limited to attending the Disciplinary Hearing, taking notes, quietly making suggestions and giving advice to the prisoner and in this way assisting the latter to present their case and giving support. Generally they cannot address the adjudicator or ask questions of any of the witnesses, however in exceptional circumstances an adjudicator may allow greater participation if he considers this appropriate. However if the "prisoner's friend" interferes or participates in the proceedings without the permission of the adjudicator, the "*prisoner's friend*" can be removed from the Disciplinary Hearing.

The adjudicator has discretion as to whether to allow a friend to be present at all and as to what he or she allows the "*prisoner's friend*" to do thereafter.

Arrangements for "prisoner's friends"

5.6 It is for the adjudicator to consider at what stage a *"prisoner's friend"* may be allowed. The "*prisoner's friend*" might see the prisoner prior to, or at, the Disciplinary Hearing. He or she may ask for arrangements to be made before the Disciplinary Hearing for access to various facilities in order to help the prisoner prepare the case. In practice these should probably be no more than an opportunity to visit the prisoner and to see the papers which the prisoner would see. The "*prisoner's friend*" should have a place in the Disciplinary Hearing to sit and assist the prisoner. Requests must be considered by a member of staff not involved in the Disciplinary Hearing and such facilities as appear reasonable for the purpose should be offered. Should the *"prisoner's friend"* come from outside the establishment (see below), it would not be necessary, for example, to provide unlimited visit access so that a case might be prepared. The *"prisoner's friend"*, by definition, is not a legal representative and should use the facilities offered for the purpose for which they have been provided.

5.7 It is within the discretion of adjudicators who the "*prisoner's friend*" may be. It would be appropriate for any person who ordinarily works in the *same* establishment to act as "*prisoner's friend*". If, however, the prisoner could not find a "*prisoner's friend*" within their own establishment, they might, under exceptional circumstances, be permitted to have another individual to act as his or her "*prisoner's friend*".

5.8 A *"prisoner's friend*" may, however, be excluded from a Disciplinary Hearing if the use of their assistance is clearly unreasonable in nature or degree, or if it becomes apparent that the assistance is being applied for an improper purpose, or is being provided in a way which is prejudicial to the progress and efficient administration of justice by, for example, causing a prisoner to waste time, advising the introduction of irrelevant issues or the asking of irrelevant or repetitious questions.

6. REQUESTS FOR LEGAL REPRESENTATION

Considering requests for legal representation

6.1 Requests to be assisted by a lawyer are subject to rule 113(9). The adjudicator must be satisfied that it is necessary or desirable, having given specific consideration to the criteria detailed below in paragraph 6.4. . The rules are designed for the expeditious determination of charges of indiscipline and in the vast majority of cases, any determination of a factual matter is likely to be a short, sharp issue. In addition to the removal of additional days' punishment, these features may well mean that it will only be in the rare or exceptional case that legal representation will be either necessary or desirable. The decision and the reason(s) for the decision must be recorded.

6.2 The adjudicator may reach a decision on granting legal representation on the basis of the charge, the reporting officer's statement and any statement the prisoner

wishes to make or read out. The adjudicator should ask for other information where this appears to be necessary.

6.3 In considering requests for legal representation it is enough for the adjudicator to satisfy themselves that it should or should not be granted. Adjudicators do not need to be sure beyond reasonable doubt that assistance or representation is not needed before rejecting a request.

Criteria *(Tarrant)* for deciding whether to grant requests

6.4 Adjudicators must take account of the following six considerations, in deciding whether to grant legal representation or the assistance of a "*prisoner's friend*". The list is not exhaustive. The circumstances of individual cases might produce other considerations which should be taken into account when coming to a decision. Nor is it necessary for *all* of the criteria to be satisfied: it might be that some of the criteria could very clearly be satisfied and that might be enough to make it appropriate to grant the request. Adjudicators, however, are not *obliged* to grant a request for legal representation or the assistance of a "*prisoner's friend*" except where, in the circumstances of the case the decision to refuse would be so unreasonable.

- **The seriousness of the charge and of the potential penalty**

6.4.1 There is no hard and fast rule as to how to determine seriousness of the charge. In the vast majority of cases, the charge will be minor (e.g. refuses to obey an order). It is a matter of degree whether the seriousness of the charge or the punishment (including cases where several charges in combination will produce a combined maximum punishment), or a combination of both, points to legal representation, a *"prisoner's friend"* or neither.

- **Where any points of law are likely to arise**

6.4.2 This might indicate the need for legal representation rather than a *"prisoner's friend"*. Points of law could include cases where the prisoner's intentions or the definition of the offence are in question.

- **The capacity of a particular prisoner to present their own case**

6.4.3 This may indicate the need for either a legal representative or a friend. The decision will depend on the circumstances of the case and the judgement of the adjudicator. Prisoners who are incapable of preparing a written reply to the charge, those who are unlikely to be able to follow the proceedings or those who have difficulty expressing themselves might need such help.

- **Procedural difficulties**

6.4.4 The adjudicator should take into account any special difficulties prisoners might have. For example, the prisoner may have been removed from association under rule 95 and thus have had no opportunity to interview potential witnesses. A prisoner may have difficulty in cross-examining witnesses (particularly those giving evidence of an expert nature). The extent to which a

"friend" or legal adviser will be necessary, or will be able to help, will depend on the circumstances of the case and the prisoner's capabilities. An adjudicator should tend to favour a legal representative rather than a *"prisoner's friend"* in cases where the prisoner will have difficulty in calling and questioning witnesses, since a *"prisoner's friend"* does not represent the prisoner and will not be allowed to question them.

- **The need for reasonable speed**

6.4.5 Delay is an inevitable consequence of granting legal representation since solicitors will wish to consult their clients, interview potential witnesses and generally prepare their case. A *"prisoner's friend"* should be readily available, but even so some delays may result from granting such assistance. This has to be balanced with other considerations and the overriding necessity is to ensure that the requirements of natural justice are respected.

- **The need for fairness**

6.4.6 Where, for example, a number of prisoners are alleged to have taken part in the same incident, the granting of assistance or legal representation to one may imply the need to grant it to others. Where help is granted to a prisoner for one charge, it should also be allowed for other charges against the prisoner arising from the same incident.

Matters arising from the decision on a request

6.5 Where legal representation or a *"prisoner's friend"* is agreed, it will be necessary to adjourn the Disciplinary Hearing. It is the prisoner's responsibility to identify a solicitor or friend and to seek their agreement and co-operation. Where requests are refused, it should normally be possible for the adjudicator to proceed with the disciplinary Disciplinary Hearing.

6.6 Where a request for legal representation or friend is refused, the Disciplinary Hearing record must be sufficiently detailed to show that the adjudicator has properly considered the request. The adjudicator must record that he or she has explained to the prisoner that the request has been considered in the light of the criteria in 6.4

7. THE ROLE AND FUNCTIONS OF SOLICITORS

Legal representation

7.1 It should be remembered that at a legally represented Disciplinary Hearing the adjudicator remains the master of their own procedure and that the procedure remains inquisitorial and not adversarial in nature.

7.2 When legal representation is agreed for a prisoner, a member of staff who will not adjudicate at the Disciplinary Hearing should contact Legal Services Branch to discuss the need for SPS to be legally represented. The need for SPS to be represented will be rare and should only be considered necessary where the case is

complex or complex points of law or procedure are likely to arise. The adjudicator must have no direct involvement in these arrangements.

Role of Solicitors

7.3 The principal function of the solicitors is to provide advice. They have an important part to play in protecting witnesses from unfair cross-examination and in presenting the case responsibly. The solicitors' role is to assist the adjudicator reach a decision as to whether he is satisfied, beyond reasonable doubt as to the innocence or guilt of the prisoner. This includes where the prisoner is represented by a solicitor and with the permission of the adjudicator, they may put questions to a witnesses by way of cross examination on their clients' behalf in terms of rule 113(7)(d). Should this be considered necessary and permissible by the adjudicator, solicitors should agree an approach.

7.4 The adjudicator should then ask any questions which will assist in arriving at a decision. After hearing the evidence, and before making a decision, the adjudicator should invite any final comments on the evidence from both solicitors before reaching a final decision.

7.5 Where a legal point is raised the adjudicator seek comments from both lawyers present so that he is able make an informed judgement on the point.

Requests for Information and Facilities

7.6 The solicitors will put requests for information or facilities to a member of staff at the prison who is not adjudicating on the case.

7.7 Before the solicitors receive instructions, the prisoner will have been charged and have appeared before the adjudicator. The alleged offence will have been investigated by prison officers and some statements may have been taken from witnesses. The solicitor advising SPS should consider the charge in the light of the evidence to see whether it is appropriate and whether further evidence is required to support it. If further evidence is required, the solicitor if necessary should ask the instructing member of staff to arrange for him to see the witnesses/further witnesses and an adjournment should be sought form the adjudicator if this is considered necessary.

7.8 Should the solicitor advising SPS consider that a finding of guilt is challengeable because there is insufficient evidence, he should invite the adjudicator to dismiss that particular charge.

7.9 Should SPS's or the prisoners' solicitor identify any errors in the charge letter e.g. such as wrong particulars or other preliminary matters these should be raised at the beginning of the Disciplinary Hearing. If it is appropriate and all parties agree the Disciplinary Hearing should proceed on the basis of the correct particulars. However if it is not appropriate or it cannot be agreed, the Disciplinary Hearing should be adjourned for further consideration or dismissed. A fresh charge should be raised if appropriate in the circumstances.

7.10 Should the solicitor advising SPS not be satisfied with the evidence set out in the statements from staff and witnesses, he should inform the instructing member of staff who will arrange for him to take further statements from the relevant witnesses.

7.11 Solicitors acting for prisoners may make a number of requests (examples are discussed below). An adjudicator is not obliged to grant a request simply because the solicitor for the prisoner has made it. The adjudicator remains master of his procedure and must decide, on the merits of each request, what action should be taken.

7.12 The solicitor acting for the prisoner may ask to see copies of all statements which it is intended to use at the Disciplinary Hearing. Where there are such statements, SPS may wish to anticipate this request by providing copies as soon as possible. Copies of any other statements made in the course of the investigation should also be provided unless there are compelling reasons for non-disclosure: for example, a real risk to the maker of the statement.

7.13 The solicitor for the prisoner may request facilities to interview prison officers or other prisoners. This request should be made first to the instructing member of staff but, if it is repeated to the adjudicator, he should first seek to establish which prisoners are required and why it is thought that they may be able to give evidence for the defence, before he considers whether this is appropriate.

7.14 The solicitor representing the prisoner may ask for a list of names of prisoners in the wing or in particular cells or for a list of officers on duty at the time. This is a matter for the instructing member of staff and they should seek to narrow the request as far as possible and to find its justification. They may consult the solicitor advising SPS on this point if so appointed.

