

PRISONS AND PROBATION OMBUDSMAN

## Learning from PPO Investigations

Adjudication complaints

PRISONS AND PROBATION  
**OMBUDSMAN**

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## Foreword



I am pleased to introduce this thematic report focusing on learning from my independent investigations into complaints about adjudications: the internal disciplinary hearings conducted in prisons. My investigations have a number of important roles: they are a safeguard against unfairness in prison, a mechanism for those in custody to ventilate frustrations legitimately and - conversely - a means of affirming the appropriateness of decision making by the authorities as they seek to maintain good order.

This report presents a review of the adjudication complaints I receive, trends over three years and an in-depth examination of cases from the first six months of 2012. It concludes with some lessons that should be learned in order to address shortcomings in adjudications - and thus avoid the need for complaints to my office in the first place.

Adjudication complaints are one of the most common types of complaint I receive. From when the office first opened in 1994 until April 2012, there were over 3,500 eligible adjudication complaints. Adjudication decisions can have substantial implications on the life of a prisoner: restrictions may be imposed, money or access to activities removed and release decisions affected. It is, therefore, important that adjudications are conducted correctly, that adjudicators hear sufficient evidence to find the charge proved beyond reasonable doubt, and that punishments imposed are fair and proportionate. Minor flaws in procedure will not necessarily render an adjudication finding unsafe, but where I consider that there have been significant failings that have resulted in

unfairness to a prisoner, I will recommend to the Prison Service that the finding of guilt be quashed.

The learning from this report focuses on reinforcing the guidance laid out in Prison Service instructions. In particular, the report notes the need to ensure that the recording of proceedings is accurate, that prisoners have access to legal advice and witnesses where necessary and that punishments are reasonable.

I would like to thank my colleague, Mr Craig Weeks, for preparing this report. It is my ambition to publish regular reports and bulletins setting out the lessons from my investigations so that performance in investigated bodies is improved and fairness and safety in prison enhanced.

A handwritten signature in black ink, reading 'Nigel Newcomen'.

**Nigel Newcomen CBE**  
**Prisons and Probation Ombudsman**



## Executive summary

- The PPO carries out independent investigations into complaints by prisoners, immigration detainees and those on probation supervision. This is an important safeguard against abuse and unfairness, a mechanism for those in custody to ventilate frustrations legitimately and – conversely - a means of affirming the appropriateness of decision making by the authorities. In the case of complaints about adjudications, the PPO has a particular role in reviewing due process within the Prison Service’s internal disciplinary system.
- This thematic report presents a review of adjudication complaints received by the PPO. It provides an overview of cases received, trends over three years and an in-depth examination of cases from the first six months of 2012. It concludes with some lessons that should be learned to address shortcomings – and avoid the need for complaints about adjudications coming to the PPO in the first place.
- Adjudication proceedings are designed to address offences committed by prisoners or young offenders against the Prison Rules 1999/Young Offenders Institution Rules 2000. A charge will be laid against the prisoner and he or she will appear at an adjudication hearing conducted by a governor or, in more serious cases, by an Independent Adjudicator, who will decide whether an offence has been committed and what the punishment will be. In the case of adjudications conducted by a governor, after exhausting internal appeal mechanisms, prisoners can appeal to the PPO against a finding of guilt and/or the punishment. (The Ombudsman is not able to consider appeals against adjudications conducted by an Independent Adjudicator and such appeals are dealt with by the Senior District Judge’s office.)
- The PPO received 1042 complaints from prisoners about adjudications between April 2009 and March 2012; nearly three quarters were eligible for investigation. Eligible complaints were received from prisoners in 111 establishments. The five establishments with the highest rate of eligible adjudications complaints were all high security prisons.
- Between April 2011 and March 2012, 269 eligible adjudication complaints were received by the PPO. This was the second most common complaint type after property related complaints.
- 21% of eligible adjudication complaints were upheld. This was slightly less than for all complaints (25%) received by the PPO, but still constitutes a very large proportion of cases in which significant flaws were identified in the Prison Service’s internal disciplinary system.
- Looking specifically at 96 cases between January and June 2012, the PPO found five areas of concern which had led to complaints being upheld:
  - proving the charge beyond a reasonable doubt
  - legal support and adjournments
  - following PSI procedures
  - witnesses
  - punishment concerns.
- Six adjudication complaint investigations are summarised as case studies to illustrate the concerns. The cases show that, if prisons do not follow the instructions set out in Prison Service Instruction (PSI) 47/2011, prisoners who have broken the rules may go unpunished, while other prisoners may be punished unfairly.
- The learning identified focuses on the five areas and stresses that the guidance outlined in PSI 47/2011 should be followed closely by adjudicators. In particular, accurate recording of hearings is important in ensuring that adjudications are proportionate and fair.





This learning lessons thematic review examines adjudication complaints from prisoners in England and Wales received by the Prisons and Probation Ombudsman (PPO). The thematic outlines the adjudication process, an overview of

the adjudication complaints the PPO has received and a detailed review of recent cases with the concerns and recommendations they have raised.

## 1. Introduction to adjudications

Prison discipline procedures aim to contribute to maintaining order and control and providing a safe environment within prison establishments. The adjudication system, along with the separate Incentives and Earned Privileges (IEP) scheme, is a key mechanism to achieving these aims.

