

**THE CENTRE**

**FOR**

**CORPORATE ACCOUNTABILITY**

**RESPONSE TO HSE**

**CONSULTATION DOCUMENT**

**“Revised Leaflet on Information to Bereaved Families  
and Internal Guidance to Inspectors”**

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# CCA'S RESPONSE TO CONSULTATION ON FAMILY LEAFLET AND OPERATIONAL CIRCULAR

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## INTRODUCTION

- 1.1 The Centre would like to thank the HSE for providing the Centre with an opportunity to comment on its (a) revised advice leaflet to bereaved relatives and (b) its revised operational circular for inspectors on dealing with bereaved families.
- 1.2 It is our view that both these documents are distinct improvements on the existing edition, and the Centre appreciates the work that has gone into their preparation. The Centre supports the bulk of the text in these two documents.
- 1.3 We do however feel that a number of changes – some more important than others – should be made and we set these out below and in the attached documents.
- 1.4 Before discussing these proposed changes, there are two general points that the Centre would like to make about HSE and its relationship with bereaved families.

### **Significance of the Stephen Lawrence Inquiry**

- 1.5 It is important that the HSE recognises that the recent impetus within police forces for family liaison emerged out of the Inquiry Report into the death of the Stephen Lawrence Inquiry which concluded that the failure in family liaison was not only a problem in itself but resulted, in a loss of police credibility with the family.
- 1.6 The report had a whole chapter on the failures of police liaison with the family of Stephen Lawrence (see chapter 26, attached) and made six recommendations. The development of police family liaison grew out of recommendation 23 which stated that “police services should ensure that at local level there are readily available liaison Officers.”
- 1.7 It is important to note recommendation 26 of the Inquiry Report which states that:

“Senior Investigating Officers and Family Liaison Officers be made aware that good practice *and their positive duty* shall be the satisfactory management of family liaison, together with the provision to a victims’ family of *all possible information about the crime and its investigation.*”  
(emphasis added)

### **The Application of HSE’s own policy on open Government**

- 1.8 The strength of HSE’s proposed family leaflet is the way it sets out clearly the role of the HSE after a work-related death. However in our view, the HSE has not given sufficient consideration to what information can and should be imparted to families. In fact the leaflet does not set out with any clarity the type of information that the HSE can and will provide and under what circumstances.

1.9 The HSE has a very positive Open Government Policy Statement. This states *inter alia* that:

“Our aim is:

- to share what we know;
- to seek proactively to identify the information which people need and strive to provide it ....

We believe all this is vital if we are to be effective in a complex world, to build on the trust of our stakeholders and partners, to develop our accountability as a positive force, and to enhance our reputation as confident and independent regulators.

Why is Openness Important?

HSE has always been held in high regard by those who work in the health and safety system. However, HSE can only retain its credibility if it maintains the trust of the people for whose benefit it regulates - workers and the public - and is seen at the same time as a fair and consistent enforcer of the law by the people that we regulate.

In order to retain and build on the trust placed in HSE, we must be **open about what we do and how we do it**. This means ...:

- responding to the needs of the injured and in particular the families of those tragically killed in accidents ...

What does being more open mean?

In simple terms it means:

- asking how we can release information.”

1.10 In light of the above, it is the Centre’s view that the leaflet (and guidance) does not reflect the positive nature of HSE’s Open Government Policy. Whilst the Centre appreciates that the HSE has to comply with section 28 of the HSW Act 1974, HSE’s policy mandates the Executive to look at what information can be provided to bereaved families (who in the Centre’s view have a clear and special interest in the provision of information) that is not in breach of this section

## **CCA COMMENTS ON ADVICE LEAFLET FOR FAMILIES**

2.1 The Centre has set out its proposed changes in the proposed leaflet itself which is attached to this note. The proposed changes are underlined and in **bold** to make them more easily identifiable. Summary reasons why the CCA is in favor of the particular changes are set out in a footnote attached to each of the changes. However more detailed reasons for some of the proposed changes are set out below.

### **Use of the term ‘Accident’**

- 2.2 It is the Centre’s view that the word “accident” should not be used in this document. The HSE’s Board has agreed that the HSE should try to avoid using, where possible, the word “accident”. It is entirely inappropriate to use the word in a leaflet which in large measure provides information about the HSE’s “criminal” investigation and the process of prosecution.
- 2.3 Alternative words can easily be used – principally the neutral word “death” (or possibly ‘incident’)

### **Protocol of Liaison**

- 2.4 It is important, in the Centre’s view, that the protocol is both mentioned and provided in the pack for bereaved relatives. As the HSE is aware the protocol is a critical document that sets out clearly the relationships between the police, the HSE and the CPS and the nature and role of the police and HSE’s respective investigations. It has been the Centre’s experience that a copy of the protocol is extremely helpful to families.