7.15 The solicitor for the prisoner may ask for an opportunity for his client to identify prisoners or prison officers. How this is arranged is a matter for the instructing member of staff. An officer of the prison will not be compelled to take part in an identification parade against his will.

7.16 After a Disciplinary Hearing with legal representation has been concluded, the prisoner's solicitor should be allowed a meeting with his client if this is requested.

8. ARRANGEMENTS FOR LEGAL REPRESENTATIVES

8.1 Legal representatives may ask for certain facilities in advance of the Disciplinary Hearing which may have a bearing on security or good order and discipline. Examples may be a visit to the scene of an alleged incident, or interviews with prisoners or staff. Such requests must be considered by a member of staff not involved in the Disciplinary Hearing.

8.2 When such an interview is requested with other prisoners or with staff, and they are willing to be interviewed, the member of staff making the arrangements should normally allow the interview. Where such requests are made during the Disciplinary Hearing, the adjudicator, provided he or she considers the request reasonable, should ask a member of staff not involved in the Disciplinary Hearing to

make suitable arrangements and, where necessary, should adjourn the proceedings for that purpose.

8.3 Where the member of staff considering the request for facilities cannot provide them and the adjudicator believes that this prejudices a fair hearing, there may be no alternative but to dismiss the charge.

8.4 Interviews between a prisoner's legal representative and potential witnesses should take place within the sight of an officer, but outwith hearing unless to do so would be prejudicial to the security or good order of the prison or the health and safety of any person. The officer supervising the interview must not be the reporting officer, the adjudicator or any other officer who may be called to give evidence at the Disciplinary Hearing. The officer supervising must not disclose the nature of the discussion unless it presents a threat to the security or good order of the prison or the health and safety of any person or unless there is a clear intention to defeat the ends of justice (coercion or collusion). In these circumstances the adjudicator must be informed prior to or if necessary at the Disciplinary Hearing.

9. THE *DE NOVO* PRINCIPLE

9.1 Adjudicators should not proceed to conclude a Disciplinary Hearing if in considering applications for assistance or legal representation they receive information or evidence which is later to be presented at the Disciplinary Hearing. An adjournment should be allowed to allow the adjudicator to come to the Disciplinary Hearing without being prejudiced by anything heard or seen in considering a request for assistance. An adjudicator who considers that it is not possible to hear the charge afresh (*de novo)* should adjourn to allow a new adjudicator to be appointed to hear the charge afresh (*de novo*).

9.2 It may be appropriate to hear evidence again because of some issue which has arisen either before, or in the course of, the proceedings. The most likely set of circumstances where evidence would require to be heard again on a *de novo* basis is where, in preliminary proceedings, there is some event which suggests a procedural impropriety, for example, if an adjudicator had already viewed video evidence in advance of the Disciplinary Hearing as part of an incident debrief.

10. GENERAL MANAGEMENT OF DISCIPLINARY HEARINGS

Disciplinary Hearings in prisoner's absence

10.1 If a prisoner refuses to attend a Disciplinary Hearing, it is for the adjudicator to decide whether the prisoner should be compelled to attend; whether the Disciplinary Hearing should proceed in the prisoner's absence; should be adjourned or should be relocated to the prisoner's location. If the Disciplinary Hearing is to proceed in the prisoner's absence, it should be noted on the record of the Disciplinary Hearing that the prisoner has been seen and warned that this will be a consequence. If the prisoner still refuses to attend, a not guilty plea should be entered. The prisoner must be informed of the decision of the Disciplinary Hearing and given the opportunity to say something in mitigation before a penalty is determined. The

prisoner should be told of any punishment imposed as soon as possible after the determination.

10.2 A prisoner who is prepared to attend a Disciplinary Hearing but is inappropriately dressed, displaying disruptive behaviour or is in a condition which is offensive to the adjudicator or others (for example on dirty protest), should be warned that the Disciplinary Hearing will proceed in their absence. The prisoner should be given reasonable opportunity to represent themselves in an appropriate condition. The prisoner should be warned of the potential consequences of their actions and/or attitudes. The record of the Disciplinary Hearing should be noted to show that the warning has been issued, by whom, and when.

10.3 Where a charge is to be heard in the absence of a prisoner who has been granted legal representation, the legal representative should be present at the Disciplinary Hearing.

Multiple charges

10.4 Where more than one charge is laid against a prisoner in respect of a single incident, it is safest to hear all the evidence on all the charges before reaching a finding on any of them. Otherwise there is a risk that the adjudicator will appear prejudiced on subsequent charges by the decision reached on the first. When a prisoner is charged with two or more offences arising out of separate incidents, these may be heard consecutively by the same adjudicator. The adjudicator must consider the need for all cases to start afresh (the *de novo* principle) and decide whether it would appear biased to continue. The test for bias is whether a reasonable and fair-minded person observing the Disciplinary Hearing with full knowledge of the relevant facts would consider it fair.

Single charges with more than one prisoner

10.5 Where more than one prisoner has been charged, cases may be dealt with either at a single Disciplinary Hearing, at which all prisoners are present, or separately and in stages, using adjournments, to allow two or more cases to proceed concurrently to virtually simultaneous conclusions.

10.6 Where more than one prisoner is charged with an offence relating to one incident and the adjudicator decides to hear the cases separately, care must be taken to ensure that the prisoner is not found guilty on evidence that the adjudicator has heard elsewhere. Evidence heard at one Disciplinary Hearing must not be taken into account in reaching a decision at another Disciplinary Hearing, unless the same evidence is presented at that second Disciplinary Hearing too.

Physical arrangements for Disciplinary Hearings

10.7 Adjudicators should ensure that the general atmosphere is as relaxed as is consistent with sufficient formality to emphasise the importance of the proceedings.

10.8 In determining the number and deployment of staff during a Disciplinary Hearing, the prisoner's general attitude and behaviour together with the nature of the alleged offence should be taken into account.

10.9 Upon commencing or resuming a Disciplinary Hearing, the prisoner should enter the room before the reporting officer and witnesses. At any adjournment the reporting officer and witnesses should leave the room before the prisoner. This is to preclude suggestions that evidence may have been given to the adjudicator in the absence of the prisoner.

10.10 The environment in which a Disciplinary Hearing takes place will be crucial to the ability of the prisoner to present his or her case. The prisoner must be allowed to sit or stand and should be offered materials for taking notes. The prisoner should be offered any further reasonable assistance in ensuring that they are able to participate fully.

10.11 The number of staff present should be the minimum necessary for the safety of those present and the conduct and security of the Disciplinary Hearing. The attitudes and behaviours of those present should encourage the prisoner's participation in stating their defence and mitigation. Where escorting officers are necessary, they should position themselves in a manner so to avoid any allegation of intimidation. Any behaviour on the part of staff which could be considered contradictory to the SPS Standards of Behaviour could constitute grounds for an appeal and eventual quashing of any finding of guilt and punishment.

10.12 The prisoner's record should not be visible and accessible to the adjudicator. This avoids the possibility of the allegation by the prisoner or their representative that the adjudicator had had access to it beforehand and thus could not come to the Disciplinary Hearing de novo.

Adjournments

10.13 Adjournments may be necessary for a number of reasons. Examples might be when a material witness is sick, when it is necessary to arrange for the attendance of communication support, when legal representation has been granted and the prisoner needs time to make arrangements, when it is necessary to obtain the results of forensic analysis or simply because a prisoner is not in a position to proceed. An adjudicator should always offer an adjournment to the prisoner if it has been necessary to amend the detail of a charge or if the prisoner has genuinely misunderstood its nature. Where a material witness is sick, the adjudicator may proceed with written evidence if the prisoner does not wish to question it. A reporting officer or other officer witness who is on leave or sick leave may be invited to participate in the Disciplinary Hearing. (There will be occasions upon which officers may be fit enough to attend for this purpose whilst remaining unfit for the full range of duties.)

10.14 Adjudicators should consider requests for adjournments to ensure that prisoners are given a fair opportunity to prepare their case before a Disciplinary Hearing (rule 113(4)). If the request is not justified, they may reject it and conclude the Disciplinary Hearing. Adjudicators must bear in mind that delay can become a

serious impediment to achieving a fair hearing and that on occasion it may therefore be necessary to continue the Disciplinary Hearing.

10.15 When legal representation has been granted, there is likely to be some delay while legal representatives are appointed and they make their preparations. It is important therefore that the adjudicator should set a date for the represented Disciplinary Hearing at the time he or she grants legal representation. The date should be at least three weeks from the date of the adjournment. If legal representatives are not then ready to proceed, the adjudicator should consider whether a further adjournment is justified. If it is, a further and final date should be set.

10.16 If the alleged offence is criminal in character and the adjudicator believes it is sufficiently serious to be reported to the police, it is best practice that the Disciplinary Hearing should be opened and adjourned until the outcome of the police investigation is known. The prisoner must be informed of the reason for the adjournment.

Removal from Association

10.17 Rule 95 enables a prisoner to be removed from association. It should not be an automatic measure, but used only where there is a real need, such as the risk of collusion or intimidation relating to the alleged offence which segregation of the prisoner might prevent. (See also paragraph 3.19 above.)

Mental or physical health of prisoner

10.18 If, during a Disciplinary Hearing, the adjudicator is in doubt about the prisoner's mental health at the time of an alleged offence, the adjudicator should adjourn the Disciplinary Hearing and invite a health care professional's comments. The adjudicator should dismiss a charge against a prisoner if, having heard the evidence, he considers that, at the time of the alleged offence, the prisoner could not, on health grounds, be held responsible for his or her actions.

10.19 If the adjudicator is not satisfied that a prisoner is able to take part in the Disciplinary Hearing, the opinion of a healthcare professional should be sought. If the adjudicator is still not satisfied, a second opinion may be sought. This should be from a medical practitioner. The prisoner's legal representative may request a second opinion and if so will be responsible for meeting the attendant costs. It is for the adjudicator to decide, having considered the expert evidence, whether or not a prisoner is fit for the Disciplinary Hearing. An adjournment may be appropriate if any incapacity is thought to be temporary.

Records of proceedings

10.20 The adjudicator must ensure that there is a clear and accurate record of proceedings setting out the reasons and evidence which informed decisions. This will allow any challenge to the Disciplinary Hearing or outcome to be assessed easily. A verbatim transcript in not required. It must be evident from the record how

the adjudicator arrived at his or her decision. Whilst the record of the procedure will vary from hearing to hearing, the record should include, but is not limited to:

- Any actions taken
- Any requests for witnesses, representation or assistance, the reasons given for those requests, and the rationale for the adjudicator's decision;
- The adjudicator's response to any other requests including evidence considered and the reasons for the adjudicator's decisions;
- The reason for any other adjournment;
- The verdict;
- Any punishment awarded;
- Any mitigating evidence presented by the prisoner and identifying any such evidence that the adjudicator took into consideration in awarding the punishment.

