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THE LAW AND PENOLOGY OF PRISON DISCIPLINE

VOLUME ONE (OF TWO VOLUMES)

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1989

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25 JAN 1990

ABSTRACT

THE LAW AND PENOLOGY OF PRISON DISCIPLINE : PETER M. QUINN

The study is of the disciplinary systems within the prisons of England and Wales. It concerns the response of the courts to prison matters brought before them and examines the effects upon prison life of an increasing demand for adherence to the rules of natural justice. Statutory authorities for the imposition of punishment within prison are reviewed as is the complex interweaving of statute, statutory instrument and internal regulations. There is a comprehensive examination of those parliamentary debates, conferences, committees of inquiry, reports and judgments that have influenced change. Particular reference is made to the question of legal or other assistance for an accused prisoner who faces a disciplinary hearing within the prison. The paper contains an account of the subsystems of discipline said to operate within penal establishments whereby the pressures of institutional life may conspire to prevent a prisoner receiving that to which he or she knows he or she is entitled. The paper draws upon the developing case law, the literature in the field and on private sources. The last of these includes the voice of prisoners themselves who are able to say how, if at all, a growing awareness by staff of the requirements of natural justice has affected the regime under which they live.

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### DECLARATION

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CHAPTER ONE

INTRODUCTION



## Chapter One

### INTRODUCTION TO THE FIELD OF STUDY

In several respects, the prison must be an exhaustive disciplinary apparatus: it must assume responsibility for all aspects of the individual, his physical training, his aptitude to work, his everyday conduct, his moral attitude, his state of mind; the prison, much more than the school, the workshop or the army, which always involved a certain specialization, is "omni-disciplinary": moreover the prison has neither exterior nor gap, it cannot be interrupted except when its task is totally completed; its action on the individual must be uninterrupted: an unceasing discipline. Lastly, it gives almost total power over the prisoners; it has its internal mechanisms of repression and punishment: a despotic discipline. It carries to their greatest intensity all the procedures to be found in the other disciplinary mechanisms.(1)

Foucault's characterisation of the prison as the all-enveloping, all-pervasive disciplinary machine makes the assumption that it is an instrument of the state operating in a totally autonomous fashion, unconcerned by its relationship to or dependence upon other organs of state. Principally, it ignores the modern prison as a creature of statute, responsible, through ministers, to Parliament and subject to the law. The existence of law cannot, of itself, guarantee that the prison does not come to reflect the Foucault model. Regimes in many parts of the world have boasted repressive prison systems wherein torture or even extermination in one form or another have been sanctioned under the law.(2) But that might seem a little remote from the penology of the liberal western state wherein the modern prison is established. If the prison were to reflect the Foucault view, would one expect its population to remain quiescent in the face of its excesses? Certainly this century, and particularly the last 20 years, has witnessed spectacular examples of prison unrest. Yet, overwhelmingly, British prisons remain peaceful. Bottomley and Pease (1986) explain that:

Statistics on prison offences and discipline convince one what orderly places prisons must be ... the triviality of the bulk of prison offences is reflected in the punishments awarded.(3)

That says little of the "feel" of imprisonment. The peaceful prison may be seen to exist where adequate, though not oppressive, systems of control are in place. Indeed, experiments to be referred to in due course have shown that, once controls have been removed, it can be but a short step to a staff reverting to a stridently coercive or sadistic regime.

The modern British prison system was established by the Prisons Act of 1877 which came into effect on 1 April 1878 and created a national prison system. The Act brought uniformity of administration and finance to a system that had previously been characterised by diversity. Some prisons had been controlled and funded by central government, others by local authorities through their ratepayers. The latter group presented little homogeneity of purpose or conditions with tales of idiosyncratic styles of maintaining discipline abounding (4). Accountability, within the nationalised prisons, was clearly to be seen through an hierarchical structure commencing with the governor, extending through the Prison Commission to the Secretary of State and ultimately to Parliament. Despite various high-sounding dicta that will be reviewed, the courts, generally, kept their hands off prisons and prison matters. With regard to devices of internal discipline, it was not until Fraser v Mudge in 1975 that these issues were tested at all (5). It was not until R v Board of Visitors of Hull Prison ex parte St. Germain in 1979 that prisoners gained any measure of success in challenging the procedure under which they were disciplined (6).

This study concentrates upon the disciplined environment of the modern prison. It is more than a study of the law relating to prison discipline - for to understand that fully, it is necessary to have an



understanding of the kind of closed environment within which codes of discipline are maintained. It is necessary to understand something of the informal as well as the formal codes. It is necessary to understand how the institution itself can "create deviance" amongst those incarcerated. Thus, consideration is given not only to the development of case law in the area of prison discipline, but also to issues touching the daily life of those most affected be they prisoners, staff, boards of visitors, or the legal representatives of prisoners. Passing reference will be made to regimes for young offenders and to prisons outside the jurisdiction of England and Wales - but only for purposes of illustration. They fall outside the parameters of this study.

Prisons represent a huge contradiction. They exist as punishment and to control, and yet to reform and to encourage self-discipline. They seek compliance with the rules and yet, as will be seen, the rules may not be known to those subject to the regime. The writer has noted elsewhere that "the model prisoner ... who slips most easily into the routine, the one who never answers back, who never kicks against authority whether physically or verbally ... may be the most disturbed and most anxious member of the prison community" (7). At the same time, the one who resists the system by legitimate means - petitions, litigation, enlisting the support of pressure groups or politicians, may be perceived as the subversive or the troublemaker. Those maximum security prisons that are staff "by sensitive and tolerant people who deal, over long periods of time, with groups of prisoners who value and respond well to the liberal aspects" and wherein material conditions are usually better than most prisons, are the very ones that have spawned much of the serious unrest of recent years (8). Of even greater significance is that prisons, despite being the state's most

demonstrative symbol of the supremacy of law over society's wrong-doers, have, until very recently, largely been shielded from scrutiny by the courts insofar as the regulation of internal discipline has been concerned.

There are two branches to the present research. The writer approaches the subject as a lawyer and as a penologist. Thus it is hoped that the result will be an unique analysis of the subject matter. The increased literature on prisoners' rights that has developed over the past decade has produced only one "standard text" on the law of prison discipline: the excellent and comprehensive "Inside Justice" by Bayard Marin (9). The present writer has attempted to add to Marin's close analysis of the law as it affects prison matters by including assessments of the "feel" of imprisonment. How do changes in the law actually affect prison management? How are they experienced by prisoners and by staff? A prisoner's legitimate expectation that the decisions of the courts will affect his daily life will come to nothing if the pressures within the institution conspire to prevent the exercise of newly acquired rights.

The thesis is straightforward. It is that matters of prison discipline are now informed by consideration of the requirements of natural justice, of fairness, to a much greater degree than in the past. The implanting of fairness, however, is not something that has happened spontaneously. It has often been forced upon Home Office through a comparatively recent sequence of judicial decisions. There has been no malice in this but rather an inclination by bureaucrats to tackle each new situation in a characteristically conservative manner without necessarily recognising the wider legal implications of their action. It will thus emerge during this study, that there are many who still perceive matters of internal discipline as manifestly unfair.

The plan of the study is to commence with an exposition of life within the disciplined environment that is the prison. The structure of the modern prison service is reviewed together with an examination of the various statutes, instruments and internal regulations the interweaving of which affect a prisoner's daily life. It will be seen that punishment may be imposed in circumstances where a prisoner may not have known that he was breaking a rule and that it may be impossible for him, or for his legal adviser to gain access to the information needed to challenge this. The next part of the work examines the responses of the courts, over the years, to prison matters coming before them. In this part of the study the writer looks beyond matters purely of internal discipline. The legacy of the "hands off" approach applied in the generality of prison cases affected much judicial thinking in many of the recent disciplinary cases. Indeed, the prisoner's plight was affected by more than "hands off" since it was often a struggle for him to take legal advice or to reach a court at all. The influence of the European Commission on Human Rights and the European Court of Human Rights will be considered together with a description of the results of the procedure whereby a prisoner (or indeed any aggrieved person) may more readily seek remedy by way of application for leave to seek judicial review of action by the authorities. The direct effect of these results on prison discipline will be considered.

In the search for fairness, the layman might assume that a person, whose liberty might be affected by the decision of a tribunal before which he appears, would be entitled to legal advice, assistance or representation. That has not been the case in prison in the past, nor is it universally the case in prison today. This study presents a lengthy charting of parliamentary debates, conferences, reports,

research studies, and judgments that have concerned the subject over the years. It gives an account of current procedures at disciplinary hearings both before boards of visitors and before governors. Questions of the true independence or otherwise of those adjudicators are addressed.

The writer has already alluded to the possibility that the pressures of institutional life may militate against the prisoner getting that to which he or she is entitled. This may be because running in parallel with any formal disciplinary procedure or authorised punishments there is said to exist an underground, alternative system - staff's system. A prisoner may well not insist upon 'rights' if to achieve them means that he or she will be substantially disadvantaged in some other way. Writers, the work of whom is acknowledged in the text, have for long written of "oblique" or "covert" justice within prisons. A systematic (though not exhaustive) examination is made of this area.

Responses to the change brought about by law are examined. One response was the establishment of the Departmental Committee on the Prison Disciplinary System (The Prior Committee) in 1984. Welcomed by many as a body with a clear brief and with authority to make wide-ranging recommendations, its work will be examined and its proposals analysed. The diluting of those proposals by subsequent Home Office action may be seen as being in harmony with its conservatism in respect of change over the years.

In papers such as this it is customary to offer thanks to those who have given assistance towards its completion. In the present case they have been so numerous that an appendix has been added for the purpose. In this introduction, therefore, I simply make special reference to Colin Warbrick who has patiently supervised my work since

its commencement and to Alastair Papps, formerly governor of Durham Prison who gave me so much encouragement and support until his transfer some time before its completion. I am grateful to Home Office Prison Department for funding my work. The views stated are, of course, my own and do not purport to represent those of the Prison Department or of the Home Office.

The Law stated is that at 31 March 1989.

Peter Quinn

Durham

1989

#### Postscript to the Introduction

Three developments are in prospect that impinge upon some of the issues explored in this paper. Criticism would be speculative since, as this is being written, their final form is far from certain. The writer became aware of them after final drafts of this study had been submitted to his supervisor. Comment upon them is thus confined to the appendices.

i) Redrafting of the Manual on Adjudications

It is not anticipated that the new manual will be in use before April or May 1989. The writer was asked for his views on the draft. A note on the restructuring of the Manual and the writer's response to Home Office may be found at Appendix 7.

ii) The Green Paper "Private sector involvement in the remand system" (10)

The notion that civilian guards will have a part to play in disciplining and controlling those remanded to custody is raised in the Green Paper. The writer's response, together with that of a colleague, may be found at Appendix 8.

iii) Prison Rules 47-56

Prison Department Circular Instruction 4/1989 informed all governors that a revision of these rules was being undertaken and that the revised versions would be placed before Parliament with a view to them coming into force in April 1989. A draft of the proposed revision to Prison Rule 47 and consequent amendments, circulated to governors in January 1989, may be found at Appendix 10.

P.M.Q.

CHAPTER TWO

THE DISCIPLINED ENVIRONMENT

## Chapter Two

### THE DISCIPLINED ENVIRONMENT

#### Introduction

For many, the concept of prison equates to isolation (1) yet the prison exists in the community as part of it. It interacts with it at many levels. It could not function at all if it did not employ people, place contracts, use local authority resources, operate bank accounts and the like. In these respects, the Prison Department has the same attributes as any other part of the administration. It is a department within the Home Office and has, at its head, a Director General with the rank of deputy under secretary. The present incumbent is a career civil servant. In the past the post has been held by formerly high ranking military officers and by those recruited from the upper echelons of industry. No Director General has yet been promoted from within the prison service, though recent Deputy Directors General have.

The Director General's "cabinet" is the Prisons board. This is made up of the Deputy Director General, civil servants who control the various groups of departmental divisions, the Director of Prison Medical Services, the Directors of the Department's four regions and, following the recommendations of Mr. Justice May, two independent non-executive members appointed by the Secretary of State (2). An organisational chart of departmental management is shown at Appendix 1 together with the organisational chart of a typical institution.

Prison Department headquarters is at Cleland House, in central London, though parts of its operations remain located in other Home Office buildings. Many headquarters functions have now devolved upon the regions, with offices at Woking, Bristol, Birmingham and Manchester (3).



This, briefly, forms the administrative structure for the management of the 120 or so prisons, young offender institutions and remand centres, the first group of which provides the main focus of this study. This range of institutions is managed by about 700 members of the former prison governor grade to whom some 25,000 staff of all grades are responsible for the day to day running of establishments (4). In recent years, the prison population in England and Wales has hovered between 48,000 and 53,000, all of whom are subject to the systems of internal discipline that will be examined in this paper.

1. Statutory and other provisions relating to the administration of prisons and, in particular, to the establishment of internal disciplinary systems

a) The Prison Act, 1952; the Prison Rules 1964 (as amended)

Prisons' parent statute is the Prison Act of 1952, as amended (5). This enacts the framework for the administrative structure described above (6); provides for the establishment of a board of visitors for each prison (7); regulates the staffing of institutions (8); provides for the confinement and treatment of prisoners including matters relating to the length of their sentences and their discharge (9); and enacts provisions regarding the prison estate (10). Criminal offences, notably those of assisting escape and trafficking of goods or articles are laid down (11). It allows for the establishment of remand centres, detention centres and borstals (12). Under s47(1) of the Act the Secretary of State is empowered to make rules for the regulation of penal institutions and for the classification, treatment, employment, discipline and control of persons required to be imprisoned therein. The Prison Act is not the only statute affecting prisons and their operation. As

will be seen, various Criminal Justice Acts fundamentally affect the processes of imprisonment. So too did the Imprisonment (Temporary Provisions) Act 1980 which, inter alia, allowed for the designation of army camps as prisons to cope with disruption caused by a period of industrial action on the part of the Prison Officers' Association (POA) (13) and more recently to help alleviate overcrowding in prisons generally. The last edition of the Prison Governors' Handbook (14) gave a list of 84 Acts of Parliament which directly impinged upon the work of prisons.

The Rules formulated by the Secretary of State, under s47 of the Prison Act are, essentially, about the good ordering of institutions through legal and quasi-legal means. The prison is no exception to the truism that all systems need rules. Indeed, the research of Zimbardo et al. (1972, 1973) (15) has suggested that a prison without rules may rapidly decline into a coercive, sadistic institution characterised by abuse of power by staff. Thus, the behaviour of staff (16), as well as of prisoners, is regulated under the Rules. The current Prison Rules are those drafted and presented to Parliament in the form of a statutory instrument in 1964. They have been amended, also by way of statutory instrument, on a number of occasions. Zellick (1981.1, 1982.1) provides a useful functional analysis and critique of the Rules. He classifies them as rules of general policy objectives (eg. the statement of the purposes of treatment and training); rules of a discretionary nature (eg. the grant of remission or temporary release); rules of general protection (eg. the provision of warmth, wholesome food, or toilet requisites); rules as to institutional structure and

administrative functions (eg. the establishment of a board of visitors) and finally, rules of specific individual protection (eg. that prisoners charged with offences against discipline should have the opportunity to present their own case in defence) (17). As will be seen, the Rules have, repeatedly, been held by the courts to be addressed to management. They accord nothing to prisoners by way of redress if they are broken to their disadvantage (18). This is not to imply that prison governors are a law unto themselves. The English courts, as will be seen, have traditionally adopted a "hands-off" approach to prison matters coming before them, but were governors to impose a discipline so severe that it constituted "cruel and unusual punishment" beyond the sanction of Prison Rules, it was the view of Purchas L.J. in R v Governor of Pentonville Prison ex parte Herbage (No 2) in 1987 that "it would be an affront to common sense that the court would not be able to grant relief" (19). "Cruel and unusual punishment", however, if established, would have constituted a breach of the Bill of Rights 1688. The right not to be exposed to such punishment was not taken away by any power given to the governor under the Prison Act. It cannot be assumed, however, that any apparent statutory right will be protected by the courts. Thus, in Pullen v Prison Commissioners in 1957, Lord Goddard C.J. considered whether or not the protection of the Factories Act 1937 extended to a prisoner who claimed that he had been injured as a result of processes employed in a prison workshop (20). His Lordship relied upon the judgment of Wrottesley J. in Weston v London County Council which had excluded technical institutes from the protection of the Act (21). Lord Goddard took

particular account of s151. This mentioned premises which were to be deemed factories, eg. laundries and dry-docks. He concluded that "if parliament had intended that a prison should be included it would be a very remarkable thing ... if they had not included any reference to prisons." He incorrectly assumed that, rather like students in the technical institute, "there is no employment for wages in the case of prisoners" (22) and thus no master-servant relationship. He dismissed the prisoner's action.

b) Internal regulations and their status

The Prison Act and the Prison Rules, as public documents, are available to prisoners for reference (23). Much criticism is levelled against the Prison Department for its conservatism in not publishing a variety of other regulations drafted, within the Department, under the blanket authority of s47 of the Act (24). Foremost amongst these are Standing Orders and Circular Instructions. But there exist, too, many Manuals, Notices, letters to governors, etc. which affect the management of the prison and the lives of prisoners, the existence of which the latter and their advisers may be unaware. Some (Headquarters Memoranda) are even kept from most staff. Unlike Standing orders and Circular Instructions, they are not placed in the House of Commons Library (25). These papers interrelate and cross-refer in such a way that one prison's inmates depicted them, in their local magazine, as a maze (26).

In simple terms, the current seventeen Standing Orders (comprising an inch thick, double-sided wad of closely printed instructions) indicate how the discretion vested in governors under Prison Rules should be exercised. The aim is that of

attaining uniformity of practice. Amendments to the Orders are communicated to governors by way of Circular Instructions. Sometimes the Circular will lay down a procedure whereby adherence to the orders may be facilitated (eg. in establishing boards to consider applicants for home leave or establishing inmate rates of pay).

The status of Standing Orders is uncertain. Blom-Cooper et al. (1982) (27) have it that, whereas Prison Rules do not confer an explicit power to make Standing Orders, the directions of the Home Secretary may be made thereunder and so orders may be said "to have some indirect legislative force". Young (1982) was unequivocal:

The Rules were, and still are, only the visible tip of an iceberg. Down below is a great mass of so-called [sic] Standing Orders whose characteristics are that they are very sweeping, that they are secret, and that they have no legal status (28).

The Prison Department does not claim that Standing orders have any quasi-legislative effect. Davies (1983) quoted a spokesman as saying "The Orders are not hard and fast rules; they are issued as guidance to governors" (29). Even so, that the understanding of the status of Orders, within the Department, is not complete may be noted from the erroneous statement in an information booklet for members of staff, viz. "Standing Orders can only be changed, or amended, by Act of Parliament" (30). Their status has, briefly, been considered by the courts. Lord Wilberforce addressed the point in Raymond v Honey, but left it open.

The Standing Orders, if they have any legislative force at all, cannot confer any greater powers than the regulations which ... must themselves be construed in accordance with the statutory power to make them (31).

In that case a governor was held in contempt for preventing a prisoner's correspondence with a court whereby the prisoner had attempted to institute civil proceedings against the governor. The governor had acted within the powers purported to be given to him under Standing Order 5, as then drawn, which required such a grievance to be ventilated, investigated internally and a definitive answer handed to the prisoner before he would be allowed to proceed. (The so-called "prior ventilation rule"). Standing Order 16B, since cancelled (32), attempted to place an absolute prohibition on a prisoner commencing a private prosecution. Similarly following the principle of Lord Wilberforce's dictum, we know from R v The Secretary of State for the Home Department ex parte Anderson (33) that it is ultra vires the Secretary of State to require things to be done by way of Standing Orders which would not otherwise have to be done and which present an impediment to the right of access to a court. In that case, an articled clerk had attended a prison to take instructions from a prisoner client about an alleged assault upon him by staff. She was turned away since Standing Orders, at that time, would have required the prisoner to have stated his grievance to staff before taking advice (the so-called "similtaneous ventilation rule"). Were he to have been unable to substantiate his allegation, he would have rendered himself vulnerable to punishment. Prison Rule 47.12, as will be seen below, makes it a disciplinary offence to make "false and malicious allegations". Robert Goff L.J. held that the simultaneous ventilation rule constituted an impediment in the way of prisoners' access to a court. The taking of legal advice was, he found, inseparable from the right of access to the court

itself and could not be denied on the basis of the Standing Order (34).

Whatever the status of the internal regulations from a penological point of view, their important effect is that they affect prisoners' daily life as if they constituted legislation. It was stated in the European Court of Human Rights judgment in Silver v UK that these directions "do not have or purport to have the force of law" (35). Nevertheless, Young (supra) spoke of them as "pseudo legislation", access to which by the prisoner or his legal adviser may prove particularly difficult.

c) Offences against prison discipline: legal, quasi legal and penological perspectives; comment upon the "catch-alls"

Offences against prison discipline are laid down in Prison

Rule 47:

A prisoner shall be guilty of an offence against discipline if he

- i) mutinies or incites another prisoner to mutiny;
- ii) does gross personal violence to an officer;
- iii) does gross personal violence to any person not being an officer;
- iv) commits any assault;
- v) escapes from prison or from legal custody;
- vi) absents himself without permission from any place where he is required to be, whether within or outside the prison;
- vii) has in his cell or room or in his possession any unauthorised article, or attempts to obtain such an article;
- viii) delivers to or receives from any person any unauthorised article;
- ix) sells or delivers to any other person, without permission, anything he is allowed to have only for his own use;
- x) takes improperly or is in unauthorised possession of any article belonging to another person or to a prison;
- xi) wilfully damages or disfigures any part of the prison or any property not his own;
- xii) makes any false and malicious allegation against an officer;
- xiii) treats with disrespect an officer or any person visiting the prison;
- xiv) uses any abusive, insolent or other improper language;

- xv) is indecent in language, act or gesture;
- xvi) repeatedly makes groundless complaints;
- xvii) is idle, careless or negligent at work, or, being required to work, refuses to do so;
- xviii) disobeys any lawful order to neglects to conform to any rule or regulation of the prison;
- xix) attempts to do any of the foregoing things;
- xx) In any way offends against good order and discipline or
- xxi) does not return to prison when he should have returned after being temporarily released from prison under Rule 6 of these Rules, or does not comply with any condition upon which he was so released (36).

It will readily be appreciated that Rule 47 encompasses offences which are criminal and which can be, and on occasion are, referred to the police with a view to prosecution. Other offences are purely disciplinary in nature and relate to internal control. The distinction will be examined further in Chapter 3(2). Much criticism has centred upon Rule 47.12 and upon the lack of clarity in what constitutes an offence under Rule 47.20.

#### A note on Rule 47.12

Zellick (1982) reminded us of the risks faced by a prisoner who is unable to substantiate an allegation of misconduct by an officer (37). The offence of making false and malicious allegations did not enter the Rules until the 1952 version (38), though it had always been possible for an aggrieved officer to frame a charge within the Rule 47.20 equivalent. Arguments remain as to whether a prison officer needs to be protected in this way when others working in total institutions, for example, residential workers, psychiatric nurses, etc. are not (39). Charges brought under paragraph 12 of the Rule can have unforeseen and undesirable consequences. The facts of R v Cairns and Croft in 1974 (40) related to a



conspiracy between a prison officer and a prisoner to effect the escape of another prisoner. Zellick (1982.2) described the background to the case (41). An inmate had previously alleged that an officer had been having a lesbian affair with the proposed escapee. She had been found guilty, before the board of visitors, of the offence of making false and malicious allegations. She was awarded, inter alia, 180 days forfeiture of remission which extended her time in prison beyond the date upon which she had been expected to be released. Evidence offered in R v Cairns and Croft confirmed that such an improper relationship had taken place. An ex gratia payment was made to the prisoner who had made the allegation in respect of her prolonged period of incarceration.

There is no consensus in modern thinking about whether or not the offence should be retained. In 1981 the Secretary of State dismissed out of hand the recommendation for abolition (42). Similarly, the Committee on the Prison Disciplinary System (The Prior Committee) supported retention of the charge in its report of 1985 (43). In 1987, Bingham L.J. emphasised the importance of this provision. In R v Board of Visitors of Thorp Arch Prison ex parte de Houghton in the Divisional Court he stated that:

It is notoriously easy for a prisoner to accuse a prison officer of corruption, violence, racial discrimination or other forms of misbehaviour and often not hard for him to obtain corroborative support from other prisoners. It is right that there should be a serious sanction where such accusations are made falsely and maliciously (44).

He did manage to place a narrower construction upon the paragraph than had hitherto applied. Amongst other more colourful allegations the prisoner, who had disliked wearing

handcuffs in a public waiting room of a local hospital, alleged that "the misanthropic mental pigmy, basic grade warder Averon ... took me to Harrogate District Hospital and behaved with a total lack of discretion". Bingham L.J. held that:

This rule is not concerned with the airing of opinions, however extreme; or comments, however ill-judged; or abuse, however scurrilous. It is concerned with factual accusations (45).

When the Chief Inspector of Prisons reported later in 1987, he recommended the withdrawal of the paragraph and noted the various ways in which a prisoner could avoid the prohibitions in it without risking a charge. He concluded that:

The best protection for prison staff lies, not in the retention of such scattergun rules, which rarely alter the manipulative prisoner, but in a thorough investigation that exposes the truth (46).

In October 1988, "a clear majority" of a Prison Department working group were found to be in favour of the abolition of Rule 47.12 and it was agreed that a recommendation on the point should be put to Ministers (47). The recommendation was approved and the offence will not form a part of the redrafted Rule 47 which will come into force in April 1989.

#### A note on Rule 47.20

Marin (1983) alluded to the "catch-all" nature of Rule 47.20 (48) and quoted Hobhouse and Brockway (1922) (49) with regard to some of the trivial or eccentric behaviour that had offended against the equivalent rule in the former statutory instrument. The list included "pricking holes in toilet paper" and "singing carols on Christmas Day". More recent infractions have included "making cat-like noises in the presence of a prison dog" (50), "picking blackberries and having bread in her room" (51), "throwing up" (52), and "putting too many toys in

a child's snowman he was making" (53). Mandaraka-Sheppard (1986) listed many similar examples (54). A former prisoner's sardonic comment about the paragraph is:

There are 21 possibilities listed in Rule 47. The one I like best is: 'A prisoner shall be guilty of an offence against discipline if he in any way offends against good order and discipline.' That covers just about everything (55).

For the sake of internal control, Rule 47.20 allows acts which are not deviant within the framework of life outside custody to be "elevated" to that status. Brewers, gamblers, those who have borrowed their friend's clothing or possessions or lesbians, may end up placed on report and punished as a result. Styal Prison, for example, was reported as operating "the LA rule" to curb lesbian activity between prisoners (56). Padel and Stevenson (1988) commented that the "vague wording (of Rule 47.20) can all too easily be interpreted as doing anything the prison officer on duty does not like" (57). A prison governor (Anderson 1984) on the other hand, has described its use, purely in terms of setting standards of acceptable behaviour.

Part of a governor's job is to express what is right and what is wrong. And there's [sic] two sorts of misbehaviour actually; one is institutional misbehaviour and breaking institutional rules ... Nobody pretends that if you're late getting to bed you will be in trouble outside (58).

A serious criticism of Rule 47.20 proceedings is that they may, very easily, offend against the principle of nulla poena sine lege. The paragraph does not allow for any strict construction of what may or may not constitute an offence and, indeed, it may often operate retroactively, ie. it may be after the commission of an act, which the prisoner does not know is prohibited, that it becomes so regarded by reporting prison officers. One writer has commented "you don't know what the rules are until you have

broken them" (59). Punishment, in some of the examples cited above, would be contrary to the requirements of Article 7 of the European Convention on Human Rights which states, in part, that no-one shall be punished for an act or omission which, at the time it was committed, did not constitute an offence against national or international law.

Hall (1937) related the nulla poena doctrine to the treatment of offenders in the wider sense. However, he raised the warning that, whatever faith one may have in a tribunal (here, by analogy, one substitutes the adjudicating governor or board of visitors), if they have no regard for nulla poena, decisions may be wise or good, but they may equally be arbitrary, repressive or stupid (60). It can be further argued that Rule 47.20 proceedings may often counter the requirements of the principle of legal certainty. They may thus, simultaneously offend against Article 10(2) of the Convention. This has it that various individual freedoms: "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law." Much of the behaviour described in this paper as offending against Rule 47.20 is not proscribed by law. An extract from the judgment of the European Court of Human Rights in The Sunday Times Case serves to enlarge upon this point:

In the court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law must be adequately accessible, the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct (61).

Thus Walker (1985) came to endorse a view of offences under the

paragraph as "repugnant to the principle of legality" (62).

#### Supplementary local rules

Rule 47.20 hints at a supplementary system of rules which stand aside from any centrally drafted rules, orders or instructions. They, too, may or may not be known to the prisoner who is affected by them (63). The supplementary rules may be published by local management (eg. wing or house rules), or remain unpublished. Local rules may vary from prison to prison. King and Elliott (1977) observed that, at Albany prison, they varied from wing to wing (64). So, a prisoner who has not contravened a local rule in one location may do so, unwittingly, in another (65). Prison Rule 7.1 requires, in part, that:

Every prisoner shall be provided, as soon as possible after his reception into prison, and in any case within 24 hours, with information in writing about the provisions of these rules and other matters which it is necessary that he should know.

Mandaraka-Sheppard (1986) found compliance with this Rule in none of the six prisons she studied (66). At worst, the local "rule" may be based upon little other than the folklore of the prison or upon, sometimes dubious, local custom and practice (67). Amidst this confusion it is hardly surprising that one writer (Stevenson 1988) came to describe the application of "largely incomprehensible and unbelievably petty ... illogical and pointless rules" within a prison (68).

If inconsistency or confusion result from a less than complete understanding of varieties of local rules both by staff and inmates, all is not necessarily made clear from scrutiny of the statutory rules or standing orders either. An internal Home Office Report (1979) noted that:

Some orders apply differently, or not at all, in open prisons ... some rules ought to be amended. Some, for instance appear to envisage a degree of control that is not appropriate to open prisons (69).

Further, the mixing of youth custody trainees (YCTs) and adult prisoners in a number of female establishments has led to the two distinct sets of statutory instruments operating in parallel within the same prison. Genders and Player (1986) noted this, together with parallel application of various local rules:

As a consequence of the youth custody policy, all the establishments were obliged to operate two sets of rules, regulations and privileges for adult prisoners and YCTs. Each institution (with the exception of Drake Hall) also had additional regulations which differed for the adults and the YCTs ... At Styal a more relaxed regime was provided for the young offenders, permitting them greater freedom of movement within the individual houses. These privileges were extended only to those adult prisoners living in the youth custody accommodation. At the former borstals, and particularly at East Sutton Park, the YCTs were accorded a more "child-like" status and this was reinforced by rules which, for example, set an earlier bed time for YCTs than for adult prisoners (70).

At various points in this paper, the question of discipline and balance are addressed - usually in the context of a balance of power or status between staff and inmates. It is important to realise that, just as there can be a capricious or idiosyncratic overuse of Rule 47.20 which may create imbalance, so too a purposeful neglect of resort to the disciplinary system can also disrupt a regime. So, as a prelude to industrial action by staff at Gloucester prison in 1986, inmate offences against discipline were allowed to go unchecked since, it seemed, prisoners were initially supporting the staff against their governor. The Chief Inspector of Prisons reported:

During the week prior to the coming into effect of the governor's new detail much hostility was directed towards the governor by the inmates. Reports in the media and conversations overheard between staff had

led inmates to feel that industrial action was a distinct possibility and would adversely affect their regime ... Passive sit down demonstrations took place on exercise and, during his rounds of the prison, the governor was subjected to verbal abuse, hand claps and cat-calling. Except on one occasion, inmates were not cautioned by staff and none were placed on a disciplinary report. Staff appear to have been unusually tolerant of such actions (71).

Standing Orders, Circular Instructions and the rudiments of practice

How do statute, statutory instrument and internal regulations affect matters of prison discipline? It will be seen later that the procedure for the conduct of an adjudication has slowly become defined and refined through the recommendations of Home Office and through the developing caselaw. The Prison Act, Prison Rules and regulations made under their authority do, however, state the rudimentary practice at adjudications.

When a prisoner is charged under Prison Rules he will, provided that he is fit (72), in all cases, face the governor who will inquire into the charge and must do so as soon as possible after the alleged offence (73). Unless there are exceptional circumstances such an inquiry will commence not later than the following day provided that is not a Sunday or a public holiday (74). A prisoner charged with an offence may be kept apart from other prisoners pending adjudication (75). The rationale for this is that it will prevent collusion with or intimidation of witnesses (76). Others argue that it can inhibit the effective establishment of an effective defence or mitigation. If the alleged offence has been referred to the police, the governor is advised to segregate under Prison Rule 43 (77), such segregation should be used "sparingly" (78). He does not have to order segregation at all. Where there is

likely to be considerable delay in mounting the adjudication, then, subject to certain conditions, he should contemplate transferring the prisoner to another prison where he can resume normal location (79).

Once an adjudication has commenced a governor has a variety of courses open to him. If it has been established that there is a case to answer he may proceed to deal with it himself unless it is an offence classified as "graver" or "especially grave" under Prison Rules 51.1 or 52.2 respectively. In the case of "graver" offences (80), unless he dismisses the charge, he must inform the Secretary of State (81) and unless otherwise directed, refer the matter to the board of visitors. A similar proviso applies in respect of "especially grave offences" (82) save that a governor does not have authority to dismiss such a charge (83) and must, unless directed otherwise, refer it to the board of visitors. Where a prisoner has been guilty of repeated offences and where the governor's powers of punishment seem insufficient, he may, likewise, refer the charge to the board of visitors (84). The element of repetition need not be repetition of the same offence (85).

When a governor proceeds to hear the charge himself, and if there is a finding of guilt, the governor is empowered to make any one, or more, of a number of awards (86). Punishment may be:

- a. a caution;
- b. a forfeiture of privileges for a period not exceeding 28 days (87);
- c. exclusion from associated work for a period not exceeding 14 days;
- d. stoppage of earnings for a period not exceeding 28 days;
- e. cellular confinement for a period not exceeding three days (88);



- f. forfeiture of remission of sentence of a period not exceeding 28 days;

In practice, 'c' and 'e' above are mutually exclusive (89).

Awards may be made in respect of offences committed by prisoners remanded in custody before trial. Here a governor may, in addition to the above (though any forfeiture of remission can only take effect on imposition of a custodial sentence) (90) order:

- g.
  - i. the forfeiture of the right to be supplied with food and drink as identified at Rule 21(1).  
ie. that he may purchase his own food;
  - ii. the forfeiture of the right to various items identified at Rule 41(1), ie. that he may purchase books, newspapers, writing materials and other means of occupation (91).

A remand prisoner who has been found guilty of escaping or attempting to escape may be ordered to forfeit the right accorded under Rule 20.1 to wear his own clothes.

Boards of visitors have greater powers of punishment. The range of awards mirrors those available to the governor though they may order exclusion from associated work for a period not exceeding 56 days (92). The same limitation is placed upon their power to award stoppage of earnings and cellular confinement. A board may order forfeiture of remission of sentence for a period not exceeding 180 days though in the case of especially grave offences they may order forfeiture of an unlimited amount of remission. Any award may be suspended for up to six months (93) and governors and boards are given a discretion as to whether or not, or to what extent, to activate a suspended award in the case of a further infraction within the period of suspension (94). A governor may order activation of a suspended award made by himself or another governor. A board may activate suspended awards made by governors or a board. If

a governor is to adjudicate in a matter where he has jurisdiction and the prisoner is subject to a suspended award made by a board, and where the effect of activating that punishment would be to exceed the governor's own powers of award "a governor should not proceed to adjudicate upon a charge without first consulting P3 or P4 Division (95) ... if he has in mind that the suspended award might be activated following a finding of guilt" (96). A pregnant woman prisoner may be segregated as a punishment, subject to certain safeguards, viz. that she is only segregated during daytime and that the cell is equipped with a bell. However, governors and Boards are not normally expected to make such an award (97). Nothing in Prison Rules or Standing Orders prevents the imposition of consecutive awards in the case of a prisoner charged with several offences arising out of the same incident (98).

Standing order 3D36 carries general instructions as to the administration of punishments following a finding of guilt. Standing order 3D38 carries explicit directions as to the conditions of cellular confinement. Yet, if these conditions are not met, a prisoner has no redress at law. In Williams v Home Office and Williams v Home Office (No. 2) in 1981, the prisoner was held to have no remedy as a result of his segregation in a control unit under a regime at variance from that permitted by the Rules (99). In R v Board of Visitors of HM Prison Gartree ex parte Sears in 1985 a prisoner alleged false imprisonment since the board had, inter alia, incorrectly awarded him 14 days cellular confinement. Mann J. considered Williams (supra) and concluded:

If a person is imprisoned in a place where he is lawfully so imprisoned, then it does not seem to me that a variation in conditions of confinement can constitute the tort of false imprisonment at common law. This is so ... whether the variation results from a managerial decision by the governor or from the determination by the board of visitors which can be, and is, flawed for want of jurisdiction. There is thus no tort (100).

Ghandi (1986) indicated that there are modern authorities to suggest that lawful detention may become unlawful if conditions change (101). However, as will be seen, many decisions of the courts where matters of prisoners' rights are at question have been tinged by pragmatism or policy considerations. As Ghandi put it:

If prisoners could claim that any adverse change in conditions of confinement constituted the tort of false imprisonment, there might be no end to the claims for damages made (102).

If the conditions of imprisonment are alleged to constitute, say, a trespass to the person, action may lie elsewhere in tort (103).

## 2. Access to Information: Prisoners and their legal Advisers

It has been demonstrated that prisoners' daily life, including their vulnerability to disciplinary hearings, is regulated not only by the Prison Act, or by the Prison Rules, or by the various internal documents described, but by a complex interweaving of the provisions of all of them. For a prisoner, or his legal adviser, to see the documents may prove an exacting or impossible task. Since 1973 there have been attempts by the Home Office to allow prisoners access to some of the papers affecting them. Various publications of the European Commission of Human Rights were then ordered to be placed in prison libraries (104). Following a number of visits to prisons during 1981, the Chief Inspector drew the Department's attention to the fact that many documents that ought to be held were

not stocked in prison libraries. A list of these publications was sent to governors by way of further circular instruction (195). In addition to the ECHR papers, the list now comprises the Manual on the Conduct of Adjudications, the Council of Europe Standard Minimum Rules for the Treatment of Prisoners, various publications explaining parole and release on life licence including the annual Report of the Parole Board, the Prison Act, the Prison Rules, and those Standing orders that have now been published (infra). The general information booklet given to prisoners on reception should also be held, as too, should be its various translations. Prison libraries are also required to hold reference copies of the Data Protection Act, the Codes of Practice under the Police and Criminal Evidence Act 1984, the Repatriation of Offenders Act 1984, together with explanatory literature and a pamphlet explaining the role and functions of the board of visitors (106).

Nevertheless, in practice, a prisoner's proper access to such papers may prove hard. Tweedie (1972) described the difficulties of trying to prepare a defence whilst, at the same time, having to fit in with the demands of the prison regime (107). Tettenborn (1980) noted that:

It is commonplace that the gulf between legal rights, on the one hand, and the practical respect and enforcement of those rights on the other, is wide at the best of times. The resources necessary for full enjoyment of legal rights are not easily acquired, especially where the person seeking to vindicate his rights is further inconvenienced by being in prison (108).

One former prisoner described to the writer how she was obliged to wait for two months between applying for and receiving a copy of Standing order 5, whilst at a London prison, such was the demand for the library copy (109). Plotnikoff (1987) reported that, despite the Chief Inspector's injunction above, a survey of ten prison

libraries revealed that not one had all the required documents on display and in one case all the papers were locked in a cabinet in a locked room near to the prison library since "they might go missing". There was no notice to prisoners in any of the prisons advising them that the papers were in stock (110). Ditchfield and Duncan (1987) wrote of similar difficulties:

A proportion of these inmates also mentioned their ignorance of the prison rules and regulations that often meant that they did not know what was permitted (or not) or what their rights were. These inmates also complained about the difficulty of obtaining this kind of information and the (apparent) unwillingness of staff to provide it: 'there is only one book of rules and nobody seems to know where it is' (111).

There may be further complications. Logan (1982) has written that:

A number of clients of mine were informed that possession of the Prison Rules 1964 was regarded by the governor of their establishment as an act of subversion although these could be purchased from Her Majesty's Stationery Office by anyone, including a prisoner. Clearly, knowledge, in his view, was dangerous (112).

Similarly the writer has seen correspondence between a different governor and a Home Office civil servant about the former's view of this issue:

... I do not propose to allow prisoners free access to copies of Prison Rules by way of the library or by any other avenue

and again:

What we do not do is to give a copy of Prison Rules to individual prisoners to take away to their cells to enable them to go through them with a fine tooth comb. It happens that, so far as [prisoner's name] was concerned, he was given a full copy of Prison Rules. This, I see as an error on the part of one of my staff, but nevertheless I am prepared to overlook it ... (113).

There are two ways of perceiving this problem. The lawyer may know that his prisoner client is entitled, for example, to his own copy of Prison Rules or to borrow one from the prison library. The penologist, however, knows too, that if the prisoner insists upon

his entitlement, he may have to live with the consequences of being seen as a "barrack room lawyer" or as Logan (supra) noted, as a "subversive". There can be no formal sanction against him and, ultimately, he would get his copy of Prison Rules, but he could be at risk from the underground system of an institution's "covert justice" that will be examined in Chapter Three(4).

Access to Standing orders and Circular Instructions, is rather more complicated than access to the Act and the Rules. Cohen and Taylor (1978) pay only superficial attention to this in asserting that:

The actual working rules are contained in a complicated series of secret [sic] documents. In the first instance the Prison Department produces a large number of Standing Orders. These, in turn, are elaborated in a further series of regular Circular Instructions (114).

Another view is that, although for all practical purposes access to information therein is gained at considerable effort, many such documents have never been secret. Young reported that:

A former Permanent Secretary said that prison Standing Orders had been in the House of Commons Library for the last 20 or 30 years; although they did not get a great deal of publicity, they were not secret (115).

Even this view merits qualification for Leigh (1980) had previously quoted an official as observing that the only Circular Instructions sent to the House of Commons Library are those which modify Standing orders (116). Such documents said Lord Denning M.R. should be kept confidential and not be "exposed to the ravages of outsiders" (117). In this, he merely echoed previously stated judicial comment in respect of the disclosure of Standing Orders. In Ellis v Home Office in 1953, Singleton L.J. had said:

The Secretary of State had sworn an affidavit in which he deposed to the fact that the Standing Orders for the government of prisons ... were documents in respect of which he claimed privilege, he having formed the view, on the grounds of public interest that those Standing Orders

ought not to be produced. No-one, I am sure, will say a word against that claim. It is of great importance that privilege should be maintained when the public interest is at stake (118).

One imagines that all the Secretary of State had done in Ellis v Home Office was to follow the practice, later to become virtually automatic, of seeking exclusion from disclosure of almost all official papers as a matter of principle. The Crown Proceedings Act 1947, whilst extending ordinary rules of discovery to the Crown, had in s28, preserved the rule in Duncan v Cammell-Laird (119). This implied that production of documents would not be ordered if inter alia they belonged to a class of documents which, as a class, should not be produced if such would harm the public interest. It was not until Conway v Rimmer in 1968 that the House of Lords was to hold that the decision as to whether or not a claim for immunity by the minister should be sustained was one for the court. Further, the court could order a private inspection of the documents in respect of which immunity was claimed in order to decide whether or not that claim was to be accepted. The court's task was to balance the conflicting interests between plaintiff and defendant in terms of whether or not justice would be frustrated by the withholding of documents (120). So, for example, in Burmah Oil Co Ltd v Bank of England, in 1980, crown privilege was successfully claimed in respect of a class of documents constituting the minutes of discussions between officials who would be advising cabinet ministers upon policy changes (121). Zuckerman (1981) stated the present position thus:

As the courts have insisted in having the final word in claims for immunity from disclosure, the term 'crown privilege' has fallen into disfavour. It is pointed out that the withholding of evidence is not something the crown can claim as a right; it is merely a public

interest. Immunity which may, or may not be recognised by the court, depending on the public interest involved and on the circumstances of the case (122).

In one sense, it can be argued that practice has not altered over the years irrespective of the changing law. Whether or not immunity from disclosure had been claimed, disclosure was always made, by Home Office, once a court had ordered that this should take place. In practice, because of difficulty of access to information, the prisoner and his lawyer may not know of the existence of documents, sight of which is necessary at a stage far removed from litigation, if the lawyer is to advise his prisoner client about even the most mundane matters.

The first modern inroad insofar as allowing a prisoner access to a Standing Order came in 1977 in the form of a memorandum from the Home Office to governors. A member of parliament had responded to a prisoner's enquiries about regulations governing correspondence with members by sending him a copy of the Circular Instruction and the Standing Order that addressed the point. The memorandum related that the prisoner had been allowed to receive the order and that in similar circumstances governors should allow the same. The memorandum concluded with the injunction:

This advice relates, however, only to SO5C. Standing Orders and Circular Instructions should otherwise be treated as management documents to which prisoners do not have access (123).

However, as the case of Silver v UK proceeded first by way of application by a number of prisoners to the European Commission on Human Rights, and then, eventually, to a judgment of the Court (124), an opportunity arose for the Home Office to consider further the question of access to information. The case concerned interference by the authorities with prisoners' correspondence. As part of an attempt to reach a friendly settlement, the government



conceded that, once revised, the whole of Standing Order 5 on communications would be published as a first step towards publishing the entire Order Book. A working group was set up comprising Home Office staff and practitioners in the field. A revised Standing Order 5 was published and took effect from 1 December 1981. An accompanying Circular Instruction (125) required that copies be held in prison libraries and that an explanatory pamphlet be made available to prisoners to purchase should they so wish (126). Likewise, the whole of the Order was made available for purchase by prisoners or by members of the public from the Home Office Library. Further Orders have now been published (127) and the Secretary of State in 1982, stated his commitment to publish them in their entirety, when revision had been completed within some years (128).

On the face of it then, indications are encouraging that prisoners and their legal advisers are now more able than they used to be to refer to some of the Prison Department's internal codes. However, this writer has described, elsewhere, the prison as a mechanistic organisation, best suited to stable conditions and which "struggles to stay the same" (129). The same may be stated of the Prison Department and its publication of Orders. The first three sentences of the published Standing Order 5 refer the reader, respectively, to Standing Orders 8A, 12 and 1H7, only one of which is published. Similarly, Circular Instruction 34/1981, which was issued at the same time as the revised Order, and which details how it should be interpreted, remains unpublished. Further, there have now been many amendments to the 1981 Order, all brought about by way of Circular Instruction. Those Circulars remain unpublished and there is no guarantee that those who purchase the Order will be kept aware of amendments or, indeed, receive an up-to-date version (130).

Shortcomings are acknowledged by the Home Office Library, one of whose staff has written:

Our arrangements for the distribution of such documents to people outside the Home Office are a bit rickety (131).

How, then, can prisoners' legal advisers gain access to the bulk of Standing orders and Circular Instructions should they need them? Owen (1985) noted that neither the Law Society nor the Inns of Court Libraries hold copies for reference (132). For the most part, the process is rather "hit and miss". Some Circular Instructions and Standing Order amendments have been published in the Prison Officers Association Magazine which is available to the public by subscription (133). Circular Instruction 55/1984 was published as an appendix to the Report on the Work of the Prison Department 1984/85 (134) and also as an appendix to a paper by the Director General in a collection of papers published in 1985 (135). Circular Instruction 32/1986 conveys the prison department policy on race relations, and states that it may be quoted and cited inside and outside institutions. Several Circulars were reproduced in Volume Two of the Report of the Departmental Committee on the Prison Disciplinary System (136). A useful summary of all Circular Instructions published over the previous three months is contained in each issue of the quarterly of the Association of Members of Boards of Visitors (AMBoV). But for accurate and up-to-date information, the lawyer has only one or two sources. A solicitor, who represents prisoners in a range of matters, told the writer:

Sometimes, if I learn of changes to Standing Order 5, I write to Home Office Library and ask them to send them. But it takes so long and I don't always get what I need. Sometimes I pick up bits from legal journals. But generally, when I need to know what Orders and Instructions say, I ask (name of M.P.) to find out from the Home Affairs Research Division in the House of Commons Library. They are very efficient (137).

Such a view is endorsed by Owen (1985):

The only way of getting copies is to ask a friendly M.P. to make photocopies from those in the House of Commons Library - the only "public" place where they are available. Alternatively, the National Council for Civil Liberties has a set of circular instructions which is available for inspection and/or photocopying (138).

Developments during the last decade have, to a degree, countered the force of Cohen and Taylor's thesis that "rules, whose full content is unknown, can be operated in any way by the all powerful" (139). However, the foregoing demonstrates that it may only be through unswerving tenacity that prisoners or their lawyers, in a relatively novel field, become aware of, and gain access to, many of the source documents they need.

The word "secret", freely utilised by Cohen and Taylor, has a particularly and clearly defined meaning within the civil service and therefore within the Prison Department. Secret documents are those which contain:

Information and material, the unauthorised disclosure of which would cause serious injury to the interests of the nation (140).

Certainly, Standing Orders and Circular Instructions do not fall within this category, nor are they marked as such. Yet the blurred boundaries between that which is freely accessible and that which remains hidden from view, or that which, whilst accessible, is not readily available, implies that, for the prisoner and his advisers, much may, effectively, remain "secret". Leigh (1980) ascribed the reasons for lack of disclosure to Home Office "defensiveness" (141), the wish to avoid "irritating publicity" (142), and traced its origins to the nationalisation of prisons more than a century ago (143). Whatever the reasons, the remaining reluctance to disclose information about internal regulation, or the lack of appreciation of the need to disseminate information that is available, serves to

complicate an area in which prisons are increasingly accountable both to Parliament and at law.

### Conclusions

With overstatement, but with a germ of truth, Leigh (1980) described the prison as an organisation "regulated, not by common law ... but by officials" (144). In different respects, it is regulated by both. Whilst the courts maintained a 'hands-off' policy regarding prison management, staff were able to use a considerable degree of discretionary power. The use, by officials of their discretion, whether at national policy level (eg. the introduction of control units), or at local level (eg. the refusal to supply a prisoner with a set of Prison Rules), has a profound effect upon the regime of the prison and the nature of the discipline within it. Whereas statute and statutory instrument provide a degree of certainty, the large areas of discretion reserved unto the administrators make challenges to the system at law both uncertain in outcome, and expensive. Prisoners and their lawyers will have access to some of the regulations affecting them, but not to all; and those regulations may be different, or interpreted differently from institution to institution. That may well be functionally sound. There would be little purpose, after all, in applying orders relating to the placing of refractory prisoners in special cells (145) in open prisons which, generally, do not have such facilities. But the area of discretion given to staff under Rule 47.20, for example, is extremely wide. There must always be room for the exercise of discretion within an organisation that is "people" based. Indeed, much of it within prison is exercised in a humane, creative and helpful manner. But in an era when the accountability of public bodies is increasingly demanded there may be questions as to whether or not prisons meet entirely the expectations and aspirations

of those most closely affected by them or of informed critics.

In the next section of this study, emphasis will be placed upon the process whereby prisoners and their representatives have attempted to test that level of accountability.

CHAPTER THREE

THE DEVELOPMENT OF DISCIPLINARY SYSTEMS

## Chapter Three(1)

### ROUGH JUSTICE TO NATURAL JUSTICE: PRISONERS' ACCESS TO THE COURT AND CHANGE FOLLOWING JUDICIAL DECISIONS, WITH PARTICULAR REFERENCE TO DISCIPLINARY MATTERS

#### An Introduction

Second only to order is a need for a sense of justice. Prisoners, after all, are connoisseurs at the receiving end of the machinery of justice and what they greatly fear and resent is the arbitrary use of power. It is, surely, appropriate that in the ultimate law enforcement institution the rule of law should prevail. The term is used in a wide sense, because what is implied here is the concept of natural justice ... This may well be to extend to prisoners standards which they themselves might not apply to others, but the prison should set an example in this respect.

So wrote Martin (1980) in an essay that examined a prisoner's avenues for expressing a grievance (1). To the outsider, lawyer or criminologist, it would appear axiomatic that the organisation most symbolic of the state's power to punish according to law should offer to those within it a regime that is just. Inherent in such a regime should be proper safeguards whereby alleged injustices may be remedied, if necessary, by resort to law. Yet Martin's statement was made at the beginning of a new era for prisons. The several actions, which for purposes of convenience will, for the present, be noted as St. Germain (2), had recently been concluded. Internal disciplinary proceedings before boards of visitors had, for the first time, been held subject to the scrutiny of the High Court by way of judicial review. Prisoners were to be afforded hearings that adhered to the rules of natural justice. Significantly, through St. Germain, the public gained an insight into the conduct of internal hearings. There were no allegations of mala fides on the part of a board of visitors, but evidence was abundant that substantial injustices had occurred.

Martin's statement raises questions that are to be explored in this chapter. The first is that if the awareness of the need to comply

with the rules of natural justice was a principle enunciated in St. Germain, what was the position of the prisoner, at law, prior to the 1979 judgments? How could he test his rights at law and to what extent were the courts prepared to intervene in the internal workings of the prison? A preamble to the next question may be stated thus: it will be seen that the various St. Germain judgments are lengthy and meticulously argued, but they address a limited issue - that of board of visitors hearings. Prison discipline is very much wider than that. It encompasses a range of activity from the avuncular "ticking off" of an inmate by a prison officer to the indefinite segregation of perceived trouble makers following administrative rather than quasi-judicial action. Writing immediately post-St. Germain, Martin could not predict how the case law would develop. The question to be explored is how was it to develop? Which areas of prison administration in relation to the maintenance of discipline are now subject to scrutiny? How do the courts distinguish between prison activity of a judicial or of an administrative or management character? These are amongst the issues to be examined in this chapter.

#### 1. Prisoner grievance, administrative responses and contradictions

One of the features that distinguishes the prison system of England and Wales from that of many European counterparts is that it is largely managed by administrators. Blom-Cooper (1984) wrote of the resistance of British prisons to the implanting of "legalism". He noted that:

the continued absence of any legal input to the administration of the prison system has been a major factor in the failure, on the part of the prison administrators, to perceive decision making within the legal framework (3).

This writer has referred, elsewhere, to the practice of prison departmental officials interpreting a legal problem within an



administrative context. Decisions which may appear to be sound within the latter may founder in relation to the former. The administrator may not have cognisance of the possible legal consequences (4). Even when matters are referred to Home Office legal advisers branch the tendency may be to concentrate on that which is defensible rather than that which is later found to be legally required. So, for example, Blom-Cooper provided examples such as the disinclination to recognise that censoring of prisoners' mail had legal implications (5). Governors do receive a form of rudimentary legal training during their induction, command and senior command training courses at the Prison Service College in Wakefield, but even this has been reduced in recent years. Short courses in employment law are offered by the College. Command course members have visited the European Court and European Commission on Human Rights - an innovation in 1982 but which has now been abandoned. Recently, all governors received a brief pamphlet, prepared by the Treasury Solicitor and Cabinet Office, designed to give them "an introduction to the basic principles of administrative law and judicial review" (6). Evans and Le Jeune (1987) indicated the prospect of systematic training in legal awareness, though they addressed the question as a need manifest in the civil service as a whole and not, primarily, amongst prison administrators (7).

Despite the present increasing sensitivity towards the legal context of the prison administrator's job, there has been much to persuade them, over the years, that the courts have not been anxious to exercise jurisdiction over their actions. Not only has "hands off" provided a device of judicial policy, but there are, at least, arguments that the administrator's ignorance of the law is matched by the judiciary's ignorance of penology, of prison and of those

social pressures leading to the commission of crime. So, Drewry (1984) was to state that:

The intellectual isolation of appellate judges, who resolve legal cases with reference to notions of social justice and public policy of which they are singularly (and collectively) ill equipped to understand ... remains a deeply worrying feature of our judicial process (8).

McConville (1982) stated that "there is a view, among the judiciary, that research is bunk" (9). Lawton L.J. countered the need to be aware of the contribution of the social sciences to his job by placing the discipline firmly within universities, whereas he had a knowledge of "living people" gained from reading newspapers, talking to magistrates and "watching television chat-shows" (10). Hailsham L.C. has argued that no one is better placed to understand the everyday perceptions of ordinary people than the judge, since they will often have been members of his platoon and he may have commanded them in battle (11). Gifford (1986) was critical that judges received no training in criminology (12) and Griffiths (1985) concluded that:

It would seem that the courts need not take too seriously their position as the custodians of the rights and liberties, at least, of convicted prisoners. They are probably troublemakers anyway (13).

It will be seen that, over the years, various high-flown dicta have asserted the supremacy of the courts over prison matters. Yet, in practice, and in the absence of positive cruelty to a prisoner, the courts offered little to him in the way of relief. To understand how it has been that prisoners are now able to challenge the findings at internal disciplinary hearings it is necessary to trace something of the way in which they managed to secure access to the courts as a matter of right in the first place. The story is one of contradictions. It has often been the administrative response to legal questions that has led critics to hold that prisoners have

been denied access to those legal processes which regulate everyday life and ensure an adherence to the law on the part of those in authority.

Sir Lionel Fox, then Chairman of the Prison Commission, wrote (1952) that any citizen had the right to seek a remedy at law for any wrong he had suffered, and had the right to take legal advice to that end. However, in the case of convicted prisoners the Commission would hold themselves "free to decide on the merits of each case as to whether or not a prisoner should be allowed to initiate legal proceedings or seek legal advice" (14). Succinctly summarising the prisoners' position he concluded:

A sentence of imprisonment does not, of itself, impose on an offender any loss of civil rights, but his position as a prisoner may disable him from exercising them (15).