### **Addition of CCA to the List**

- 2.5 The HSE asked the Centre to set out why, in its view, its ‘Work-Related Advice Service’ should be listed as one of the support organisations. It is for the following reasons:
- We are the only independent, non-Government, non-profit organisation in Britain which provides free and independent advice to relatives nationally on how the system of law enforcement operates in relation to a work-related death and how they can help ensure that the incident is adequately investigated and the evidence subject to proper scrutiny by the relevant prosecution bodies. It should be noted that none of the other organisations mentioned on the current leaflet (a number of which do not in fact exist) provide the same level of expert advice provided by the Centre.
  - We are a member of the Federation of Independent Advice Centres (FIAC) and have formal complaint procedures.
  - The National Association of Citizen Advice Bureaus and the Law Centre’s Federation have agreed to ensure that families are informed of the work undertaken by the Advice Service and where appropriate recommend referrals.

### **Solicitors and Inquests**

- 2.6 The Centre is of the view that the HSE should state quite explicitly that families should have a lawyer present at the inquest. In our experience, inquests with lawyers are far more rigorous and thorough than those which are without. The inquest provides the only forum where the family has an opportunity to ask questions of witnesses, and indeed if there is a decision not to prosecute, the only forum in which the family will have a detailed understanding of the circumstances of the death.

- 2.7 It is our experience that families always regret not having lawyers present at the inquest hearing and it is not something that can not be rectified once the inquest has concluded. Inadequate inquests often fuel in families a lack of confidence in the system of investigation which can negatively inform the way a family perceives the HSE investigation itself.

### **Information that can be provided**

- 2.8 The heart of the Centre's concern about this leaflet is centred around paragraph nine. The Centre was surprised that the HSE did not set out more clearly exactly what information could and should be provided to bereaved relatives. One of purposes of the leaflet must be to explain to families what information they can expect to receive from the HSE. It is our view that the proposed leaflet does not match the HSE's "Statement on Openness" (see above).

- 2.9 It is our view that the following paragraphs should be included in this leaflet.

#### The information that we can provide about the investigation (a)

The Health and Safety at Work Act 1974 imposes certain restrictions on the information that an inspector can provide you about the on-going investigation (b). However it is the HSE's policy (c) to provide as much information as we legally can and if we are unable to tell you something we will explain to you why.

We should be able to provide you with the following information:

- copies of any improvement or prohibition notices imposed upon any company, organisation or individual that may have been involved in the circumstances surrounding the death (d);
- summary details of any inspections that the HSE has made in the past of any company or organisation that may have been involved in the circumstances surrounding the death (e) ;
- anonymised details of previous injuries and deaths that have taken place at the premises of any company or organisation involved in the death (f).
- a summary of the evidence that we have obtained during the investigation – including, where possible, summaries of statements taken from individuals (we will not however be able to tell you the names of those people who gave us those statements) (g).
- the names of the individuals that we have interviewed and of those who have given us statements (h)

It should be noted that in some situations we might ask you to keep certain information confidential to yourself and your advisors to avoid prejudicing any future legal proceedings (i).

It can be difficult to remember everything that we have said at a meeting or on the phone, so we would suggest that you take notes of anything that we have said. If you would like us to put anything we have said in writing,

please do not hesitate to ask us – although we may not always be able to do this.

2.10 The reasons why the CCA are in favor of the proposed new text are set out here:

- (a) A principal purpose of this leaflet must be to ensure that families are aware of what information they can expect to receive from the HSE inspector. As a result, there should be a clear sub-heading dealing with this important issue – otherwise the subject gets lost in the rest of the text.
- (b) The HSE needs to be clear that it is the 1974 Act itself that restricts inspectors from providing information - and not other general common law principles of confidentiality etc. The reasons for this are set out below – but justification for this view is most clearly evidenced by the fact that other investigation bodies do have much more open policies in relation to information provision to families.
- (c) HSE's and HSE's policy on information is absolutely clear; information should be open unless it is legally restricted or will result in significant harm. It is important to summarise this in the document.
- (d) Prior and subsequent improvement and prohibition notices: Notices since 1988 are publicly available. The HSE should **routinely** provide copies of any notices during the first visit with the family.
- (e) Summary details of inspections/investigations undertaken by the HSE prior to the death. GAP 1 states that:

“There is no right to have a copy of the inspection or investigation report itself .... However, in most cases it would be reasonable to provide information on the factual aspects of a report e.g. the premises inspected, the date of inspection, what was found, any breaches of health and safety legislation, any action required and the date by which is required.”