Adjudications are designed to address offences committed by prisoners or young offenders against the Prison Rules 1999/Young Offender Institution Rules 2000. Adjudication hearings are conducted in establishments by a governor or other trained prison staff. In cases where the adjudicator considers that the offence is serious enough to merit a punishment of additional days or in exceptional situations where the charge against the prisoner is very serious (e.g. serious assaults, escapes), the case should be referred to an Independent Adjudicator. Independent Adjudicators are District Judges or Deputy District Judges approved to inquire into charges referred to them. Investigation of Independent Adjudication cases is not within the remit of the PPO and not explored in this report.

Adjudication hearings are expected to be inquisitorial rather than adversarial and adjudicators are expected to act impartially, inquiring into the prisoner's defence, weighing up the evidence provided and deciding whether the charge has been proved beyond a reasonable doubt. Where guilt is proved, adjudicators are expected to decide an appropriate punishment.

PSI 47/2011 outlines the considerations that adjudicators must make before, during and after hearings. Two of the key principles from the PSI are that:

- prisoners understand the charges against them and have access to further information and support to understand the adjudication process – both before and after the hearing and
- punishments are fair, safe and proportionate to the charge.

There were 92,328 proven adjudication cases in England and Wales during 2011; Table 1 summarises the cases by offence type:

**Table 1: Adjudication cases by offence type in England and Wales 2011<sup>2</sup>**

Offence type	Number of offences
Disobedience or disrespect	37,188 (40%)
Unauthorised transactions/possessions	22,557 (24%)
Violence	16,655 (18%)
Wilful damage	7,325 (8%)
Escapes or absconds	35 (<1%)
Other offences	8,568 (9%)
<b>Total</b>	<b>92,328</b>

<sup>1</sup> PSI 47/2011 replaced Prison Service Order (PSO) 2000 in September 2011 and included some changes to the paperwork used by the establishments. Some cases in this review would have been opened by the PPO after September 2011, but would still have been subject to PSO 2000.

<sup>2</sup> Adjudication cases where a punishment was issued from Ministry of Justice prison population data: Offender Management Caseload Statistics 2011. <http://www.justice.gov.uk/downloads/statistics/mojstats/omsq-2001/omsq-q4-2011-annual-tables.zip>

In addition to the punishment, adjudications remain on a prisoner's record and may be noted by the Parole Board and during consideration for Release on Temporary Licence and Home

Detention Curfews. For this reason, it is crucial that the system is fair, proportionate and follows due process.

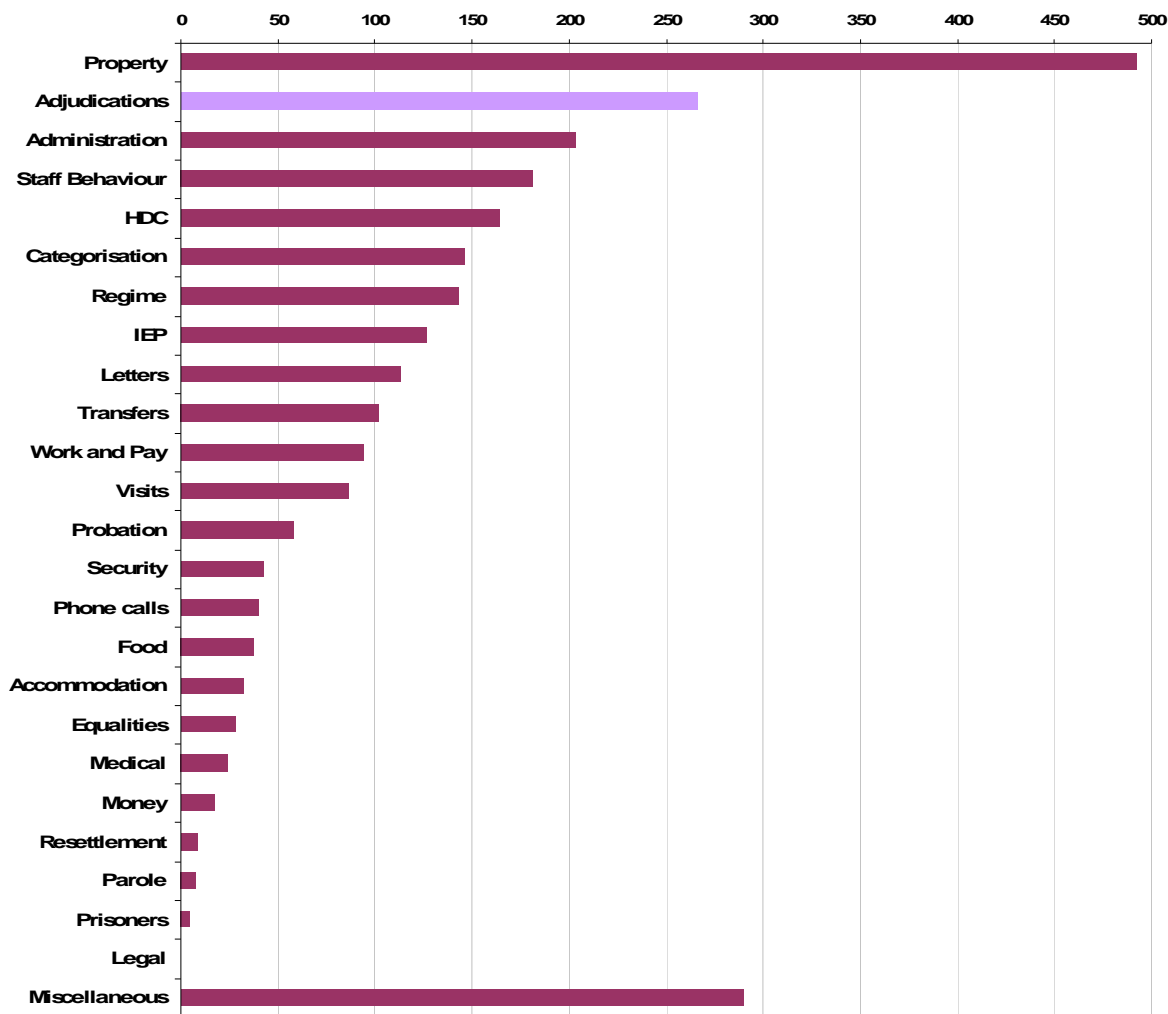
## 2. PPO adjudication complaints overview