Where a prisoner pleads guilty, it will be necessary for the adjudicator to set out their reasons why they have accepted the plea and record the evidence that supports the decision.

10.21 Verdicts and punishments must be recorded separately.

10.22 The record of the Disciplinary Hearing (or a copy) should be retained at the establishment for the period of five years after the Disciplinary Hearing, in case of a subsequent complaint or legal action.

11. EVIDENCE

General

11.1 It is for the adjudicator to assess the truth of each statement given in evidence and, where there is doubt, to try to obtain further information that will help an assessment. An example is where a prisoner's defence is a simple contradiction of the evidence of a member of staff. Adjudicators and reporting officers must always bear in mind that the allegations set out in a charge are not in themselves evidence: the occurrences alleged in a charge must be substantiated by evidence from witnesses and/or physical evidence.

11.2 An adjudicator may need to assist an unrepresented prisoner who has difficulty framing questions and will then be responsible for discovering from witnesses the information the prisoner seeks.

11.3 The prisoner or their legal representative must hear, and have the opportunity to challenge, all the evidence. The adjudicator must only consider relevant evidence; he may have regard to general knowledge of the background in the prison in which the incident is alleged to have taken place.

Written evidence

11.4 Under rule 113(10), the adjudicator may take into account evidence in any form. However, a previously written statement may be accepted only if it is read out

and either the writer is present at the Disciplinary Hearing so that the prisoner may have an opportunity of questioning him or her, or the prisoner consents to its being accepted without having such an opportunity (rule 113(11)). Where the written evidence, however, relates to an analysis of a sample provided for drug testing purposes under rule 93 or for the purpose of testing for alcoholic liquor under rule 94 the adjudicator has discretion as to whether to allow the person who provided the analysis to be present. Before he or she exercises discretion, the adjudicator must invite the prisoner to say why he or she needs the person to be present and satisfy himself that the reasons advanced are, or are not, sufficient to require that person's attendance to give oral evidence.

Physical evidence

11.5 It is important that physical evidence is retained and produced at the Disciplinary Hearing. The prisoner must be allowed to ask questions about it in the same way as any other evidence. If there is a dispute about the location of an alleged offence, it may be appropriate for the adjudicator to visit the location in order to ascertain the facts. In this case the Disciplinary Hearing should be adjourned and reconvened after the visit. A note of the visit and what was discovered should be entered on the record of the Disciplinary Hearing.

Hearsay evidence

11.6 The adjudicator may decide to hear hearsay evidence, subject to the overriding requirement to be fair to the prisoner. First hand evidence is preferable to hearsay evidence but there will be occasions, for instance where no members of staff witnessed the alleged offence or where an absconder from another establishment is being dealt with, when a reporting officer has to rely on what he has been told. If the prisoner pleads not guilty, a finding of guilt based solely on hearsay evidence would be unsafe. Where a prisoner disputes the hearsay evidence, and for this purpose wishes to question the witness, and where there are insuperable or very serious difficulties in arranging attendance, the adjudicator should refuse to admit that evidence or, if it has already come to notice, should expressly dismiss it from consideration. If there are prisoner witnesses who are called but who refuse to give evidence, the adjudicator must assess whether, in the light of their refusal to give evidence at first hand, the hearsay evidence is credible. The adjudicator should disregard the hearsay evidence where there is any doubt.

Circumstantial evidence

11.7 There may be occasions when, in the absence of sufficient first-hand evidence, it will be proper for an adjudicator to take circumstantial evidence into account. Circumstantial evidence is that which tends to suggest that the prisoner committed the offence as opposed to direct evidence that he did. It is unlikely that this alone will ever be sufficient evidence upon which to reach a finding, but it will add to the sum of available information and may thus help to explain more fully the context of the alleged offence.

Witness issues

11.8 Any person employed by SPS may be required to appear as a witness and give evidence as part of his or her duties. Prisoner witnesses may be required to attend the Disciplinary Hearing, but cannot be compelled to give evidence. If they decline to do so, this must be recorded in the record of the Disciplinary Hearing. Other people may be invited to attend as witnesses, but there is no power to compel their attendance. Copies of the letter of invitation and of the reply, if any, should be made available to the prisoner and should form part of the record of the Disciplinary Hearing. When a witnesses' presence is required by the prisoner and their evidence is deemed relevant to the charge, and yet there are compelling security reasons why they should not be admitted to the prison or they decline to attend, charges against the prisoner may have to be dismissed. The costs of (non-SPS) witnesses who are attending from outwith the establishment will require to be met by the party requesting the witness or by the witnesses themselves.

11.9 Under rule 113(8) an adjudicator has the discretion to refuse to call witnesses named by the prisoner or by the reporting officer; but this must be done reasonably and on proper grounds and not, *for example*, for reasons of administrative convenience or because the adjudicator considers the case against the prisoner is already made. The prisoner should first be asked what assistance or evidence he or she believes the witness might give. If the request is refused, the adjudicator should give reasons and these should be noted on the record of the Disciplinary Hearing. A witness may be refused, for example, if it is clear that he or she was not present at a material time and had no relevant information to offer, if the adjudicator believes that the request is simply part of an attempt to render the Disciplinary Hearing unmanageable, or if the adjudicator already accepts the evidence that the prisoner hopes the witness will confirm.

11.10 Other witnesses of the alleged incident known to staff or the prisoner should be brought to the attention of the adjudicator. If it is known that there are such witnesses but they cannot, or will not, be identified the adjudicator should proceed without their evidence.

11.11 It is important that, on leaving the room, no witness should have the opportunity to talk to those waiting to give evidence.

Examination of witnesses

11.12 A prisoner must be allowed to ask questions of the reporting officer and witnesses. If the prisoner abuses this right the adjudicator should require questions to be put through him. The adjudicator and the prisoner may both question witnesses, as may the reporting officer where he or she is presenting the case against the prisoner.

Allegations against staff made before or at a Disciplinary Hearing

11.13 If an allegation is made against a member of staff during a Disciplinary Hearing, whether by the prisoner or a witness and the adjudicator considers it relevant to the charge, the adjudicator should consider; whether to adjourn to allow an investigation to take place or whether the staff member under caution, should be

asked to give evidence. The staff member cannot be compelled to incriminate him/herself

11.14 If an allegation is made against a member of staff during Disciplinary Hearing, whether by the prisoner or witness, and the adjudicator considers it not relevant to the charge the prisoner should be advised. The adjudicator should continue to report the matter in accordance with local procedures.

11.15 Where the adjudicator is unable to conclude the relevance of the allegation to the charge being heard, the adjudicator should adjourn the Disciplinary Hearing to allow a full investigation to take place. The adjudicator must ensure that he is not influenced by any matters arising out of the investigation of which he may become aware and which are not presented as evidence. If there is a danger of such influence, the resumed Disciplinary Hearing should be conducted by a different adjudicator who comes to the proceedings afresh, thus preserving the *de novo* principle

11.16 A member of staff cannot be compelled to incriminate him/herself at a Disciplinary Hearing. An adjudicator must be satisfied that in doing so it does not prejudice the prisoner. If allegations are made by a prisoner, and a member of staff is thereby suspected of misconduct which would require to be dealt with under the SPS Employee Code of Conduct, any further statement made by the member of staff would be inadmissible in disciplinary proceedings unless he or she had first been cautioned. The adjudicator should adjourn the Disciplinary Hearing pending a formal disciplinary investigation into the allegation, or continue in the knowledge that what the member of staff said could not be used in any subsequent disciplinary action under the Employee Code of Conduct.

12. BREACHES OF DISCIPLINE

12.1 The guidance in this section is not comprehensive, but presents an outline of the essential elements of disciplinary offences under the paragraphs in Schedule 1 of the Rules.

12.2 PARAGRAPH (1) - COMMITS ANY ASSAULT

Specimen Charge. Under paragraph (1) of Schedule 1, commits any assault. At [time] on [date] in [place] you assaulted [name] by [punching] him or her.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner attacked another person; and
- The prisoner's attack was physical in character and was deliberate on his or her part.
- A prisoner will be guilty of assault if he or she commits a deliberate attack on another person. A physical attack does not only include physical striking but also includes spitting or being struck by an item that is thrown.

12.3 PARAGRAPH (2) - FIGHTS WITH ANY PERSON

Specimen charge. Under paragraph (2) of Schedule 1, fights with any person. At [time] on [date] in [place] you were fighting with [name].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- There was an altercation between at least two persons; and
- The altercation was physical in nature.

Fighting is similar to assault or any other charge in that self-defence is a complete defence. It will be a complete defence if a person acted in self-defence and response was proportionate. It is not, however, a defence to a charge of fighting that a prisoner consented to a fight. A fight must involve more than a single action or a single act of forcible resistance. It is for the adjudicator to decide whether the conduct did or did not amount to a fight and consider the intention of the persons involved.

12.4 PARAGRAPH (3) - USES THREATENING WORDS OR BEHAVIOUR

Specimen charge. Under paragraph (3) of Schedule 1, uses threatening words or behaviour. At [time] on [date] in [place] you used threatening words or behaviour towards [name], by [saying “You wait till I get out - I’ll come round and kill you.”].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner performed a specific act or adopted a general pattern of behaviour or said specific words;
- The act, pattern of behaviour or words was threatening. , taking account of the circumstances of the case; and
- The prisoner intended to be threatening or was reckless as to whether his or her words or behaviour might be so.

This could be a single incident or, may have continued over a period of time. It is necessary to be satisfied that a reasonable person at the scene would consider the words or behaviour threatening. It is important to show how the action was threatening, but it may not always be necessary to establish at whom the action was aimed and it is not necessary to name an individual in every charge.

12.5 PARAGRAPH (4) - USES ABUSIVE OR INSULTING WORDS OR BEHAVIOUR

Specimen charge. Under paragraph (4) of Schedule 1, uses abusive or insulting words or behaviour. At [time] on [date] in [place] you used (abusive OR insulting) words or behaviour towards [name], by [calling him a stupid, fat, ugly idiot."].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner performed a specific act or adopted a general pattern of behaviour or said specific words;

- The act, pattern of behaviour or words were abusive or insulting, taking account of the circumstances of the case; and

- The prisoner intended to be abusive or insulting or was reckless as to whether his words or behaviour might be so.

It should be borne in mind that words or behaviour may be annoying or rude without necessarily being abusive or insulting. It is necessary only to be satisfied that a reasonable person at the scene would consider the words or behaviour abusive or insulting. This could be a single incident or may have continued over a period of time. It is important to show how the action was abusive or insulting, but it may not always be necessary to establish at whom the action was aimed and it is not necessary to name an individual in every charge.

