



**Response to
Department for Constitutional Affairs Consultation
Hearing the Relatives of Murder and Manslaughter
Victims**

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**For further information contact:
Sally Ireland, Senior Legal Officer (Criminal Justice)
Tel: (020) 7762 6414 Email: sireland@justice.org.uk**

Introduction

1. JUSTICE is an independent all-party legal and human rights organisation, which aims to improve British justice through law reform and policy work, publications and training. It is the UK section of the International Commission of Jurists.
2. We are grateful for the opportunity to respond to this consultation, and are happy for our responses to be made public.

Summary

3. We recognise that victims of criminal conduct may feel marginalized by the criminal justice process, and agree that this should be avoided where possible. Any measures taken to achieve this, however, must be subject to the primary purpose of the system – to serve the interests of justice, rather than those of any individual.
4. We therefore believe that:
 - The provision of advice and assistance for relatives of murder and manslaughter victims regarding the criminal process, how they can make representations, when hearings are taking place, etc. is to be welcomed;
 - It should be recognised, however, that a relative may become a witness or indeed a suspect in the case;
 - We are not opposed in principle to relatives giving oral evidence at the sentencing stage;
 - The statement should be confined to the impact of the offence upon the victim and (subject to admissibility) their direct knowledge of its impact upon others;
 - Because of our view as to the proper contents of the statement, we believe that it would be possible for the prosecutor to take the relative through the statement in court in most cases;

- A properly trained lay caseworker should be able to provide appropriate advice and assistance to relatives on the criminal justice process;
4. We recognise that in some cases the appropriate person to receive advice and assistance may not be a blood relation but a partner or close friend; the term 'relative' is used throughout this response for reasons of convenience.

Response

Questions 1 and 2

5. JUSTICE recognises that under current procedures the families of murder and manslaughter victims may feel isolated from the criminal justice process and powerless to challenge what they believe to be untruths put forward during that process, and that this is likely to exacerbate their grief and distress.
6. While paying attention to the rights and needs of victims' families, it is essential, however, that trials and sentencing procedures remain fair and that, as the government have recognised, the prosecuting authorities retain their independence. These aims, however, can in our view be convergent – since provided that it is done in the right way, the provision of information by victims' families to the prosecutor and/or the court can in fact enhance the fairness of proceedings by ensuring that the court has full information before it.
7. In considering the seriousness of an offence, the court is mandated by s143 Criminal Justice Act 2003 (CJA) to take into account 'any harm which the offence caused, was intended to cause or might foreseeably have caused'. In a homicide case part of the harm caused, of course, may be psychological trauma and financial loss caused to bereaved relatives by the killing.
8. There should therefore be provision for such evidence to be put before the court. There is no great difference in principle between the provision of oral evidence and the written victim impact statement that already exists. It may also allow families to feel that the court has given audience to the impact of the crime upon them. However, there are specific concerns that will arise if oral evidence is available:

- The family should not feel under pressure to give evidence or to 'perform' well while doing so; if they do then the psychological benefits of this measure are open to question;
- Such evidence should be confined to the effect of the crime upon the relative giving evidence, and, subject to admissibility, to the effect, perhaps others (for example children) who are not giving evidence;
- Evidence should not be given upon the facts of the case; any evidential dispute between prosecution and defence after conviction should be resolved in the normal manner, if necessary by *Newton* hearing;
- The sentence imposed should not be influenced by the eloquence of the relative;
- The relative should provide a written statement that should be disclosed to the judge and the defence with the evidence in the case, or as soon as possible afterwards; the defence should have time to take instructions upon the statement and investigate its veracity if necessary. The oral evidence given should normally be confined to what is in the written statement; if new circumstances have arisen between the giving of the statement and sentencing then these should be the subject of a further written statement that should be disclosed as soon as possible;
- The defence must be able to cross-examine the relative upon their evidence, although we believe that, if the evidence is confined as outlined above, they will not wish to do so in some cases. In cases where the homicide had a domestic element or the defendant was known to the victim's family cross-examination may be more likely.

Question 3

9. If the evidence given by relatives is confined as suggested above, we believe that they could properly be 'examined in chief' by the prosecution advocate, without the independence of the CPS being compromised. Currently, after all, the prosecution put written victim impact statements before the court. However, it may be that the relative wishes to be independently represented, and if they have had advice from an advocate at earlier stages of the case then they may wish that person to examine them in court.
10. We are not opposed in principle to any of the options suggested as to who should take the relative through their evidence in court. However, we are concerned

generally at the impact upon the legal aid budget of instructing an independent barrister or solicitor.