Between April 2011 and March 2012, 5,395 complaints were received by the PPO. Once received, complaints are assessed for eligibility to ensure they are within the Ombudsman's terms of reference and the appropriate internal appeal avenues have been completed. Overall, half (2,711) of the complaints received in 2011/12 were eligible for investigation.

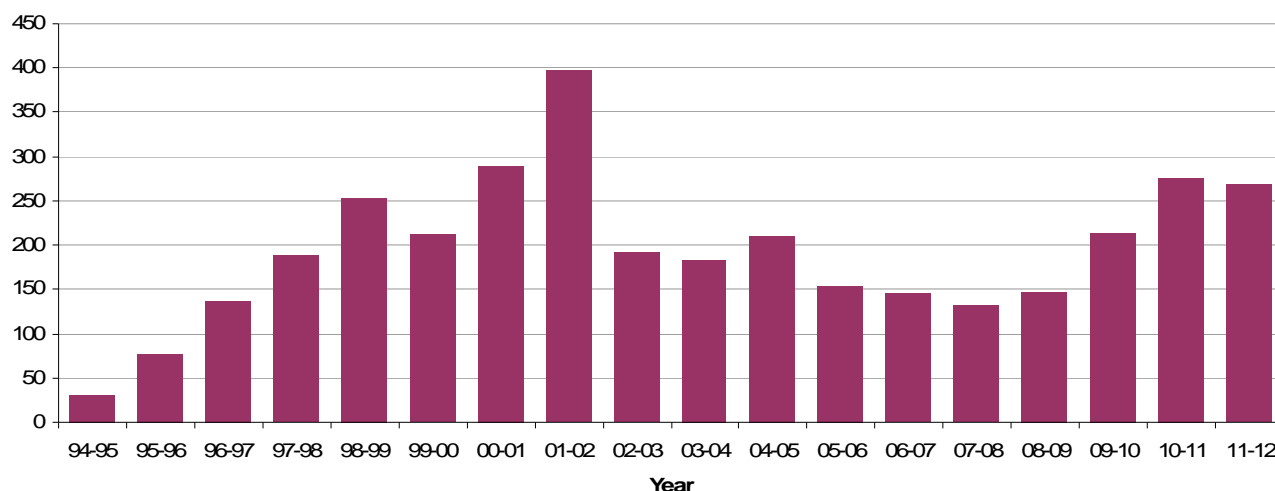
Eligibility of adjudication complaints is much higher than most other types of complaint, with 72% of those received during 2011/12 eligible for investigation. Complaints related to adjudications

were the second most common type of eligible complaint received by the PPO (Figure 1). The high eligibility rate for adjudications is likely to be due to the fact that the internal appeal process is simpler than the internal appeal process for other complaint types. Appeals against the finding of guilt and/or the punishment are sent first to the Prisoner Casework Unit (PCU) and then the relevant Prison Service Deputy Director of Custody (DDC) who decides whether or not to uphold the appeal. If the DDC does not uphold the appeal, prisoners can then complain to the PPO.

Figure 1: Eligible complaints received in 2011/12 by the PPO



**Figure 2: Number of eligible adjudications complaints received each year by the PPO**



Between the establishment of the PPO in 1994 and March 2002, the number of eligible adjudication complaints increased (Figure 2). This pattern is similar to that for all PPO complaints.

In 2002, an amendment was made to the Prison Rules 1999 requiring Independent Adjudicators, rather than governors, to give additional days as punishment. Review of independent adjudications is within the remit of the Chief Magistrate's Office and not the PPO. This change resulted in a substantial reduction in adjudication complaints to the Ombudsman.

The number of eligible complaints received in 2011/12 (269) was similar to that of the year before (275). These figures are double that of 2007/08 (132), the lowest number received since the adjudication changes in 2002.

## **2.1. Three year profile of adjudication complaints to PPO**

Between April 2009 and March 2012, the PPO received 1,042 complaints from prisoners about adjudications, 759 (73%) of these were eligible for investigation.