Any person with the address and name of a company can obtain information about inspections/investigations into the company – though there may be a cost attached to it. It is the Centre's view that the family should be **routinely** provided with this information or informed that this information is available to them if they would like it.

- (f) as with (e) above, this is information that any person can obtain if they have the name and address of a premise. It should be provided routinely to a family, or alternatively they should be informed that access is possible.

- (g) anonymised summaries of statements. Section 28 (7) appears to suggest that no information gained as a result of taking section 20 statements can be provided to anyone. However GAP 1 states that it is HSE practice to provide information (that is otherwise restricted) to bereaved relatives in a “redacted” (i.e summarised) form (see below) and it is our view that this practice should be set out clearly in this document. (It should also be noted that PACE interviews are not caught by this sub-section.)
- (h) names of interviewees etc. The HSE already does this. For example, the CCA has been present at a meeting at which HSE’s Head of Litigation was present where an inspector provided the bereaved family with (a) the names of all the individuals spoken to and (b) all those who had given statements. This information should be routinely provided. The Centre does appreciate that the provision of names may not be possible if oral summaries of statements have been provided to families and only a small number of statements had been taken by the HSE. The provision of names in such circumstances would allow the identification of witnesses.
- (i) Confidentiality: this particularly relates to (g) and (h) above. The police and the PCA routinely provide information in confidence – and it is the Centre’s understanding that either no breach of this confidence has taken place, or if it has, that it has affected any future proceedings.

2.11 As a result of the above, Paragraph 51 of the revised leaflet is problematic. In our view it should be removed. By the time of trial, all appropriate information should have been provided to a family – with the appropriate agreements on confidentiality. New agreements can be made if the HSE has a particular concern. If a family contacts the HSE after proceedings have been issues (not having sought information from the HSE prior to this) information should be provided as long as there is confidentiality agreements.

## **CCA COMMENTS ON “OPERATIONAL CIRCULAR”**

3.1 The Centre has set out some of its proposed changes in the document attached. The proposed changes are underlined and in **bold** to make them more easily identifiable. The reasons why the CCA is in favor of those particular changes are set out in a footnote attached to each of the changes.

3.2 The Centre has a number of general points to make.

### **Section on “Provision of Information”**

3.3 The Guidance does not make clear to inspectors what information they can and should provide to relatives. As a result it is likely that inspectors will interpret the rather vague guidance on this point as they see fit – and perhaps in an even more restrictive manner than HSE itself considers appropriate. Furthermore, the lack of

clarity on this point, is likely to result in inconsistencies in the approach of different HSE inspectors to similar situations. It is therefore the Centre's view that there needs to be a distinct section on 'the provision of information' which clarifies what information can be provided and what information can not be provided.

### **Written Statements and Oral Summaries**

- 3.4 In the Centre's view, the guidance to inspectors fails to make a key distinction – one that is made elsewhere in HSE's documents – between:
- copies of the written statements themselves taken by HSE inspectors, and
  - oral summaries of statements;

- 3.5 Paragraph 12 of the Guidance states the following:

“We should aim to be as informative as possible within the statutory bounds on disclosure and without prejudicing any subsequent legal proceedings by ourselves or another enforcing authority. It may be appropriate to explain the reasons why we do not provide *written statements* (for further information on the legal reasons for this see appendix).” (emphasis added)

- 3.6 Para 12 clearly relates to written statements. This is confirmed in Para 1 of Appendix 3 itself which states:

“... while it is perfectly proper to give details about the progress of an investigation, care must be taken not to disclose investigation material, for example witness statements or records of interview.” (emphasis in original)

The HSE has informed the CCA that:

“records of interview are either the transcript of a defendant's interview under caution or a summary of the interview under caution.”<sup>1</sup>

The HSE has also informed the CCA that “summary of the interview” refers to a *written* summary of the cogent points made in an interview, not an oral summary.

- 3.7 It is the Centre's view that there is an important distinction between (a) copies of written statements and (b) oral summaries of these statements (that might indeed be anonymised).

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<sup>1</sup> E-mail from HSE. It should be noted that this definition appears to indicate that statements taken under section 20 of the HASAW 1974 (which are not taken under caution, and are the most common statements taken by HSE inspectors) are not investigation material. For the purposes of this note it is assumed that the HSE does intend to include section 20 statements within the meaning it gives to investigation material.



