



House of Commons
Justice Committee

Joint Enterprise

Eleventh Report of Session 2010–12

Volume I: Report, together with formal minutes, oral and written evidence

Additional written evidence is contained in Volume II, available on the Committee website at www.parliament.uk/justicecom

*Ordered by the House of Commons
to be printed 11 January 2012*

HC 1597

Published on 17 January 2012
by authority of the House of Commons
London: The Stationery Office Limited
£13.50

Justice Committee

The Justice Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Ministry of Justice and its associated public bodies (including the work of staff provided for the administrative work of courts and tribunals, but excluding consideration of individual cases and appointments, and excluding the work of the Scotland and Wales Offices and of the Advocate General for Scotland); and administration and expenditure of the Attorney General's Office, the Treasury Solicitor's Department, the Crown Prosecution Service and the Serious Fraud Office (but excluding individual cases and appointments and advice given within government by Law Officers).

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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the internet at www.parliament.uk/justicecommittee. A list of Reports of the Committee in the present Parliament is at the back of this volume.

The Reports of the Committee, the formal minutes relating to that report, oral evidence taken and some or all written evidence are available in a printed volume. Additional written evidence may be published on the internet only.

Committee staff

The current staff of the Committee are Tom Goldsmith (Clerk), Sarah Petit (Second Clerk), Hannah Stewart (Committee Legal Specialist), John-Paul Flaherty (Inquiry Manager), Ana Ferreira (Senior Committee Assistant), Sonia Draper (Committee Assistant), Greta Piacquadio (Committee Support Assistant), Frances Haycock (Sandwich Student) and Nick Davies (Committee Media Officer).

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Summary

Joint enterprise is a form of secondary liability whereby a person who agrees to commit a crime with another becomes liable for all criminal acts committed by the other person (the principal offender) in the course of their joint criminal venture. It is a common law doctrine, which means it has been developed by the courts over the years. Our primary recommendation is that the Ministry of Justice should take immediate steps to bring forward legislation in this area. We believe the problems to be sufficiently acute, however, that we also recommend the Director of Public Prosecutions issue urgent guidance on the use of the doctrine when charging. In particular, we would welcome guidance on the relationship between association and complicity, which is of vital importance in gang-related violence and homicides.

We were surprised to learn in the course of this inquiry that no record is made of the number of people charged under joint enterprise every year, or the outcomes of those cases. Given the evidence we heard that the doctrine is being applied inconsistently, together with the high number of cases involving joint enterprise being heard in the Court of Appeal, we would have expected that such data would have been collated to ascertain a true picture of the number of charges, convictions and appeals involving the joint enterprise doctrine. We have recommended such data be collated in future.

Having examined the law in this area, and heard from witnesses who have recent experience of the operation of the doctrine, both as the victims of crime and as defendants' representatives, we have concluded that joint enterprise should be enshrined in statute to ensure clarity for all involved in the criminal justice system. While we recognise that there are particular problems with the operation of the joint enterprise doctrine and murder, we feel strongly that reform in this area should not have to wait for a wider review of the law on homicide.

1 Introduction

1. On 19 October 2011 we announced our inquiry into the aspect of secondary liability in a criminal venture commonly known as joint enterprise. Our inquiry was prompted by dissatisfaction with the operation of the doctrine amongst campaigning groups. Concerns were expressed both by groups representing victims and groups representing those who believe they have been convicted following a miscarriage of justice.

2. Our terms of reference focused on four specific areas:

- How often and in what types of cases is joint enterprise used?
- Has the use of joint enterprise in charging defendants changed in recent years?
- What would be the advantages and disadvantages of enshrining the doctrine in legislation?
- What would be the impact of implementing the Law Commission's proposals as set out in *Participating in Crime*?¹

3. We received 26 submissions from witnesses and held two oral evidence sessions with witnesses listed at the end of this Report. We are grateful to all those who took the time to contribute to our inquiry.

4. As will be clear from the terms of reference, the purpose of this inquiry was to investigate claims that the doctrine of joint enterprise was so unclear, or so complex, that its use could potentially cause injustice to either victims, and the families of victims, or defendants. It was described to us as a “complex and volatile” area of law.²

1 Law Commission paper No. 305, May 2007, Cm 7084

2 Ev 43

2 The current law and criticism of the doctrine

5. To find a defendant guilty of a criminal offence, a jury must be satisfied ‘so that it is sure’³ that the defendant both committed the crime and had the requisite state of mind to carry out the crime, known as the *mens rea*. An example is murder. To be convicted of murder an offender must be shown both to have caused the victim’s death and to have intended either to kill or cause ‘really serious harm.’⁴ Another example is burglary. To be convicted of burglary under section 9(1) of the Theft Act 1968 the defendant must be found both to have entered a building as a trespasser and, at the time, intended to commit theft or grievous bodily harm.⁵

