

CHAPTER 3

THE HEARING/PROCEDURAL ISSUES

1. Inquisitorial or Adversarial

There has been much discussion about the degree to which the proceedings should be adversarial or inquisitorial. The Rules say that formality should be avoided and the panel should make its own enquiries where possible to satisfy itself about the level of risk, but that the proceedings may be conducted in such a way as the panel considers most suitable to deal with the issues. The European cases and the House of Lords, however, speak of the need for adversarial proceedings in order to satisfy the requirements of Article 5(4) of the European Convention on Human Rights.

In reality, most reviews and hearings contain elements of both adversarial and inquisitorial practices. The Board has an important inquisitorial role; it may call witnesses, make directions about evidence it requires and ask questions at the hearing. There may be cases, however, particularly at recall hearings where there are disputes over fact that will justify parties taking a more adversarial stance leaving the panel more in the role of independent arbiter.

Notably, the Secretary of State is required to submit all written evidence to the Board that he considers relevant, while the prisoner may elect not to rely on a report he has commissioned and the Board has no power to force him/her to disclose it. This discrepancy may be offset to some extent by the power of the Secretary of State to withhold material from the prisoner under Rule 8.

The panel will wish to take account of the need to have witnesses, particularly the prisoner, to be at their ease. The crucial consideration is that the panel wishes to hear all the material evidence and witnesses should feel comfortable enough to give it. The chair should not allow a representative of either party to badger a witness. Once a question has been answered clearly and satisfactorily the chair should ensure that the representative moves on to the next question. Similarly, the panel should treat witnesses with respect.

2. Panels

The Rules permit the Board to proceed with 1-3 members on panels. At present, all ISP review and recall cases are normally listed for 3-member panels.

2.1 The missing panellist

Sometimes a member is unavoidably detained or ill and cannot attend. The remaining members should immediately discuss and decide whether they are satisfied that the hearing can go ahead. The following should be borne in mind:

- a. If the appointed chair is missing and one of the remaining members is a qualified chair the case may go ahead provided the members are satisfied they can determine the issues.
- b. Where the missing member is a 'specialist', for example a psychiatrist or psychologist, and the crucial issues turn on that member's expertise the presumption will be that the hearing will not go ahead.

- c. Where a hearing goes ahead with two members, and following the hearing they are unable to reach agreement on the decision, then the entire review must be deferred and the Board will re-list the case for a fresh panel.

3. Privacy

Rule 22(3) provides that hearings shall be held in private. However, in addition to witnesses and observers, the panel chair may admit to the hearing such other persons on such terms and conditions as he considers appropriate.

4. Order of evidence

It is important to remember that the chair has wide discretion over how the hearing is conducted. Although the following part of this guide can be taken as the norm, proceedings are nevertheless subject to directions the chair, in discussion with co-panellists, may make to the contrary.

Although the panel has a judicial role, it will try to keep the proceedings informal. It is likely that the proceedings will be more formal if there is strongly contested evidence (for example regarding the circumstances of a recall). However, witnesses are not required to give evidence on oath.

Unless one of the parties applies for the chair to direct otherwise, all participants can expect to be present during the entire hearing.

Some proceedings will be digitally recorded, and it is the Board's intention to roll this process out until all hearings are recorded. Where that is the case, the digital recording will be the official note of record. All notes made by members of the panel do not form the official record and cannot be disclosed thereafter.

Where proceedings are not digitally recorded there will be no verbatim record. In such a case, *McIntyre* (2013) held that it is the Board's responsibility to ensure that a proper record is made of each hearing, and that the panel chair's notes constitute the Board's official note of record. When the panel chair is asking his/her questions they will be reliant upon the other panel member/s to take full notes of the answers received, so that they can comply the official note. In such a case, notes made by other panel members do not form the official record and cannot be disclosed thereafter.

The panel may manage the hearing as it thinks best in order to apply itself to the job in hand. A pre-hearing discussion with the members of the panel is essential to establish the way the hearing will be run, including the order of witnesses, who should question them, and in what order. A suggested procedure is as follows:

- a. The chair will direct his/her opening remarks to the prisoner, introducing all the participants and outlining how the hearing will proceed. The prisoner may be asked whether he/she objects to the presence of any of the observers (and if so, why) and whether he/she intends to give evidence. Should the prisoner decline to give evidence, the chair should remind him/her that before directing release, the Board must be satisfied

that the risk to the public is acceptable and that the prisoner's evidence will be likely to assist.