Question 4

11. Victims have been given a number of rights under the Victims' Code; it is important in order that the service providers be properly accountable that they should both know their rights and know which services should be provided to them. In that regard we believe that the person who provides relatives with advice about the process should ideally be independent of those service providers.
12. Following a murder or manslaughter, there are a number of areas upon which relatives should receive advice: the relationship between an inquest and a criminal prosecution; the availability of legal representation at an inquest; the possibility of a s130 PCC(S)A compensation order, CICA compensation and/or a civil action for damages; whether and how to make a complaint about the conduct of the investigation or prosecution, the stages of a criminal prosecution and practical arrangements concerning the trial, etc.
13. Some areas of advice, such as regarding the viability of a civil action, will require a legally qualified advisor. However, while legal advice in these areas should remain available on ordinary principles, we do not believe that an independent legal advisor is needed to keep relatives better engaged in the criminal justice process. The advice needed – upon the various stages of the prosecution, arrangements for trial, etc., is largely practical in nature. Information given upon legal issues such as bail, sentencing, etc. can be largely confined to an explanation of the powers available to the court, and where appropriate, any role assigned to the relative under the Victims' Code or the current proposals.
14. We would propose that relatives be assigned an independent caseworker, with a proper level of knowledge of the criminal justice process and the workings of the Victims' Code. The caseworker could refer relatives on to legal advisors or to other services (for example, counselling) as appropriate.
15. Such a caseworker might not, however, be a substitute for a police family liaison officer. A liaison officer is better equipped to tell relatives about what is happening in the police investigation; further, at the early stages of the investigation – before a

suspect and witnesses have been identified – it may not be appropriate to assign a caseworker to relatives who may become witnesses or suspects themselves. We recommend that family liaison officers continue to be provided to relatives in homicide cases, with an independent caseworker being assigned at an appropriate stage; for example, after someone has been charged.

Questions 5 - 10

16. In cases of serial or multiple offending, or where the relatives of a victim are estranged, it may not be appropriate, for geographical or other reasons, to assign a single caseworker to all concerned relatives, although each case will turn on its facts.
17. We believe that in many cases the CPS advocate will be able to take the relative through their statement. We see no reason why they should not do so for more than one relative.
18. Relatives should, we believe, indicate, on or as a supplement to their written statements (for example, by means of a tick-box), whether they wish to give oral evidence, and if so, whether they would be happy to do so through the prosecutor or would prefer to do so unrepresented, through an independent advocate or through another person. The judge should, after hearing any representations from the prosecution and defence, decide from whom he wishes to hear. If a relative is offered the chance to give oral evidence then the judge can decide whether, if they have requested an independent advocate, one should be allowed – subject to representations from the prosecution and defence the relative's wishes should normally be respected. In cases of serial or multiple offending at least one relative of each victim should normally be offered the chance to give oral evidence.
19. We agree that the defendant should be excluded.
20. Where the relative is vulnerable by reason of age, physical or mental condition, etc., special measures may need to be considered – for example, pre-recording a victim impact statement on video. In relation to the appointment of a caseworker, where the victim lacks capacity (ie they are a child or suffering from mental illness or learning disability such that they lack capacity), the relative who is given information etc. by service providers should normally be a relative with capacity. Where there are multiple relatives wishing to appoint an independent advocate any conflicts of interest

should be resolved on normal professional ethical principles by the advocate – which may result in his being unable to act for one or more clients, who should then be able to obtain an alternative advocate.

Questions 11-14

21. While relatives will require support from the time that they become aware of a death, it may not be appropriate to appoint a caseworker until, for example, after criminal charges have been brought. Until then, a police family liaison officer could provide support. The police should be able to investigate unhindered; it may not become immediately clear whether a relative is a potential witness in the case (and if so for whom) or even a suspect.
22. We agree that the option of a lay advocate should be considered. The preferred solution, we believe, is for a lay caseworker to provide advice and assistance during the criminal process and then at the sentencing stage when oral evidence is given, for different options to be considered – with the primary option being the use of the CPS advocate to take the relative through their statement.

Questions 15-16

23. Relatives may find it useful to receive advice not only on the criminal process but also on inquest procedure, the possibility of civil action, how to make a complaint about the investigation etc., the representations that they can make to service providers both under the Victims' Code and otherwise, the definition of murder and/or manslaughter, sentencing and the possibility of compensation either from a defendant or from CICA.
24. The face-to-face interview should be the primary method of giving advice and assistance if this is what relatives wish; it will also be useful to give some information in writing eg leaflets and the caseworker should be available to assist relatives by telephone.

Question 17

25. It should generally be borne in mind that unlike the victim of a violent crime other than homicide, the relatives of a murder or manslaughter victim will generally not have

direct knowledge of the crime (unless they were an eye-witness) and will not be able to make representations about, for example, the acceptance of a plea to a lesser charge or the discontinuance of proceedings based upon their own direct knowledge of the facts of the offence.

26. That said, they should be able to make representations upon the matters in paragraph 63 of the consultation, subject to those representations being given no more weight than is appropriate by the relevant service provider. Representations should be recorded in written form. Relatives should be made aware that if their representations pass the standard tests for disclosure, they may be disclosed to the defence, subject to any PII etc.

