

ANNEX F

GUIDANCE ON SETTING DIRECTIONS FOR ORAL HEARINGS

1. Introduction

The objective of this document is to assist panel chairs in setting directions. It is based on the experience of Parole Board staff and members in terms of what works well and what is liable to cause problems and it reflects the views of those stakeholders who have been consulted. It is not, however, a substitute for other standing instructions of the Parole Board, notably the Parole Board Rules. If you are chairing a panel and have any doubts about the appropriateness of a direction, it is recommended that you consult the Legal Advisor.

All cases referred to chairs will have been subject to Intensive Case Management (ICM) which should have identified any significant gaps in the dossier such as the absence of mandatory reports. The process should also have flagged up those cases which may require directions to be made and complied with in several stages before they are ready for an oral hearing.

2. Guiding Principles

2.1 Purpose of an oral hearing

The role of a panel at an oral hearing is to determine whether the prisoner's risk is low enough for release or transfer to open conditions and/or to comment on the continuing areas of risk that need to be addressed, where these matters cannot be determined on paper. It is necessary only to determine WHETHER or not risk remains too high; if it does, there is no requirement to investigate WHY this is the case.

2.2 Remit of the Parole Board

Beyond making a direction for release or a recommendation for transfer to open conditions, the Parole Board has no role to play in how or, indeed, whether the prisoner progresses through his or her sentence. It is acknowledged that some prisoners will be unable to progress and will spend the rest of their lives in custody.

2.3 Scope of directions

Directions should always be proportionate, reasonable, necessary, lawful and deliverable. They will usually be confined to four areas: the timetable for the hearing, the reports that are needed, the witnesses who are required to attend, and the disclosure of material submitted under Rule 8. The number of directions made should be the minimum that is necessary to enable the panel to do its job properly. Chairs should consider carefully

what witnesses and additional reports are essential. In this regard, they should review, at the earliest opportunity, the directions made by the ICM member to see if it is appropriate to stand down any witnesses warned that they may be required to attend the hearing. Applications for additional directions from legal representatives of prisoners should be considered in the light of this principle.

3. Best practice points

3.1 Time estimates

A difficulty with oral hearings is estimating accurately how long it will take to hear a case. An accurate estimation is vital for listing purposes, particularly as the Board increasingly seeks to list more than 2 cases per day. The ICM member will have estimated the time allowance on sending the case to oral hearing. However, good practice is for chairs to review this, as circumstances may have changed such that it may now be estimated that the case will take significantly longer (or shorter) than expected, enabling or necessitating a change in listing arrangements. If the panel chair amends the time estimate reasons should be provided.

The starting point - that is the minimum time needed (including the panel discussion before and after the hearing) - will usually be one hour where there are no witnesses. For each witness, it is prudent to allow between 10 and 60 minutes depending on the nature of their likely contribution. A Personal Officer's character reference will only take a few minutes whereas a Psychologist's or Offender Manager's evidence will likely require much more time. The length of each witness will of course depend on the extent of questioning by panel members, the prisoner's representative, and the Public Protection Advocate (PPA), if one is present.

Recall cases will take longer where there are issues of disputed evidence. Experience shows that a Secretary of State's representative attending a hearing will add between half an hour and three-quarters of an hour to the time it will take to hear a case. A Victim Personal Statement will add to the length of proceedings depending on the means by which it is delivered, principally whether or not the victim attends the hearing in person.

The need for an interpreter can also increase materially the length of a hearing, although the additional time needed will depend on whether everything is to be translated for the benefit of the prisoner (because he or she speaks little or no English) or whether only the questions to the prisoner and his or her responses need to be translated. It is probably reasonable to double the time allowed for those parts of the hearing where the interpreter will be used.

Having calculated how long it will take to hear all the evidence and submissions, the ICM member or chair should build in a further time contingency to allow for administrative delays; for instance, the late arrival of witnesses, short adjournments for the prisoner to have a comfort break or give instructions, or reports being provided on the day

needing to be photocopied and read. A number of variables will determine how much contingency should be allowed but a reasonable rule of thumb is 20% (an additional 12 minutes per hour of expected hearing length).