12.6 PARAGRAPH (5) - COMMITS ANY INDECENT OR OBSCENE ACT

Specimen charge. Under paragraph (5) of Schedule 1, commits any indecent or obscene act. At [time] on [date] you [exposed your genitals to an officer in the visit area].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

The prisoner performed a specific act or adopted a general pattern of behaviour; and The prisoner intended to be indecent or obscene or was reckless as to whether his or her acts or behaviour might be so.

These terms should be given their ordinary meanings, taking account of the circumstances of the case. The adjudicator requires to be satisfied that a reasonable person at the scene would find the act or behaviour indecent or obscene.

12.7 PARAGRAPH (6) - INTENTIONALLY ENDANGERS THE HEALTH OR PERSONAL SAFETY OF OTHERS

Specimen charge. Under paragraph (6) of Schedule 1, intentionally endangers the health or personal safety of others. At [time] on [date] in [place] you intentionally endangered the health or personal safety of [name or names] by [throwing a can of corrosive fluid to the ground].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

The health or personal safety of at least one person other than the prisoner was endangered: in other words, there was a definite and risk of harm to the health and safety of such a person;

- The danger was caused by the prisoner's conduct; and

- The prisoner intended this to occur.

A charge under this paragraph may apply, e.g.: when a prisoner is alleged to have emptied a container of corrosive fluid onto the ground with the intention to cause injury.

12.8 PARAGRAPH (7) – RECKLESSLY ENDANGERS THE HEALTH OR PERSONAL SAFETY OF OTHERS

Specimen charge. Under paragraph (7) of Schedule 1, recklessly endangers the health or personal safety of others. At [time] on [date] in [place] you recklessly endangered the health or personal safety of [name or names] by [connecting a radio to a light socket].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

The health or personal safety of at least one person other than the prisoner was endangered: in other words, there was a definite and risk of harm to the health and safety of such a person;

- The danger was caused by the prisoner's conduct; and

- The prisoner was reckless as to whether it would endanger health or personal safety of others.

A charge under this paragraph may, on occasion, be correct when a prisoner is alleged unlawfully to have abstracted electricity by tampering with the mains supply to wire up a radio or other electrical item.

12.9 PARAGRAPH (8) - FAILS, WITHOUT REASONABLE EXCUSE, TO OPEN HIS OR HER MOUTH FOR THE PURPOSE OF ENABLING A VISUAL EXAMINATION IN TERMS OF RULE 92(2)(e)

Specimen charge. Under paragraph (8) of Schedule 1, fails without reasonable excuse to open his or her mouth for the purpose of enabling a visual examination in terms of rule 92(2)(e) At [time] on [date] you refused, without reasonable excuse, to open your mouth to enable [officer] to carry out an examination of it.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner refused to open his or her mouth, when instructed to do so; and

- He or she could offer no good reason for refusing to do so.

12.10 PARAGRAPH (9) - IS ABSENT FROM A PLACE WHERE HE OR SHE IS REQUIRED TO BE OR IS PRESENT IN ANY PLACE WHERE HE OR SHE IS NOT AUTHORISED TO BE

Specimen charge. Under paragraph (9) of Schedule 1, is absent from any place where he or she is required to be or is present in any place where he or she is not authorised to be. At [time] on [date] you were absent from [the dining hall] where you were required to be (OR you were [in the cell of [name]] where you were not authorised to be).

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner was required to be in a particular place or was not authorised to be in the place he or she was found;

- The prisoner was in fact absent from the place he or she was required to be or was in fact present at the place he or she was not authorised to be;

- The prisoner had no justification for his or her actions; and

- The prisoner intended this to happen, or was reckless as to whether it would happen.

This charge can apply to incidents both within and outside the prison. If a prisoner absents him or herself without permission for a specific purpose, such as buying something in a local shop, with every intention of returning to the prison, then a charge under this paragraph would apply.

It will be important to show that any local instructions to prisoners were passed to them, and to the prisoner in particular, or that reasonable steps had been taken to pass instructions to the prisoner. A genuine belief that he or she was not required to be somewhere, or that he or she was authorised to be in the place where he or she was found, would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.11 PARAGRAPH (10) - IS DISRESPECTFUL TO ANY PERSON, OTHER THAN A PRISONER WHO IS AT THE PRISON

Specimen charge. Under paragraph (10) of Schedule 1, is disrespectful to any person, other than a prisoner, who is at the prison. At [time] on [date] in [place] you were disrespectful to [name], a person who was at the prison by [swearing at them].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- There was an act;

- The disrespect was directed towards a specific individual or group;

- The act was disrespectful in the reasonable understanding of the term;

- The person to whom the act was disrespectful was a person other than a prisoner; and

- The prisoner intended to be disrespectful to such a person, or was reckless as to whether he or she was being disrespectful.

This charge covers either verbal and physical attitudes or behaviour. A genuine belief that, for example, the conduct was not disrespectful would be a defence. Where a prisoner states that he held such a belief, its reasonableness is a matter for the adjudicator.

12.12 PARAGRAPH (11) - INTENTIONALLY FAILS TO WORK PROPERLY OR, ON BEING REQUIRED TO WORK, REFUSES TO DO SO

Specimen charge. Under paragraph (11) of Schedule 1, intentionally fails to work properly or, on being required to work, refuses to do so. At [time] on [date] in [place] you intentionally failed to work properly, by [talking with other prisoners when you should have been cleaning] (OR at [time] on [date] in [place], being required to work [in the metal shop] you refused to do so.)

Evidence of intentional failure to work properly. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner was lawfully required to work at the time and in the circumstances specified;

- The prisoner failed to work properly: the alleged failure should be measured against a standard which is appropriate to the task and/or the individual; and

- The prisoner intended not to work properly, or was reckless as to whether he was not doing so.

This means that the prisoner must have known his work was not, or might not be, up to the standard. It would be a defence where the adjudicator is satisfied that the prisoner believed that the work was adequate. Where a prisoner states that he held such a belief, its reasonableness is a matter for the adjudicator.
Evidence of refusing to work. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner was lawfully required to work at the time and in the circumstances specified;

- The prisoner refused to work. This may be either by an act or an omission. The prisoner does not have to say “I refuse”, but his or her actions may amount to such refusal; and

- The prisoner intended to refuse to do such work, or was reckless as to whether he or she was doing so.

This means that the prisoner must have known that he or she was required to work at the time and in the circumstances alleged, or must have been aware that this might be the case. It would be a defence where the adjudicator is satisfied that the prisoner believed that he or she was not required to work there. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

If the prisoner claims to have been excused from carrying out the work required in accordance with rule 82, care must be taken to investigate fully such a defence. If the prisoner claims to have been unfit to carry out such work, but has not been medically certified as unfit, the adjudicator may wish to seek evidence on the point.

This is the correct charge to bring in respect of alleged offences at the place of work. A refusal to attend a place of work would constitute an offence under paragraph (12).

12.13 PARAGRAPH (12) - DISOBEYS ANY LAWFUL ORDER

Specimen charge. Under paragraph (12) of Schedule 1, disobeys any lawful order. At [time] on [date] in [place] you disobeyed a lawful order to [return to your cell].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner did not comply with the order;

- The action of a member of staff amounted to a lawful order;

- The prisoner intended not to comply with a lawful order, or was reckless as to whether he or she was not doing so; and

- The prisoner must have understood what was being required of him or her.

A lawful order is one which a member of staff has authority to give in the execution of his or her duties. A lawful order is a clear indication by word and/or action given in the course of his or her duties by a member of prison staff requiring a specific prisoner to do, or refrain from doing, something. It is not necessary to preface any such instruction by the words “This is an order”, “I am giving you a direct order”, or the like.

The prisoner need not have said “I refuse”, but it is important to be satisfied that he or she did not comply with the order within a reasonable period of time. Where a prisoner eventually complies with an order, there may be sufficient evidence for a

finding of guilt where the adjudicator is satisfied that the prisoner deliberately delayed compliance.

12.14 PARAGRAPH (13) - DISOBEYS OR FAILS TO COMPLY WITH ANY RULE, DIRECTION OR REGULATION APPLYING TO A PRISONER

Specimen charge. Under paragraph (13) of Schedule 1, disobeys or fails to comply with any rule, direction or regulation applying to a prisoner. At [time] on [date] in [place] you disobeyed (OR failed to comply with) the regulation requiring you [not to drink or eat visitors snacks in the visits room.]

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The rule, direction or regulation applied to the prisoner;
- The prisoner did not comply with the rule, direction or regulation;
- The rule, direction or regulation was lawful in respect of the particular prisoner; and
- The prisoner intended not to comply with such a rule, direction or regulation, or was reckless as to whether he or she was not doing so.

A lawful rule, direction or regulation is one which prison staff have the authority to impose in keeping prisoners in custody or is one contained in the Rules. Rules, directions or regulations of the prison can range from the requirements of the Rules themselves to a local regulation of that particular establishment or hall.

The adjudicator must be satisfied that the prisoner was aware of the direction or regulation. It would be a defence that the adjudicator is satisfied that the prisoner believed that the rule or regulation did not apply to the prisoner .Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.15 PARAGRAPH (14) - INTENTIONALLY OBSTRUCTS A PERSON, OTHER THAN A PRISONER, IN THE PERFORMANCE OF THAT PERSON'S WORK AT THE PRISON.

Specimen charge. Under paragraph (14) of Schedule 1, intentionally obstructs any person, other than a prisoner, in the performance of that person's work at the prison. At [time] on [date] in [place] you intentionally obstructed [name], in the performance of that persons work [by placing your foot in the door].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established;

- There was an obstruction of some sort, physical or otherwise;

- The person obstructed was not a prisoner and was at the prison for the purpose of working there; and

- The prisoner intended such a person to be obstructed in such a way.

This charge would cover physical obstruction, or a prisoner who deliberately provides false information to an officer.

12.16 PARAGRAPH (15) - DETAINS ANY PERSON AGAINST HIS OR HER WILL

Specimen charge. Under paragraph (15) of Schedule 1, detains any person against his or her will. At [time] (OR between [time] and [time]) on [date] in [place] you detained [name] against his or her will.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established.

The victim was detained for example: in a confined space such as a cell or open space such as a recreation area: and that freedom of movement must have been curtailed in some way by force, or threat of force;

- Detention must be against the alleged victim's will; and

- The prisoner intended the victim to be detained against his or her will, or was reckless as to whether this would happen.

This charge is designed largely to deal with the hostage taker. It is important when laying and dealing with these charges to decide whether or not the victim colluded in events. Where collusion is suspected, it may be appropriate to lay a charge under paragraph (16) either instead of, or in addition to, one under paragraph (15) if the incident has also involved a refusal to allow officers, or anyone else working at the prison, to enter a cell or any other part of the establishment.