Judicial confirmation of this may be seen from the dictum of Sellers L.J. in Hinds v Home Office in 1982:

A person in custody does not have the same rights as ordinary individuals. In order to safeguard the rights of prisoners in custody, the rules provide that, with the consent of the prison authorities, prisoners are allowed, at their discretion, to take legal advice and, in some cases, to bring proceedings (16).

So, whereas Zellick (1981) has written of prisons as "creatures of law" (17) he has also noted that "the legal position of the prisoner, in England, remains primitive" (18). Hewitt (1982) suggested that "the administration of justice too often stops at the prison gate. But then so do all the safeguards provided before conviction in an attempt to ensure that justice is done" (19). A former prisoner, identified only as "Shaun" (1982) had it that "once you're inside those gates it's a law unto its own. It's got nothing to do with the law of the land" (20). Even The Times newspaper has avowed "let it roundly be said, there is no such thing as prisoner's rights" (21).

Such views conflict with the stated policy of the Prison Department and also of a number of judicial pronouncements. A white paper of 1969 gave prisons' task as holding those committed to them "under the law" (22). A recent statement of the tasks of the prison service (1984) subsumes the whole under the requirement to act "in accordance with the relevant provisions of the law" (23). Judges, through the years, have stressed the status of prisons as being subordinate to the law. Lord Mansfield said he "had no doubt of the power of the court over all the prisons in the kingdom" (24). In 1955, Barry J, in D'Arcy v Prison Commission, stated that "a prisoner is deprived of his liberty ... but he is not divested of his rights as a citizen" (25). Shaw L.J. in R v Hull Board of Visitors ex parte St. Germain stated, obiter, that:

Despite the deprivation of his general liberty a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration ... The court are, in general, the ultimate custodians of the liberties of the subject, whatever his status (26).

Finally, in Raymond v Honey in 1982, Lord Wilberforce was to state that "a prisoner retains all those rights that are not taken away from him either expressly, or by necessary implication" (27).

Now, it would be incorrect to suggest that the exercise of the administrators' discretion necessarily leads to injustice. When injustice in a disciplinary award is perceived the Prison Rules allow that the Secretary of State may remit the awards either by reducing them or by substituting another, less severe, award (28). Subject to his directions, governors and boards of visitors are given authority to remit or mitigate awards (29). However, traditionally, were a prisoner to wish to challenge internal decisions, including those at disciplinary hearings, he would first have had to overcome a number of hurdles. The most powerful of these was that

presented by the combined effect of Prison Rules 33.2 and 34.8. Under the former, "the Secretary of State may, with a view to securing discipline and good order or the prevention of crime or in the interest of any persons, impose restrictions, either generally or in a particular case, upon the communications to be permitted between a prisoner and other persons." Under the latter: "A prisoner shall not be entitled under this Rule to communicate with any person in connection with any legal or other business, or with any person other than a relative or friend, except with the leave of the Secretary of State." Such leave was, of course, often given - but not as of right. It may have been given as a result of reluctant resignation rather than in recognition of the prisoner's right of access to a court. Thus in the matter that was to become D'Arcy v Prison Commissioners (supra) an internal Home Office minute recorded:

We must expect a good deal of this sort of thing. The grant of free legal aid and to all and sundry and the passing of the Crown Proceedings Act have now created a climate favouring such litigation by prisoners. Indeed, they have nothing to lose and a good deal to gain in the way of special letters, interviews, a day out sooner or later and a general bolstering of self-importance (30).

If the Secretary of State, or as Sellers L.J. more accurately had it "the prison authorities" (31) allowed correspondence with a lawyer with a view to challenging internal matters, a prisoner would formerly have been required to exhaust internal channels of stating his grievance before stating it outside, even to his lawyer. In effect, the Home Office as potential defendant would know all the material facets of the plaintiff's case before he would be allowed to take advice on the point. The decision of the European Court of Human Rights in Golder v UK (32) which, on the face of it, guaranteed a prisoner the right of access to a court and the right

of access to legal advice to make the former a reality helped little. First of all, since Mr. Golder had brought a civil action, Home Office initially applied the effect of the judgment only to civil cases (33). Secondly, the insistence on prior ventilation and the handing down of a definitive answer before advice could be sought, even after Golder, led Taylor (1980) for example, to conclude:

The Home Office has shown that it is quite prepared to engage in the deliberate and secret subversion of a verdict issued by the European Court (34).

The decision in R v Secretary of State for the Home Department ex parte Anderson has ameliorated the position of the prisoner to the extent that he is now in a position analogous to that of a member of the public who wishes to take legal advice by removing the requirement of ventilation of a complaint to the prison authorities before advice can be sought (35).

2. "Hands Off": The courts support the administrators

It has been seen that the existence of internal hurdles often countered the effectiveness of resort to law as a way whereby a prisoner might settle a grievance. A further barrier to effective challenge lay in the traditional custom of the courts simultaneously to assert an authority over prisons, but also, in general, to refuse to exercise it. Zellick (1981) presented the clearest of accounts of the reluctance of courts to grant relief to the aggrieved prisoner by employment of the "hands off" principle (36). Fitzgerald (1984) coined the phrase "laissez-faire" in this respect to capture the seemingly capricious way in which the courts have responded to prisoner litigants (37). The spirit of such capriciousness was further noted by Zellick (1985) who considered how a House of Lords would eventually choose between contradictory

decisions on prison adjudications emanating from different domestic jurisdictions: "Whether they would make the right choice is anybody's guess" (38). It is thus appropriate to examine the authorities on "hands off" with regard to prison matters generally before concentrating, particularly, on cases founded on challenges to disciplinary procedures.

The modern authority for "hands off" is that of Arbon v Anderson and others in 1943 (39). The appellant had been interned, during wartime, under the Defence (General) Regulations - specifically regulation 18B (40). He had been held at Liverpool, Brixton, Stafford and Lincoln prisons and also at a camp near York. The then Secretary of State, Sir John Anderson, had issued instructions that the Prison Rules of 1933 were to apply to persons so detained as if they were prisoners awaiting trial. Mr. Arbon furnished lengthy claims of alleged breaches of statutory duty by the governors of the jails that had held him. Further, he argued that the Secretary of State's duty to observe the Prison Rules was absolute and that he was bound, by statute, to see that they were observed. The alleged breach lay in the fact that the requirement to hold Mr. Arbon as an unconvicted prisoner with privileges not generally available to convicted men, had not, universally, been met. Goddard L.J. ultimately held that there had been no breach of Prison Rules. The Secretary of State's instructions had been departmental instructions which did not confer rights. Insofar as they had not been followed, the departures "must be assumed to have been approved by the Home Secretary" (41). Goddard L.J. proceeded to consider the consequences, at law, had there been a breach of Prison Rules. Could that have given rise to an action for breach of statutory duty? His view was that it could not. "Neither the

Prison Act, 1898, nor the Rules, were intended to confer any such right." He concluded:

... it seems to me impossible to say that, if [a prisoner] can prove some departure from the Prison Rules which caused him inconvenience or detriment, he can maintain an action. It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules. The safeguards against abuse are appeals to the governor, to the visiting committee, and finally to the Secretary of State and those, in my opinion, are the only remedies (42)

These have been the dicta that have informed and influenced the thread of case law in English prison cases until very recently. There follows a review of that case law.

In Silverman v Prison Commissioners in 1955 (43) a preventive detention prisoner was held, in accordance with the Prison Rules, as an ordinary prisoner. Since the Prison Act enacted that such prisoners be accorded special treatment, the plaintiff argued that to make the rule was ultra vires the Secretary of State. Streatfeild J. refused to make such a declaration holding that this could only have been possible in the case of an enforceable legal right. Prison Rules conferred no such rights. Zellick has argued the irony whereby a prisoner may be able to succeed in an action against the prison authorities by seeking a common law remedy, but not if he relies on those statutory provisions ostensibly there to safeguard him (44). Thus it was that, contemporaneously with Silverman, Mr. D'Arcy (supra) managed to obtain damages against the Prison Commission since the governor of Parkhurst prison had failed to exercise a proper duty of care towards him, knowing him to be at risk. Even in similar cases of alleged negligence, however, the D'Arcy principle has not been followed. In Ellis v Home Office (45) the plaintiff, a prison hospital patient was improperly left unsupervised with a mentally disturbed fellow prisoner, Mr. Hamill.



The latter attacked and injured the plaintiff. It was held that, whereas risk of damage was foreseeable, it was no more foreseeable in the case of possible actions by Mr. Hamill than in the case of any other prisoner. Thus Mr. Ellis' action failed. Later, in Egerton v Home Office (46) a prisoner who was known to other prisoners, though not to supervising staff, as a sex offender, was beaten by prisoners in the toilet area of a workshop and his arm rendered useless. May J. found that the level of supervision in the shop itself had been adequate, but he was critical that staff there had not been informed of the prisoner's history. What of breach of duty of care to Mr. Egerton? May J. found that even had the officers known his history no member of staff could, nevertheless, reasonably have expected him to be at risk once he had left their presence. Perhaps such tortuous extensions of the "reasonable foresight" test can best be explained in terms of the policy considerations stated by Bailey, Cross and Garner (1977):

Ordinary principles of liability are modified, or should be modified, to take account of the special position of those [public] authorities in society and law (47).

Whatever the reason, the door pushed ajar by D'Arcy appears to have been closed in the last two cases reviewed.

After Silverman (supra) it fell to the courts, on a number of occasions, to consider the application of the Prison Rules. In Hancock v Prison Commission in 1960 (48), Winn J. refused to set aside an award of forfeiture of remission stating that "it is manifest that the control of prisons and prisoners by the Prison Commission and the visiting justices should not be interfered with by the courts." Later, in Hinds v Home Office in 1962 (49), an attempt to found an action on a breach of Prison Rules was struck out as being frivolous and vexatious and an appeal against this

dismissed. Sellers L.J. enunciated the principle of less eligibility which, for many years, has characterised much of the argument against amelioration of prison conditions (50). He told the plaintiff:

You are in prison, and you want every facility as if you were an innocent man. We cannot tolerate this sort of argument ... a person in custody does not have the same rights as ordinary individuals.

He stressed the need to reinforce policy considerations:

The prison governor and the Home Secretary are not bound to give you every whim you seek ... These rules are administrative only and if there is any breach of them, the way in which that breach should be put right is to complain to the visiting justices. There is no legal course of action in respect of any breaches of the rules. If there were, those carrying them out would never be free from the threat of legal proceedings.

Similar interests of policy may have guided Lord Denning M.R. in deciding Becker v Home Office in 1972 (51). A prisoner had claimed from the Home Office the 8 17s. 0d. expended by it and recouped from her in respect of the production at court in a private civil action. She had formerly agreed to pay this sum. Under s29 of the Criminal Justice Act 1961, the Secretary of State was empowered, under certain circumstances, to direct the production of such a prisoner. But ss51 and 52(2) of the Prison Act, 1951, enacted that expenses incurred, including a prisoner's "removal from one place to another shall be paid by the state". Mrs. Becker emphasised the imperative. It was held, in making an order under s29(1) that the Secretary of State had a power to impose conditions as to payment of expenses and that the effect of the Prison Act in this respect was purely regulatory. Sections 51 and 53(3) said Lord Denning "do not give any colour of right to prisoner to have anything provided for him free of charge" (52). Mrs. Becker had two further grievances. The first concerned her prison medical treatment which the judge at

County Court had found "open to severe criticism". Lord Denning disagreed and, since the appellant had suffered no damage, her action was bound to fail under this head. The second concerned an infraction of the Prison Rules. The appellant was a trustee for her children. A cheque had been received at Holloway Prison and had been lost by the prison authorities. It was stopped and a replacement cheque was issued by Mrs. Becker's bank. There was no loss, but for some ten days there was uncertainty. Mrs. Becker argued a contravention of Prison Rule 42(3) which has it that:

Any security for money shall, at the discretion of the governor, be a) delivered to the prisoner or placed with his property in the prison; or b) returned to the sender; or c) encashed and the cash dealt with in accordance with paragraph 2 of this Rule.

Lord Denning M.R., with Edmund Davies and Stephenson L.J.J. concurring, held that there could be no reliance upon the breaking of the Rule as a cause of action.

If the courts were to entertain actions by disgruntled prisoners, the governor's life would be made intolerable. The discipline of the prison would be undermined. The Prison Rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action (53).

This view was endorsed by Edmund Davies L.J. who said that:

A breach of the Prison Rules does not per se create any civil liability at the suit of the party who claims to have been damaged thereby (54).

In 1981, the Arbon v Anderson authority was endorsed, obiter, by Tudor Evans J. in Williams v Home Office No.2 (55). Here, the plaintiff had been held in a so called "control unit" at Wakefield prison after a "completely perfunctory process" (56). The case will be examined, in close detail, in Chapter Four. Suffice it to note, for the present, that the regime was mounted in contravention of a number of Prison Rules and the finding of breach was confirmed in the judgment of Tudor Evans J. Nevertheless, in dismissing Mr.

Williams' action in its entirety he stated that:

Counsel accepts that there is ample authority that a plaintiff cannot rely upon a breach of the rules to establish or support a cause of action (57).

Further, he stressed: "The rules are regulatory and not mandatory (58).

3. Towards "hands on": establishing a right of access to the court

The development of "hands on" had its origins in a "pincer movement" before both the European and the domestic courts.

a) The European dimension

It is important to appreciate something of the situation that prevailed in prisons before Golder v U.K. (59), the burden of which is noted below. Evans and Berlins (1975) described the combined effect of Prison Rules 31.1 and 34.8 thus:

An ex-prisoner told us that, not only did the inmate have to draw up his own case but, if he wished to approach a lawyer, his petition might be seen by the very people he was complaining about. 'The governor will ask you why you want a lawyer. In many cases, the request must be referred to the Home Office. The governor will tell you that the way to do that is to petition the Home Secretary. If you wish to take some legal action against a prison officer, the governor gives you permission to petition, then the petition is handed, open, to the wing principal officer or the landing officer. It is then given to the governor.' Prisoners say pressure may be brought on them to withdraw a petition, but, if they do, that may imply that their complaint is false and malicious. If the prisoner pursues his complaint, the allegations are investigated and a report of the investigation is submitted to the Secretary of State with the petition. If the Secretary of State considers that the complaint is false and malicious, the prisoner is likely to be charged before the governor and remanded to be dealt with by the board of visitors (60).

The writers explained the disadvantages, to the prisoner, of this "prior ventilation" rule. However, no internal hurdles were placed in the way of a prisoner who wished to complain to

the European Commission of Human Rights. Since 1966, the United Kingdom government has recognised that subjects may make individual application to the Commission. Even prior to their partial redrafting, in 1981, Prison Department Standing Orders allowed prisoners to express their grievances in this way without impediment. A prisoner would be permitted to take legal advice in respect of the drafting of his application unencumbered by internal regulations (61).

The first attempt by a serving prisoner to address the issue of access to legal advice in respect of a European application was Mr. Gyula Knecht1 (Knecht1 v UK) in 1969. The applicant had suffered the loss of a leg as a result, he claimed, of medical negligence. He asserted that he had been prevented from writing to his solicitor with a view to taking action. This, he argued, infringed his rights under Article 6(1) of the European Convention of Human Rights which is to be discussed in Chapter Three(2). The Commission declared Mr. Knecht1's application admissible. Ultimately a friendly settlement was reached under which the government made an ex gratia payment in exchange for an agreement to withdraw the application. Further, the government agreed to make an exception to the general prohibition within Standing Orders to the effect that where a prisoner had suffered physical injury or impairment of a physical condition and claimed damages in negligence, then permission to take legal advice, including the instituting of proceedings would be automatic. Clearly, the government had not recognised an unqualified right of access to a court or to legal advice. A judgment declaratory of the right of a serving prisoner, in

this respect, was not forthcoming until that in Golder v UK in 1975.

The facts in Golder were not in dispute. The applicant had been serving a lengthy prison sentence when a riot took place at the prison holding him. Officer Laird was injured and, in his statement about the event, he identified Mr. Golder as his assailant. The latter was charged under Prison Rules but, some time later, it became apparent that the officer had been mistaken and Mr. Golder was told that he was no longer under suspicion. Later still he discovered that, in his prison record, his name was present on a list next to which was endorsed "charges not proceeded with". He wished his innocence to be established and thus he petitioned the Secretary of State for this entry to be expunged. The petition was rejected. He decided to sue the officer for defamation based on his statement that he had been the culprit. He wished to write to his solicitor for advice. The Secretary of State refused him permission to do so. This, the prisoner contended, was in breach of Article 8 of the Convention which says:

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The Commission found that there had been a breach of both Article 8 and of Article 6 which guarantees right of access to a court. When the case came before the European Court of

Human Rights, it handed down a judgment which confirmed the Commission's opinion. The government, as a result, announced new procedures for all prison department establishments. The former requirement that a prisoner had to petition the Secretary of State for permission to take legal advice about instituting civil proceedings or to institute the proceedings was abolished. Instead, he would be required to make an application, which would always be granted, provided that the anticipated proceedings were against the Home Office and arose out of or were connected with his imprisonment and that he had received a definitive reply to his grievance from the Home Office before he proceeded. A hastily drafted Circular Instruction (64) amended Standing Orders, the "Litigation" section of which was soon replaced by a new Order (the present Standing Order 16).

This prior ventilation rule was soon to fall into disrepute, being seen by critics (eg. Cohen and Taylor 1978) (65) as an ingenious device that avoided the rigours of the Golder judgment. Access to a civil court and to necessary advice could be delayed were the prisoner's grievance - stating petition to be delayed. Bilton (1980) for example, was to report a delay of 27 months occurring in one case before the announcement of a definitive decision by the Secretary of State (66).

Prior ventilation was not displaced until the achievement of a friendly settlement, before the Commission, in the case of Reed v UK in 1981 (67). The applicant had aspired to take legal advice because he believed that he had been libelled by a prison officer and because he sought a

remedy for alleged assaults upon him by prison staff. He complained that he had been prevented from taking advice until the prior ventilation procedure had been completed. He stated that whilst the procedure was in train, his correspondence with his solicitor was continuously subject to scrutiny or delays. As a part of the friendly settlement terms, the government undertook to change various restrictions on correspondence rules, but, particularly, to abolish prior ventilation. It would be replaced by "simultaneous ventilation", the effect of which was described in Chapter Two.

Simultaneous ventilation was a clumsy procedure to operate. A structure was laid down (68). Depending upon the nature of the grievance, it was to be ventilated to the Secretary of State by petition, to the board of visitors or to a visiting officer of the Secretary of State. If the complaint consisted of an allegation against staff it was to be made to the governor and, if the prisoner were to be unable to substantiate it, it could lead him to being charged with making false and malicious allegations. It has been seen that it was not until the domestic case of R v Secretary of State for the Home Department ex parte Anderson, in 1984 (69), that the simultaneous ventilation requirement as regards expressing grievances to lawyers was removed (70).

Despite Golder, the question of unhindered access to a court or to legal advice was not complete. Article 6 explicitly refers to the disposition of civil and criminal matters. The addition, to Prison Rules, of Rule 37A(1) in 1976 (71) ostensibly carried into effect the Golder



liberalisation:

A prisoner who is a party to any legal proceedings may correspond with his legal adviser in connection with the proceedings and unless the Governor has reason to suppose that any such correspondence contains matters not relating to the proceedings it shall not be read or stopped under Rule 33(3) of these Rules.

But where proceedings were merely contemplated, the new Rule 37A(4) clawed back to the Secretary of State the discretion to make directions:

Subject to any directions of the Secretary of State, a prisoner may correspond with a solicitor for the purpose of obtaining legal advice concerning any cause of action in relation to which the prisoner may become a party to civil proceedings or for the purpose of instructing the solicitor to issue such proceedings.

How did it come about that the Golder decision was so long in being implemented and was then diluted in effect? Lillich and Newman (1979) (72) noted that the initial government reaction to the decision was encouraging, the Secretary of State of the day assuring the House of Commons that:

I shall give effect to the court's ruling in the Golder case and I am actively studying the means by which this should be done (73).

However, they suggested that good intent was rapidly overtaken by expediency in the face of hostile opposition from the Prison Officers' Association (74). Thus, they noted that when the revised Prison Rules were eventually announced (75) "critics found them so little changed as to constitute a deliberate defiance of the court" (76). It was only following Raymond v Honey in 1982 (77) when a prison governor was found to be in contempt of court having prevented a prisoner's correspondence with a court where allegations of theft were in question, that Standing Order 16B was cancelled (78) and full

effect was given to Golder.

One anomaly remained and that related to the omniscience ascribed to the governor by Rule 37A(1). How could the governor have reason to suppose that a matter contained in a letter did or did not relate to the proceedings in which the inmate was engaged, unless he read it, or caused it to be read, to find out? A decision of Forbes J. in the Divisional Court served to confuse the matter. In R v Governor of Brixton Prison ex parte McComb in 1983 he held that, whereas such letters should not be read, there was nothing in the Rule to prevent them being "examined" by staff:

In my view the purpose of retaining the power of examination is to enable prison authorities to satisfy themselves that the letter or communication purporting to be a legal communication is what it purports to be (79).

The subtlety of the distinction between "reading" and "examining" was not readily grasped by Mr. McComb or by his legal advisers. They responded by applying to the European Commission alleging a continuing breach of the Golder principle. The Commission was sympathetic to the prisoner's argument and the government agreed to settlement of the matter (80). The result was a further amendment to Standing Order 5 coupled with an explanatory Circular to staff (81). This required that adherence to the Rule be guaranteed by the opening of such letters in the presence of the prisoner (to check, for example, for illicit enclosures). A notice to prisoners was issued advising that an endorsement of an envelope "S.O. 5B 32(3)" will alert staff to the correct procedure. Similar advice was sent to the Law Society which undertook to advise its members accordingly (82).

b) The domestic dimension: prison discipline and the "discovery" of judicial review

It has been seen that a prisoner may now take legal advice and institute proceedings without undue hindrance. Any recourse to law he might have would be fruitless, were the "hands off" doctrine to imply that once access had been established, a court would not grant a remedy. Nevertheless, the initial "testing of the water" was disappointing.

In Fraser v Mudge and others in 1975 (83) an application, described by Lord Denning M.R. as "unusual" (84) was made. The case was an appeal from the judgment of Chapman J., at first instance, who had refused to grant an ex parte application for a declaration that a prisoner was entitled to legal representation at a board of visitors adjudication. He had also refused an injunction to prevent the board proceeding until the prisoner had had the opportunity to take legal advice. Lord Denning noted that the prisoner "or someone on his behalf has instructed lawyers". This, of course, emphasised the defect in the ponderous structure that has been discussed above, viz. that no internal Rule, Order or Circular Instruction could prevent a relative or friend seeking legal advice on a prisoner's behalf. Lord Denning noted that, under s47(2) of the Prison Act, 1952:

A person who is charged with any offence under the rules shall be given a proper opportunity of presenting his case.

Rule 49(2) of the Prison Rules 1964 is almost identical. The significance of the phraseology of the section and the Rule will be considered in due course. That the opportunity was vested in the prisoner himself was seen, by Lord Denning as "of very considerable importance". Representation could,

thus, not be countenanced.

It is interesting to compare Lord Denning's judgment in Fraser v Mudge with his in the earlier case of Pett v Greyhound Racing Association Ltd. (85). In Pett a trainer had been accused of administering stimulants to a dog before a race. He was required to attend a disciplinary tribunal, the date of which was postponed to allow him to take legal advice. During the period of the postponement he was informed that the rules of the Association did not allow for legal representation at the hearing. In subsequent action the right to legal representation before the tribunal was recognised. Lord Denning declined to apply a dictum of Maughan J. in MacLean v Workers Union (86) which would have excluded representation at domestic tribunals. He said:

A lot of water has flowed under the bridge since 1929. The dictum may be correct when applied to tribunals dealing with minor matters where rules may properly exclude legal representation ... but the dictum does not apply to tribunals which affect a man's reputation or livelihood or any matters of serious import. Natural justice then requires that he can be defended, if he wishes, by counsel or a solicitor.

He distinguished Fraser v Mudge from Pett with no more convincing an argument than that it fell into "a very different category" and continued:

We all know that when a man is brought up before his commanding officer for breach of discipline, whether in the armed forces or in ships at sea, it has never been the practice to allow legal representation. It is of the first importance that cases should be decided quickly. If legal representation were allowed it would mean considerable delay. So also with breaches of prison discipline. Those who hear the cases must, of course, act fairly. They must let the man know the charge and give him a proper opportunity of presenting his case. But that can be done and is done without the matter being held up for legal representation. I do not think we ought to alter

existing practice. We ought not to create a precedent such as to suggest that an individual is entitled to legal representation. There is no real arguable case in support of this application (87).

Roskill and Ormrod L.JJ. concurred. Roskill L.J. stated:

It occurs to me that the requirements of natural justice do not make it necessary that a person against whom disciplinary proceedings are pending should, as of right, be entitled to be represented by solicitors, or counsel, or both (88).

Two comments are apposite. First it will be appreciated that, though the appeal was refused, the employment by Roskill L.J. of the concept of representation not being a matter of right, left open the question of whether or not a panel had discretion to allow it. Secondly, no cognisance was taken, nor apparently was it argued, that Article 6(3)(c) of the European Convention of Human Rights could have a bearing upon the decision. That paragraph requires that:

Everyone charged with a criminal offence has the following minimum rights ...  
(c) to defend himself in person or through legal assistance of his own choosing ...

Since at issue in Fraser v Mudge was a charge of attacking a prison officer, it appears that the alleged conduct of the prisoner indeed amounted to a criminal offence notwithstanding that the charge was framed within the disciplinary code. It will be seen that neither of these points was to be addressed for several years.

It will shortly be demonstrated that actions resulting from the Hull prison riot of 1976 and its aftermath were of significance in reshaping the attitudes of the courts as to their responses to applications from prisoners. However, of contemporary and of equal importance in terms of prisoners being able to secure effective remedies at law was the

comparative ease, by that time, with which applicants could ask for permission to seek judicial review (89). Mr. Justice Mann described it thus:

The procedure by way of judicial review was created in 1977. The creation was a landmark in public law. A single, simple and as occasion required, speedy procedure was provided in regard to the supervisory jurisdiction of the High Court over all decisions taken in the exercise of powers conferred by public law (90).

Robson (1979) explained the grounds for the review of the deliberations of a tribunal by the High Court to be as follows:

An improperly constituted tribunal; a lack of jurisdiction to hear the case or acting in excess of the tribunal's powers; a failure to observe the rules of natural justice which means giving each party a fair hearing and an absence of bias in members of the tribunal and finally an error on the face of the record, by which is meant the papers setting out the facts of the case, the conclusions of the tribunal and the reasons for the decision (91).

Judicial review allows for the court to exercise control over tribunals or similar bodies exercising a judicial function by the making of one or more of the prerogative orders of certiorari, prohibition or mandamus. Further, an applicant could be awarded a declaration and/or an injunction in addition to the above. Once entitlement under Order 53 of the Rules of the Supreme Court had been established, the court could proceed to judicial review under the following general heads: that there had been an abuse of jurisdiction (was the matter within the vires of the tribunal); that there had been an abuse of discretionary power (did the tribunal, eg. reach its conclusion by a reliance on unreasonable or irrelevant factors); or where there had been a transgression of the rules of natural justice (simply stated as whether or not the

proceedings had been fair).

In 1981, a revision of the Order (92) allowed for a relaxation in the method of applying for judicial review. It is difficult to describe the procedure in a more succinct form than that given by Blom-Cooper (1982):

Order 53 now provides that every applicant shall go initially before a single judge with a simplified documentation of a brief notice containing a statement of, inter alia the relief sought (it is even enough simply to ask for judicial review without specifying the precise remedy sought) and the grounds on which it is sought, together with an affidavit verifying the facts relied on in the notice. The applicant may indicate in his notice that he desires an oral hearing. Otherwise the application will be determined privately before the single judge on the papers alone and a handwritten copy of the judge's order is sent to the applicant. If the applicant is dissatisfied with the judge's order he can renew his application within ten days by applying to be heard by a single judge in open court. If the application in a criminal matter is rejected without a hearing the applicant is permitted to renew his application and be heard by a two judge divisional court. Unless the court directs otherwise, in civil matters, the appeal will be heard by a single judge sitting in open court. The single judge may order that the proposed respondent should be notified of the application and be invited to attend on the oral hearing and if necessary argue against the application. The oral ex parte application may be treated as the application for judicial review itself, thus substantially truncating the time and cost of the whole procedure. If the appeal to the single judge is refused after an oral hearing there is no right of appeal to the Divisional Court, but there is the right of appeal to the Court of Appeal (93).

The ease whereby judicial review can now be sought has led to a "mushrooming" of its use by certain groups of applicants. Blom-Cooper (1984) described how, in each of the three years before that there had been a 20 per cent increase in the volume of applications and of cases where leave to appeal was granted (94). Gibb (1986) reported that over the previous five years, applications had doubled to more than a

thousand (95). It was reported in The Independent newspaper that, during 1986, leave to apply for review of Home Office decisions was granted in 263 cases (96). Sunkin (1987) provided the most comprehensive analysis of both the growth in the number of applications for judicial review and of the brakes imposed upon its use (97). He concluded that, despite the increase in applications noted above, this has tended to be restricted to a limited number of subject areas. In some areas (eg. immigration and prison cases) there has been an expansion. In others (eg. housing and homelessness, employment and licensing cases) there has been a contraction (98). Sunkin sounded warnings as to the development of a 'hidden jurisprudence' whereby judicial review caselaw is concealed in unreported transcripts (99). On occasion he found the use of judicial discretion to be exercised on something of a pragmatic basis. Thus in the wake of Lord Brightman's expressed concern in Pulhofer v London Borough of Hillingdon (100) at the "mass of litigation" resulting from disputes under the Housing (homeless Persons) Act 1977 and announcing that he was "troubled at the prolific use of judicial review" a marked increase in refusal rates in homeless person applications ensued. Sunkin indicated the irony whereby the court, asked to review the use of discretion by others might refuse leave to apply for judicial review according to criteria which, themselves, may be shrouded in uncertainty (101). It has been suggested (Rose, 1984) that the Order 53 procedure together with the Crown Office list, the panel of specialist judges and finally the decision in O'Reilly v Mackman (102) (infra) that the Divisional Court may now virtually be seen as the



administrative division of the High Court (103).

Judicial review is a procedure which, as will be seen, has been utilised by prisoners, and by their representatives, successfully to challenge various breaches of natural justice at disciplinary hearings (104). The Prison Officers' Association has also used the procedure to good effect on behalf of its members (105). The volume of prisoner applications has brought about internal procedural change that has helped to guarantee a much greater awareness, amongst prison staff and boards of visitors of the need to manifest fairness. The developing thread of case law following the Hull riot has brought about the change that will now be explored.

There have certainly been more serious incidents of the breakdown of internal discipline than that which took place at Hull. In 1932, for example, a mutiny at Dartmoor prison was quelled by the use of firearms by staff, leaving prisoners wounded (106). No riot, however, can have been more public. Unlike similar events of more recent years at Parkhurst, Albany and Gartree, Hull is a city prison and media coverage was extensive. An exposition of the background to the subsequent litigation is appropriate. Various accounts of the riot have been published (107) and the subsequent prosecution, conviction and dismissal of some staff suggested that the regime had broken down almost entirely. Immediately following the riot, disciplinary charges were brought against 185 of the 310 prisoners held in the jail. When it is realised that the prisoners of one whole wing refused to participate, the figure represents a very high proportion of the remainder. Many of those remanded by the governor to the board of visitors, under

Prison Rules 51.1 and 51.2 faced a multiplicity of charges. In all, some 500 charges were brought.

The logistics of mounting the adjudications were complicated. The first need of management was to restore a sort of stability. The population of the peaceful 'B' wing was immediately decanted to other prisons. Some rioters were also transferred after they surrendered and those remaining, after the end of the riot, were housed in 'B' wing. In all, 235 prisoners were transferred to 13 prisons around the country (108) to await adjudications which were to be held by itinerant panels of the Hull board of visitors. In the post-Fraser v Mudge climate it was seen to be important to dispose of charges speedily, uncluttered by legal advice and representation. However, as far as fairness was concerned, it will be seen that there were serious shortcomings. An indication of the peremptory manner in which charges were heard is recorded by Taylor (1980):

Altogether Rajah faced four charges. The entire hearing of these lasted 15 minutes and the deliberation of findings (as timed by Rajah) took one minute, 40 seconds. He was 'awarded' 390 days loss of remission, 154 days loss of privileges, 154 days loss of earnings and 154 days exclusion from associated labour (109).

One prisoner, Mr. Saxton, forfeited 720 days remission in similar circumstances (110).

The proceedings before the board were challenged by seven prisoners who contended that the hearings, in their cases, had not been conducted in accordance with the rules of natural justice. Their method of challenge was an application for judicial review by way of certiorari to quash the board's findings. This first attempt to bring prison discipline

within the ambit of judicial review failed. In R v Hull Prison Board of Visitors ex parte St. Germain and others, in 1978, in the Divisional Court (111) Lord Widgery C.J. reviewed the authorities. He concluded that a board of visitors, in adjudicating, was performing a judicial act and that his instinct told him that it was one to which an order of certiorari should apply. However, relying heavily on the judgment of Goddard L.J. in ex parte Fry (112), he concluded that certiorari would not go in the case of private disciplinary proceedings of a closed body. Concurring, Cumming-Bruce L.J. acknowledged precedent, but his judgment was tinged by elements of expediency:

It gradually became clearer and clearer to me that as a matter of common sense there would be very grave public disadvantages in allowing the writ to go either to a prison governor or to a board of visitors when exercising disciplinary functions. A prison is an organisation wherein the officers, under the governor's command seek to control the inmates, a body of men who are not here voluntarily and who, thanks to defects of character or the frustrations of life in confinement are liable to acts of indiscipline and resentment of authority. Those responsible for penal institutions have a task that no one really envies (113).

Park J. agreed with his brethren. The applicants appealed to the Court of Appeal (114).

The court first had to determine whether or not it had jurisdiction in the case. Did the offences alleged against the appellants amount to a "criminal cause or matter" within s31(1)(a) of the Supreme Court of Judicature (Consolidation) Act 1925? If they did, appeal would be only to the House of Lords, under s1(1)(a) of the Administration of Justice Act, 1960. Megaw L.J., supported by Shaw and Waller L.J.J. held that the Court of Appeal did have jurisdiction, since the

offences of which Mr. St. Germain and the others had been found guilty could not be so classified. Rather, since the Prison Rules explicitly classified the offences as "offences against discipline" they could be distinguished from offences against the public law (115). That a prisoner had an extra-judicial avenue whereby he could challenge an adjudication, i.e. by petitioning the Secretary of State, did not oust the Court's jurisdiction. Megaw L.J. did not find it necessary to agonise over whether or not a board, when adjudicating, is performing a judicial or an administrative function. He noted the dictum of Lord Widgery C.J. in the Divisional Court that the quality of the act was judicial in character. Even so, would certiorari go in such a case? Lord Parker C.J. had previously held that "private or domestic tribunals have always been outside the scope of certiorari since their authority is derived solely from contract, that is, from the agreement of the parties concerned (116). It was evident that the agreement of the parties was not a feature of prison disciplinary hearings and thus, certiorari was not excluded. He concluded that the application should be remitted to the Divisional Court for hearing as an application to move for judicial review under the provisions of the Rules of the Supreme Court, order 53. Shaw L.J. concurred. The merits of the prisoner's case did not concern him; the cardinal issue was whether or not the High Court had jurisdiction. He acknowledged that a question of public policy might be a factor to consider, but argued that "to deny jurisdiction on the grounds of expediency seems to me ... to be tantamount to abdicating a primary function of the

judiciary" (117). Waller L.J. also concurred, stating that "the rules of natural justice do apply to hearings before boards of visitors and certiorari would lie unless there are compelling reasons to the contrary" (118).

The case was remitted to the Divisional Court and was considered, in June 1979, under the name R v Hull Prison Board of Visitors ex parte St. Germain and others (No.2) (119). Geoffrey Lane L.J. noted that Prison Rule 49(2) afforded to a prisoner the opportunity of hearing what had been alleged against him and of presenting his own case. He also referred to the "green book" (120) that explained to the accused that he could call witnesses if the panel chairman gave his permission. He set out the principle grievances of the prisoners and explained why they had argued a breach of natural justice. Each applicant complained that he had not been afforded sufficient opportunity to present his own case. The complaints fell into four categories. These were that the board of visitors refused to allow the applicants to call witnesses; that they admitted and acted upon statements made during the hearing by the governor which were based on reports from prison officers who did not attend to give evidence; that the chairman insisted on questions by the applicants in cross examination being channelled through him and that the applicants were not allowed to speak in mitigation after findings of guilt had been pronounced.

The procedural point of the routing of questions was conceded by counsel immediately. Lane L.J. endorsed the discretionary powers vested in the chairman to allow or to disallow witnesses but stated that this was a discretion to be

exercised "reasonably, in good faith and on proper grounds"

(121). He then turned his mind to the crux of this matter:

Clearly, in the proper exercise of his discretion a chairman may limit the number of witnesses, either on the basis that he has good reason for considering that the total number sought to be called is an attempt by the prisoner to render the hearing of the charge virtually impracticable or where, quite simply, it would be quite unnecessary to call so many witnesses to establish the point at issue. But mere administrative difficulties, simpliciter, are not, in our view, enough. Convenience and justice are often not on speaking terms (122).

The exercise of dispersing the rioters, described above, had made the administrative task of identifying the witnesses and producing them at 13 prisons all over the country, some at several adjudications, in different prisons, well-nigh impossible (123). That it would have proved difficult to produce witnesses to give evidence was insufficient reason to exclude that evidence.

Lane L.J. then addressed the question of hearsay evidence. Relying on the authorities of General Medical Co. Council v Spackman (124), University of Ceylon v Fernando (125), and the dicta of Diplock L.J. in R v Deputy Industrial Injuries Commissioner ex parte Moore (126), he concluded that, subject to the overriding consideration of fairness, the board was entitled to accept hearsay evidence. In order to meet the requirements of natural justice, it was imperative that the accused should be informed of the hearsay evidence so that it could be challenged. To deprive him of that would deprive him of a fair hearing. An example of such a shortcoming was provided by quoting from the transcript in the case of one of the applicants, Mr. Saxton:

The governor said "six out of 14 sightings say he was the first man to go on the roof. Others suggested it was Saxton who carried the lead to smash the windows to get on the roof". Then the chairman said "case proven".

The prisoner had not had the chance to examine the evidence to which the governor had referred. The witnesses were not identified and the prisoner had no chance to comment upon the governor's statement. Lane L.J. finally ruminated upon the way that the Hull board had probably reached the right results, despite the irregularities:

These men were prisoners. Some of them were dangerous. Most of them were difficult. All of them were, no doubt to some extent, untrustworthy. But they faced, and they were entitled to a fuller hearing than that which they, in fact, received (127).

In all, sixteen findings of guilt were quashed (128).

4. "Hands on": The search for natural justice at disciplinary hearings

a) The generality of cases

In St. Germain, then, the courts had held that, not only would disciplinary hearings before boards of visitors be subject to judicial review but that, if proceedings were to contravene the rules of natural justice, then they would be quashed. Hearings were required to be fair. The modern case declaratory of "fairness" is that of Ridge v Baldwin in 1963 (129) concerning the dismissal of a chief constable by a police authority because of his negligent conduct. It was established that the authority had reached its decision based on the comments of the judge during the trial in which the chief constable had been acquitted of charges of corruption. The chief constable had not been permitted to make out his defence. The House of Lords held the dismissal void since the rules of natural justice required that he should be given a

fair hearing which, in the circumstances described, he had not. It was Ridge v Baldwin argued Carroll (1983) that, some fifteen years later, helped judicial control of disciplinary powers to vault the walls of British prisons and to provide for scrutiny of the way in which they are conducted (130).

"Fairness" is not an abstract concept and Palley (1980) has explained that it is developing a substantive content. She illustrates the point thus:

I refer to cases such as HTV v Price Commission (131) where not only Lord Denning, but also Scarman L.J. said that public bodies must act consistently and reasonably and that this is what fairness means. Then there is R v Barnsley Metropolitan Borough ex parte Hook (132), the case of the urinating stall holder, where it was said that when there is harsh or unreasonable punishment this is not valid on grounds of fairness. Then there is the Liverpool Taxi Fleet Operators Association Case (133) where it was held that undertakings to hear parties must be observed before a decision can be taken. So I think that there are all kinds of meanings that are being given to fairness. Then you get the most conservative judgment of Megarry V.C. in McInnes v Onslow-Fane (134) where he says that you have a penumbra where fairness may have a very full content ranging right from the equivalent of natural justice to something far less (135).

So, if "fairness" can be seen to be increasingly substantive in character, what aspects thereof can be seen to relate most particularly to adjudications within prison? The present Home Office guidance to adjudications provides a useful summary:

Natural justice requires that no man should be a judge in his own case; that both sides must be given a fair chance to state their views; that there must be a full investigation of the facts. Essentially, therefore, adjudicators must be seen to act fairly, in good faith and without bias or prejudice. This requires adjudicators to reach decisions solely on the basis of the evidence and thus, panels must start de novo (136).

It should not therefore come as a surprise to see, stated, that those adjudicating, with the power to affect issues of



the liberty of the subject, should be required to act fairly. Yet there are, clearly, feelings abroad that something in the nature of internal justice offered it the potential to be less than fair in execution. Perhaps one should not expect prisoners, often "consumers" of the product, to express satisfaction with it. Their comments tend to reveal a deeply rooted cynicism that adjudications are anything other than part and parcel of a system designed to support staff. Hobhouse and Brockway (1922) recorded:

There is a general impression that they take their cue from the prison governor, and are therefore useless. 'The magistrates seem to be wholly dependent upon the governor for guidance regarding procedure. Consequently they are his puppets' writes one ex prisoner ... 'They are completely dominated by the governor ... I was forcibly ejected for demanding the right to defend myself ...' (137).

More recently, Maguire and Vagg (1984) noted, similarly, that:

The great majority [of prisoners] felt ... that the proceedings were controlled 'behind the scenes' by the governor, that the prisoner was not given a fair hearing and that, often, evidence was not produced or questioned thoroughly ... The 'story' which came over was that most prisoners facing an adjudication felt that the board would be biased against them and, therefore, gave up hope of a fair hearing (138).

One prison officer (Hateley (1987)) wrote to the writer of his experience at a remand centre:

The one thing that stands out in my mind was a board adjudication when, after hearing the charge and evidence, they retired to consider sentence [sic] and I was called in. I expected it would be to give antecedents [sic] which should have been read out anyway but it was actually to ask me what I felt they should award and would the reporting officer be put out if he didn't get a severe enough punishment for his report (139).

Thus one can understand that when the Jellicoe Committee came to examine boards of visitors, in 1975, they found "very few"

prisoners with faith in the fairness of the process (140). Independence of boards will be examined in greater depth in Chapter Three(2).

Even after the St. Germain judgment there remained two important qualifications upon the circumstances in which a court would respond favourably to applications. In the first place, and it was not at issue in this case, there was equivocation as to whether or not governors' adjudications would be subject to judicial review. That question will be addressed in Chapter Three(3). Secondly it was confirmed that applications will only be granted where departure from the rules of natural justice has resulted in serious injustice. Trivial or technical breaches will not lead to the grant of relief. Megaw L.J. stated:

I referred earlier in this judgment to the submission of counsel that the proceedings of boards of visitors in respect of offences against discipline are 'subject to judicial review, at any rate where the allegations are of breaches of the procedure laid down in the Prison Rules and/or rules of fairness and natural justice.' I think that is too widely stated. It is certainly not any breach of any procedural rule which would justify or require interference by the court. Such interference would only be required and would only be justified, if there were some failure to act fairly, having regard to all the circumstances and such unfairness could reasonably be regarded as having caused a substantial, as distinct from a trivial or merely technical injustice which was capable of remedy. Moreover, it would be fallacious to assume, as appears frequently to be assumed, that the requirements of natural justice in one sphere are necessarily identical in a different sphere (141).

Much of the post-St. Germain litigation has been helpful in clarifying sound practice and also in marking the distinction between that which will render a hearing flawed and that which is merely trivial or technical. Thus, in R v Board of

Visitors of Pentonville Prison ex parte Rutherford (142) an application for judicial review of an adjudication was refused where a prisoner had been required to stand to present his case and had been denied writing materials. It was held, by Hodgson J. that "there might be cases where it would be a breach of natural justice ... however, it is not part of the High Court's job to lay down the precise procedure a board should adopt." Likewise, in R v Board of Visitors of Swansea Prison ex parte Scales (143) the omission of the brief particulars of the offence in addition to the words of the relevant Prison Rule on the pre-hearing papers served on the prisoner was seen by Hodgson J. as insufficient cause to order judicial review. In R v Board of Visitors of Wandsworth Prison ex parte Raymond (144) the accused prisoner had not had sight of a welfare report prepared on him for presentation at an adjudication. "If there was a breach in this case, it was a technical and marginal one and since the applicant had not been prejudiced thereby" said Webster J. in refusing the application.

There is some evidence that in deciding what amounts or does not amount to a trivial transgression of the rules of natural justice may be influenced by the remaining vestiges of "hands off". Thus, in Rye v Home Office in 1981 (145) an application for judicial review in respect of a decision of the Oxford prison board of visitors was refused. In answer to the chairman's question "Have you had sufficient time to prepare your defence?" the accused had replied "Yes, but I am having trouble getting some of the witnesses I need. The prison officers won't tell me their names." Later, during the

hearing, Mr. Rye stated "I would like to question the officer who held my right arm." Mr. Rye's problem in identifying witnesses was somewhat similar to that of Mr. St. Germain. He was a Gartree prisoner, temporarily lodged at Oxford, thus those around him were strangers. A month before Mr. Rye's application, Glidewell J. had offered comment on the question of the calling of witnesses in R v Board of Visitors of Nottingham Prison ex parte Moseley (146). Noting that a board must act fairly, he said that had a prisoner asked for and been refused permission to call a witness, this would, prima facie, have amounted to unfairness. Nevertheless, in Rye, Forbes J. declined to construe that the applicant's words had amounted to a request to call witnesses. His view was that "The board of visitors no doubt took the view that they had heard one officer detail the circumstances of the assault and felt it unnecessary to call another."

A further indication that "hands off" may have informed a decision was that in R v Board of Visitors of Winchester Prison ex parte Cartwright also in 1981 (147). The applicant had complained of a number of procedural errors which were countered by way of affidavits from participants in the adjudication. However, Ralph Gibson J. disposed of the applicant's principle grievance with cavalier alacrity:

He said in evidence that he was placed in a straight jacket and held on the floor so that he could effectively take no part in the proceedings ... It is perfectly plain that he was not. He was in a body belt but they did secure his hands with handcuffs. On the evidence of the Chairman, one hand was released so that he could make notes on a clipboard.

The application was dismissed.

Despite decisions like the above, a body of caselaw has

emerged and is developing that helps to ensure that the procedure of boards is becoming shaped by concepts of fairness. Home Office communication with boards via various memoranda and by amendments to the manual on Adjudications is, slowly, leading to a consistency of practice unknown before St. Germain. One of the early post-St. Germain cases, in 1981, was that of R v Board of Visitors of Gartree Prison ex parte Brady and Mealy (148). That case will be examined in some detail since it is important, not only because of the clear principles enunciated by Hodgson J. with regard to fairness in the prison context, but also since it gives an interesting insight into the quality of some internal hearings. Further reference will be made to the case when the question of legal or other assistance for the prisoner is considered.

In ex parte Brady and Mealy, Hodgson J. prefixed his judgment with a statement of his interpretation of the concept of natural justice in the prison:

It is for alleged breaches of natural justice that the orders quashing these adjudications is sought. I confess that I do not, myself, much like the phrase 'natural justice' which always prompts in my mind the question of what is unnatural justice. 'Natural justice' is really only a collection of rules of fairness (149).

He proceeded to list a series of general principles that he had applied in order to decide whether there had been unfairness. In summary these were that:

- i) Disciplinary proceedings such as the present take place in a wholly different context from ordinary criminal proceedings and they should not be equated;

- ii) They are, of necessity, conducted in a comparatively informal way;
- iii) The chairman is very much more the master of the proceedings than is the judge or magistrate in the formal adversarial proceedings of the criminal courts;
- iv) It is important to distinguish between matters of procedure and principles of fairness;
- v) When considering the context in which the proceedings take place and whether they have been conducted fairly it is necessary to remember that the penalties can amount to a very substantial loss of liberty and that the prisoner has been without legal assistance;
- vi) Allowance should be made for the prisoner who may not be able to distinguish between matters of mitigation and matters of substantive defence (150).

Mr. Mealy had faced six charges arising out of a riot at Gartree prison. He had been given proper notice of the hearing but, despite the good reason for it (the availability of a witness), Hodgson J. was critical of the fact that when he entered the adjudication room he found himself facing the sixth charge first. The chairman did not explain the reason to him and, when asked, he simply stated that it was convenient. There were further errors. Mr. Mealy called a prisoner witness who told the panel that he had not seen the accused at the time of the alleged offence. The chairman's response was to say to the witness "And you wouldn't say if you had recognised him?" Hodgson J. described this as "an unfortunate question of observation ... It must have had the effect of convincing the prisoner that no witness he called

stood much chance of being believed" (151). Finally, in respect of the sixth charge, Mr. Mealy called, as a witness, the prison doctor, whom he alleged had seen him at the time of the riot at a point proximate to the disturbance but not participating. The doctor attended. The chairman asked him where he had been on the night and he replied that he had been in the administration building and in the hospital, but not in the prison proper. In an affidavit Mr. Mealy had adduced that it was whilst passing from one to the other the doctor had stood at a gate adjacent to the wing and that was where the two had seen each other. Having heard that the doctor had not been in the prison proper, the chairman dismissed him as a witness and told Mr. Mealy "The doctor was not in the prison at the time, he cannot help you." Mr. Mealy replied that since he had been in the vicinity there was a question he wished to put to him to which the chairman replied "We are not interested in what you have to say to him." Hodgson J's response to this was to conclude:

It seems to me quite impossible successfully to contend that the chairman was acting fairly in failing to allow Mealy to put a single question to Doctor Smith, or, at least, in discovering from Mealy what it was that he wanted, if he could, to adduce from Doctor Smith. When he did learn that Mealy was saying that the doctor was in the vicinity, it seems to be plain beyond peradventure that fairness demanded that he should be called back (152).

Following this, the panel refused to allow Mr. Mealy to sum up his defence and when he complained he was told that he had already stated his defence. Hodgson J's decision in respect of this charge was that the proceedings:

did not, by a long way, reach the standard of fairness which they should have done. I am quite clear in my mind that the injustice caused thereby

to mealy was substantial as distinct from merely technical (153).

The panel then turned to the first charge against Mr. Mealy. They heard the evidence of an officer which the accused contended was significantly at variance from the evidence he had presented at the earlier hearing before the governor. Mr. Mealy asked for the record of the earlier hearing to be produced. The chairman asked the witness if he had changed his story and this was denied. He refused to order production of the record of the preliminary hearing stating "What happened at the previous hearing is not relevant." Hodgson J. concluded that the mere fact of the unavailability of a record of a previous hearing was neither here nor there, but in present circumstances, unless the chairman had been satisfied that the application was a frivolous one, the record being available, it should have been produced. "I am once again unable to acquit the chairman of unfairness." (154) Further, when the chairman called the governor to give evidence he refused to allow Mr. Mealy to put questions to him on much the same basis as in the case of the doctor - he had not been in the prison itself. After the governor had been dismissed, Mr. Mealy said "He was in charge of the prison ... I want to call the officer in charge of the prison" to which the chairman simply replied "We will adjourn for lunch". Hodgson J's view was:

I do not think, there, the chairman is there beyond quite serious criticism ... Once he had called the governor, there was no excuse for not allowing Mealy to ask him questions (155).

He found that the proceedings on the first charge were not fairly conducted and the finding was quashed.



Mr. Mealy pleaded guilty to the second and third charge but equivocated on the fourth saying that he did not see its point. The chairman concluded that a guilty plea was appropriate. This, said Hodgson J. was "an almost classic example of an equivocal plea and there can be no doubt that a plea of not guilty ought to have been entered" (156). Nevertheless, since it emerged through the evidence that Mr. Mealy admitted smashing windows with a piece of wood, no injustice was perpetrated by the chairman's mistake and the award was allowed to stand. The conduct of the fifth charge was found to be fair, except that when Mr. Mealy asked to call a witness to support his mitigation he was told that this was not allowed. That was clearly wrong, but was not such a mistake as to render the whole proceedings unfair, and the award in the case of the fifth charge was allowed to stand.

Thus, through ex parte Brady and Mealy boards became informed that natural justice within the context of an adjudication implied, inter alia, that allowance should be made for the prisoner who is a layman in the face of a quasi-judicial panel; that if witnesses are to be excluded it must be for good reason and not simply because the panel doubt their credibility; that if the panel or reporting officer are allowed to put questions to a witness, the accused must be afforded the same facility; that the accused should be allowed to sum up in his defence; that, despite the responsibility to hear charges de novo, the record of the preliminary hearing should be produced if it is necessary for the accused to help establish his defence; that an equivocal plea should result in the entering of a plea of "not guilty"

and that witnesses could be allowed in respect of establishing a mitigation, not only of a defence.

Other aspects of procedure have been clarified through further applications for leave to apply for judicial review. In R v Board of Visitors of Dartmoor Prison ex parte Seray Wurie (157) a prisoner, who had committed many offences in prison, was referred to the board of visitors by the governor using his power under Rule 51.2 as a "repeated offence". The applicant argued that this was ultra vires the governor since the present charge was one of assault and he had never been charged with that before. The Divisional Court held that "repetition" did not imply repetition of the same offence and thus the board could, properly, hear the charges.

In dismissing an application for judicial review of an adjudication in R v Board of Visitors of Gartree Prison ex parte Sears (158) Mann J. held, following Williams v Home Office No. 2 (159) that a variation in terms of confinement (i.e. the imposition of cellular confinement imposed at adjudication) could not constitute the tort of false imprisonment. Nevertheless, he stated obiter that:

No sensible distinction could be drawn between a bench of justices acting in a judicial capacity and a board of visitors so that a board could be liable for torts committed in consequence of acting in excess of jurisdiction.

In stating that view Mann J. was doing nothing more than endorsing the dicta of Lord Denning M.R. in O'Reilly v Mackman in the Court of Appeal in 1982 (160), where he described hearings before boards as "in all essentials ... of the same character as a magistrates court" and continued:

It is clear to my mind that boards of visitors are entitled to be protected from having actions at law brought against them. They are in the same position as magistrates. They owe a duty to the state to do their work to the best of their ability. But this is not a duty owed by them to the parties before them. It is not a duty which a prisoner can enforce by action. Be they careless, ignorant or mistaken. Be they guilty of want of natural justice. Be they malicious or biased. Go they to sleep and do not heed the evidence. nevertheless, no action lies against them. As I said of any judge, high or low, in Sirros v Moore (161) 'He is not to be plagued with allegations of malice or ill will or bias or anything of that kind. Actions based on such allegations have been struck out and will continue to be struck out.' They reason lies in public policy. No judge shall be harassed by the thought that 'if I do this or that I may be sued by this or that prisoner or this or that litigant' (162).

Nevertheless, three weeks after the judgment in ex parte Sears, the Home Office offered legal representation by Treasury Solicitor and an indemnity against any damages awarded against a board in such circumstances (163).

In R v Board of Visitors of HMP Walton ex parte Weldon (164) Mann J. considered the decision of a board of visitors to hear separate charges against a prisoner on separate occasions and to award punishment in respect of both on the latter occasion. The prisoner had requested a newly constituted panel to hear the second charge. The board had failed to apply the test in R v Liverpool City Justices ex parte Topping (165). The board had a discretion to adopt either course. But in exercising that discretion they should have acted judicially, i.e. they should have addressed the question of possible bias. The consecutive awards of 90 and 60 days of loss of remission were quashed.

In R v Board of Visitors of Frankland Prison ex parte Lewis (166) a prisoner sought judicial review of an

adjudication arguing an infringement of the rules of natural justice since the chairman of the panel knew him. He had previously interviewed him in his capacity as a member of the local review committee of the Parole Board. The adjudication had resulted in a finding of guilt for being in possession of a controlled drug and the chairman would have known of the applicant's drug related conviction. Woolf J. held that a board when acting judicially must act fairly. That a board had administrative functions, too, inevitably meant that members might know a substantial amount about a particular prisoner. A panel had a discretion not to proceed if it felt its capacity for fairness to be compromised but it should not be too ready to regard the background knowledge of the prisoner as contributing to this.