3.2 Reports

"Current" reports in the dossier should be no more than 12 months old. Avoid routinely asking for addendum reports from the Offender Manager or Offender Supervisor where existing reports are less than six months old. Updates/addenda should only be directed if there has been a significant material change or development that the panel should be made aware of.

If, where reports are several months' old and/or further information has become available you consider that it would be appropriate to have an addendum report produced, it is helpful to be precise about what you want to avoid unnecessary work for the report writer. Suitable wording might be:

"A brief addendum report from (name or job title) updating his report of (date) in the light of any developments since it was written and after consideration of the independent psychology report."

or, in the case a specialist report:

"Report from Medical Officer at HMP... addressing:

- *Mr A's Hepatitis C*
- *The fits/seizures from which he is said to suffer*

The report writer is asked to comment on whether these medical conditions are relevant in terms of Mr A's suitability for release or ability to cope in the community. Would any special licence conditions or arrangements need to be put in place?"

Always set a deadline for directed reports.

3.2.1 *Justifying reports*

Before asking for any report, consider its purpose. Is it necessary to ask for a written report where someone is to be called to give oral evidence?

Some ICM members and panel chairs habitually direct the production of lengthy psychologist's reports for cases where there is no apparent need for any in terms of assessing risk. This often happens because the prisoner's representative requests such a direction, usually for the purpose of galvanising the Prison Service into action when his or her client has become "stuck" in the system. You are reminded that it is NOT the Board's role to help prisoners progress. Our only remit is to determine the level of risk, not the causes thereof, however interesting that might be. Unless the content of such a report is likely to change the panel's mind

about the feasibility of a progressive move, it is not appropriate to ask for it.

Similarly, some chairs routinely direct addition of old reports to the dossier without explaining why these are needed to inform a current risk assessment. Reasons should be given for directions to add old reports.

3.2.2 Directions

If you request a risk assessment from a psychologist, please state the areas of concern (instrumental violence, sexual offending etc.) that are to be investigated, and whether you require a clinical or forensic assessment, but do not specify the assessment tool (e.g. HCR-20) that should be used. Similarly, if there are concerns about psychopathy, you should raise these but not ask specifically for a PCL-R assessment.

Please avoid generic phrases such as “full psychological assessment” or “conduct report” which may not be readily understood by the recipient of the directions. Be precise about the information you want from the report.

Notwithstanding the need to be specific, the Parole Board has had rather conflicting requests and advice from different sources about the extent to which we should specify by whom the information is to be provided. Lifer/parole clerks at some prisons want precise instructions so that they know to whom to direct the request, others consider that this ties their hands and that, provided the information requested is supplied, it should not matter who writes the report.

Pragmatically, it is suggested that you word the directions in such a way as to cater for both situations, for example:

“...report on custodial behaviour since recall. This should address adjudications, the results of drug tests, security reports, offending behaviour work completed or scheduled and any other information deemed relevant. It should be written by a Seconded Probation Officer or another individual nominated by Mr X’s Offender Manager.”

NOMS policy currently requires that if a prisoner is transferred within three months of the commencement of the parole process, the sending prison must assume responsibility for preparing reports. However, prisons cannot have local policies of refusing to write reports until the prisoner has been in the establishment for a minimum period (this would prevent parole reviews from proceeding in a timely way) and if a review is delayed for any reason, it may be necessary to ask for updated reports from the receiving establishment.

Be mindful of how long it will take to get any report that you request. We have been advised that it can take up to three weeks to source an old report (for instance, the sentencing remarks) if it has been archived. The production of a new psychologist’s report normally takes three months and a post-course risk assessment such as a SARN may take six months or more.

The Parole Board cannot force a prisoner's representative to disclose an independent psychiatric or psychologist's report, even where this has been publicly funded. It can only say that it would be helpful for the report to be disclosed. Moreover, the Board cannot directly commission any such report.

3.3 Witnesses

In general, where information is available in the form of documents it may not be necessary to call a witness at all. For instance, at a recall hearing, where the reason for recall was a prisoner's behaviour in a hostel, the evidence of the supervising officer supplemented by statements and copies of the relevant pages from the hostel log will usually obviate the need for the hostel manager to attend as a witness. As a panel chair, if a potential witness has already produced a comprehensive report you might consider that little further information is likely to result from oral evidence.