### **2.1.1. Eligible complainants' profile**

Female prisoners were underrepresented as they make up 2% of the PPO's eligible adjudication complainants but 6% of national proven punishments<sup>3</sup>. There was also a disproportionate representation of black prisoners, who constituted 29% of eligible adjudication complainants in comparison to 16% of national proven adjudications.

Young people are more likely to be adjudicated on than older age groups, with 53%<sup>4</sup> of national proven adjudications against prisoners under 25, although this group makes up only 28% of the prison population. However, this group contributes only 13% of PPO's eligible complaints about adjudications, acutely highlighting the lower use of the PPO by young people. Despite efforts by the PPO to provide better and targeted information to young people in custody about the role of the office, and the existence of Youth Justice Board funded advocates in juvenile establishments, the PPO receives few complaints from young people. This finding is evidence that it is unlikely that young people have less to complain about and is more likely to be explained by reasons such as shorter sentences and less familiarity with the system.

<sup>3</sup> National Offender Management Service equalities annual report 2011/12, Annex C – Offender Data <http://www.justice.gov.uk/downloads/publications/noms/2012/statistics-offenders.xls>

<sup>4</sup> Ibid.

### 2.1.2. Establishments

Over the three year period, the PPO received eligible complaints from prisoners in 111 establishments across England and Wales.

Prisons vary in size so the numbers of complaints per 100 prisoners have been examined to allow comparative analysis.

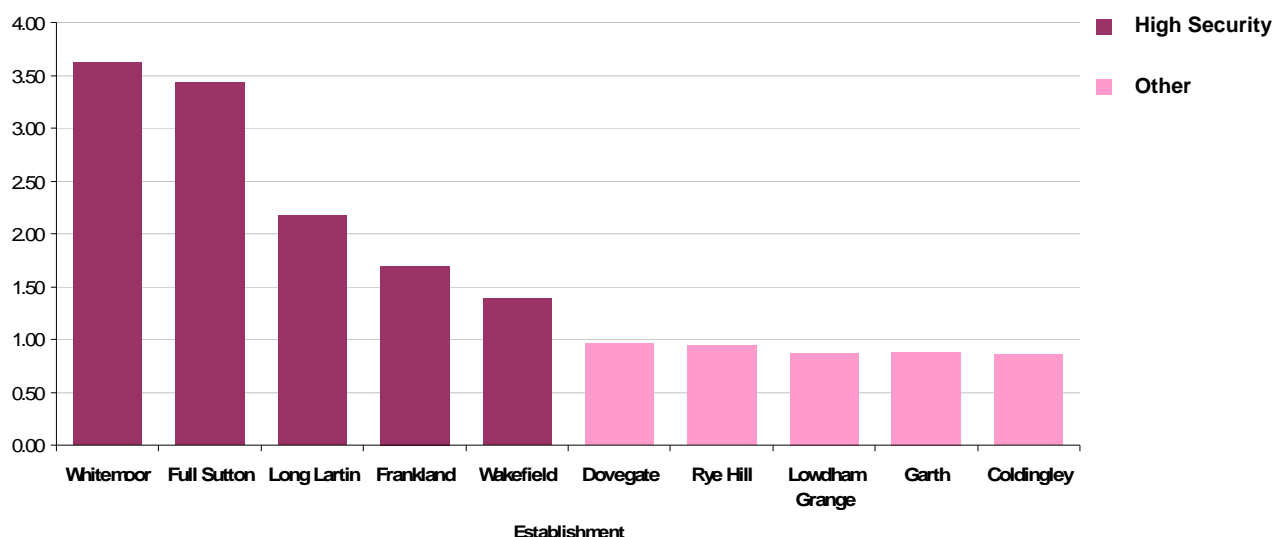
The top five establishments, all of which were high security prisons, averaged over one eligible adjudication complaint per 100 prisoners. The highest of which, Whitemoor, had on average 3.6

complaints per 100 prisoners (Figure 3).

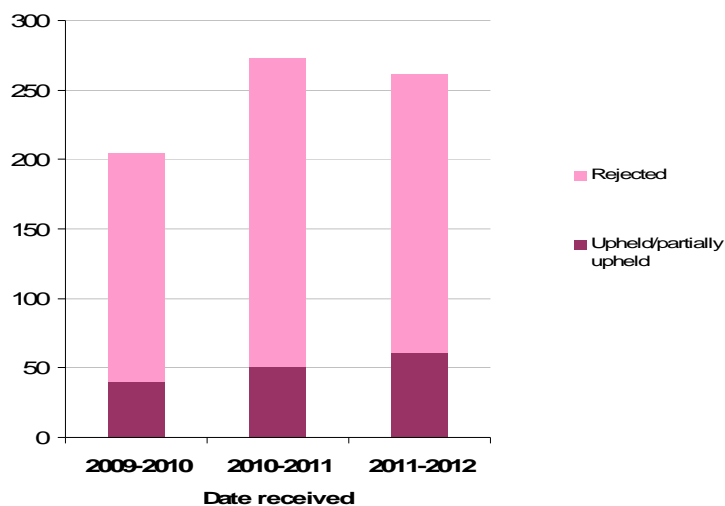
### 2.1.3. PPO complaint case decision

The PPO upheld 19% of adjudications in 2010/11 and this was unchanged from the previous year (Figure 4). In 2011/12, the uphold rate increased to 23%, meaning that more cases were upheld despite fewer cases being completed. The three year average is 21% for these adjudication cases, which is slightly lower than the uphold rate for all eligible complaint cases received in the three years (25%).