In R v Board of Visitors of Dartmoor Prison ex parte Smith (167) the practice of finding a prisoner not guilty as charged, but guilty of a lesser offence (eg. not guilty of causing gross personal violence under Rule 47.2, but guilty of assault under Rule 47.4) was confirmed to be contrary to natural justice and the awards were overturned.

b) The Drugs Cases

The general principles applicable to adjudications in relation to internal drugs related offences are as described above. Such offences have been separated out, for the purposes of this paper, for two reasons. First, the caselaw here can be seen, directly, to have affected internal practices by implanting legalistic concepts, particularly clarifying the standard of proof necessary before a finding of guilt may be reached. Second, having regard to the

penological emphasis of the study, drug offences have an unique relevance. The presence of illegal drugs within prison hints at a breakdown in security in one way or another. Drugs are reported to have been introduced in foodstuffs brought into prisons by visitors (168), by kissing at a family embrace (169) or by more eccentric means. Prisoners have grown their own cannabis within prisons (170). It has even been alleged that one supplier disguised himself as a prisoner and walked into an open prison to deliver his goods (171). The presence of illegal drugs within a prison implies that the balance has been disturbed between an oppressive regime with a high regard for the enforcing of security restrictions, and a more humane system allowing for the use of discretion in the implementation of its requirements. Possession of drugs may serve to define relationships between prisoner and prisoner, or give the prisoner a power over staff, if corruption has been involved. Drugs may become an alternative currency, they may lead to unpredictable responses in those who use them and can lead to the commission of further internal offences, eg. the threat of assault to enforce payment. The writer's understanding is that in R v Liverpool Prison Board of Visitors ex parte Davies (172) the accused prisoner's reluctance to name a witness he wished to call in his defence and to confirm that the drugs found belonged to that witness, was not out of a wish to be needlessly awkward. To have named the witness would have left him vulnerable to prisoner retribution whereas had the authorities discovered the name on their own initiative the accused would have been seen to have acted soundly according to the inmate code. Of further

relevance, in the penological context, is that those prisoners who are found guilty of possessing small amounts of illegal substances will, invariably, be punished quite severely, whereas the Crown Prosecution Service might have been disinclined to prosecute for a similar offence committed in the community. The Manual on Adjudications reflects the extreme vulnerability of the prisoner in this respect when compared with his counterpart outside:

There is an important difference between the mechanism available for dealing with drug abuse in prisons and that provided under the criminal law. Under the Misuse of Drugs Act 1971, the relevant offence is one of possessing a controlled drug. Prison Rule 47.7 provides for a disciplinary offence of possessing an unauthorised article. It is therefore open to the reporting officer to charge a prisoner under Rule 47.7 with the possession of a pen or a razor which has been in contact with, for example, cannabis resin; a charge need not be limited to possessing cannabis resin itself. This is taken to mean that the jurisprudence of the Misuse of Drugs Act to the effect that a charge of possession can only relate to a measurable quantity of a controlled drug is not binding on charges under the Prison Rules, and a charge under Rule 47.7 may be made out notwithstanding that only traces of the drug, not amounting to a measurable quantity, are found (173).

So, whereas it will be seen that the standard of proof necessary to establish a finding of guilt, internally, is rigorous, there are likely to be proportionately more charges brought, in the first place, than in free conditions. Thus the police are said to prefer internal adjudications to the prosecution of inmates charged with drug offences (174).

The first of the cases in which prison practice in relation to drug offences came to be scrutinised was that of R v Board of Visitors of Highpoint Prison ex parte McConkey in 1982 (175). Mr. McConkey had been charged within the elastic parameters of Rule 47.20. It was alleged against him that he

had offended against the good order and discipline of the prison by being "present at an unlawful drug smoking party or session in room seventeen, Slessor unit". Room seventeen had been occupied by two prisoners and the accused often visited to play cards. On this occasion he was present, with the occupants and with a fourth prisoner. A prison officer entered the room suspecting that cannabis was being smoked. He found a pipe and some cannabis. The inmates were charged with a variety of offences, though it was not alleged against Mr. McConkey that he had been using the drug. He was found guilty at adjudication and ordered to forfeit ninety days remission. McCulloch J. granted an application for an order of certiorari to quash the findings. He accepted counsel's argument that no offence against good order and discipline could be established against a prisoner who merely remained in the vicinity of a person whom he knew to be committing an offence. For there to be guilt, some evidence of the participation in the offence must be established - an element missing in the present case. He acknowledged the special nature of offences under Prison Rules and described them as a private code. He carefully indicated the importance of not abandoning those criteria whereby criminal responsibility is established in the general criminal law:

The special problems of prisons justified the existence of rules which would be intolerable in the outside world, but they provided no reason to adopt an approach to interpretation which was harshly at odds with the generally accepted notions of criminal responsibility. No doubt there were circumstances in which presence at a party would be an offence against good order and discipline, for example, where there was in effect an order to the effect that prisoners were not wilfully to remain in the presence of others whom they knew to be using drugs; but no such rule was alleged here.

The contention that an offence under paragraph 20 had been established, since de facto Mr. McConkey had been encouraging the others, was flawed since that matter had not been put to him.

The significance of ex parte McConkey, therefore, is that, for the first time, a court declared that the commission of an internal offence did not exempt the adjudicators from abiding by those factors relating to the establishing of guilt according to the criminal law standard. An attempt was made to ensure that, in the absence of notice to the prisoner it is not any activity that will contravene Rule 47.20 simply because the reporting officer perceives it as such. Some other element must be present, eg. the promulgation of some order to prohibit the action. Presumably, this caveat would not apply where the behaviour alleged was such that a reasonable person would perceive it, manifestly, to offend against good order and discipline. In such a case, however, it is likely that a charge would, more properly, be framed under one of the other paragraphs of Rule 47. Ex parte McConkey does not appear to have affected the use of Rule 47.20 as a "catch-all" by staff (176). The decision does mean, however, that where faults in the adjudication process are, as in St. Germain (supra) more than trivial or technical, leave to apply for judicial review is likely to be successful.

The decision in R v Deputy Governor of Camp Hill Prison ex parte King, in 1984 (177) is considered in Chapter 3(3) insofar as it concerns the question of judicial review of decisions of governors at adjudications. In the present context, however, important principles were enunciated as



regards standards of proof in charges of having unauthorised items (in this case a concealed hypodermic needle). Prison officers had found it wrapped in tissue paper and hidden in the electrical fittings of a cell which was in multiple occupancy. The four occupants were charged under Rule 47.7 in that they had in their cell, or in their possession an unauthorised article. All pleaded not guilty saying that they had no knowledge of the presence of the item. Lawton L.J. noted that the offence coincided with a campaign, within the prison, to stop drug trafficking and abuse amongst inmates. That the needle and tissue paper were clean convinced the deputy governor, on adjudication, that the items had not been in the cell for long. He concluded that the inmates must, therefore, have known of their presence and all were found guilty. Mr. King, through counsel, contended that mere knowledge was not sufficient basis upon which to find him guilty. He could only have been guilty if the word "had" could have been interpreted as excluding any measure of control over the prohibited article. On the other hand, counsel for the deputy governor contended that to ensure such articles as hypodermic needles are not kept in cells, the offence was one of absolute prohibition. Though not forming part of the report of proceedings, the writer's information is that a notice to prisoners had been published at the prison by the chairman of the board of visitors to advise them that the offence was regarded as such and that defence or mitigation based upon lack of knowledge would be fruitless (178). Lawton L.J. said that in the days when each prisoner had his own cell, a reasonable conclusion might have been that each

prisoner had knowledge of and thus control over those items in his cell. But those times had passed and in the present case the deputy governor had misconstrued the Rule. Griffiths L.J. expanded upon those aspects of internal relationships that could result in injustice were the absolute prohibition understanding of the Rule to be sustained:

To give the rule the construction contended by the Home Office would mean that, if some young thug had smuggled into a dormitory an unauthorised article such as a file which he kept beneath his pillow and boasted of it to the weaker inmates whom he terrorised, they would all immediately be guilty of an offence against discipline, which they could only terminate by informing on the bully, a course of action which would almost certainly expose them to really serious risk of physical injury. To construe a rule in a way that produces such a result seems to me to be nothing less than inhuman and cannot have been the intention of those who drafted the rules (179).

Though it will be seen, in the next section of this work, that the Court of Appeal held judicial review not to go in ex parte King, despite the misconstruction of the rule, the case acted as a signal to governors and to boards about the constituent elements of "unauthorised possession". The upshot has been the virtual eradication of cavalier findings of guilt based on the "bang to Rights" assumptions of old (180). The Manual on Adjudications published in the year after ex parte King now counsels a much greater sensitivity towards the rules of natural justice and requires adjudicating governors as well as boards of visitors to adhere to the criminal law standard of the need for guilt to be established beyond reasonable doubt. Establishing this may often imply considerable delay since, in the face of a 'not guilty' plea, the Manual requires that the suspect substance be sent away for forensic analysis at an approved laboratory (181). Dyer (1988) reported that the

delay could be as long as 26 weeks (182). Should the prisoner be discharged in the meantime, the charge against him will fall.

5. Procedural brakes on relief: "hands on" with a finger in the dyke

Whereas the writer has, elsewhere in this paper, expressed scepticism as to the general validity of "floodgates" arguments, there is abundant evidence that the procedure for judicial review has led to a substantial growth in the challenges at law to the decisions of the administration when acting in a judicial capacity. By the mid 1980s, "hands off" was no longer the inevitable response of a court when faced with prison matters. Stevens (184), working at the centre of the administrative process, expressed uncertainty as to whether or not the doctrine would still be invoked by a court (183) and Walker (1984) described the doctrine simply as "finished" (184). But "floodgates" remained a real concern for those charged with maintaining discipline within institutions. Prison governors were made aware, during their training for command, of the situation prevailing in the United States. There, ease of access to a court had led to prisoners suing their victims, suing juries, suing prisons for the inadequacy of their law libraries (something unknown in a British prison) and suing a railway company because its locomotives disturbed a prisoner's sleep. An instance was cited of officials in Oregon struggling under a two year backlog of 80,000 writs issued by prisoner at a nearby prison (185). Another instance was given of the "right" enjoyed at Washington State Penitentiary, for the prison chapter of Hell's Angels to ride their motor cycles on periodic "burns ups" within the walls (186). Some wardens were said to be facing claims from inmates amounting to millions of dollars (187). Palmer (1973) asked:

Can correctional staff and administrators withstand the pressure? There are many reasons why protracted litigation can be counter-productive to the correctional process. First, due to liberalised rules of discovery in both state and federal courts, correctional staff can find themselves intimidated with depositions, interrogatories, motions to produce and other fact finding methods. Overworked staff can find themselves spending the bulk of their time preparing for litigation rather than working with inmates towards their rehabilitation. Morale suffers when inmates file spurious claims, asking for millions of dollars in damages for alleged injuries suffered. It becomes a game with some inmates as to who can add more zeros to the damage figure (188).

Would it be, as many governors feared, that the American experience would be replicated within our own system. One prison officer (Hornsby, 1986) was certain that such a time had already arrived:

Prisoners in both countries are flooding the courts with litigation; at every opportunity they challenge the right of staff to remain in control. Governments seem unable or unwilling to take a firm and positive stance against this intolerable situation ... Of course no-one would wish to deny any prisoner the basic human rights of justice but what is intolerable (and extremely costly to the taxpayer) is the situation prison officers now witness in Britain and the US - prisoners openly manipulating the respective legal systems in order to cause disruption in the jails or simply as an attractive alternative to hours of dreaming indolence (189).

The reality is somewhat different. If one were to think of the prison population of England and Wales as approximating to that of a medium sized town, then worthy of comment would be how little, and not how much litigation emanates therefrom. Even the growth in applications for leave to apply for judicial review merely reflects the growth in use of the remedy in the population at large. The courts have shown themselves adept at imposing checks to counter the possibility of "floodgates" across the spectrum of applications for judicial review, including those concerning prison matters. Webster J. has described a practice approximating to that of a pre-trial hearing whereby, after leave to apply for judicial review has been given, the applicant's counsel is asked to give an

undertaking to reconsider and withdraw the application, if, on receipt of evidence from the applicant, there seems no reasonable prospect of the application succeeding (190). The injured prisoner may also fail in his action should he choose the wrong procedural channel whereby to secure a remedy. It seems that unless there are exceptional circumstances, application for leave to apply for judicial review is the only course open to him in challenging the result of an adjudication.

In Heywood v Hull Prison Board of Visitors and another in 1980 (191) before Goulding J. the plaintiff, who, like Mr. St. Germain had been a participant in the Hull prison riot of 1976, considered that the board of visitors adjudicating in his case had failed to observe the rules of natural justice. He had suffered a loss of remission of 250 days. There was delay, agreed by the judge as not being his fault, in the seeking of a remedy. When he did so it was by way of originating summons to the chancery Division for a declaration that the adjudication before the board was null and void. Speed was more important since, by the time of the hearing, the plaintiff was detained only by virtue of the forfeited remission. Unlike other litigious participants in the riot he attempted to avoid the procedural rigours of judicial review whereby he would first have to ask for leave to apply for the remedy. Goulding J. was much taxed by the parallel jurisdiction of Chancery and Queen's Bench Divisions in such instances. It was in Queen's Bench Division that the wealth of experience in such matters lay. Further, Order 53 of the Rules of the Supreme Court (supra) made the latter appear the logical course of action. Nevertheless, could the action be struck out in view of Order 15 of the same instrument, rule 16 of which states:

No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order

is sought thereby and the court may make binding declarations of right whether or not any consequential relief is or could be claimed.

Goulding J. reflected that the Rules of the Supreme Court must be construed as a whole and that an action seeking a declaration, in the present circumstances, circumvented the safeguards of application for judicial review. Not least among these was the obligation placed upon the applicant to act expeditiously. Next, where an order of certiorari is obtained, the court may not only quash the decision of the tribunal, but may also remit the case to it with an order to reconsider. That is excluded where action is by way of originating summons for a declaration. The latter process would render the board of visitors liable to cross examination by counsel: something decried by the judge as "undesirable" (192). The authorities, including literary authorities were reviewed. Borchard (1933) had it that:

It ought not to make any difference to judges through which door the petitioner enters the judicial forum, provided he is lawfully there and the court is in a position to grant him relief (193).

Similarly, the Law Commission, the report of which led to the revision of Order 53, did not see application for judicial review as an exclusive procedure (194). Dicta of Lord Denning M.R. in De Falco v Crawley Borough Council were considered. The case related to the duties of a housing authority under the Housing (Homeless Persons) Act 1977. The Master of the Rolls held, inter alia, that in such an action the plaintiff would not be confined to the procedure of judicial review:

They issued writs in the High Court claiming declarations and an injunction. It was suggested that they should have applied for judicial review because that was the mere appropriate machinery. This is a statute which is passed for the protection of private persons in their capacity as private persons. It is not passed for the benefit of the public at large ... No doubt such a

person could, at his option, bring proceedings for judicial review under the new R.S.C. Order 53. He could get interim relief also. So the applicant has an option. He can either go by action in the High Court or County Court or by action for judicial review (195).

Goulding J. noted that the dicta would be of little assistance to the plaintiff since they were limited to statute passed for the benefit of private persons and not of the public at large. He found, too, that there was much pointing in the direction of judicial review as being the only appropriate procedure. He cited Lord Goddard's dicta in Pyx Granite Co Ltd v Ministry of Housing and Local Government where, having affirmed the general position about remedies not being exclusive, he concluded that "There are some orders, notably convictions before justices, where the only appropriate remedy is certiorari" (196). Whilst recognising that the boards of visitors' findings did not equate to a magistrates court conviction, Goulding J. found "at least sufficient resemblance between [their] functions" (197) to be on guard after the Pyx Granite dicta. Of the profoundest influence upon his ratio was the decision of the Court of Appeal in the 1978 case of Uppal v Home Office (198). This was an immigration case where the plaintiff had moved, by way of originating summons in the Chancery Division for a declaration. Roskill L.J. noted that "the relief sought against the Secretary of State was in a form indistinguishable from judicial review". At first instance, Megarry V.C. had held that:

Where two or more different types of proceedings are possible in the same court (and of course the Chancery Division and the Queen's Bench Division are both parts of the High Court) then I do not see why the plaintiffs should not be free to bring whatever type of proceedings they chose.

Goulding J. believed it impossible to confine such observations on the above to immigration cases. De Falco was distinguished since the legislation in point was of "a special character directed to the

protection of individual homeless persons" (199). He concluded that, whereas he had sympathy with the academic view cited and with the dicta of Megarry V.C. in Uppal at first instance, "the observance of judicial discipline in the hierarchy of courts in this country seems, to me, much more important than any particular considerations affecting the plaintiff in this individual case" (200). All further proceedings in the action were stayed. Having stressed that his intent was to apply the Rules of the Supreme Court in the interests of justice, Goulding J. had in mind the wider policy issue of procedural correctness rather than individual justice for Mr. Heywood (201). St. Germain had revealed very serious breaches of natural justice in the post-riot adjudications. It was at least possible that these had been repeated in Mr. Heywood's case. Yet he remained in prison, serving imprisonment only by virtue of the consequent loss of remission, faced with commencing his action against de novo because he had chosen the wrong procedure.

The insistence upon Order 53 procedure as the correct way to seek a remedy in these circumstances was later confirmed in the House of Lords in O'Reilly v Mackman and others and other cases in 1982 (202). A group of four Hull prison rioters who had been found guilty of offences before the Hull board of visitors had, like Mr. Heywood, begun proceedings by way of originating summons to seek declarations that the board's findings and awards were null and void because of breaches of natural justice. The reasons for seeking relief in this way rather than by asking for leave to apply for judicial review were two-fold. In the first place, three of the prisoners had delayed for so long in seeking relief that there was little chance of the latter remedy being available under Order 53.



Secondly, in each case, there was likely to be a serious dispute as to the facts. In proceedings for judicial review evidence is usually taken on affidavit. In actions for a declaration, the use of oral evidence and of cross-examination would have been a matter of course. An unanimous House of Lords dismissed the prisoners' appeal against the decision of the Court of Appeal to refuse declaratory relief. The leading judgment was that of Lord Diplock. He reviewed the authorities and considered the development of judicial review as a remedy. He concluded:

My Lords, Order 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law: nor does s31 of the Supreme Court Act 1981 ... The position of applicants for judicial review has been drastically ameliorated by the new Order 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under order 53) ... Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained on an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provision of order 53 for the protection of such authorities. My Lords I have described this as a general rule; for, though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should in my view, at this stage in the development of procedural public law, be left to be

decided on a case to case basis ... In the instant cases where the only relief sought is a declaration of nullity of the decisions of a statutory tribunal, the board of visitors of hull prison, as in any other case in which a similar declaration of nullity in public law is the only relief claimed, I have no hesitation, in agreement with the Court of Appeal, in holding that to allow the actions to proceed would be an abuse of the process of the court. They are blatant attempts to avoid the protections for the respondents for which Order 53 provides (203).

The more restrictive approach to the applicants' once perceived alternative remedies has had the effect of making the lower courts much more careful as to the way in which matters are routed to them. Thus, whilst not relating to prison discipline; the more recent case of R v Secretary of State for the Home Department ex parte Dew (204) is of interest. A prisoner at Wandsworth had been injured by a bullet in the course of his arrest. Treatment had been prescribed. The treatment could not be administered at Wandsworth which did not have medical operating facilities. He was transferred to Parkhurst where he was led to believe that the operation would take place. It did not and he was returned to Wandsworth. Simply stated, Mr. Dew sought damages and an order of mandamus to compel the Secretary of State, the governor and the medical officer to arrange suitable treatment. He did this by way of application for judicial review and applied for an order as if the proceedings had been brought by writ. The application was struck out by McNeill J. as disclosing no arguable complaint in public law. Mr. Dew's action, in essence, was an attempt to recover damages for negligence and because of a failure to supply proper treatment. It was held to be a misuse of order 53 to seek to do this by way of judicial review. An adequate remedy could be procured by action in negligence. No order was made.

### Some Conclusions

It has been illustrated that, in post war years, and particularly since Fraser v Mudge (supra), great changes have come about in the way that prisoners have managed to gain access to the court in matters of discipline. Similar changes are evident in the way in which courts have responded to inmate litigation. O'Reilly v Mackman represented something of a restriction in the way in which relief could be sought by directing litigants to Order 53 proceedings alone where a public law remedy is sought. Order 53 offers a speedy and precise form of remedy that was unavailable to early prisoner litigants. The "floodgates" effect has been minimised by the parameters set, by the courts, within which grievances must fall before application for judicial review will be granted. It should be noted that it is not only in areas of prison discipline that prisoners have come to challenge administrative decisions in this way. So, for example, procedures regarding revocation of life licence (205), the granting of parole (206), and the production of a prisoner at remand hearings (207) are among other issues to have been subject to this type of scrutiny.

Has the management of prisons suffered from the results of the "legalising" of internal discipline? The writer would argue to the contrary believing it to be proper for those holding public office to be accountable, not just to their ministers, but to the law, for their actions. It is easy to be alarmist by placing too great an emphasis upon the American experience. Jacobs (1983) presented a number of hypotheses resulting from the growth of the prisoners' rights movement there (208). Whereas some of these undoubtedly were positive in terms of increased public awareness of prison conditions and the expansion of measures of protection available to prisoners, others revealed that its effects had been dysfunctional insofar as managing a coherent regime

was concerned. It had led to increased bureaucratization of the system and demoralised staff, making it more difficult for them to maintain control. However, there are other, particular internal benefits to be gained from the liberalising of access to legal advice and to the courts. Alpert (1978), also looking at the American experience, considered the provision of legal aid to secure advice as assisting rehabilitation and as a factor reducing "prisonization". External professional advice reduced misinformation, provided an acceptable means to solve legal problems and, further eliminated the prisoner's dependence on "jailhouse lawyers" to whom they might end up in debt of one sort or another (209). All of these elements will be of assistance to management as well as prisoners. There is little to be lost by a competent management in offering to the prisoner the possibility of testing out its decisions at law.

A further aspect of the implanting of the principles of natural justice disciplinary hearings remains to be considered. Audi alteram partem clearly implies that boards and governors must listen to what an accused prisoner has to say in his defence or in mitigation. But can a friend or adviser assist him in that process? These arguments will now be examined.

## Chapter Three(2)

### ASSISTANCE, REPRESENTATION AND A CONCERN FOR PROCEDURE

#### 1. The case for assistance and representation

It may be argued that for a prisoner to be assisted or represented at disciplinary hearings is part and parcel of adherence to the rules of natural justice. If found guilty he may forfeit remission - in certain circumstances all of his remission - thus effectively prolonging his incarceration. It has been seen that infraction of some paragraphs of Prison Rule 47 amounts to a trivial contravention of an internal regulation. In other cases it can amount to the commission of a crime which, if it were to result in a prosecution, would carry with it the right to representation as a matter of course. Iles, Connors, May and Mott (1984) suggested that 40 per cent of charges heard by boards of visitors at the 27 male prisons in their survey might have been prosecuted in the courts (1). When dealt with internally, until recent decisions of the domestic and European courts, representation would never have been granted and, even now, is seldom granted. The premise upon which assistance and representation had traditionally been denied lay in the drafting of Prison Rule 49.2:

At any inquiry into a charge against a prisoner he shall be given a full opportunity of hearing what is alleged against him and of presenting his own case.

The last phrase is crucial in terms of interpretation. If a prisoner were entitled to present "his own case" this indicated, to administrators, that others might not do it on his behalf. Sight had been lost of a restriction under the Rule that was not imposed by the parent statute. Section 47(2) of the Prison Act 1952 simply states that:

Rules made under this section shall make provision for ensuring that a person who is charged with any offence under the rules shall be given a proper opportunity of presenting his case.

The statute echoes the drafting of s52(2) of the Criminal Justice Act, 1948 which concerned the management of prisons:

Rules made under the section shall make provision for ensuring that a person who is charged with any offence under the rules, shall be given a proper opportunity of presenting his case.

There was no implication in these sections that a proper presentation of the case had to be by the prisoner himself, though, as will be seen, the question of interpretation taxed parliament to some extent during the various debates on the Bill. Certainly a review of the literature and of more recent judicial comment suggests that, in many cases, prisoners did need assistance. When Hobhouse and Brockway (1922) gathered information from magistrates who were members of visiting committees (the predecessors of boards of visitors) they noted that:

One of our witnesses, who is a chairman of quarter sessions as well as an experienced visiting magistrate, gives it as his strong conviction that it is the exception for a prisoner to get a really fair trial (2).

Other evidence included accounts of the unfair position of the prisoner vis-a-vis the reporting officer who could rely upon corroborative statements from his colleagues. The prisoner would have been segregated pending the hearing and would have been unable to gather convincing defence material himself. A retired chief prison officer, Merrow-Smith (1962) reflected, in his autobiography, that:

A man brought up on a report before the governor was given the chance to answer the charge against him but few were capable of doing so effectively. Ignorance and lack of education rendered many of them inarticulate and the stern barrack room atmosphere of the whole proceedings, too, often reduced them to a few stumbled words that could easily have been mistaken for guilt (3).

Some prisoners suffer from particular disadvantages that must make the adjudication seem a veritable conundrum to them; they may not even understand the nature of the proceedings. Thus, elsewhere, the writer has noted:

The woman, said to have a mental age of six, had been charged with assaulting two prison officers. It was the third time that she had been on report. Before the adjudication she had been held alone, under medication, since she had taken to banging her head on the cell wall and to pulling out her hair. Still she had been passed medically 'fit' to face the board of visitors. 'Ann has been a very naughty girl' said the governor to the chairman of the board, using language that Ann might understand. Compassionate prison officers held Ann's hand throughout the hearing, treating her as one might a recalcitrant child (4).

The example of Ann is not isolated. In 1985, the chair of Holloway prison's board of visitors told the Observer newspaper that:

I would say that more than half the women coming before us are suffering metal disorder. We have complained repeatedly about it. Many of them cannot have a grasp of the proceedings (5).

Even when metal capacity is not in doubt, the prisoner may, nevertheless, feel alone and intimidated by the process if unassisted. The ambience of the adjudication room is likely to convey "the impression of a hostile 'establishment' environment" (6) wherein the procedure was described, in surprisingly emotive terms, by one former governor (Vidler, 1964) as a "rigmarole" which humiliates the prisoner, conducted in "polluted" atmosphere (7). This is likely to be heightened within institutions wherein the practice of "eyeballing" (8) persists or where other constraints are placed upon the prisoner's ability to present his case in a relaxed manner (9). The process may be considered as fair if one accepts that it conducted by an independent body acting according to a procedure which is established and laid down in the "Manual on

Adjudications" (11). This publication is available to prisoners who purchase it or who borrow it from the prison library. Should the prisoner, for one reason or another, not peruse the Manual, then at the very least he will be given sight of form 1145 (see Appendix 2) within good time of the hearing (12). This explains the procedure to him. Yet the paradox of making precise information available to a prisoner is that it is written in a precise style. The writer has been told by prisoners, on many occasions, that though they have had proper access to the necessary documents, they have not understood them. Similar linguistic difficulties are likely to arise in the adjudication room, too. Harris (1982) expressed it thus:

No chairman could pierce the iron curtain of incomprehension which descends when a disadvantaged man attempts to communicate, verbally, with an essentially middle class audience (13).

Prisoners may feel overawed by the whole experience. Behan (1958) saw the adjudicating governor in the role of colonial potentate (14), Purvis (1985) believed he was appearing before the Prison Commissioners (15); Ward (1986) was unable to convince an adjudication that pre-menstrual tension was a mitigating factor (16), and Merrow-Smith (1962) recalled the frightened prisoner who, in response to the order "On the mat and give your full name and number to the governor", did not stand on the mat but fell to his knees upon it (17). Martin (1974), an academic who was also a board of visitors member, pointed to further procedural difficulties. The accused prisoner may have difficulty in guaranteeing the evidence of independent witnesses. The prisoner code of not "grassing", or informing upon others, may hinder him in this respect. If he is segregated prior to the hearing, under Rule 48, he may not have access to potential witnesses at all. Some witness may be anxious to give evidence that will please powerful inmates. Further,



uncertainty as to procedural technicalities may lead to the prisoner ordering the presentation of his case in an incompetent manner:

This can lead to what are, strictly speaking, unjustifiable pleas of 'not guilty'. A prisoner, for example, may plead 'not guilty' to assaulting an officer, then admit during the proceedings that he did strike a blow, but claim that it was not his fault because he had been provoked, or that it was an accident or a gesture that had got out of hand. Legally this should be part of a plea in mitigation but the distinction, easily drawn by a detached expert, tends to be swamped in the process of the prisoner trying to express what it felt like to be involved in what happened (18).

## 2. Influences leading to change

Informed critics of the prison system, including academics, lawyers and those within the system, have expressed views as to the efficacy of affording to prisoners facilities more closely akin to those available within the community at large. Such expressions have been evident ever since the nationalisation of prisons. At a conference of visiting justices convened in 1879 to review the effects of the Prison Act 1877, particularly as regards the powers of visiting justices, a Madame Venturi attempted to argue the case for recognising prisoners' "personal rights". To cries of approbation her views were declared "outside the objects of the conference and the speaker withdrew" (19). The modern thrust towards assistance for prisoners at internal hearings, however, may be traced back to pre-war years. Liverman (1938) heralded it thus:

The defendant, as a prisoner, naturally starts off at once with a serious handicap. He suffers from the disadvantages which he would not have if he was being tried outside the prison in any court in the country. In the first place, unless he is a rare exception, he will experience some difficulty in adequately presenting his case (20).

He continued that, in his experience as a board member and magistrate, he had "rarely heard a prisoner put his case adequately or ask questions effectively as we understand it in any other

court" (21). Drawing comparisons with courts martial, he argued the case for a "prisoner's friend" to state the prisoner's case and to formulate questions on his behalf. Such, he argued, would be in accordance with "elementary justice" (22). Similar arguments, drawing upon similar comparisons, were made out by Rhys Davies, Member of Parliament for Westhoughton, during the second reading of the Consolidated Fund (Appropriation) Bill in 1938. Mr. Davies recalled that two years previously there had been 572 "complaints" by prison officers against prisoners compared with a mere six "complaints" by prisoners against staff. This, in itself, presented "a serious issue for those who are within prison walls". He recommended "the services of a friend to watch his interests" (23). It fell to the editor of a contemporary journal to supplement the above by noting that of the 572 charges against prisoners, 558 were upheld, whereas of the six allegations of misconduct made by prisoners against staff, none were upheld (24).

i) The Criminal Justice Bill 1948

The first post-war move towards assistance for the prisoner is evident in the record of the committee stages of the Criminal Justice Bill of 1948. Basil Nield, MP, moved an amendment to allow for legal representation in cases where corporal punishment, retained in prison after its abolition as a penal sanction which might have been ordered by the court, was a potential disposal (25). If a prisoner were to have the right to present his case, then, argued Mr. Nield, he should have the right to present it properly (26) and that should be with legal assistance. Mr. Orville James MP enlarged the debate:

The surroundings in which the tribunal is held are more formidable to the person concerned, because he has no friends there at all. In a court of law at least the public are about, and a person also has the

opportunity of getting his witnesses together ... Without a lawyer being there the opportunities are not there, and the purpose of the lawyer is to interview all witnesses and produce the necessary evidence. That is one of the main purposes of having legal representation. I do not want to go beyond the scope of the amendment, but if a person is to be legally represented the purpose is not only that a speech shall be made or that witnesses produced by the prosecution shall be examined; it is also essential that the lawyer shall have the opportunity of producing witnesses on behalf of the defence, and of seeing witnesses before the trial takes place ... The man cannot, in my view, be represented in any other way (27).

Mr. James reviewed alternative forms of representation - a welfare officer of the Discharged Prisoners Aid Society (28), a member of the visiting committee itself or a member of prison staff. Each presented, to him, conflicts of interests. The lawyer could be the only "prisoner's friend" permissible (29). The view received considerable support in the committee. Mr. Chuter Ede, MP, considered representation for the reporting officer and reminded the committee of the 1938 debate referred to above, suggesting that someone other than a lawyer might be the "friend" (30). "Impossible" was the riposte of Hector Hughes, MP (31). Mr. Gage, MP, reminded the House that at a represented hearing, legal assistance should be provided, not only for the reporting officer but for the prison governor as "prosecutor" (32). Mr. John Maude, MP, concluded the discussion by sounding a cautionary note counselling against allowing the lawyer "a roving commission to see prisoner after prisoner, possible simply on the instructions of the man who is accused" (33). The amendment was withdrawn on the understanding that the Secretary of State would give the matter further consideration before the report stage of the bill (34).

At the report stage, after some conflict with the Deputy

Speaker as to whether or not arguments as to representation came within the scope of amendments to the relevant clause, Emrys Hughes, MP, introduced the point thus:

I am not putting this matter forward from a legal point of view, but from the point of view of the man who is in gaol and who is always against the state machine and needs the assistance of legal luminaries to put his case properly; the illiterate, primitive man shut up in gaol, with all the apparatus of the law against him. I suggest that if he is allowed to have legal advice in a law court outside, it is more essential that he should be legally represented behind prison walls ... I ask him (the Home Secretary) to make it clear in this clause, that the prisoner behind prison walls, will have legal representation when he is so vitally affected (35).

Mr. Gage, MP, responded by suggesting that:

I think the case is entirely met by omitting those words ("as is expedient" and putting the situation plainly as the subsection now does: ' - provision for ensuring that a person who is charged with any offence ... shall be given an opportunity of presenting his case.' I hope that I am not being presumptuous in stating that it would appear to any lawyer that if a person is to be given a proper opportunity to present his case, that can only mean one thing: that he shall be able to obtain legal representation (36).

Mr. James disagreed, saying that to some, a proper opportunity might be afforded by giving them a sheet of paper and a pencil. He asked that the clause be drafted unambiguously so that there could be no doubt as to the right to representation. Mr. George Benson, MP, informed the House that he had supported the unsuccessful argument for a "prisoner's friend" at the time of the debate on the 1939 Criminal Justice Bill, but that he found present proposals impractical:

It is quite customary for 10, 15 or 20 cases a day to be adjudicated upon by the governor. Any prisoner who wished to make trouble for the Home Secretary to give him legal representation could cause unlimited trouble. There is also the danger that if the troublemaker wished to make trouble by demanding legal representation he might get more severe punishment (37).

Mr. James agreed and stated that he would not argue for representation in trivial cases but rather, for example, where a guilty inmate might face a flogging. Mr. Benson replied:

I think the most that the Home Secretary can say at the present moment is that he will not exclude the possibility of a prisoner having legal representation where the charge is a very serious one. That is a very different thing from giving the prisoner the right to have it, irrespective of the offence (38).

At this point, Mr. Ede rose to announce that he had considered the issues raised in standing committee and on the floor of the House and he had decided to refer the question to a "committee on prison punishment" and seek its recommendations (39).

ii) The Prison Governors' Annual Conference, 1948

The contemporary parliamentary debates did not go unnoticed by prison governors. Their 1948 conference heard papers on the theme "Prison offences and punishments" delivered by governors of different persuasions. Dr. Taylor of Holloway argued that whereas fairness did not imply an automatic need for assistance at a hearing, there were circumstances when it would be helpful. The simplistic reasoning behind the recommendation might not stand close scrutiny, but her conclusion is hard to counter:

Does she, for example, have adequate means for preparing her defence, should she have a friend present at the hearing? Well, in the vast majority of reports I hear, there is no defence. In 100 consecutive reports heard at Holloway up to the end of June 1948, 95 of the prisoners concerned admitted the charge, nearly always without reservation, at any rate, no reservation they could honestly hope I would take seriously ... However, there are occasions when the presence of a friend might help a prisoner to be more confident and also make her feel that, innocent or guilty, as much as possible had been done on her behalf. One has in mind the hearing of the more serious charges before the visiting committee. Many a prisoner who has given a good account of herself before the governor will stammer, hesitate and generally create a bad impression when before a large

committee of people, many of whom she has never seen before and who have much greater powers of punishment. A friend could assist the prisoner in the preparation of her case and generally watch her interest in the hearing of a case (40).

She suggested that a member of the visiting committee itself might take on the role, perhaps on a rota basis.

The second paper at the conference was delivered by A.C.W. Richards, then governor of Wandsworth. Like Dr. Taylor, he declared himself a firm believer in fairness. This, for him, encompassed listening to the prisoner and having a knowledge of him as an individual and of knowing the qualities or limitations of the officer bringing the charge. It also encompassed strict punishment:

I am of the opinion that it is far wiser - and perhaps more merciful - to punish a man properly if he is to be punished at all, than to go through a programme of kindly pecks ... one real hard smack [sic] more often than not, proves sufficient (41).

What of visiting committees? Mr. Richards believed that they already showed "admirable patience" and "impartial fairness". However, he was concerned that:

Some of the 'busy-body' women members of certain committees within my experience allow their hearts to run away with their heads and throw judgment completely out of balance in consequence (42).

In a system which, to him, was so manifestly fair to a prisoner, what need was there for a friend?

Where would this friend be obtained? Surely not from amongst his fellow prisoners? That would reduce the whole thing to a farce and, in my opinion, is completely unthinkable. Should he, then, be from amongst the staff? That certainly would be better, but would bristle with difficulties and would lead to all sorts of complications under a variety of circumstances. No! I do not see why there should be a friend present in the case of an ordinary governor's report. If a governor is capable of taking a report at all, then, in my opinion, he should be trusted to do it conscientiously. If he

cannot be trusted - or is incapable - then he should not be a governor and it would be well to employ his activities elsewhere than in a prison (43)

In the discussion that followed, a number of governors supported the idea of the presence of a friend to assist the prisoner at adjudication. One, Mr. Finch, said that he was "horrified to realise that anyone could oppose" the idea. At this, Mr. Richards reminded him that "governors are dealing with men, the majority of whom are rogues and scoundrels, not fallen angels" (44). The conference turned to other matters after the chairman reminded participants that the Home Secretary had announced the setting up of a committee to examine the subject.

iii) The Report of a Committee to review punishments in prisons, borstal institutions, approved schools, and remand houses 1951 (The Franklin Committee) (45)

It will be seen from the title of the report that the Committee's remit was considerably wider than to consider representation. Yet, ironically, in its warrant of appointment, the use of corporal punishment in prisons and borstals was specifically excluded. This had been one area wherein there had been a degree of unanimity amongst members of parliament that representation before an adjudicating panel should be afforded. Nevertheless, the committee considered it en passant.

The Franklin Report commenced with a review of contemporary prison conditions and with an analysis of offences and punishments. To some degree, they showed themselves to be cognizant of the peculiar features that set prison offences aside from the more commonplace infractions of the criminal law:

It would not be possible to consider prison punishments in abstraction from their environment. They are bound up with prison discipline and prison regime and are directly affected by the general conditions and factors of prison life - buildings,

pay, privileges; facilities for work, exercise, education; the quality of the prison staff, and so on (46).

In other ways, the committee were somewhat naive, or blinkered, in their appreciation of day to day prison life:

No witness has come forward to give direct evidence of prisoners being placed on report and punished at the whim of spiteful or unscrupulous members of the prison staff. No doubt it is possible for the prisoner to receive unfair treatment from an officer. But prisoners and prison officers have, after all, to live together and there are, in fact, efficient safeguards against injustice of this sort (47).

The committee acknowledged that there might be some unfairness, but doubt was cast even upon that, since the evidence on the point was said to be hearsay and based upon information from ex-prisoners. Safeguards were seen to exist since, after the event of an alleged injustice, the prisoner had a variety of people to whom he could complain (48). The effectiveness of this "remedy" was not considered. Staff were seen as largely "humane" (49) and "tolerant" (50) and "moulded" in their attitudes by their governors (51). Testimony as to their "forbearance and understanding" even at adjudication was forthcoming from ex-prisoners (52). In such an atmosphere of all-round fairness, could representation or assistance for the prisoner be necessary? The committee rejected the interpretation of s52(2) of the Criminal Justice Act that implied the right to be represented if the prisoner so wished. Members feared the "floodgates" that would be opened were this to be the case. The committee, correctly, noted that even those arguing in favour of representation did not argue for it in other than the most serious alleged offences - those carrying corporal punishment as a



potential award:

Punishment by whipping is repugnant to a very large number of people in this country. Sentence of corporal punishment can no longer be pursued by a court of law and it has been retained as a punishment for graver offences committed in prison because it is the view of the overwhelming majority, if not, indeed, the view of those with practical experience of prison administration in this country that its retention is necessary to safeguard prison officers against savage acts of violence from certain types of prisoners. The public are therefore rightly concerned that it should not be used improperly or injudiciously. A number of witnesses have represented to us that an accused prisoner cannot have the same protection against injustice as a defendant in a court of law unless he enjoys the assistance of a trained advocate in preparing and presenting his case (53).

Who could act as advocate? Did it need to be a trained lawyer? Fellow prisoners and members of staff as "prisoners' friends" were discussed as possibilities. Members of the National Association of Prison Visitors and of the National Association of Discharged Prisoners' Aid Societies were rejected since those bodies felt the role to be incompatible with their social welfare duties. The committee could not agree to members of boards of visitors or visiting committees themselves, undertaking the task, and concluded that the only person suited to the job would be the lawyer (54). Since, effectively, legal representation would only be considered in corporal punishment cases, it would be restricted to those charges where, under prevailing procedure, the greatest of care was taken in any case, culminating in the personal decision of the Secretary of State as to whether or not the award would be ratified (55). In such cases as might warrant corporal punishment the committee noted that there was seldom a dispute as to the facts. It concluded:

In practice, therefore, the scope for skilled

advocacy is more restricted than in the criminal courts, and we conclude that, in most prison cases, the main function of the advocate would be limited to making a plea ad misericordiam (56).

The committee's final dismissive note revealed how little of the issue had really been grasped by them:

The character of some recidivist prisoners is such that they would be prepared to risk a flogging by striking an officer in order to have the opportunity afforded by legal representation of maligning the character of individual officers or of discrediting the prison authorities. If prisoners of this type were allowed to be represented the effect on prison discipline would, we believe, be disastrous. A prison officer whose character had been assailed by a lawyer at the instance of a vindictive prisoner would thereafter be in an unenviable position. He could be sure that the knowledge of his ordeal by cross examination would be cherished by all prisoners and his subsequent behaviour to them could hardly remain unaffected (57).

The Franklin Committee did, it must be recognised, present some helpful and positive recommendations to the Secretary of State. Without articulating the necessity to adhere to the rules of natural justice, it did, eg, recommend that the governor should not remain "closeted" with a board of visitors during its deliberations (58) and that a prisoner should be told, in good time, that he is to face adjudication so that he could have time to prepare his case (59). In other areas, the report is open to serious criticism.

Klare (1951) could not comprehend the "sweeping conclusion" that only lawyers should act as "prisoner's friend". His view was that, should the committee's recommendations be accepted, it would "virtually render s52(2) inoperable" (60). Liverman (1951) supported Klare, noting that "the recommendation seeks to destroy the whole principle of the prisoner's friend". The proposal had been supported by the Howard League and by the Magistrates' Association, in their evidence to Franklin yet,

Liverman feared, if the recommendation were to be accepted "the long fight for a prisoner's friend will have been lost for an indefinite time". He argued for fairness.

Even in the courts outside prison, the most able and educated defendant who is not legally represented, frequently finds himself quite unable to place his situation adequately before the court. Sometimes such a defendant receives much consideration from prosecuting council and is often patiently assisted by the presiding judge or chairman. But modern ideas do not consider it right that any person charged with a criminal offence should have to depend upon fortuitous assistance of this kind (61).

Liverman concluded that the committee seemed prepared to allow an analogous situation to persist within prison walls where punishment might be more severe than could be ordered by an outside court. Dawtry (1951) contested the conclusion that the only "friend" could be a lawyer. His experience of courts martial demonstrated, to him, the potential value of lay assistance. That welfare officers might suffer difficulties in establishing themselves in the role of "friend" did not seem, to him, sufficient reason to exclude them (62). Swingeing criticism came from Rose (1951) who attacked not only the recommendations of the committee, but also the scientifically careless and unsystematic way in which they had gathered their evidence often relying upon "highly personal opinions expressed and the very general data available" (63). Nevertheless, on 6 July 1951, the Secretary of State thanked the committee for their "careful and painstaking inquiry". He accepted various of the committee's recommendations including that prisoners charged with offences against discipline should not be allowed legal or other representation (64). When pressed by Mr. Sidney Silverman, MP, to reconsider that decision, he declined to do so (65).

iv) Between Franklin and Weiler

Despite the Franklin Report's shortcomings, the airings that it had afforded to the pro-representation lobby appeared to have left its supporters unable to muster any more effective arguments for some time. In 1957, Hector Hughes, MP, asked the Secretary of State to consider allowing appeal from a "disciplinary committee" to an outside tribunal where representation "by counsel or next friend" might be allowed (66). Mr. Butler simply replied that, given his reserve powers to mitigate or remit awards "the position is satisfactory" (67). When in 1962 Henry Brooke, as subsequent Home Secretary was asked to review the procedure to allow for representation, he simply referred back to the Franklin Committee's recommendation which, he said, remained valid (68). Indeed, two years later, with regard to representation, Mr. Brooke was to state that:

One cannot go more than a certain distance in these cases. A man who has got himself into prison cannot hope to have all the advantages that a free man would have outside if he was having his case presented by a lawyer or a trade union official or someone like that. My experience is that in such cases the visiting committee or the board of visitors is very anxious to get to the bottom of what is troubling or biting the man who has complained to it, but I do not think that a right way of doing that would be to insert in the rules a provision that a prisoner who came up before the visiting committee or the board of visitors could have as of right a friend by his side (69).

No account was taken of pleas such as that of the practitioner Merrow-Smith (1962) that, whereas the provision of assistance might be expensive and administratively cumbersome, it would, nevertheless, be "much more in keeping with the high traditions of British justice" (70). Mr. Brookes' careful choice of words, however (that a prisoner could not have "assistance as of right") would prove significant in later years

as the judiciary came to examine the use of discretion in the absence of right. That parliamentary statement, and particularly the phrases about "a man who has got himself into prison", brought criticism from English (1973) since it ignored the fact that a proportion of the prison population comprises the unconvicted (71).

A further attempt to instigate an appeal procedure was thwarted when, in 1967, Roy Jenkins, MP, as Home Secretary, reiterated the Butler stance of 1957 (72) and in 1970 he said, in a written answer, that he found it neither "necessary nor practicable" to provide for legal assistance at internal hearings (73).

By 1972 a new element had entered the debate - the views of prisoners themselves. Perhaps of equal significance was the adoption of the prisoner "cause" by academics with ease of access to publishers and to the media. The resulting literature was partisan and with a clear political thrust. Prisoners were the poor or oppressed who should be freed from the chains of state control. The movement, exemplified by the "new", the "radical" or the "Marxist" criminologist, drew its inspiration from two main sources. In the United States, the shameful and murderous climax to the Attica prison riots had brought to the public, in this country as well as there, the awareness that all was not well with the management of prisons (74). The radical student movement of the late 1960s and early 1970s had been nurtured on the writings of Genet, Jackson and Davies (75). Prisoner self-help and legal actions to guarantee their civil rights became widely reported in this country. Those such as John Irwin gained in status and in credibility as his role

changed from that of prisoner, to writer to academic criminologist with a chair at San Francisco. He, in concert with other lawyers, academics and writers maintained the impetus towards penal reform. The second source of inspiration, for the English movement, came from Scandinavia. Not only could the northern European countries boast low crime rates, small prison populations and a traditionally liberal method of dealing with offenders, but the publication of Thomas Mathiesen's The Politics of Abolition in 1974 revealed a solidarity amongst prisoners that resulted in them becoming "unionised" (76). For those penal administrators unfamiliar with the writings of the left, the Prison Service Journal published an account of such developments in October 1971 (77). The English movement loosely organised itself around a number of banners. "Case-Con" accommodated the radical social worker. The "National Deviancy Conference" accommodated the radical academic penologist. The two joined forces with prisoners to form their own pressure group PROP (Preservation of the Rights of Prisoners) (78). An attempt to found an organisation of radical lawyers, UPAL (Up Against the Law), was short lived but significantly, this was the era that gave birth to the concept, in this country of the "law shop" or local legal advice centre.

PROP's early days were characterised by iconoclastic fervour and by its naivety. Though it inconvenienced management, ministers were not swayed to accede to its "Demands" (1972) (79) or by its coordinated sequence of prisoner demonstrations. Though largely peaceful, they nevertheless resulted in 6,000 worth of damage (80), 1,499 governors' adjudications and 250 board of visitors adjudications during 1972 (81).

PROP's subsequent urging of prisoners to walk away from open prisons was withdrawn in the realisation that such would be to urge their members to break the law, as opposed to a local prison regulation. One of PROP's demands was that their members (and membership was free to serving prisoners (82)) should be represented at internal disciplinary hearings (83). If PROP was disorganised and anarchic, others of a more conservative leaning nevertheless listened to what it had to say (84). The argument in favour of representation or assistance was carried forward with lucidity, by a columnist in The Guardian newspaper. Dean (1973) described the "secret trials" taking place inside prisons where members of boards of visitors had greater powers of punishment at their disposal than were available to magistrates. The power to make multiple consecutive awards, irrespective of the 180 day limit on forfeiture of remission on a single charge had led, shortly before publication to five Gartree prisoners forfeiting 420, 400, 390, 220 and 200 days' remission respectively. Dean quoted Zellick as expressing concern that "every week prisoners are brought before these prison courts without even the basic civil liberties being preserved". Martin Wright, of the Howard League, told Dean that recent legislation implied that a defendant in a magistrates court who had no prison record could not be sentenced to imprisonment unless he had been offered legal aid. Prisoners at adjudication did not even have a lay adviser to assist them. Dean then summarised a range of proposed improvements to the system. These included:

That prisoners should be allowed legal advisers when appearing before either the board or the governor - although there are probably too many hearings for lawyers to handle there is no reason why lay legal advisers should not be allowed. They are already

admitted to rent tribunals and supplementary benefit tribunals ... There should be a formal right of appeal (85).

Support for Dean came from an unlikely source. Four serving assistant governors, a former assistant governor and a prison chaplain wrote to his editor. They noted that some of those in the internal judicial role also felt dissatisfaction with the process. They noted some of the factors militating against too close a parallel with court proceedings in conditions of freedom - the lack of legal knowledge on the part of the adjudicators, the reluctance of many lawyers to become involved (86) and the dictates of the institutional culture that might make a prisoner witness reluctant to give evidence. They also noted that Standing Orders offered, to governors, a discretion to refuse certain people admission to the prison. How could such a person, possibly known to the accused prisoner as a person of integrity, effectively act as 'friend' if the governor were to exclude him? On the principle of representation, the prison staff concluded:

Representation at adjudication should, for example, assist not only in making certain that a defence is properly presented, but also that the basic area of comprehension on the part of the accused is catered for. Without dwelling on the question of the different linguistic codes likely to be employed by judge and judged, it might be significant to relate that on one occasion one of us heard a man being praised by a board of visitors who later approached an assistant governor to ask: "Why did they give me a bollocking sir?" It is important not only that a man knows he is charged with an offence and is aware of the consequences, but also that he is aware at all times of what is going on about him at the hearing. This does not always happen now (87).

It was later in 1973 that the then Home Secretary, Robert Carr was to announce to the annual conference of boards of visitors the establishment of a working party comprising board



of visitors members and prison department staff under the chairmanship of T.G. Weiler of the Prison Department to examine adjudication procedures with a view to standardising them.

v) The Report of the working party on adjudication procedures in prison 1975 (The Weiler Report) (88)

When appointed, in July 1973, the working party was given the following specific brief:

To review arrangements for the hearing by governors and boards of visitors of disciplinary charges against inmates of prison department establishments and to make recommendations (89)

However, Mr. Carr's expectations were greater than that since he had told boards that there were "no doubt a number of specific aspects on which more explicit guidance would be helpful generally" (90).

One of these aspects was the implementation of the recommendations of a previous committee, also chaired by Mr. Weiler, that led to the 1974 amendment of Prison Rules (91). The working party had as members, some who had been on the earlier committee. Its Report offered a comprehensive analysis of the place of the disciplinary system within the prison as a whole and acknowledged the reservations formerly expressed in the prison staff's Guardian letter. But its consideration of the assistance issue is uncharacteristically muddled, revealing dissent between witnesses and, indeed, between members. In one, seemingly contradictory paragraph, the committee noted that:

One of the most important responsibilities of the adjudicating panel under the existing procedure is to ensure that the prisoner is given any assistance he may require to ensure that his side of the case is adequately presented. [This writer's emphasis.]

and that:

The particular need for this arises from the fact that the prisoner ... is not represented by anyone either to present his case for him or to advise him during the proceedings (92).

So on the one hand, the prisoner must have any assistance he required, but on the other, if he required legal or other advice or representation, he could not have it. The assumption must be - and this is confirmed in one member's note of dissent - that all assistance necessary was to be given by the chairman of the adjudicating panel or, indeed, by the whole panel (93). Mr. Weiler's personal aspiration that his working party might have produced "bolder recommendations" on the representation question "which might have blunted subsequent pressure to launch the Prior review" had to be balanced against the conservatism of some of the board of visitor and governor members thereof (94).

The assurance of "fairness" is implicit in the working party's recommendations, but it is not considered in the context of what may be "fair" according to the rules of natural justice. Rather it seems that "fairness" is that which can be accommodated within the strictures of that seen as operationally possible. Thus they came to reject assistance in general:

... it would be extremely difficult for anyone from outside the establishment to undertake the representation of the prisoner. He could not be expected to be familiar with the circumstances of the establishment and the relevant background to the case, and if it were proposed that hearings should be adjourned to allow someone from outside to make the enquiries necessary to overcome these difficulties, this would inevitably introduce the kind of delays which could only prolong tension in an institutional setting. Equally we think that since - unlike persons involved in criminal proceedings - prisoners and staff involved in an adjudication have to continue in association and daily contact afterwards, there would be inevitable difficulties about a prisoner or a member of staff representing or acting as advocate for a prisoner. (A member of staff could, for example, find himself caught between conflicting loyalties with his wish to do his best

for the prisoner inhibited by natural reluctance to challenge his colleagues) (95).

The conclusion was that it should remain the task of the prisoner to represent himself. The dissenting view, appended to the report, revealed a lack of unanimity on the point. Dr. J.J. Harris was the chairman of the board of visitors at Leyhill prison. He accepted the working party's reservations about the appropriateness of assistance being provided by fellow prisoners, by members of staff or by those from outside the prison. Nevertheless, Dr. Harris was concerned at the isolation the prisoner would be likely to feel when appearing before the panel. He was later, and elsewhere, to enlarge upon this:

At the adjudication the prisoner is escorted into a room to stand before a bench of up to five people. The governor and clerk are there. Normally the uniformed staff present the evidence. The prisoner's first impression would be that the room was full of hostile "establishment" figures. There is probably not a single familiar and friendly face among them. At some prisons, even today, he has to conduct his defence while standing the entire time. To add to his difficulties he may be further intimidated by the presence of two escorting officers, flanked either side, but slightly in front, facing him. However sympathetic the panel chairman is, he can't compensate for any inadequacies in the preparation of the prisoner's case (96).

A former prisoner, Packham (1984) later described this "immeasurable gulf" between board members and prisoners (97). Dr. Harris admitted to a degree of cynicism as to whether or not justice, even rough justice, could be seen to have been done where "conviction" rates before boards were in the order of 98 per cent (98). His proposal, however, was unique in that he thought the prisoners' best interests to be served by being represented by a member of the board itself, being styled "prisoner's friend" for the purpose.

Dr. Harris's proposals were explicitly rejected by the

working party in the course of further equivocation. Perhaps it was the constraint of time upon them that prevented experimenting with assistance before concluding that it would be inappropriate. What transpired, however, was that having come to that conclusion they then urged that experiments should take place "in three or four representative establishments to test the effect of making assistance available to the prisoner in preparing (as opposed to presenting) his case" (99). They suggested that this role should be undertaken by an officer or an assistant governor, but not by a specialist or by a member of the board. The latter might be in an invidious position if later called upon to be a member of an adjudicating panel. The working party recognised the emergence of practical difficulties: would the member of staff be reluctant to come forward? The committee recorded that:

Careful evaluation will then be required before any conclusions can be drawn about the desirability of some general developments along these lines (100).

The foregoing should not be seen as an unqualified adverse criticism of the Weiler Report. Its greatest contribution to progress in adjudication matters was in its drafting of a model uniform procedure which was, after all, the prime purpose for its being set up. That draft procedure laid the foundation for the two publications that offered a recommended form for the conduct of adjudications published by Prison Department during 1977 - the so-called "green book" (101) and "yellow book" (102). The only guidance previously given had comprised one and a half pages of typescript issued as a "hand out" at board of visitors training courses at the Prison Service College (103). The green book was described by Webster J. in ex parte Tarrant as "very

useful and comprehensive", though he did criticise it since it made no mention of the standard of proof which, he said, had to be the criminal standard (104). Mr. Weiler was an astute and highly respected civil servant whose chairmanship was described by Dr. Harris (1982) as "excellent" (105). However, the matter of what was, or was not, legally sound was not addressed and the question of assistance was perceived only within the administrative framework.

One of the working party members described to the writer his concern that the proposed experiments should be successful in demonstrating the need for, and the ability of prison staff to offer assistance:

At the time I thought that if we did not move in that direction of our own volition we should be overtaken by lawyers, as indeed has proved the case (106).

It must be recognised, however, that the working party's conclusions were made known at the very time that "hands off" was at its most influential in respect of prison disciplinary matters. The Report was published just as the decision in Fraser v Mudge, was handed down (107). Much as the penal reform lobby might have hoped for some development in this area, the courts and the administrators were at one in refusing these facilities.

vi) Alongside Weiler: Jellicoe

At about the same time that the Weiler working party was formulating its views, another group was meeting to consider different aspects of the adjudication process. Three special interest groups, Justice, the Howard League for Penal Reform and the National Association for the Care and Resettlement of Offenders, had set up an independent committee under the

chairmanship of The Earl Jellicoe with the brief:

To examine the functions at present carried out by boards of visitors of penal institutions and make recommendations (108).