6. Secondary liability allows the prosecution to proceed not only against the principal offender who committed the crime but also against others who were involved in the commission of the offence. Crucially, secondary liability is a common law doctrine. According to Professor Jeremy Horder, Professor of Criminal Law at King’s College, London and former Law Commissioner, the rules on complicity were originally “drawn up to accommodate the notion that people have different roles in the commission of an offence”⁶ and the rules have evolved over the years. The Law Commission commented in one of its reports on complicity, *Participating in Crime*,⁷ that: “At the core of the doctrine of secondary liability is the notion that D can and should be convicted of the offence that P commits even though D has only “aided, abetted, counselled or procured” P to commit the offence”.⁸

7. While the courts have often treated joint enterprise as an umbrella term,⁹ the type we considered in this inquiry is a form of secondary liability whereby a person who agrees to commit a crime with another becomes liable for all criminal acts committed by the other person (the principal offender) in the course of their joint criminal venture. Professor Graham Virgo, Professor of Criminal Law at Cambridge University, gave us the following example:

where two persons, D1 and D2, have a common purpose to commit one crime, such as burglary (crime A), and, in the course of committing that offence, D1 commits another offence, such as murder (crime B). D2 will be liable for crime B as a secondary party if he foresaw that D1 might commit that offence with the necessary intent. D2’s liability is justified on the ground that, by continuing with the common venture after realising that crime B might be committed in the course of it, he will

3 The modern formulation of ‘beyond reasonable doubt’.

4 *R v Vickers* [1957] 2 QB 664

5 Theft Act 1968, section 9(1)

6 Q 119

7 Law Commission paper No. 305, May 2007, Cm 7084

8 *Participating in Crime*, para 1.5

9 See Hughes LJ in *R v ABCD* [2010] EWCA Crim. 1622

have sufficiently associated himself with the commission of crime B and will from then on be considered a secondary party to that offence.¹⁰

As Professor Virgo points out, joint enterprise is, in the strictest sense, a misnomer because the doctrine concerns liability for an offence that is a departure from the agreed joint venture.¹¹ It is in this sense that we use the term joint enterprise in this report.

Joint enterprise and other forms of complicity

8. Joint enterprise, in the form described above, must be seen in the context of other common law and statutory forms of complicity, including aiding, abetting, counselling or procuring; and the law on inchoate liability, where an act intended to assist the carrying out of a criminal enterprise is completed but the enterprise itself fails because the principal offender does not carry out the act intended.¹² Together they allow prosecutors to bring proceedings against all participants in offences, a particularly important weapon in tackling large scale criminal operations such as drug smuggling. However, as can happen with common law doctrines, the law on complicity has been complicated over the years by court decisions. The Law Commission, in its report *Participating in Crime*, identified the limited reach of inchoate liability as leading to an over-extension of secondary liability, which carries more serious consequences for the secondary participant. This in its turn created problems with the “parity of culpability”—the principle that those facing the same punishment should be equally guilty of the offence.¹³

9. The Law Commission’s recommendations in *Participating in Crime* (2007) together with those in its earlier reports *Inchoate Liability for Assisting and Encouraging Crime* (2006)¹⁴ and *Murder, Manslaughter and Infanticide* (2006)¹⁵ allowed for complete and interlocking statutory provision for complicity. To date however, only the reforms contained in *Inchoate Liability for Assisting and Encouraging Crime* have been enacted.¹⁶ The Government has announced it will not be implementing the proposals in *Murder, Manslaughter and Infanticide* during this Parliament and told us in written evidence:

Ministers have written to the Chairman of the Law Commission to explain that whilst there may be potential benefits to implementing the report on *Participating in Crime*, this would be a major piece of work and it will not be possible to implement the report during the life time of this Parliament due to other priorities and pressures on Government resources. The Government hopes that it may be possible to return to this subject in the longer term, however.¹⁷

10 Ev w10

11 *Ibid.*

12 Hughes LJ, *R v ABCD*

13 *Participating in Crime*, paras 1.7-1.11

14 Law Commission paper No. 300, July 2006, Cm 6878

15 Law Commission paper No. 304, November 2006, HC 30

16 Serious Crime Act 2007

17 Ev 36

Concerns over the law on joint enterprise

10. The aspect of joint enterprise which has come in for most criticism is the mental state required for a finding of guilt, or *mens rea*. This type of joint enterprise essentially relies on the court determining what the offender could have anticipated or foreseen rather than what was explicitly agreed or intended: the so-called *Chan Wing-siu* principle.¹⁸ Professor Horder explained the principle using the example of a murder committed in the course of a burglary:

if you [the principal offender] commit the murder in the course of the burglary, I [the secondary offender] must have foreseen that that the murder might occur as a realistic possibility, not a purely fanciful one, yet...carried on to commit the burglary along with you...I must have anticipated that [the murder] might occur.¹⁹