Collusion amounts to a complete defence where the alleged victim was a willing participant. Details of injuries sustained by the victim would tend to negate collusion although the adjudicator would have to be alert to the possibility that minor injuries might have been self-inflicted, as would matters such as evidence of previous relationship history between victim and prisoner.

The adjudicator should investigate whether or not there was any attempt by the prisoner to pressurise the victim into saying he was colluding. A disciplinary offence under paragraph 15 may begin with collusion but develop into an unlawful detention where one party changes his mind and wishes to surrender but is prevented from doing so by the other. The evidence of witnesses will be of importance in proving lack of consent.

Any item used as apparatus for restricting movement should be produced in evidence. Where this is impractical or difficult, a photograph of the item may be produced instead.

12.17 PARAGRAPH (16) - DENIES ACCESS TO ANY PART OF THE PRISON TO ANY PERSON OTHER THAN A PRISONER

Specimen charge. Under paragraph (16) of Schedule 1, denies access to any part of the prison to any person other than a prisoner. At [time] (OR between [time] and [time]) on [date] you denied access to [part of prison] to [name], by [barricading your door].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- Access was denied;
- The site was part of a prison;
- The person denied access was not a prisoner; and
- The prisoner intended such a person to be denied access, or was reckless as to whether this would happen.

This charge is designed to deal with those prisoners who deny access to any part of the prison for example by erecting barricades, but is also appropriate where a prisoner denies access without constructing a physical barrier.

12.18 PARAGRAPH (17) - DESTROYS OR DAMAGES ANY PART OF A PRISON OR ANY OTHER PROPERTY, OTHER THAN HIS OR HER OWN.

Specimen charge. Under paragraph (17) of Schedule 1, destroys or damages any part of a prison or any other property, other than his or her own. At [time] in [place] you destroyed (OR damaged) [a television set] belonging to HMP [name] (OR [a radio] belonging to [name]).

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- Part of an establishment or other property was destroyed or damaged;
- The property did not belong to the prisoner;
- There was no lawful excuse to damage the property; and
- The prisoner intended such property to be destroyed or damaged in such a way, or was reckless as to whether this would happen.

The adjudicator must be satisfied that the article was damaged by the prisoner. Guilt is not determined merely on the basis of his or her being in possession of a damaged article.

A genuine belief that he or she owned the property or was entitled to damage it would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.19 PARAGRAPH (18) - INTENTIONALLY OR RECKLESSLY SETS FIRE TO ANY PART OF A PRISON OR ANY OTHER PROPERTY, WHETHER OR NOT THAT PROPERTY BELONGS TO HIM OR HER

Specimen charge. Under paragraph (18) of Schedule 1, intentionally or recklessly sets fire to any part of a prison or any other property, whether or not that property belongs to him or her. At [time] on [date] in [place] you intentionally (OR recklessly) set fire to [the gymnasium at HMP [name]] or to [a blanket] in your cell.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner set fire to a part of an establishment or other property: property should be taken to mean property of any description, whether heritable or moveable; and

- The prisoner intended to set fire to the property, or was reckless as to whether this would happen.

12.20 PARAGRAPH (19) - TAKES IMPROPERLY ANY ARTICLE BELONGING TO ANOTHER PERSON OR TO THE PRISON

Specimen charge. Under paragraph (19) of Schedule 1, takes improperly any article belonging to another person or to the prison. At [time] (OR between [time] and [time]) on [date] in [place] you took improperly [a radio] belonging to [name] OR [a ruler] belonging to [the Education Department] OR [a sign] belonging to [HMP [name]).

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- There was an article;

- The article belonged to another person or to the prison;

- The prisoner assumed physical control of the article;

- The article was taken improperly. This means that the prisoner did not have permission to take it; and

- The prisoner intended to take such an article improperly, or was reckless as to whether he or she was doing so.

This charge covers exclusively articles belonging to people other than the prisoner and can be considered as similar to the criminal charge of theft.

It would be a defence to a charge under this paragraph that the prisoner genuinely believed he or she owned the article or had permission to take it. Where a prisoner states that he held such a belief, its reasonableness is a matter for the adjudicator. Consequently, if a prisoner has signed for another prisoner's goods but has not yet collected those goods, he cannot be guilty of an offence under this paragraph. In these circumstances a charge of attempt under paragraph (31) might be appropriate.

12.21 PARAGRAPH (20) - HAS IN HIS OR HER POSSESSION, OR CONCEALED ABOUT HIS OR HER BODY OR IN ANY BODY ORIFICE, ANY ARTICLE OR SUBSTANCE WHICH HE OR SHE IS NOT AUTHORISED TO HAVE OR A GREATER QUANTITY OF ANY ARTICLE OR SUBSTANCE THAN HE OR SHE IS AUTHORISED TO HAVE

Specimen charge. Under paragraph (20) of Schedule 1, has [in his or her possession] [concealed about his or her body or in any body orifice] [any article or substance he or she is not authorised to have] [a greater quantity of any article or substance than he or she is authorised to have]. At [time] (OR between [time] and [time]) on [date] in [place] you had in your possession (OR concealed within your [ ]) an unauthorised article, namely [a razor blade] (OR a greater quantity of [tobacco] than you were authorised to have, namely [2oz tobacco])

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- Presence: the article or substance exists; or existed at the time of the report;
- It was found where it is alleged to have been found. (Where it is practicable to do so, the article or substance in question should be produced in the Disciplinary Hearing);
- The prisoner was not authorised to have the article, or to have the quantity of the article;
- The article is what it is alleged to be; and
- The article was in the possession of the prisoner.

This paragraph is intended to cover the possession of an article or substance (for example money) which is unauthorised in itself; an article or substance which may be authorised (such as a radio) but which is, in the particular case, unauthorised (perhaps, because it has been smuggled in); an article or substance which may have been authorised to a certain prisoner but not to the one in whose possession it is found; or possession of more of certain articles than a prisoner is entitled to have.

Knowledge of its nature can be properly inferred from all the circumstances, for instance, whether it was hidden or whether the prisoner attempted to dispose of it before it was found. It is good practice for a reporting officer to question the prisoner as soon as an article or substance is found so that his or her immediate reaction to its presence can be adduced in evidence.

A prisoner who drops or throws away an article or substance simply because he or she believes that it is about to be discovered may still be guilty of possession at an earlier stage if there is sufficient evidence that it was in his or her control before it was abandoned. Care will be needed in specifying the time the offence is alleged to have occurred in such a case.

In the case of charges under paragraph (20) it will be necessary to show that the prisoner was aware of the restrictions on authorisation or quantity or was reckless as to whether there were such restrictions. A genuine belief that the article or substance was authorised or that there were no restrictions on quantity allowed in possession would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

If a prisoner is found in possession of a number of unauthorised articles or substances, the reporting officer may wish to consider a charge in respect of each. Each charge should be placed in one charge letter and all should be ordinarily dealt with at the same Disciplinary Hearing. The reason is that, should all the articles or substances be covered by one charge, and should the prisoner later have a complaint upheld in respect of *one* of the articles or substances, the whole Disciplinary Hearing may have to be quashed.

12.22 PARAGRAPH (21) – HAS IN HIS OR HER POSSESSION WHILST IN A PARTICULAR PART OF THE PRISON, ANY ARTICLE OR SUBSTANCE WHICH HE OR SHE IS NOT AUTHORISED TO HAVE WHEN IN THAT PART OF THE PRISON

Specimen charge. Under paragraph (21) of Schedule 1, has [in his or her possession] [any article or substance whilst in a particular part of the prison which he or she is not authorised to have when in that part of the prison]. At [time] (OR between [time] and [time]) on [date] in [place] you had in your possession (OR concealed within your [ ]) an unauthorised article, namely [a kitchen ladle] in [A Hall] where you were not authorised to have it.]

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established;

- The article or substance exists; or existed at the time of the charge;
- The article /substance is what it is alleged to be;
- The prisoner was not authorised to have the article or substance, when in that part of the prison;
- It was found where it is alleged to have been found. (Where it is practicable to do so, the article or substance in question should be produced in the orderly room.); and
- The article was in the possession of the prisoner.

This paragraph is intended to cover in the possession of an article or substance which a prisoner may have in one place (e.g. the kitchen) but which he or she may not remove from the place where he or she is authorised to have it.

Knowledge of its nature can be properly inferred from all the circumstances: for instance, whether it was hidden or whether the prisoner attempted to dispose of it before it was found. It is good practice for a reporting officer to question the prisoner as soon as an article or substance is found so that his or her immediate reaction to its presence can be adduced in evidence.

A prisoner who drops or throws away an article or substance simply because he or she believes that it is about to be discovered may still be guilty of possession at an earlier stage if there is sufficient evidence that it was in his or her control before it was abandoned. Care will be needed in specifying the time the offence is alleged to have occurred in such a case.

It will be necessary to show that the prisoner was aware of the restrictions on places in the establishment where articles or substances could be kept or was reckless as to whether there were such restrictions. A genuine belief that there were no restrictions on places where it might be taken would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

If a prisoner is found in possession of a number of unauthorised articles or substances, the reporting officer may wish to consider a charge in respect of each. All charges should be placed in one charge letter and generally dealt with at the same Disciplinary Hearing. The reason is that, should all the articles or substances be covered by one charge, and should the prisoner later have a complaint upheld in respect of *one* of the articles or substances, the whole Disciplinary Hearing may have to be quashed.

12.23 PARAGRAPH (22) – HAS IN HIS OR HER POSSESSION, OR CONCEALED ABOUT HIS OR HER BODY OR IN ANY BODY ORIFICE, ANY PROHIBITED ARTICLE

Specimen charge. Under paragraph (22) of Schedule 1, has [in his or her possession] or [concealed about his or her body] or [in any body orifice] any prohibited article. At [time] (OR between [time] and [time]) on [date] in [place] you had in your possession (OR concealed within your [ ]) a prohibited article, namely [a mobile phone].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The article exists; or existed at the time of the report;
- It was found where it is alleged to have been found. (Where it is practicable to do so, the article in question should be produced in the orderly room.);
- The article is a prohibited article;

- It is what it is alleged to be; and

- The article was in the possession of the prisoner or concealed about his or her body or in any body orifice.

This paragraph is intended to cover the possession of, or concealment about his or her body, an article which is a prohibited article.

Knowledge of its nature can be properly inferred from all the circumstances: for instance, whether it was hidden or whether the prisoner attempted to dispose of it before it was found. It is good practice for a reporting officer to question the prisoner as soon as an article is found so that his or her immediate reaction to its presence can be adduced in evidence.

A prisoner who drops or throws away an article simply because he or she believes that it is about to be discovered may still be guilty of possession at an earlier stage if there is sufficient evidence that it was in his or her control before it was abandoned. Care will be needed in specifying the time the offence is alleged to have occurred in such a case.