Conversely, there are circumstances where oral evidence is preferred because written information is not likely to be available at the time of the hearing; for example when the panel wishes to enquire about a prisoner's performance on an offending behaviour programme, and the post-course report is not yet available. In such circumstances, an oral report can obviate the need to defer a hearing.

When deciding on whether or not to call someone as a witness, you should balance the importance of the evidence that he or she is likely to give against the inconvenience to that witness of getting to the hearing especially as regards the distance that he or she will have to travel. The use of video-link should be considered, especially for external probation officers, and in exceptional circumstances it might be acceptable for evidence to be given over a conference telephone or other mechanism by which all parties can hear the witness.

It is good practice to avoid having too many witnesses, not least because of the effect that it will have on the length of the hearing. In particular, where a group of witnesses would be called to give evidence on or around the same issue, the presence of all of them is unlikely to add anything material to the panel's understanding of the issues in the case. For example, where several people witnessed an incident that led to a prisoner's recall, written statements from all of them would probably suffice. Similarly, it is usually unnecessary to call a number of prison officers to give evidence about someone's custodial behaviour.

3.3.1 Directions

Directions should be precise about the evidence that the witness will be required to give and avoid the use of general phrases such as "to speak to his report." Where possible, the directions should give some detail as to specific matters witnesses will be asked to deal with in oral evidence: this enables witnesses to understand precisely what will be required of them and prepare appropriately.

3.3.2 Persons who should not normally be called as witnesses

Serving prisoners should not normally be called as witnesses, unless this is unavoidable; the logistical difficulties around securing their attendance are likely to be considerable and prison Governors are generally very resistant to directions of this kind. Any necessary evidence from other prisoners should be in writing where possible.

It is also good practice to avoid, if possible, calling as witnesses prison officers from a previous establishment. This, too, is for logistical reasons and you should bear in mind that the prisoner's file will have been transferred to his or her new establishment so staff who worked with him or her previously will not have had the opportunity to refresh their memories by reference to it.

Children should not be called as witnesses, and there would anyway be difficulties in their coming into a prison to give evidence.

In cases concerning domestic violence, it may not be useful to hear evidence from a victim who, according to the prisoner, has forgiven him and is now reconciled with him. The possibility of coercion and re-victimisation if the witness should say "the wrong thing" in evidence should be borne in mind and a written statement is often to be preferred in such cases.

3.3.3 Probation officers

Offender Managers are responsible for the progress of prisoners in custody and on licence. They are the principal source of information on the prisoner and usually essential to have an effective hearing. Where there is a realistic prospect of release, and particularly with a Lifer in open conditions, the attendance of the Offender Manager should always be directed. In addition, if a prisoner has been recalled and has requested an oral hearing the Offender Manager should always be present.

If the supervision of the Lifer is likely to change on release, for instance because he or she is to be relocated to another area, panel chairs should consider directing the attendance of the future supervising officer or a representative of the Probation Service in the release area so that the panel can be satisfied about the robustness of release arrangements.

These considerations would also apply in the case of an Extended Sentence Prisoner contesting the validity of his or her recall and/or applying for re-release.

A number of prisons are now experiencing difficulties in retaining Offender Supervisors (particularly those from probation services) and increasingly are using agency staff to fill gaps. As such, many of these have little or no contact with the prisoner, and in some cases the prison do not even know the allocated OS at the time of dossier disclosure. Members are therefore asked to consider carefully whether Directing OS's to attend oral hearings will bring added benefit. Where possible, access to C-NOMIS notes may

provide additional information, when an OS is not available or has little knowledge of the prisoner.

3.3.4 Psychologists

Many of the psychologists working in the Prison Service are “trainees” in terms of their chartered forensic psychology status, although they are qualified psychologists. Questions have arisen over whether it is appropriate for them to give evidence or whether their supervisor should do so. There will usually be no problem with their giving evidence but generally, a report writer who is still a trainee will want his or her supervisor to be present at the hearing and will seek to arrange this direct with that individual. However, to anticipate the potential problem of the supervisor not being consulted about his or her availability for the hearing, it is good practice to include something along the following lines in directions:

“Ms B, Senior Forensic Psychologist at HMP [prison] is invited to attend the hearing in her capacity as Mr C’s supervisor”.