11. In its 2007 report on aspects of secondary liability the Law Commission recognised that the principle was “severe”, although the Commission recommended its retention with certain safeguards.²⁰ Tim Moloney QC and Simon Natas, both specialists in criminal law, argue that the principle should be abandoned because in some cases it can lower the bar for conviction:

The prosecution will usually find it easier to adduce evidence that the defendant foresaw what the principal might do than to adduce evidence that he actually intended the principal to cause serious injury or to kill—indeed, such evidence may not go far beyond evidence of association (or alleged “gang membership”) added to alleged presence at the scene. For this reason, the *Chan Wing-siu* principle increases the likelihood that cases will be prosecuted on the basis of weak and tenuous evidence...²¹

12. In addition, Professor Graham Virgo told us that the courts’ approach to determining the mental state required for a finding of joint enterprise was “inconsistent”.²² In some cases the secondary participant in the criminal venture was only required to foresee the commission of the offence. In others, the secondary participant was apparently required to foresee the state of mind of the principal offender, as well as foreseeing the criminal act itself.²³

13. One of the reasons the Law Commission recommended the retention of the *Chan Wing-siu* principle was the existence of two defences. A defendant can refute a charge under the joint enterprise doctrine either by showing that there is a “fundamental difference”²⁴ between the joint criminal venture agreed on and the crime committed during the course of that venture, or by showing clear and unambiguous withdrawal from the venture before the crime took place.

18 *R v Chan Wing-siu* [1985] 1 AC 168

19 Q 116

20 *Participating in Crime*, para. 3.8

21 Ev w7

22 Ev w11

23 *Ibid.*

24 *R v Powell and English* [1999] 1 AC 128

14. The nature of the first defence has meant that the “common law has tied itself in knots trying to understand or give extra detail to the meaning of ‘fundamental difference.’”²⁵ Whether a weapon is present, whether a ‘more lethal’ weapon is used than could have been anticipated, how ‘more lethal’ should be defined and how the principal offender’s state of mind should be viewed in evaluating whether a “fundamental difference” exists have all preoccupied the courts in recent years.²⁶ The House of Lords considered the defence in 2008²⁷ and the Court of Appeal in both 2009²⁸ and 2010.²⁹

15. The law relating to withdrawal is less complex but we were told that it is too tightly drawn. Tim Moloney QC and Simon Natas told us:

The case of *Mitchell* suggests that in fact, [a defendant charged with secondary liability] may find it extremely difficult to argue that [the principal offender’s] offence was too remote...Rather, the scope of a joint enterprise, even in a case of spontaneous violence, can be drawn so wide that those who would appear to have little or no culpability for the killing can be included within it.³⁰

In *Mitchell* the defendant and her friend became involved in a violent argument over a taxi with another group of people:

The fight ended. Mitchell’s co-defendants went to a nearby house and armed themselves with weapons. She did not go with them. They returned to the car park where they saw the opposing party and chased them. Having caught up with them, an assault ensued and fatal head injuries were caused to the victim. At the time, Mitchell was in the car park looking for her shoes...it was [left] open to the jury to conclude that the enterprise that Mitchell had joined at the time of the argument over the taxi still continued at the time of the fatal attack. She, by her continued presence in the car park, had not withdrawn from it. Mitchell was therefore convicted of murder even though it was accepted that she may not have participated in the second assault at all.³¹

25 Q 108

26 Ev 43

27 *R v Rahman* [2008] UKHL 45

28 *R v Yemoh* [2009] EWCA Crim. 930

29 *R v Mendez and Thompson* [2010] EWCA Crim. 516

30 Ev w8

31 *Ibid.*

3 The use of joint enterprise

16. Witnesses representing offenders who claim they have been wrongly convicted, those who represent people who have lost family members through gang attacks and others told us that they believed the current law on joint enterprise was leading to miscarriages of justice. The Prison Reform Trust (PRT) told us that:

The Prison Reform Trust is concerned that joint enterprise may be used disproportionately in cases involving children and young adults and can act as a drag-net, bringing individuals and groups into the criminal justice system who do not necessarily need to be there. Our visits to young offender institutions have produced anecdotal evidence that this is the case.³²

17. Gloria Morrison, from the campaigning group JENGbA (Joint Enterprise Not Guilty By Association) told us that the complexity of the law presented serious difficulties for juries: “The juries often come back to the judge to say, “We don’t want to convict this person.” They are very confused. They can see who is culpable and they do not want to do it. The judge will say, ‘No; it’s a joint enterprise. You have to convict or acquit.’”³³ The complexity of the law can be overwhelming; Ms Morrison told us that: “In Laura Mitchell’s case [the jury received] a 49-page route to verdict.”³⁴ Tim Moloney QC, Simon Natas,³⁵ PRT³⁶ and JENGbA³⁷ all thought the use of joint enterprise was increasing. JENGbA submitted some evidence to us on this issue but accepted that in the absence of official records it must remain partial.