It will be necessary to show that the prisoner was aware that the articles are "prohibited" or was reckless as to whether there were. A genuine belief that the article is not prohibited would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

If a prisoner is found in possession of a number of prohibited articles, the reporting officer may wish to consider a charge in respect of each. All charges should be placed in one charge letter and generally all charges will be dealt with at one Disciplinary Hearing. The reason is that, should all the articles be covered by one charge, and should the prisoner later have a complaint upheld in respect of *one* of the articles, the whole Disciplinary Hearing may have to be quashed.

12.24 PARAGRAPH (23) - SELLS OR DELIVERS TO ANY PERSON ANY ARTICLE WHICH HE OR SHE IS NOT AUTHORISED TO HAVE

Specimen charge. Under paragraph (23) of Schedule 1, sells or delivers to any person any article which he or she is not authorised to have. At [time] on [date] in [place] you [sold]/ [delivered] [a prison pillow from the store] which you were not authorised to have to [name].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

The article was sold or delivered by the prisoner to another person. (The person to whom the article was sold or delivered does not have to be a prisoner.);

- The item was not authorised for the prisoner; and

- The prisoner intended to sell or deliver an unauthorised article, or was reckless as to whether he was doing so.

This charge is to be used for articles which in themselves are authorised articles but which are not authorised for the giver. The charge represents a single offence which may be committed in two separate ways: selling or delivering. It is not necessary to show which of the two is involved.

A genuine belief that the article or substance was authorised or that there were no restrictions on quantity allowed in possession would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.25 PARAGRAPH (24) - SELLS OR, WITHOUT PERMISSION, DELIVERS TO ANY PERSON ANY ARTICLE WHICH HE OR SHE IS ALLOWED TO HAVE ONLY FOR HIS OR HER OWN USE.

Specimen charge. Under paragraph (24) of Schedule 1, sells or, without permission, delivers to any person any article which he or she is allowed to have only for his or her own use. At [time] on [date] in [place] you sold (OR delivered without permission) to [name] a [radio] which you were allowed to have only for your own use.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The article was sold or delivered by the prisoner to another person. (The person to whom the article was sold or delivered does not have to be a prisoner.);

- The item was allowed only for the prisoner's own use;

- In the case of delivering, the prisoner did not have permission; and

- The prisoner intended to sell or deliver such an item in such a way, or was reckless as to whether he or she was doing so.

The charge is to be used for articles which the prisoner is allowed to have but not pass on. The charge represents a single offence which may be committed in two separate ways: selling or delivering. It is not necessary to show which of the two is involved.

A genuine belief that that there were no restrictions on selling or delivering the article would be a defence. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.26 PARAGRAPH (25) CONSUMES, TAKES, INJECTS, INGESTS CONCEALS INSIDE A BODY ORIFICE, INHALES OR INHALES THE FUMES OF ANY SUBSTANCE WHICH IS- (a) A PROHIBITED ARTICLE; (b) UNAUTHORISED PROPERTY; OR (c) AN ARTICLE WHICH HE OR SHE HAS BEEN AUTHORISED

TO KEEP OR POSSESS BUT WHICH HE OR SHE HAS NOT BEEN SPECIFICALLY AUTHORISED TO INHALE OR INHALE THE FUMES THEREOF.

Specimen charge. Under paragraph (25) of Schedule 1, consumes, takes, injects, ingests conceals within any body orifice inhales or inhales the fumes of any substance which is (a) a prohibited article (b) unauthorised property or (c) article which he or she has been authorised to keep or possess but which he or she has not been specifically authorised to inhale or inhale the fumes thereof. At [time] on [date] you [consumed/took/injected/ingested] (concealed within your [ ] inhaled or inhales the fumes of) [substance], which is a prohibited article.

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The substance must be proved to be a prohibited article, unauthorised property or an article which he or she has been authorised to keep or possess but which he or she has not been specifically authorised to inhale or inhale the fumes thereof ; and

- There was an intention on the part of the prisoner to consume, take, inject, ingest, conceal, inhale or inhale the fumes of the substance, or the prisoner was reckless as to whether he or she was doing so.

It will not be sufficient to assume that because, for example, a prisoner is seen to receive something from a visitor which he or she swallows before it can be retrieved, this is a drug (as opposed for example to the square of chocolate he asserts it to be). It will therefore be necessary to retrieve the substance or catch the prisoner in the act of taking it.

12.27 PARAGRAPH (26) SMOKES IN AN AREA OF THE PRISON WHERE SMOKING IS NOT PERMITTED BY VIRTUE OF RULE 36

Specimen charge. Under paragraph (26) of Schedule 1, smokes in an area of the prison where smoking is not permitted by virtue of Rule 36. At [time] on [date] you [were smoking in the work shed].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The cigarette must be proved to have been alight in the area in question;

- The area was not permitted by virtue of rule 36; and.

- The prisoner intended to smoke the lit cigarette or was reckless as to whether he or she was doing so. The term cigarette includes tobacco products.

It will not be necessary to catch the prisoner in the act of smoking it.

12.28 PARAGRAPH (27) - ADMINISTERS A CONTROLLED DRUG TO HIMSELF OR HERSELF OR FAILS TO PREVENT THE ADMINISTRATION OF A

CONTROLLED DRUG TO HIMSELF OR HERSELF BY ANOTHER PERSON BUT SUBJECT TO RULE 117.

Specimen charge. Under paragraph (27) of Schedule 1, administers a controlled drug to himself or herself or fails to prevent the administration of a controlled drug to himself or herself by another person but subject to rule 36. Between [date] and [date] you administered [cannabinoids] to yourself or failed to prevent another person administering it to you.

Prisoners are to be charged under paragraph (27) only as a result of samples taken under compulsory drug testing provisions. The test must have been of the prisoner's urine or other authorised sample, which is not an intimate sample. Prisoners should not be charged on the basis of positive test results obtained by way of any voluntary testing arrangement.

Discovery of an alleged offence occurs when two elements have been established. First, an initial screening test must have given a positive result for a controlled drug and, second, at all material times the prisoner must have been in prison custody when the drug was administered.

If the controlled drug was alleged to have been taken whilst the prisoner was released temporarily under Part 15 of the Rules, paragraph (27) cannot be used. The alleged offence is then under paragraph (30), since the prisoner would have broken a licence condition (assuming that the licence contained such a condition) expressly prohibiting the misuse of controlled drugs.

At the start of a Disciplinary Hearing, if the prisoner enters an unequivocal plea of guilty, the adjudicator may proceed with the Disciplinary Hearing. If the prisoner pleads not guilty or equivocates over a plea, the Disciplinary Hearing should be adjourned and the sample sent for a secondary, confirmation test. At a resumed Disciplinary Hearing, the result of the latter test must be admitted as evidence. Under rule 113(12) the adjudicator may take the lab test into account without requiring the technician who conducted it to be present; provided that, having given the prisoner the opportunity to say why the technician should be present, he or she is satisfied that it is appropriate to admit the test in evidence and that there is no sufficient reason why the technician need give oral evidence.

Where a confirmation test is to be carried out, the prisoner may arrange for an independent analysis of his sample (part of which will have been retained under drug testing procedures) and submit the results in evidence. He or she should be asked before the Disciplinary Hearing is adjourned whether he or she wishes to do so. Pending completion of the independent analysis the Disciplinary Hearing must be adjourned. The detailed procedures to be followed in the event of an independent analysis being requested are set out in the SPS Information Sheet "Procedures for Conducting Independent Testing of Urine Samples". As stated in the Information Sheet, if the results of the independent analysis are not available within six weeks of the request's being made, or if any of the intermediate steps in the process are not completed within the timescale laid down in the Information Sheet, the adjudicator should conclude the Disciplinary Hearing on the basis of the evidence available at that time. NB If the prisoner becomes due for release before any of these periods

has expired, the Disciplinary Hearing will fall and the prisoner must be released without a verdict being reached.

The wording of the offence, together with the existence of the express defences under rule 117(3), assist in clarifying what has to be established before there can be a finding of guilt. The existence of the express defences permits the adjudicator, in the absence of any credible explanation from the prisoner, or from any witness, to find guilt on the basis of the positive test without the need to find additional evidence as to knowledge or intent. The express defences do not remove the duty of the adjudicator to enquire into the offence, but he or she is not obliged to enquire into a defence unless there is sufficient credible evidence produced in the course of the Disciplinary Hearing to cast reasonable doubt on those elements.

There can be additional defences to the three express ones. It will, for example, be a defence to a current charge if the prisoner has already been charged with using the same drug during any part of the period covered by the current charge. This defence will not be available if the result of the test on which the current charge is based is higher than that which gave rise to the earlier charge, as this would indicate that the prisoner had used the drug again since the previous test.

If a potential defence, including one of the express defences, is raised in some way other than by the prisoner, it must be investigated.

The table of minimum waiting periods which is available to the adjudicator is required before a prisoner may be charged, or charged again.

12.29 PARAGRAPH (28) - ESCAPES OR ABSCONDS FROM PRISON OR FROM LEGAL CUSTODY.

Specimen charge. Under paragraph (28) of Schedule 1, escapes or absconds from prison or from legal custody. At [time] (OR between [time] and [time]) on [date] in [place] you escaped from HMP [name] (OR you absconded from [the grounds maintenance party] OR you escaped from [an escort].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner was held in prison or in legal custody;
- The prisoner escaped or absconded;
- The prisoner had no lawful authority to do what he or she did; and
- The prisoner intended to escape.

Escaping is evading secure custody from prison or a secure escort. Absconding is evading non-secure custody from an open prison or a non-secure escort e.g. special escorted leave. If the prisoner did not get beyond the boundary of the establishment in trying to escape, a charge under paragraph31) of Schedule 1 would be correct. If a prisoner at an open establishment absents himself for a specific purpose, such as

buying something in a nearby shop, with every intention of returning to the prison, then a charge under paragraph (9) would apply.

A prisoner being escorted to or from a prison, or working out with the prison perimeter is in legal custody. A copy of the committal warrant should be produced, together with the details of the critical dates applicable at the time of the escape or abscond as evidence

It is for the adjudicator to decide whether the alleged conduct of the prisoner amounted to an escape / abscond and the details of the charge should therefore contain details of the events alleged. It would be a defence that he or she had been authorised to leave the prison or the control of the officer. It must be shown that the prisoner knew he or she was leaving legal custody without lawful authority. This will be provided by the evidence: for example, the tools used, the actions of the prisoner after the escape, and the explanations given on return to custody. It is a defence if the prisoner genuinely believed that he or she had authority to act as he or she did. Where a prisoner states that he or she held such a belief, its reasonableness is a matter for the adjudicator.