**Figure 3: Prisons with the highest number of eligible adjudications complaints per 100 prisoners per year (average over three years)<sup>5</sup>**



**Figure 4: Adjudication complaint decisions**



<sup>5</sup> Based on June 2012 prison population data, Ministry of Justice statistics <http://www.justice.gov.uk/statistics/prisons-and-probation/oms-quarterly>

### 3. In depth adjudication case content and themes

This section examines adjudication complaints received by the PPO in 2012. It looks at cases where complaints have been upheld and identifies actions which prisons can take to ensure adjudications are not subsequently found to be flawed.

#### 3.1. Sample

The analysis looks at 154 adjudication complaints which were received by the PPO in the first six months of 2012 and closed by the end of October of the same year. Of these cases 43 were found to be ineligible, 12 had missing information and 3 were withdrawn.

The 96 eligible cases were considered in detail using prison adjudication forms (DIS1, DIS3, DIS5 and DIS7 – or pre PSI 47/2011 equivalents) and the PPO's electronic case management system.

#### 3.2. Charges against Prison/Young Offender Institution Rules

The vast majority of the sample, 93 out of the 96, were in violation of Prison Rule 51<sup>6</sup>, with the other three violating YOI Rule 55<sup>7</sup>.

The 93 cases which were in violation of Prison Rule 51 involved offences committed under 17 of the 29 paragraphs stipulated in the rule.

Table 2 shows that the most common charge in this sample was against Prison Rule 51, paragraph 22 '*disobeys any lawful order*', with paragraph 12 '*consuming alcoholic beverages*' the second most common.

The charges against YOI Rule 55 related to paragraph 25 ('*disobeys any lawful order*'), paragraph 1 ('*commits any assault*') and paragraph 5 ('*fights with any person*'). Only the first of these was upheld.

**Table 2: Complaints received and upheld by the PPO by paragraph/charge type (where three complaints or more were received)**

Charge	Number of complaints	Number upheld
Disobeys any lawful order (paragraph 22)	32	9 (28%)
Consumes any alcoholic beverage whether or not provided to him by another person (but subject to rule 52A / 56A) (12)	12	2 (17%)
Commits any assault (1)	9	3 (33%)
Is found with any substance in his urine which demonstrates that a controlled drug has, whether in prison or while on temporary release under rule 9 / 5, been administered to him by himself or by another person (but subject to rule 52 / 56) (9)	9	0 (0%)
Fights with any person (4)	6	3 (50%)
Uses threatening, abusive or insulting words or behaviour (20)	5	1 (20%)
Destroys or damages any part of a prison / young offender institution or any other property, other than his own (17)	4	0 (0%)
Intentionally endangers the health or personal safety of others or, by his conduct, is reckless whether such health or personal safety is endangered (5)	3	2 (67%)
Uses threatening, abusive or insulting racist words or behaviour (20a)	3	0 (0%)

<sup>6</sup> Further information on Prison Rule 51 can be found at: <http://www.legislation.gov.uk/ukxi/1999/728/article/51/made>

<sup>7</sup> Further information on YOI Rule 55 can be found at: <http://www.legislation.gov.uk/ukxi/2000/3371/article/55/made>

### 3.3. Upheld cases: themes

A quarter of complaint cases in this sample (25 out of 96) were upheld by the PPO. Where cases were not upheld, procedures and punishments were found to have adhered to the relevant PSI guidance.

Five areas of concern for the PPO have been identified from the upheld adjudication complaints cases in the sample. These highlight areas where significant flaws were found which led to the PPO recommending that the cases be quashed. Case studies are used to illustrate the areas of concern.

#### 3.3.1 Proving the charge beyond a reasonable doubt

As a quasi-judicial process, PSI 47/2011 states that an adjudicator has to be satisfied beyond a reasonable doubt that a charge has been proved in order to find the prisoner guilty. In line with other judicial processes, if they are not satisfied, they should dismiss the charge.

In order to prove the charge beyond a reasonable doubt, the adjudicator is required to investigate thoroughly the circumstances and ensure the evidence available is sufficient to reliably prove the finding of guilt.

The PPO raised concerns in eight cases in this sample regarding the extent to which the adjudicator investigated the charge. Broadly,

adjudicators had not questioned staff and/or prisoners sufficiently to prove the charge beyond reasonable doubt (case study one).

Historically, the PPO has also had concerns where adjudicators did not fulfil the evidence requirement for the relevant charge. The PSI gives specific direction regarding the considerations for each charge type that adjudicators must make in order to find the prisoner guilty. Where these were not fully met, the PPO would recommend the charge be quashed.

#### 3.3.2. Legal support and adjournments

In order to facilitate a fair and lawful system, prisoners should be allowed a sufficient amount of time to adequately provide a defence against the charge. This should include time to obtain legal support if necessary. PSI 47/2011 (paragraph 2.14) supports this, stating that prisoners should understand the initial charges against them, have access to further information and receive the necessary support to understand the adjudication process. Where support has not been made available on request, the Ombudsman will recommend that the adjudication finding be quashed.