18. Jean Taylor of Families Fighting for Justice, a campaign group seeking to ensure prosecutions in cases of unlawful killing, told us that the lack of clarity over joint enterprise led to it being inconsistently applied. In some cases, she told us people are “taken in just for standing by and watching”³⁸ while in other cases “a group or gang has been allowed to walk free...they have not been charged with joint enterprise.”³⁹

19. There is little or no evidence, beyond the anecdotal, on the use of joint enterprise in England and Wales against which the above allegations can be tested. While, as the Director of Public Prosecutions told us, joint enterprise “is available for pretty well all offences, unless there is a statutory reason it cannot be used”⁴⁰ no statistics are collected on its use or whether its use is increasing. The Director of Public Prosecutions told that, in his

32 Ev w14

33 Q 78

34 *Ibid.*

35 Ev w6

36 Ev w14

37 Ev 27

38 Q 44

39 *Ibid.*

40 Q 2

experience, “It is very commonly used for violence, affray, burglary and those sorts of offences. They would be the most common ones...”⁴¹

20. Although there are no statistics on the use of joint enterprise there is evidence to suggest that the doctrine is causing some confusion in the courts. Joint enterprise has been the subject of a high number of appeals in recent years, as Professor David Ormerod, Criminal Law Commissioner at the Law Commission, observed:

Despite the experience at the bench and bar in these cases, and the now commonplace use of written directions and routes to verdict for the jury, the steady flow of appeals continues. In 2010 there were eight Court of Appeal decisions on this topic. The outcomes of the trials and indeed of the appeals are often perceived as illogical or unfair.⁴²

21. During the course of this inquiry the Supreme Court was also required to consider an aspect of the law on joint enterprise. In *R v Gnango* the defendant was engaged in a gunfight with another man across a car park in South London. Tragically, a young woman on her way home from work was killed by a bullet fired from the gun of the other man. The question for the court was whether, by participating in the gunfight, the defendant was guilty of engaging in a joint enterprise with the other gunman and so guilty of murder, or whether he was guilty solely of attempted murder. The Supreme Court found that the definition of joint enterprise could include a ‘shoot-out’ between two people where each was intending to harm the other.⁴³ This case illustrates the difficulties that can arise for courts and juries considering the cases based on joint enterprise.

22. The Director of Public Prosecutions, while appreciating that we may have concerns that there were no data on the use of joint enterprise, told us:

I think the reason there are not specific statistics is that at the moment the prosecutor can, and arguably should, charge an individual both as a principal and as a secondary party in the same indictment. There is an argument that as a matter of law you have to do that. At the outset, the advantage for the prosecutor is being able to charge in that broad and, if you like, alternative way. The only way to collect statistics would be to try to work out after the event, looking at jury verdicts, whether they had in fact convicted on the basis of the principal offence or secondary liability. I accept that can probably be done, but it is not something we have done up to now. Therefore, unlike other offences where we are able to put a flag in the system when an offence is charged and then marry it up to a conviction, that is simply not possible under our current arrangements. I think that is why you do not have statistics...⁴⁴

23. Crispin Blunt MP, Parliamentary Under Secretary of State at the Ministry of Justice and the Minister with responsibility for the criminal law, agreed with the DPP and told us that the collection of statistics would be resource intensive:

41 Q 2

42 Ev 42

43 *R v Gnango* [2011] UKSC 59

44 Q 2

You would have to go back to the cases individually and manually to do that. If there were an immediate prospect of an issue to address—I understand the scale of how often joint enterprise is used—we would, obviously, have to consider whether to devote that scale of resources to it, but I would be misleading you if I suggested that that were an immediate prospect.⁴⁵

24. Mr Blunt accepted that there were some problems: “it comes back to the issue of availability of resources. If it is possible to get a better fix on this without it costing an arm and a leg in terms of either people or money, it is an area where we could do with better data.”⁴⁶

25. We were surprised to learn in the course of this inquiry that the number of people charged as secondary participants in a joint enterprise is unknown. This means it is difficult to judge whether any, or all, of the criticisms on the use of joint enterprise that we heard from several witnesses are well-founded. What is clear is that applying the law on joint enterprise presents the courts with such difficulties that cases are regularly reaching the Court of Appeal, and even the Supreme Court. We consider whether the law should be clarified through being enshrined in legislation below but it is evident that any statute would inevitably take some time to come into effect. We therefore recommend that data on the number of joint enterprise cases, and the number of appeals, be collated. This will allow the Director of Public Prosecutions to consider how best to alleviate problems, whether through guidance, training or otherwise. We look forward to studying the data as soon as it is available.

Is there a particular problem with the law and use of joint enterprise in cases of murder?

26. A number of witnesses expressed particular concerns about the operation of joint enterprise and murder. A conviction for murder carries with it a mandatory life sentence. Despite recommendations from the Law Commission⁴⁷ and others⁴⁸ no government has produced a bill on the abolition of the mandatory life sentence or on creating a two or three tier approach in which intending to cause really serious harm is treated differently from premeditated killing. The difficulties over the “parity of culpability” are thrown into particular relief when the court has limited discretion over the length, and no discretion over the type, of sentence.