The committee set about gathering its evidence in much the same way as did Weiler and indeed, received a measure of cooperation from the Prison Department (109). However, because of the policy implications of the Home Secretary's statement to the 1973 annual conference of boards of visitors that he "did not propose any major changes in the existing framework of the adjudication system" (110) governors were precluded from answering questions about adjudications (111). The Jellicoe Committee presented the very wide ranging recommendations that are reproduced at Appendix 3. It addressed fundamental questions such as whether or not an adjudicating board could be seen as independent and whether or not the adjudication function could be seen as compatible with the "pastoral" role also ascribed to boards. Their Report presented a way of looking at procedures which can be seen to have influenced subsequent inquiries. However, on the issue of representation, the committee was rather circumspect:

There are two major requirements of due process which present particular difficulties. First is the independence of the tribunal, the second is the right of the accused to be represented. Some form of representation may require consideration elsewhere at a later stage and, in any case, falls outside our terms of reference. We would only mention here that it is a completely separate issue from the independence of the tribunal. Whoever adjudicates there may still be a problem of representation.

vii) Post-Weiler and Jellicoe: More ruminations

The Smith, Austin and Ditchfield research

The experiments that Weiler had suggested were, on the face of it, simple to implement. But it has been seen,

throughout this paper, that almost any policy development has to be seen against the backcloth of how it will affect, or how it will be received within the institution. That Smith, Austin and Ditchfield (1981) were able to salvage any results from their Weiler-inspired research (112) was, itself, remarkable. That it took six years between the Weiler recommendation and the publication of their paper has to be understood in the context of one after another institutional obstruction placed in the path of its completion. A "minor and utterly uncontentious experiment" (Pease 1982) (113) was frustrated through the excessively defensive responses of staff associations and of boards themselves.

The research had the following stated purpose:

- i. to test whether prisoners facing adjudication by the board of visitors adequately understand the procedures involved at the adjudication.
- ii. to test whether such prisoners would be better enabled to prepare their case by having the procedures explained to them in advance by a board member (who would not be on the adjudication panel) and
- iii. to examine what problems prisoners experience in preparing and presenting their defence, with a view to improving other forms of assistance such as written advice.

A project was designed to be conducted in six prisons in the south east region that would allow three conditions to be observed and assessed: assistance, prior to adjudication, by assistant governors or prison officers, by board members. There were to be "control" conditions where no such assistance would be provided. The initial result of setting up this design was that the Prison Officers' Association and the Governors' Branch of the Society of Civil and Public Servants announced that they did not wish their members to participate in the experiment

(114). This meant that only one of the models of assistance could be tested. The project was redesigned using Pentonville and Wormwood Scrubs prisons as the experimental venues and Maidstone and Wandsworth as the controls. Employing tactful understatement, the researchers reported that "the project's teething troubles were far from over" since, at this point, the Wormwood Scrubs board of visitors declined to take part unless the researchers' proposals were modified. In this, they were supported by the local Prison Officers' Association branch which withdrew support because of an unrelated grievance (125). This left Pentonville in the experiment and, though the researchers were able to draw upon documentary evidence from the prisons in the original design, they were faced with cooperation from a prison that produced very few adjudications each year. With remarkable tenacity to task they proceeded to analyse such results as they could. They were able to attend three of the prisons as "non participant observers" of the adjudication process, but were not able to visit Wormwood Scrubs at all. The findings presented a cause for concern (116).

That a member of the board had offered guidance as to procedure before the adjudication had little effect on the hearing itself. Most prisoners who, in the main had difficulty in understanding the standard notes of guidance on procedure still relied heavily upon the chairman for guidance during the hearing. Most prisoners thought that the pre-hearing meeting with a board member made little difference to the outcome, though a member said that it had helped prisoners to feel calmer during the hearing. Subsequent interview with board members confirmed that they, too, felt that the innovation had been of



little consequence. Members of the Pentonville board had, in practice, found it hard to stick to their brief of advising on procedure and occasionally strayed into advising the prisoner how to conduct his case.

Most of the prisoners interviewed felt that they were hampered in making out their cases. Drawing parallels with charges before magistrates they felt that they should have been represented by solicitors or, alternatively, have had the charges referred to an outside court. Some would have settled for assistance from a probation officer or a member of the board acting as "friend" (117). In a phrase reminiscent of some of the views explored earlier in this chapter, the researchers wrote:

Some of the prisoners were poorly educated and not very intelligent. Furthermore, a few spoke poor English and a few seemed to have psychiatric problems. Unless they are given considerable assistance, it is unrealistic to expect such men to prepare an accurate written statement or to present their case effectively (118).

In 100 adjudications observed by one of the researchers 99 procedural errors were noted (119). The 364 adjudications, of which the record of the hearing was scrutinised, produced findings of guilt in 98 per cent of the cases (120). The assumption that an adjudicating panel, in the absence of formal assistance, would help the prisoner to present his case was not universally valid. Sometimes panel members were unable to do this since they lacked the technical knowledge or training "to ask the right questions and bring out all the facts" (121). Two members of the Pentonville board argued for legal representation for the prisoner to guarantee this.

It is difficult to gauge the response to or effects of the

Smith, Austin and Ditchfield research. Croft (1981) emphasised that the main conclusion to be drawn from it was that "prisoners do seem to require some assistance before, and perhaps during, the hearing" (122). Yet it certainly did not influence the Home Office to implement any immediate change.

#### The May Report, 1979

When Mr. Justice May conducted his exhaustive review of the United Kingdom prison services, he took the unique step of consulting the judiciary, informally, as to their view of boards and the conducting of disciplinary hearings. Consensus was that judicial review offered an adequate safeguard against injustices (123). His Committee concluded:

The choice lies between two views. The one is that since many, if not most adjudications by boards are on facts which do, at the same time, constitute offences against the criminal law triable in the ordinary criminal courts (eg. assaults), the adjudications should also effectively be criminal trials, with all the safeguards for the accused that these involve. The second view is that adjudications are not, and should not be thought of as criminal trials; they are the proceedings of domestic tribunals to which the principles of natural justice, which really only means those of common fairness, apply; that to equate adjudications with trials would be to misrepresent their true nature; and that to provide legal representation and legal aid could only introduce unwarranted cost and delays where continuing uncertainty can quickly affect the mood of staff and inmates in volatile institutions. On balance we do not think a sufficient case for change has been made out (124).

Set against an opinion stated so firmly, it is perhaps not surprising that the Smith, Austin and Ditchfield research had so little immediate effect.

#### The Benson Report, 1979

Matters did not rest with the May Committee's dismissal of the need for change. In the same month that it reported, parliament had also received the Report of the Royal Commission

on Legal Services (The Benson Report). The Commission reported that:

Persons on remand or serving sentences in prisons are at a disadvantage when seeking legal services, because they cannot visit solicitors and there may be some restrictions on their correspondence. Persons in prison may need, or wish, to seek legal advice in a variety of circumstances, in particular, the following ... (d) in relation to matters internal to the prison, including complaints about staff or conditions, or in connection with disciplinary proceedings (125).

The Commission recommended the setting up of a duty solicitor scheme for prisons and, in respect of adjudications where forfeiture of remission was at stake, said:

We regard loss of remission as an extended loss of liberty. In general we consider that no one should face the risk of loss of liberty without the opportunity of legal advice and representation, though accepting that strict application of this principle in prisons should not impede disciplinary arrangements in relatively minor cases. Accordingly we think that there are good reasons against imposing a penalty involving loss of remission on any prisoner unless:

- a) he has been given the opportunity of being legally represented or
- b) the period of loss of remission is seven days or less or
- c) in circumstances such as those now prevailing in Northern Ireland, the Secretary of State on security grounds, prescribes alternative arrangements (126).

The effect of those recommendations was minimal. For the first time, one had been made that would have brought legal advice or representation into the arena of hearings before a governor since he has the power to award 28 days forfeiture of remission (127). The recommendations were not acted upon. Four years after the Report, a duty solicitor scheme was established at Manchester prison and later, a similar scheme was introduced to Camp Hill. There was some disquiet amongst those with an

informed interest in these matters when the Manchester scheme was terminated by the Home Office, in 1985 (128). It later became known that this followed an unpublished evaluation, not by lawyers, but by prison psychologists (129).

#### B.I.H.R. Conference, 1980

In June 1980, a conference on "Judicial Review of Prison Discipline" was held at Queen Mary College, University of London, under the aegis of the British Institute of Human Rights. The conference gathered together academics, those from special interest groups, those from the professions and Home Office civil servants. Professor Nigel Walker introduced the question of representation or assistance for the prisoner. He counselled against providing too sophisticated a form of supervisory authority over "very trivial hearings with very trivial results" but felt that consideration should be given to representation by a lawyer, or by a friend, even at hearings before a governor (130). Professor Palley agreed. She cautioned against "an over judicialised procedure" but saw fairness as the overriding factor. Only representation would manifest fairness. She urged consideration of another element, viz. representation for the reporting officer where the prisoner was represented (131). Mr. Sargant, of "Justice" noted that an experienced and enlightened prison governor had spoken to his organisation in terms hostile to representation. His view had been that problems of discipline could be resolved in a friendly way without being "flared up" by lawyers (132). His contribution produced a pithy response from one delegate who believed it "an interesting description of procedure which results in the loss of 120 days remission, as being a nice

friendly procedure". The conference produced an interesting exchange of ideas, but had no discernible effect upon practice.

Home Affairs Committee 1980-81:

The next occasion upon which representation at adjudication was considered, in parliamentary circles, was when the Home Affairs Committee of the House of Commons received evidence from members of the Prison Officers' Association in 1980 (133). The Association had submitted a lengthy memorandum which contained a short, neutral, passage on the role of boards of visitors (134). The national chairman, Mr. Steel, and the national secretary, Mr. Evans, were called to give oral evidence.

Mr. Evans, a full time official, stated that he had last worked in a prison in 1972, but that in all his time at Pentonville he "never saw one occasion where a board of visitors did not deal fairly with a man" (135). He agreed with Mr. Arthur Davidson, MP, that for a hearing to be fair a prisoner should be able to present his case. But in response to the members' suggestion that the process would be fairer if the accused had somebody to speak on his behalf, perhaps a person with a knowledge of legal procedure, Mr. Evans gave a surprising reply:

The board of visitors that I worked with, in the main nominated one of the board of visitors to act as the prisoner's friend and did bring out the questioning and the cross-examining that you are now referring to and they did it very, very well (136).

Mr. Davidson persisted: "Why are you opposed to someone speaking on his behalf? Would that not be fairer all round?" Mr. Evans replied that "They do speak on his behalf and a member of the board of visitors speaks on his behalf" (137). Mr. Davidson turned his attention to the offence of making false and

malicious allegations against an officer and raised the question of the involvement of lawyers in the grievance procedure. If a prisoner were to be charged with that offence, Mr. Davidson asked:

Why should he not, facing very, very serious charges, have the full benefit of somebody who can present his case properly and cross-examine the evidence that is put against him?

Mr. Evans' response was that:

I can only once again reiterate that there is a member of the board of visitors who acts in that respect as the prisoner's friend. He does undertake the cross-examination. I am sure that the chairman of the board of visitors directs that that be done (138).

Mr. Steel was unable to accept that the introduction of lawyers to the grievance or disciplinary procedures as necessary and informed the Committee that his members would not cooperate with such a scheme at that time (139).

Mr. Evans' evidence was surprising in that he was describing an arrangement which he maintained to have been in operation at Pentonville prior to 1972. Yet this would have been far in advance of practice in any other prison at the time. It demanded more from the Pentonville board than did the very limited alteration in standard procedure required by the Smith, Austin and Ditchfield research, supra. Perhaps the passage of time, or misunderstanding, had affected Mr. Evans' recollection of events. The board chairman at that time certainly did not recall it that way. The writer's enquiries about pre-1972 Pentonville practice produced the following reply:

The chairman of the board, has been contacted and takes the view that the board never did nominate a prisoner's friend on adjudications. They did simply satisfy themselves that the prisoner knew the procedure to be gone through, but no more than that (140).

### A Prisoners' Rights Bill 1981?

The next development of note was the attempt, in March of 1981, to introduce a Prisoners' Rights Bill to the House of Commons. Mr. Alf Dubs, MP, was the unsuccessful author of the proposed legislation which would have provided, at clause two:

- 2(1) A prisoner charged with an offence against discipline shall receive prior to the hearing of such charge except where otherwise provided
  - a) a notice of such charge in writing
  - b) a fair and accurate summary in writing of the evidence to be added in support of such charge
  - c) the names of the witnesses to be called to give evidence by the prison authorities.
- 2(2) A prisoner so charged shall be entitled to legal representation at the hearing.
- 2(3) A prisoner shall be entitled prior to the hearing to confer with his legal adviser.
- 2(4) A prisoner shall be entitled, at the hearing, to a full opportunity to present his case and to call any person as a witness he may wish, notwithstanding such a person may be another prisoner or member of the prison staff.

The Bill was lost (141).

### Mealy, Brady and Departmental thought

It was now that issues of representation, whilst not central to the outcome of the case, once again received consideration in the Divisional Court. R v Board of Visitors of Gartree prison ex parte Mealy and Brady has been considered, at length, in Chapter Three(1). It is hard to imagine an adjudication with so many procedural and other errors. On the present point Hodgson J. Stated, obiter that:

The prisoner was at a substantial disadvantage when compared with someone facing an ordinary criminal charge. The prisoner need not be allowed legal or other assistance and this applicant had not had any assistance at all ... The prisoner could not be expected to have the flexibility of a trained legal mind (142). [This writer's emphasis.]

It was this dictum that persuaded the writer to conclude that whereas the accused "need not be allowed legal or other

assistance", there was nothing in statute, statutory instrument, or internal regulation, to prohibit that. One interpretation of the dicta in Fraser v Mudge (supra) might be that whereas Lord Denning had said it had not been practice to allow representation nor was that necessary in order to be fair; and whereas Roskill L.J. had said that representation at such hearings was not a right, neither had precluded it as being a matter within the discretion of the board to grant (143).

During 1982, the Home Office announced recognition that a foreign prisoner with little knowledge of the English language would be disadvantaged insofar as the guaranteeing of a fair hearing was concerned. Lord Avebury asked the Minister of State what provisions were made for such prisoners. Lord Elton responded by citing Prison Rule 49.2 and by adding:

Where a prisoner has difficulty in understanding English he is given assistance, whether by members of the adjudicating panel, prison staff, other inmates or an interpreter, to enable him to participate in the proceedings (144).

Also in that year, the Prison Department's Director of Operational Policy spoke to governors at a training course at the Prison Service College. He said that he believed that "a good case could be made out for representation at adjudications, or, alternatively, the removal of adjudications from boards of visitors and the formation of a judicial authority to deal with the more serious offences against discipline," However, his view was that such moves would be "deeply resented by staff" (145).

#### The Justice Report

One further Report informed thinking on the present question. In 1983, the organisation 'Justice' published its



paper "Justice in Prison" (146). A wide range of prison matters were considered including the Smith, Austin and Ditchfield research. 'Justice' concluded that the only appropriate person to provide the assistance they deemed necessary would be the lawyer (147). The committee would not have made legal representation quite so widely available as had been recommended by the Benson Report. The 'Justice' recommendation was to limit it to hearings before boards where cases were complex, prisoners were of low intelligence, illiterate, or in some other way handicapped or where a serious charge would be likely to result in a lengthy period of forfeited remission (unspecified in length) (148). A procedure was put forward whereby a governor would be required to consider the need for representation at the initial hearing but whereby, if this were to be refused, the request could be renewed before the board. Remuneration for lawyers was recommended under the "Green Form" scheme.

Change was imminent. The developing caselaw meant that by 1983, lawyers, politicians, academics and some practitioners were at one in that they foresaw that, at last, assistance would be forthcoming. When it came to effecting it, Home Office was accused of a naive faith in the survival of "hands off" making it appear that the change had been sudden (150). The Prison Officers' Association announced "the collapse of the prison disciplinary system". It was, they believed, an "extraordinary development ... definitely unanticipated by the Home Office, but was probably foreseeable" (151). Change should have been foreseen. Events at Albany prison in 1976 had resulted in an action by two prisoners which by this time had reached the European Commission of Human Rights. Further, disturbances at

Albany and Wormwood Scrubs in the early summer of 1983 resulted in adjudications, the procedure at which was being challenged by way of judicial review. Those matters will be examined.

viii) Campbell and Fell, Tarrant and others

On 16 September 1976 an incident occurred at Albany prison when a group of six prisoners occupied a corridor in the prison and refused orders to give up their protest. Two of these men were Mr. Campbell and Fr. Fell. When staff re-occupied the corridor, a number of injuries resulted to both groups. The prisoners concerned appeared before the governor of the prison charged with offences, some of which were classified, under Prison Rule 52, as being "especially grave". The charges were remanded to the board of visitors. Mr. Campbell attended neither hearing and said that he would only attend before the board of legally represented. He had been charged with mutiny and with doing gross personal violence. The hearing before the board, in both cases, lasted less than 15 minutes and, after announcement of a finding of guilt, as well as the forfeiture of a range of privileges, Mr. Campbell was ordered to forfeit 605 days remission. He ultimately sought leave to apply for judicial review. His application failed, as did his appeal against that decision. In addition to the loss of a range of privileges, Fr. Fell was ordered to forfeit 570 days remission. However, most of the matters for which he sought a remedy concerned his difficulty in securing legal advice in connection with his personal injury claim resulting from the fracas. He had various other complaints about the controls placed upon to whom he had been allowed to write. Of particular relevance to this section of this paper is that, having eventually gained

access to the Commission, on 12 May 1982 that body expressed the opinion inter alia that the proceedings before the board of visitors, in Mr. Campbell's case, had involved a breach of his rights under Article 6 of the European Convention on Human Rights (152). That Article, in part, states:

- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...
- (3) Everyone charged with a criminal offence has the following minimum rights ... c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

The applicants had claimed that the hearings before the board of visitors constituted the determination of "a criminal" charge, both because of their seriousness and because of the onerous punishments that resulted. The Commission accepted these claims and also concluded that a board of visitors did not constitute an "independent and impartial tribunal". Further breaches of Article 6 (and Article 8) were apparent in the delay in allowing the applicant to obtain legal advice and also because Fr. Fell had not been allowed to receive advice in private. In the absence of a friendly settlement, the case was referred by the commission to the Court. Its judgment will be considered shortly.

Whilst these events were in train, further prison disturbances resulted in the domestic courts having to address the question of representation at adjudication. Following a riot and a roof top demonstration at Albany, two prisoners, Mr. Tarrant and Mr. Leyland were charged with mutiny. Later, at

Wormwood Scrubs, a violent confrontation led to a number of prisoners, including Mr. Clark and Mr. Anderson and, following yet another incident, Mr. Tangney, being charged, inter alia with assault or attempted assault upon staff. In the subsequent litigation (R v Secretary of State for the Home Department and others ex parte Anderson and others; hereinafter cited as ex parte Tarrant (153) ) the prisoners secured judicial review of the resulting adjudications. Their applications were based on the refusal by the boards of visitors, in four of the cases, to allow legal assistance at the hearing and in two of the cases, the refusal to allow a friend or adviser to assist. The leading judgment was that of Webster J. He considered himself bound by the decision in Fraser v Mudge so that there could exist no right to representation before the board (154). But that left open the question of the use of discretion:

It does not follow, from the decision that a prisoner has no entitlement to legal representation as of right, that the board before which he appears has no discretion to grant him legal representation; and if it has such a discretion, then he has the right that the board should, in his case, exercise that discretion and exercise it fairly and properly. In my view, therefore, the principle enunciated by Lord Wilberforce and Lord Bridge in Raymond v Honey applies to this case. In short, therefore, two questions fall to be answered: first, has the board, in principle, at common law, such a discretion? Secondly, is such a discretion taken away expressly or by necessary implication? (155).

Webster J. concluded that the board, like any other tribunal, is master of its procedure and no rule of common law or of statute took away from it the discretion to grant legal assistance if requested. He rejected a range of arguments advanced on behalf of Home Office, including that of "floodgates". Even if the grant of legal representation were to become the norm, "floodgates" would not be sufficient reason to

deny something that was correct in principle (156). He reminded the court that in ex parte St. Germain No. 2, Geoffrey Lane L.J. had cited Lord Atkin in General Medical Council v Spackman about the administrative inconvenience of producing witnesses:

Mere administrative difficulties simpliciter are not, in our view, enough. Convenience and justice are not often on speaking terms (157).

Webster J. then turned to another of the applicants' grievances viz. that they had not been allowed a friend to assist them during the hearings. He concluded that for the same reason that no right to legal representation existed, so, too, no right to assistance from a friend existed. However, the same discretion to allow it was vested in the board as in the case of legal representation. Had the boards exercised their discretion and decided not to grant assistance? Webster J. found that they had not. Rather they had simply believed that it was something beyond their powers to grant and had not considered it. He proceeded, in a most helpful part of his judgment, to suggest to boards the kind of things that should be taken into account in deciding how their discretion should be used. The list was not intended to be comprehensive but included:

1. The seriousness of the charge and the potential penalty;
2. Whether points of law are likely to arise;
3. The capacity of the particular prisoner to present his own case (158);
4. Are there likely to be procedural difficulties?
5. The need for reasonable speed;
6. The need for fairness as between prisoners and between prisoners and prison officers (159).

He reviewed the complexity of the charges in the present case and concluded:

In my judgment, where such questions arise or are likely to arise, no board of visitors, properly directing themselves, could reasonably decide not to allow the prisoner legal representation. If this

decision is to have the result that charges of mutiny will more frequently be referred to the criminal courts in some other form, I, personally, would not regard that result as a matter of regret (160).

In a brief judgment Kerry L.J. concurred.

Since the Divisional Court had decided ex parte Tarrant in the way it had, Webster J. found it unnecessary to address arguments advanced in reliance on Article 6 of the Convention or of the opinion of the Commission in Campbell and Fell v UK.

Almost immediately after ex parte Tarrant came to judgment, so did Campbell and Fell (161). Had there, indeed, been a breach of Article 6 of the Convention? Were the disciplinary charges that had been brought against the prisoners also criminal charges thus attracting the right to legal assistance? The mere fact that the alleged offences were classed in the Prison Rules as breaches of discipline did not imply that the prisoners were excluded from the protection of the Article. The Court applied the tests established in Engel v Netherlands as to whether or not the breaches fell within the protection afforded by the Article. The tests are:

- i) whether the state classified the offence as criminal or disciplinary or both;
- ii) "the very nature of the offence" and
- iii) the severity of any penalty to which the applicant was exposed (162).

In Campbell and Fell, by four votes to three, the Court held that "exceptionally grave charges" brought against prisoners before the board of visitors did amount to the determination of criminal charges. The particular ones in this case, although brought under a disciplinary code, had much in common with criminal offences. This "gave them a certain colouring which does not coincide with that of a purely disciplinary matter" (163). Further, the amount of remission

forfeited gave the proceedings the character of criminal proceedings within the third of the Engel tests. The consequence of this was that legal representation as of right should have been granted to the accused. The question of independence and impartiality will be addressed in the next section of this chapter.

Home Office practice and the directions given to boards of visitors did change after Campbell and Fell, but only to a limited extent. Boards were told that there were now circumstances where a prisoner appearing before them had a right to legal advice, assistance or representation. However, the new directions related only to those offences classified under Prison Rules as "especially grave". In a letter sent to the chairmen of boards and to all governors, an accurate summary of the Campbell and Fell judgment was given. However, insofar as future practice was concerned, the letter advised:

There are two points for action, both of which concern only those cases where a prisoner is charged with an especially grave offence: that is mutiny or doing gross personal violence to an officer. These points are:

- i) where a person charged with such an offence indicates that he would like legal representation, that request should always be granted.
- ii) where a board makes a finding in respect of a charge of an especially grave offence, some steps are needed to make the judgment publicly known.

The judgment does not affect cases other than those involving charges of an especially grave offence (164).

This, it is suggested, is a misinterpretation of the judgment, and leaves aside consideration and application of the Engel test. It is nevertheless an interpretation that has gained hold within prisons. When, for example, Ditchfield and Duncan (1987) were commissioned by the Committee on the Prison

Disciplinary System (the Prior Committee, infra) in 1984 to determine perceptions of the fairness of the system, they reported that the court in Campbell and Fell had ruled that "where a prisoner is charged with an especially grave offence, any request he makes for legal representation should be granted" (165). The court did hold this; it held that representation should have been granted because the acts in question amounted to criminal charges, not because they were "especially grave" within the terminology of the Rules. Further, Home Office evidence later given to the Prior committee attempted to preserve the myth, claiming unidentified support of their position:

The decision in Campbell and Fell has been generally interpreted (and we have no cause to dissent) to the effect that it bites only on the especially grave offences of mutiny or incitement to mutiny and gross personal violence to an officer in which the potential punishment of forfeiture of remission is unlimited (166).

It remained the position in practice therefore that, irrespective of Campbell and Fell, the domestic courts still had to test the issue of whether or not legal assistance or representation should be granted as of right when alleged offences constituted criminal charges (both as regards the act and the likely penalty), but were not classified as "especially grave" under the Prison Rules. Livingstone (1987) concluded that the right to representation, at least by a friend, is an essential element of fairness even in respect of run-of-the-mill adjudications. This would help to guarantee adherence to the rules of natural justice (167). He believed that the biggest obstacle to establishing such a universal right is that tribunals, including boards of visitors, may determine their own



procedure. Livingstone indicated that ex parte Tarrant neither set precedent nor heralded progress. Rather the judgment declared how the common law on the subject stood. It was but the starting point of the sequence of litigation that will now be considered.

In R v Board of Visitors of Blundeston Prison ex parte Norley in 1984 (168), it fell to Webster J. to decide, in the absence of a request by the accused prisoner to be represented, whether or not the board should have advised him of his right to request representation and then considered whether or not to grant any request. He concluded that natural justice dictated that this would only be necessary in the most exceptional circumstances, for example where a prisoner might not be capable of understanding the possibility, or might not be capable of making his own application. It was "desirable and sensible" that the prisoner should be asked his wishes, but in the absence of a request from him there was no duty upon the board to consider the question (169).

This ratio, in turn, was considered in R v Board of Visitors of HM Prison Swansea ex parte McGrath later in the same year (170), before Forbes J. It was argued, by counsel for Mr. McGrath that Norley was wrongly decided and that Tarrant, properly applied, meant that the board should have taken the initiative in asking the prisoner whether or not he wished to apply to be legally represented. Two background elements are of relevance. Standing Orders required that Form 1145 be served on the prisoner in good time before the hearing. There should have been post-ex parte Tarrant amendments to the form to explain the question of legal or other representation. Mr. McGrath had been

handed an unamended form. Forbes J. was content to "assume without in any way deciding it" that this amounted to a breach of Prison Rule 7, but he saw this as being of a "purely procedural and ancillary nature" (171). It is a matter of record that, three quarters of the way through the proceedings when the chairman asked Mr. McGrath if he had anything to add to what he had already said, he replied: "I'm not professional - I don't know what training you've had. It takes a professional person to cross-examine. I can't do it. I'm not a professional, I'm not that clever" (172). It was argued, by counsel, that this was tantamount to a request for legal advice, but was perceived by one panel member (by way of affidavit) as merely "a throwaway comment" (173). Forbes J. said that:

It seems plain to me that the board of visitors could not possibly be criticised for considering, as they did, that the remark was not intended as a bona fide request for legal representation and was in the nature of a protest or demonstration of some kind or something of that sort.

He continued:

It seems to me that the proper approach for this court to take is the familiar Wednesbury approach (174): can it be said that no board of visitors, properly directing itself, could have failed to recognise McGrath's remarks as a request for legal representation? Using that approach I come to the conclusion that there is no reason for not accepting the board's conclusion on this matter ... If the Wednesbury approach is the wrong one, I would hold myself that these remarks did not, and were not intended to amount to a request for legal representation (175).

He concluded that ex parte McGrath did not manifest any of the exceptional or unusual circumstances envisaged by Webster J. in ex parte Norley and thus, no remedy would be granted in respect of the absence of the exercise of discretion.

The present Manual on Adjudications offers that, as part

of the model procedure, the question as to legal advice should be put by the chairman (176). The present Form 256 (see Appendix 2) leads the chairman in the direction of asking the question. But should a 'rogue panel' demonstrate that it is its own master by departing from the Manual or the Form, it may do so (177). Ex parte Norley and ex parte McGrath appear to close the door on remedy by way of judicial review if the question as to advice or representation is not put. But would the cases be decided again in the same way? Immediately after ex parte McGrath came the decision in the House of Lords in Council of Civil Service Unions v Minister for the Civil Service (178). In that case, Lord Diplock carefully reviewed the possibility of a remedy where members of the plaintiff union had been disadvantaged since their "legitimate expectation" had not been met. A "legitimate expectation" was distinguished from a "reasonable expectation" in that in the former a public law remedy may be found. In the latter "whereas an expectation or hope that some benefit or advantage would continue to be enjoyed, although it might well be entertained by a 'reasonable' man, would not necessarily have such consequences" (179). What, then, constitutes a "legitimate expectation"? Yeates (1965) explained it thus:

A legitimate expectation falling short of a right may entitle the holder to some measure of procedural fairness before he is cleared or deprived of the expectation. An assurance that a particular procedure will be followed, or a settled course of conduct following it, may give rise to a legitimate expectation entitling the beneficiary to insist on the procedure (180).

It is thus arguable that the publication of a model procedure to which the accused prisoner has access may lead him to the "legitimate expectation" that it will be followed. The

model procedure places an onus upon the panel to address the question of representation:

At every adjudication the panel must ask the prisoner if he has read and understood the procedure (F1145) which informs him that he may apply for assistance or representation. If the prisoner makes no request, the panel should nevertheless, ask him if he wishes to be assisted or legally represented, without leading him to expect that a request will necessarily be granted (181).

That being the case, it is submitted that any further Norleys or McGraths might well find that they do have a remedy by way of judicial review based upon the thwarting of the legitimate expectation that the panel will adhere to its model procedure.

The thread of caselaw on the matter of representation has recently been taken one step further forward in a Northern Ireland case wherein Livingstone's thesis (supra) was tested.

In Hone v Maze Prison Board of Visitors; McCartan v Same, in the House of Lords (182), prisoners had appeared before the board charged with assault on staff. Lord Goff gave the judgment of an unanimous House. The judgment of Webster J. in ex parte Tarrant was approved and thus, the issue of discretion to grant legal or other assistance at board of visitors hearings was endorsed. But what of Article 6 and the foregoing arguments about a right to representation (as opposed to a right to ask for it) where a breach of internal discipline approximating to a criminal charge is put? Lord Goff was dismissive:

No doubt it is true that a man charged with a crime before a criminal court is entitled to legal representation and ... no doubt, it is also correct that a board of visitors is bound to give effect to the rules of natural justice. But it does not follow simply because a charge before a disciplinary tribunal such as a board of visitors relates to facts which in law constitute a crime, the rules of natural justice require the tribunal to grant legal representation ... In the nature of things, it is difficult to imagine that the rules of natural

justice would ever require legal representation before the governor. But although the rules of natural justice might require legal representation before the board of visitors, there is no basis for [the] submission that they should do so, in every case, as of right (183).

His Lordship's view was that each case should be considered in the light of the circumstances of the particular offence. He continued:

It is easy to envisage circumstances in which the rules of natural justice do not call for representation, even though the disciplinary charge relates to a matter that constitutes, in law, the crime, as well might happen in the case of a simple assault where no question of law arises and where the prisoner charged is capable of presenting his own case. To hold otherwise would result in wholly unnecessary delays in many cases to the detriment of all concerned including the prisoner charged and a wholly unnecessary waste of time and money contrary to the public interest (184).

The assaults in Hone and McCartan had constituted an attack upon three prison officers, in two separate incidents, when tea was thrown into their faces and when they were punched and kicked. Still, Lord Goff would not countenance:

an adventitious distinction being drawn between disciplinary offences that happen to be crimes and those that happen not to be so, for the punishments liable to be imposed do not depend on any such distinction (185).

The restricted meaning on the expression "criminal offence" had, in his view, ensured that the application of Article 6 "did not exceed the bounds of common sense". The awards made by the board of visitors had been, in the case of Mr. Hone, 60 days loss of a range of privileges and 30 days cellular confinement and, in the case of Mr. McCartan, 20 days cellular confinement and 30 days forfeiture of remission, the latter suspended for six months. "Common sense" or not, his Lordship did not appear to have embraced the Engel principles

(supra) in reaching his decision, each one of which would appear to have been pertinent. His Lordship's references to the European Convention on Human Rights were dismissive. The qualifications he placed upon the right to representation reflected neither the spirit of the Engel judgment nor the decision (186).

Hone and McCartan, it is submitted, serves to complicate issues of internal discipline. Lord Goff's dicta about governors' hearings will, no doubt, be taken by prison administrators as authority to preclude legal or other assistance at those hearings. Yet, since it is now clear that the House of Lords regards an adjudicating governor as performing a judicial and not a managerial function (187), if his discretion to allow that assistance before him is excluded, eg. by Home Office direction as a matter of principle, that would clearly place an improper fetter upon that discretion. This point is considered further in Chapter Three(3).

### 3. A Note on Prison McKenzies

It has been shown that a board has a discretion to allow - or in some circumstances a prisoner has a right to have - assistance from a friend, not necessarily a lawyer, at hearings before them. The term "McKenzieman" has entered prison parlance to describe such a person. The term originates from a 1970 divorce action McKenzie v McKenzie (188). There the earlier dicta of Lord Tenterden in Collier v Hicks were cited:

Any person, whether he be a professional man or not, may attend as the friend of either party, may take notes, may quietly make suggestions and give advice (189).

In ex parte Tarrant, Webster J. adopted a purist approach to the definition (190). He distinguished a McKenzie - a member of the

public attending an open court and associating himself with a party to proceedings - from an assistant at a board of visitors hearing. The latter was an instance where the public had no right to attend, but might do so if invited (191). However, Kerr L.J. employed the term uncritically and thus it is the term to be used in this paper. He developed Webster J's thinking on the point and considered the kind of people who might be regarded as appropriate to play the role. That person should be:

A suitable person who is readily available and willing to assist, namely not a fellow prisoner, but, for instance, a probation officer, social worker or clergyman acquainted with the prisoner (192).

It was his view that this facility would be requested more frequently than assistance or representation by lawyers (193). This has not transpired, and an examination of the prison McKenzie role in practice will follow in Chapter Four.

#### 4. A Concern for Procedure

##### i) Introduction: A Note on Independence

Reference has been made, in the foregoing pages, to the standard model procedure contained in the Manual on Adjudications. The model procedure pre-supposes that a hearing will be before a governor or an independent tribunal. It is difficult to perceive the governor in the "independent" role. He is the manager of the organisation within which the alleged offence has taken place. He is the employer of the reporting officer. Certainly, in adjudicating, he will have his mind on maintaining the good order of his prison and the delicate balance that exists between the staff disciplinary function and the preservation of a tolerable life for inmates. He will do his best to come to a hearing with an open mind. Yet the experience of managing his prison day in day out will

equip him with the kind of knowledge that may make bias hard to avoid. Morris (1975) noted the argument that a governor may well be seen as a judge in his own cause (194). He may know the strengths and weaknesses of the principal characters at the hearing. If, for example, the charge is one of assault, he may already have seen papers indicating difficulties that a particular officer has had with a particular inmate. The governor, faced with a simple conflict of evidence may be inclined to accept the staff version of events since, in the absence of other clarifying factors, he knows that is what staff expect of him. He may be swayed by the exigencies of the regime to make a particular award in the hope that it may have some general deterrent effect. Considerations such as the above were those that assisted Lawton L.J. in framing the ratio in R v Deputy Governor of Camp Hill Prison ex parte King where he distinguished between the independent board of visitors and the governor who was "nothing more than a manager" (195). But whereas it is clear that boards of visitors must commence each hearing de novo, Griffiths L.J. in ex parte King regarded prior knowledge on the governor's part as a factor that enhanced his adjudicatory skills.

With the governor's knowledge of the personalities with whom he is dealing, I suspect that he will usually be left in no doubt as to the truth of the matter (196).

But what of boards of visitors? Two strands of thought have permeated this paper in respect of their independence. One view is that enunciated by a variety of writers, former prisoners, members of staff, and even some board members, who hold that it is difficult to perceive independence or



impartiality as characteristics of the performance of their duties. Another has been the unquestioning acceptance of the courts, the Home Office and boards in general that they are independent and impartial. Some examples of the first view have been given in a previous chapter. Others include that of Fitzgerald and Sim (1982) who reported the disquiet of the chairman of the board of Lincoln prison:

If it's a bit of a toss up, or if we're fairly convinced he did it, but there isn't necessarily a legal proof, possibly hearsay, something of that sort, we, as likely as not, for the good of the establishment, would support the officer (197).

More sinisterly, a colleague who conducted a series of training seminars for board members in 1984 was told by an experienced and senior prison governor that "My board would grant legal representation in every case if they had their way" (198). One can only speculate as to the covert (or even overt) influences brought to bear upon that board in a sincere, though misplaced concern for the good of the establishment. Fitzgerald and Muncie (1983), were able to see boards of visitors as an integral part of the "institutional apparatus of control" (199).

The Jellicoe Committee of 1975 had concluded that the powers of punishment vested in a board demanded rather greater independence than that generally claimed. Rather, the Committee demanded such "conspicuous independence" as would be manifest by a panel cognisant of legal principles. Their recommendation was:

That serious offences against discipline be tried by professional adjudicators drawn from lawyers of the standing required for appointment as circuit judges or recorders. We hope that a lead in this work might be given by circuit judges. The panel of adjudicators would be appointed by the Lord

Chancellor and the administration of the scheme would be coordinated by governors and circuit administrators (200).

The Committee envisaged a hiving off of the judicial function of the board from the "watchdog" or supervisory function which would fall to the hands of a separate prison "council", members of which would be excluded from adjudication panels. Boards, however, appear to have great faith in their own impartiality and fairness. It was thus, perhaps, not surprising that when Mr. Justice May canvassed their views of the Jellicoe proposal in preparation for his report of 1979 he found only one board in favour of the separation of their functions (201).

Whence, therefore, would come the impetus for change? Clearly Home Office would not be spurred in the direction of a separating function simply because there were feelings abroad that independence was in doubt. Mr. Justice May had recommended against it and the caselaw that has been reviewed reveals generally uncritical acceptance that boards stand aside from the management of prisons and are thus manifestly independent. The question came to be considered in close detail in Campbell and Fell v UK, supra. It has been seen that one of the requirements of Article 6 of the Convention on Human Rights is that hearings falling within the Article must be heard by "an independent and impartial tribunal". Mr. Campbell had argued that when adjudicating in his case, the board of visitors were mere "cyphers" (202). He submitted that they acted as an arm of the executive under the direction of the Secretary of State and, thus, could not be seen as independent or impartial within the meaning of the

Article (202). The European Commission on Human Rights had noted that boards were under a legal obligation to act in an independent and impartial fashion but it also noted that members were appointed by and could be removed by the Secretary of State and that any of its other functions brought it into daily contact with prison officials in such a way as to identify it with management (203). It could thus not be seen to meet the requirements of the Article. Drzemczewski and Warbrick (1985) gave an account of those elements that ought to be taken into account in deciding the matter:

Independence connotes freedom from influence both of the executive and the parties and of the members of the tribunal. Independence is measured by objective factors such as the status of the judge and the manner and terms of his appointment. Impartiality has objective and subjective aspects. The subjective element is lack of actual bias against a party. The objective element is the lack of appearance of bias (204).

The European Court of Human Rights, nevertheless departed from the Commission's view and found that the board of visitors did meet the criteria required by the Article. To hold that being appointed by the Minister implied the absence of independence would equate with a contention that the judiciary are not independent since they, too, are appointed by, or on the advice of a Minister. That members are appointed for a relatively short period of time should be understood in the context of the task being unpaid - members might be unwilling to commit themselves to longer periods. Though the Secretary of State could require resignations, this would be likely in only the most exceptional of cases - so rarely as not to threaten the independence of the board in performing its judicial function (205). What, then, of independence in the

light of the board's dual role? In performing its supervisory tasks a board is in frequent contact with prison officials, just as with the inmates themselves. The court held that, even at such times, the board acts independently of both groups, its function being "to hold the ring" between them.

The Court decided that:

The impression which prisoners may have that boards are closely associated with the executive and the prison administration is a factor of greater weight - particularly hearing in mind the importance in the context of Article Six of the maxim 'justice must not only be done: it must also be seen to be done'. However, the existence of such scrutinies on the part of inmates, which is probably unavoidable in the custodial setting, is not sufficient to establish a lack of "independence". This requirement of Article Six would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a board and the authorities, to think that the former was dependent on the latter; ... however, the court does not consider that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression (206).

That the board, in dealing with Mr. Campbell's case, was acting impartially was clear to the Court since it came to it de novo. It found no breach of Article Six in respect of a failure to hear the adjudication in public - the Article allowed for a departure from this in special circumstances. There was a breach in that there had been no public pronouncement of the finding.

Campbell and Fell has thus stated the definitive position as to whether or not boards are independent. The test is an objective one though the court's perception and interpretation of objective independence and impartiality, in this case, matches neither that described by Dzremczewski and Warbrick (supra) nor, it is submitted the views of the majority of prisoners affected by the deliberations of boards.

There are research findings (Milton 1976) to show that other, similarly disadvantaged, groups appearing before tribunals have similar perceptions of collaboration with the authorities, their attitudes often being directly related to the outcome of the hearing (207). But, as will be seen when the evidence to the Prior Committee is considered, the Campbell and Fell judgment has not completely allayed concern over the question of independence and impartiality described by many of those with a special interest in the field of study.

ii) The Developing Procedure

It will be recalled that the Franklin Committee had, as part of its brief, the requirement to consider the procedure and disciplinary hearings and to make recommendations. Such recommendations as were made were helpful, but hardly far reaching. In respect of governors' hearings the Committee noted a widespread practice of not telling prisoners that they were to face adjudication and of not apprising them of the details of the charge until they faced the adjudication. There were institutional management reasons for this since staff would wish to avoid further disturbances that an aggrieved prisoner might cause were he to have too much notice of the charges against him (208). The Committee believed that, nevertheless, there was no justification for such a practice which was contrary to the contemporary Prison Rule 40, the precursor of the present Rule 49 (supra). The recommendation was, simply, that there should be adherence to the statutory instrument and that the prisoner should be allowed writing materials so that he could make out his

defence in that way if he wished (209). As regards visiting committees, it was noted that Prison Rules gave no guidance as to procedure. It seemed to be assumed that members would follow the practice of petty sessions (210). The Franklin Committee reported that:

There are committees which have been at pains to maintain the highest standards recognised for the administration of justice; but we are convinced from the evidence that the practice of some committees is wholly unsatisfactory, while the procedures adopted by others falls short of the standard which, in our opinion, it should be aimed at (211).

The report noted the practice of some boards that conducted adjudications as a full board of anything from 12 to 20 members. Evidence was sought from the Magistrates' Association which was "emphatic in their agreement, holding it essential in the interests of justice that disciplinary offences should not be dealt with at the monthly meeting". Apart from the intimidatory nature of such proceedings, the Report noted the unfairness to the prisoner who might commit his offence a couple of days after the monthly meeting and then have to wait almost a month until the charge would be dealt with (212). Further, malpractice was noted at some prisons where it had become common to delegate adjudicatory functions to one member of the committee who would sit as sole adjudicator in the course of the statutory weekly visit (213). The Committee's recommendation was adherence to the then Rule 45 that required adjudications to be before not fewer than three, no more than five members (214). Thus adjudicating panels should be appointed, each panel to be chaired by the chairman or vice-chairman of the board (215). The Committee did not recommend a codified procedure. There was no overt

contemplation of the requirements of natural justice save insofar as that would be guaranteed by the belief that:

we think it most important that a prisoner charged with a prison offence should have the benefit of orderly procedure and of all the safeguards that operate in favour of a defendant in a criminal court (216).

It has already been seen that, for Franklin, the latter did not encompass representation or assistance. Whereas a codified procedure was not felt necessary, "informality and slackness" (217) could be avoided by ascertaining that adjudicators and prisoners "should be fully informed about the course which the proceedings will follow". The recommendation that a notice to this effect should be incorporated in Prison Rules was not adopted, though the draft presented in the Report forms the basis for the present Form 1145 (218). The final recommendation, resisted by the Prison Commission, but now part of standard procedure, was that the governor should withdraw during the panel's deliberation as to guilt and nature of award. The Weiler working party had had, of course, procedure as one of its principle concerns. Weiler, as Franklin before him, noted a lack of consistency in the way in which adjudications were mounted (219). The desirability of adjudicating within a relaxed environment was stressed so that the prisoner could feel at his ease in presenting evidence. Weiler made the revolutionary recommendation, in the prison context, that hearings should take place with the prisoner sitting down. The escorting officers should sit to his side. The practice of "eyeballing" should cease. Many boards and governors implemented this recommendation immediately. Others resisted until instructed to implement the recommendation.

Some still resist (220).

Weiler addressed the need for a standard procedure. The working party noted that a brief 'model procedure' had been used for instructional purposes, at the Prison Service College in Wakefield. The merit of a comprehensive standard procedure, for Weiler, was twofold:

It will greatly facilitate the training of new members and the ease with which they can familiarise themselves with, and prepare themselves for, the responsibilities of adjudication. Secondly, adherence to such a procedure will obviate the present risk that the findings and awards of an adjudication may have to be set aside on review, as a result of procedural deficiencies which are technical and do not relate to the actual merits of the case (221).

Here, of course, Weiler was referring to a review by the Secretary of State following a petition. The question of judicial review had not arisen by the time of the Report. The drafting of a standard model procedure was, perhaps, Weiler's greatest contribution to the development of coherent and consistent adjudications within all prisons. His Report had regard to the fact that the Prison Department had embarked upon the drafting of a 'Notes for guidance of boards of visitors' at the same time that the working party was meeting (222). It was hoped that the draft standard procedure would be incorporated. Weiler recommended, further, that the guidance for governors contained in Standing Orders should be revised, having regard to some of the implications, in the model procedure for them (223). That did not come about, but in 1977 the so-called "yellow book" and "green book" relating to governors and boards adjudications respectively were published by the Prison Department (224).



Weiler rejected the practice of some boards that conducted adjudications without the presence of the governor. It was important that he attend to give his report, after a finding of guilt, upon which the prisoner should be able to question him. He should sit apart from the panel to indicate that he was not part of it and should withdraw during deliberation upon guilt and award (225). The working party was not able to recommend a 'tariff' system of punishments. The circumstances of an abscond, could vary so much from prison to prison that it was essential to keep a flexibility in the system (226). It was suggested that, where two or more absconded together and one, who was apprehended first, was adjudicated upon, details of the award made should be available to the panel concerned in adjudicating upon his confederate (227). Consistency could be encouraged by the adjudicating panel having available to it a list of offences and awards over the previous 12 months, by discussing awards at the monthly meeting, and by the governor providing boards with details of his awards. Communication between boards was to be encouraged to help ensure consistency.

Weiler's working party did not contain lawyers. Its Report and the yellow and green books were drafted, within P3 Division of the Home Office by administrators. There is no reference to natural justice in either of the publications. They are permeated by considerations of fairness, yet, as the course of litigation developed, the recommended procedure became out of date. It contained guidance on the reduction of charges that was overtaken by ex parte Smith (228), had no guidance on standards of proof nor was there reference to

representation or assistance since there was the firm belief that such could not be allowed.

A further factor to be taken into account in considering the influences upon a changing procedure is that of the "ginger group", AMBOV (Association of Members of Boards of Visitors). AMBOV had been set up in 1980 following a letter in The Times that urged the "promotion, encouragement and exchange of information on all matters relevant to the interest and effectiveness of board members" (229). Funding was initially assisted by the charitable Rowntree Trust (230). Within a year, a periodical was in quarterly circulation, conferences were being organised and the "AMBOV Handbook" had been prepared to supplement the advice given in the "green book" (231). The looseleaf format of the handbook made simple the addition of amended pages to allow for changes in the law. Significantly, unlike the "green book" the Handbook was drawn up by a solicitor and a leading academic criminologist - then both members of boards of visitors. When, in 1984, the Prison Service College was asked to advise on the revision of the "green book", it was the format of the AMBOV Handbook that influenced some of the recommendations made (232). A welcoming, though incredulous, Prison Officers' Association expressed surprise that the formation of the AMBOV had been "allowed" by the Prison Department (233) and, indeed there is evidence to suggest that there was resistance to this at both departmental and board of visitor level (234). If ex parte St. Germain was a watershed, then ex parte Tarrant was another. AMBOV's response was immediate and additional procedural advice, to be bound into the handbook, was

promulgated to members almost a year before the Home Office matched this with the revision of the "green book" (235). The procedural change that ex parte Tarrant brought about will be examined in Chapter Four.

### Chapter Three(3)

#### GOVERNORS AND BOARDS OF VISITORS: THE SAME, BUT DIFFERENT?

Prison governors have more limited powers of punishment than boards of visitors (1). Nevertheless, the awards that they may make, particularly when these are ordered to operate consecutively, can seriously affect the condition of a prisoner's incarceration. In 1985, governors adjudicated in 95.5% of disciplinary hearings in male institutions and in 94.5% of hearings in female institutions (2). In 1986, the figures were 95.4% and 95.3% respectively (3). Thus, proportionately, the impact of their decisions upon the discipline of institutions enormously outweighs that of boards. But what if governors make mistakes, or act unfairly, in their conduct of internal proceedings - can the prisoner seek a direct remedy by way of judicial review as is the case with boards? The answer, within the English and Welsh jurisdiction, until very recently was that he could not. He could only proceed indirectly by seeking judicial review of the Secretary of State's decision following a petition on the point. The thread of case law is slight and, when compared with the authorities within the jurisdictions of our close neighbours, particularly Northern Ireland and the Irish Republic, this is difficult to comprehend, save in terms of "hands off".

Maintenance of internal discipline within the traditional mould has been seen as analogous to that administered by commanding officers of regiments or sea captains (4), schoolmasters (5) or managers (6). Prison governors, generally, concurred with the "manager" analogy. At a meeting of their branch of the Society of Civil and Public Servants with members of the Home Office in February 1987, to consider the implementation of new management structures, the governors' view was

that "it was essential for him [the governor] to be actively involved in day to day management, eg, adjudications" (7). Jenkins (1987) then a serving governor, described his view of the function of governors' reports as being "regulatory or managing, rather than a simple pursuit of justice" (8).

The "manager" analogy is the one that has informed most judicial pronouncements over the years. In R v Board of Visitors of Hull Prison ex parte St. Germain, in 1979, an attempt was made, for the first time, to examine the governor's role less perfunctorily than hitherto. All three Lords Justices spoke obiter on the point of governor's hearings. Megaw L.J. considered that, whereas boards of visitors were charged with various responsibilities connected with prison administration, their adjudication function was independent and different in character from their other functions. A governor, on the other hand, had powers of summary discipline "intimately connected with his functions of day to day administration". He continued:

To my mind, both good sense and the practical requirements of public policy make it undesirable that his exercise of that part of his administrative duties should be made subject to certiorari (9).

Waller L.J. perceived prison discipline as a continuum starting with that maintained by the prison officer on the landing, in the yard of workshop. Only when that failed would the governor become involved. He drew the distinction between the governor's "long stop" position in the mechanisms of internal control and that of a board of visitors exercising a judicial function. He concluded:

I agree with ... the importance of the officer charged with maintaining discipline not being interfered with by the courts (10).

He said that he could not envisage any circumstances in which certiorari would go against a governor.

Shaw L.J., however, in a lengthier and more considered analysis of the distinction, concluded that, whereas judicial intervention in prison management would generally be "irrelevant, but also intrusive and impolitic" (11), deprivation of liberty did not imply that a prisoner would hereby be disinvested of certain residuary rights. That Prison Rule 7.1 enabled a prisoner to petition the Secretary of State in respect of stating a grievance did not bar him from seeking other remedies available at law:

The opportunity for a prisoner to seek from the Secretary of State redress for a grievance (rr.7 and 56) does not amount to a right of appeal for review of an unwarranted decision by a board of visitors or a prison governor. The fact that such means of possible redress has not been pursued before the application is made to the court may, in some cases, be regarded as a discretionary obstacle to the grant of relief by the courts; but it cannot be an absolute bar ... I do not for my part find it easy, if at all possible, to distinguish between disciplinary proceedings conducted by a board of visitors and those carried out by a prison governor. In each case the subject matter may be the same; the relevant fundamental regulations are common to both forms of proceedings. The powers of the governor as to the award he can make (which really means the punishment he can impose) are more restricted than a board of visitors in a corresponding situation; but the essential nature of the proceedings as defined by the Prison Rules is the same. So, in nature if not in degree, are the consequences to a prisoner (12).

Shaw L.J. then reminded himself that the case under consideration did not concern governors' adjudications and he confined the rest of his judgment to those of boards of visitors.

His judgment, whilst stating a minority view on the review of governors' adjudications, at least hinted that there was an argument to be made out on the point. It is perhaps strange, therefore, that some four years were to elapse before an attempt was made to seek leave to apply for judicial review of a governor's adjudication. On 12 August 1983, Mr. Ewing, a prisoner then at Cardiff prison, applied for judicial review of a governor's adjudication held there (13). The prisoner had forfeited remission and was thus being detained beyond his

earliest date of release (ie. the point in sentence when he would normally have been released, taking into account his period of remission for good behaviour). Popplewell J. granted leave to apply for judicial review. The Home Office was not prepared, at that time, to risk an adverse finding. Accordingly, the Secretary of State invoked his power under Prison Rule 56.1 to remit the award and to restore forfeited remission to Mr. Ewing who, then having no grievance, abandoned his application.

It fell to the Court of Appeal, one year later, fully to explore the merits of an application for judicial review of a governor's decision at adjudication. This was in R v Deputy Governor of Camp Hill Prison ex parte King, the facts of which were related in Chapter Three(1) of this study (14). The deputy governor of the prison had adjudicated; Mr. King had been found guilty and had been ordered to forfeit fourteen days remission. He asked for leave to apply for judicial review of the deputy governor's decision. The Divisional Court held that there was no error of law to be reviewed. On the general principle Kerr L.J. was of the view that governors' adjudications could be directly reviewed and Glidewell J. disagreed. On appeal all three Lords Justices agreed that there had, indeed, been a misconstruction, by the deputy governor, of Rule 47.7. What of the central question of judicial review? The judgments, it is argued, appear flawed by alarmist policy considerations (15). Lawton L.J. took into account the applicant's contention that, since adjudications under Prison Rules 1964 conducted by boards of visitors are subject to judicial review, logically those made by governors under the same Rules must also be so subject. Despite this, he excluded that possibility:

Broadly stated, judicial review is available when any person exercising statutory functions misapplies public law. Judicial review, however, is not available merely because someone exercising statutory functions performs them

incompetently. The courts are not concerned with supervising the exercise of statutory powers of management, but with preventing the misuse of public law. It follows, so it seems to me, that this court has to decide whether a prison governor when making an adjudication ... is performing a management function or exercising a judicial one (16).

He placed the position of the adjudicating governor as "nothing more than a manager appointed by and answerable to the Secretary of State" (17). He perceived boards of visitors as being excluded from the management function. Thus, for them, adjudications had a judicial character. Whilst a governor's adjudication had judicial trappings it was "but one aspect, and a minor one, of his managerial functions" (18). Lawton L.J. stressed the policy implications of exposing governors' adjudications to judicial review:

The powers given to the governors for imposing awards for offences against discipline are necessary for the proper and efficient discharge of their duties as managers. All prisons are likely to have within them a few prisoners intent on disrupting the administration. They are likely to have even more who delude themselves that they are the victims of injustice. To allow such men to have access to the High Court whenever they thought the governor had abused his powers, failed to give them a fair hearing or misconstrued the Prison Rules would undermine and weaken his authority and make management very difficult indeed (19).

He considered those options available to the aggrieved prisoner. He could complain to the board of visitors which, of course, is not an appellate body from a governor's adjudication and thus would be unable to grant relief. Secondly, said Lawton L.J., the prisoner could petition the Secretary of State. In the latter case he offered a possibility of review:

If a prisoner has a well founded complaint that a governor has misconstrued a Prison Rule and the Secretary of State has rejected his petition inviting attention to the misconstruction, he may be entitled to apply for judicial review of the Secretary of State's decision, the relief being in the form of a declaration as to what is the correct construction (20).

Concurring, Griffiths L.J. acknowledged the force of argument that a



logical extension of the reviewing of board of visitors' decisions should be to extend it to governors' adjudications too. However he declared himself "firmly of the opinion that the court should not extend the boundaries of judicial review to embrace the decisions of prison governors" (21). Likewise, stressing policy considerations, he noted:

The common law of England has not always developed on strictly logical lines, and where logic leads down a path that is beset with practical difficulties, the courts have not been frightened to turn aside and seek a pragmatic solution that will best serve the needs of society (22).

He envisaged the prospect of every disciplinary award being the subject of challenge at law, thus undermining a governor's authority. This point was echoed by Browne-Wilkinson L.J. in his concurring judgment:

The practical repercussions of holding that the disciplinary decisions of prison governors are subject to review by the courts are frightening. It would be to shut one's eyes to reality to ignore the fact that, if prisoners are able to challenge, in the courts, the disciplinary decisions of the governor, they are likely to try to do so in many often unmeritorious cases and the maintenance of order and discipline in prisons is likely to be seriously undermined (23).

Griffiths and Browne-Wilkinson L.JJ. also agreed that the proper course for the aggrieved prisoner would be to petition the Secretary of State whose decision on the petition could be reviewed. Leave to appeal to the House of Lords was refused.