Prisoners can be supported during the adjudication process by legal advisers (solicitors who provide advice but do not attend the hearing), legal representatives (solicitors who attend the hearing to put the case on the

**Case study one:** Mr A was found guilty of *disobeying a lawful order* under Prison Rule 51, paragraph 22. He was punished with seven days stoppage of earnings at 50% and seven days loss of canteen.

During his third and final adjudication hearing, Mr A pleaded not guilty. Evidence related to the charge was read out to him and he confirmed that he understood but did not agree with it. When asked what he disagreed with, he said he did not want to comment. The adjudicator told him that he would proceed and find the charge proven based on Mr A's statement that he would not comment.

PSI 47/2011 is clear that adjudicators have a duty to properly investigate the charge. Even though Mr A did not offer a defence himself, the responsibility was still on the adjudicator to enquire into the alleged offence to determine whether the written evidence was accurate in all respects. By finding Mr A guilty based on his statement that he would not comment, the adjudication fell short of what was required.

The PPO recommended that the charge be quashed and lost earnings be remitted.



prisoner’s behalf) or a McKenzie friend someone, often another prisoner, who is not legally trained but who attends to assist by taking notes, giving evidence or making suggestions as to how to challenge the evidence).

If a prisoner requests legal advice, the adjudicator must adjourn the hearing for a sufficient time to allow the prisoner to consult a legal adviser. As with other forms of ‘domestic’ tribunal, legal representation (including McKenzie friend support) is not an inherent common law right. Adjudicators are obliged to consider the six criteria of the ‘Tarrant Principles’ and decide whether to allow the representation. The criteria require the adjudicator to consider:

- the seriousness of the charge and the potential penalty
- whether any points of law are likely to arise
- the capacity of particular prisoners to present their own case
- procedural difficulties
- the need for reasonable speed
- the need for fairness.

Adjudicators are expected to record their reasons for refusing or allowing a representative or a friend and inform the prisoner.

The majority of prisoners in the upheld cases in this sample (20) had requested support, with

legal advice most commonly sought (Table 3). In four investigations in this sample, concerns were raised relating to legal or McKenzie friend support.

Where a prisoner requests the opportunity to seek legal advice, PSI 47/2011 (paragraph 2.16) states that *“the adjudicator must adjourn the hearing for a sufficient time to allow the prisoner to consult a legal advisor”* and suggests later (Annex A, paragraph 2.8) that *“two weeks will normally be enough”*. If a prisoner requests a second adjournment at a later hearing, the PSI (paragraph 2.16) states that *“the adjudicator should consider whether this is justified, and may either grant an adjournment or refuse it”*.

**Table 3: Legal support requests from prisoners in upheld complaints cases**

	Number of prisoner requests*
Legal advice	18
Legal representation at the hearing	6
McKenzie friend	1

\*Five prisoners made requests for more than one type of support.

The Ombudsman raised concerns in relation to a prisoner not having enough time to access legal advice during the Christmas holiday period (case study two).

**Case study two:** Mr B was charged with *disobeying a lawful order* (Prison Rule 55, paragraph 22) to move location and was punished with seven days loss of half his earnings, canteen and association.

At his first hearing, on 23 December, Mr B requested time to seek legal advice and the adjudicator adjourned for seven days to facilitate this. At the second hearing, Mr B refused to provide a plea as he had not been able to speak to his legal team as it was the Christmas holiday. The adjudicator proceeded nevertheless.

Although the length of an adjournment is a matter for the adjudicator’s discretion, this discretion must be exercised reasonably. The first adjudicator only adjourned for a week and given that this was during the Christmas holiday, it is questionable as to whether this was a reasonable amount of time to provide. Similarly, the refusal of the second adjudicator to offer more time to contact legal advice (at a time which was still in the Christmas/New Year period) was questionable.

As a result the Ombudsman recommended that the finding should be quashed – and lost earnings restored – on the basis that Mr B had been given insufficient time to obtain legal advice to support his defence of the charge.

<sup>8</sup> The Tarrant Principles were laid down by the Divisional Court in 1984 as criteria to either refuse or allow representation or a friend

### 3.3.3. Following PSI procedures

In order to ensure a prison discipline system that offers parity across establishments and between individual prisoners, PSI 47/2011 (and previously PSO 2000) sets out detailed procedures for the adjudication process. The Ombudsman expects adjudications to follow these procedures and where serious flaws exist may recommend quashing the case.

The accurate completion of paperwork is an important part of the adjudication process. Records may be used outside of the prison during appeal proceedings and as part of judicial reviews, meaning that the log of events needs to be transparent and easy to understand.

The Ombudsman raised concerns in seven cases in this sample where information was missing (e.g. how a guilty charge was reached by the adjudicator) or where forms had been completed incorrectly or were illegible.

In three further cases, the Ombudsman recommended that the finding of guilt be quashed due to procedural errors where:

- the prisoner was not allowed to see CCTV evidence (case study three)
- written statements were entered into the adjudication without the prisoner being able to challenge them
- an incorrect charge was used (case study four).

### 3.3.4. Witnesses

Witnesses are valuable in providing evidence that assists the adjudicator's understanding of the events leading to the charge. Witness testimony can also be significant to prisoners defending the charge. The Ombudsman expects adjudicators to call relevant witnesses when required.