27. The Committee on the Reform of Joint Enterprise (CRJE), “an ad hoc collection of lawyers, academics and otherwise concerned individuals and groups”,⁴⁹ told us the operation of joint enterprise and the *mens rea* for murder contradicted “three fundamental principles” of the criminal law:

45 Q 135

46 *Ibid.*

47 *Murder, Manslaughter and Infanticide*, Law Commission paper No. 304, November 2006, HC 30

48 For example, the Homicide Review Advisory Group who published its report in November 2011.

49 Ev w18

First, in the absence of a clear mental element for liability, it imputes intention or foresight on the basis of the unconnected actions or agreement of D2 with D1. Second, there is a perilous slope involved in guiding juries on joint enterprise. Although the strict letter of the law does require D2 to know or subjectively foresee the elements of the ultimate offence committed, the reality is different. The courts' and prosecutors' readiness to allow a jury to find that D2 foresaw a risk that a weapon would be used on the basis of his knowledge of its presence detracts from the subjective nature of the mental element. Third, there being no connection required to be proven between D2 and the victim's death, D2's guilt is constructed from a wide range of precarious bases—essentially his association with the person who actually committed the murder.⁵⁰

This results, the CRJE concluded, with “the labelling of individuals who—albeit not entirely innocent—cannot properly be called ‘murderers’.”⁵¹

28. The Director of Public Prosecutions acknowledged that the imposition of a life sentence when “someone has played a very minor part in a very serious offence” has the potential to appear disproportionate. Juries, the DPP told us, “may feel that it simply does not feel fair to convict someone” in those circumstances.⁵² This evidence reflected that drawn to our attention by Professor Lee Bridges, Emeritus Professor at Warwick University, which suggested that public support for the imposition of mandatory life sentences in “typical joint enterprise scenarios” was weak.⁵³

Gang-related and group violence

29. Public fears over gang-related and group violence have been heightened in recent years. We heard evidence that the principle behind the doctrine of secondary liability, that everyone involved in a criminal enterprise should be held accountable, may also have a deterrent effect on young people who could become involved with such activity. Jean Taylor, of Families Fighting for Justice, told us that being aware they could be prosecuted for even minor involvement in a crime could have a direct effect on young people's behaviour. Ms Taylor's organisation had sought to raise awareness of the law among young people through the relatives of those who had lost family members talking through the consequences for all involved in gang-related violence:

I strongly believe there are no better people to do that talk. It is no good a police officer getting up there, because they don't like the police; they don't welcome the police. Families go in and do these workshops.⁵⁴

30. We also heard evidence that public policy considerations relating to gang violence, together with a lack of clarity over the ambit of the law, may mean that joint enterprise

50 Ev w20

51 *Ibid.*

52 Q 24

53 Ev w2

54 Q 54

could lead to over-charging in gang related matters. The Committee on the Reform of Joint Enterprise told us that:

The adverse effect on young people of being charged and put on trial for serious offences for which they are eventually acquitted on the basis of precarious charges, and in respect of which they may spend substantial periods of time remanded in custody is grave and cannot be ignored.⁵⁵

31. The CJRE’s evidence reflected similar concerns from both JENGBA and Families Fighting for Justice.⁵⁶ Professor Horder agreed, telling us “there is a terrible temptation to charge—I do not say indiscriminately—everyone involved in the gang or who has some association with it.”⁵⁷ He suggested that “guidelines might do a lot to ameliorate some of the harshness of the law”:

if the people involved—the Director of Public Prosecutions, the Attorney-General, and so on—could get together and decide what threshold must be met before it would be appropriate to charge people on that basis, I, for one, would be very relieved. It is there, I think, that there is a real risk of injustice, because it is inevitable that everyone who is arrested in that scenario will say, “It wasn’t me. It was the other person.” That is also what the perpetrator will be saying, of course. It will be very difficult for a jury to distinguish between the credibility of those claims unless the police and the prosecution exercise—I do not say greater restraint than they are doing, as I am sure that would be controversial—restraint in accordance with principles. That is very important.⁵⁸

32. The law on joint enterprise, and secondary liability more generally, was developed by the courts to ensure that all participants in a criminal enterprise could be held accountable. We welcome evidence to suggest that the deterrent effect intended by the courts can discourage young people, who may be on the periphery of gang-related activity, from becoming involved in criminality. At the same time, the Crown Prosecution Service and the police should have in mind that it is not the purpose of the law of joint enterprise to foster gang mentality or draw people into the criminal justice system inappropriately.

33. Over-charging under joint enterprise will not assist the task of those trying to deter young people from becoming involved in gangs. It may also deter potential witnesses to an offence who fear that they might be charged under joint enterprise if they come forward, impeding the justice process. We recommend that the Director of Public Prosecutions issues guidance on the proper threshold at which association potentially becomes evidence of involvement in crime. Such guidance should deal specifically with murder, although we acknowledge such guidance will not assuage the concerns of some of our witnesses.