- 3.8 The CCA, for the purposes of this response<sup>2</sup>, accepts that the HSE is not legally able to provide copies of section 20 statements to bereaved relatives. However it is the Centre's view that the provision of oral summaries is not prohibited. Indeed, in other documents, the HSE both accepts this distinction and accepts that oral summaries of section 20 statements is permitted. Para 13 of Appendix B to Gap 1 concerns itself with the application of Section 28. It states that:

*“The purpose of a disclosure determines whether it will be lawful, rather than the individual or body to whom the disclosure is made. Where HSE judges that the public, or sectors of the public, are in need of information for the purposes described above we are entitled to disclose it. The range of circumstances in which disclosure of information would serve a positive health and safety purpose is broad, and we should consider each case on its merits. However, the health and safety purpose must be broader than, for instance, meeting the natural concerns of relatives of victims who have died in accidents. The provisions of Section 28, as presently drafted, do not provide for such understandable concerns, in themselves, to constitute a proper reason to make a disclosure to victims and relatives of victims of accidents. Wherever possible we should look to provide information in these circumstances in a redacted form – i.e. the information should be made available to the relatives of victims in a way which does not disclose commercially sensitive or other confidential material. In all cases of doubt the Solicitor's Office should be consulted, via normal Directorate/Divisional channels.” [emphasis added]*

- 3.9 Discussions with the HSE's Open Government Unit has confirmed that this paragraph means that inspectors can provide oral summaries of section 20 statements as long as it ensures the identity of the person giving the statement and any commercially sensitive information contained in the statement - is kept secret.
- 3.10 However, the guidance under consultation fails to inform inspectors that this information can be provided to bereaved relatives.

Para 11 of the Guidance therefore needs to be totally revised to take this into account.

### **HSE's Open Government Policy**

- 3.11 The Guidance fails to reflect the HSE's open government Policy. This point has already partially been made in relation to the HSE's advice to bereaved relatives. In the Centre's view HSE's Open Government Policy should mean a much more

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<sup>2</sup> The Centre is currently seeking advice on whether the HSE is interpreting 'for the purposes of this function' – an exemption from section 28 restrictions - in a too limited a fashion. Apart from anything else, dealing with the bereaved families is clearly part of the purposes of HSE's functions and since this requires information about the nature of the investigation, in our view that information should be made available under that sub-section.

thoughtful consideration of what information would be of interest to bereaved relatives.

- 3.12 In the Centre's view, as stated elsewhere, this would include:
- improvement/prohibition notices in relation to relevant companies, organisations, individuals;
  - criminal record of relevant companies and organisation;
  - summaries of inspections and investigations into relevant companies and organisations;
  - details of reported incidents in relation to relevant companies and organisations;
- 3.13 The Centre appreciates that the HSE may not think that it is appropriate for all of this information be provided on a routine basis (though there is no reason why the HSE should not be able to organise itself to ensure that this is possible). If routine provision of inspection/ investigation/ RIDDOR reports concerning the relevant organisations is not possible – the HSE should definitely inform bereaved relatives that this information is available if they would like access, free of charge. However, it is the Centre's view that notices and details of any criminal offences should be provided routinely.
- 3.14 HSE's Open Government Policy should also mean that the HSE look imaginatively at providing information to bereaved relatives. If, for example, an inspector is undertaking a joint investigation with a police officer and there is some information coming from their joint inquiries that the inspector finds s/he unable to disclose (because of section 28) but the police is able to disclose, the guidance should indicate to inspectors that they should make arrangements with the police to disclose that information to relatives.

### **Appendix 3: Other legal obstacles**

- 3.15 It is the Centre's view that the legal arguments set out in Appendix 3 only apply (if they apply at all) to the provision of written statements and they do not apply to the oral provision of summaries. In effect, these legal principles do not add very much to the more crucial section 28 restrictions.

- 3.16 *Information should not be disclosed until the end of a criminal trial*  
The appendix states that:

First, it is not usual to disclose material until any criminal proceedings have been completed. The leading case in this area is *Conway v Rimmer* [1968] 1 AER 874, in which Lord Reid said (at page 889):

*... it would be generally wrong to require disclosure in a civil case of anything which might be material in a pending prosecution, but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.*

There are a number of subsequent cases which support this principle.

3.17 It is the Centre's view that this case does not support the position that is articulated here.

- The phrase quoted by the HSE is part of the following paragraph:

“The police are carrying on an unending war with criminals many of whom are today highly intelligent. So it is essential that there should be no disclosure of anything which might give any useful information to those who organise criminal activities; and it would be generally wrong to require disclosure in a civil case of anything which might be material in a pending prosecution but after a verdict has been given, or it has been decided to take no proceedings, there is not the same need for secrecy.”