- b. The chair will invite the Secretary of State's representative (if present) to give the SofS's view on what the outcome of the case should be. This will normally entail reading the official view contained in the dossier, expanding where necessary. Although the SofS's representative will not normally give formal evidence about the prisoner, he/she may be asked general questions about sentence management issues. It is very rare to have an SofS representative now, mostly in cases where there is an immigration element or if it is a high profile case.
- c. The chair will invite the prisoner's representative, or the prisoner if he is unrepresented, to state what decision and/or recommendation he/she will be asking the panel to make. This should be a short statement of fact. Time will be given at the end of the hearing for a closing argument.
- d. The chair will invite one of the parties, normally the SofS's representative if present, to call his/her witnesses. The witnesses will be asked questions, usually in the following order:
 - i. by the SofS's representative;
 - ii. by the prisoner's representative;
 - iii. by each Panel member in turn;
 - iv. by the SofS's representative on re-examination.
- d. Once all the SofS's representative's witnesses have been heard, the prisoner's representative will be invited to call his/her witnesses. Normally the prisoner will be invited to give evidence first. The procedure then follows as above, with the SofS's representative and prisoner's representative changing places in the order.
- e. Normal procedure without an SofS representative is that the panel will lead the questions, beginning either with the Offender Supervisor and Offender Manager and then the prisoner or the prisoner first depending on the issues in the case.
- f. Once all the evidence has been heard, the chair will invite the SofS's representative to sum up in light of all the evidence presented.
- g. The chair will then invite the prisoner's representative to sum up in the same way. It is required to allow the prisoner's representative to have the final word.
- h. The chair will advise all present that a decision will be made and conveyed to the prisoner, his/her representative, the prison Governor and the SofS within fourteen days.
- i. All participants will be asked to leave the room and wait nearby while the panel discuss whether any further contributions are needed. Provided the

panel is satisfied that it has all the evidence it needs, the participants can be given leave to go.

- j. The panel will then deliberate and make its decision. A decision may be taken by a majority but will be presented as a decision of the entire panel. Parties will be notified in writing. The post-panel discussion is crucial and is the point at which the panel evaluates the evidence and agrees the main bullet points for the reasons. It is essential that a full discussion takes place, even where each panel member has the same view on the appropriate decision.

5. Admissibility of evidence

The Board is not bound by criminal rules of evidence. Under Rule 23(6), the panel may consider any relevant document or information. This means that the panel may allow either party to submit evidence that would be inadmissible in a court of law. This has particular application when considering hearsay evidence (see below).

The interpretation of this Rule will be for the panel chair.

5.1 Hearsay

The Board frequently receives evidence that would not be admissible in a court of law because it amounts to hearsay.

It is well established in the courts that the Board may entertain hearsay evidence. However, weight given to such evidence will need to be considered carefully, and there may be cases where the evidence is so fundamental to the main issue before the panel that fairness requires the attendance of the primary source of that evidence. Normally, second hand evidence would be the limit of acceptable hearsay but each case is different and panels will need to balance the need to assess the facts and risk, against the right of a prisoner to a fair hearing.

5.2 Disclosure at the hearing

Panels will frequently arrive at the hearing and be provided with papers that have not previously been submitted. In almost all cases, it will be sufficient to ensure that copies are available for all parties and that the hearing goes ahead as near to the start time as possible, after the panel has read the material. However, there are potential problems that could arise:

5.2.1 The other party objects to the late disclosure

This will often happen when the SofS submits an expert report that the prisoner would want to challenge, but could also happen the other way round. Where the prisoner submits an expert report to rebut one the SofS has submitted earlier, there may no problem and the panel may feel it appropriate to reject any application by the SofS to defer – the prisoner is entitled to have the last word. If, however, the late report is submitted by the SofS and the prisoner applies to

defer in order to commission his own report it will be for the panel to decide as a matter of fairness.

The panel will take into account the effect of the report on the case as a whole. For example, where the report is negative to the prisoner whereas the bulk of the other reports are positive, a deferral request will be hard to resist. If the panel decides to defer, it should ask the prisoner for a timescale and make a direction for a date by which the report should be received.

5.2.2 The SofS seeks to withhold the material

In these circumstances, the panel should clear the room of everyone except the SofS and prisoner representative. If the SofS has no formal representative, and the material is being presented by a state witness (e.g. the Offender Manager), the panel may wish to give that witness some time to telephone the Public Protection Casework Section to seek their authority to make the non-disclosure application on the SofS's behalf. The SofS should be asked why the application was not made ahead of the hearing and in line with the Rules and on what basis the information should be withheld. The panel should afford the prisoner's representative the chance to read the material and make submissions on its disclosure. It must be explained to him/her that under no circumstances may the material be disclosed to the prisoner until the panel chair has made a direction.

The panel should then ask both parties to leave the room while it makes a determination. The criteria under Rule 8 should be applied and the two representatives only called back for the direction under Rule 8(1)(a) and (b) to be conveyed.