Questions 18-22

27. Since it is our view that the relative should only give admissible evidence upon the impact upon them (and perhaps, upon other relatives and friends) of the murder or manslaughter in question, we believe that the opportunity to cross-examine relatives will not be taken up in a proportion of cases.
28. The relative should be warned that they might be cross-examined and told generally about giving evidence. The general rules prohibiting improper coaching of witnesses in criminal trials should apply.
29. The oral statement should be based upon the written victim impact statement, which should be submitted to the court and the defence as soon as possible and in any event in time for any challenge to its content to be prepared. If new circumstances have arisen since the original statement is made, these should be the subject of a further statement, which should be disclosed as soon as possible. Questions on matters not contained in a written statement should only be allowed with the judge's permission on an interests of justice test.
30. When the statement is being made the relative should be asked to provide information about the impact of the offence upon them and of their direct knowledge of its impact upon others known to them. It would be improper to attempt to insulate the statement from cross-examination through witness coaching. Since police customarily take statements from witnesses in criminal cases it would not be

necessary for a person to be legally qualified in order to take a statement from a relative.

Questions 23-24

31. We agree that special measures should be available in order to allow a vulnerable victim to give evidence. These should be applied for in the normal way by the prosecutor or victim's advocate and should be open to opposition by the defence.
32. Written statements should continue to be made and put before the court in the normal way. It should be open to relatives to provide a written but not an oral statement if they wish to do so. There may be legal argument about the admissibility of the statement – although written statements are commonly put forward without opposition at present.

Question 25

33. Since the oral evidence should generally be confined to the contents of written statements, at the indication stage we do not believe that will be necessary to ask the relative to give oral evidence in most cases. It may be necessary, however, for there to be a delay while the relative(s) are asked whether there is any additional information that has come to light since their last statement was written. Such delay could be avoided by ensuring that those who have provided written statements are made aware of any dates for new hearings and that it is possible that an indication will be requested and/or a guilty plea tendered. They could be then asked to provide any supplementary statement shortly before the hearing.
34. If the defence wish the relative to be called to give oral evidence before an indication is given this should be possible with the judge's permission.

Questions 26-28

35. Pleas in mitigation generally contain two sections, in addition to any authorities etc. cited: representations about the offence, and representations about the offender. The victim's relatives will, as we have noted, will often not have any direct knowledge of the facts of the offence. Unless the offender is known to them, they may also not have any direct knowledge of the offender.

36. Aspersions are likely to be cast upon the victim's character in situations such as excessive self-defence and provocation, and some cases of diminished responsibility and suicide pact. They may also be cast in other cases.
37. We are concerned that, unlike the victim of a non-fatal crime, the relatives of homicide victims may have an inaccurate or idealistic view of their relative. They may not be able to believe that their relative, for example, attacked someone who killed him in excessive self-defence. However, in some cases they may have useful information to give to the prosecutor.
38. In some cases it will not be practicable to give advance notice of a guilty plea; sentencing could be delayed in order for advance notice to be given of matters to be raised in mitigation, in order that the prosecution could investigate and where necessary challenge any matters raised. During this interval the relatives could have notice of the matters raised and provide any relevant information to the prosecution.
39. The defence should, however, be permitted to put any further information of which the prosecution did not have notice before the court, although the judge should consider whether it had been provided late in order to prevent investigation of its veracity.
40. We do not consider that a legally qualified advocate is needed for the relative to liaise with the prosecution regarding mitigation. It may be appropriate for them to see the prosecutor with their caseworker or the police liaison officer.

Question 29

41. We agree that it is not necessary for the advocate to appear at the Court of Appeal, subject to any particular point being taken – for example, regarding the truthfulness of the relative's evidence – which requires them to be present.

Question 30

42. We agree that the caseworker, while themselves expressing no opinion on the lenience or otherwise of a sentence, should be able to inform relatives that they may write to ask the Attorney General or CPS to refer a sentence given, if they are not satisfied with it, and give them practical information such as addressees and practical

assistance - for example, taking down a dictated letter if a person has difficulty with literacy.

Questions 31-32

43. The caseworker would need to be updated as to the progress of the case – hearing dates, etc. - and would need information about prosecutorial decisions, and applications etc, about which the relative can make representations.
44. Service providers who are given responsibility under the Victims Code to provide information to victims should also provide such information to caseworkers, as appropriate. Once the case is in court the court may be best placed to provide hearing dates etc. to the caseworker although the CPS may be better placed to give notice of applications etc.

Question 33

45. The post of a relatives' caseworker would require training in a number of fields, and should include detail upon the criminal justice process and the victims' code; information about various bodies to whom relatives can be referred, and training on how to deal with people who have gone through traumatic events.

Witnesses

46. Finally, we are concerned about the provision of advice and assistance to relatives who may be, or who may become, witnesses in the case. While it may be unavoidable that relatives in some cases who receive advice from caseworkers also become witnesses in the case, care should be taken to avoid prejudicing the trial where possible by giving them information that would not appropriately be given to a witness. Where a witness is receiving advice from a caseworker, normal principles of disclosure should be used to determine whether that fact, plus the details of any advice or information given to or received from the relative should be subject to disclosure.

Sally Ireland
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