It is clear that the context in which Lord Reid made his statement was in relation to the disclosure of information to “those who organise criminal activities” rather than to bereaved relatives.

- This case involved “disclosure in a civil case” to a person who had been subject to a criminal investigation. Providing information to bereaved families is an entirely different situation.
- It should be clear that *Conway v Rimmer* does not set out a principle that effects the disclosure of information to a bereaved relative.

This can be seen by looking at the following situation. If a bereaved relative met a person who had given a statement to a police officer (or indeed HSE inspector), the bereaved relative would be able to obtain a copy of that statement – prior to any criminal trial - if the witness consented. Obtaining a copy of the statement is a matter of consent and nothing else.

Technically, a bereaved family could obtain copies of the statements of all witnesses if they consented.

3.18 *Impact of Article 6 and 8 of the Human Rights Act*

The HSE states the following:

HSE as a public authority has a duty to act in accordance with Convention Rights. Individuals have rights, under Article 6, to a fair trial, and the presumption of innocence and, under Article 8, to respect for their family life and correspondence etc. ‘Suspects’ are entitled to have their guilt or innocence established in a criminal trial, and those who are not prosecuted or acquitted are entitled to the presumption of innocence. This would be undermined if HSE released evidence that allowed people to determine why the person was suspected in the first place or cast doubt on their innocence.

3.19 This paragraph does not make clear how exactly the provision of a statement to a bereaved family is in breach of these articles. One assumes that it is not HSE's argument that there would have been a breach of Article 6 (the right to a fair trial) if witnesses consent to providing statements to a bereaved family – even if those statements turned out to contain evidence that might allow a prosecutor to charge a particular person with an offence. In addition, in any case, Article 6(2) - which guarantees the presumption of innocence in criminal proceedings – applies only to a person who is subject to a criminal charge and does not therefore apply at the investigation stage.

3.20 There would certainly be no breach of Article 8 if summaries of statements were provided in an anonymous form.

3.21 *Public interest factors*

The HSE makes the following point:

It is also recognised that there is a public interest in ensuring that witnesses feel free to come forward to give statements to investigators without fear that such statements will be used for other purposes (see, for example, *Taylor v SFO* [1997] EWCA Civ 2163); to do otherwise may put off witnesses from coming forward which would be detrimental to the criminal justice system as a whole. For this reason it is not usual to disclose witness statements to third parties even after proceedings have been completed, except with the consent of the witness or following a court order.

3.21 It is correct to say that this case does make clear that there is a public interest in ensuring that witnesses feel free to come forward to give statements to investigators – however most of the statements taken by HSE inspectors are 'section 20' statements – which individuals are legally obliged to give. It is not clear how witnesses will be 'put off' in giving information to the HSE by the fact that the statements were to be shown to bereaved relatives<sup>3</sup>.

3.22 *Prejudice*

The HSE's final point is as follows:

Lastly there is a possibility of prejudice which may occur from pre-trial disclosure to third parties. Any pre-trial meetings at which witnesses are present could generate potentially prejudicial material. HSE has to comply with its duty in relation to the disclosure of unused material in accordance with the Criminal Procedure and Investigations Act and the Attorney General's Guidelines on Disclosure. Any meetings at which witnesses are

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<sup>3</sup> It should be noted that the CCA is not arguing that statements – as such - should be given to bereaved relatives, only that it is difficult to see how witnesses would be deterred from giving evidence when they have to give it in any case.

present creates material which must be recorded and retained, and which is potentially disclosable to the defence in any subsequent prosecution.

- 3.23 It may well be the case that “pre-trial meetings at which witnesses are present could generate potentially prejudicial material.” However, it is not clear what is meant here by “witnesses”. Are HSE inspectors who might have to give evidence in a criminal trial considered to be ‘witnesses’? If this is so, any meeting between bereaved families and HSE inspectors will create these problems – which would mean that HSE inspectors involved in the investigation should not meet bereaved families at all.

In a small number of cases, members of the bereaved family are ‘witnesses’ and this may well mean that a genuine problem is created.

- 3.24 In the Centre’s view any legal appendix should:
- clarify the application of section 28
  - clarify the different rules that apply to copies of written statements and oral summaries
  - discuss how confidentiality agreements with relatives can ensure that information can be provided without prejudicing future proceedings;<sup>4</sup>

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<sup>4</sup> The Centre has not had the time to re-work the appendix. Please contact the Centre if you would like further consideration on this point.