The judgment in King is open to criticism. Zellick (1984) (24) pointed to Lawton L.J.'s confused understanding of the duties of boards of visitors which, he assumed in his judgment, had no managerial function. Boards spend less time adjudicating than in undertaking their other duties and if those other duties are not managerial in character at least they possess executive characteristics (25). Why then, should the performance of boards' other duties not become impaired by reason of the susceptibility to judicial review of their adjudications?

Zellick concluded that "these observations must be seen, like the invocation of common sense and public policy, as mere judicial rhetoric" (26). Further, he pointed to a non-sequitur whereby it was suggested, by Griffiths L.J., that the governor's authority would be undermined and his job made more difficult were his adjudications subject to review. Magistrates, judges and boards of visitors act daily with this in prospect. All that is necessary, contended Zellick, is that, like the latter groups, governors should adhere to the law and to correct procedure (27).

There are other criticisms to be levelled at the King judgment. First, merely because a remedy exists by way of petition to the Secretary of State a prisoner should not be prevented from seeking remedy by other means, in the absence of legislation to that effect (28). Secondly, if disruption and mayhem in prisons is likely to result from a governor's decisions being subject to review, it is equally likely that the same result may occur from the frustration of the aggrieved prisoner in having to overcome internal hurdles (eg. the petition) before the law will intervene to safeguard him. Boyle, Hadden and Hillyard (1975), albeit in a different context, expressed the role of the legal system in this respect as follows:

Any institution, in a liberal democratic state must have the confidence of the people if it is to operate successfully. The legal system is no exception ... The belief that, when necessary, ordinary people may seek, and obtain, the redress of grievance through legal channels, reduces the likelihood that they will resort to other, more violent and disruptive means (29).

So access to the courts may, in fact, assist in the effective management of prisons, rather than hinder it. In the third place, it is disappointing that the discredited "floodgates" argument was employed in support of the ratio decidendi of King. Were there to be an increase in the number of applications for leave to apply for

judicial review emanating from prisons, that would not necessarily reflect incompetence within the organisation, but simply might reflect the growth, in the population at large and described earlier in this paper, of seeking such a remedy.

The "floodgates" argument is unlikely to be well founded and its use in judgment in King is questionable save in terms of misplaced "public policy" considerations. It might be inconvenient for prison governors and for the courts to be deluged with applications, but its proper perspective was that previously noted by Kerr L.J. in R v Secretary of State for the Home Department ex parte Tarrant (30). He had dismissed "floodgates" as unlikely to have a basis in fact, or even if it were to, then he dismissed it as a factor which should be taken into account in reaching a correct judgment. In support, he cited Waller L.J. in ex parte St. Germain as follows:

I realise that, when dealing with prisoners living in a prison world there is the risk of a number of unmeritorious applications for judicial review. This is a risk which must always be accepted so long as there is a possibility of a meritorious application. I would regard the possibility of an application in the nature of prohibition as mandamus as so remote as to be ignored; and I would expect a successful application for certiorari to be only a remote possibility in any event. The fact that there are no precedents for such applications is a possible indication that there will not be a flood of applications. But even if there were, that would not be a ground for refusing the remedy, because there might in a particular case be a possibility of real injustice (31).

The final criticism of King originates from an examination of how courts in the neighbouring jurisdictions have decided the question. Whereas the law of other jurisdictions is largely excluded from this study, it is important to realise that "King-type" issues had been examined elsewhere and with different results. In the Irish Republic, Byrne, Hogan and McDermott (1981) noted that "the power of the High Court to review awards of punishment meted out by the prison governor, was not seriously doubted" (32). So, for example, judicial review, by

way of certiorari, of governors' adjudications had, for some time, guaranteed safeguards to the accused prisoner and had also clarified procedural issues for adjudicating governors. In The State (Gallagher) v Governor of Partlaoise Prison in 1977 (33), Finlay P. held that the right of the accused to be heard did not extend to being represented at a governor's adjudication. Further he endorsed the governor's authority to suspend part, and not all of an award. In The State (Fagan) v Governor of Mountjoy Prison (54) the following year, a prisoner's contention that natural justice had been breached since the adjudicating governor, as a manager of the institution, was an "interested party" was rejected. Governors were advised, through the judgment, that the decision would have been otherwise had the governor witnessed the alleged offence. In The State (Richardson) v Governor of Mountjoy Prison (35) in 1980, Barrington J. held that any punishment awarded must not only be in concert with the need for good order and discipline within the prison, but also with the prisoner's constitutional rights. Discipline within Irish prisons does not seem to have suffered as the Lords Justices in King feared, nor does there appear to be evidence that opening the feared "floodgates" has swamped either the administration or the courts.

The courts in Northern Ireland also followed a different line in deciding the point. In R v The Governor of the Maze Prison, ex parte McKiernan in 1985 (36) the Court of Appeal addressed three aspects of the argument against the reviewability of governors' hearings. First was the contention that governors are in a position comparable to that of the commanding officer whose disciplinary decisions are not open to judicial review. Already, both Megaw and Waller L.JJ. had voiced caution against the purported authority for this view (ex parte Fry (37)) in their judgments in ex parte St. Germain. Megaw L.J. had noted

that the decision in ex parte Fry was based on the facts of the case and doubted that it remained good law (38). In ex parte King, Lawton L.J. had examined the authority of R v Army Council ex parte Ravenscroft with regard to the invulnerability of military discipline to judicial review (39). Seeing prison governors as managers, even he was unable to accept a direct parallel. Nor could Lowry L.C.J. in ex parte McKiernan. He endorsed the caution of Megaw L.J. in respect of ex parte Fry. Further, he distinguished disciplinary hearings by the governor from those of commanding officers on the basis that the latter are characterised by the presence of a contractual relationship:

Unwarranted reliance has, in my opinion, been hitherto placed on the proposition that the chief officer of a force governed by discipline ought not to be subject to the prerogative jurisdiction. Even if this proposition is sound in relation to the discipline exercised by a commanding officer of a battalion over the men under his command ... (which I do not unreservedly accept) it is unsound in relation to the disciplinary functions of the governor of a prison when hearing charges against inmates of that prison who do not belong to the disciplined body of men of which that governor is the superior officer; the analogy between prisoners ... and military subordinates is not persuasive (40).

"If there is an analogy with a commanding officer" concluded Lowry L.C.J. "the true parallel is in relation to prison staff, and not to inmates" (41). He then addressed the argument that judicial review is excluded since there remain alternative remedies - the argument which, it will be recalled, had found favour in ex parte King. He dismissed it as follows:

I would make the following points:

- i) the existence of an alternative remedy is no bar to certiorari;
- ii) this alternative remedy is neither all-embracing nor clearly defined;
- iii) the subject's recourse to the courts for the determination of his rights is not excluded except by clear words (42).

The court then considered the public policy argument against extending judicial review to governors' hearings. Lowry L.C.J.

presented an alternative view from that with which we have become familiar in England and Wales:

It seems to be both reasonable and in the public interest that a prison governor, when adjudicating on a charge against a prisoner, should be expected to proceed according to natural justice and prison rules and quite unreasonable and contrary to the public interest in a civilised state that he should, in his judicial capacity, exercise an autocratic power and enjoy a freedom from High Court supervision which are denied both to the board of visitors and to all inferior courts (43).

He declared that he saw no difference between governors' and board of visitors' adjudications and disposed of the "floodgates" argument briefly and comprehensively:

The floodgates argument is a last resort which is not in high judicial favour and which certainly does not impress me in this kind of case (44).

He then quoted extensively from the judgment of Shaw L.J. in ex parte St. Germain and concluded:

I would go so far as to say that the entire judgment of Shaw L.J. in that case is a cogent and convincing exposition of the argument for certiorari going not only to a board of visitors but also, by implication, to a governor when hearing a charge (45).

O'Donnell L.J. concurred.

Commenting upon ex parte McKiernan, Zellick (1985) considered that the judgment "puts to shame the decision of its English counterpart in King with its rhetorical and unconvincing invocations of public policy, practicalities and common sense" (46). Nevertheless, it was one that received a certain degree of affirmation in the subsequent case of R v Governor of Pentonville Prison ex parte Herbage (No. 2) in 1986. May L.J. in the Court of Appeal (47) in his minority judgment, employed "King-type" arguments to hold that where, in a prison, an inmate were to be housed would not be a decision that should be subject to judicial review. It was a management decision (48). Purchas L.J. approved of May L.J.'s dicta as regards King and noted that "public

policy and the difficulty of managing a prison and maintaining discipline therein [imply that] this is clearly a convenient and salutary position" (49). So, it appeared that the matter rested at the point where the prisoner in Northern Ireland could seek remedy by way of judicial review of governors' adjudications, yet his English and Welsh counterparts could not. Their remedies remained limited to complaint to the Parliamentary Commissioner for Administration, with all the uncertainties that that implies (50) and petition to the Secretary of State whose decisions would be subject to judicial review.

The contradictions within the two jurisdictions were not resolved until the House of Lords gave its judgment in R v Deputy Governor of Parkhurst Prison and another ex parte Leech and another, in 1988 (51). In his leading judgment, Lord Bridge reviewed the authorities. He unequivocally adopted the ratio of McKiernan:

It is now well established that where any person or body exercises a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be exercised judicially, the court has jurisdiction to review the exercise of that power. The governor of a prison holds an office created by the 1952 Act and exercises certain powers under the 1964 Rules which were conferred on him and him alone. The exercise of those powers might well affect the legitimate expectations of prisoners. The governor's duty to act in accordance with the rules of natural justice is clearly spelt out in the rules. Thus a governor, adjudicating, bears all the classic hallmarks of an authority subject to judicial review (52).

His Lordship believed it fatuous to argue that a distinction could not be drawn between a governor's judicial function in relation to infractions of discipline and his day-to-day management functions (53). He was scathing in his rejection of the "commanding officer" and "schoolmaster" analogies. Accepting that governors' hearings were likely to concern less weighty matters than those coming before boards and allowing for greater speed and less formality before him, there remained "no foundation on which to build a logical defence of the

denial of jurisdiction to review governors' awards" (54). The "floodgates" argument was rejected as "one which should make our judicial blood run cold" (55). Were the courts to be "inundated by a flood of unmeritorious claims" His Lordship was satisfied that they would decline jurisdiction. He recommended an amendment to Prison Rules whereby the Secretary of State would be empowered not only to remit punishment, but also to quash the adjudications. The reason was two-fold. First, a flawed adjudication in respect of which punishment had been remitted might still indicate to the Parole Board that the prisoner was a troublemaker - the finding of guilt still standing. Second, were the Secretary of State to have this power "it would be difficult to suppose that the court, as a matter of discretion would be likely to grant judicial review to the prisoner who had not petitioned the Secretary of State" (56). A caveat was entered in respect of the civil servant dealing with the petition who might be likely simply to accept a governor's account of proceedings and who might not deal with the petition in a judicial way. He concluded that:

No-one can predict the consequences with any certainty. It may be a virtual certainty that a number of troublemakers will take every opportunity to exploit and abuse the jurisdiction. But that is only one side of the coin. On the other side it can hardly be doubted that governors or deputy governors dealing with offences against discipline may occasionally fall short of the standards of fairness which are called for in the performance of any judicial function. Nothing, I believe is so likely to generate unrest among ordinary prisoners as a sense that they have been treated unfairly and have no effective means of redress. If a prisoner has a genuine grievance arising from disciplinary proceedings unfairly conducted, his right to petition a faceless authority in Whitehall for a remedy will not be of much comfort to him. Thus, I believe it is at least possible that any damage to prison discipline that may result from frivolous or vexatious applications for judicial review may be substantially offset by the advantages that access to the court will provide for the proper ventilation of genuine grievances, and, perhaps, the availability of the court's supervisory role may have the effect on the conduct of judicial proceedings by governors, which it appears to have had in the case of boards of visitors, of enhancing the standards of fairness observed (57).



Lords Fraser, Brandon, Ackner and Oliver concurred.

What will be the effect on the system of the Leech judgment? On the day of the judgment, the Independent newspaper reported that:

Prison reform groups hailed the decision as a significant step in prisoners' rights which could open the way to other challenges to the penal system (58).

If the model of the Irish Republic is taken, challenges there will be. One can reasonably anticipate the advent of requests for legal or other assistance at governors' hearings and for hearings to be conducted by an independent governor (both rejected by the courts in the Irish Republic). Certainly it is difficult to see how a governor, confronted with a request for the former could do other than apply the Webster J. criteria of ex parte Tarrant in using his discretion (59). The dicta of Lord Goff in Hone v Maze Prison Board of Visitors; McCartan v Same (60) are unfortunate in this respect. He found it difficult to envisage circumstances where representation would ever be appropriate before the governor. But this writer would argue that if the governor is to act judicially, he must certainly "direct himself properly in law - he must call his own attention to the matters which he is bound to consider ... if he does not ... he may truly be said ... to be acting unreasonably" (61). Any fetter, eg. a Home Office instruction that legal representation is not allowed at governors' hearings would, clearly, inhibit a reasonable use of discretion which, it is argued, should be based upon the Webster J. criteria. Indeed, Lord Bridge, in ex parte Leech uttered a strident warning as to the effect of any Home Office attempt to interfere with a governor's discretion in this respect:

A prison governor may, in general terms, be aptly described as a servant of the Secretary of State, but he is not acting as such when adjudicating on a charge of a disciplinary offence. He is then exercising the independent power conferred on him by the rules. The Secretary of State has no authority to direct the governor, any more than the board

of visitors, as to how to adjudicate on a particular charge or what punishment should be awarded. If a Home Office official sought to stand behind the governor at a disciplinary hearing and tell him what to do, the governor would properly send him packing ... Short of giving a direction under Rule 51.5 to transfer disciplinary jurisdiction over a particular case to his own officer, the Secretary of State has no power to interfere with either the governor or the board of visitors before they make their award (62).

Perhaps ex parte Leech will act as the spur towards the increased legal awareness training for governors, the need for which was considered in Chapter Three(1). A degree of attitude training may also be necessary now that we know that governors must adjudicate in a role other than that of manager. They should no longer reach the pragmatic solution that will be informed by the need for "balance" within the institution, or by staff expectations of punishment. They must now be meticulous in their objectivity. Considerations of the overall good of the establishment are likely to play a lesser part in the process. Sadly, the guidance issued to governors immediately following the ex parte Leech judgment addressed none of the fundamental consequential issues (63). It assured them that only a handful of prisoners had sought judicial review following petitions to the Secretary of State after ex parte King. They were assured, too, that only a small proportion of applications for leave to apply for judicial review had been granted and that if judicial review of a governor's decision at adjudication were to be sought, all papers should be forwarded to the Prison Department. There was no hint of reminding governors that, in adjudicating, it was now accepted that they act judicially and not merely managerially. There was no attempt to apprise them of the facts of ex parte Leech or of ex parte Prevot (64) with which it was joined. The opportunity to implant a little legal awareness in governors, in an area impinging upon the daily performance of their duties was not taken.

## Chapter Three(4)

### SUBSYSTEMS OF DISCIPLINE

#### Introduction

Klare (1960) described the prison as a temporary home for those serving their sentences. It is the place wherein "perhaps for years on end, he [the prisoner] will eat, dream and wake, have his quarrels and his reconciliations". Staff too, share institutional life. It is "where their whole working life is spent and, to some, it is a good deal more than that: the scene of endless endeavour, occasional triumph and frequent frustrations" (1). Barker (1986) described staff as "those other prisoners" (2). The Prison Officers' Association (1987) found that comments made about their public image included "They seem to lead separate lives ... in a way, the wardens [sic] are doing time too" (3). Bardsley (1987) noted that officers, as well as prisoners, are subject to "extreme pettiness" in terms of some of their conditions of service (4). McDermott and King (1988) found that staff and prisoners shared a mistrust of the Home Office (5). Each group, prisoners and staff, depends upon the other insofar as the maintenance of a reasonably comfortable life is concerned. Much, in the management of a prison, hinges on the balance between the conflicting (or sometimes congruent) interests of both groups, but balance does not imply equality. As a "contaminated man" (Sykes 1959) (6) the prisoner, traditionally, has been seen to have demonstrated the justification for his isolation from ordinary, decent people. "Symbolically", argued Fitzgerald (1977) "prisons represent the triumph of good over evil" (7). The prisoner was, until recently, believed to have forfeited most of his civil rights by coming to prison, or if he had not forfeited them, it was difficult, or impossible for him to exercise them. Staff are invested with an authority and power over the prisoner that allowed

Klare, as other writers before and since, to conceptualise prison as a totalitarian regime (8). He acknowledged external democratic control but listed the characteristics of a prison that led him to his conclusion. These included the imposition of the will of a small ruling group, sometimes by force, upon the larger group and the effective removal of opposition (9). There is a detailed control of each aspect of daily life, enforced by a proliferation of bureaucratic regulations. There is censorship, the encouragement of informers and even, he argued, the attempt to impose an ideology. Harding, Hines, Ireland and Rawlings (1985) suggested, in this respect, that "uniformity of clothing and appearances reinforces an authoritarian structure and serves to break down individual resistance to an imposed system" (10). Bramham (1980) identified elements of institutional staff dominance as including coercion, control over the ecological setting, over time and timetabling, over information and over scarce resources (11). The question of balance in the institution, then, becomes the preservation of the superior - subordinate relationship between staff, the small ruling group, on the one hand, and inmates on the other. The significance of this is illustrated by Dobash, Dobash and Gutteridge (1986) in their study of Holloway and Cornton Vale:

Prison Rules and their application dominate and direct relationships both amongst prisoners themselves and between prisoners and staff ... The Rules were exercised with wide discretion, which could become, in prisoners' eyes, omnipotent power by prison staff (12).

Institutions have many and varied ways of achieving balance sometimes involving the sharing of power between staff and prisoners (Low 1980) (13). Whereas prisoners' access to the courts has, in recent years, opened up aspects of internal discipline to public scrutiny, the prison shares many of the characteristics of Goffman's (1961) total institution (14). There are other, more subtle, forms of

discipline available to staff by which they may control prisoners without resort to the formal system. Here, too, the courts have, generally, adopted a "hands off" policy. The pattern was set in Leigh v Gladstone and others (15), in 1909, where it was advanced by counsel for the plaintiff that the forced feeding of a suffragette had been adopted as a measure outside the existing rules, to discipline a refractory prisoner. Lord Alverston C.J. rejected this conjecture, seeing the medical officer's and the governor's duty to preserve life as paramount. The practices to be reviewed below do not present such "life or death" dilemmas. However, they represent similarly unchallengeable areas of disciplinary control. McKenna (1983) (16) described it as "oblique discipline". No account such as this can be exhaustive - practices will change from prison to prison, and over time but they can have just as great or greater an effect upon prisoners, and the regimes under which they live, as can resort to formal methods.

The manifestation that there exist subsystems of discipline - staff's discipline as it were - commences on reception to a prison. Fitzgerald (17) provided a colourful, if atypical, account of the process which is a significant one in terms of control whereby prisoners are encouraged to see themselves as "less" than those in authority over them. Garfinkel (1956) (18) coined the phrase "degradation ceremony" to describe the process of personality stripping whereby adjustment to institutional processes and expectations takes place. Despite this there are suggestions, in the literature, that however punitive such processes may appear, prisoners rapidly adjust to them in different ways - from placid acceptance (19) to "fighting back" (20).

Prisoners' memoirs and the general tenor of much of the radical pressure group press could lead to the conclusion that internal

disciplinary measures are based upon naked abuse of power, either in terms of use of physical force or of drugging - the emotively nicknamed "liquid cosh" (21). Examples of such behaviour by staff upon inmates do exist. Reports persisted for some time that the so-called "Birmingham bombers" were beaten by staff, at Birmingham prison, in 1974 (22). This was later to be admitted (23). Eight staff were convicted of conspiring to assault prisoners following the Hull Prison riot of 1976 (24). The Chief Inspector of Prisons had previously criticised their "unnecessary zeal" which caused "damage to and disappearance of" prisoners' property (25). Though three members of staff were, in 1980, acquitted of the murder of a prisoner, Barry Prosser, a verdict of "unlawful killing" had already been returned at a coroner's hearing (26). Such despicable, if rare, behaviour has led certain academics to conclude that "brutality is a feature of everyday life in prison" (Fitzgerald and Muncie 1983) (27). Moreover, fear of such conduct can create a climate whereby prisoners may be uncertain about their own safety. Thus, one was to tell the writer:

You just don't know what it's like when you are locked in at night and you hear a group of staff hurrying about the wing. It makes you not assert yourself and just keep your head down (28).

Rayner (1974), in her account of inmate anxiety within Brixton prison, recognised this characteristic:

Prisons are assumed [by prisoners] to have at their disposal, far reaching resources of possible harm in the form of disciplinary sanctions ... The individual can have a general misconception about the ability and freedom of the staff to assert their authority, formally or informally, by physical means (29).

Other abuses of the superior-subordinate relationship, acknowledged by one governor to his colleagues, concerned "the bad old days when officers sometimes deliberately "made" reports and on occasion, even planted prohibited articles (30).

When staff acted illegally they were always vulnerable to the process of law. The hurdles that had to be overcome by the prisoner seeking a remedy have been described elsewhere in this study. However, even at the height of "hands off" it was made clear, for example by Winn J., that there were some aspects of behaviour by prison staff which would render them liable to intervention by the courts. Thus, in 1960, in Hancock v Prison Commissioners, despite rejecting the plaintiff's argument about calculation of a sentence, he was to state, obiter, that

It is manifest that the control of prisons and prisoners ... should not be interfered with by the courts unless in any particular case there has been some departure from law and good administration amounting to an offence in law (31).

Clearly, the incidents described above constitute "a departure from law ... amounting to an offence" and a remedy could be obtained. It must be recognised that the large majority of prison staff condemn with disgust those kind of excesses. The point is endorsed by Jones and Cornes (1977) who concluded that prison officers are not "sadistic thugs" who enjoy inflicting injuries upon their "defenceless charges" (32). Nevertheless, from a penological perspective, there exists, in the practice of prisons, a range of options available to staff whereby prisoners may be disciplined in covert ways, which cannot be challenged, and where no effective remedy is available. Some methods exist within the framework of statutory rules, circulars, etc., others arise out of the interaction between the superior-subordinate groups that exist whereby covert discipline may be administered to preserve the balance of power in the regime. The position is stated succinctly in Halsbury:

Indiscipline in a prison may also be dealt with informally by the prison authorities by such devices as transfer to another establishment, alteration in categorisation and rejection for various privileges such as home leave which are in the gift of authorities and are not regulated by the Prison Rules (33)

Morris (1987) expressed a relevant concern:

The danger is that the increasingly legalistic nature of adjudications will emasculate their value as a control device and thus induce prison officials to place greater reliance on administrative powers as disciplinary tools (34).

It is this danger that will now be examined.

## 1. A DISCIPLINARY SUBSYSTEM WITHIN THE RULES

### i) "Administrative Segregation" as a disciplinary subsystem

Prison Rule 43 provides as follows:

43.1 Where it appears desirable, for the maintenance of good order and discipline or in his own interest, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association accordingly.

43.2 A prisoner shall not be removed under this Rule for a period of more than 24 hours without the authority of a member of the board of visitors or of the Secretary of State. An authority given under this paragraph shall be for a period not exceeding one month, but may be renewed from month to month.

43.3 The governor may arrange, at his discretion, for such a prisoner as aforesaid to resume association with other prisoners and shall do so if in any case the medical officer so advises on medical grounds.

The circumstances in which a prisoner is segregated "in his own interests" are likely to be when he is a sex offender, usually against children, when he is in debt to prisoners or when he is thought by his fellows to be a "grass" or informer (35). All the Rule does, in this respect, is to remind the governor of his common law duty of care to those in his custody who may be at risk. Invariably the use of segregation facilities under this part of the Rule will be at the request of the prisoner concerned. There is more contention about the use of the Rule "for the maintenance of good order and discipline", a process referred to by Gruner (1982) as "administrative segregation" (36). He



described its use as part of a disciplinary subsystem thus:

Rule 43 allows any prisoner to be separated indefinitely from others without being charged with any specific offence and without a hearing before a tribunal of any kind. The procedure is an administrative act, independent of the formal prison disciplinary machinery. It is not classified as a punishment, but the conditions of the regime ... are often almost indistinguishable from solitary confinement (37).

A former prison governor and now Deputy Director General, Brian Emes, gave a useful synopsis of the kinds of prisoner for whom segregation is necessary for the purposes of good order and discipline in his evidence before Tudor Evans J. in Williams v Home Office No. 2 (38). Such prisoners were said to be those who are extremely violent, those obsessed with their innocence who might do damage whenever left in the prison community, those who attack sex offenders who might be reluctant to give evidence against them, those who practise extortion and, lastly, the potential rioter or escapee.

Gruner reviewed a number of cases where injustices, or at least inconsistencies, seem apparent. Some may be open to dispute (39). However, his general thesis that the system is open to misuse, is inadequately overseen by board of visitors members, and cannot be challenged in the courts, merits examination.

(a) The possibility of misuse

Every prison will have its proportion of difficult prisoners - perhaps in the same ratio to those in life outside the walls - who find it hard to live within the expectations of society. The Advisory Council on the Penal System (1968) described them as "the small minority of prisoners on whom the normal sanctions of withdrawal of

privileges and loss of remission have no effect and who, for whatever motives, or from whatever defects of personality, will disrupt the normal life of the prison community (40). For a governor or his staff to identify these people may not be an exact science. Mangold (1977) indicated the dilemma for staff in trying to assess whether or observed behaviour was innocuous or dangerous.

Try dealing, day in, day out, with that unpredictable psychopath on the wing; try figuring out what the IRA bomber is doing talking conspiratorially with the arsonist (41).

An anxious staff may experience even the most normal of human behaviour as an indicator of impending disciplinary problems. Thus, two serving prisoners (Anderson and O'Dwyer 1987) observed that "the alertness of staff here is a recognisable component of their acquired behaviour, ie. [sic] a noisy laugh is enough to send screws investigating" (42). Often reasons for the decision to segregate under Rule 43 will be clear. In the case of Mr. Manikum, cited by Gruner (43), an escape attempt from an Isle of Wight prison was thwarted on the discovery of an inflatable dinghy and various navigational aids outside the prison. An investigation suggested that Mr. Manikum had assisted the potential escapees through his "practical sailing experience and knowledge of Solent waters" (44). It was not known that he had committed any offence under Prison Rule 47, nevertheless the governor ordered Rule 43 segregation until transfer could be arranged to a prison where the prisoner's seamanship skills would be of less use to others who might exploit them. On other occasions the evidence upon which a governor will act is less certain.

Information may be given by other prisoners about bullying, extortion, drug dealing and the like. They may be too afraid to formalise their complaint in case of reprisal. A governor will be left to make an ad hoc judgment as to whether "prisoner politics" is at work to secure the removal of a disliked prisoner from the normal life of the prison. Tudor Evans J. turned his mind to this point in stating, in Williams No. 2, that

If a prisoner is beaten up and the governor suspects, but is unable to prove, that a particular prisoner is responsible, he is fully entitled to place the suspect on Rule 43, not to punish the prisoner, but to prevent repetition of the incident (45).

Gruner's criticism that a prisoner is often given an inadequate reason for his segregation (46) may be understood when a governor believes that he must protect the source of his information. The prisoner has no voice in the matter. Tudor Evans J. considered this too:

There is no right to be heard or make any representation against the decision. The plaintiff could, as he knew ... have petitioned the Secretary of State. There is no evidence that the Secretary of State would not have considered the petition fully and fairly (47).

Thus, since the use of Rule 43 for disciplinary purposes is vested so completely in the governor, albeit with the oversight of the board of visitors, a great deal must be taken on trust as to whether or not it is properly used. Other than by acceptance, verbatim, of the accounts of former prisoners, there is little evidence to the contrary. Mandaraka-Sheppard (1986) reported the use of Rule 43 in conjunction with Rule 45 in an example from Styal prison. The latter Rule authorises a governor to confine a

prisoner, temporarily, in a special cell but only for so long as the prisoner is "violent or refractory". In what she acknowledges as "an extraordinary case", a prisoner was so isolated for six and half months (48). Similarly, the ceasing of a practice that had implied an abuse of Rule 43 was reported in a Prison Department minute of 1986. Here, high security prisoners had routinely been segregated under Rule 43, irrespective of the threat posed to good order and discipline, as a matter of course, on the night before transfer (49). If the above represent isolated examples, that the potential for the misuses of the Rule exists can be gleaned from the following extract from the private notes of a board of visitors member:

Strong [staff] feelings rose dramatically at the last adjudication where a suspended award was made. This was an assault charge when she had assaulted an officer by throwing tea. She was on "dirty protest" at the time and the staff concerned undoubtedly must have found the experience very distasteful. Immediately following the adjudication she was returned to "punishment" [sic] as a Rule 43 prisoner. She had been on Rule 43 prior to this offence - kept on Rule 48 (50) prior to the adjudication and subsequently returned to Rule 43 after the hearing. I believe she remained on Rule 43 for up to three weeks afterwards ... As far as Theresa was concerned she was still being punished whether the terminology be Rule 43 or Rule 48 - there being no sign of an award being suspended (51).

Gruner suggested that, despite denials from subsequent ministers, Rule 43 segregation is tacitly accepted as punishment within the Home Office. Henry Brooke, as Home Secretary, described it as "a severe penalty" in 1964 (52). A draft report of P2 Division of the Home Office into the operation of Rule 43, in 1972, acknowledged the effect that prolonged segregation could have. Reviewing previous

policy, the report acknowledged:

the number of cases was relatively small and, although individual prisoners may have suffered considerable discomfort and in some cases acute personal distress under these arrangements, the prevailing situation did not constitute a problem for management (53).

The experience of segregation as punishment may be further complicated when elements of "treatment" are added. The events that led to R v Secretary of State for the Home Department ex parte Herbage (No. 2) in 1987, concerned the location of a 35 stone man who could not climb stairs, but who was otherwise healthy, in a cell in a prison hospital. May J. described the prisoner's complaints:

He is constantly subjected throughout the night to shouting, screaming and banging from the mentally disturbed inmates. He contents that, although he himself is wholly sane, he is surrounded by psychopaths, mental depressives and other mentally disturbed persons with the result that he finds himself unable to sleep ... The applicant's overall contention is that, in these circumstances, he is subjected to cruel and unusual punishment contrary to the Bill of Rights 1688 (54).

Genders and Player (1988) recounted further confusion over the experience of isolation for medical purposes as opposed to punishment in their brief study of a life sentence prisoner main centre:

The all embracing quality of captivity is similarly manifest within the hospital ... The situation is perhaps best illustrated by the fact that, within this area, alongside cells designated for hospital use are segregation cells used for isolating women for disciplinary purposes (55).

It is little wonder that they further found:

Staff were perceived primarily as symbols of authority, their paramount function being that of containment and control. The women drew no distinction between uniformed officers and nursing staff (56).

Whatever the reason for segregation, be it for disciplinary purposes or, on occasion, for treatment, it may well be experienced by prisoners as punishment as long as no clear distinction exists between what Zellick refers to as "non-punitive and punitive dissociation". Thus he was to argue that the Rule 43 prisoner "should suffer none of the consequential privations associated with solitary confinement" (57).

(b) The adequacy of oversight

It has been seen that one of the safeguards provided within the Rules to prevent abuse of Rule 43 segregation is that no prisoner can be so segregated for more than 24 hours without the sanction of a member of the board of visitors or the Secretary of State. That authority remains valid only for one month though it may be renewed. So how does the allegation of abuse of the rule arise? Why, for example, did the board of visitors in the example of Theresa quoted above, not refuse authority to segregate? The answers are complex and lie in the same area of balancing conflicting group interest described earlier in this chapter. A former Director General of the Prison Service explains the board's function thus:

The members must have a sensitive understanding of the approach of management, the attitudes of staff and the problems of inmates. They must earn the respect and confidence of all parts of the prison community ... They need to acquire a working knowledge of the prison system and a full knowledge of all aspects of life within the establishment to which they have been appointed (58).

The attitudes of staff and a knowledge of life within their own establishment may have persuaded board members in

Theresa's case that the staff expectation was for more than a suspended award in response to assault upon one of their number. If staff withdraw support from a board member, despite that member's "considerable power" (59), he may find it very difficult to perform the full range of duties satisfactorily (60). This, together with the knowledge that, if a member refused, an official representing the Secretary of State would be likely to reverse the decision, may have persuaded the member to agree. Such rationalisations were acknowledged by Silburn (1982) who wrote of a "streamlined" system of authorisation, by the board, prevailing at Wandsworth (61). Maguire and Vagg (1984) revealed varying systems of authorisation existing from board to board. In some cases it is obtained from the member paying his rota visit to the prison, in others it may be over the telephone or by post. Some members saw the prisoner first, others did not. In one case, which resulted in a change in a board's practice, authorisation was refused by one member and later obtained from another (62). Gruner quoted two former governors as being unable to remember board members ever refusing authorisation (63). Maguire and Vagg found no case of refusal in their research. Silburn wrote that the continuing authorisation from month to month is "uncomfortably near to being a rubber stamp" (64). Thus, that independent oversight of administrative segregation, as provided by the interest of the board, may not be as effective as one might at first imagine.

(c) Remedies at law

The dicta of various judges about safeguarding the liberties of the individual in whatever state he finds himself, have been considered. So what, then, of the prisoner who believes himself to be unjustly segregated for the maintenance of good order and discipline? A hint of how the matter might be decided was given by Waller L.J. in R v Hull Board of Visitors ex parte St. Germain:

There are many administrative decisions made within prisons which would not be capable of review and would have as serious consequences to the prisoner as some finding of board of visitors. ... A prisoner may be segregated under Rule 43. This would be an administrative decision with serious consequences but one which could not be reviewed by the Court (65).

The issue did not come before the courts until Williams No. 2 (66) some two years later. Mr. Williams had been segregated in a "Control Unit" at Wakefield prison. The period during which segregation was authorised had been extended to 180 days, with the possibility of further extension were the prisoner not to conform with the regime. Authorisation for renewal of segregation was undertaken, not by the board of visitors, but by the Secretary of State under Rule 43.2, acting through his appointed Control Unit Committee. It was conceded by Home Office, that renewal had not been considered on a monthly basis, and, indeed, no discussion of Mr. Williams' case took place at all between 20 August 1974 and 4 February 1975. Yet he remained segregated. Tudor Evans J. considered fifteen different submissions from the plaintiff and, in a lengthy judgment, dismissed each one of them. Significantly, in terms of Gruner's critique, the handling of the question of the



acknowledged breach of Prison Rules in extending segregation was disregarded:

The question I have to decide is whether it is a compliance with the Rule to renew the authority automatically. In my judgment, the renewal of authority under Rule 43.2 does require a consideration of the state of the relevant facts before there is renewal. The language of the provision in the Rule that the authority shall not exceed one month suggests, to me, that the renewing authority should at least look at what happened in the preceding month. That was not done on my findings of fact. The committee did not, on their evidence, even ask themselves the limited question: has anything changed? I therefore find that there was not a compliance with the renewal procedure, but whether it affects in any way, the lawfulness of the plaintiff's detention, is a matter I must consider later (67).

The judge continued to consider the dicta of Waller L.J. in ex parte St. Germain (68), Goddard L.J. in Arbon v Anderson (69), and Lord Denning M.R. in Becker v Home Office (70). He also took account of dicta of Cantley J. in the unreported case of Payne v Home Office (71). Here a prisoner had contested the Secretary of State's decision to classify him as category A (ie. high risk) prisoner, which meant that he would be housed in conditions of maximum security (72). After reviewing the different regimes applying to prisoners in various kinds of prisons, Cantley J. said:

The duty of the prison authorities is to keep him in custody for the appropriate period and not to allow him to escape. It is not for the prisoner to choose the place or conditions of his confinement (73).

Tudor Evans J. found that segregation under Rule 43, even in a Control Unit, did not amount to punishment and, further, he found the legality of confinement therein unaffected by breach of the Rules (74).

One would wish to avoid the polemic surrounding the use of administrative segregation and must agree with Zellick that it is no use pretending that violent and disruptive inmates do not exist (75). The 1984 report of the Prison Department Control Review Committee suggested alternative ways of dealing with such prisoners, based on grouping them in small units (76). Nevertheless, how they become allocated there, the quality of the regime and how to secure a return to normal prison life are likely to remain administrative decisions, not open to scrutiny save by petition to the Secretary of State. Allocation to such a special unit may, itself, become a new factor in a subsystem of discipline, in addition to the present segregation under Rule 43.

ii) Allocation as a subsystem of discipline

Section 12 of the Prison Act 1952 enacts, in part:

12(1) A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison.

(2) Prisoners shall be committed to such prisons as the Secretary of State may from time to time direct; and may by direction of the Secretary of State be moved during the term of their imprisonment from the prison in which they are confined to any other prison.

In practice, local prisons which receive prisoners from courts in their area will generally allocate them to prisons within their own region. Male life sentence prisoners will usually be allocated either to Wakefield or to Wormwood Scrubs in the initial period after sentence since facilities exist there to assess and to accommodate the particular needs of such prisoners. Female lifers, initially, will be allocated to Durham for the same reason. It will thus be recognised that those staff responsible for allocation could have a powerful device at their

fingertips. The conforming prisoner might be allocated near to his home, the non-conforming one might be sent far away. Prisoners' quality of life may vary considerably depending upon their allocation. Hattersley (1988) reported that in some locations they could enjoy a high level of association with others. In contrast, when he visited the long term wing at Wormwood Scrubs, association amounted to two hours of watching television twice a week (77). That prisoners are aware of this staff power over them may be gleaned from the serious allegations at Wandsworth prison in 1983 that desirable allocations were being "sold" by staff responsible for that function in collusion with prisoners' families (78). Inconvenient allocation can have a profound effect on contact with families. Morris (1965) found that family visits were limited "by a variety of factors, primarily distance, expense and the difficulty of travelling with young children (79). Vercoe (1970) reported the same (80). Morris found that only 54 per cent of wives visited on each occasion that it was possible (monthly). The Prison Reform Trust (1983) observed that "twenty years on, the position is little different" (81). Likewise, necessary contact with legal advisers can be inhibited by the nature of the allocation. The writer has noted, elsewhere, the practice of one board of visitors which, if it granted legal representation at an adjudication, recommended to the prisoner that he should seek transfer back to his nearest local prison if he were to make effective use of the facility, so remote is the prison in question (82).

Prisoners may be drafted from one prison to another on a "bulk transfer" to relieve overcrowding in the former. Family and legal visits may suffer in this case too (83). Whereas such

drafts cannot be said to have a disciplinary purpose behind them, staff at the receiving prison inevitably believe that the dispatching prison has used the draft for such a reason (84). Prisoners may also be transferred or re-allocated individually, often as an alternative to the use of administrative segregation. The system is known to staff and prisoners alike as "ghosting". "Ghosting" is formalised in the case of prisoners in maximum security dispersal prisons whereby they can be removed, without notice, for a period not exceeding 28 days, to a local prison (85). Less formality exists in other cases when transfer is a matter for negotiation between governors and the regional office of the Prison Department. Such transfers will usually take place for sound management reasons even though, as in many instances of administrative segregation, it may not have been possible to establish an offence within Rule 47. Pickering (1970), a former Director of Prison Medical Services, wrote: "To save disturbance to the community, uncooperative members are quietly removed by the ghost-train" (86). There remains the possibility that "ghosting" may be used impulsively for less than sound reasons. Adams and Cooklin (1984) provided an example:

He [the governor] accused me of stirring people up. It was true that I had pointed out to a number of men in the prison that they were entitled to have a radio. But it was hardly a breach of Prison Rules to inform people of their rights ... The governor made it clear to me that, at the first opportunity he would have me moved. He would 'not have subversives in his prison' (87).

On occasion, "ghosting" can have unsatisfactory secondary effects. Budge (1985) recorded the disruption to studies if a prisoner is moved from a prison which is a designated Open University Centre to one that is not (88). In similar circumstances, Curtis (1973) recorded that his "ghosting" was so

speedy that he was unable to collect his books and course papers from his locker before transfer (89). Sutcliffe (1987) reported the "ghosting" of a prisoner on the very day he was to sit an examination (90). Wavell (1988) wrote of a prisoner for whom "ghosting" frustrated his intention to marry. His fiancée had given notice of the wedding to a registrar in London, only to find that, during the period of notice, her prospective husband had been transferred to the West Midlands (91).

If there appears to be an element of capriciousness about "ghosting" the Divisional Court has attempted to set some parameters upon its use, at least in respect of remand prisoners. In R v Secretary of State for the Home Department ex parte McAvoy in 1984, a prisoner applied for a judicial review of the Secretary of State's decision to transfer him, without notice, from a London prison to Winchester. He sought an order of mandamus to require the Secretary of State to order his return to London. He faced serious charges. His parents, who lived in the capital, were both in ill-health and found it difficult to visit him. His solicitor, a sole practitioner, would have had to set aside a whole day for visits to Winchester. The hours allowed for legal visits were restricted at Winchester. Leading counsel had professional commitments that made it impossible for him to attend during those hours. Webster J. held that, in the exercise of his discretion to transfer an unconvicted remand prisoner under section 12(2) of the Prison Act, the Home Secretary is obliged to take account of his right to receive such visits as he liked and that his legal advisers must be afforded reasonable facilities for interviewing him. Had he failed to take matters into account this would have amounted to misdirection in the

exercise of his power under the section. Thus, the decision would have been reviewable by the High Court. In this case, no misdirection was established and the applications were rejected. Ex parte McAvoy seems to establish, therefore, that the Secretary of State must act fairly with regard to transferring prisoners - but what is fair will depend on the circumstances. In this case it was argued by Home Office that the prisoner had been transferred "for operational and security reasons". Having declared the general principle above, Webster J. had it that:

Where the Secretary of State had security reasons for transferring a prisoner from one prison to another, the prisoner's right to be visited by his family and interviewed by his lawyers for the purpose of preparing a case for trial, would rarely, if every, be a factor of significance in deciding whether the prisoner should be transferred (92).

In stating the law, thus, Webster J. was merely applying to the context of prison the more general principle as to whether or not judicial review will go in cases where matters of security are raised. Lord Parker had previously stated the position as regards evidence with security implications.

Those who are responsible for the national security must be the sole judges of what the national security requires. It would obviously be undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public (93).

More recently, in Council of Civil Service Unions v Minister for the Civil Service (94) in 1984, the respondent had used her powers under an Order in Council to amend the terms and conditions of civil servants working at an intelligence gathering centre. This precluded the membership of recognised trades unions and the amendment was made without consultation. Normally, consultation with the unions would have been expected, but the respondent had denied it on the grounds of national

security. It was felt that consultation might have resulted in industrial action, as it had in the past. A prima facie case for judicial review was made out. Having stated that, Lord Fraser of Tullybelton continued:

The issue here is not whether the minister's instruction was proper or fair or justiciable. The sole issue is whether the instruction was reached by a process that was fair to staff ... If no question of national security arose, the decision making process in this case would have been unfair. The question is one of evidence. The question of whether the requirements of national security outweigh the duty of fairness in any particular case is for the government and not for the courts; the government alone has access to the necessary information and in any event, the judicial process is unsuitable for reaching decisions on national security. But if the decision is successfully challenged on the ground that it was reached by a process which is unfair, then the government is under an obligation to produce evidence that the decision was based upon grounds of national security (95).

To an unanimous judgment, Lord Diplock added:

National security is the responsibility of the executive government; what action is needed to protect its interest is ... a matter on which those on whom the responsibility rests, and not with the courts of justice, must have the last word. It is, par excellence, a non-justiciable question (96).

This is not to imply that a court will simply resort to "hands off" where questions of national security are raised. In R v Secretary of State for the Home Department ex parte Ruddock and others in 1987 (97), Taylor J. reviewed the authorities and concluded that, whereas the court would not intervene in such cases, in the absence of legislation to the contrary, it would still need to satisfy itself that there was evidence to support the national security argument. A Court of Appeal decision, R v Secretary of State for the Home Department ex parte H in 1988, indicated that whereas a minister must act reasonably in reaching his decisions, the court would be right to respect his

circumspection in disclosing the precise details of evidence.

Dillon L.J. said:

Where considerations of national security were said by the Home Secretary to arise, the courts could not and did not expect that all details of evidence of matters concerning national security to be put before them in civil proceedings ... He could not, in view of what he had said in a letter to H's solicitors be required to produce his actual evidence or to disclose the names of the sources of his information to the court since that would necessarily involve disclosure to H, contrary, if the Home Secretary were right, to the national interest (98).

Now, in almost any case of "ghosting", elements of a security nature will be present. In ex parte McAvoy the prisoner was in category "A" (99) and thus the Secretary of State, clearly, had little difficulty in convincing the court not to test the precise details of evidence. Different factors might be present in the "ghosting" of a prisoner from, say, a category "D" open prison to more secure conditions. For the present, however, the dicta of Webster J. in ex parte McAvoy indicate a reluctance to intervene, at all, where security is adduced.

iii) The indeterminate sentence and subsystems of discipline

The indeterminate sentence may be described as one where the parameters are not fixed by statute. Release is at the discretion of the Secretary of State. Those remaining today are life imprisonment and its equivalent for juveniles, viz. detention during Her Majesty's Pleasure. The sentence of borstal training, abolished by the Criminal Justice Act, 1982, could have been seen as partly indeterminate. Its parameters were such that a young person could be sentenced for a period of not less than six months and not more than two years and that release would be at the Secretary of State's discretion at an appropriate time between the two. In R v Brown (100) an attempt had been made to



sentence a young man to "at least 20 months" borstal training. It was held by Cairns L.J. and Mais J., in the Court of Appeal, that the recommendation was unsound. Unlike cases where a person is sentenced to life imprisonment for murder, there was no statutory authority for such a recommendation.

The rationale for the indeterminate sentence has always been somewhat confused. According to a therapeutic model of imprisonment it allows those administering the treatment to choose the precise moment that a cure has been effected. Brockway, warden of Elmira Reformatory, so influential an institution in the inception of Borstal (101), spoke in support of indeterminacy at a prison congress in 1870. The resolution, unanimously adopted there, stated:

Sentences limited only by satisfactory proof of reformation should be substituted for those measured by lapse of time ... With men of ability at the head of our penal establishments, holding their offices during good behaviour we believe that it will be little, if at all, more difficult to judge correctly the moral cure of a criminal, than it is the mental cure of lunatic (102).

The paradox of the indeterminate sentence was that an inmate could remain incarcerated for longer than a judge might have intended because he did not live up to institutional expectations. Demonstrating behaviour the institution liked to see became more important, for him, than any serious rehabilitative effort (103). Indeterminacy serves a punitive end as well. Mitford (1974) wrote that:

[It] reassures the public on both counts: by promising the reform minded a benevolent prison system wherein the criminal will be dealt with as fairly as his fallen state deserves, and by offering the law-and-order hard-liners assurance that he can be kept almost indefinitely (104).

Atkinson (1984) recognised that "every life sentence has always contained an element of retribution and deterrence as well as an overriding assessment of risk of dangerousness (105).

However, it is in the cloudy area of therapeutic-versus-punitive goals that there lies the seed of the disciplinary subsystem. A prisoner serving a determinate sentence knows that, whatever staff's view of him, provided he stays clear of disciplinary reports, he will be released on a date known to him, ie. at a point two-thirds or one half of the way through his sentence depending upon the length of his sentence and taking into account remission for good behaviour. The life sentence prisoner has no such absolute luxury and staff are thus able to exercise a kind of control over him (106). Whilst the incarceration of young offenders falls outside the scope of this study, the following passage is illustrative of the kind of arbitrariness that can influence sentence length. Wickham (1978), in his study of Rochester Borstal, noted:

Institution Boards are not reports as such, but are usually "stiff" warnings by the governor and can result in temporary removal from the discharge list for a specified period. Trainees usually appear on such boards for subversive activities in the wing situation. Generally the Institution Board is a "catch-all" charge as it is not necessary for a trainee to be charged with specific acts of misbehaviour. Usually staff have reason to believe that the trainee has been disrupting good order and discipline, but there is little evidence, or the trainee is so disinterested in his training he has become a nuisance (107).

There is no parallel to the "Institution Board" described for adult life sentence prisoners, however the uncertainty of what is being written down, how the prisoner is being seen, and the effect of that on a future release date can make the prisoner less likely to challenge the system. Thus, for example, one life

sentence prisoner informed the writer that she had been requested, by staff, to rewrite a letter she was intending to send to a friend since she had named members of staff. She knew that the letter did not contravene Standing Order 5.

Why did I not stand my ground? I was in the right ... Frankly, it was easier to comply than to put up a fight ... Besides, I have never refused to rewrite for fear of the consequences (108).

She added that were she to fight for her entitlement she was afraid of being seen as a troublemaker. Staff could not discipline her overtly for insisting upon posting her letter. But as a "troublemaker", the reports to Home Office about her could have an influence she wished to avoid (109). Sapsford (1978) explained the "different ground rules for lifers" by quoting one thus:

If you get in a fight with a fixed termee you go up before the governor and you both get the same punishment. But it goes on your record and when they are considering your release they see there is violence (110).

A little more certainty has recently been implanted into the life sentence with the decision in R v Secretary of State for the Home Department ex parte Handscomb and others in 1987 (111). The discretion to release such a prisoner is vested in the Secretary of State who may do so on the recommendation of the Parole Board after consultation with the Lord Chief Justice and the trial judge if available. This is required under section 61(1) of the Criminal Justice Act 1967. Ex parte Handscomb decided that the Home Secretary would be guilty of Wednesbury unreasonableness were he to adopt a general rule or practice of postponing that consultation. Internal reviews of the case for release should be in accordance with a period of imprisonment (ie. a notional determinate sentence, less one-third remission time) recommended

by the judiciary. A life sentence prisoner may, henceforth, know something of his likely date of release relatively early in sentence. This does not detract from the powerful effect of what may be recorded about him when deciding upon the kind of report that will be made by prison staff to the Parole Board. Sapsford (supra) continued: "Lifers can never know that they may not have condemned themselves to a vastly extended sentence because of one momentary aberration".

iv) The Search

Just as a governor may arrange a prisoner's transfer, or order segregation for the purpose of maintaining security within the institution, he may order, too, that other devices should be employed to that end. On the face of it, searching of prisoners is conducted for good reasons and is subject to strict regulation under Prison Rule 39. The rule requires that:

1. Every prisoner should be searched when taken into custody by an officer, on his reception into a prison and subsequently as the governor thinks necessary.
2. A prisoner should be searched in as seemly a manner as possible as is consistent with discovering anything concealed.
3. No prisoner shall be stripped and searched in the sight of another prisoner.
4. The prisoner shall be searched only by an officer of the same sex.

The Prison (Amendment) (No.3) Rules 1988 added the words "or in the sight or presence of an officer not of the same sex" to Rule 39.3 above. Clarification of what is meant by "in the sight or presence" was conveyed to prisons by way of Circular Instruction 45/1988 together with the injunction that such searches should be conducted "with courtesy and with as much consideration as possible for the inmate". Searches may take the form of a

"rub-down" or the more comprehensive "strip search". Following the escape of William Thomas Hughes from Leicester, the Chief Inspector of Prisons (1977) described the procedure thus. At a rub-down search:

The prisoner is instructed to empty his pockets, stand with his arms outstretched and with feet apart. The officer will then, using both hands, rub over his clothing, covering body, arms and legs, as a precaution against clandestine articles being in the prisoner's possession. If for any reason the officer suspects a prisoner of having a prohibited article secreted on his person, he must obtain permission for a strip search (112).

At a strip search:

A prisoner is placed in a cell or room out of sight of other prisoners and in the presence of two officers he is ordered to strip to his shirt or his vest. Each article of clothing will be handed to the officer for examination. The prisoner is required to hold his arms up and stand with legs apart to ensure that no prohibited articles are concealed on his person (113).

Passing reference is made in Standing Order 1B to searching as part of the reception procedure into prison. Circular Instruction 79/1965 gives special advice about the searching of prisoners suspected of being potential suicide risks or as being likely to attempt to bring drugs into prison, or both. Further guidance on strip searching as a "deterrent and detective measure" in respect of the prevention of drug trafficking is given in Circular Instruction 25/1987. Circular Instruction 13/1977 conveys to governors the recommendations of the Chief Inspector, regarding searching, following the Hughes escape. Annex C to Headquarters' Memorandum 84/1986 reinforces instructions as regards the searching of category A prisoners. None of these orders or circulars has been published. Further, the Order refers staff to the "Manual on Security" (114). This is a restricted document to which access is denied to all outside

the Home Office. When the statutory body, the Standing Advisory Commission on Human Rights, established by section 20 of the Northern Ireland Constitution Act 1973, sought sight of the equivalent document within that jurisdiction, access was denied by the Northern Ireland Office. The Commission's Report (1986) (115) on strip searching notes a parliamentary written answer of 7 March 1986 in respect of the English and Welsh jurisdiction:

Detailed instructions on searching are contained in documents whose availability is restricted in the interests of security (116).

For the purposes of this paper it is enough to record that the Manual on Security gives very precise instructions as to when, how often and in which circumstances various types of searches may take place (117).

Why, then, should a practice, which is widely recognised as necessary and which is so closely regulated, have a place in this part of the present paper? The answer lies, as in many prison matters, in its potential for abuse. The allegation has been made that searching practices are used for other than the stated purpose and that the governor's discretion to order searches is immune to successful challenge. McAleese (1985), who noted a dramatic increase in the number of strip searches in one prison, stated the issue as follows:

At a more subtle level, concerned with the maintenance of internal discipline, it seems to me that strip searching has so utterly demoralised the inmates of Armagh that the prison has become much easier to control (118).

The National Council for Civil Liberties (1986) concluded that strip searching could be used consciously or unconsciously as a method of punishment, but advised that:

The only concrete evidence we can produce from our own experience to give credence to this suspicion was the casual observation made by one prison officer during our visit to Armagh that a particular prisoner had not been strip searched for three months "because she had been so good" (119).

The suggestion remains that the discretion vested in the governor, under Rule 39.1, may allow him to employ searching, and particularly strip searching, as a quasi-disciplinary measure. In 1986, two Brixton remand prisoners sought to test the issue in the courts. Allegations of excessive use of searching had been raised in the press on their behalf:

The are strip searched before and after each court appearance, after every legal and social visit and on random occasions up to three times a week. There are also body searches (ie. with clothes on): in a random week from 5 August to 10 August inclusive, Anderson was body searched 34 times and O'Dwyer 26 times. (These figures are the women's own.) (120).

The prisoners' solicitor wrote to the Secretary of State to complain that:

Our clients are strip searched before and after every social and legal visit and before and after attending court. In addition our clients are subjected to up to two random cell and strip searches at least twice a week ... In this case, both the manner and frequency of searching exceeds the lawful requirements of security ... In addition to strip searches, our clients are searched with their clothes on at least 116 times each month (121).

Replying to Jo Richardson, MP, who had raised the question of the frequency of such searching at Brixton in the House of Commons in the previous July, the Minister of State with responsibility for prisons revealed that during that month

both prisoners were searched nine times before or after court appearances. In addition, one prisoner was searched on 12 occasions following visits and on six other occasions (during wing or cell searches); and the other, eighteen times following visits and on five other occasions (122).

The Minister of State concluded that the frequency of searching

was "certainly not untoward in the circumstances" (123). Both prisoners, unsuccessfully, petitioned the Secretary of State on the point. On 1 May 1986, they sought leave to apply for judicial review both of the decisions of the governor of Brixton to authorise strip searches, body searches, cell searches and changes, and of the refusal of the Secretary of State to act upon their complaints. In R v Governor of HM Prison Brixton, ex parte Anderson and O'Dwyer (124), Hodgson J. refused leave in both cases. In respect of the governor's use of discretion he held himself bound by the decision in R v Deputy Governor of Camp Hill Prison ex parte King (125). It will be recalled that King concerned an application for judicial review of a governor's decision at adjudication. The Court of Appeal upheld the decision of the lower court not to grant leave on the basis that governors, adjudicating, are performing management functions and not judicial or quasi-judicial ones. "The only distinction between the facts of this case and the facts of King is that this case is very much less strong in the applicants' favour than King's case was", said Hodgson J. He took account of the criticisms of King in R v Governor of the Maze Prison ex parte McKiernan (126). He proceeded to distinguish between governors' "judicial decisions" and their managerial functions. Whether King or McKiernan were eventually to be held good law, he held himself bound by King and that the present case was purely managerial in character. Similarly, Hodgson J. could discern no evidence in the affidavits placed before him to support judicial review of the Secretary of State's actions. Now that it is ex parte McKiernan that has been upheld in the House of Lords, Hodgson J.'s dicta and ratio can be understood as good law. In R



v Governor of Pentonville Prison and another ex parte Leech and another, in 1988, governors' adjudications were held to be directly reviewable by way of judicial review, not since managerial decisions had that quality, but rather because adjudications were distinguished from areas of management. They are reviewable because they are judicial in character (127). An attempt by the prisoners Ms. Anderson and Ms. O'Dwyer to appeal against Hodgson J.'s decision not to grant them leave was withdrawn. Their solicitor described events thus:

We went back to the Court of Appeal following Leech. They indicated very strongly that the finding would be against us and so we withdrew. We are now commencing action for assault (128).

In common with several of the practices reviewed in this chapter, it is submitted that searching and strip searching cannot be seen as covert uses of discipline per ipsos. So much will depend upon context, frequency, perceived need etc. Strip searching represents a particularly emotive area where the language of sexual abuse is used freely by the abolitionist lobby. The sister of one of the applicant prisoners above, has been quoted as saying: "The women feel they are being raped - that's what strip searching is" (129). One who has experienced the practice, similarly, held: "We feel after a strip search what a woman feels after rape ... it is a violation of our bodies" (130). Such accounts have received academic affirmation in that a psychiatrist, Browne (1984), concluded:

Strip searching is a rather violent procedure and a tremendous intrusion on a human being. It's a violent act and I think, in this sense, rapacious ... Speaking as a psychiatrist, I think we are probably more aware than ordinary doctors of how sensitive a person's response is to them (131).