Witnesses, including the reporting officer when relevant, may be called during proceedings and can be questioned by both the prisoner and adjudicator.

In six cases in the sample, the Ombudsman raised concerns about whether the correct witnesses were called or whether denying permission to call a witness was appropriate (case study five).

### 3.3.5. Punishment concerns

Following a finding of guilt, a punishment is normally awarded. Punishments should be proportionate to the charge. In complaints where this is not the case, the Ombudsman may recommend that the punishment be amended or the case quashed.

Punishments were awarded in 24 of the cases in the sample, six of these were either partially or fully suspended. One prisoner was awarded a caution only.

**Case study three:** Mr C was found guilty of *disobeying a lawful order* (Prison Rule 51, paragraph 22) and given 14 days loss of half his earnings and 14 days loss of canteen.

The finding of guilt was largely based on CCTV evidence that the adjudicator had viewed without Mr C being present. Although the adjudicator described clearly what they had seen, this was not the same as Mr C being able to see for himself the evidence that ultimately led to the finding of guilt.

PSI 47/2011 (Annex A, paragraph 2.6) addresses the use of CCTV evidence:

*'If CCTV recordings form part of the evidence to be presented at the hearing ... arrangements should be made for the accused prisoner and any legal advisers or representatives to view the evidence at the prison. Failure to allow such evidence to be viewed is likely to lead to any guilty finding being quashed.'*

The adjudicator's failure to allow the evidence to be viewed was contrary to the PSI and so the Ombudsman recommended the finding be quashed and earnings remitted.



**Case study four:** Mr D was charged with *fighting with any person* (Prison Rule 51, paragraph 4) and punished with 14 days loss of half his earnings and 14 days loss of canteen and association.

Prison records showed that the other prisoner involved in the fight had been found not guilty on the basis that their actions were only in self defence.

Paragraph 2.52 (PSI 47/2011, Annex A) in relation to fights and self defence findings, details what adjudicators should consider:

*“Were all those prisoners charged with the offence engaged in fighting each other in the ordinary sense of the word, i.e. inflicting unlawful force (see paragraph 2.45) on each other? Or was one (or more, if more than two prisoners were involved) only using reasonable force in self-defence? If so, the charge of fighting should be dismissed, and the other prisoner (the aggressor) charged with assault, within 48 hours of the ‘discovery’ of the assault offence.”*

If the other prisoner had been acting in self-defence and was not fighting, then Mr D could not have been fighting either and therefore had been found guilty of an offence he did not commit. In these circumstances the PPO recommended that the finding of guilt be quashed.

Mr D should have been charged not with fighting, but with assault. Examples like the case of Mr D show that if prisons do not lay the correct charge, it can result in justice not being administered.

**Case study five:** Mr E was found guilty of *disobeying a lawful order* (Prison Rule 51, paragraph 22) and punished with 14 days cellular confinement and 14 days loss of TV.

Mr E asked for a witness from Healthcare who would testify that he had a problem sleeping due to pain (his defence was that he was asleep when the officers came in and did not fully comprehend that he was being given an order). The specific nurse requested was not on duty, so the adjudicator spoke instead to the deputy manager of Healthcare, who said there were no issues that would prevent Mr E being alert in the mornings.

PSO 2000 (which was still in place at the time) stated that an adjudicator can decline to call a witness but that this must be done on reasonable grounds and not purely for administrative convenience. The PSO also says that the adjudicator can accept hearsay evidence, so long as the prisoner does not want to challenge it. The adjudicator did not call the nurse Mr E had asked for because she was not on duty. This was not a sufficient reason for not calling her and amounted to declining for administrative convenience.

The Ombudsman recommended that the finding be quashed and that the prison ensure adjudication witnesses are refused on proper grounds.

Seventeen prisoners received more than one punishment type. The most common punishments - the removal of canteen/facilities to purchase/use of private cash/TV and stoppage of earnings (Figure 5) - are closely linked in day to day prison life. In the majority of cases, where applied, earnings were reduced to half for a period of two weeks. In two cases the stoppage of earnings was at 100%.

Removal of gym was the most widespread ‘additional’ punishment used by adjudicators, found in five cases in this sample.

In four of the upheld cases the Ombudsman raised additional concerns on two topics: removal of statutory gym and 100% loss of earnings.

**Statutory gym removal**

The Prison Rules provide that all prisoners should be provided access to gym provision (termed ‘statutory gym’) for at least one hour a week to encourage healthy living while in prison. As part of the IEP scheme, prisoners can have increased access to the gym on the basis of good behaviour.