12.30 PARAGRAPH (29) - FAILS TO RETURN TO PRISON WHEN HE OR SHE SHOULD RETURN AFTER BEING TEMPORARILY RELEASED UNDER PART 15 OF THE RULES

Specimen charge. Under paragraph (29) of Schedule 1, fails to return to prison when he or she should return after being temporarily released under Part 15 of the Rules. At [time] (OR between [time] and [time]) on [date] in [place], having been temporarily released, you failed to return (name of prison) on (date) at (time)

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established;

- A temporary release licence, signed by an individual with authority to do so, had been issued;
- The terms of the license were clear and unambiguous;
- The date and time of return was recorded on the license;
- The prisoner was made aware of them; and
- There was no justification for the failure to comply with any condition.

A copy of the licence, and preferably the original, should be produced in evidence. Where a prisoner is charged with failing to return, a frequently used defence is that he or she was not well enough to do so. It will be for the adjudicator to determine the reasonableness of this defence.

Where it is a condition of the licence that the prisoner is unable to return from temporary release due to ill health, he or she should present himself to a doctor. Failure to do so would justify a charge.

In punishing a prisoner found guilty of an offence relating to absence outside the establishment, or a failure to return after being temporarily released, the length of time the prisoner has been unlawfully at large should not influence the level of the punishment. However, it may be taken into account as an indicator of attitude in conjunction with other factors, such as whether the prisoner resisted arrest or surrendered himself, the pressures on the prisoner to surrender or not to return, the extent to which plans were made to stay at large indefinitely and so on. No account should be taken of any criminal offences committed by the prisoner while at large. Such offences will be considered by the police.

12.31 PARAGRAPH (30) – FAILS TO COMPLY WITH ANY CONDITION UPON WHICH HE OR SHE IS TEMPORARILY RELEASED UNDER RULE 100 or PART 15

Specimen charge. Under paragraph (30) of Schedule 1, fails to comply with any condition upon which he or she is granted special escorted leave or is temporarily released under Rule 100 or part 15. At [time] (OR between [time] and [time]) on [date] in [place], having been granted special escorted leave /temporarily released, you failed to comply with the condition that you should [condition]].

Evidence. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- A temporary release licence, signed by an individual with authority to do so, had been issued or an individual with the authority to do so has granted special escorted leave;

- The terms of the license/grant were clear and unambiguous;

- The prisoner failed to comply with any of the conditions of his or her licence/grant;

- The prisoner intended not to comply with any condition or was reckless as to whether this would happen (for example the prisoner took a late bus or train knowing that he might not therefore be back at the prison on time); and

- There was no justification for the failure to comply with any condition.

12.32 PARAGRAPH (31) ATTEMPTS TO COMMIT, INCITES ANOTHER PRISONER TO COMMIT, OR ASSISTS ANOTHER PRISONER TO COMMIT OR ATTEMPT TO COMMIT, ANY OF THE FOREGOING BREACHES

Whichever of the above is used, the charge must specify one of the other paragraphs of Schedule 1.

Specimen charge (a). Under paragraphs (28)] and (31) of Schedule 1, [attempts to escape or abscond from prison or from legal custody]. At [time] on [date] in [place] you attempted to [escape by running for the fence].

Evidence of attempting. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- The prisoner committed an act which was more than merely preparatory to the commission of the intended offence; and

- The prisoner intended to commit the full offence.

It is not necessary to show that it was one that he or she would be able to carry out (because, for example, the level of security was such that an attempted escape could not possibly have succeeded).

An example might be that the manufacture of a rope out of knotted sheets would constitute an attempted escape, but using the same rope to descend into the grounds would constitute an offence under Para 28. (If a prisoner were found to have a knotted sheet, he or she might be charged under paragraph (20), (21), (22) or, if applicable, under paragraph (19) of Schedule 1.)

Specimen charge (b). Under paragraphs [(17)] and (31) of Schedule 1, [incites another prisoner to destroy or damage any part of a prison or any other property, other than his or her own]. At [time] on [date] in [place] you [incited a group of prisoners to commit damage to a holding room in Reception].

Evidence of inciting. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

The prisoner acted / communicated to other prisoners in such a way as to encourage or persuade others to commit a listed offence. It is necessary to show that other prisoners were sufficiently near to be able to react to the incitement;

- The act/ communication was capable of inciting other prisoners to commit the offence;

- The l offence was either the subject of the incitement or the consequence of it; and

- The prisoner intended to so incite or was reckless as to whether he did so.

Incitement in this context means seeking to persuade another prisoner to commit a disciplinary offence, whether this is done by suggestion, persuasion, threats, pressure, words or implication. It does not matter that nobody attempted to commit the full offence. It is for the adjudicator to decide whether what the prisoner did or said was capable of inciting other prisoners, and he or she should take into account the nature of the prisoners involved in deciding this.

Specimen charge (c). Under paragraphs (28) and (31) of Schedule 1, assists another prisoner to escape or abscond from prison or from legal custody. At [time] on [date] in [place] you assisted [name] to escape by [supplying him with knotted bed sheets].

Evidence of assisting. Before an adjudicator can be satisfied of guilt beyond any reasonable doubt, the following must be established:

- An offence was committed by another prisoner. This may include an attempt;
- The prisoner actively assisted the other prisoner in the commission of the offence; and
- The prisoner intended to assist the other prisoner.

It is not sufficient that the prisoner was aware of, and did not prevent, the offence occurring. It is important that he or she did something which made the commission of the offence easier. However, since paragraph (31) is dependent upon the commission of another offence, it would be a defence that the other prisoner was found not guilty of the substantive offence.

13. VERDICTS

Standard of proof

13.1 Regardless of how the prisoner has pleaded the adjudicator must consider all evidence before arriving at a conclusion. The adjudicator must be satisfied beyond any reasonable doubt that the prisoner has committed the offence which is the subject of the charge before finding guilt. Otherwise the finding must be one of not guilty.

Mitigation

13.2 If the finding is one of guilt, the prisoner should be asked whether he or she wishes to say anything in mitigation. There is no need to use the word ‘mitigation’ so long as the prisoner understands that this is an opportunity to further explain his actions. If the prisoner asks to call any person to support a plea in mitigation, this should be allowed, unless the adjudicator is satisfied that the witness will not be able to give relevant evidence. If no plea in mitigation is put forward, this fact must be recorded.

Giving reasons for decisions

13.3 Since a prisoner has the right, both internally and through the courts, to challenge a Disciplinary Hearing, it is essential that he or she should be given sufficient reasons for the decision in order to exercise that right effectively.

14. PUNISHMENTS

Fitness for punishment

14.1 No prisoner about whose fitness for the punishment the adjudicator has any doubt should be punished.

Available punishments

14.2 Punishments available are those contained in rule 114. No other punishment may be imposed. A caution is available under rule 114(1) (a) where a warning seems sufficient to mark an offence and discourage its repetition. More than one punishment can be imposed for the same offence where an adjudicator deems this to be appropriate. This is subject to rule 114.

14.3 Punishments must be within the range of, and expressed in terms of, the Rules. Any punishment should start immediately unless:

- it was ordered to be suspended; or
- it was ordered to be consecutive to another punishment but subject to rule 114(3).

14.4 If two or more punishments of the same kind are imposed at the same time for separate offences, they may be ordered to run concurrently or consecutively to one another. Generally it will be good practice to impose concurrent punishments if the offences are part of the same incident. If consecutive punishments are imposed, the Disciplinary Hearing should ensure that the result is not excessive for all the offences taken together. Records should clearly show whether punishments are concurrent or consecutive.

14.5 The adjudicator should ensure that the prisoner fully understands the effect of any punishment imposed e.g. the consecutive effect of wages punishments.

Consistency of punishments

14.6 There is no central tariff of punishments. A punishment should take account of the circumstances and seriousness of the offence and of the prisoner's behaviour during the present sentence. It should also take account of the type of establishment, the circumstances of the prisoner, the effect of the offence on the regime, the general order and discipline of a closed community and the need to discourage the prisoner and others from repeating the offence. A lack of consistency exposes the punishments awarded to legal challenge on the grounds of unfairness.

Forfeiture of privileges

14.7 Privileges may be withdrawn as a punishment, for a maximum period of 14 days. Rule 114 (1)(b) provides that the Governor may impose forfeiture of any privileges granted under the system of privileges applicable to a prisoner for a period not exceeding 14 days.

Stoppage of or deduction from earnings

14.8 Rule 114 (1)(c provides that the Governor may impose stoppage of or deduction from earnings for a period not exceeding 56 days and of an amount not exceeding one half of the prisoner's earnings in any week (or part thereof) falling within the period specified. The administrative process to recover wages means that

although applied immediately/concurrently they are effectively consecutive where more than one wages punishment is applied.

Cellular confinement

14.9 An adjudicator may impose cellular confinement for a maximum period of 3 days. Prisoners serving a punishment of cellular confinement are subject to the condition of the current Direction to Rule 114 which states that a prisoner who is subject to cellular confinement must serve the period of cellular confinement in accordance with the following conditions:

- Cellular confinement must be served in a cell identified by the Governor for this purpose;

- the Governor may remove the bed and any bedding from the cell between 0700 hours and 1700 hours;

- the prisoner may store in the cell such items as the prisoner would otherwise be entitled to store in his or her cell under rule 47 but the Governor may remove any items which the Governor considers to be incompatible with cellular confinement;

- the prisoner may only be allowed to take exercise or spend time in the open air under rule 87 separately from other prisoners; and

- Young offenders subject to cellular confinement may only be allowed to take part in physical recreation, activities and pursuits under rule 87 separately from other prisoners.

14.10 Prisoners serving a punishment of cellular confinement should be allowed all normal facilities, except those which are incompatible with cellular confinement, unless a punishment of forfeiture of privileges has also been imposed.

14.11 Prisoners' serving a punishment of cellular confinement retain important rights such as the right to correspond, to take exercise or where weather permits, to spend a period in the open air and to use the complaints procedures (Part 12 of the Rules). In accordance with rule 120 they may also make a request to an officer to speak to;

- a member of staff of the Scottish Administration;

- a member of the prison monitoring team; or

- a sheriff or a justice of the peace visiting the prison in terms of section 15 of the Act.

14.12 Prisoners should be allowed to attend the main service of their religion unless in accordance with rule 95. They should be allowed to have books within reasonable limits. Access to visits and a telephone should be allowed in accordance with normal arrangement unless there is an increased risk to safety, security or good order of the prison.

14.13 Where cellular confinement is imposed on a prisoner the Governor must inform a healthcare professional as soon as possible. In accordance with rule 40, where the Governor receives a recommendation from a healthcare professional that, having regard to a prisoner's health, the prisoner should not be subject to cellular confinement where this has been imposed in terms of rule 114(1)(d), the Governor must give effect to that recommendation without delay.