55 Ev w20

56 Q 57

57 Ev 27

58 Qq 120–121

4 Should the joint enterprise doctrine be enshrined in statute?

34. The complicated nature of the law on secondary liability as a whole was condemned in the following terms by Professor Andrew Ashworth, Professor of Law at Oxford University:

...[the law is] replete with uncertainties and conflict. It betrays the worst features of the common law: what some would regard as flexibility appears here as a succession of opportunistic decisions by the courts, often extending the law, and resulting in a body of jurisprudence that has little coherence.⁵⁹

35. Witnesses were almost unanimous in seeing a legislative solution as the right approach. Professor Jeremy Horder agreed that legislation was needed noting that the President of the Supreme Court had said “that he thought there was certainly a need for legislation to address the problem.”⁶⁰ Professor David Ormerod told us: “The case for legislative reform seems overwhelming.”⁶¹ Professor Graham Virgo told us that developments in the law had led to him supporting parliamentary intervention:

Although at one stage I advocated in print that the law on joint enterprise was broadly satisfactory and clarification should be left to the courts, my view now is that the common law doctrine has become so confused, both as to its ambit and interpretation, that statutory reform is the only solution.⁶²

36. The lack of clarity over the common law doctrine on joint enterprise is unacceptable for such an important aspect of the criminal law. We therefore recommend that it be enshrined in legislation. We do not make this recommendation lightly. We fully appreciate the pressures on the parliamentary timetable but the evidence we have heard on joint enterprise has convinced us that legislative reform is required.

How should the Government begin the process of statutory reform?

37. In our terms of reference we focused specifically on whether the proposals in *Participating in Crime*, the Law Commission’s report from 2007, should be implemented. We have heard some criticisms of them. Tim Moloney QC and Simon Natas condemned the Law Commission’s retention of the *Chan Wing-siu* principle, which they see as opening the door to potential miscarriages of justice:

In our experience, prosecutions for murder on the basis of joint enterprise have become more common in recent years and are increasingly focussed on evidence of association or alleged gang membership. There is increasing potential for cases to be

59 *Principles of Criminal Law*, Ashworth (4th ed 2003) p. 441

60 Q 111

61 Ev 43

62 Ev w10

left to juries largely on the basis of evidence of association between defendants, a trend which we believe is directly related to the *Chan Wing-siu* principle.⁶³

38. Professor Jeremy Horder, Criminal Law Commissioner in 2007, told us that he believed the retention of the principle was sound because it was needed to ensure convictions of guilty parties: “It could be, for example, that I know perfectly well that you are going to do it and I carry on none the less, and that is enough to make me liable, even though I did not intend it.”⁶⁴

39. The Director of Public Prosecutions had some concerns about technical aspects of the Law Commission’s proposed draft bill: “the Law Commission’s recommendations made at the time were somewhat complicated and might not achieve their stated aim owing to the lack of clarity around some of the wording used.”⁶⁵ Professor David Ormerod, Criminal Law Commissioner, at the Law Commission, told us that there had also been some movement in the case law since the Commission’s report in 2007, which it would be helpful to consider before any statute on complicity was passed.

40. Professor Lee Bridges suggested that the Law Commission’s proposals were defective in that they did not make it clear that mere association was not sufficient to incur criminal liability.⁶⁶

41. As noted above, the Ministry of Justice said in written evidence that there was no prospect of the introduction of legislation on complicity in this Parliament. Crispin Blunt MP, Parliamentary Under-Secretary of State for the Ministry of Justice, repeated that evidence when he appeared before us:

We said to the Law Commission that there is no prospect of addressing [the law on complicity] in the course of this Parliament. Listening to the evidence that you have just taken on changes in the area, if we were going to proceed through a Law Commission review process, we wouldn’t simply look at the issue in isolation. We would obviously have to look at the law of murder. Again, with that review, we have made it clear that there is no prospect of doing that in the course of this Parliament.⁶⁷

42. We fully appreciate that the Government has limited resources for developing new legislation. We therefore recommend that the Government consult on the Law Commission’s proposals in its report *Participating in Crime*. We acknowledge the issues raised by our witnesses with those proposals but believe they form an excellent starting point for the Government. Even with the caveats noted above, the Law Commission’s report remains a thoughtful and detailed review of the law on complicity which allows the Government to proceed directly to a consultation.

43. While we have not looked at the wider issue of reform of the law on homicide, we believe that expecting reform of the joint enterprise doctrine could be part of a wider

63 Ev w6

64 Q 116

65 Ev 36

66 Ev w16

67 Q 138

review of homicide law is an unrealistic approach. Reforming the law on murder will always be a high risk strategy for any Government and it is our view that it is very unlikely to happen in the near future. Legislative clarification of the law on joint enterprise should not have to wait for a Government to embark on wider and potentially controversial changes to the law on homicide.