3.3.5 Witness refusals to attend

Occasionally, a witness may refuse to attend a hearing. The reasons for this refusal need to be investigated but if you are not satisfied that they are legitimate (for instance a previous engagement), you may issue a witness summons. Please refer to Chapter 1 of the Practice Guide for further information about this. This is not a step that the Parole Board would normally take unless one of the parties has asked us to do so, and you should only issue a summons if the evidence that the witness would give is essential to the case AND that evidence cannot be given in written form or via video-link.

4. Other matters

4.1 Specialist members on panels

The ICM member will have considered whether or not the case requires the presence on the panel of a psychologist or psychiatrist. However, good practice is for the chair to review this need in light of any updated information which may have been received.

The decision to request a specialist member should be made when it is considered that a contribution from a psychiatrist or psychologist panel member is necessary in order to make a fair and rigorous risk-based decision.

4.2.1 Psychologists

Forensic psychology is the application of psychological knowledge to offenders and offending behaviour in order to make evidence based predictions about when re-offending may occur. Forensic psychologists are skilled in the use of risk assessment tools and other assessment

techniques. They also have skills in the design and implementation of interventions to modify offending behaviour.

It is appropriate to request a psychologist for cases where:

- a. current psychological evidence needs specialist interpretation;
- b. there are two or more differing psychological opinions; or,
- c. there are questions with regards to an offender's response to interventions due to issues such as motivation to change, levels of psychopathy, personality disorder or learning difficulties.

4.2.2 Psychiatrists

Psychiatrists are medically qualified doctors who following their general medical training have specialised in psychiatry. This means that they can prescribe medication as well as recommend other forms of treatment. Psychiatrists have knowledge of NHS services, how it functions in practice and the various NHS treatment options available e.g. for mentally disordered offenders and those with significant substance misuse.

It is appropriate to request a psychiatrist for cases when:

- a. there are issues relating to the offender's major mental disorder (and in some cases physical illness);
- b. the offender has been or is currently detained in a mental health setting or secure psychiatric unit for on-going mental health problems;
- c. current psychiatric evidence requires specialist interpretation; or,
- d. licence conditions are proposed which involve mental health services.

4.2.3 Cases where either a psychologist or psychiatrist would be appropriate

It is appropriate to request either a psychiatrist or a psychologist for cases when:

- a. there are less serious mental health concerns or evidence of psychological distress with an identified or suggested link to the offender's risk of re-offending or harm (e.g. substance misuse, anxiety, depression or self-esteem issues);
- b. personality disorder or psychopathy has been identified or suggested;
- c. there is a learning disability, developmental disorder such as autism, Asperger's Syndrome, attention deficit hyperactivity disorder (ADHD) or brain injury; or,
- d. the case has complex risk issues, for example where the offending involves multiple victim types or sadistic behaviour, motivation for the offence is unclear and the offender denies some or all aspects of their offence.

4.2 Parole Hub

All cases must be considered for suitability for a video-link hearing, although chairs should be aware that not all prisons are able to link to the parole hub. Chairs should start from an assumption that cases are suitable, and then consider why a case may not be suitable, taking into account relevant issues in the dossier and any representations made by the offender or his representative.

Factors which may mean a case is unsuitable for a video-link hearing include physical impairments/disabilities (eg; hearing problems), mental health concerns or cognitive problems (eg; learning difficulties), complex risk assessments involving numerous witnesses and/or contested or contentious evidence.

4.3 Interpreters

If it is clear from the dossier that an interpreter will be needed, one should be supplied automatically. There have, however, been instances where this has not happened and it might be prudent to make such a direction to avoid the necessity of adjourning or deferring the case on the day.

4.4 Unrepresented prisoners

It is expected that a number of prisoners will find it increasingly difficult to secure legal representation, in particular pre-tariff review cases. Chairs are asked to consider this when setting Directions and a legal representative is not clearly identified.

4.5 Sentence progression

As stated at 2 above, in the light of the terms of the Secretary of State's referral to the Parole Board, the prisoner's progress through his or her sentence is not an issue into which we should enquire.