Depending in whose favour the direction is made, the other party must be given the chance to apply to defer in order to make an appeal under Rule 8(8). If such an application is forthcoming, the chair has no option but to defer so that the appeal procedure can run its course.

Where the prisoner's representative refuses to accept service of the material under these circumstances, it is likely there will be no other option than to defer for a formal application to be considered in writing.

6. Other matters

6.1 Questioning of witnesses

The panel may find it advantageous to lead the questioning of the witnesses, but this will depend on circumstances that will become clear at the outset of a hearing, especially should a prisoner have special needs or is clearly anxious.

The questioning of witnesses by the panel should always be fair, polite and relevant with the aim of assessing risk and establishing the viability of the release plan. So long as there is no bias or undue influence there is no reason, where it is necessary, why the panel's questioning should not be firm and penetrating. It is important that the questioning is relevant, concise and

focused. Do not enter into a fishing expedition or rehearse previously clarified information without good cause.

6.2 Note-taking

It is the responsibility of the Board to ensure that a proper record is made of each hearing and in particular the evidence given at it. The record of the proceedings and evidence before the panel may be required for judicial review and it can also be essential if the evidence given is relied on at a further hearing.

The judgment of *McIntyre* (2013) held that, in the absence of a recording, the chair's note constitutes the Board's official note of record of the proceedings. It is therefore essential that panel chairs make full and legible notes of evidence heard. It is also essential that panel chairs do not destroy their notes of the hearing. In such a case, notes made by other panel members do not form part of the official note of record and cannot be disclosed.

The chair's notes are a document belonging to and controlled by the Board. It may be necessary to make the notes available as the record for use in the further proceedings. If the prisoner disputes the version of evidence given in the Board's decision, the chair must consult either the digital recording or their notes and his/her version will prevail. Chairs are encouraged not to include personal opinions about witnesses or the case within their notes, or if this is necessary as part of the judicial decision making process, make it clear such notes are separate to the notes of evidence. This will be relevant for any future decisions that may have to be made about disclosing the notes.

6.3 Dealing with disruptive behaviour

The Rules provide that the chair of the panel may require any person present at the hearing who is, in his/her opinion, behaving in a disruptive manner to leave and may permit him to return, if at all, only on such conditions as the chair may specify. The panel has no power to hold any person present in contempt.

6.4 Children and young persons

Occasionally children and young persons may be present as 'prisoners' and particular care needs to be taken to ensure that their evidence can be adduced as effectively and fairly as possible.

When hearing evidence from a child, the panel should have regard to the key principles of the Practice Direction issued by The Lord Chief Justice in relation to trials of children and young persons in the Crown Court (see Members' Handbook, Section B, Chapter 14 – "Children and Young People"). The overriding principle is that the hearing itself should not expose the child or young person to avoidable intimidation, humiliation or distress and that all possible steps should be taken to assist the young person in understanding and participating in the proceedings. So far as possible, the ordinary hearing process should be adapted to meet those ends. Modifications to the hearing process may include:

- a. Ensuring that the young person has had the opportunity to have legal representation
- b. Enabling the young person to see the hearing room prior to giving evidence in order that he can familiarise himself with it
- c. Permitting the young person, if he wishes, to sit with members of his family in a place which permits easy informal communication with his legal representative and others
- d. Explaining the proceedings to the young person in terms he can understand
- e. Conducting the hearing according to a timetable which takes full account of a young person's inability to concentrate for long periods (for example, facilitating frequent and regular breaks)
- f. Taking a more informal approach to the proceedings, including addressing the young person by his/her first name
- g. Restricting observers to a minimum (for example, family members may be appropriate but others may not)
- h. Additional guidance in respect of hearings concerning children and young people may be found in Chapter 5.

7. Facilities

Each oral hearing will be unique to the establishment in which it is held. However, whilst facilities will vary, all establishments are required to provide the following:

- a. A private and quiet room for the hearing, with a table large enough for 9 or 10 people and space around it for witnesses and observers to sit
- b. A room for the legal representative to speak privately with the prisoner
- c. A waiting room for the Secretary of State's representative (if from outside the prison), witnesses and observers
- d. Water and a box of tissues in the hearing room
- e. Male and female toilets nearby
- f. Photocopying facilities
- g. If possible, access to a networked computer
- h. A member of staff on hand, although not in the hearing room, throughout
- i. Refreshments (tea and coffee) for the panel, and lunch where more than one hearing is being conducted

Panel members should be escorted to the hearing room immediately on arrival, without waiting for witnesses or the legal representative.

Where facilities do not meet the standard, panel chairs are entitled to ask why not. If a satisfactory explanation is not given, an e-mail should be sent to the Director of Business Development, who will take up the matter with the prison Governor.