**Email Exchange of Legal Documents/Correspondence RE-ISSUE – 18/01/21**

Good Evening,

Following a number of queries relating to the above subject, it has been necessary to re-issue the following guidance. The original publication, cascaded at the beginning of December, together with the additional notes and clarification which were issues shortly after the original notice, are copied below for your information. Could I please ask that the information is in turn re- sent to establishments within your remit.

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Dear All,

We have had some queries this week following the advice provided last week (repeated at bottom of chain) on facilitation of sharing legally privileged documents via email. We have also been contacted by Email-A-Prisoner who are receiving reports of solicitors having issues reaching their clients in custody in regard to non-legally privileged correspondence. The Email-A-Prisoner service is a valuable and useful one to those in custody and we do not want to prevent those in custody receiving non-legally privileged correspondence via that service.

As set-out in last week’s advice, prisons were asked to stop facilitating the exchange of legally privileged documents between those in custody and their legal advisers/other confidential correspondents via email. This was relating to legally privileged documents that were being sent in via email with the expectation that prison staff would open, print and share those documents, which is not permitted. This has led to queries as to what constitutes legally privileged documents, for which we have set out some clarification below.

**Email Exchange of Legal Documents/Correspondence**

Rule 39 (YOI Rule 17) applies to delivery of legally privileged material between those in custody and primarily their legal adviser or the court, as well as some other confidential correspondents as set out in Output 14 of PSI 49/2011.

As such, any email addressed and intended for a member of staff is not legally privileged and should not be treated as such. For example, if a legal adviser is contacting the prison to arrange a legal visit, video call or attendance at court, this correspondence would not be legally privileged. However, if a legal adviser or the court is emailing a member of staff something to pass on to someone in custody, the member of staff should clarify with the sender that the content of those documents is not legally privileged or subject to Rule 39/YOI Rule 17, prior to opening or sharing.

Not all correspondence between a legal adviser or the court and someone in custody will be legally privileged. For the avoidance of doubt, when a legal adviser or the court is contacting someone in custody by email you should ask that they mark any correspondence that is not legally privileged or confidential and not subject to Rule 39/YOI Rule 17 (and therefore able to be opened and shared by prison staff) as “NOT RULE 39” or “NOT RULE 17” (for YOIs). This will provide clarity for prison staff.

Anything that a sender confirms as “NOT RULE 39” or “NOT RULE 17” (for YOIs) and hence is not legally privileged can and should be passed on as usual. Anything that a legal adviser or the court cannot, or will not, confirm as “NOT RULE 39” or “NOT RULE 17” (for YOIs), must not be opened or shared by prison staff unless the processes required by Rule 39/YOI Rule 17 are followed.

If a legal adviser or the court wish to share legally privileged documents with someone in custody, they cannot do so by requesting that a member of prison staff receives an email, opens and prints documents. Instead, they should utilise the postal service following the processes in PSI 49/2011, or they can request an in-person official visit, which prisons must facilitate – in a COVID secure manner – where required.

I hope this provides some further clarity on what constitutes legally privileged documents and how to handle correspondence from legal advisers and the court received via email.

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Dear All,

With immediate effect prisons are asked to stop facilitating the exchange of legally privileged documents between prisoners and their legal advisers or other confidential correspondents by email. Material sent electronically which is printed off by prison staff to be passed to the prisoner would result in a breach of Prison Rule 39 and the accompanying Prison Service Instruction (PSI) 49/2011 -Prisoner Communication Services, which contains guidance on handling legal and confidential mail.

Prison Rules 38 and 39 (1) and Young Offender Institution Rules 16 and 17 (1) provide for correspondence between prisoners and their legal advisers (defined as solicitor, counsel, or a clerk acting on behalf of either) or the Courts to be treated as privileged and confidential. Confidentiality protections are also extended to other bodies listed in PSI 04/2016. Such correspondence may only be opened, read or stopped by prison staff in accordance with the specific provisions laid out in Prison Rule 39/YOI Rule 17. There are no powers to allow legally privileged or confidential emails to be opened and printed off by staff, even if they do not read them and even if they are asked to do so by the sender or receiver. The prison would not be able to protect legal privilege and confidentiality if documents are sent in this manner, which would constitute a breach of the Rules and even if accidental, could lead to legal challenge.

Whilst there may be requests from those in custody themselves, legal service providers or other confidential correspondents to facilitate such a service as an exception because of the impact of COVID-19, prisons must still comply with Prison Rule 39 and the right to access confidential legal services and correspondence with the bodies listed in PSI 04/2016. This is not possible when printing out emails for prisoners. If requested to do so, prisons should advise senders that legally privileged and confidential documents should be sent via post or handed over at in-person visits as opposed to email.

Prisons are reminded that they can still offer in-person official visits. In all cases, alternatives to face-to-face visits should be utilised as far as is possible, including the use of video-link, in-cell telephony, additional PIN credits and the provision of offices to facilitate private phone calls.

Further advice on how legal mail should be handled is provided in Annex D of PSI 49/2011.