It is never appropriate to direct that a sentence planning review be carried out or that a prison Governor explain why a prisoner's security category has not been downgraded. Similarly, you should not direct that a prisoner be assessed for or attend a particular course or treatment programme before the hearing, be transferred to another closed establishment or, in the case of those in open conditions, undertake home leaves.

4.5 Secretary of State

There have been instances of directions to the Secretary of State that he should be represented at the hearing, even that he should be legally represented. Please refrain from doing this. The Parole Board has no power to order the Secretary of State to be represented; it is entirely a matter for him to decide.

4.6 Prisoners with mental health concerns

There is a slightly different procedure for hearing cases in secure units. Some additional reports and witnesses, over and above what would be the norm in prisons, are usually required.

In the case of those in prisons rather than secure units, the Parole Board should not direct that a prisoner be transferred to a psychiatric hospital for assessment and treatment, notwithstanding the views of report writers.

4.7 Security Information

Security information may be considered in a hearing but usually only when it is in writing. In view of the sensitivity of some information and the need to protect those who provide it, you should not direct that the names of the informants be disclosed, other than under Rule 8.

4.8 Next review

It is not within the remit of the Parole Board to set a date for the next review of a case as the terms of the Secretary of State's referral makes clear. The fact that the procedure for considering paper recall cases under the CJA 2003 allowed panels to set a date for a further review has caused some confusion among those chairing ESP oral hearing cases. Save where a case is being adjourned, a chair should not set a date for a further review.

4.9 Physical evidence

Should you think it appropriate to direct that physical evidence be produced, bear in mind the restrictions on items that can be brought into a prison. Special administrative arrangements will usually be needed and it may be effectively impossible for certain items to be produced at a hearing if they would not normally be allowed into a prison.

4.10 Observers

There are no hard and fast rules about the attendance of observers but it is sensible to guard against having too many additional people at a hearing lest this should prove intimidating for the prisoner or for witnesses. Consideration should also be given to the fact that the presence of some observers – for instance a prisoner's parents – could prove problematic if it makes the prisoner less frank when giving evidence.

4.11 Order of cases

If more than one case is to be heard on a given day, and one is more complex than the other(s) in terms of the nature of the case, disputed evidence or the number of witnesses, it is sensible to list that case last on

the day so that there will be no knock-on effect on other hearings if it overruns.

4.12 Logistics of the hearing

Given the wide circulation and judicial nature of directions, it is not appropriate to use them for outlining administrative arrangements that chairs consider necessary, and the practice of some panel chairs of stating how many rooms for witnesses will be required or that all parties to the proceedings are to be supplied with lunch can cause unintentional offence to some prison Governors. If chairs wish to stipulate such arrangements this should be done in a separate communication to the Case Manager.

DIRECTIONS – INTERIM GUIDANCE & GOOD PRACTICE January 2014

1. Introduction

As the impact of the UKSC judgment in *Osborn & others* is felt, members who are not ICM trained are required to issue Directions. The Board has therefore issued this interim guidance on Directions, which should be read alongside section 3 of the existing ICM Manual:

http://www.paroleboard.gov.uk/members/policy_and_guidance/handbook/s/icm_manual/ (*Please note that other sections of the ICM Manual are now out of date, pending the outcome of the current project to review case management and the Parole Board's work following the Osborn judgment.*)

It is important that members apply the different approach we must now take to an oral hearing. Where previously oral hearings were generally only held where there was a realistic prospect of release or progression, or where there were complex or disputed risk factors to assess, this will not always be the case now. Previously, it was rare to have an oral hearing without the Offender Manager in attendance, and often the Offender Supervisor and other professional witnesses as well. Now, where, for example, the oral hearing is granted on the basis that the offender has provided tenable grounds as to why a face to face encounter with the Board is appropriate, it may not be necessary to call any other witnesses. Therefore members should always consider the reason they have granted the hearing and issue Directions and requirements for witness attendance accordingly.

Members should also refer to PBM 37/2013 for further guidance on interim changes to the various template forms currently used and associated good practice guidance on issuing Directions.