Davis (1988), a former Professor of Mental health at the

University of Bristol, described strip searching as "a stupid procedure that imposes serious stress". He believed it had been introduced "in supposed interests of security but without regard to ... damaging effects (132). Ms. Anderson and Ms. O'Dwyer have, themselves, published moving accounts of the effects of the practice upon them (133). In some ways, the "cornering" of strip search by the feminist lobby has obscured the essence of the penological debate about the rationale for, and the effects of, the practice. It is also applied to male prisoners. Ditchfield and Duncan (1987) suggested that men, too, may feel humiliated by the process (134). Firmly viewed by the courts as being within management discretion, it remains, effectively, a "hands off" area for them. Thus, its potential as a covert disciplinary measure remains. Mezey (1987), a psychologist (135), averred that whether or not the purpose of strip searching was the ostensible one of safeguarding security or the hidden one of reinforcing docility and thus control, the prisoner would experience it as punishment. Fears are expressed, not only by McAleese (supra) in relation to the Northern Irish jurisdiction, but by interested parties in the domestic jurisdiction too. So, the Police Monitoring and Research Group of the London Strategic Policy Unit reported, in 1986, that, despite official assurances, their conclusions included that strip searching is:

- i) used disproportionately in relation to some categories of prisoners [and]
- ii) used as a method of punishment and to deter prisoners from any protest (136)

Even the Society of Civil and Public Servants (1987), then the sole parent body of the prison governors' trade union branch, has warned that strip searching should never be used as a punishment, thus recognising its potential in that respect (137).

## 2. "COVERT JUSTICE" AS DISCIPLINARY SUBSYSTEM

The term "covert justice" has been coined to describe those facets of an internal discipline which, whilst not employed improperly, nevertheless avoid the consequences, for staff, were more appropriate methods to be used. Covert justice represents a way of sorting things out to staff's advantage in a way that the prisoner cannot challenge.

### i) Diversion

The essence of this was captured by Rutherford (1983):

There are other subtle features of disciplinary procedures which might be noted, whereby, for example, charges against a prisoner are reduced so as to keep the matter within the jurisdiction of the governor who can be relied upon to make consecutive awards rather than putting the case to a board of visitors which is regarded as lenient (138).

This was precisely the practice described to the writer and a colleague by members of the board of visitors at Birmingham prison in 1982 (139). It was explained that they were concerned that staff felt them too lenient. So, for example, a charge of assault on an officer which would normally be referred to a board might be "massaged" by the reporting officer into three lesser charges as follows:

- (a) Rule 47.19 : Attempts to assault an officer.
- (b) Rule 47.14 : Uses abusive, insolent, threatening or other improper language.
- (c) Rule 47.18 : Disobeys a lawful order (ie. to go to the segregation unit).

Subsequent correspondence with the governor indicated that such practice may previously have obtained but was no longer tolerated (140). The effect of such diversion, as well as providing the possibility of more severe punishment for the inmate, guaranteed that any errors at adjudication could only

be remedied by the Secretary of State and could not, at the time, be directly scrutinised by the courts by way of judicial review. There is no evidence to suggest that such a practice of diversion is widespread, though it is known to have existed elsewhere (141). Rutherford's warning is clear, and that is that the possibility of such a lapse from good practice remains. If diversion is rare, the use of multiple charges where one would suffice may be employed more widely as a method of securing more severe punishment than the one charge would warrant (Ditchfield and Duncan 1987) (142).

Diversion may, of course, operate in the reverse. Trivial offences can be diverted to a board where there is a hope that a punishment beyond the governor's powers may be awarded. Referral would be appropriate should it be because the alleged offence was "repeated" under Rule 51.2. Otherwise it would be improper. In the one case where this was to be tested, R v Board of Visitors of HM Prison Wandsworth ex parte Reid in 1985, counsel for the board accepted that the panel had not been "lawfully seized of the ... charge under Rule 47.18 (of refusing to take his hands out of his pockets), having regard to the terms of Rules 51 and 52 of the Prison Rules". Macpherson J. agreed to the quashing of the award. He refused to make any further declaration as to "further or other relief that may be considered just by the court". Counsel for Mr. Reid had argued that the case should continue so that his client "should know where he stands in this matter". Macpherson J. refused to be drawn into making a declaration which, in his view, would have had no practical effect (143).

ii) The power of the pen

The power of staff to affect the life of prisoners by the tenor of reports submitted upon them has been mentioned, briefly, above. Style and content of reporting can affect other than life sentence prisoners. Baldwin and Hawkins (1984) describe the phenomenon thus:

Decision makers may be doing little more than ratifying decisions already made for them by those who supply "information" and assessments. Information suppliers can thus, in certain circumstances, consciously achieve desired outcomes (144).

Of prime importance, to the prisoner, will be those reports that might affect release (eg. to the Parole Board) or transfer. Not only can transfer cause domestic difficulties, as has been seen, but in some prisons, prisoners enjoy a far wider range of privileges than others (145) Regimes may vary, as Lord Parker once noted, and on occasion may approximate more closely to schooling than to imprisonment (146). Prisoners may be interviewed by staff prior to the preparation of such reports but only in very rare circumstances will the content of the reports, or the content of other records providing sources for the report writer, be known to the inmate. Tudor Evans J. in Williams No. 2 agreed that it was "incredible" that the prisoner did not know of his past record. He read an extract therefrom and concluded: "The plaintiff may not have been told the specific details of the conduct that led to his transfer to the control unit, but I am quite sure he knew of them" (147). As in Williams No. 2, it is only, generally, when the content of reports is disclosed by order of a court that prisoners become aware of what is written about them. They are thus, generally, unable to

challenge inaccuracies. A solicitor (Hallmark 1986) has described the problem of a professional adviser getting access to reports:

One particular case has involved representing a prisoner serving a life sentence who has made application for both parole and transfer to an open prison. These applications having been refused, we have sought to obtain details of the Home Office papers on which the decisions to refuse the applications were made. It seemed to us appropriate that in this case on these applications it was incumbent upon those involved in both the applications and the decisions to be operating with the same set of facts. We have been unable to obtain disclosure of the "Lifer Summary". The probation officer involved in the parole process has been able to see the papers, but is precluded from disclosing the contents, even to the prisoner or his solicitors (148).

The decision in R v Governor of Pentonville Prison and another ex parte Herbage No. 2, in 1987 (149), helped to clarify issues of disclosure of documents to a court, but it has assisted little in the process of disclosure to legal advisers at the earlier point of advising their clients whether or not they may have a cause of action.

If inaccuracies are discovered in a prisoner's record, they may be noted as such, but it is doubtful that they will be deleted. The question has not been directly tested at law, though it will be recalled that Mr. Golder's original concern in the matter that was to become Golder v UK (150), was the Home Office's refusal to remove inaccurate statements from papers that would reach the Parole Board (151). The only judicial comments on the point are those of Waller L.J. in R v Wandsworth Prison Board of Visitors ex parte Rosa; of Hodgson J. in R v Board of Visitors of Gartree Prison ex parte Brady and Mealy and of Lord Bridge in Leech v Parkhurst Prison Deputy Governor, all of them obiter. In the first Waller L.J.

said that:

It is submitted that the finding of guilt cannot be expunged even though the whole of the forfeiture has been remitted by the Secretary of State. It is not necessary to decide whether this submission is correct, it is sufficient to assume that it may be (152).

In the second, Hodgson L.J. simply assumed that overturned findings of guilt would be expunged from the record, but did not consider the point in detail (153). Lord Bridge, however, paid some attention to the issue in the last of the three cases (154). A finding of guilt made against a prisoner at adjudication had been found to be unsafe and the Secretary of State had exercised his power under Prison Rule 56.1 to remit the punishment awarded. The prisoner's record was amended to the effect that the previous earliest date of release was reinstated, but the entry relating to the adjudication was not expunged. A petition was unsuccessful and His Lordship noted that a pro forma reply from the Home Office had instructed the governor to inform the prisoner that:

Prison Rule 56.1 does not give the Secretary of State any power to quash a finding of guilty; that power rests with the courts. The recording system does not allow the removal of entries from a prisoner's record but these will be annotated as appropriate to show a not guilty finding and any action taken by the Secretary of State under Prison Rule 56.1 or by the courts to quash a finding (155).

Thereupon the prisoner sought leave to apply for judicial review. The inability of the Secretary of State to quash the award was seen by his lordship as " a manifest inadequacy". He continued:

This may seem of minor significance. If the award has been remitted it may perhaps be of little consequence that the adjudication of guilt has not been set aside. But when the prisoner's record shows merely that the punishment has been remitted

by the Secretary of State, those who have to take account of the record, as for example when the prisoner's eligibility for parole is under consideration, will not know, as in the case of Leech that the proceedings leading to the award were wholly invalid and it is at least possible that the record may operate to his prejudice. This is a lacuna in the rules which can readily be cured by amendment and it is very desirable that it should be (156).

Such amendment to the statutory instrument has not taken place and the aggrieved prisoner remains vulnerable, as Lord Bridge noted, to whatever interpretation the Parole Board may place upon a finding of guilt remaining upon a prisoner's record long after the adjudication has been overturned.

Prisoners, of course, are not the only group in society denied access to that which is written about them, but for no other group, save, perhaps, psychiatric in-patients, can a report have such an effect upon fundamental liberty. Yet entries can be made on prisoners' records by any staff at any time based upon fact, myth or rumour. There is no need to prove an allegation and yet this can seriously affect the prisoner's life (157). Logan (1982), noted that prisoners had been able to get hold of their prison records during riots at Gartree and Hull. They discovered that:

They contain pieces of information which are wholly baseless and for which the person responsible has never been asked to provide the slightest shred of evidence to support any of the allegations. As such it is open to unchecked abuse (158).

It is not suggested that such entries are necessarily made malevolently - though they may be. The Parole Board, in 1982, made known its displeasure at some of the gratuitously offensive remarks contained in reports reaching it from prisons (159). In 1988, Mr. B.M. Caffery, head of P3 Division of the Home Office, wrote to advise all governors "of the need



to avoid racially offensive remarks and derogatory language in written reports on individual inmates" (160).

iii) The blind eye

That the prison governor owes a common law duty of care to those prisoners in his charge cannot be doubted. In Ellis v Home Office, Singleton J. described it thus:

The duty of those responsible for Her Majesty's prisons is to take reasonable care for the safety of those who are within, and that includes those who are within against their wish or will (161).

On rare occasions, issues relating to the governor's duty of care have been tested in the courts (162). It will be appreciated that the nature and characteristics of internal institutional relationships described throughout this chapter may nevertheless leave a prisoner vulnerable, or unwilling to contest alleged breach. Governors are reminded, by way of Circular Instructions (163), of their duty of care. This cannot be of assistance to the prisoner in respect of whom the duty is abandoned by, say, his landing officer and where the prisoner is reluctant to complain. The Howard League (1985) raised the possibility of prison officers turning "a blind eye" to some abuses of prisoners and cite in support the writings of a former prisoner, a journalist and their own former director, Martin Wright (164). One, unnamed, former prisoner described this facet of the question as follows, in 1982:

The officer walked in front so the cons can get at you. The next thing I knew, five cons were piled on top of me and I was taking on five cons and the officer comes up and I was just getting them off. He took me into this room opposite after and he says "Look, I saw you hitting my cleaners ... but I didn't see them hit you." He says "I can charge

you with assault on my cleaners or we can forget the whole thing." I said "We might as well forget the whole thing, 'cause you'll do nothing about it" (165).

Now, if such incidents occur, it will be recognised that they can represent a powerful, if indirect, application of an unauthorised punishment. It will be argued that little credence can be placed upon such anecdotal accounts as the last, however, McDermott and King (1988) described a more ritualised form of "blind-eye turning" in their discovery of "no-go" areas for staff in one of the prisons in their study (166). A novel, similar, and potentially disturbing aspect of the same is described by Genders and Player (1986) in their study of the mixing of adults with youth custody trainees in a number of institutions. They wrote:

There was a clear expectation held by certain senior prison staff and Prison Department administrators, that the adult women would control the somewhat more boisterous and disruptive behaviours of the young offenders and create a level of stability amongst the population ... Yet what was meant by "control" was not clearly defined ... On the one hand it could suggest that adult prisoners would exercise a direct, though informal, disciplinary function; alternatively it could mean that a calming and more stabilising influence would be felt by simply having present more experienced and steady women (167).

Happily, the latter appears to have been the general experience of those institutions affected, and the study presents a fascinating insight into the various balances of power and authority within prisons. Despite this, the researchers recount an event at one prison which led the adult prisoners to use "a number of strategies, from quiet reasoning to physical intimidation". The response of management to that is not recorded. Subsequent correspondence with the, then, governor, revealed that that incident was but one of many (168).

3. A DISCIPLINARY SUBSYSTEM BEYOND THE REACH OF THE RULES:  
PERKS AND THE ABSENCE OF PERKS

The final aspect of the informal application of discipline, again arises out of the imbalance in the distribution of power between staff and inmates and the need of staff to emphasise this. It is a product of life in the total institution and is unaffected by any formal system of rules. Fitzgerald and Muncie (1983) have described it thus:

Not all breaches of discipline will be dealt with through formal channels. Troublesome prisoners may find themselves moved from a single to a multiple occupancy cell, educational or recreational facilities are suddenly limited as cell searches become more frequent (169).

A former long term prisoner (Alexander 1988) described the experience of this form of control, albeit within a foreign jurisdiction, thus:

Although it [education] was a great privilege it was also a lever they could use against us; in fact any privilege, whether it was food, clothes or education, or visits or letters, any privilege was of that two edged character (170).

McDermott and King (1988) found much to support this kind of practice by staff. They wrote:

We asked the searchers how they intended to proceed over the confiscated items. They explained that, in this case they would not be pressing charges since there were more effective ways of dealing with this prisoner: "We confiscate it [the tattoo gun] but there is no way we can prove that it is his. If we charged him he would simply say it is part of a model aeroplane or something and he'd get off. No, I think we'll have a quiet word with the education officer. That will mean he's thrown off education and sent back to the shops. That will mean he won't get daily use of the gym to lift weights either" (171).

Jenkins (1987) wrote of the maximum security prison of which he was in charge. He saw formal and informal rewards and controls as elements in an unwritten contract that is well understood by staff and by prisoners. His anxiety about their existence was that

a governor might be accused of colluding with his charges. He considered the benign effect of such process without acknowledging its potential for abuse (172).

Maguire and Vagg (1984) reported the possibility of manipulating the rota of unlocking for meals so that those at the end of the queue never have a choice of food (173). Searle (1984) noted how late unlocking can prevent a prisoner attending chapel services (174). Maguire and Vagg noted the case of the prisoner who was found not guilty at adjudication, but nevertheless forfeited his trusted job (175). According to Carlen (1985) some prisoners see "rationing" of their contact with their children and families as disciplinary controls (176). Warren (1982) recalled interference with his domestic correspondence as "a way of putting pressure on me" (177). One serving prisoner explained, to the writer, why he had tried to smuggle letters out of his prison thus:

I have heard that censors swap letters about. I did not want to risk it because I have other girlfriends (178).

Another prisoner told the writer why her friend had refused to join a protest:

What is important? Her children first, then her parents ... Many girls wanted [her] to join with them in complaining about vegetarian meals ... [she] refused. Why? Feared that if she queried all the officers' pettinesses, injustices and general discriminations, when it came to petitioning for visits and telephone calls, it would not be taken seriously (179).

Prisoners who have their children with them in prison may feel even more vulnerable to the quality and authenticity of reports about them since the decision in R v Secretary of state for the Home Department ex parte Hickling and another (180). The prisoner was transferred from an institution having a mother and baby unit to one that did not. Accordingly her child was taken into the care of the local authority. In delivering judgment, Sir Edward Eveleigh held

that a prison governor had authority, without referring the matter to the Home Secretary, to separate the mother and baby in his custody because of the mother's behaviour to her child and the effect it was having on other children in the unit. Warren (1982) recounted the way in which staff may assert discipline quite improperly, but most effectively:

At the time of the roll call an argument broke out between Tomlinson and a screw. I intervened and was told by the screw: "You stay out of it. You're not dealing with women and kids now." This took place in front of about twenty prisoners. They could have concluded that I had convictions for sex offences ... Cons mete out their own treatment to sex offenders (181).

From time to time, journalists report upon prisons where illicit privileges have been offered to prisoners. The tenor of such reports is often sensational and tends to reflect instances of corruption, complicity or ignorance on the part of staff (182). But the conscious distribution of "perks" around a prison can offer another hidden disciplinary device. Bailey, Jones and Harris (1985) warned against too heavy a reliance upon former prisoners' subjective accounts of their prison experience (183). They will often, however, present the only first hand account of the kind of areas that have been considered above. A rare insight into a prison manager's perception of this dynamic is provided by a prison governor, Wheatley (1981):

Prisoners enjoy, sometimes as a group and sometimes individually, a number of "perks". "Perks" are rewards and privileges which are in breach of the rules of the institution. As an example there is the old established custom of allowing laundry workers to have the best pressed shirts and facilities to press shirts for other prisoners ... There are even examples where prisoners influence quite important decisions. It is, in many prisons, accepted practice that inmates in trusted jobs suggest suitable replacements to staff ... If an inmate breaches convention about inmate behaviour he may be met by withdrawal of cooperation by staff or by staff using their discretion to adversely affect him (184).

Acknowledging that prisoners may "fight back" and that management, in turn, may respond in conventional ways, Wheatley continued:

As well as the obvious punishments and deterrents there exist, within prison, a large number of decisions taken about inmates by staff which determine whether inmates lead a comfortable or an uncomfortable life. These will differ in different institutions. But normally staff control access to the best jobs, the best cells, the best education classes, home leave, pre-release employment scheme and parole. If, in taking decisions on these sort of topics, the need to maintain a stable subculture is borne in mind it is possible to see that deserving cases are rewarded and the undeserving are not successful (185).

### CONCLUSION

Ditchfield and Duncan (1987) suggested that informal sanctions could be more punitive than the formal ones or could even be administered in addition to them (eg. transfer following a finding of guilt at adjudication). In their survey of eight prisons they found that 56 per cent of officers and 39 per cent of governors attached "a lot of importance" to the informal disciplinary measures. Groups of 157 officers, 93 inmates and 28 governors were asked about the most important informal means for keeping order in the prison. The tabulation shown overleaf resulted. Also revealed by the survey was that, whereas "ghosting" was generally seen, by all groups, as the most important informal measure available to the prison, the reverse was the case at the remotest of prisons. There, denial of requests to be transferred elsewhere took its place (186).

The modern prison represents a large and complex bureaucracy. Bureaucracies function best in stable conditions and according to prescribed systems of rules. The imposition of discipline, on the face of it, is maintained likewise by adherence to a system of rules and laid down procedures. Infraction of the rules by prisoners will lead

Informal Measure	Inmates (157) No. of sample mentioning	Officers (93) No. of sample mentioning	Governors (28) No. of Sample mentioning
Transfer to another prison	94	50	18
Informal warnings	83	50	7
Change of work	79	51	12
Adverse parole report	54	15	5
Change of wing	45	23	8
Status withdrawn (eg. red band as "trusted prisoner" status)	30	18	6
Use of certain privileges (eg. hobbies materials, correspondence courses, TV programmes, posses- sions, etc.)	26	16	1
Change of cell	24	19	1
Ban on gym	25	20	3
Friendship/consideration/ respect/fairness	22	4	-

to a set of consequences. If prisoners believe that they have been dealt with unfairly, another set of rules and procedures will guarantee scrutiny by the board of visitors, by the Secretary of State or by the courts. But it has been seen that, as living organisations, prisons do not fall within the above model. Innovation may be called for to tackle new or unforeseen circumstances. Or, staff may have learned that to wander outside the system and procedures provides them with a more immediate and effective way of asserting discipline. Clemmer (1940) in his classic work on prison life, recognised this feature:

Social controls are complex forces resulting from the interaction among a people; forces which have grown up over the years and which have a utility. Social controls develop slowly from culturally established sources (187).

It should be recognised that a system of informal control devices need not be inherently sinister. There will be many a prisoner who will welcome a stern ticking off or removal from a particular job, than to be segregated under rule 48, face an adjudication and the prospect of forfeited remission. In a carefully drafter Circular Instruction, P2 Division of Home Office attempted to place the informal measures in context:

A great many minor incidents of misconduct can be dealt with on a completely informal basis without recourse to formal measures of any kind. As staff become more skilled and better trained in handling difficult and often disturbed prisoners and defusing potentially explosive situations, it should be possible for an increasing amount of misbehaviour and aggression to be dealt with within the general treatment approach of the regime (188).

The Circular reviewed some of the "punishments and other measures relevant to control": segregation under Rule 43, "ghosting", etc. But it also wandered into one of the contentious areas which has been alluded to above:

There will, of course, be some prisoners who cannot or will not respond to this type of approach; and for them other more formal methods will be necessary. For the more disturbed prisoners, removal to the prison hospital, either for a short period of observation, which can also serve as a cooling off period, or for a longer period of treatment and isolation, may be the more appropriate measure (189).

The danger implicit in this account lies in the confused understanding of that which amounts to disruptive behaviour based upon exercise of free will or that which is rooted in medical needs. Isolation in a prison hospital protective room will, almost certainly, be in more austere conditions than those enjoyed by a prisoner segregated as a punishment or under Rule 43 for the purposes of good order and discipline. Nor will normal board of visitor oversight be likely to have much effect. A prisoner, so segregated, is not held under Rule 43, but under the instructions of the medical officer. The latter



is directed not to act capriciously and he and the governor are charged with visiting such a prisoner regularly (190). The medical officer remains the final authority on the point.

An attempt has been made to examine many of the elements of social control and imposition of an informal discipline. It will be recognised that however far the courts are now prepared to "put their hands on" prisons there remains a battery of institutional responses that do not readily lend themselves to intervention. An image of prison as a totalitarian structure may thus remain an accurate perception. If it is true that prison staff harbour "corrosive anxieties" (191) about the present formal disciplinary system and the question of review of their actions at law, it is at least likely that there may be further recourse to the informal subsystems. If staff come to believe, with Wood (1983) (192), that "the prisoners' position is increasingly improved in relation to that of the officers", resort to the subsystems may become their most effective way and the way least able to be challenged, of preserving the superior/subordinate relationship.

CHAPTER FOUR

RESPONSES TO CHANGE AFTER TARRANT

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### RESPONSES TO CHANGE AFTER TARRANT

#### INTRODUCTION

St. Germain (1) introduced to prisons the concept of the "judicialising" of internal disciplinary hearings. Boards were no longer cushioned from external scrutiny and an awareness of the requirements of natural justice was implanted. No longer could boards administer a "knockabout" sort of justice that, probably, got things about right in the end. They had to be manifestly fair and if they were not, the prisoner knew that he could seek a remedy by way of judicial review. Staff were, largely, protected from any change. Their responsibilities and practices within the disciplinary framework remained exactly the same. Tarrant (2) was to change that. The involvement of lawyers, often viewed by staff with suspicion (3), and that staff could be required to face rigorous cross-examination and be held accountable for statements made, was certainly threatening to many. It seemed that the "flood gates" had opened. The Prison Officers' Association feared that legal representation at adjudications would never be denied to the accused prisoner (4) and, at their first post-Tarrant annual conference, nine motions concerning representation and related matters were tabled (5). In this chapter, the nature of post-Tarrant change, together with responses to it, will be explored.

#### 1. Responses within the Prison Department

##### i) The announcement of the Committee on the Prison Disciplinary System (The Prior Committee)

As ex parte Tarrant was making its way through the domestic courts and Mr. Campbell and Fr. Fell were pursuing their actions in Europe, it became evident to Home Office that fundamental questions needed to be addressed about the efficacy

of internal disciplinary proceedings. In October 1983, the Secretary of State announced to the annual conference of boards of visitors that he intended to establish a departmental committee of distinguished outsiders to review the process. Mr. Brittan stated that there are two requirements in a prison adjudication system that should be met:

First it is a commonplace that justice delayed is justice denied, but in a disciplined institution there are very special reasons why charges should not be left unresolved to cloud relations between inmates and staff. There is, therefore, a particular reason for despatch. Second, the fairness and effectiveness of the system should command the confidence not only of the general community and the courts, but also of inmates and staff, and of those who conduct the adjudications themselves (6).

He concluded that he was "doubtful whether it [the adjudication system] meets our present needs".

On the same day, the terms of reference of the committee were announced to Parliament. These were:

To consider the disciplinary offences applying to prisoners, and the arrangements for their investigation, adjudication and punishment, having regard in particular to:

- i) the need within custodial institutions for a disciplinary system which is swift, fair and conclusive;
  - ii) the extent to which it is appropriate to use the ordinary criminal law, courts and procedure to deal with serious misconduct by prisoners;
  - iii) the connection with the investigation of related allegations by prisoners about their treatment;
  - iv) the pressure on prison and other criminal justice resources:
- and to make recommendations (7).

In March 1984 the House was informed that the departmental committee would be under the chairmanship of Mr. Peter Prior, and that it was hoped that the report would be ready within 12 months (8). Two months later, the full composition of the committee was announced (9). This was followed, almost

immediately by an explanatory note to prisons as to the proposed methodology of the committee, together with an invitation to individual members of staff, and to prisoners to submit evidence. Guidance was given as to the form the evidence should take (10). Advertisements were placed in the press inviting members of the public to submit evidence too. That evidence, and the report itself, will be considered in the next chapter of this study.

ii) The Quentin Thomas and other letters

The law was changing as the Prior Committee was setting about its task of collecting evidence. The judgment in ex parte Tarrant, for example, was handed down in November 1983. The departmental response to this was immediate. Copies of The Times report of the proceedings were circulated to the institutions. A sequence of correspondence, emanating from P3 Division of the Prison Department commenced. The Secretary of State announced, in a written answer to the House of Commons, that where a board of visitors allowed legal representation and where the prisoner was without funds, the lawyer's fees would be met centrally (12). This assurance was soon superseded by an amendment to the Legal Advice and Assistance (Amendment) Regulations allowing for costs to be met from the legal aid fund, subject to an assessment of the prisoner's means (13).

The sequence of correspondence from P3 Division, largely written by the Assistant Secretary, Quentin Thomas, offered directions to governors and to boards in rather a piecemeal way. The message that this gave to the field was that the outcome ex parte Tarrant as other decisions before it, had not been anticipated (14). Further, some of the advice contained therein

was hastily drafted and was subsequently to be amended.

In the first of these letters (15), a precis of ex parte Tarrant was given to boards, together with general guidance as to the procedure to be invoked in considering applications for legal representation. Whilst stressing that boards remained masters of their own procedure, the letter gave certain guidance not envisaged by Webster J. or Kerr L.J. in their judgments.

The panel chairman should ask the prisoner whether he wishes to be legally represented. The board may feel it right to say to him that if he says he does not, he will not be given another opportunity of seeking legal representation (16).

That comment would hint at a fetter upon the use of a board's discretion where, for example, a prisoner who had said that he did not require assistance, discovered, as proceedings unfolded, that the matter was much more complicated than he had imagined. A board commencing a hearing without granting legal representation would be in jeopardy of offending against Wednesbury principles were it to refuse to entertain a subsequent application during the hearing (17). The board would not, of course, have to grant the assistance or representation requested. But it could certainly be advanced that "no reasonable body properly directing itself could have reached such a decision" (18) as to decline to consider the subsequent application in the first place.

The letter detailed the mechanics whereby the prisoner would be enabled to secure the services of a lawyer and advised that "the Home Secretary has decided that, in cases where the prisoner is legally represented, arrangements will be made for the governor to be legally represented also". The latter would present the case against the prisoner. The importance of guilt

being established according to criminal law standards was conveyed. Advice was given as to "McKenzie" assistance, and this will be considered later, under that head.

Mr. Thomas wrote, simultaneously to governors (19). Correspondence with solicitors concerning adjudications was to attract the same protection as Rule 37A letters, despite the fact that adjudications were not considered "legal proceedings". Clerks to boards were required to amend Form 1145 so that prisoners would know of their right to ask for, though not necessarily to receive, legal representation. Confirmation was given that Treasury Solicitor would appoint a local agent to represent the governor where the prisoner was represented.

Three weeks after this sequence of letters, the Director of Operational Policy wrote to Regional Directors, sending copies to all governors (20). The burden of his memorandum was to give guidance as to procedure in grave or especially grave offences. The Director noted Webster J.'s hint in Tarrant that the referral of such serious charges as mutiny to the criminal courts would be appropriate. Henceforth, governors would be required to seek Home Office guidance before the preferring of such charges. It would be a headquarters decision as to whether or not the incident should be referred to the police and that would be taken "in the light of legal advice and bearing in mind the prisoner's earliest date of release". Should the matter eventually be dealt with internally, advice subsequently held to be erroneous (21), was given viz. that boards could, if they deemed it appropriate, reduce the charge to some lesser offence. Contemplation of the prisoner's earliest date of release provided scope for an exercise in institutional pragmatism

designed to avoid the implications of ex parte St. Germain and the safeguards of ex parte Tarrant:

With the advent of legal representation there is a potential difficulty with inmates whose dates of release are imminent. Where the police decide not to prosecute a prisoner who has been formally charged and remanded with an offence against prison discipline which is a graver offence ... and it is the governor's judgment that the imminence of the prisoner's earliest date of release precludes the hearing of the charge by the board of visitors, the governor may be directed to resume the adjourned hearing and determine the charge himself. The governor's powers of punishment are, of course, limited to those prescribed in Rule 50. This procedure derives from the provisions within Rules 51(1) and 52(1) for the Secretary of State to direct that the offences to which those rules refer may be dealt with other than by a board of visitors (22).

The Director clearly anticipated the problem that would be caused within institutions were a prisoner, charged with a serious offence, seen to "get away with it" by staff, simply because the proximity of his release date precluded the conclusion of the adjudication. In Ewing's application Popplewell, J. had previously attempted to overcome this problem by granting bail at the significant date, and would have required the prisoner to return to the prison later to complete his sentence were judicial review of his adjudication to have been denied (23). The circumstances described in the Director's letter are not on all fours with Ewing. In that case, a contested adjudication had taken place. Here, it was merely anticipated. Further, the power of a judge to order bail in Ewing circumstances (ie. during the currency of a sentence) is highly questionable. The distasteful part of the Director's advice, however, was that it lent a legitimacy to the practice of diversion described in Chapter Three(4). It is a cynical use of the Rules if, thereby, in the most serious of offences



identified therein, the Webster J. principles are to be avoided for the sake of an adjudication at all costs. Presumably "fairness" would dictate that were such a prisoner to be but one of a group involved in a concerted act of insubordination (and that is the essence of mutiny) (24), then all charges would be dealt with at governor level. The Director may well have had in mind the preservation of staff confidence in the disciplinary system at a time of rapid change. Nevertheless, it is submitted that such diversion and the avoidance of the more normal safeguards for the accused cannot be good practice. Should the police (or, now, the Crown Prosecution Service) decide not to prosecute, the proper course should be to take proceedings as far as possible before the board. If the prisoner is discharged in the interim, the prison may simply have to acknowledge that it is unable to pursue its case against him (25).

Further advice on "McKenzie" assistance was sent to governors and to boards on the day after the Director's letter, and this will be considered in due course. The letter to governors reminded them that the criminal law standard of proof applied equally to adjudications before them as it did to those before board.

On 11 January 1984, Mr. Thomas circulated to governors and to chairmen copies of standard guidance to be sent out to governors' legal representatives (26). Solicitors in practice in the community would have been very familiar with procedure before the more widely known tribunals but appearing before boards of visitors would be completely new to them. Without proper guidance the experience could be overawing as, indeed, proved to be the case in the first post-ex parte Tarrant

adjudication where legal representation was granted. Sharp (1985) described how the Treasury Solicitor's agent withdrew half way through the preparation of the case, causing an unnecessary delay at odds with Webster J.'s emphasis on speedy resolution of matters (27). One of the values of the guidance leaflet was that it placed in context for the novice the question of infraction of discipline within the closed community, for example the difficulty of finding prisoner witnesses who are prepared to give evidence was explained. However, in one respect the guidance was at odds with the spirit of ex parte St. Germain:

The solicitor for the prisoner may require facilities to interview prison officers or other prisoners ... The solicitor representing the governor should seek to establish which prisoners it is sought to interview and why it is thought that they may be able to give evidence for the defence. There can be no possibility of arranging for the solicitor to see all the prisoners who were in a particular wing at the relevant time - indeed many of these prisoners may be in other prisons by the time that the interviews are sought (28).

If, in practice, the defence lawyer were to be so trammelled, he would have been in the position of not knowing what he did not know. In other words, unless he were able to arrange for a variety of witnesses to be seen, he would be unaware of which of them could give evidence of assistance to his client. It has been seen that, after the Hull prison riot of 1976, participants were dispersed all over the country. Had legal representation been a possibility at that time, it would have been essential for the defence to be given a list of participants and their whereabouts. It has already been noted that one of the main impediments faced by Mr. St. Germain in presenting his own case, was that he did not know the identity

of some of his potential witnesses. There would, it is submitted, be an argument that rules of fairness were not being observed, were the prison to refuse to provide the information requested.

On the same day that the "Guidance to Governors' Representatives" was despatched, Mr. Thomas wrote to all board chairmen with recommendations as to sound practice (29). Apart from comments as to "McKenzie" guidance, advice was given both as to providing the unassisted prisoner with staff statements relevant to the charge and also as to the facilities that would be offered by the governor whereby the unassisted prisoner could interview fellow prisoner witnesses. Part of this indicated that the Home Office were still locked into an assertive or robust style of management response to the problems of natural justice that were evident:

It is open to the governor to grant such requests for interviews and, where they are actually made to the board, for the board to refer them to the governor for consideration, with any recommendations it thinks appropriate. If other prisoners are willing to be interviewed by the prisoner and have, or may have, relevant evidence, the governor should allow the interviews, if he judges it appropriate. If he believes it would not be appropriate, whether because it would cause difficulty to the orderly running of the establishment, or for some other reason, he should refuse the request (30).

The assertion that "there can be no question of arranging for the prisoner to see all the prisoners who were on a particular wing at the relevant time" was repeated together with a reminder that no-one, neither staff nor inmate, was obliged to be interviewed. One imagines that the grant of an application for movement to judicial review would have been well-nigh automatic were a governor simply to have disallowed interviews with potential witnesses if it was a regard for management of

his prison rather than for the consideration of justice that provided his rationale. Later, in the letter, Mr. Thomas urged governors to assist the accused prisoner in identifying his witnesses. However, he was to "take such steps as he thinks appropriate and which do not disturb the orderly running of an establishment to identify prisoners or staff whom the accused person can describe". The management interest was paramount. An accused prisoner was to be allowed access to legal or other reference books in order to prepare his defence.

The facilities to be granted to the represented prisoner were to be almost the same. The governor's authority to deny a solicitor access to potential witnesses, as above, was preserved. The general advice, however, was just a little "softer" than that in relation to the unrepresented prisoner. The letter had it that:

There can be no question of his [the defence solicitor] being allowed to interview, say, all the prisoners in a particular wing at a particular time. But in some cases, for quite understandable reasons it may be difficult for the solicitor to identify in advance who may have relevant evidence. In such cases, governors should use their discretion as appropriate (31).

By May 1984, policy was being shaped by rather more than an immediate response to immediate problems in the field. A body of knowledge expertise was being built up within Prison Department and was being supplemented by the collective experience of boards and governors gathered at various regional conferences. Further, the AMBOV pamphlet "After Tarrant" (32) had contributed to the debate as, indeed, had forceful criticism of the above sequence of correspondence contained in the Association's quarterly (33). Mr. Thomas' response on behalf of his Division was his lengthy letter of 1 May addressed to all

chairmen with copies sent to governors (34). It provided particularly sound advice in a number of areas and corrected several of the errors that had been conveyed in previous correspondence. Mr. Thomas removed the misunderstanding that a prisoner would have a once and for all chance to ask for legal representation and he recommended the use of a "filtering panel" of board members to consider the application. It could be, after all, that in deciding whether or not a prisoner should be allowed assistance, a panel might have heard so much of the evidence as to hinder them coming to the case with fresh minds. Advice was that if assistance were to be denied, boards should give reasons and note those reasons on the record of the proceedings. This is significant if one bears in mind various of the dicta, cited above, in ex parte Norley (35) and ex parte McGrath (36) in the Divisional Court later that year. It will be recalled that the court there held that a panel would not be required to exercise its discretion as to whether or not advice or assistance should be contemplated unless it were to be asked to do so, save in exceptional circumstances. Mr. Thomas' advice which was presented by counsel for the applicant in both the above cases and which was rejected was that:

If the prisoner has not asked for assistance, the board will, no doubt, ask him if he wants it. There may also be cases where the prisoner does not apply but where the board feels he should be represented or assisted. In such cases, the board will, no doubt, explain its view to the prisoner and invite him to accept representation or assistance. But if the prisoner explicitly rejects this, the board might, in general, feel that it would be wrong to impose it on him (37).

A further recommendation was that where adjournment were to be necessary so that a prisoner could arrange his assistance, the adjournment should be to a specific date to avoid the

proceedings falling into limbo. Because of this extra delay, governors were urged to give added thought as to whether or not segregation pending adjudication remained necessary. If they were to be satisfied that it did, boards should take that into account in making their awards (38).

Mr. Thomas next addressed the question of the calling of witnesses. He reminded boards of the advice in the green book viz. that, if the accused wished to call witnesses he should be asked how he thinks their evidence will be of assistance to him and that they should be called unless the panel is satisfied that their evidence will not be of use. Boards were urged that, if they were in doubt as to whether or not to call witnesses, they should err on the side of helping the accused to exonerate himself. The discretion whether or not to call witnesses had to be exercised in good faith and on proper grounds, irrespective of the administrative difficulties implied by the need to produce them. A reasonable belief that the prisoner was calling a large number of witnesses to render the hearing of the charge virtually impractical was sufficient reason to limit the number. Similarly, chairmen were told that they could deny a witness if his production was simply to establish a point that had already been established. Mr. Thomas then reviewed the way in which the Divisional Court had approached the question in the case of three of the applicants who had joined in the ex parte Tarrant action. He wrote thus:

Leyland An officer gave evidence that he saw Leyland at about 11.30 am through a hole. Leyland claimed that another prisoner, Banks, had been charged with making the hole at 11.55 am. The chairman did not allow Leyland to question the officer on this apparent inconsistency, nor to call Banks, seemingly on the grounds that Banks had been transferred and that the board considered times to be approximate.

Webster J. concluded: 'It may be that the panel, by the time that request was made, had concluded (as could in fact well be the case) that there was nothing in Leyland's point about the hole and that he had been properly identified. But in my view they should not have reached any such conclusion without hearing witnesses whom Leyland wished to call to substantiate his evidence on those issues ...'

Tangney Tangney was allowed to call some of the witnesses he asked for, but some even of these claimed they had not been eye witnesses. He was allowed one replacement witness and, in all, asked for ten or eleven witnesses including a prison officer, but was allowed only to call the prison officer and four witnesses, three of whom claimed not to be eye witnesses. Webster J. concluded: 'It should have been apparent to the board that Tangney had been kept apart from other prisoners under Rule 48(2), that he might, as he said was the case, not have had contact with any of them and that it might therefore be necessary for him to call a number of witnesses before finding more than one who had witnessed the scene. In these circumstances I do not see how the board could have been satisfied that none of the other witnesses whom Tangney wished to call would be able to give useful evidence should they be called; nor, applying Lord Lane's test in St. Germain No. 2, do I see how they could have concluded that Tangney's wish to call more evidence was an attempt to render the hearing impracticable or that it was unnecessary to call so many witnesses to establish the point at issue.'

Clark The board refused to adjourn to allow Clark to call four of the nine alibi witnesses he had named; the grounds being that the four had been transferred and would add nothing to the evidence of the five who were available. Webster J. took the view that the board was not entitled to take that view until the five had been heard; but even then if the board did not believe or were doubtful about the evidence of the five, they could not have been satisfied that the other four would not be able to give useful evidence without assuming the case was already made out against the prisoner or that the other four witnesses would be unreliable (39).

Mr. Thomas concluded his letter by offering succinct advice about the composition of panels. He also stressed that, whereas the record of the proceedings need not be verbatim, it should convey all important points and that the chairman was responsible for ensuring its accuracy. He noted that, as a

tribunal, the rules of evidence applicable to court proceedings did not apply, but that no evidence was to the prisoner's disciplinary record should be entered until after a finding of guilt had been pronounced. He concluded by noting that a prisoner could refuse to attend an adjudication, but that any application for legal representation entered by such a prisoner should be considered on its merits.

The sequence of correspondence was almost complete. On 21 May 1984 the Director of Operational Policy wrote to Regional Directors advising them, in general terms, about their discretion to refer grave or especially grave offences to the police for investigation and possible prosecution in the courts, and about whether or not referral to boards of visitors would be more appropriate (40).

On 12 July 1984, Quentin Thomas wrote to board chairmen to convey the burden of the Campbell and Fell v UK judgment (41) and, on 17 July 1984, he wrote enclosing a copy of the report of R v Board of Visitors of Dartmoor Prison ex parte Smith (42) and advised that boards should no longer reduce charges during the process of adjudication (43).

Mr. Thomas's final contribution came with his letters to governors and to chairmen dated 15 October 1984 (44). Assurance was given on the legitimacy of adjudicating in absentia in the case of so called "dirty protesters" provided that they had been given proper notice of the hearing and a chance to clean themselves up so that they could attend if they so wished. Such prisoners should still be given the opportunity to request legal assistance before boards. Guidance was given in respect of adjournment for legal advice. Governors were told that



prisoners were entitled to seek legal advice about both governors or a board adjudication. However, there was no obligation placed upon a governor to adjourn the hearing until the prisoner had received that advice. Similarly, if a prisoner were to delay seeking legal advice at a board hearing, or sought to change his legal adviser as the proceedings developed, or if he were to be without funds and the Law Society refused to transfer legal aid and he ended up unrepresented through no fault of the board, the advice given was that the adjudication should proceed. Governors were instructed that they were authorised to arrange identity parades to assist prisoners in identifying witnesses, staff or inmates. The practical effect of this was diminished by the comment that:

There is no question ... of governors instructing staff to take part in parades against their will or of taking disciplinary action against an officer who declines to be involved (45).

Alternatively the governor was advised that he might feel it appropriate to invite any staff witnesses to come forward of their own volition. If a board were to believe that a prisoner had been hampered in the preparation of his case because he had not had the opportunity to identify witnesses, the avenue of dismissing the charge remained open to them. Brief accounts of recent Divisional Court judgments were conveyed.

iii) The Manual on the Conduct of Adjudications in Prison Department Establishments

As the above sequence of correspondence was being received by governors and boards, one section of P3 Division was expending much effort in the preparation of a replacement for the old green and yellow books. The result was the "Manual on the conduct of adjudications in prison department establishments",

referred to hereafter as "the Manual" (46). The Manual was conveyed to establishments under the cover of Circular Instruction 2/1985. Copies were enclosed for each board member, the governor, the clerk to the board of visitors, the training officer and sufficient other copies to be "located where those involved in adjudication matters may have ready access to a copy" (47) including the prison library for reference by prisoners. It was announced that copies would be made available for purchase by the general public (48). The Manual was not drafted by lawyers. However, it provides, in the main, a careful and precise account of the procedure recommended to be followed, together with an explanation of why the procedure is stated as it is. Corrections to the early Thomas letter are incorporated and there is clear guidance about the principles to be taken into account in deciding whether or not to grant legal advice or assistance. The whole document is imbued with considerations of natural justice. But there is room for criticism in a number of areas - largely where considerations of fairness are cluttered by considerations of that which is managerially sound or expedient in maintaining "balance" within the institution. The writer's comments are as follows:

a) The McKenzieman

The origins of the McKenzieman have been examined. In the context of the board of visitors hearing it is necessary to marry two concepts. The first is that the McKenzieman may be, at law, "any person, whether he be a professional man or not" (49). The second is the one enunciated in ex parte Tarrant that a board is a master of its own procedure. There is no impediment in the way of any person to whom the role is

ascribed, with the consent of the board, taking on that task. Yet the unfortunate dictum of Kerr L.J. in ex parte Tarrant to the effect that such a person should be "a suitable person ... namely not a fellow prisoner" (50) has been interpreted within Home Office as authority for excluding such a person. This view informed the whole sequence of Mr. Thomas' letters and is reproduced in the present Manual (51). Yet there is nothing, at law, to preclude a fellow prisoner acting as a McKenzie man. Indeed, if there is merit in the Weiler argument that those who adjudicate should be "people who are familiar with the establishment in which the alleged offence has occurred - its objectives, its regime, its culture, its stresses and to internal relationships" (52), there must be equal strength in the argument that the McKenzie man should be similarly equipped. It is thus apparent that any prisoner who seeks McKenzie assistance may face hurdles unforeseen by the court in ex parte Tarrant. Should he require a prison chaplain as his McKenzie man, he would be likely to receive the assistance for which he hopes. Indeed the Prison Department chaplaincy set up a small working group to give guidance to chaplains called upon to perform the function. A brief, but helpful information sheet was circulated to all prisons in October 1985 (53). Probation officers, however, were more circumspect as to whether or not they should undertake the role. They occupy an uncertain position in prisons. They undertake responsibilities that prison officers claim they would wish to fulfil (54) and, at the same time, their union, the National Association of Probation Officers, has a policy of eventual withdrawal from prisons (55). To be seen to take the prisoner's part where a prison officer

were to place an inmate on report might be to put in jeopardy any credibility the probation officer had achieved with staff. NAPO set up a subcommittee to examine the implications of the ex parte Tarrant judgment for its members, who, nevertheless, did undertake the role on occasion. However, in autumn 1985, governors were informed as follows:

This recommendation (ie. the probation officer McKenzie) is not endorsed by the Home Office and is contrary to the policy of the Association of Chief Officers of Probation. There can, therefore, be no question of probation officers being instructed, or persuaded, to act as McKenziemen (56).

The door remained open, of course, for probation officers who were content to act as McKenzies to do so. In the climate of uncertainty, the prisoner who asked for his probation officer friend to assist him, might, unwittingly, still have to struggle against the conservatism of an institution that resisted too radical a change. So, one of the first, and one of the very few probation officers to adopt the McKenzie role explained the circumstances of his involvement thus:

I was in a dilemma in that a recently seconded female probation officer had been asked by the inmate to act in the capacity of a prisoner's friend. I was approached by the security staff to avoid the possibility and, further, to undertake the function myself. I met the inmate on several occasions and helped him to collect his thoughts in preparation for his defence. I think he found my advice helpful to him and he put in a reasonable case and was quite controlled ... There were a number of occasions where, had I been a legal adviser, I would have found it necessary to object (57).

The writer's correspondent did not reveal whether or not the prisoner knew that the substitute prisoner's friend was, in fact, the Security Department's friend too. So, the prisoner who feels he may have the protection he wishes, may still remain subject to the vagaries of institutional pressure that operate,

unknown to him, to the best interest of the institution. The Wandsworth board has indicated that it doubts that McKenzie assistance will make a significant contribution to adjudications there, "the difficulty being that prisoners cannot find an acceptable friend" (58).

Prison governors and prison officers exclude themselves from selection for the McKenzie role since there has been no rescinding of their unions' collective views expressed at the time of the Smith, Austin and Ditchfield research (supra). The kind of people who have undertaken the role, apart from chaplains, have tended to be probation officers who have ignored NAPO advice or, on occasion, prison visitors. Statistics on the use of McKenziemen are interesting and show that between November 1983 and June 1985, only 87 prisoners have asked for assistance from a McKenzie and that 76 such requests were granted. Almost half of these cases emanated from one prison where a particular member of staff performs the task (59).

When McKenzies come from outside the prison, they must satisfy not only the board that they may appear, but also the governor that they are fit persons to pass through his gates. If a prisoner has sought legal advice before the hearing and if that advice was that he should ask for McKenzie assistance, the solicitor may also nominate a person to his client for that purpose. Practice varies between local Law Societies as to whether or not legal aid funding will be extended to cover that person's expenses (60).

b) Access and facilities for the legal representative or adviser

It would appear the remotest of possibilities that a solicitor instructed by the prisoner would be refused entry for

the purpose of representing him. Ex parte Anderson (supra) would appear to guarantee unhindered access by the legal adviser to his prisoner client (61); but need the representative be the particular one of the prisoner's choice? When one prisoner asked that a solicitor should represent him in stating his application to a board (as opposed to representing him at adjudication), Home Office advice was that:

The question of whether a solicitor is to be allowed inside the prison for such a purpose is for the Governor. It would be open to him to refuse on security or management grounds (62).

Should such a person wishing to enter the prison to advise a prisoner client about adjudication prove so unacceptable to a governor that he might refuse him admission, then dismissal of the charge would appear the only proper course for a board unless, of course, the prisoner were to be satisfied with alternative legal advice.

The writer has argued elsewhere that outsiders may be excluded under the authority of Prison Rule 87(1) which states that "No outside person shall be permitted to view a prison unless authorised by statute or by the Secretary of State". But the writer's view was that exclusion for the purpose of assisting at adjudication under this rule "would be to recognise a tortuous extension of the meaning of 'view'" (63). Yet that is precisely how practice appears to have developed. The principle that the governor controls his gate is preserved even to the extent that this may result in the abandonment of an internal disciplinary hearing.

The Manual has it that:

Requests from legal representatives or advisers for facilities should be referred to the governor for his consideration. The reason is that facilities may

have a bearing on security or good order and discipline, and the responsibility for admitting any person into a prison rests with the governor. Where requests for facilities are received by a panel it may recommend that they be granted. Where a governor is unable to provide the facilities requested and the panel believes that this prejudices a fair hearing, there may be no alternative but to dismiss the charge notwithstanding the implications that this could have for discipline and control within the establishment (64).

The kind of circumstance where abandonment might arise would be where, for example, a prisoner's representative wished to call particularly disruptive former inmates as witnesses, or where the production of sensitive parts of the prison records is sought.

This latter example may raise a conflict. Under Prison Rule 96(3) "a member of the board shall have access to the records of the prison". On the face of it, it would seem that should a board feel the production of papers necessary at a hearing, they could require them to be presented. Fitzgerald (1984) envisaged one of the values of a lawyer at such proceedings to be that he would know which documents should be disclosed:

There are special problems caused by official secrecy - medical reports, hospital occurrence books and other official documentary material which often have the key to the determination of a case: lawyers can discover their existence and require their production - sometimes with devastating effect (65).

But can they? AMBOV has expressed concern at the apparently unquestioning willingness of medical officers to certify prisoners as "fit for adjudication". Haynes (1986), a member of the Pentonville board wrote:

I have been on three adjudications in the last year where this was raised, in all three cases the doctor had signed: in two he was asked to attend and, on appearance, withdrew his signature" (66).

What if unfitness had been argued by the prisoner's representative? Would documentary evidence have been made available to him and thus to the board? When the AMBOV chair raised the question with the Home Office it became apparent how restrictively the interpretation of Rule 96.3 would be:

Rule 96.3 of the Prison Rules allows a board member to have access to the records of the prison. The documents to which Rule 96 applies are those which may reasonably be required by board members in the exercise of their duties. The phrase 'records of the prison' does not include all the documents in the prison. There are some documents which ministers would not regard as disclosable to board members (for example confidential medical documents on individual inmates maintained by the medical officer) ... Material relating to the security arrangements of the establishment would also not be disclosable. I do not think I could give you a definitive list (67).

The conservatism expressed in relation to medical information is surprising since the Director of Prison Medical Services had already written to all prison medical officers explaining, in part, that:

We are advised that the General Medical Council, on legal advice, does not envisage that objection would be taken to a doctor disclosing medically confidential information to a tribunal such as a panel of members of a board of visitors ... It follows that a panel may properly request relevant medical information in response to such a request a medical officer may properly give it (68).

The confused picture resulting from this conflict appears to be that a board may request that sensitive matters be placed in evidence. Should a medical officer or governor decline the request, notwithstanding Rule 96.3, the proper course would be to dismiss the charge were the board to believe that non-disclosure would prejudice a fair hearing.

c) The calling of witnesses

The clearest account of good practice in relation to the calling of witnesses is that given by Geoffrey Lane L.J. in ex



parte St. Germain (No. 2) (69) and reiterated by Webster J. in ex parte Tarrant:

There was some suggestion that the chairman should have no discretion to disallow the calling of a witness whose attendance is requested by the prisoner. This suggestion was largely withdrawn in the course of argument and we do not think it had any validity. Those who appear before the board of visitors on charges are, *ex hypothesi*, those who are serving sentences in prison. Many such offenders might well seek to render the adjudications by the board quite impossible if they had the same liberty to conduct their own defences as they would have in an ordinary criminal trial. In our judgment the chairman's discretion is necessary as part of a proper procedure for dealing with alleged offences against discipline by prisoners. However, that discretion has to be exercised reasonably, in good faith and on proper grounds. It would clearly be wrong if, as has been alleged in one instance before us, the basis for refusal to allow a prisoner to call witnesses was that the chairman considered that there was ample evidence against the accused. It would equally be an improper exercise of the discretion if the refusal was based on an erroneous understanding of the prisoner's defence, for example, that an alibi did not cover the material time or day, whereas in truth and in fact it did. A more serious question was raised whether the discretion could be validly exercised where it was based on considerable administrative inconvenience being caused if the request to call a witness or witnesses was permitted. Clearly in the proper exercise of his discretion a chairman may limit the number of witnesses, either on the basis that he has good reason for considering that the total number sought to be called is an attempt by the prisoner to render the hearing of the charge virtually impracticable or where quite simply it would be quite unnecessary to call so many witnesses to establish the point at issue. But mere administrative difficulties, simpliciter, are not in our view enough (70).

It has already been noted that, following ex parte Fox-Taylor in 1982, staff are under a duty to disclose that there were witnesses to an event if this is not known to the prisoner (71). Though the Manual conveys the spirit of the above dictum, practice may be some way removed from the aspirations of judges or panel members. Access to witnesses by the legal representatives, as has been seen, becomes a matter for the

governor's discretion (72). In the main, such interviews will be within the sight, but out of the hearing, of prison staff although the governor can order them to be within the hearing of staff "for reasons of security or because of the possibility of coercion or collusion between witnesses" (73). In these circumstances, the supervising officer should not disclose the nature of the discussion unless it presents a threat to security (74). Morris (1975) indicated that there was no effective way of ascertaining that members of staff involved in the hearing as witnesses would not collude (75). There is no Rule 48 equivalent to prevent this occurring. Though bad practice, collusion by staff would not be something about which the adjudicating panel, the prisoner or his representative could know. The Manual makes the tacit assumption that this is something that does not happen and the matter is not addressed.

A prisoner may be further hampered, unlike his counterpart in open court since, whereas a prison officer may be compelled to attend and give evidence as part of his conditions of service, the model procedure places no such compulsion upon a prisoner witness (76). Dilling (1980) agreed that, technically a prisoner witness can be required to attend, or be vulnerable to a charge of disobeying a lawful order under Prison Rule 47.18 (77). Attendance may also be compelled by the issue of a subpoena. Prison governors were told, in 1984, that no such power is vested in a board of visitors (78). Yet Morris (1986) argued that the advice in the Manual regarding the attendance of prisoner witnesses almost certainly does not reflect the formal legal position.

Boards as inferior tribunals recognised by law and exercising judicial functions, can request the Crown Office to issue a subpoena requiring the witness to attend (79).

Morris recognised, however, that the value of evidence given by a prisoner under threat of some sort of sanction would be likely to be of limited value bearing in mind the "social reality of prison life" (80).

The power to subpoena may prove of assistance if the witness to an alleged offence is a member of the public. The Manual simply indicates that such a person "may be invited to attend" or that, subject to certain provisos, a written statement may be solicited (81). If Morris is correct in his analysis, the power to subpoena may result in the giving of reliable evidence from a witness who might otherwise be disinclined to attend a hearing.

Since publication of the Manual a case has come to judgment that may clarify something of the governor's position vis-a-vis "controlling his gate". In R v Secretary of State for the Home Office ex parte Lee in 1987 (82) counsel instructed to represent a prisoner before the Wandsworth board, contested the prison medical officer's opinion that Mr. Lee was fit for adjudication. He also wished to determine whether or not the prisoner's mental state might have contributed to his actions if he were to be found guilty. He applied for an adjournment so that his client could be examined by an independent psychiatrist. The board agreed and adjourned. The Secretary of State directed that an independent psychiatrist should not be allowed to visit the prison to examine the prisoner. That decision formed the basis of the prisoner's application. Before the Divisional Court reached the stage of making any declaration

on the point, the Secretary of State reversed his decision and the independent psychiatrist was admitted. Nevertheless, counsel sought two declarations that were not contested by the Home Office. Glidewell L.J., with Schieman J. concurring, declared, first, that the task of deciding whether or not a prisoner was fit to face adjudication lay with the board of visitors itself. The second was that a board was entitled to take into account the prisoner's state of mind at the time of the offence and to dismiss the charge if they believed him not responsible for his actions. Fitzgerald (1987), who represented the applicant, perhaps read more into the judgment than there was, since he has commented:

The outcome does appear to indicate the argument that the board must be treated as final arbiter of what witnesses it will hear - even where this conflicts with the Secretary of State's powers to authorise whom he will allow to visit a prison. The interests of justice in the adjudication process will be treated as paramount over any such administrative convenience (83).