Paragraph 2.121 (Annex A, PSI 47/2011) states that access to statutory gym provision should not be removed as a part of adjudication

punishments:

*“This punishment does not allow prisoners to forfeit anything that must be provided or allowed under the Prison / YOI Rules (i.e., things that are ‘statutory’ rather than a privilege)... Access to the gym under PR 29 /YOI R 41 should not be forfeited, although additional access under IEP may be lost.”*

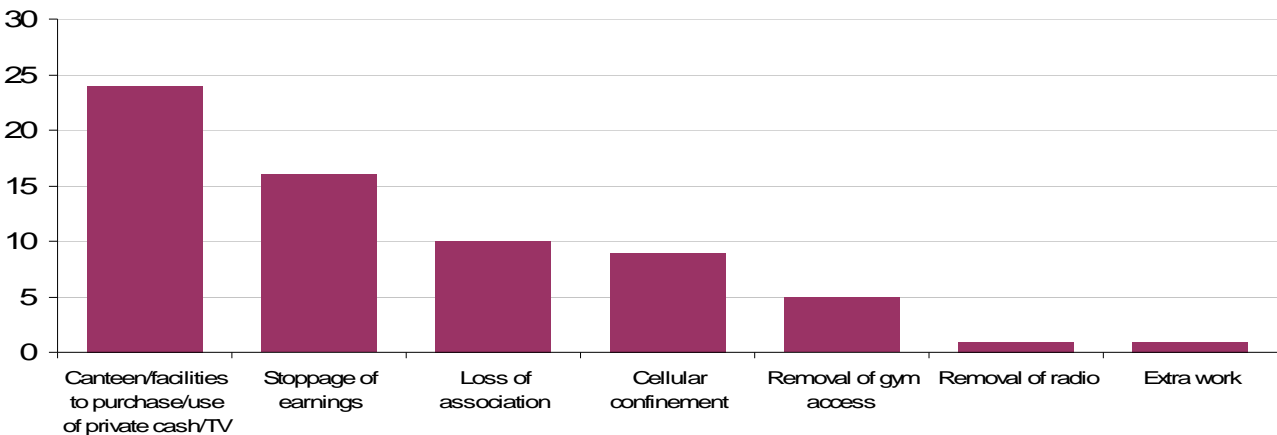
The Ombudsman raised concerns in two of the cases that this punishment was being given and governors were reminded that statutory gym is not a privilege that can be removed (case study six).

**100% loss of earnings**

The Ombudsman and his predecessors have long held the view that prisoners should not be subject to complete withdrawal of their earnings. Full loss of earnings, as found in two cases in our sample, can prevent the prisoner from being able to afford phone calls that are important to wellbeing and maintaining contact with family members. The loss of earnings at this level can also lead to problems with debt.

The use of a smaller percentage withdrawal of earnings, over a longer period of time if necessary, is preferred by the Ombudsman.

**Figure 5: Adjudication punishments by type (24 cases in total)**



**Case study six:** Mr F was found guilty of fighting with another prisoner, contrary to Prison Rule 51, paragraph 4. He received a punishment of 14 days stoppage of earnings at 50% and 14 days loss of canteen, television and gym.

In addition to concerns about a failure to adequately prove guilt, the Ombudsman was concerned about the punishment related to the gym.

Paragraph 7.21 of PSO 2000 (applicable at the time of adjudication) states that '*Statutory gym is not a privilege and must not be withdrawn as a punishment*'. In this case, the adjudicator had acted outside of their power when removing all gym.

The adjudication was quashed and the Ombudsman recommended that the governor of the prison remind their adjudicators that statutory gym must not be withdrawn as a punishment.

## 4. Lessons to be learned from adjudication complaints

Adjudication proceedings are a key element of the disciplinary process in prisons. They are expected to be proportionate, fair and lawful and underpinned by the detailed instruction of the PSI.

The majority of the adjudication complaints that the PPO upholds are as a result of procedural errors or lack of sufficient investigation from adjudicators. Adjudications, as part of a quasi-judicial system, need to offer fairness, proportionality and the opportunity for prisoners to provide a defence against the charge. Significant procedural errors and lack of investigation undermine this system.

Prison adjudicators need to ensure that they follow the guidance correctly and apply appropriate punishments. If they do not do so, the Ombudsman will recommend quashing findings of guilt that he considers to be unsafe.

The investigations highlighted in this report illustrate that there are straightforward steps adjudicators and establishments can take to deliver effective adjudications:

- Ensure that guilt is fully established through thorough investigation of the facts of the case. Even in cases where the prisoner pleads guilty, the onus remains on the adjudicator to prove the charge beyond a reasonable doubt.
- Ensure the correct charge is laid and, where the charge needs to be altered, that this is done promptly.
- Accurately record the details of the hearing.
- Comply with PSI guidance around witnesses ensuring they are called where relevant. Written evidence from witnesses should only be accepted where the prisoner does not wish to ask questions from them.
- Provide appropriate information and support to prisoners to access legal advice or representation when requested. The length of time provided for adjournments should

balance the needs of the prisoner seeking advice with the need to ensure that justice is delivered to appropriate timescales.

- Ensure that punishments are fair, safe and proportionate to the charge. For example, although removal of privilege gym may be a suitable punishment, statutory gym provision must not be removed. Similarly, the loss of 100% earnings should be avoided to safeguard a prisoner's ability to contact the outside world.

The PPO investigations have also highlighted concerns where the PCU in Prison Service Headquarters did not provide replies to prisoners that specifically addressed the grounds of appeal. Generalised, formulaic responses at this first stage of appeal are unhelpful to prisoners and solicitors making representations on their behalf. The Ombudsman has recommended that the PCU provide more specific responses when addressing adjudication appeals.

The Ombudsman also expects to be consulted before amendments are made to PSI 47/2011 in order to be able to comment on the fairness and proportionality of changes - and to ensure that lessons have been learned. If prisons can be encouraged to get adjudications right first time, there will be fewer complaints requiring the Ombudsman's intervention.



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