Conclusions and recommendations

1. We were surprised to learn in the course of this inquiry that the number of people charged as secondary participants in a joint enterprise is unknown. This means it is difficult to judge whether any, or all, of the criticisms on the use of joint enterprise that we heard from several witnesses are well-founded. What is clear is that applying the law on joint enterprise presents the courts with such difficulties that cases are regularly reaching the Court of Appeal, and even the Supreme Court. We consider whether the law should be clarified through being enshrined in legislation below but it is evident that any statute would inevitably take some time to come into effect. We therefore recommend that data on the number of joint enterprise cases, and the number of appeals, be collated. This will allow the Director of Public Prosecutions to consider how best to alleviate problems, whether through guidance, training or otherwise. We look forward to studying the data as soon as it is available. (Paragraph 25)
2. The law on joint enterprise, and secondary liability more generally, was developed by the courts to ensure that all participants in a criminal enterprise could be held accountable. We welcome evidence to suggest that the deterrent effect intended by the courts can discourage young people, who may be on the periphery of gang-related activity, from becoming involved in criminality. At the same time, the Crown Prosecution Service and the police should have in mind that it is not the purpose of the law of joint enterprise to foster gang mentality or draw people into the criminal justice system inappropriately. (Paragraph 32)
3. Over-charging under joint enterprise will not assist the task of those trying to deter young people from becoming involved in gangs. It may also deter potential witnesses to an offence who fear that they might be charged under joint enterprise if they come forward, impeding the justice process. We recommend that the Director of Public Prosecutions issues guidance on the proper threshold at which association potentially becomes evidence of involvement in crime. Such guidance should deal specifically with murder, although we acknowledge such guidance will not assuage the concerns of some of our witnesses. (Paragraph 33)
4. The lack of clarity over the common law doctrine on joint enterprise is unacceptable for such an important aspect of the criminal law. We therefore recommend that it be enshrined in legislation. We do not make this recommendation lightly. We fully appreciate the pressures on the parliamentary timetable but the evidence we have heard on joint enterprise has convinced us that legislative reform is required. (Paragraph 36)
5. We fully appreciate that the Government has limited resources for developing new legislation. We therefore recommend that the Government consult on the Law Commission's proposals in its report *Participating in Crime*. We acknowledge the issues raised by our witnesses with those proposals but believe they form an excellent starting point for the Government. Even with the caveats noted above, the Law Commission's report remains a thoughtful and detailed review of the law on

complicity which allows the Government to proceed directly to a consultation. (Paragraph 42)

6. While we have not looked at the wider issue of reform of the law on homicide, we believe that expecting reform of the joint enterprise doctrine could be part of a wider review of homicide law is an unrealistic approach. Reforming the law on murder will always be a high risk strategy for any Government and it is our view that it is very unlikely to happen in the near future. Legislative clarification of the law on joint enterprise should not have to wait for a Government to embark on wider and potentially controversial changes to the law on homicide. (Paragraph 43)

Formal Minutes

Wednesday 11 January 2012

Members present:

Rt Hon Sir Alan Beith, in the Chair

Steve Brine	Rt Hon Elfyn Llwyd
Mr Robert Buckland	Yasmin Qureshi
Jeremy Corbyn	Elizabeth Truss
Nick de Bois	

Draft Report (*Joint enterprise*), proposed by the Chair, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 43 read and agreed to.

Summary agreed to.

Resolved, That the Report be the Eleventh Report of the Committee to the House.

Ordered, That the Chair make the Report to the House.

Ordered, That embargoed copies of the Report be made available, in accordance with the provisions of Standing Order No. 134.

Written evidence was ordered to be reported to the House for printing with the Report, together with written evidence reported and ordered to be published on 25 October and 1 November 2011.

[Adjourned till Tuesday 24 January at 10.15am.]

Witnesses

Tuesday 25 October 2011	<i>Page</i>
Keir Starmer QC , Director of Public Prosecutions, Crown Prosecution Service	Ev 1
Jean Taylor and Christine Jones , Families Fighting for Justice	Ev 7
Dr Andrew Green and Gloria Morrison , Joint Enterprise: Not Guilty by Association (JENGbA)	Ev 11
Tuesday 1 November 2011	
Professor Jeremy Horder , Professor of Criminal Law, King's College, London	Ev 16
Mr Crispin Blunt MP , Parliamentary Under-Secretary of State for Justice, Keir Hopley , Deputy Director in charge of criminal law and legal policy, and Michael des Tombe , Senior Legal Adviser, Ministry of Justice	Ev 23

List of printed written evidence

1	Joint Enterprise: Not Guilty by Association (JENGbA)	Ev 27, 32, 37, 39
2	Ministry of Justice	Ev 35
3	Crown Prosecution Service	Ev 36, 45
4	Law Commission	Ev 42