It is submitted that ex parte Lee is helpful in reiterating that a board, as master of its own procedure, may decide which witnesses it will hear, but the decision does nothing to affect the Manual's advice that where a governor perseveres in his refusal to admit a witness, the board should, if they believe that this offends against fairness, dismiss the charge (84). Thus, effectively, control of the gate remains with the governor.

## 2. At grass roots: staff and prisoners

The writer has, elsewhere, borrowed from the thesis of Burns and Stalker (1966) to describe the prison as a mechanistic organisation, best suited to stable conditions (85). The evolving case law in the decade after Fraser v Mudge (86) had certainly faced

prisons with more rapid change in respect of internal discipline than during any similar period since nationalisation. Staff who had previously placed faith in the fact that courts generally adopted the "hands-off" policy in prison cases found it difficult to adapt to the new era of accountability. Logan (1982) suggested that management, too, had been ill prepared for change:

Until that time [the Hull riot of 1976] the concept of prisoners' rights was alien both to the Prison Service and the Home Office. The views of both could be encapsulated in the view expressed by a senior prison governor that the only right a prisoner had was to be released at the end of his sentence (87).

There is some evidence that staff came to feel let down, or resentful, that the Department and the courts did not understand or support them in what they saw as their unique position in relation to society's miscreants. The General Secretary of the Prison Officers' Association told the annual conference of the Scottish P.O.A., in 1983, that the Home Office had not 'fought its corner in Europe' (88). Prison governors were quick to express their concern that the demands for procedural correctness could, in some way, inhibit the process of their perception of justice. Indeed, it could upset the balance between staff expectations of support for them and protection for the prisoner. So they have written:

I am impressed by the force of arguments in favour of improving Board of Visitors adjudications. As a non-lawyer I ask myself the question how best can we achieve justice? That isn't always the same as being legally pure - at least, not in my experience (89).

and:

There appears to be a strange inconsistency between calls by the House of Commons majority for longer sentences for prisoners and current moves to ensure that they have legal representation when facing adjudications. On the one hand, prison staff are expected to contain prisoners; on the other, prison staff are expected to maintain control in a situation in which the prisoners' position is increasingly improved in relation to that of the officers (90).

Prison officers were also quick to make their view known both as an Association (91) and as individuals.

We live in an age where the right to challenge authority is exercised to the full at all levels of society, but the most profuse challengers seem to come from those elements that have difficulty living within the laws of our very tolerant system of government ... The ready access to a solicitor which is afforded to inmates, at no cost to themselves, has now created an imbalance which even our prison officers will find hard to cope with. The undoubted protection it provides for inmates has not been weighed against the staff's opportunity to retain control ... It must be looked at as one more step in a fairly long chain of events and in conjunction with legal representation at Board of Visitors level ... Unless real balance is restored and officers encouraged to carry out their difficult task in a firm but fair way, our standards will decline even further and the subversives will be given an opportunity to do their worst - without penalty (92).

Staff anxieties were exacerbated by the initial response of the Home Office to their request for training to equip them for the changed climate of the legally assisted representation. H.M. Chief Inspector of Prisons had expressed concern, in 1982, that staff training for adjudications should be akin to that of the police insofar as the presentation of evidence and cross-examination were concerned (93). Milligan, Rajcoomar, Lees and Whelan (1984) noted "a genuine fear of questioning by legal representatives within internal hearings" (94). An experienced prison officer at Albany prison, who had had previous experience in the police force, observed the limitations of staff who, because of their lack of training could, unwittingly, be confused into assisting the case for the defence. He wrote that he found such evidence:

sadly lacking in content and detail sufficient enough for a strong prosecution and this enabled the counsel for the defence, on cross-examination, to pull the prosecution apart ... and because this was so the prosecution witnesses tended to get some facts confused thereby strengthening the defence's case. Prison officers, as a whole are totally inexperienced in giving evidence in a court of law, which these hearings are turning into and

consequently, under cross-examination by an experienced barrister at law, find themselves on alien territory and they tend to be a little unsure of themselves (95).

Yet, when the General Secretary of the Prison Officers' Association sought the provision of the necessary training (96) he received a dismissive response:

There is a constantly developing situation and we, governors and boards of visitors, are in a position of learning and reacting to those developments. I am sure you will appreciate that until a clearer and stabilised picture emerges we cannot reach conclusions about the training which it might be desirable for prison officers to undertake. An additional complication is that the adjudication procedures are actually interim measures pending the outcome of the deliberations of the Departmental Committee [the Prior Committee] ... judgments about the speed of that exercise cannot be made but obviously that too will influence decisions on training, content and timing (97).

Two weeks later, the same writer stressed to regional directors that staff should "be reminded of the need for evidence by staff at adjudications to be carefully prepared and properly presented (98). Thus, three institutions commenced their own forms of uncoordinated local training with consequential variations in resulting practice (99). The writer's discussions with members of the Prison Officers' Association National Executive Committee at the time revealed a degree of incredulity that Home Office was, seemingly, again prepared to react to developments rather than to anticipate them and train accordingly (100). A reversal of headquarters policy led, later in the year, to the preparation of a comprehensive training package that was distributed to all institutions (101).

Were the staff anxieties well founded? There is little evidence to suggest that they were. When Quentin Thomas spoke to the annual conference of chief prison officers later in 1984 he informed them that:

It is important to keep the scale of things in perspective as only about eleven percent of prisoners have asked for legal representation and only about three percent have been granted it (102).

Morgan (1987) noted that, in 1986, this figure had reduced to just over five percent of prisoners who asked for legal representation of whom fewer than a third (or 1.6 percent of the whole) were granted. Expressed another way, legal representation was granted in only 59 of the 3,765 cases coming before boards during that year (103). This may give reassurance to staff but probably does little to reduce the perception of boards by prisoners as being anything other than part and parcel of "the system". Whereas ex parte Tarrant, on the face of it, posed a threat to the stability prized by the mechanistic organisation, changes following the initial consequences of the judgment have been relatively slow and thus, relatively easy for boards and for governors to manage. Mattfield (1987) demonstrated that only one out of every thousand adjudications has been overturned at judicial review (104). This figure, of course, does not take account of those awards overturned by the Secretary of State at a point prior to the application for leave to seek judicial review. Does this justify complacency? The writer suggests not. Mattfield further revealed a disquieting misunderstanding of issues at higher institutional management level. She contrasted public and private comments made by critics of the penal system and by those within it. One unnamed, prison governor told her that he:

likened discipline in prisons to the law of the jungle and saw no need for an overhaul of the system. He opined that loss of remission was not a great worry to inmates who got themselves into prison and knew the consequences if they broke the rules. Prison culture, he saw, as a more oppressive burden upon the inmates. They were more worried about the "big burly" prisoners who came to their cell door and threatened 'I'm going to have your arse tonight' than the thought of losing remission if they did not behave (105).



Of the intervention of lawyers at internal hearings he told her:

that lawyers had no place in prisons - they only went to screw the system like everybody else. He felt that only those inside the walls can put an offence in context and are fit to judge. Outsiders, he felt, are not equal to the task (106).

That governor is not unique. A different one told the present writer, of an inmate before him:

He was incoherent; I told him to shut up, ticked the right boxes and found him guilty. That's a good tip (107).

Stern (1987) argued that the day to day level of fairness within a prison, irrespective of policy or of the best intentions of reforming administrators, is dictated by the staff of the prison itself. Whether reforms are carried through or subverted remains in their hands (108). If local management is to reduce the post-Tarrant practice to a level such as noted above there must remain concern.

There is little evidence to suggest that there have been any alterations in the prisoners' perception of the adjudication process post-Tarrant. The only research to take account of their views is that of Ditchfield and Duncan (1987) which was conducted so soon after the judgment that some doubt as to its long-term validity may be expressed (109). Three hundred and eight interviews were conducted in eight adult male prisons. Of the 157 prisoners interviewed, 107 had recently been on report. Only one fifth of these had appeared before boards. Opinions were, more or less, equally divided as to whether or not the hearings had been "fair". Their complaints largely concerned lack of representation when prisoners believed it necessary, intimidating ritual, failure to listen, failure to investigate the circumstances or to elicit mitigating evidence (110). When the inmate sample was asked what

sort of body should deal with the more serious offences, twice as many opted for matters to be disposed of by outside court rather than by a board even with legal representation. The full response was as follows:

<u>Body Preferred</u>	<u>Percentage of Sample of 157</u>
Board of Visitors	3
Board of Visitors with legal representation	27
Outside court	54
The governor (with increased powers of punishment)	5
The governor (with increased powers of punishment and legal representation)	8
Not stated	3

(111)

The survey does not reveal how many of the prisoners questioned had had experience of a legally assisted adjudication. The writer's impression, as a prison manager in daily contact with prisoners, confirms that the Tarrant judgment has had little effect on how prisoners regard the internal processes. No amount of procedural safeguards will offer reassurance when prisoners feel that boards proceed having in mind an assumption of guilt or that "the board were simply on the side of the officers" (112).

### CONCLUSIONS

The announcement of the establishing of the departmental committee to scrutinise disciplinary systems marked the first rigorous review of the subject for more than a decade. Developments in the domestic courts and in Europe had offered the Secretary of State little alternative but to engage in such a review. It has been argued, most forcefully by the Prison Officers' Association, that there would have

been merit in anticipating the developments rather than being seen to respond to them, sometimes inappropriately. Despite the Prison Officers' Association view, it cannot be denied that the Prison Department did its best in responding as quickly and as helpfully as possible after the Tarrant and Campbell and Fell judgments became known. The Manual, despite the shortcomings noted above, offers the clearest of signals that adherence to the rules of natural justice is imperative and that governors' adjudications are not exempt from the procedural safeguards for the prisoner. Where cause of concern remains is largely in relation to how change is perceived and interpreted within the prisons themselves. One hesitates to rush to the easy, if expensive, recommendation that legal representation should be granted, as of right, as it is before many other tribunals. Despite boards' best endeavours, accusations of lack of professionalism recur. In the writer's own experience of observing post-Tarrant adjudications, panels have, for example, attempted to increase their award after the conclusion of the adjudication and wished "a happy Christmas" to the prisoner they had confined to cell for 30 days on 17 December (113). Similarly, Logan (1987) wrote of the prisoner who requested legal assistance before a board so that witnesses, who had been transferred from the prison, could be interviewed. He was told that this was not necessary since, as they had been transferred, they could not be called to give evidence in any case (114).

The training given to governors and staff on their various in-service courses, and to board members at their study weekends does not appear significantly to have affected the way in which they dispose of matters before them. In the manner traditionally ascribed to the best of the English amateur, they contrive to get things about right in the end - Mattfield's account of the number of awards overturned at

judicial review stages provides some evidence for that. Whether such an unmethodical approach to issues of guilt or innocence or of prolonged imprisonment is one that can be sustained will be explored during the examination, in this paper, of evidence presented to the Prior Committee.

CHAPTER FIVE

THE PRIOR REPORT

## Chapter Five(1)

### THE PRIOR REPORT

#### 1. Introduction

The announcement of the setting up of the Departmental Committee on the Prison Disciplinary System has been considered in Chapter Four together with the terms of reference given to it.

The methodology adopted by the Committee is recorded at Appendix 5. Its members visited 42 prison department establishments and observed about 100 adjudications. A small piece of research was commissioned to discover the perceptions of the adjudication process held by the various parties to it (1). Other published and unpublished pieces of research were considered. Visits were made by members of the committee to prisons in Northern Ireland, the United States, Canada, Sweden and the German Federal Republic. Sub-committees were formed and were charged to report to the whole committee. The latter met on 28 occasions (2).

#### 2. The evidence to Prior

Some of the evidence presented to Prior has not been available to the writer. On occasion, those who gave evidence had either destroyed their records or regarded the evidence given as confidential and declined to share it. Others, simply, did not respond to the writer's enquiries. Nevertheless, the precis of evidence subscribed presents a much more comprehensive picture than that previously published (3). Thirty-five organisations, special interest groups, official bodies, etc. were reported to have submitted written evidence as were 62 boards of visitors (4). Replies were received from 34 of the former group and 40 of the latter. In addition, two individuals who submitted written evidence sent their papers to the writer, unsolicited. In the pages that

follow, emphasis has generally been placed upon evidence given that distinguished the contribution from the bulk of the others. Thus, the writer does not attempt to reproduce every point made by each contributor.

(a) The evidence of boards of visitors

Despite being recorded as having submitted written evidence, the boards of visitors of Aylesbury (5), Kirklevington (6), Parkhurst (7) and Portland (8) denied to the writer having done so. The board of visitors at Hatfield declined to send copies of their evidence to the writer, but confirmed that their "views broadly agreed with the majority of other boards" (9). Generally speaking, the boards of Wetherby (10), Buckley Hall (11), Aldington (12), Usk (17), Leicester (18) and Wymott (19) were in favour of the system as it stood and recommended no change. The same was true of the Rudgate board (20) except that they recommended that the clerk to the board of visitors should be legally trained - particularly when there was legal representation for prisoner and governor. Similarly, the Norwich board (21) were satisfied with matters as they stood but urged further "intensive training" for adjudicators. The Norwich board also urged a "procedural audit" in the form of a Home Office official periodically attending adjudications to act in a "consultant" role, thus ensuring that the system functioned as it was supposed to do. Bullwood Hall board of visitors (22) were relatively satisfied with the status quo. They suggested a third tier to the system "for the extremely serious cases", but, at the same time, recorded that they "have not, in the past, had any cases which were so serious that we did not feel competent to deal with them."

The board at Grendon Underwood (23), too, were relatively satisfied with the system as it stood. They did, however, tabulate a group of offences which they believed should always be prosecuted externally and they urged an amendment to Rule 47.7 by the addition of the word "knowingly" thus removing the myth of strict liability implied by the words "has in his cell or room or in his possession any unauthorised article". Strangely, perhaps, the Grendon board recommended a return to the formality of officers and inmates standing when giving evidence or making statements (24). They also sought clarification of a matter that would seem without doubt: "whether an adjudication panel may have the power to call a prison officer as a witness..." They further recommended that governors' adjudications be conducted, on occasion, by subordinate grades, thus freeing the governor for other duties.

The Featherstone board of visitors (25) favoured increasing governors' powers of punishment which would enable him to deal with a greater number of offenders. They were divided as to whether offences of mutiny or of gross personal violence to an officer should be referred to outside court which, some members believed, would be ignorant of "prison regime, prison way of life and prison society". Similarly, some members were concerned that legal aid should not be "made available for all offences under Regulation [sic] 47". This appears to indicate the board's misunderstanding of their discretion as to whether or not to grant legal assistance or representation. Should they grant it, eligibility to apply for legal aid arises. If they do not, it does not. Finally they criticised the "initial appeal procedure" by way of petition to the Secretary of State as "both ponderous and slow".

The Stafford board of visitors (26) recommended a redrafting



of Rule 47 to exclude offences which they regarded as purely criminal in character. They expressed a veiled wish that the board might be given some sort of appellate jurisdiction over governors' adjudications. They recommended that where a prisoner were to be legally represented the same should be true of the prison staff (presumably the reporting officer since the governor would be represented in any case) and that the board, too, should have legal assistance. They were critical of the quality of officers' reports to them and also the lack of availability of witnesses whom they believed should have attended hearings before them. This criticism is surprising in view of both the judgment in R v Board of Visitors of Blundeston Prison ex parte Fox-Taylor (27), examined in a previous chapter, and of the power vested in the board to adjourn for the attendance of the witnesses it requires to attend. This board too recommended the granting of an appellate jurisdiction and stated it would welcome the publication of "non-binding guidelines" to assist in maintaining consistency of awards.

The Cardiff board of visitors (28) advised that they believed it should be a matter for the board to decide whether an internal infraction of discipline should be referred to the criminal courts. This should include any case in which legal representation had been granted. "In this way", they argued, "inmates on remand would still have to answer a charge if they were released from prison before appearing on adjudication." They recognised that legislation would be necessary before a court could deal with "offences which are not strictly criminal offences". They sought alternative punishments for the inmate approaching his release date who had been found guilty before them and suggested that such cases should be referred to the Secretary of State, but did not indicate what he might do

about them. They urged a "timetabling" of adjudications so that not more than three should be held on a single day and that no contested case should be heard by a panel of fewer than three members. This board, too, recommended that the clerk be legally qualified when there was a legally assisted hearing. They recommended the submitting of photographic evidence where, say, the allegation was one of assault and where the passage of time had led to the healing of wounds. Finally, whilst declaring themselves generally satisfied with the prisoners' avenues of appeal from decisions at adjudications, they recommended that governors or officers should be provided with a system to appeal against "perverse decisions". The rationale for this was that "natural justice seems to demand equal rights of appeal to both sides, particularly in closed establishments".

The Brockhill board of visitors (29), whilst being generally satisfied with things as they stood, clearly had difficulty in framing recommendations. They reported that "this board of visitors has as many views of its role as there are members". Of particular interest, however, was that a member of the board should attend governors' adjudications in the "watchdog" role (30). Further - and here they were at variance with most boards - they noted that "the great majority of this board felt that the board of visitors should not adjudicate, this being at odds with the supervisory and pastoral role". Finally, they made the curious recommendation that "requests for legal representation should only be granted where the charges are serious and liable to lead to further loss of liberty [loss of remission]". This would seem to exclude the possibility of legal representation where a board is seized of "repeated" offences, irrespective of the guidance given by Webster J. in ex parte Tarrant

(31). Since the only other charges of which they should normally be seized are those noted as "serious" under Rule 51.2 this would seem to imply a right to representation at most hearings. The writer doubts that this is what the board had in mind. This board, to, wrote that it would welcome advice on consistency of awards.

The Dover board of visitors (32) were generally satisfied with the present system, but urged further training for staff and for their members. As if to evidence the need for this they expressed a misunderstanding of the need for legal representation by providing their own alternative to Webster J's guidance:

Legal representation should be offered only when the offence is serious, the facts confused and at variance in each statement, and the defendant pleads not guilty. In Youth Custody Centres a trainee is more likely to be confused by a legal representative rather than helped.

Such assistance, they believed, should be provided by prison officers or the panel chairman. They were concerned at the lack of effective punishment for the inmate who was approaching his latest date of release (ie. one who had lost most of his remission). They noted: "It is difficult and frustrating for the board and the cause of considerable delight and merriment to the less stable trainees." The board criticised the slowness of the appeal system, expressed concern about prolonged segregation before hearings and dismissed the question of consistency of award "for a multitude of practical or ethical reasons".

The Rochester board (33) also rejected the need for consistency and criticised the tardiness in replies to appeals by way of petition. The board expressed concern that the granting of legal representation could contradict the need for matters to be despatched speedily. Where a board granted legal representation the matter should automatically be referred to outside court or, at the

very least, the board should have a legally qualified clerk to assist them. The board challenged the role of the governor's representative at legally assisted adjudications. They opined that to expect the same person to represent the governor and to guide the board "would be seen as unjust by the defence and would make it appear that the board is not impartial".

The Leeds board of visitors (34) believed that "every offence committed within the confines of the prison, or committed by inmates under the charge of prison officers either at court or elsewhere, should be dealt with by an internal disciplinary body". However, they regarded offences of mutiny and of gross personal violence to be so serious that they could not be accommodated under the system as it stood. Those cases, they recommended, should be dealt with by a specially constituted regional panel of board members who would have the special knowledge of prison life not normally vested in a court. They did not regard legal representation as necessary in any matters other than those referred to the special panel, where evidence should be given under oath. If assistance were to be necessary at other hearings, within the Webster J. guidelines, that assistance should be by a McKenzie man rather than by a lawyer. Where there is legal representation, they recommended that the board should be assisted by a legally qualified clerk.

The board of visitors of Winchester prison (35) urged a more precise framing of charges so that the use of the "catch-all" Rule 47.20 would diminish. They believed that a governor's power of punishment should be increased but that should be accompanied by a formal system of appealing. Similarly, they believed that there should be a direct avenue of appeal to the courts from decisions of the board. They expressed concern over the need for training in a

variety of areas but did not want to split the adjudication function from their other duties. A majority proposed an absolute upper limit on the amount of remission that could be forfeited for each offence, which would effectively deprive them of their power, under Rule 52.3, to award unlimited forfeiture in certain circumstances.

The Castington board of visitors (36) sought the authority to decide to refer a charge to outside court and expressed a collective doubt about the post Campbell and Fell (37) situation of legal representation being granted as of right in certain circumstances.

Like the Leeds board, the Long Lartin board (39) favoured the establishment of a regionally convened panel to deal with legally represented cases, composed of magistrates with qualified support. They raised the question of whether or not payment should be considered for such a panel. They found merit in the combined pastoral and adjudicatory functions of boards. They were satisfied with the conduct of governors' hearings but were critical of their experience of granting McKenzie assistance. The reasons for this were not explained.

The Liverpool board of visitors (39) felt that governors should be empowered to deal with some matters presently referred to boards and that inmates should be given the choice of appearing before one or the other. They believed that the advent of legal advice had left them disadvantaged without legal advice of their own. Thus they suggested some "immediate access to Home Office to enable panels to resolve difficulties which arise during hearings".

The Reading board (40) welcomed recent changes which had made the system efficient and fair to all parties. Yet, having concern for the delay involved in legally represented cases, recommended that legal assistance should be granted in the case of Rule 51.1

cases (classified as "graver offences" under Prison Rules) and that they should then, automatically, be referred to the Crown Court. They did not state a view as to Rule 52 ("especially grave") offences. Their recommendation, they believed, would allow the majority of alleged offences to be dealt with expeditiously.

Brief written evidence was given by one member on behalf of the board of visitors at Preston prison (41). Stress was placed upon speed and that inmates should be provided with access to the local duty solicitor so that advice could be well-nigh immediate.

The Glen Parva board (42) believed that legal representation should be rarely necessary in the case of young offenders "because of the nature of the inmate population and the length and purpose of their sentence". They recommended that it should be possible, partially, to suspend awards. They urged the use of more simple language, particularly in form 1145 that briefly explains the procedure at adjudication to inmates. Lastly, they criticised appeal by way of petition "because we feel the petition actually goes to the wrong place" (ie. Home Office Prison Department). They recommended that such petitions should be submitted to an independent reviewer. They urged wider publication of the results of the many unreported ex parte applications resulting from adjudications which, they believed, would increase public awareness of internal proceedings.

The Ashford board (42A) classified offences as those equating to serious criminal offences which should, as is custom, be dealt with by the criminal courts; those which are criminal offences, eg. less serious assaults which "still need to be dealt with in a quasi-judicial manner in the prison environment; and those offences constituting merely antisocial behaviour, eg. truculence or

indecentcy in language or gesture, or idleness". Here they recommended lower tier hearings before wing managers who should be vested with the power of immediate, though not too severe, punishment. Increased powers of punishment vested in a governor would equip him to deal with many cases presently referred to the board. They recommended that the board should have an appellate function from governors' adjudications, together with the power to increase an inadequate award. They did not believe legal assistance to be necessary at governors' hearings, but, should the inmate appeal to the board, the Webster J. criteria should apply as at present. They recommended adding "taxing ... physical exertion or menial work" to the range of punishments at their disposal.

The Erlestoke board of visitors (43) noted the arguments in favour of legal representation before governors as well as before boards. They believed this important since there is no independent watchdog present at governors' hearings. They were also concerned that legal representation could cause governors not to refer matters to the board, and to accept lesser awards for the sake of administrative convenience. The conundrum could be solved by implementing their general view that "it would be preferable at establishments like Erlestoke, not to provide for legal representation for board of visitor adjudications". Their evidence continued:

We not only consider that it is unnecessary for legal representation to be provided at the second [board of visitor] tier; its provision would be bound to lead to substantial delays, prejudicing the smooth administration of the establishment requiring extra staff and generally adding a quite unjustifiable extra degree of inconvenience and hassle.

As regards especially grave offences, they argued for prosecution, but that trial should be before an itinerant stipendiary magistrate

who would sit with magistrate members of the board: a third tier in the hierarchy of disciplinary panels. They did acknowledge that there should be legal representation at the third tier, but with "special provisions for rules of procedure, evidence and standard of proof". A board should be empowered to refer cases to the third tier "if this seemed justifiable in the light of legal complexities". They recommended a revision of the powers of punishment. The third tier should have the powers presently vested in the board, the board's powers should be reduced and the governor's increased.

The Everthorpe board (44) argued for the presence of their own legal adviser, distinct from the governor's representative, when an inmate is legally represented. They further urged that certain offences committed in the community should be referred to them viz. that where escapees or absconders who stole cars, clothes or food in the neighbourhood to aid their escape, and where it was decided not to prosecute, the board should have jurisdiction. They suggested that delay in legally represented cases could be avoided by establishing a time limit of about three weeks before which date the defence must be prepared to proceed. This, they believed, would prevent defence solicitors subverting the internal process by delaying until after the inmate's discharge date.

In what surely must have been the most carefully drafted and closely argued of the pieces of evidence submitted by boards to the Committee, Wandsworth (45) whilst generally supporting the status quo, stressed the importance of adhering strictly to the procedural guidelines laid down by the courts and by the Home Office. They felt dissatisfaction with the dual role of the legal representative of the governor who was supposed to assist them too. This was



largely based upon their own experience of the "quality of performance by staff of the Treasury Solicitor [which] has been generally poor" (46). They noted that much of the criticism of boards levelled by the special interest groups in their evidence was based upon a reported lack of competence on the part of board members. They believed it essential that boards should be perceived as competent and were critical of the inadequacy of training to equip them for their role in the post-Tarrant environment of the adjudication room. They noted that, post-Campbell and Fell, the findings at certain adjudications would be made public. It was their view that, to avoid the labelling of hearings before them as those of "secret courts", there should be consideration of allowing the press to attend hearings where serious charges were concerned.

The Risley board of visitors (47) submitted an idiosyncratic piece of evidence that foretold of "disaster" were there to be any change to the system, save to abandon some of those that had recently come about and to increase the governor's power of punishment. In taking account of institutional pressures within a remand centre, they counselled:

Only people who have experience within the walls of a remand establishment can possibly understand these things and the introduction of solicitors, other forms of panels, or even magistrates' courts bring the danger of making wrong decisions or awarding inappropriate punishments.

They urged an extending of the already elastic parameters of the "catch-all" Rule 47.20 since, in some way, that would protect "unarmed and unprotected prison officers". They denied conflict between the pastoral and the punishing roles of boards. After all:

The role of good parents in a family ... will be to see to the welfare of that family in every way, but, at the

same time, will punish any deviation from behaviour necessary in a well run family when required to do so. Respect, not resentment, is the most usual outcome and indeed has been so since time immemorial.

They saw the intervention of any other panel, professional or lay, as leading to "the playing of the system by those inmates who know 'the book' from front to back, better than most". They urged the presence of a governor grade at hearings before them. He was to be "very experienced in the conduct of adjudications". As well as presenting a report on the inmate, he was "to courteously advise the clerk or panel of any errors or omissions as a case progresses". They believed that,

The use of a McKenzie man would appear to be a non-starter. He would seem to be a very difficult man to find.

Further, they believed the McKenzie role is already carried out by prison staff and by the panel chairmen. And, as if to dispel any doubt, they concluded by dismissing the need for any independent enquiry into their function on the grounds that they are, themselves, already independent and that every board of visitor adjudication is an independent enquiry.

The board of Camp Hill prison (48) denied that forfeiture of remission approximated to prolonged imprisonment. It was merely part of the original sentence contemplated by the trial judge. In stressing the need for hearings, with legal representation, to be dealt with expeditiously, the board pointed to the existence of the duty solicitor scheme that operated in the prison on one night per week as helping to prevent this (49). The board's view was that legal assistance should only be given in very serious cases, and they doubted that it should ever be granted if the prisoner made it known that he wished to plead guilty. They doubted that legal assistance would be necessary to argue mitigation. One important

view expressed concerned the overturning of awards. They noted that where an award was, say, of forfeiture of remission, and was then overturned, this would be accomplished with no attendant disadvantage to the prisoner. Where an award was one of cellular confinement, it commenced immediately and would be likely to have been concluded by the time the response to any petition or other action had been made known. The board suggested that a petition against the conduct of the adjudication should act as a trigger whereby the award would be suspended until the outcome became known. The board concluded their evidence by advising against too close a scrutiny of disciplinary processes for fear that change could result from unrepresentative minority views. There was oblique reference to the Association of Members of Boards of Visitors in this respect.

Only one prison board of visitors allowed the writer to review their evidence whilst, at the same time, insisting upon the preservation of their anonymity (50). This board was generally satisfied with the existing system, though they recommended that the provision whereby a prisoner is notified that he is to face adjudication at least two hours before the hearing (51) should be extended to 24 hours, or longer if the panel believe it necessary (52). They were concerned for the personal security of their members at hearings and concluded that responsibility for their safety should "remain indisputably with the governor" who should be able to order the resurrection of "eyeballing" if he believed it necessary. They stressed that, if they felt it necessary, the panel should be prepared to grant legal assistance whether or not the accused had asked for it. Finally, they pointed to the paradox whereby, at a crucial time, economies had been demanded in the Prison Department training budget, whilst at the same time, public

funds were being disbursed in respect of legal aid at adjudications.

Many boards were concerned at the inadequacy of training for their members, for their clerks and for staff. Opinions were divided as to whether or not a tariff of punishments for particular offences should be published. The majority were against it, many seeing their establishment as unique and thus having special needs in punishment terms. Most boards favoured the preservation of their dual role and a large number commented upon the impoverished physical conditions in which adjudications were held.

(b) The evidence of special interest groups, organisations, etc.

As in the case of the writer's request for sight of evidence from boards of visitors, requests to special interest groups, too, produced a number of replies from those listed in the appendix to the Prior Report which denied that they had submitted evidence. These were the Association of Chief Police Officers (53), the Treasury Solicitor (54), the Magistrates' Association (55), the Lord Chancellor's Department (56) and the pressure group Women in Prison (57). Further, the Crown Prosecution Service, whilst allowing the writer sight of evidence, provided by the Director of Public Prosecutions, required that it be used for background information only (58). A similar interdict was placed on evidence sent to the writer by the Isle of Wight Advisory Committee on Justices of the Peace (59).

The Association of Chief Officers of Probation (ACOP) envisaged a three tier disciplinary system (60). "Breaches of rule" should be dealt with by governors from whom should be taken the power to order loss of remission except in exceptional cases. Major "breaches of rule" should be heard before a tribunal familiar with the prison regime, operating under rules of evidence and with the

prisoner represented. Criminal offences should be dealt with by an outside court. They noted that the tribunal might be assisted by the presentation of a report from a probation officer seconded to the prison, but that:

It is entirely inappropriate for them to depart from their impartial role in any judicial or quasi-judicial hearing by speaking or acting for the prisoner against the evidence or complaint of prison staff.

They recommended, further, that the Parliamentary Commissioner on Administration's role in relation to complaints resulting from adjudications should be reviewed and perhaps extended. ACOP were concerned at the possibility of bias arising out of the dual functions of the board. Thus, they recommended distinct panels of the board - one for each function, or the establishing of an entirely separate tribunal for disciplinary purposes.

In its lengthy written evidence, the Association of Members of Boards of Visitors (61), recommended that boards should play no part in prison disciplinary hearings. They were uncomfortable with the "often contradictory duties" of boards. Serious institutional offending should be referred to a visiting panel of magistrates. Minor offences should be heard by the governor from whom should be taken the power to award forfeiture of remission. The visiting panel should normally conduct its hearings inside the institution, but might also sit outside to hear cases against inmates who had recently been released. Hearings before visiting panels, which should be elected by members of the local bench, would entail legal representation as of right. The governor should have the discretion to refer matters before him to the visiting panel, the power of punishment of which should be limited to 120 days' forfeiture of remission and to 240 in total in consecutive awards. Their power to make other awards should be restricted. Especially grave offences

should be the subject of prosecution externally. Rule 47 should be revised. Offences of "making false and malicious allegations" and the "catch-all" paragraph 20 should be abolished. There should be a formal appeals procedure. Magistrates who are board members should be excluded from membership of the visiting panel, but, as other board members, they should have the right to attend hearings before the visiting panel as part of their inspectoral function. AMBOV recommended, further, the ceasing of the involvement of board members in various administrative processes of the prison. Mr. Smith, the chair of the Association, was later invited to enlarge upon the written evidence at an oral hearing before the committee.

The Central Council of Probation Committees in its brief written evidence (62) accepted the status of the board of visitors as a tribunal and not as a court. The main burden of their paper was to express their hostility to the notion of a probation officer acting as a McKenzie. They were satisfied that probation officers should provide information on the inmate's social background to the board. They were satisfied that area probation committees might have a role in the recruitment of potential McKenzies "from the ranks of prison volunteers".

The Church of England Board for Social Responsibility (63) was convinced that the twin functions of the board were incompatible. It recommended some sort of filtering system so that the governor should not become overburdened with trivial offences. A chief officer might decide which cases should go forward, or a parallel of minor reports in young offender establishments might be introduced. It was seen as essential that adjudicators should know prison life. An itinerant panel of lay or stipendiary magistrates, perhaps with a "circuit" of establishments, might achieve this, given the necessary

training. It recommended experiments whereby inmates might be diverted out of disciplinary procedures.

The Commission for Racial Equality (64) urged a monitoring of disciplinary procedures on an ethnic basis. They suggested that translations of the guidance notes should be made available for prisoners whose first language is not English. They suggested, too, that the composition of boards should reflect the multi-racial character of the wider society.

The Free Church Federal Council (66) ruled out the need for legal assistance in all but the most serious charges which, in their view, should be dealt with in the courts. They saw the involvement of lawyers and "any rigid application of a model of justice" as damaging to the complex network of prison relationships. The headmaster/commanding officer analogy was utilised to explain the discipline that the Council had in mind. They recommended that any forfeiture of remission should be reflected in the date of the prisoner's release on parole (67). The Council recommended various procedural improvements, notably that the accused prisoner should have disclosed to him the whole of the reporting officer's evidence before the hearing. They recommended that boards of visitors should be empowered to scrutinise records of punishment awarded by the governor and to refer back to him any matters about which a prisoner had expressed dissatisfaction. In effect, they should be the appeal body from governors' adjudications. Where a disciplinary power is exercised by other than the governor, the prisoner should be accorded the right of seeking a remand to the governor himself.

Perhaps it was not surprising that the evidence of the Prison Governors' Branch of the Society of Civil and Public Servants (68) largely supported the status quo. They did recommend a revision of

Rule 47 and that this should include an examination of the definition of "mutiny" and the addition of a discrete charge of "assaulting a prison officer". The Branch equivocated upon whether or not a system of visiting magistrates should replace boards of visitors for disciplinary purposes, though, in their final summary of evidence they favoured boards. They argued that the "widespread assumption that a prison officer cannot be prevented from preferring a charge should be clarified and staff must be re-educated on this point". They urged that the decision should be vested in a senior member of staff. They urged the revision of the various forms used in the adjudication process, and that adjudication matters at regional offices should be monitored more closely, with management of this vested in a civil servant of higher rank than at present.

Her Majesty's Inspectorate of Prisons submitted brief, but carefully argued, evidence (65). They noted that some infractions of internal discipline were also crimes, but that, except in serious cases, it would be unnecessary to invite the police to investigate. In the less serious cases, the governor should adjudicate, though the prisoner might elect to be tried in court. They argued against legal representation as of right across the range of internal charges. They believed that, with adequate training, the adjudication function of the governor could be delegated to subordinate ranks. They believed it finely balanced as to whether or not boards of visitors should continue to adjudicate, or whether that function should be transferred to an alternative body. They believed that their impression of the fairness of boards had to be matched with questions of public confidence and the perception of them, by prisoners, as part of the establishment. Hence an alternative body was recommended. Familiarity with prisons would be



important and so they might be drawn from those magistrates presently serving on boards, who would then give up their watchdog function. The Inspectorate recommended the tape recording of hearings so that the laborious process of longhand reporting could be done away with. They had reservations about extending legal assistance at adjudication any further. Cost was at the root of this. They made a plea for increased staff training in adjudication matters and for governors' powers of punishment to be increased, together with a central system of review of a percentage of cases before them. They criticised delays in the "appeal" system.

The Home Office, itself, gave lengthy pieces of written evidence (69). Much of this was of an informative nature, reviewing, for example, the work of the various inquiries into the system of internal discipline that had previously taken place. The memoranda of evidence explained how the system presently operated whilst expressing "no implications about the Home Office's view of the present arrangements" (70). The distinction between prison rules that were regulatory and those that constituted criminal offences was addressed as was the interaction of the two systems.

The case for having some relatively cheap and accessible machinery which can deal quickly with offenders seems particularly strong in respect of the less serious cases and, in practice, this might imply having internal machinery ... This is especially true in dealing with young offenders who indulge in behaviour such as skylarking and horseplay which, if not firmly checked, can quickly lead on to bullying (71).

Whilst hesitating to lead the Committee in one way or another, Home Office averred that "the Committee may feel that the case for retaining some internal first tier machinery is incontestable" (72). Home Office presented various alternatives as a second tier tribunal. Mechanisms for review were considered, and the absence of an internal appellate body was noted (73). Appeal would seem to be

a matter the Committee should address, including whether or not the existing oversight at regional office, or by way of petition, remained adequate methods of reviewing adjudications. Short memoranda were submitted on the construction of offences (74) and on the procedure for dealing with offences under Prison Rules (75). a separate memorandum was issued in respect of the offence of making false and malicious allegations against an officer (76). Home Office noted that the judgment in ex parte Anderson (77) had largely rendered ineffective the protections it had taken into itself in Circular Instruction 14 of 1980 which had required internal ventilation of complaints:

One clear possibility is that the more intelligent and competent prisoners will increasingly make their complaints in the most damaging fashion and with impunity through their lawyers and in legal proceedings, while those who place themselves in jeopardy of a charge under Rule 47.12 by making an internal complaint will predominantly be the small-fry and the disturbed (78).

There followed a descriptive memorandum on mechanisms for review of adjudications. No recommendations were made save that "the Committee will wish to have regard to the resource implications as well as to other matters (79).

The Howard League (80) attempted to give something of an overview of the subject by reviewing the recommendations of Jellicoe (see Chapter Three(2)). Their own recommendations echoed part of that report. They suggested that minor matters should continue to be dealt with by the governor, but that "all other offences falling within the general ambit of the criminal law should be dealt with by the criminal courts". However, such a court might comprise "a lawyer of standing" sitting within each prison, assisted by two lay magistrates. They recommended the removal from Rule 47 of the "catch-all" charges, particularly that of making false and malicious

allegations. The supervisory function left with boards of visitors should be enhanced by ascribing to them a function of hearing staff complaints as well as those of inmates. They suggested the appointment of a prison ombudsman to investigate prison maladministration.

The Institute of Legal Executives (81) recommended a three-tier system of governor, board of visitors and "additional tribunal" with legal representation as of right at the second and third of those, unless, of course, that right were to be waived. The third tier would be a tribunal formed of magistrates and the public would be admitted to its hearings. The Institute recommended extensions to the duty solicitor scheme to prisons.

The Justices' Clerk's Society (82) doubted that the independence of boards, confirmed by the European Court in Campbell and Fell v UK, was a reality. The adjudicating governor was, manifestly, not independent. He was seen to hold a "tripartite role - prosecutor, judge, administrator". But despite their misgivings they acknowledged that it would be impractical for all disciplinary matters having criminal law equivalents to be referred to the criminal justice system outside. The Society recommended a police investigation of all allegations of serious institutional offending - serious assaults or use of gross personal violence, sexual or drug offences. The Crown Prosecution Service should use the same criteria as employed outside in deciding whether or not to prosecute. As regards property offences, the governor should retain a discretion as to whether or not the police should be invited to investigate. Where prosecutions took place, the Society believed that magistrates' courts "would be willing to take all reasonable steps to expedite the hearings of cases involving prisoners". There

should be an appeal system, from internal hearings to magistrates' courts, though to deter frivolous appeals the court should be empowered to increase as well as to decrease the award made at the lower level hearing. The Society recommended that, if boards were to continue adjudicating in matters that constituted crime, they should have access to "genuinely independent advice" of a superior quality to that available from their unqualified clerk or from interested parties (governor or Home Office). They recommended that a panel should be formed, comprising qualified justices' clerks and their assistants, from the neighbourhood, who could be called upon when boards were to deal with "quasi-criminal offences". Solicitors or barristers might also play that part. They believed there was no need for legal assistance to be available for the prisoner who faced charges of a purely disciplinary (ie. not criminal) nature./

The Law Society (83) appreciated the special problems of maintaining discipline in prisons and that a "swift, fair and conclusive" system of internal justice must prevail; but as the other side of the equation there had to be the acceptance of fairness by those subject to internal justice. They believed that this was made difficult by "oppressive overcrowding and related insanitary conditions". These exacerbated tension contributing to the problem of internal discipline. The Society shared the "widespread feeling" that boards of visitors are "not sufficiently independent to achieve public confidence as a judicial body". Pressures on the time of the magistracy meant that they were not an appropriate body to take on boards' disciplinary functions. Nevertheless, they supported the three tier system of the governor, a disciplinary tribunal and the courts (for serious breaches of the criminal law). The Society believed that the governor should retain

his powers, but that prisoners should be able to opt for a hearing before the new disciplinary tribunal as an alternative. Boards should lose their disciplinary powers. In their place should be substituted "a single person who will be a circuit judge or recorder approved by the Lord Chancellor" (84). This would guarantee manifest independence, being totally unconnected with Home Office or the Prison Department. The Society believed that, whereas it would be desirable were every prisoner to be legally represented at disciplinary proceedings, this would prove impractical. In any case, were a prisoner to opt for a hearing before the tribunal, he would have the prospect of it there. The tribunal should have two scales of punishment available to it. One should relate to serious offences referred to it automatically. The other should relate to the less serious offences before it at the prisoner's request. The Society would solve the problem of ineffectual punishments being awarded to life sentence prisoners (who have no remission to forfeit) by transferring them "administratively, rather than judicially, to prisons with regimes of advancing restriction". The Society concluded by rejecting the dual role of the governor's representative should the Committee recommend retention of the present system.

The Legal Action Group (LAG) (85), counselled that prison discipline should remain a matter for prisons, but where alleged misconduct equated to an indictable offence, the opportunity to elect for police investigation and trial before a jury should be given to the prisoner. There should be no "double jeopardy" and, when matters were dealt with internally, it should be possible only to make one award in relation to each offence. Only one charge should be preferred arising out of one set of facts. LAG recognised

that governors should retain the authority to adjudicate in the less serious cases but that their powers of punishment should be curtailed and that where forfeiture of remission was in prospect, for those should be legal representation. Where loss of remission was not in question, guilt could be established on a balance of probabilities. Otherwise the criminal standard of proof should apply. There should be a right of appeal to a reconstituted board of visitors where loss of remission had been awarded. Governors' adjudications should also be directly reviewed by the courts and an appeal body should be set up to hear appeals from board of visitors adjudications. The Group doubted the adequacy of present procedural safeguards and was critical of the segregation of prisoners pending adjudication (except at their own request). Boards should continue to adjudicate, but their pastoral function should be hived off. Boards, which should reflect a wider social spectrum, should be placed under the supervision of the Council on Tribunals. Representation before boards of visitors should be as of right. There should be an absolute ceiling of 180 days' forfeiture of remission vested in boards, whether awards are made concurrently or consecutively. Any greater punishment would only be appropriate after a full trial.

The national Association for the Care and Resettlement of Offenders (NACRO) (86) argued for a body distinct from the board of visitors to conduct adjudications. Rehearsing many of the points reviewed above, NACRO took specific exception to the Weiler thesis of 1975 that there was an advantage in having an adjudication panel that was "familiar with the establishment in which the alleged offence has occurred - its objectives, its regime, its culture, its stresses and its internal relationships" (87). This hinted at "hole

in the corner" justice. Knowledge of institutional processes did not imply a lack of fairness, per se. However:

If any of these factors are taken into account in considering either the finding of guilt or the award, this should be done openly and the accused should have a chance to reply.

NACRO was critical of procedure before boards, arguing for the "due process" model of the magistrates' court to be implanted. So, for example:

Both calling witnesses and cross examining require the chairman's permission. These features of the system for dealing with disciplinary offences fall well below the normal standards of natural justice to be found in courts or tribunals.

They proceeded to argue for legal representation, as of right, at all disciplinary tribunals dealing with serious matters, both for the prisoner and the reporting officer. NACRO urged the abolition of "eyeballing" and of the requirement for inmates to stand during adjudications at some establishments. They urged a more careful formulation of offences under Rule 47 (including the abolition of the "catch-all" charges). They believed that there should be a presumption against segregation pending adjudication. A reduction in the maximum forfeiture of remission that could be ordered by boards was made and since there was a "lack of any independent element" at governors' hearings, the power to award forfeiture of remission should be taken from him.

The National Association of Probation Officers (NAPO) (88) distinguished between those elements of the disciplinary system designed "to maintain domestic order" and those to "maintain the accepted rule of law". The former, they held, should be removed from the disciplinary system. Secondly, where an offence equates to a criminal offence, the accused, or the complainant, should have the option of referral of the case to the criminal courts, with legal

representation as of right. The charge of making false and malicious allegations should be abolished and various "staff protection" rules should be amalgamated into one, equating to the law relating to obstruction of the police. They sounded a warning note about the pressure upon governors to collude with prison staff's view that their view of events should, automatically, be accepted. Such pressures contributed to their belief that the power to award forfeiture of remission should be taken from him. Where fines are imposed, the level should relate to that of the inmate's earnings. NAPO were critical of procedure within the adjudication room where they found "the close proximity of officers normally face to face with the inmate who is standing to attention, cannot engender a belief that authority is prepared to listen with any degree of tolerance or understanding". NAPO proposed the establishment of a national adjudication board, with legally trained members operating through regionally based panels of three. Boards of visitors would thus be freed to concentrate upon their other duties. An inmate facing a disciplinary or criminal charge should have legal advice before entering a plea. The duty solicitor scheme should be extended to all establishments.

The National Association of Senior Probation Officers (NASPO) (89) expressed concern that the need to conclude a matter swiftly should not interfere with "basic rights to justice". Minor matters should continue to be dealt with by the governor, but a reconstituted second tier, appointed in like manner to a local review committee of the parole board should form a disciplinary board to deal with matters presently referred to panels of the board of visitors. The disciplinary board should have the power to remit a serious case to the magistrates' court. Further, NASPO



recommended that all complaints by prisoners against members of staff, irrespective of their grade, should be adjudicated upon by the disciplinary board. The offence of making false and malicious allegations should remain, but should only be invoked where malicious intent could be proved and where the complaint was not upheld by the disciplinary board. The power to order forfeiture of remission should be removed from the governor. Where forfeiture of remission is ordered, there should be an avenue of appeal to the magistrates' court.

In a lengthy and meticulous submission, the National Council for Civil Liberties (NCCL) (90) proposed a large number of changes to the disciplinary system. They argued for a redrafting of the rules whereby certain offences would be consolidated. Thus, the offences of using "any abusive, insolent, threatening or other improper language" and being "indecent in language, act or gesture" should be replaced by a single offence of using "threatening, abusive or insulting words or behaviour likely to create a breach of the peace". Greater clarity was recommended in a redrafting of offences of "mutiny", "doing gross personal violence" and "possessing an unauthorised article" so that the exact nature of the prohibited conduct would become clear. The "catch-all" offences should be abolished. Others to disappear would be those of "treating with disrespect any officer or any other person visiting a prison" and "repeatedly making groundless complaints". The prospect of double jeopardy should be eliminated. NCCL argued that where a prisoner is charged with an offence which also constitutes a significant offence against the criminal law (such as assault occasioning actual bodily harm, causing grievous bodily harm, escape, causing criminal damage valued at more than 200, and riot)

he should have the right to elect to be dealt within the outside courts instead of internally. The NCCL's other relevant recommendations were that Rule 52, together with its special category of "especially grave offences" should be abolished. All offences at present governed by Rules 51 and 52 should be triable only by a visiting panel chaired by a recorder or circuit judge. The maximum penalty for any one offence should be 180 days' loss of remission. The maximum penalty at any one sitting should be one year's loss of remission. No award of cellular confinement in excess of 50 days should be made at any one time. Governors should have no power to make awards of forfeiture of remission. Boards of visitors should lose their adjudicatory functions and be replaced by visiting panels chaired by a judge. Prisoners charged with offences before a visiting panel should have the right to be legally represented where they intend to plead not guilty. Visiting panels should have the power to subpoena witnesses and to administer oaths. Boards of visitors should be replaced by Prison Councils. These Councils should have no "executive function". Prison Councils should have the duty to inquire into and report on the case of any prisoner referred to them by a member of parliament on the grounds of maltreatment by members of the prison staff. They should have one third of their membership appointed directly by local authorities. Remission should be a right instead of a privilege. Prison governors should be required to justify the segregation of a prisoner pending adjudication to the visiting panel after seven days and thereafter at fourteen day intervals. The prisoner should have a right to appeal and to make representations in this respect.

The written evidence of the Northern Ireland Office (91) commenced with descriptive passages about the disciplinary system

within their jurisdiction. It commented that neither governors nor boards had asked them to recommend any change save those necessary to comply with the evolving case-law. The Office hoped that

no steps would be taken which would make the disciplinary procedures more cumbersome and/or complex, thereby placing additional burdens on governors and other members of staff.

If there were to be changes, it was hoped that they would be as simple as possible "and should not be capable of being strung out by prisoners - particularly those whose objective is to cause as much difficulty to the system as possible" (92). The Office concluded that if an alternative adjudicatory panel were to be recommended, the magistrates' court would be the proper forum wherein serious prison disciplinary matters should be judged.

Robert Kilroy-Silk, MP, submitted evidence on behalf of the Parliamentary All-party Penal Affairs Group (PAPPAG) (93). The group believed that "several features of this system as it has operated up to now fall well below the normal standards of natural justice to be found in courts or tribunals". Thus, recent developments in the courts, imposing more rigorous standards upon adjudications, were welcomed. PAPPAG had three recommendations. These were that a body, separate from the board of visitors, should adjudicate in the more serious cases. The second was that the maximum loss of remission to be awarded for a single offence should be reduced to three months and that consecutive awards should not be imposed for "what is essentially the same offence". Cases requiring more serious penalties should be referred to outside court. Thirdly, the group recommended that legal aid and legal representation should be available to all prisoners appearing before boards or any replacement panel. They took account of the small number of board of visitor adjudications, annually, and believed

that it would impose not too great a burden upon the criminal justice system to allow legal representation, as of right, in view of that.

The Parliamentary Commissioner for Administration (94) briefly noted that his office "had been concerned with the way in which the prison authorities had carried out their administrative functions under existing rules and procedures relating to disciplinary matters". Shortcomings had been noted in reports of individual cases made available to the Committee.

The Penal Affairs Committee of the Religious Society of Friends (95) found it irksome, in general, that punishment for infractions of internal discipline implied punishing those already being punished. Thus, this should be restricted to matters that constituted offences at law. They counselled group meetings and mediation as devices that could resolve internal conflict in an acceptable way.

In a lengthy and carefully constructed document, the Prison Officers' Association (POA) (96) made far reaching proposals which they acknowledged appeared to be at variance from their previously held position. Their proposals, they said, were founded on the three principles of "safety, control and fairness". A new code for the disciplinary system should be drawn up and made available to prisoners, to their families and to staff. Not only should this contain the kind of information presently reproduced in "the green book", it should also have supplements giving details of firms of solicitors. The present structure of Rule 47 should remain, though it should be split into "A" and "B" - one comprising criminal offences and the other, those of a "domestic" nature. The declining usefulness of the charge of making false and malicious allegations

was noted. The "catch-all" paragraph 20 should be kept and used, whenever possible, as an alternative to segregation under Rule 43. At least in that way, a prisoner would have a hearing before being segregated. The disciplinary functions of boards of visitors should be removed along with the administrative functions where the Secretary of State had a parallel jurisdiction (eg. approving administrative segregation or use of restraints). Governors' powers of punishment should be reduced to class "B" offences. There should be no legal representation at governors' hearings, but it was clear that the Association was not firm in that position and "might be willing to review our opposition" (97). Visiting committees of magistrates should be restored, though with redefined functions. They would try all class "A" offenders and such class "B" offenders as were referred to them by governors. The magistrates "should be familiar with the prison, not to the prisoner" (98). The Association endorsed that part of the Campbell and Fell judgment that saw the issuing of a public pronouncement as satisfying the requirement for a public hearing under Article 6 of the European Convention on Human Rights. They believed that the prison disciplinary system should be integrated with the criminal justice system in that class "A" offences could be tried before a magistrate, were a prisoner to be released before an internal hearing. There should be a formal appeals procedure with legal representation before the visiting committee as of right. The visiting committee should have no greater powers of punishment than a magistrates' court and there should be maximum liaison between prison staff and police as regards to investigation of offences. The visiting committee should be vested with the power of ordering compensation to be paid. The power of the Secretary of State to order that charges be referred to

him under Rule 51.5 should be removed as should the prisoner's right to petition him in respect of disciplinary proceedings (save regarding restoration of lost remission). The Association did not favour the proposal made by various other bodies, giving evidence, that a prisoner should be able to opt for trial rather than adjudication since:

that preserves the gap between disciplinary and criminal proceedings which we would wish to see closed altogether (99).

Finally, the Association argued for a greater role for the prison officer in the process of internal discipline. This would involve much more sophisticated training and also the appointment of a case-officer to all inmates who had suffered a loss of remission. Their job would be to report on the conduct of the inmate if, at some future time, he were to apply for a restoration of the remission that he had forfeited.

The Prison Reform Trust (PRT) (100) made several rather bland and generalised recommendations, later clarified in the oral evidence of its representatives. They also recommended the removal of the adjudication function from boards of visitors which henceforth should be vested in a local panel of magistrates. They would deal with serious cases as well as others referred to them by the governor, and the press would be admitted to hearings before them. Loss of remission should be "reserved for the more serious cases" or where other penalties had proved ineffective. Nevertheless, the Trust believed that the governor should retain the power to authorise loss of remission. There should be formal appeal from such decisions. The possibility of awarding consecutive penalties arising, substantially, from the same facts, should be abolished. Legal representation should be granted within the

principles expounded in ex parte Tarrant. The question of issuing subpoenas in respect of outside witnesses should be clarified.

The Prosecuting Solicitors' Society of England and Wales (101) acknowledged that their special interest extended only to those cases that the police were required to investigate. However, they found any award involving loss of remission "effectively a sentence of imprisonment and our instincts rebel against such sentences being passed without proper legal trials before properly constituted public courts". The first was that the board of visitors should be given "the status and appearance of a magistrates' court" including the setting aside of a room at the prison to be known as "the Court House". Alternatively, or additionally, they foresaw a system being devised whereby the more minor, though not merely disciplinary, offences could be referred back, by a judicial authority, to the governor for sentencing.

Radical Alternatives to Prison (RAP) (102) did "not regard it as part of its function to make detailed proposals on disciplinary measures" but were "deeply concerned by the immediate suffering endured by prisoners owing to the policies and practices of the present disciplinary system". RAP urged that the watchdog function of boards should disappear in favour of a body to be appointed by the local authority. Similarly, their adjudication function should be exercised by magistrates. Offences equating to criminal offences should be heard before "a properly constituted court" and legal representation should be a right. A special caveat was entered in respect of the role of the prison medical officer at adjudication. Cases were cited of a prisoner at Hull (Mr. Overton) who had been certified fit to face an adjudication for refusing to work the day before he died of cancer, and of a remand prisoner

(Mr. Heather-Hayes) who had been found fit after a minute's silent appearance before the doctor and soon before his suicide.

Evidence was submitted, on behalf of the Senate of the Inns of Court and the Bar by the Criminal Bar Association (103). They recommended the retention of disciplinary powers by the governor who could deal with matters "within hours of the offence to ensure good order in the prison". However they recommended that boards of visitors should lose their adjudication role. A "wholly independent" body should deliberate in the most serious offences. "Graver" and "especially grave" offences should be referred to a stipendiary magistrate. An increase in the governor's power to order forfeiture of remission (albeit only by two days) should limit the number of cases needing to be referred to the stipendiary. No appeal structure, beyond that offered by judicial review, was felt to be necessary.

(c) The evidence of individuals

The following passages cannot purport to be representative of evidence submitted to the Committee by individuals. However, both pieces of unsolicited information submitted to the writer have merit in view of the particular perspectives that they bring to the question of internal discipline. Group Captain G.L. Pendred (104), a member of the board of visitors at North Sea Camp detention centre, submitted individual evidence informed by many years of service at military disciplinary hearings. To begin with, it was his submission that the summary or abstract of evidence, "the essential precursor to a court martial", is far more comprehensive than the brief notice of report given to a prisoner. Secondly, he noted that the members of the court martial will never be from the accused's own unit or station, thus avoiding the risk of "prejudice through



familiarity or gossip". In serious cases, a judge advocate will be appointed. He is an independent member of the Judge Advocate General's Department. His function is "to control the proceedings of the court so that they conform to the proper legal requirements, the rules of evidence, fairness to the accused etc. and to advise the court on points of law". Awards are subject to confirmation and to appeal. Evidence is given on oath; the press are admitted and junior staff may attend as part of their training. Mr. Pendred recommended a judge advocate equivalent - a qualified lawyer to control the proceedings of boards. He believed that the governor's representative at legally assisted hearings should be a member of the Home Office Legal Adviser's Branch. The services had their own lawyers and this avoided the risk of the assumption that "a local solicitor drawn from a list will always be efficient, competent or effective. If his particular expertise happens to be conveyancing, he may be in some difficulty". A "retrospective rebate" system was proposed whereby an accused, who had been segregated pending adjudication, would automatically have that taken into account at the time an award was made. Perhaps Mr. Pendred's most interesting recommendation was that boards of visitors should continue to adjudicate, but should mimic the services' counterparts by not sitting at their own establishment; rather they should sit at "equivalent establishments serving a similar role".