Forfeiture of entitlement to wear own clothes

14.14 An untried prisoner who is found guilty of escaping or attempting to escape may forfeit for a designated period the right to wear his or her own clothing under rule 32. A convicted prisoner may forfeit the entitlement to wear his or her own clothing under rule 31 where the entitlement to do so forms part of the privileges system within the prison.

Untried and civil prisoners

14.15 Untried and civil prisoners may forfeit their entitlements to have books, newspapers etc. under rule 52 for any specified period. Their entitlement to keep tobacco was removed in the 2018 SSI amendments, which made tobacco an unauthorised item.

Forfeiture of access to PPC

14.16 Under rule 114(g) a governor may impose on a prisoner a forfeiture of entitlement to withdraw money in terms of rule 51(3) for a period not exceeding 14 days.

Suspension of punishment

14.17 Under rule 115, an adjudicator may order any punishment other than a caution to be suspended for up to six months so that it cannot take effect unless the prisoner commits another disciplinary offence in the suspension period. An individual punishment may not be suspended in part. Where more than one punishment is imposed for the same offence, some of those punishments can be suspended, with others starting immediately.

14.18 If a prisoner commits a further offence against discipline during the period of suspension of an earlier punishment, the activation of a suspended punishment should not be automatic and each case must be decided on its merits. An adjudicator may, irrespective of the punishment given for the later offence, direct:

- that the suspended punishment is to take effect;
- that the suspended punishment and the further punishment (except for cellular confinement under rule 114(1)(d)) are to be served consecutively;
- that the period or amount of the suspended punishment is to be reduced and will take effect as so reduced;

- that the suspended punishment is to be suspended again for a period of up to six months from the date of the Governor's direction;

- that the further punishment is to be suspended for a period of up to six months from the date of the Governor's direction; or

- that both the suspended punishment and the further punishment are to be suspended for a period of up to six months from the date of the Governor's direction.

14.19 A suspended punishment which is partly or fully activated can be directed to take effect immediately or to be consecutive to a punishment imposed for the subsequent offence.

Interruptions to punishment

14.20 When a punishment is interrupted because the prisoner is on bail or is unlawfully at large, the balance of the punishment should be served if the prisoner returns to custody in connection with the same legal proceedings or is recaptured.

14.21 Time spent in hospital or days on which a prisoner attends court count as part of a punishment period.

15. DISCIPLINARY APPEALS

15.1 Rule 118 provides that any prisoner found guilty of any breach of discipline may, within 14 days of the decision, appeal the said decision. A disciplinary appeal may be against:

- Both the finding of guilt and any punishment imposed; or

- Only the punishment imposed.

Where a prisoner appeals, this does not suspend the punishment.

15.2 A prisoner found guilty at a Disciplinary Hearing should upon request be provided with copies of the record of the Disciplinary Hearing, including statements of witnesses. No charge for photocopies should be made. This also applies to copies of documents supplied to a prisoner's legal representative. Reasonable charges may be made in respect of multiple copies.

Consideration of Disciplinary Appeals

15.3 Where the adjudicator of the Disciplinary Hearing was an officer other than the Governor in charge, the appeal must be dealt with as if it were a complaint to the Internal Complaints Committee (ICC) under Rule 123. The prisoner should be issued with the appropriate form (currently PAF1).

Following investigation of the appeal, the Governor must if recommended to do so by the ICC:

- Quash any finding of guilt; or

- Remit or mitigate any punishment (other than a punishment where the period for which it was imposed has expired by the date of the decision of the appeal).

15.4 Where the adjudicator of the Disciplinary Hearing was the Governor in charge or took place in a contracted out prison, the appeal will be considered by Scottish Ministers. The prisoner should be issued with the appropriate form (currently PAF2). The completed form should be forward to the nominated individual in SPS Headquarters as soon as is possible to allow sufficient time to investigate and issue a response. Upon receipt of an appeal Scottish Ministers must:

- Investigate any relevant matters raised in the appeal; and

- Provide a written response to the prisoner within 20 days of the appeal being made.

In accordance with rule 118(7) Scottish Ministers may:

- Quash any finding of guilt; or

- Remit or mitigate any punishment (other than a punishment where the period for which it was imposed has expired by the date of the decision of the appeal);

- Substitute another punishment which is, in the opinion of the Scottish Ministers, less severe; or

- In the case of the disciplinary appeal, refuse the appeal.

15.5 If the Governor or Scottish Ministers quash any finding of guilt the Governor must destroy any record in the prisoner's file which relates to the alleged breach of discipline except where the record, or a part of it, relates to any other finding of breach of discipline which continues to form part of the prisoner's record.

15.6 Following the conclusion of the appeals procedure in relation to any appeal brought under this rule, a prisoner is not entitled to make any further appeal or complaint under the Rules in relation to the same matter to which the breach of discipline in question related. The prisoner may however refer his appeal to the SPSO. The SPSO will not consider the merits of the case but will consider whether the adjudicator complied with the Rules and this guidance. The SPSO may make recommendations to the Chief Executive of SPS.

15.7 A prisoner may seek to have a judicial review of the outcome of the Disciplinary Hearing. Governors who receive notification or advance warning of an

application for judicial review should send all papers, together with the record of the relevant Disciplinary Hearing, to Legal Services Branch for attention.

16. THE APPLICATION OF THE RULES OF NATURAL JUSTICE

16.1 A prisoner may seek to have the outcome of the Disciplinary Hearing judicially reviewed. The grounds for any such challenge are likely to surround the legality or reasonableness of the outcome or the fairness of the procedure.

Legality

16.2 In a judicial review the Court will consider whether or not the process or outcome was in accordance with the law. Examples might be: Was a prisoner's friend disallowed under the mistaken belief that such a person must not be a fellow prisoner? Was there a misinterpretation of the concepts of intent or recklessness?

Reasonableness (Irrationality)

16.3 This is based on the Wednesbury principle. A decision is likely to be quashed at judicial review if it is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. This may be so where the adjudicator has taken into account irrelevant considerations or failed to take into account relevant considerations, if he or she has applied the wrong test in reaching a finding, or if the punishment imposed was indefensibly severe.

Procedural impropriety

16.4 Primarily this relates to the question of whether or not the prisoner has been given a fair hearing, was the Disciplinary Hearing conducted in accordance with the Rules and this guidance, and was it in accordance with the rules of natural justice? A number of factors may constitute procedural impropriety, as follows:

a) The *de novo* principle. The adjudicator must come to the Disciplinary Hearing afresh, with an uncluttered mind. The adjudicator should start the proceedings without reference to any previous Disciplinary Hearing of the charge, for example one at which the question of legal representation was decided. There is one exception to this and that is if, during the course of the second Disciplinary Hearing, the accused disputes evidence saying that it is at variance with that offered at the preliminary Disciplinary Hearing. The record of the preliminary hearing may then be admitted as evidence at the represented hearing so that the evidence may be challenged.

b) The rule against bias. The basis of this is the legal maxim that no one is to be a judge in his own cause. Bias may be suggested if, for example, the accused prisoner were to be a friend of the adjudicator or where an adjudicator had been the victim of a previous offence by the accused. It points to a personal involvement in an incident going beyond an interest in maintaining good order and discipline. A general good knowledge of the prisoner's history would not normally be sufficient to amount to bias.

c) The fettering of discretion. An adjudicator has discretion in a number of areas, particularly as to whether or not to admit evidence, to hear witnesses, or to allow legal representation or other assistance. He or she must act fairly in exercising that discretion. It is legitimate for decision makers to consider how like cases are to be treated/were treated, but the adjudicator must consider the unique circumstances of a particular case.

d) The *audi alteram partem* rule. An adjudicator must hear both sides of the case. Each party to a Disciplinary Hearing must have the opportunity to present his version of the facts and to ask questions of each other to substantiate his side of the events. Likewise, each party must be allowed to comment on all the material considered by the adjudicator and be given an opportunity to explain, contradict or correct it. Each party must be allowed to call witnesses to corroborate his evidence. It would be improper for an adjudicator to refuse to call a witness on the grounds, say, that the accused had already called a number who had been unable to corroborate the defence or mitigation.

e) Legitimate expectation. The courts have developed a doctrine of legitimate expectation to indicate entitlements to which they will give effect over and above rights enshrined in law. When considering the duty to act in any particular case, it is necessary to look at the conduct of the adjudicator as a whole in order to decide whether the circumstances are such that the accused has acquired a legitimate expectation that the adjudicator should act towards him or her in a particular way.

f) Excess of jurisdiction: *ultra vires*. The outcome of a Disciplinary Hearing will be quashed if the adjudicator acts outside the Rules and this may occur in a variety of ways. Examples might be where the offence of which the prisoner has been found guilty is not an offence specified in Schedule 1 of the Rules ; where punishment is in excess of that allowed under Rule 114 ; or where the charges were laid outside the specified time limits, in the absence of exceptional circumstances.

17. SIGNPOSTING

17.1 Whilst the primary role of the adjudicator is to inquire into a report of alleged events and to decide whether there has been a breach of discipline in terms of rule 110 and Schedule 1 of the Rules, practise has developed which has broadened the role of the adjudicator to be a vehicle for diverting prisoners from further disciplinary offences by appropriate and timely referral to services within the prison.

17.2 It will often become apparent in the course of Disciplinary Hearing that there are contributory factors to the commission of the disciplinary offence. These might be social, for example a family difficulty, relate to the individuals health or the individual's ability to cope with the difficulties inevitably faced by imprisonment. Whilst many of these factors may be presented in mitigation, following the conclusion of a Disciplinary Hearing, there is an opportunity, on behalf of the prisoner, to seek to engage the services or support of a number of internal or external providers. Examples might be referrals to addiction services or counselling following

bereavement. In many cases these services will already have been engaged. The referral of a prisoner for further support or interventions should be seen as best practise and an opportunity to assist the prisoner in desisting from committing future disciplinary offences.

ANNEX 1

Model letter to the solicitor representing the prisoner

Where a prisoner is to be represented by a solicitor the following letter should be sent from the instructing member of staff:

"I understand that you will be representing (name) at a Disciplinary Hearing at this establishment on (date). If you have any queries about preparing your client's case, would like to interview witnesses or consult with your client beforehand, please contact me.

Disciplinary Hearings are inquisitorial hearings and, while they are governed by the principles of natural justice, they are not subject to the same procedural rules as a hearing in the courts. The adjudicator will conduct the inquiry and may well expect to pursue his own line of questioning, as well as listening to the questions you ask on your client's behalf.

The adjudicator will also be concerned to ensure that your client's case is heard promptly. We will make every effort to ensure that you have the opportunity to prepare your case in advance of the Disciplinary Hearing, to avoid further adjournments.

The documents relating to the charge brought against your client are enclosed. The Disciplinary Hearing will take place at [time] on [date]. You should arrive at [place] at least [time] before the Disciplinary Hearing, from where you will be shown either to your client or to the Disciplinary Hearing, according to your preference."