2. Good practice considerations

- a. Directions should always be proportionate, reasonable, necessary, lawful and deliverable.
- b. Always set a deadline for Directed written reports or documents.
- c. Avoid jargon and stock phrases; please use plain language as the prisoner should also be able to understand exactly what the Direction means.
- d. Avoid lengthy Directions, which have the potential to confuse recipients. They can also mean that there is a lack of clarity in precisely what is required. If you do consider it to be necessary to provide some narrative, ensure that the specific Directions seeking reports/documents are clearly and obviously set out.
- e. Avoid issuing too many Directions. If you find yourself setting a lot of Directions, ask yourself if you are seeking this information as it is *necessary* in order to make a full and fair assessment of the case. If you are making Directions for a different reason, consider whether there is a more appropriate process to achieve the outcome.
- f. Avoid routinely asking for addendum reports from the Offender Manager (OM) or Offender Supervisor (OS), where current reports are less than six months old. It is recommended that a Direction is made stating that updates/addenda should only be submitted if there has been a significant material change or development that the panel should be made aware of. If the OM and/or OS is being called as a witness then oral evidence may suffice, particularly if the substantive report (PAROM1 or Part B Recall Report [previously Annex H]) are less than six months old and comprehensive. NOMS has agreed to update the Parole Board automatically on any developments that are relevant to the review.
- g. Use clear and precise language that focuses on the outcome required.
- h. Where you consider a witness to be necessary, you should direct their attendance, but make it clear that the Panel Chair will have the final say on witness attendance. (Please do not declare that a witness is *not* necessary, as the Panel Chair may have a different view. It is easier to stand down a witness than to direct the attendance of one who has been told he is not required).
- i. Where you consider that it may be appropriate for a witness to give evidence by telephone or videolink, please indicate that this may be the case, subject to the final say by the Panel Chair.

- j. When setting Directions for witnesses to attend hearings, please direct a named individual (with their job title, where applicable) to attend, rather than just referring to their profession.
- k. Where you have granted the hearing on the basis that the offender has provided tenable grounds as to why a face to face encounter with the Board is necessary, do not feel obliged to call any other witnesses.

2.1 Suitability for the Parole Hub (as set out in PBM 21-12)

Members should be aware that not all prisons are able to link to the Parole Hub, however, all cases should be considered for suitability for a video link hearing. The assumption is that most cases should be suitable to be heard by video link. When considering suitability, members should identify relevant issues within the dossier for themselves and also take into account any representations made by the offender or his legal representatives.

This guidance is not intended to restrict members, or to suggest that where such factors are present in an individual case it will necessarily mean it is not suitable for a video link hearing. Instead, it simply provides a list of factors which *may* mean that the case is unsuitable. Each case must be considered on its own merits.

Factors which may mean a case is unsuitable for a video link hearing:

- a. Physical impairments/disabilities (e.g. sight or hearing problems)
- b. Mental health concerns, or cognitive problems (e.g. learning difficulties)
- c. Complex risk assessments involving numerous witnesses and/or contested or disputed evidence

3. Duty ICM

3.1 Requests to expedite hearings

The impact of Osborn means we can expect, at least initially, some listing delays. Therefore it is likely that we will return to considering a number of requests to expedite or prioritise hearings. Members should refer to the existing guidance on those issues (which can be found at Annex 5 of the ICM Manual:

http://www.paroleboard.gov.uk/members/policy_and_guidance/handbook/s/icm_manual/) and note the following:

Members considering requests to expedite hearings should concern themselves solely with the judicial question of whether, in the circumstances of the case, the matter should be expedited. The capacity of the Board to meet such a Direction is not relevant to members' consideration. It is then for the Board to decide whether it can meet the requirement of the Direction. If not, the case manager will write to the parties to explain that the Board has not been able to meet the Direction

to expedite and that the listing will instead be in X month. Members should provide brief reasons for the expedition, so that listings and case managers are aware of the issues.

Where you refuse a request to expedite a hearing, please ensure that you provide reasons as to why you do not consider it meets the criteria for expedition.

3.2 Templates

You must use the relevant templates:

<http://www.paroleboard.gov.uk/members/templates/>

Using the correct format will assist the Secretariat in uploading the Directions to PPUD, cutting down on unnecessary manual data entry, and facilitating better management of compliance with the Directions.