Finally, it falls to the writer to consider the paper submitted to the Committee by Alastair Logan (105). Mr. Logan is a solicitor who had gained an immense knowledge of the law relating to prisons through his many years' involvement in representing clients who have tested their grievances against the Prison Department through the courts. He had previously published a monograph that

was circulated to his prisoner clients informing them of post-Tarrant law on adjudications; advising them how they should conduct themselves at hearings before boards; the facilities for which they should ask and how they should proceed if they are unsuccessful (106). The lengthy summary that follows is the briefest that can attempt to do justice to Mr. Logan's evidence. He commenced by acknowledging that "the maintenance of discipline within a closed institution has factors attached to it which are idiosyncratic and which do not lend themselves easily to a system of criminal justice". He noted the domestic, as opposed to criminal, quality of certain acts prohibited under Rule 47. He noted, however, an acceptable overlap of jurisdiction between boards of visitors and the courts in certain matters. He was concerned at the delay caused in dispensing with justice when, for example, a case was referred to the police who subsequently failed to charge the accused, the matter reverting to the board of visitors. He felt that some limit ought to be placed upon the time taken to decide upon external prosecution. He offered a model of a redrafted Rule 47 removing certain offences that should, properly, come within the ambit of the criminal law alone. More appropriate charges than "mutiny" under Rule 47.1, for example, might be "riotous behaviour", a conspiracy charge or a charge of criminal damage, etc. at an outside court.

Mr. Logan opined that an essential in maintaining good order and discipline within a closed institution is that there should be a shared perception of the fairness of the disciplinary system. He was particularly critical of the tardiness of Home Office in relation to developments in the courts - reacting to them rather than anticipating them. This had produced a variety of

dysfunctional institutional responses. One was uncertainty on the part of boards of visitors and staff - not to mention prisoners who often found themselves subject to a system that had been widely criticised. Disquiet among prisoners had manifested itself in a number of different ways. There had been an increased number of applications for judicial review, as there had in the number of petitions to the Secretary of State and requests for solicitors and members of parliament to involve themselves in prison grievances. The extra work involved for all could heighten the prisoners' fear that all was not fair. An example cited was that:

The average time taken for answering a petition has risen and is now about four months. Some have taken in excess of one year. Some have never been answered. The use of pro-forma replies, whilst understandable, simply reinforces the prisoners' belief that the answer was a foregone conclusion (107).

Bureaucratic attempts to solve grievances in the way that had always been the style in the past conspired to produce the very behaviour sought to be inhibited:

All of the above are avenues which remove control from local level. This is undesirable. It produces delay and a variety of conflicts and makes the task of management more difficult. Further, it tends to undermine authority and has made for staff dissatisfaction. Finally, it does not result, frequently, in any benefit to the prisoner and this, coupled with the delay is a positive incentive to dissatisfaction and therefore indiscipline (108).

Mr. Logan noticed undesirable confusion in the present system whereby "adjustment from a disciplinary system without representation to a disciplinary system with occasional representation" was difficult to understand by outsiders with little knowledge of prisons.

He argued in favour of the present basic structure of the adjudication system, but that governors' adjudications should not be delegated beyond the deputy governor role. To delegate it further

would leave in an awkward position the junior ranking governor, in charge of a wing, who might have had a hand in whether or not the charge was brought in the first place and might well have a role in the implementation of any punishment. Governors should lose the power to order forfeiture of remission and all the supporting forms should be revised so that the prisoner would genuinely be given notice of exactly what had been alleged against him. He counselled that "a proper system of providing information both to the prisoner and his legal representative should be put into force immediately". He had in mind access to a very wide range of prison documentation that would assist in defence - including the whole of Standing Orders. In order to preserve "separation of powers" boards of visitors should be split into a pastoral division and a judicial division. Members should progress from one to the other so that adjudicators would be sure to have a knowledge of the dynamics of prison life. Magistrates should be represented in the judicial division and the chairman of an adjudicating panel should always be a magistrate. It should have a qualified clerk. The matter of legal representation should be dealt with by the board as if it were a magistrates' court, ie. it should always be granted, since forfeiture of remission may be seen as further imprisonment. Various recommendations about administrative matters were made regarding segregation, recording of evidence, the provision of writing material, etc. Punishment scales were considered together with a plea that medical officers should be more sensitive to current information on the effects of cellular confinement before certifying prisoners as fit to undergo that punishment. Further, he urged that an award of forfeiture of privileges should not be interpreted to include loss of access to educational facilities.

Mr. Logan recommended the establishing of an appeals tribunal to comprise a high court judge and two assessors from judicial divisions of boards other than that from whence the appeal arose. An argument was made for a duty solicitor scheme to provide legal "clinics" within prisons with a wider brief than simply to advise on disciplinary matters.

### 3. Conclusion

It is difficult to gather together common themes from the foregoing. In the broadest of senses, boards of visitors remained relatively happy with the status quo whilst other contributors of evidence expressed dissatisfaction ranging from the mild to the extreme. Boards, in the main, believed that they are independent bodies - indeed, Campbell and Fell had affirmed that for them; but the majority of other witnesses had difficulty in accepting it. Most of them believed that they should retain a role in the oversight of prisons, though that should be limited to the exercise of their "pastoral" or supervisory functions. One common theme amongst boards' evidence was that they felt increasingly incompetent in the face of rapidly changing caselaw. They, and a large number of other witnesses, stressed the need for increased and more sophisticated training. Widespread dissatisfaction was expressed by both groups of evidence givers as to the efficacy of the system of appeal from adjudications. Many, including some boards, raised questions as to whether the expertise of the legal assistance offered to prisoners, post-Tarrant, was equal to the task of understanding the nature of disciplinary hearings within an unique environment.

It will be appreciated that the diversity of opinions and recommendations solicited by the Committee must have provided them with bewildering foundations upon which to build their Report. That

document will now be considered.

## Chapter Five(2)

### THE REPORT OF THE COMMITTEE ON THE PRISON DISCIPLINARY SYSTEM, OCTOBER 1985

#### 1. "Clearing the Decks"

The opening pages of the main body of the Report (1) convey a cogently argued account of the maintaining of control and discipline within prisons (2). There is consideration of the special nature of the need for disciplinary measures that might seem petty to the outsider - the Committee took note of how disputes over towels or over extra pieces of bread may become inordinately significant in terms of internal relationships. Difficulties of maintaining discipline, they found to be compounded by the poor physical conditions within many prisons; by the presence of uncooperative or disturbed prisoners within the system and by the conflicting demands placed upon staff. They were concerned at the impoverished nature of prison officers' training in comparison with that in other jurisdictions visited by their members. Further, whilst recognising the need for control over budgets, it was noted that the reducing of the quality of a regime to come within fixed cash limits could offer not only reduced job satisfaction for staff, but also could affect the quality of relationships between staff and inmates: tension could lead to a greater potential for loss of control. The Committee noted that this disciplinary system offers but one part of maintaining control, and a small one at that. It had to be matched against the positive incentives to encourage good behaviour that do exist. Above all it was important to recognise that most prisoners simply want to complete their sentences peacefully and without creating disciplinary problems. Good relationships with staff, an active routine and above all, a perception of fairness within the

system were seen as important elements in maintaining stability. They believed it important to distinguish between those procedures which might be seen as fair, even if the outcome of following the procedure might not be seen as fair by the prisoner and those which, simply, were not fair in themselves. In this context, the Committee felt the existing grievance procedure to be "complex, confusing and frustrating". If prisoners are to have confidence in the disciplinary system, that, too, must be seen as "fair" by staff and prisoners. Concern was expressed about the prospect of disciplinary measures being driven underground were the former group to lose faith in the official processes. Following a brief account of the disciplinary system as it stands and an account of pressures for change (3) the Committee embarked upon an assessment of the requirements of a disciplinary system.

In considering the scope of the system (4) they addressed a number of questions:-

- i) Is there a need for a formal prison disciplinary system? The Committee found the answer to be self-evident. Like other committees before them they believed it necessary to have a system that would uphold and enforce rules designed for the common good; to signal disapproval of wrongdoing; to deter repetition both individually and collectively and to discourage the imposition of unauthorised punishment by those affected by the wrongdoing. This was not to deny the discretion vested in the prison officer to decide when to invoke the formal system.
- ii) The dividing line between the disciplinary and the criminal justice systems. The Committee noted the different quality of the different offences listed at Prison Rule 47. Some had the



quality of crimes; others did not. Should the former be diverted to the courts, leaving governors to deal only with minor matters? Despite having support among prisoner witnesses and, indeed, some staff, the Committee rejected the notion. Speed was of importance as was the desire not to clog up the processes of the police and the courts. Prisons were not unlike certain outside agencies (e.g. firms or colleges) that might have their own internal disciplinary measures to deal with lesser infractions of the criminal law without resort to prosecution. The courts might not be familiar with "the proper use of the domestic disciplinary punishments" or the effect on the prisoner, or others, of too severe or too lenient a punishment. Prosecution would involve the prison service in further costly and unnecessary escort duties. But if discipline in charges of a "criminal" nature were to remain inside, should the prospect of forfeited remission be abandoned? The Committee felt that the prison system had become used to the sanction and it would be too radical a step to scrap it. The decision whether or not to prosecute "should be based on normal considerations of public prosecution policy and the offence dealt with in whichever system appears appropriate to the case". The Committee did, however, recommend against double jeopardy in that it should no longer be possible for a prisoner to be arraigned before the court and the board of visitors.

- iii) Should a disciplinary system be able to extend the time prisoners spend in prison? The Committee, as has been seen, favoured retention of forfeiture of remission as a sanction - they approved of its flexibility in that forfeited remission

could be restored under certain circumstances. However, they condemned any proposal that might lead to a disciplinary tribunal being given the power to impose any additional prison sentence.

- iv) What powers of forfeiture of remission should a disciplinary system have? The Committee concluded that the effect of Campbell and Fell v UK (50 "would seem to be that an issue will be treated, for the purposes of the Convention, as disciplinary rather than criminal if the maximum sanction available is limited and amounts to no more than about 180 days forfeiture of remission". The Committee's view, however, was that the especially grave offences - those that might attract a greater degree of forfeited remission - should be dealt with in the criminal courts. A new criminal offence should be created to deal with mutiny. The maximum cumulative award at an internal hearing should be 180 days forfeiture of remission. There was a recommendation for consultation between the Prison Department, the police and the Crown Prosecution Service with the hope of establishing "a consistent policy for the treatment of criminal offences in prison".
- v) What requirements of due process are appropriate? The view was that the prisoner should be adequately safeguarded at the hearing (see below); there should be an effective appeal process and that where substantial forfeiture of remission was in the balance, the adjudicators should be "impartial, fair and independent of the prison administration". They were to be "professionally and procedurally competent". So, if change were to be needed, what form should it take. The Committee gave a signal as to the philosophy that would inform the

Report as a whole:

The present system is no longer adequate. We do not deny that it has served well since it was set up, and had the flexibility to be able to respond to decisions made by the courts here and in Europe. But prisons cannot remain isolated from developments in the wider society ... In the light of these factors it is inconceivable to us that the present system can continue without structural reform. The cumulative logic of the recent legal and other developments affecting the position of prisoners points clearly to a system for maintaining prison discipline which contains a substantial legal input, provides proper safeguards and manifests conspicuous independence (6).

vi) Who should the adjudicators be? The Committee believed it "inescapable and right" that governors should deal with the great majority of "run of the mill" offences. They should retain the power to award forfeited remission - thought there should be an appeal procedure where the total exceeds seven days. But what form should the second tier adjudicating panel take? The Committee stressed the increased "legalising" of internal procedures. This seemed to indicate a need for greater legal expertise to be vested in the adjudicator, or at least available to adjudicators. This might be accomplished by the presence of a lawyer of standing being a member of the tribunal, or by the assistance of a legally qualified clerk. Differing views as to the independence of the board of visitors were reviewed and the Committee concluded that:

We think it essential for the adjudicating body dealing with more serious offences against discipline to be clearly seen to be wholly independent of the prison system and that its members, during their term of office should have no other function related to its administration (7).

A new body was needed.

2. The recommendations of the Committee (8)

The recommended new body was to be a statutory tribunal - the Prison Disciplinary Tribunal (9). It should be wholly independent of the prison system, have a judge as its president and the chair of each adjudicating panel should be legally qualified: a solicitor or barrister of not less than seven years' standing. He should be assisted by two lay members who would have responsibility for a group of prisons. The tribunal would have an appellate jurisdiction over governors' hearings. It would not be a court - it would not be open to public scrutiny, thus its findings should be subject to scrutiny by the courts. It should retain a degree of informality in its deliberations. The criminal standard of proof should be preserved. The Committee estimated that the tribunal would deal with its workload in about 2,000 sitting days per year which would require about ten full-time appointments. The circuit judge, who would be appointed as a part-time president and would be responsible for training, conferences, the maintenance of common standards and the interpretation, to tribunal members, of points of law of general importance (10). A regional chairman, designated from amongst the ranks of legally qualified chairmen, could be made responsible for many pre-hearing procedural questions, including the grant of representation. A wide spectrum of the population should be reflected amongst the lay members. Former members of boards of visitors might be people with the necessary background knowledge, but serving members, members of local review committees, prison visitors, etc., should be excluded as having too close a link with the prison. Appointment to the new body should be the responsibility of the president; panel chairmen should receive a sessional fee; lay members should be reimbursed on the same basis

as magistrates. The closest link with Prison Department would be the administrative support to be offered to tribunals from within regional offices.

The Committee considered the range of prison offences (11). Apart from the creation of the criminal offence of mutiny, with a maximum penalty of 10 years' imprisonment, it was felt that the existing criminal law is adequate to deal with the more serious internal infractions of discipline. However, a further separate offence of assaulting a prison officer in the execution of his duty might be added, analogous to that of assaulting a police officer in similar circumstances. The Report contains a new draft code of disciplinary offences which the Committee hoped would be clear and simple for staff to operate. Any code should make it clear to prisoners what constitutes an offence; it should identify offences not presently specified within Rule 47 and should reduce the need for, and scope of, the present "catch-all" paragraph 20. The code offered a "single class" of disciplinary offences which could be dealt with by the governor or the tribunal according to the circumstances. The governor should decide whether to deal with the charge or to remit it to the tribunal. The draft code offered was as follows:

A prisoner shall be guilty of an offence against discipline if he:

- (1) Commits any assault;
- (2) Without lawful excuse detains any person against his will;
- (3) Denies access to any part of the prison to any officer;
- (4) Fights with any person without lawful excuse;
- (5) Deliberately endangers the health and personal safety of others or is reckless as to such a result of his actions;

- (6) Acts in concert with others in a manner which constitutes a breach of good order and discipline;
- (7) Intentionally obstructs an officer of the prison in the execution of his duty;
- (8) Escapes from prison or from legal custody;
- (9) Without reasonable excuse fails to return to prison when he should have returned after being temporarily released from prison under Rule 6 of these Rules or to comply with any condition upon which he was so released;
- (10) Knowingly and without reasonable excuse has in his possession or under his control:
  - (a) any unauthorised article, or
  - (b) any article in greater quantity than he is authorised to have;

("unauthorised" in this and other paragraphs means authorised by the Prison Rules, Standing Orders, the governor or any other officer of the prison).
- (11) Sells or delivers to any person any unauthorised article;
- (12) Sells or, without permission, delivers to any person anything he is allowed to have only for his own use;
- (13) Takes improperly or is in unauthorised possession of any article belonging to another person or to a prison;
- (14) Intentionally or recklessly sets fire to any part of the prison or, without lawful excuse, any other property including his own;
- (15) Without lawful excuse, destroys or damages any part of the prison or other property not his own, intending to destroy such property or being reckless as to whether it would be destroyed or damaged;
- (16) Without reasonable excuse, is absent from any place where he is required to be or is present at a place where he is not authorised to be;
- (17) Treats with disrespect any officer of the prison;
- (18) Uses threatening, abusive, or insulting words or behaviour as a result of which a threat to good order is likely to occur;

- (19) Makes any allegation of misconduct against an officer which he knows to be false or does not believe to be true;
- (20) Deliberately fails to work properly, or being required to work refuses to do so;
- (21) Disobeys any lawful order;
- (22) Disobeys or fails to comply with any rule or regulation applying to him (it shall be a defence to this charge for the prisoner to show that he did not know, and that he had no reasonable way of knowing, of the rule or regulation in question);
- (23) In any way offends against good order and discipline;
- (24) (a) Attempts to commit, or
  - (b) Incites another prisoner to commit, or
  - (c) Assists another prisoner to commit or attempt to commit any of the foregoing offences (12).

The Committee then addressed the question of punishments (13), commencing with forfeiture of remission. This, they noted was widely viewed as the most serious sanction available and differed from all others since it had the effect of varying the length of detention. They believed that, for the prisoner, it constituted the most unpleasant punishment and is also the one more frequently awarded. This might be seen as surprising though the Committee noted that often there might be few practical alternatives:

In our prisons, the effects of most punishments can be frustrated, often by the lack of resources. To begin with, prisoners in this country have few privileges, an approach based on removal of privileges cannot be regarded as a major sanction. Furthermore, some punishments are unenforceable; cellular confinement, for example, cannot be carried out if there are no cells available; nor can segregation if there is a shortage of staff. Other punishments can be mitigated by the effort of other prisoners; the effect of stoppage of earnings, for example, can be eased by borrowing (14).

Ironically, cellular confinement or a new award of "extra" work might even be seen as a privilege. Overseas experience had shown the Committee that systems were able to function more positively

without the sanction of forfeited remission - or with the sanction in severely restricted form - but where a more wide ranging list of privileges was available. The possibility of their withdrawal operated as a significant factor in the management of prisons and prisoners. Should the forfeiture of remission affect the date upon which a prisoner becomes eligible for release on parole (which might effectively negate the award)? The Committee's view was that it would not be right "to introduce a disciplinary penalty which had a direct and unavoidable effect on the parole arrangements". The record of a prisoner's disciplinary problems was but one factor to be taken into account in deciding upon an appropriate release date. What of life sentence prisoners who have no remission to lose? It was noted that lifers might be expected to undergo long periods under other forms of punishment but that the record of a lifer's disciplinary infractions would also be taken into account in deciding a release date. In effect, a lifer might be punished twice. This might be obviated were a parallel to forfeited remission to be introduced whereby an adjudicator might recommend a delay in the periodic review of a life sentence.

In deciding a maximum award before a tribunal, the Committee recognised that any recommendation might be somewhat arbitrary. They considered, however, that 120 days might be appropriate - the nearest equivalent in effect to the maximum prison sentence available to the magistracy for one offence. They were critical of the present power, vested in boards, to order a succession of consecutive awards. They felt that a cumulative maximum of 180 days should apply. Governors should retain the power to award forfeiture of remission since:



Governors must remain the central figures in the maintenance of prison discipline. No recommendation of ours should undermine their authority or ability to deal quickly with the great majority of offences (15).

Whilst not castigating the way in which governors employ the award, the Committee believed it necessary "to provide genuine safeguards against the unjust use of this power". They recommended that the upper limit set upon the governor's power should remain at 28 days, but that this limit should also apply to the cumulative total for related offences. There should be a right of appeal to the tribunal where the total punishment exceeded seven days' forfeiture. The facility to restore forfeited remission as a mark of improved behaviour should remain (16). The authority presently vested in governor and board of visitors should be exercised by governor and tribunal. The Committee could not see a rationale for the requirement, under the present circular instruction, that the final seven days of forfeited remission should not be restored. Consistency of practice might be assisted by the introduction of standard forms, across the system, for this purpose.

As regards other punishments, the Committee recommended no change save for the addition of extra work to the list. Suspended punishments should remain, but the prospect of the partially suspended award was dismissed. Powers to mitigate awards should be retained, but both governors and the tribunal should be empowered to reduce punishments if the circumstances seem appropriate.

The Committee moved on to consider questions of representation and assistance (17). A review of the case law and current practice was reproduced. They were satisfied that there should be no absolute right to representation at disciplinary hearings, rather the discretion to allow it should be vested in the tribunal as it is now in boards of visitors. They found representation to be "clearly

inconsistent with the domestic nature of (governors') hearings", particularly since, in cases involving a forfeiture of remission of more than seven days, there would be an avenue of appeal to the tribunal.

Tribunals should follow the practice of boards of visitors in asking whether or no the accused prisoner wishes them to consider an application for assistance. If an application is refused, the reasons should be recorded. The unsatisfactory dual role of "governor's representative" having a responsibility to guide the panel could be abandoned once a legally qualified chairman was in position. Where a prisoner is legally represented, the establishment may also be represented - but not automatically. That would be a management decision. Where a prisoner is unrepresented "someone of appropriate authority from within the establishment" should present the prosecution case. The Committee's view was that any alleged offence will have been committed against the whole prison community and not just the reporting officer. The "prosecutor", however, should be allowed to stay in the adjudication room for the duration of the hearing, readily available to offer clarification of evidence to the tribunal. Delays could be reduced by preparatory work. For example, pre-hearing sessions could be utilised to decide upon procedural questions such as that of representation as has been seen. Training of local lawyers in prison matters might produce a pool of expertise and the inclusion of prison work under the umbrella of the local duty solicitor scheme might expedite matters. The Treasury Solicitor should appoint permanent local agents so that prosecution expertise might also develop. The decision on the granting of legal aid could be hastened if the tribunal were to provide the accused prisoner with a

certificate to confirm that representation had been granted. Greater emphasis should be placed upon increasing the prisoner's awareness that he may seek legal advice before the hearing, irrespective of whether or not he requests, or is granted, it at adjudication proper. Without elaborating, the Committee doubted that the McKenzie men "can have much application to prison disciplinary hearings". The Committee's observations overseas, however, did not lead them to the conclusion of various British reports and witnesses that to place a member of staff in an advisory role to the prisoner would present him with a conflict of interest or compromise his position vis-a-vis his colleagues. This need not extend to representing the prisoner, but might constitute the giving of advice or the presentation of mitigation.

The Committee next turned their minds to matters of procedure (18). No essential changes were recommended to that relating to governors' hearings, but the tribunal was seen to have "a different purpose and approach". It needed to be more formal, and yet flexible. Primary legislation would be necessary for its establishment and statutory rules to regulate its procedure would be necessary. Such rules should include the power to compel attendance of witnesses, to order disclosure of documents, etc. The Committee supported the existing requirement under Prison Rule 48.1 that a disciplinary charge against a prisoner should be laid as soon as possible. The present permissive approach whereby any officer may place an inmate on report should remain, but the charge should only go forward once it has been vetted by a more senior officer. This would help to guarantee a proper framing of the charge and diminish the likelihood of dismissal on a technicality. Once laid, the charge should only be withdrawn on the decision of the adjudicating

governor, but in practice, the offering of no evidence should emerge to prevent the needless convening of a tribunal should, for example, the establishment's legal representative decide that the evidence did not meet the necessary standard of proof. The general recommendation of giving the prisoner at least two hours' notice of a charge before the governor, was approved, but where a matter is remanded to tribunals, there would be merit in giving notice of the date of the hearing, together with relevant documentation, as soon as practical after the governor's hearing. The Committee expected about seven days' notice to be appropriate. In order to prepare their case, prisoners should not only be given Form 1127 (19), as at present, stating the basis of the charge, but also should be given copies of the reporting officer's statement together with any witness's statements. A defence representative should be given copies of these, together with a record of the preliminary hearing before the governor. The Prison Department was directed to consider re-wording Form 1145 bearing in mind the level of literacy in the prison population and the need for translation into minority languages. Further, prisoners should be allowed to keep copies of the form with them during the hearing. Medical Officers were encouraged to be more precise in the advice given to governors or tribunals than at present. However, some ethical concern was expressed about the ambiguity of the doctor's role in both caring for the patient, yet certifying fitness for punishments. Any report submitted by a medical officer to the panel should be done so openly and the doctor be prepared to face questions on it. Where it might not be in the prisoner's best interest to know the content of the report, there would be "considerable advantage in the prisoner being legally represented". The report should then be available to the

lawyer for him to use in his client's best interests. Ultimately, the doctor's ethical position would be preserved if he were able to explain to his client that disclosure was not a breach of trust - rather a legal requirement.

The question of a prisoner's collusion with prisoner witnesses led the Committee to consider that legal assistance would assist in preventing this. But where there was no legal assistance and the prisoner had had difficulty in consulting with witnesses (eg. if a governor were to be satisfied that collusion or intimidation might come about) then the tribunal would have to consider whether or not that had prejudiced the chance of a fair hearing. If it had, the correct conclusion would be to dismiss the charge. Segregation of a prisoner facing a charge should require the approval of the board of visitors if it exceeded seven days (or successive periods of seven days) and of the legally qualified tribunal chairman if it were to exceed 28 days. Periods of segregation pending adjudication should be taken into account when deciding upon the punishment.

The Committee was concerned that much valuable time was taken up by governors adjudicating in person. They therefore recommended that Prison Rule 98 should be invoked so that hearings could be conducted by more junior members of the governor grade. Their view was that hearings should continue to take place in private, though, exceptionally, a tribunal chairman might wish to advise members of the public or the press (20). Statutory rules should require that the prisoner or his representative should have the right to sum up for the defence before any finding of guilt or otherwise is announced.

Since the Committee's view was that hearings before the tribunals would be disciplinary and not criminal, a tribunal should

be empowered to admit any evidence; it should not be fettered by the rules of evidence applying in criminal courts. Evidence before a tribunal, but not before a governor, should be on oath. The present guidance on the hearing of witnesses by governors and boards of visitors should be followed. The test as to whether or not they will be heard should be based on whether or not they are liable to be able to contribute to the deliberations of the hearing and not based upon convenience or cost. In common with other statutory tribunals, the prison disciplinary tribunal should have the authority to compel attendance by witnesses and to order disclosure of documents. The Committee did not see such a need arising out of governors' hearings. Witnesses should enjoy privilege against civil action for defamation in relation to their evidence. Refusal to comply with the directions of the tribunal should lead to a charge of contempt. Thus the status of the new tribunal should be such as to bring it within the provisions of section 19 of the Contempt of Court Act, 1981. The power to bring in findings to an alternative, lesser, offence than the one in the charge should not be reinstated.

Any report to the tribunal, after a finding of guilt, should be presented by a person other than the reporting officer and should be open to question by the accused or his representative. The prosecution should not seek to advise on punishment unless requested to do so by the tribunal. Any recommendations should be subject to questioning.

The duty of keeping an adequate record of the hearing should devolve upon the chairman of the tribunal, the clerk's duties becoming more those of a facilitator (arranging a date, booking a room, stewarding the panel, etc.) than of a clerk to a court. Members of a panel should be indemnified against damages and costs

for torts committed arising in "the exercise or purported exercise of their functions" (a comparison was drawn with section 53, Justices of the Peace Act 1959).

So far as physical conditions are concerned, the Committee recommended provision of an adequate venue for adjudication; that the accused should be seated and that the practice of "eyeballing" should cease wherever it was still to be found.

The Committee's view was that the system of "minor reports" in young offender institutions should remain and should be extended to remand centres and to young offender units within adult prisons. Such a system should be closely monitored by the governor or by a senior uniformed member of staff. Losses of kit - often the subject of minor report - should be subject to an administrative procedure whereby the department could be compensated rather than being subject to a fine at a disciplinary hearing.

Next the Committee considered appeals and other forms of review (21). At the time of the Report, the only method of challenging a governor's adjudication was by way of petition to the Secretary of State. Statistics showed that only about one out of every thirteen such petitions produced a result favourable to the prisoner. This resulted in a polarisation of view. Home Office belief was that such figures vindicated the adjudication process. Prisoners tended to believe it was useless to petition, an internal review of a governor's decision being likely to support the governor. The Committee concluded that:

The availability of an effective appeal process where any substantial issue or right of liberty is at stake is an important element of the perceived fairness of a disciplinary system. Procedures need to be open, accessible, prompt and decisive (22).

The "natural channel for appeal" from governors' hearings would be

the tribunal. Pragmatic grounds led the Committee to recommend this only in cases where more than seven days remission was forfeited before a governor. A procedure for appeal to the tribunal was recommended. There should be no further avenue of appeal, though the tribunal's deliberations should be subject to judicial review. But how should a prisoner appeal from the findings of the tribunal? Having rehearsed the difficulties in establishing such a procedure, the Committee supported the setting up of an appeal tribunal partly modelled on the system of appeal from the Crown Court to the Court of Appeal, ie. it would be necessary for the aggrieved prisoner to secure leave to appeal first. If the appeal were to be frivolous, similar controls would apply as in the outside world - legal aid would not be forthcoming were the prisoner to persist and the time spent awaiting the appeal might be ordered not to count towards sentence. The chairman of the appeal tribunal would be the president of tribunals assisted by legally qualified chairman and lay members of tribunals seconded for that purpose. The appeal tribunal should sit at a venue of its choice (which would avoid the logistical problem, eg. of transferring a high security prisoner to a distant point were he granted leave to be present). Otherwise, prisoners could temporarily be lodged in a prison conveniently close to the seat of the tribunal. However, the presence of the prisoner would only be required if the tribunal decided it to be essential. The tribunal should give reasons for their decisions. The Secretary of State should be given power to quash findings of guilt (presently lacking under Rule 56.1) in respect of awards not coming within the ambit of the appeal tribunal.

Finally, the Committee briefly looked to the future (23). Their recommendations were designed to be "an attempt to find the



best system to meet our future needs rather than to bolster up the existing one". A range of staff and tribunal members would need training both in technique and in attitude to equip them for working within the new system.

### 3. Costings

The Committee concluded their deliberations with an assessment of costs (24).

Acting upon various assumptions they concluded that the additional cost of fees, loss of earnings compensation and expenses would be about 350,000 per annum. The cost of additional administrative staff would be about 400,000 per annum. There could be additional calls upon the legal aid fund. They noted that total expenditure on the prison service, in the financial year 1985-86 was to be some 590,000,000. The total cost of their proposals would be less than 1,000,000. How could further expense be justified? The Committee put this into context:

Satisfactory disciplinary arrangements reduce tensions and, in consequence, may diminish major prison disturbances, but this is speculative. Savings could also arise from reduction in the present need to defend decisions in the more expensive proceedings of judicial review, to which, in future, we believe less resort will be needed. There would however be substantial staff time savings compared with the other major option, that of greater reliance on prosecution in courts. All in all, the costs involved, marginal in comparison with the whole cost of the prison service, should be a worthwhile investment. Disciplinary arrangements which command wider confidence are likely to have long-term economic benefit for prison management (25).

## Chapter Five(3)

### COMMENT UPON AND RESPONSES TO PRIOR

#### 1. Introduction

There can be no doubt that the Prior Report represents the most comprehensive review of the system of maintaining prison discipline to have been undertaken since prisons became nationalised in 1877. Mr. Prior's stated objective viz. "to decide what are the ideal arrangements for fairness" (1) was achieved with diligence and commendable speed. It left some boards of visitors, however, feeling confused and hurt. To accept its recommendations, said the chairman of one, would render boards impotent (2). Another employed the emotive imagery of "agreeing to be raped" were boards to favour the establishing of the proposed Tribunal (3). Indeed, it can be advanced that the Report showed certain shortcomings, but hardly such as to produce so extreme a view. Amongst these shortcomings was the conclusion that a court would have difficulty in placing prison offences in context since a judge would not have "a special understanding of the background of institutional life" (4). There may be many reasons for keeping run-of-the-mill prison offences out of court, but that is not one. The Committee believed that a court would not be able to decide

Should a sentence be consecutive or concurrent with the existing sentence, for example? In the case of a prisoner already subject to a long sentence, what would be the impact - on the prisoner, other prisoners and the community - of a relatively short sentence? (5).

These are elements that fall to be decided, now, in the case of criminal offences committed in prison that are prosecuted in outside courts. Juries return verdicts and judges sentence with a competence unhindered by Prior's anxiety that they might not know what they are about.

Another shortcoming lies in the Committee's uncharacteristically muddled thinking on the issue of whether or not forfeiture of remission amounts to additional imprisonment:

Would it be a reasonable alternative to empower a disciplinary tribunal to pass additional prison sentences? We are certain that it would not. Such a provision would, it is true, recognise the view of some of our witnesses that forfeiture of remission amounts, in practice, to an additional term of custody and should attract the same due process protections as apply in the criminal courts; but the power to impose sentences of imprisonment is, in our view, properly limited to the criminal courts following a public hearing (6).

Yet, it has been seen that consecutive awards of forfeited remission (or under Rule 52.3, one award) may amount to what is, in effect, extra imprisonment, without the trappings of a public hearing. The Committee recognised that forfeited remission "is not technically an extra prison sentence" (7), but that in the eyes of the recipient prisoner "it does amount to an extra deprivation of liberty" (8). Their conclusion to restrict forfeiture of remission to 120 days is based upon a parallel with the effective imprisonment that can be imposed at a magistrates' court (9). Why this parallel but for the assumption that forfeited remission is extra imprisonment? Further, the Committee's recommendation that the cumulative total of remission that may be forfeited in respect of "additional or aggravating offences" should be 180 days (10) is based upon the strange belief that:

The effect of the European Court judgment in Campbell and Fell seems to be that they would regard a punishment up to 180 days' forfeiture of remission as a proper disciplinary punishment (11).

One of the Committee members was later to admit that:

After more than a year I still occasionally find myself in a nightmare in which I am required, in cross examination, to distinguish between imposing an additional sentence of imprisonment and requiring a prisoner to spend a longer period than would otherwise be

the case in prison ... I ultimately convinced myself that there is a difference; and that is that forfeited remission can be restored (12).

Such a rationale is only partly tenable since, as instructions now stand, forfeited remission may only be partially restored since any of a cumulative total of seven days or less cannot be restored at all by a governor or board (13).

The Committee's awareness that points of law do, occasionally, arise at adjudication and that a panel needs a degree of legal knowledge to cope with them (14) is to be welcomed. The president of tribunals however, was recommended to be a circuit judge. Amongst his responsibilities was to be the training of tribunal members (15). Yet he may have had singularly little training in criminological or penological matters himself (16). An irony might be, and this is not to reject training, that legally qualified tribunal chairmen, dealing with breakdown of internal discipline, might become more cognisant of penological questions than those judges or magistrates who sentence to imprisonment in the first place (17).

There is some inconsistency in the Committee's recommendation that "extra work" should be formalised as a disciplinary award (18). There may be work within a prison setting for a variety of reasons. It may exist simply as something to occupy a prisoner's time, it may exist for the questionable therapeutic reason of "teaching the work habit". It may be there to assist Prison Service Industries and Farms Division to meet contract dates and to make a profit. In a sense, all of these purported reasons may be seen to have some positive or beneficial rationale behind them. It is not clear that a punishment of extra work could be perceived by the prisoner in a similar way and the tendency to perform such tasks might well be

undertaken without the degree of commitment that the prison, as an employer, might require. Were the extra work merely to be token, or purposeless, there would be little to distinguish it in quality from the tedium of the Victorian crank or treadmill (19). Further, the Committee had previously recognised that, in the impoverished environment of many prisons, extra work could even be seen as a privilege, since work of any kind might be a rarity (20).

The Committee attempted a compromise between the conflicting views:

It is important that presenting extra work as a punishment should not be seen to devalue work as a necessary part of a prison regime by which prisoners can develop purpose and self respect. We are conscious of the irony that, in many prisons, especially locals, it is not possible to provide ordinary work, let alone extra work. Moreover, other establishments have staff shortages which may limit the extent to which those engaged in extra work can effectively be supervised. But a number of the existing punishments have such practical limits on their availability for local and resource reasons and there is no reason why this punishment should not be available where it can be used. In many establishments there are tasks - possibly dirty, unpopular tasks - which do not otherwise get done and which would be suitable employment for prisoners so dealt with (21).

Yet it is inevitably the dirty jobs in establishments that do get done. To neglect them would be contrary to hygiene or Health and Safety at Work Act requirements. To leave them to the uncertainty of whether or not inmates happened to be under punishment could not be tolerated by management. Deployment of staff to oversee such tasks would contribute to shortages of staff in other areas where supervision might be necessary.

A brief comment is necessary regarding the Committee's rejection of the need for legal representation at a governor's adjudication. It is discussed in two brief paragraphs and is described, without further elaboration, as "inconsistent with the domestic nature of these proceedings" (22). The rationale is that,

under their proposals, any forfeiture of remission, before a governor, of seven days or more would attract the right of appeal to the Tribunal where the question of representation would be considered. Subsequent judicial pronouncement, albeit obiter (23) has confirmed the Committee's view. Yet, attention is drawn to the argument made elsewhere in this paper that if a governor is now seen to be acting judicially in conducting his adjudications, he should be bound by the same considerations as a board of visitors in deciding questions of legal or other assistance or representation.

The Committee's recommendation that, in certain circumstances, it might be desirable to admit the public or representatives of the press (24) appears to have been made without adverting to the vexed question of "who controls the gate?" The Prior model suggested that invitations should be made on the recommendation of the hearing panel and with the agreement of the President of the Tribunal. Yet, as has been seen, Rule 87.1 has been interpreted and endorsed, by Home Office, as placing the authority to admit people to the prison firmly in the hands of the governor. If that position were to be maintained a panel would, of course, have the option of hearing the adjudication outside the prison gates, always assuming that it had the authority to order the production of the accused prisoner and any prisoner witnesses to appear before it - or of dismissing the charge. Both of those alternatives might be seen as undesirable.

Finally, it is submitted that evidence recommended to be given under oath or affirmation (25) in the case of prisoner witnesses would be unlikely to produce other than an increase in cases of perjury, such are the pressures within prisons not to give evidence either against fellow prisoners or in favour of prison staff.

2. Board of visitors' responses to Prior

The coordinating committee of boards of visitors, under the chairmanship of John Appleton of the Gartree board, requested responses to the Report from boards. Seventy-seven replied and of those twenty-one sent unsolicited copies to the writer who has also had sight of the coordinating committee's report which drew together the comments of all seventy-seven (26). Boards of visitors were overwhelmingly hostile to Prior and its recommendations. There were indications that some members felt personally slighted. The Norwich board, for example,

were unanimous in rejecting the report as whole and in these circumstances are not prepared to comment specifically upon any of the hundred recommendations which we do not consider adequately address any adjudicating problems which might require some attention [and in] expressing the hope that the Secretary of State will not accept the proposals which do not satisfy the terms of reference set (27).

They doubted the findings of the research commissioned by Prior. They expressed surprise that board of visitor members of the Committee had put their names to the Report and recorded that:

Obviously, we could go on and on knocking holes in a report which is voluminous in words, but short of real conclusive evidence for change (28).

The Preston board unanimously rejected the notion of the Prison Disciplinary Tribunal and suggested an alternative Board of Adjudicators: the itinerant adjudicating panel made up of board members. In apparently contradictory statements, they noted that:

The board unanimously opposes the proposal that prisoners should have the right of appeal against forfeiture of more than seven days remission [but] unanimously agreed that a speedy and competent appeal procedure is required (29).

Further, they "unanimously agreed that the proposed system will provide scope for prisoners to be manipulative" (30).

The Featherstone board split into factions - the chairman and two members versus the deputy chairman and the other members (two newly joined members stood aloof). They were concerned that magistrates who were independent enough to sit in a magistrates' court and "judge their fellows" were not seen as "independent enough to judge the misdemeanours of inmates in a prison where, after all, they would have no power to extend the sentence beyond that to which the inmate was sentenced by a court of law". Further, the majority, strangely, believed that:

The Report [sic] would seem to be guilty of using their own perhaps biased views and attributing them to the "present day society" or to the community - when the vast majority of law abiding citizens generally have only one criticism and that is the leniency of sentencing policy (31).

Some boards welcomed the Prior recommendations. Rochester, for example, announced that:

Our views are unanimous and we welcome the Report. We would be very happy to shed the responsibility for adjudications so that we would have more time to visit the establishment informally (32).

They did, however, offer of their collective wisdom to the proposed Tribunal in terms that may cast some doubt upon their objectivity at the time of writing.

A normal Tribunal deals with law abiding citizens who can be expected to tell the truth when on oath. A prisoner, if convicted in court after pleading "not guilty" has almost certainly told lies when on oath and could be expected to do so again (33).

A comprehensive analysis of the collective responses of boards was sent to the Secretary of State on 21 February 1986 (34). Forty-five boards were found to be opposed to the establishment of a Prison Disciplinary Tribunal. Seventeen were in favour. Four boards of visitors could not reach a collective view. Nine boards produced what were styled "miscellaneous" responses, ie. some favoured



adjudications both before boards of visitors and Tribunals whilst some liked neither but suggested alternatives. Two boards simply acknowledged the interests of the coordinating committee (35).

A summary of boards' reasons for rejecting the Tribunal was given. These were as follows:

- (a) expense, delays and inconvenience to staff and inmates would result from what was seen as "an unnecessary adjudicatory body";
- (b) there was resentment that the integrity of boards was believed to have been doubted;
- (c) only about 20 of 18,000 adjudications had been overturned by the courts since St. Germain;
- (d) the decision in Campbell and Fell v UK had confirmed the independence of boards of visitors;
- (e) the practical workings of a Tribunal would "leave much to be desired"; members would not have the same intimate knowledge of local conditions as a board of visitors;
- (f) in time, a Tribunal would become seen as part of the management, the establishment and "the legal system itself";
- (g) the setting up of a Prison Disciplinary Tribunal could be "regarded as pandering to misinformed public opinion, misguided pressure groups and inmates' views with very little notice taken of boards";
- (h) undue influence was accorded research findings critical of boards of visitors adjudications;
- (i) were the adjudication function to be taken from boards, their function would become meaningless, approximating to that of "unpaid social workers";

(j) how can a board be seen as fair when taking applications from prisoners, but unfair when adjudicating? (36)

The reasons put forward by those boards favouring the establishing of a Tribunal were few, and some of those were half-hearted; the synopsis recorded that many boards were resigned to it being set up regardless of their views. Of the boards in favour, this tended to be because they were happy to abandon the adjudication function so that they could concentrate upon the pastoral role; because of the increased "legalising" of the disciplinary system or because they recognised that too great a knowledge of an institution might affect their objectivity. The proposal was seen on the one hand as "beneficial to staff and inmates" and yet, at the same time, was described as "an inmates' charter".

The more general views of boards were that governors' powers of punishment should be increased, though reservations were expressed as to the efficacy of the proposed "extra work" punishment. The recommendation as to a new code of internal offences was strongly endorsed. Referral of more serious charges to the courts was supported, as was the need for a formal system of communication of decisions between Tribunal, governors and boards of visitors. Boards believed that the funding for training the new Tribunal members should not be at the expense of other prison spending and should have a separate budget.

Despite the reservations expressed by boards of visitors, Professor Cretney's enthusiasm for the Report remained. A member of the Committee, he told a seminar mounted by the National Association for the Care and Resettlement of Offenders that it had constantly had in mind the question of whether or not their recommendations

could be justified in ten years' time:

I think we all felt profoundly unhappy at the way in which, in recent years, we had lurched from expedient to expedient and concerned that the system which we put forward should be capable of meeting the requirements for natural justice for the foreseeable future.

Of the initial Home Office response, he added:

Tarrant has not led to an uncontrollable flood of legally represented adjudications; the European Court in Campbell and Fell did not follow the European Commission's views about boards of visitors. It must therefore have been very tempting for the Home Office to put the Report on one side. It was certainly encouraging that the Home Secretary did not adopt that attitude; but gave such a positive response to the Report (38).

Observers of the system had by this time, however, already begun to doubt the extent to which Professor Cretney's enthusiasm would be translated into change. Dean (1985) reported that:

The new system of prison disciplinary tribunals proposed by the Prior Committee last month is being opposed by senior Home Office officials (39).

And when the chairman of the board of visitors coordinating committee gave his personal views as to the prospects for the Prior Committee's recommendation, circumspection was evident:

My worry is that he [the Home Secretary] will be advised to pick the eyes out and that the more expensive bits - particularly the appeals procedure - will not see the light of day. This could be seriously counterproductive, because the proposals form a package and many of them are interdependent. The courts have to be convinced that the safeguards in the proposed system are commensurate with the powers of punishment and any significant watering down of the former will only increase the likelihood of the Department finding itself back at square one before long (40).

### 3. The government response to Prior

#### (a) "Conclusions some of which are provisional" (41)

The government response was contained in a white paper presented to Parliament in October 1986. The tone was set by the statement that:

while it accepts the basic principles upon which the Committee's proposals are founded, it has reached some different conclusions on the changes which are needed to the existing arrangements. The government considers that the necessary changes can be brought about by adapting the present arrangements for lay involvement in the prison system; it regards its proposals as an evolution of these arrangements (42).

Tribute was paid to the competence of boards. However, of their dual role, the government displayed reservations:

The combination in a single body ... of adjudicatory and supervisory responsibilities is undesirable. The suspicion created in the minds of prisoners, staff and outside observers that the latter prevents the former from being discharged independently and impartially, is, in the government's view, sufficient to call into question the adjudicatory functions of boards ... What now needs to be decided is the kind of body which should assume the adjudicatory functions of boards of visitors (43).

The Prior Tribunal, as it was described, was believed to have serious disadvantages. It was seen as "more weighty" than magistrates' courts whilst being called upon to deal with offences that need not be criminal in character. Secondly, it was believed that the pool from which a legally qualified chairman would be drawn would be the same as that from which other judicial officers, mainly recorders and assistant recorders, are appointed, thus depleting the pool to an undesirable extent. Delay could result from difficulty in appointing a legally qualified chairman. Lastly, the setting up of administrative support for the Tribunal would require unnecessary expense. Should the new body be developed from the existing structure of magistrates' courts which were more widely dispersed around the country than prisons and already had their own administrative structure? This too was rejected (44) in the face of the increased resources that would have to be made available and of opposition from the Council of the Magistrates' Association (45).

A third option was preferred. This would be to split the adjudicatory and watchdog functions of boards. The former would be

performed by local panels of lay people. Collectively these panels would constitute a new prison disciplinary Tribunal (46). Tribunal members should be disqualified from sitting as members of boards and vice versa, though it was hoped that some board member would resign to take up appointment as members of the Tribunal. Each panel of the Tribunal would be assisted by a secretary appointed from the administrative staff of the prison and arrangements would be made for them to seek legal advice from local lawyers should this prove necessary. This third option could be implemented for less than half the cost estimated in the case of the Prior Tribunal (47). The government proposed "to bring forward legislation at an early opportunity to establish such a Tribunal (48).

The Committee's recommendations that the code of disciplinary offences be redrafted was accepted and amendments to Prison Rules were promised. The creation of a criminal offence of prison mutiny was rejected since the government believed that such a similar charge could be brought under proposed public order legislation at that time passing through its various parliamentary stages. No decision was forthcoming as to whether it should remain an offence to make false and malicious allegations since the government would wish to consider the report or grievance procedures being concluded by HM Chief Inspector of Prisons (49). The government agreed that prison officers should have the same protection as the police in carrying out their duties. But rather than the creation of a new summary offence of assault on a prison officer, it favoured a Home Office recommendation that all common assaults should, in future, be triable summarily with a maximum prison term of six months. For more serious attacks, higher maximum penalties remained available.

The proposal to reduce maximum punishments was accepted but the creation of a new offence of "extra work" was rejected. It would be difficult to release staff to supervise the punishment and would be unrealistic in prison where it was hardly possible to provide ordinary work for prisoners (50).

Recommendations as to appeal were considered (51). Appeals from governors' adjudications were believed to be necessary since a governor could be seen as not being an independent adjudicator, bearing in mind that he exercises parallel management and control functions. An "appeal threshold" of 14 days' forfeiture of remission should be set and the local tribunal should be accorded the power to rehear a case. As regards appeals from the tribunal, the government believed that:

Bearing in mind the availability of the petition system and judicial review, the government has reached the conclusion that there is no need for a further mechanism for reviewing the liaisons of the Prison Discipline Tribunal (52).

The government declared itself satisfied that matters concerning legal representation at hearings should remain as it was and that it should not be available at governors' adjudications (53).

Various other procedural issues were considered (54). The government noted that the power to subpoena witnesses had never been used, though prison officers could be ordered to attend as part of their duties. The government rejected any alteration both to this procedure and to the question of the giving of evidence on oath. It also rejected the recommendation that where there might be a dispute as to which documents should be produced at a hearing (eg. if the governor resisted because of security or medical implications) that it should be for the tribunal to decide which should be produced. The standard of proof should remain that of proof beyond reasonable

doubt. An administration separate from the Home Office was rejected, particularly since the Home Secretary remained accountable to Parliament for all aspects of prison administration. The tribunal should not have a role in authorising Rule 43 segregation. That was seen as a management rather than a disciplinary function, to be exercised in the first place by the governor, subject to the oversight of the board of visitors. The government accepted that minor reports should be retained in young offender establishments. Prior's recommendations on restoration of forfeited remission were accepted.

(b) Breathing space

The government response to Prior was not final. Public comment was invited. A financial survey was undertaken for the purpose of comparing costs of the existing system with the prediction of expenditure under the proposed scheme (56). Many boards of visitors and special interest groups made their views known to the Home Office. The replies of boards of visitors spanned a spectrum of views from that of Castington, the board of which simply accepted the white paper as it stood, to that of Northallerton, the board of which rejected it in its entirety. The latter board felt that the system would become "Americanised" and "play into the hands of do-gooders" (57). The Howard League for Penal Reform expressed dissatisfaction that the Prior recommendations had been "watered down" and that some had been jettisoned (58). Swingeing criticism of the white paper came from the Law Society (59) which regarded it as imperative that any prison tribunal should have a legal element if it were to be seen as impartial, fair and independent of the prison authorities. It refuted the allegation that to require legally qualified chairmen

would be to "drain the pool" of lawyers who might be needed for other jobs. After all, it noted that the Lore Chancellor's Department had told Prior that there were sufficient lawyers available. It saw the additional cost of lawyers as minimal when compared to the prison budget as a whole and denied that to have a legally qualified chairman would, necessarily, involve added expense. It argued that an appellate body, independent of the Home Office, should be established, with an ultimate right of appeal to the courts.

The Prison Reform Trust noted "a sad statement about the pace of penal reform that over four years from the establishment of the Prior Committee, we are seemingly no closer to an independent disciplinary system ... the government has said that it is reconsidering how it wishes to proceed and we must hope for action during 1988" (60). The Trust can hardly have hoped for the action that resulted.

(c) Implementation? What a difference a year makes

At the annual conference of boards of visitors held at the University of Nottingham in September 1986, one month before the publication of the white paper, the Secretary of State indicated that with the agreement of his fellow ministers, change was at hand. He believed that there was nothing in the argument that a lay board did not have the competence to adjudicate in the post-Tarrant climate. He stated, however, that:

Your involvement with prisons, prisoners, prison management and prison staff in your watchdog capacity prevents you from being seen to be completely independent in your adjudicatory role ... my judgment is that the time has come to separate these two functions (61).

As late as March 1987, civil servants were still looking to the consultative process and to the principles of the white paper as indicating the way forward (62). Policy, in full, was not to be



disclosed until the Minister of State spoke at the annual conference of boards of visitors in September of that year.

Lord Caithness announced that the Criminal Justice Bill, then passing through Parliament, which had been perceived as the vehicle for legislating for change, would not be so utilised. "There is a limit", he said "to how many disparate topics even a Criminal Justice Bill can contain and prison discipline was one of the subjects for which room in the bill could not be found." Procedural change, including access to legal expertise for the board, was promised, as was a new code of discipline. Lord Caithness reported that the fears that led to the setting up of the Prior Committee in the post-Tarrant climate, had largely proved unfounded - to the extent that he doubted that the "upheaval which the creating of a new adjudicatory body would be bound to create is actually necessary" (64). He was concerned at the difficulty he foresaw in recruiting sufficient lay people for the new body and said that:

We can see no prospect of finding new arrangements above governor level which will command general support. The prison discipline area is one in which we would not want to push through changes which did not command such support (65).

He finished his address by saying:

The Home Secretary has concluded that we should not proceed with our proposal to create a new lay body to adjudicate on the more serious breaches of prison discipline. This function will stay with boards for the foreseeable future and we will get down to work with boards and governors and others to improve the disciplinary system in other ways than by structural change. I recognise that this means foregoing the objective of separating the adjudicatory and the watchdog functions. This is not entirely satisfactory though it is not without its advantages as many of you have pointed out. But if we allow ourselves to become impaled on this point and, as I have said, wait for a consensus to emerge about how to effect a split of these functions, we shall fail to make other improvements which the Prior Report has shown are needed and are within our grasp (66).

He promised that the new arrangements would be in place within 18 to

24 months.

Light and Mattfield (1988) described the abandonment of the central argument of Prior as "nothing short of scandalous" (67).

They indicated that:

It is clearly not the case that there exists no consensus on this issue as, aside from some board members (who did not wish to see their powers diminished), wide support has been expressed for the introduction of the independent tribunal. This includes academics, pressure groups, the Law Society, Magistrates' Association and the Prison Officers' Association.

Shaw (1987), similarly had noted widespread agreement between groups with interests as diverse as PROP and the POA (68). Only one year previously, as has been seen, the Home Secretary had noted the lack of conspicuous independence of the adjudicating panel. There was certainly speciousness in the contention that no room could be found for legislation in the Criminal Justice Bill since several unrelated additions and amendments were to be made to it after Lord Caithness' speech. Professor Cretney's aspiration that a system had been devised that would stand scrutiny in ten years' time had come to nothing. Expedience and the immediate cheapness of minimal change had outweighed other arguments of manifest fairness and impartiality that have been rehearsed above. The opportunity, afforded by Prior, to implement the most radical and necessary of changes in the machinery of internal discipline in prisons had not been taken. Prisoners and their lawyers will doubtless continue to view boards of visitors as less than impartial. This may well give prisoners further causes of grievance and thus militate against the management of peaceful prisons. Shaw (supra) suggested that the abandonment of Prior's major proposals might actually make it more difficult to enforce discipline in prisons (69). The future is likely to hold further lengthy and expensive litigation, the prospect of which

could have been diminished had the principal recommendations of the Departmental Committee been accepted and implemented.

CHAPTER SIX

CONCLUDING COMMENT

## Chapter Six

### CONCLUDING COMMENT

This paper commenced with a reproduction of Foucault's perception of prison as representing a crushing and repressive despotism. Other references have been made to its approximation to a totalitarian regime, to its quality as the symbol of the state's total power over the individual and to its alleged innate "lawlessness". The writer hopes to have dispelled some of the anxiety that might result from assuming the above characterisation to be universally correct. That the courts have shown themselves more prepared to engage with disputes originating within prisons has, of late, opened internal processes, including disciplinary processes, to public scrutiny to a far greater extent than was the case, say, twenty years ago. That which has been revealed has often merited public concern, eg. the inception of the Control Unit at Wakefield prison, the denial of access to legal advice in contravention of the European Convention on Human Rights or the disregard of the rules of natural justice at adjudication. The vestiges of "hands off" have often implied that the aggrieved prisoner has found himself without an effective remedy and for a long time this was as true of the review of disciplinary proceedings as it was of any other. There is, perhaps, a paradox in that the system set at the centre of internal discipline and which should, above all, have manifested fairness, came to be so widely mistrusted. Yet it was as recently as 1979 that the courts showed a willingness to scrutinise adjudication procedures. Their willingness to entertain such actions has had a profound effect upon practice. This study has shown the unparalleled degree to which both administrators within Home Office and governors now recognise their accountability to the law for their actions, even if at times it appears that they do not understand that

same law. It is equally true of boards of visitors which, collectively, seem acutely aware of the spectre of judicial review should they make any major error at their adjudications.

It has been made apparent, in this paper, that change has not overtaken Home Office rapidly. It has only been through remarkable patience and resolve that some prisoners have received satisfaction at all. Change has often been resisted, eg. in the full implementation of the Golder judgment. It has sometimes been avoided, eg. the change of heart over the extent to which the Prior Committee's recommendations would be given effect.

That there has been change is not to hint at complacency. Despite the decision in Campbell and Fell v UK, criticisms remain as to the true independence of boards of visitors when they adjudicate. Governors' lack of "legal awareness" is a matter for regret. Prisoners' practical difficulties in exercising those rights affirmed by the courts recur as may be concluded, for example, from Chapter Three(4) of this study. On 14 November 1988 the Director General of the Prison Service wrote to all its members and offered "a simple and motivating statement of purpose":

Her Majesty's Prison Service serves the public by keeping in custody those committed by the courts. Our duty is to look after them with humanity and to help them to lead law-abiding and useful lives in custody and after release (1).

Though he did offer an interpretation of the words used, it is unfortunate that the requirement to hold prisoners "under the law" within the wider context envisaged by the 1969 White Paper "People in Prison" (2), was not explicitly stated. Prison staff and all dealing with prisoners must constantly be confronted by that requirement. It is thus that the oppression of the Foucault model and the decline into arbitrariness may be further resisted.

It is submitted that the thesis put forward in Chapter One has been demonstrated to be valid. Concepts of natural justice and fairness now have an influence upon the management of prisons and particularly in relation to the disciplinary process to a greater extent than at any time in the past. The assumption that because a court has pronounced on this or that entitlement of a prisoner does not automatically imply that it will be easy for him to exercise it. In the use of the overt disciplinary system those who deny the prisoner his rights are now likely to have their hearings overturned as a result. The prisoner may remain vulnerable to the covert processes that have been considered in this paper.