List of additional written evidence

(published in Volume II on the Committee's website www.parliament.uk/justicecom)

1	Dennis Demery	Ev w1
2	Dr Peter Freeman	Ev w1
3	Professor Lee Bridges	Ev w2, w16
4	Janet Cunliffe	Ev w3
5	Tim Moloney QC and Simon Natas	Ev w6
6	Professor Graham Virgo	Ev w10
7	Progressing Prisoners Maintaining Innocence	Ev w12
8	Prison Reform Trust	Ev w14
9	Howard League for Penal Reform	Ev w17
10	Committee on the Reform of Joint Enterprise	Ev w18
11	Wrongly Accused Person Organisation	Ev w22
12	Gillian Phillips	Ev w24
13	Justice on Appeal	Ev w25

List of unprinted evidence

The following written evidence has been reported to the House, but it has not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives (www.parliament.uk/archives), and are available to the public for inspection. Requests for inspection should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074; email archives@parliament.uk). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

Deborah Madden
Justice4Jonathan
Louise Lovely

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681-I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519-I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547

Oral evidence

Taken before the Justice Committee on Tuesday 25 October 2011

Members present:

Sir Alan Beith (in the Chair)

Mr Robert Buckland
Jeremy Corbyn
Ben Gummer

Mr Elfyn Llwyd
Yasmin Qureshi
Elizabeth Truss

Examination of Witness

Witness: **Keir Starmer QC**, Director of Public Prosecutions, gave evidence.

Chair: Welcome, Mr Starmer. We are glad to have you with us this morning to discuss mainly joint enterprise, although there is one other question to which I will refer in a moment when we have declared interests where necessary.

Mr Buckland: I have been a criminal barrister for 20 years prosecuting and defending. I have not taken on any cases since the general election, but I still sit as a recorder in the Crown court.

Chair: One of the later questions, of which we gave you notice, relates to universal jurisdiction. I happen to be the president of the Liberal Democrat Friends of Israel.

Mr Llwyd: I have prosecuted and defended cases both as a solicitor and barrister. I have not done any prosecution work since April 2010.

Yasmin Qureshi: I have also prosecuted and defended. I have not done any private work, or any work to do with law, since February of last year. I also used to work for the Crown Prosecution Service. I was there for about 10 years and was a special case worker for a few years. A member of my family is a higher court advocate currently in the Crown Prosecution Service.

Chair: That done, I invite Mr Llwyd to ask questions.

Q1 Mr Llwyd: Mr Starmer, what general advice is given to prosecutors on the use of joint enterprise? Are you aware of any particular advice issued to the police?

Keir Starmer: There is no particular advice we give to prosecutors. They have been well used to using joint enterprise over the years, and we have not given them any specific or different advice. I am not sure what the position is in relation to the police, but I suspect that most difficult joint enterprise cases would be charged by us. Therefore, they would probably take their lead from us, but I do not know whether they have issued specific advice. If they have, I have not seen it.

Q2 Mr Llwyd: It strikes me as rather odd that we cannot find any statistics on the number of joint enterprise cases. Nowadays, there are statistics to prove and disprove everything on earth. It seems to me rather strange that there are no statistics to show how often it is being used. In your experience, for

which offences is joint enterprise most commonly used?

Keir Starmer: It is available for pretty well all offences, unless there is a statutory reason it cannot be used. It is very commonly used for violence, affray, burglary and those sorts of offences. They would be the most common ones, but as a matter of law, it is available for pretty much all offences.

To come back on the point about statistics, I understand any concerns that the Committee may have on this. I think the reason there are not specific statistics is that at the moment the prosecutor can, and arguably should, charge an individual both as a principal and as a secondary party in the same indictment. There is an argument that as a matter of law you have to do that. At the outset, the advantage for the prosecutor is being able to charge in that broad and, if you like, alternative way. The only way to collect statistics would be to try to work out after the event, looking at jury verdicts, whether they had in fact convicted on the basis of the principal offence or secondary liability. I accept that can probably be done, but it is not something we have done up to now. Therefore, unlike other offences where we are able to put a flag in the system when an offence is charged and then marry it up to a conviction, that is simply not possible under our current arrangements. I think that is why you do not have statistics, though I understand your concern about not having them.

Q3 Mr Llwyd: There is a belief that perhaps some police forces tend to overuse joint enterprise as a tool to deal with gang crime, for example.

Keir Starmer: As you may hear later this morning, there are concerns both ways. For most of the bigger cases we would probably be involved in the charging decision. These days there are not many big joint enterprise cases that are charged by the police.

Q4 Mr Llwyd: This is difficult for you to answer, is it not? Is the use of joint enterprise by prosecutors on the increase? I understand if you cannot answer.

Keir Starmer: I am afraid I cannot answer that; it goes back to the statistics. All I can say is that the advice and general approach has not changed. Therefore, there is no reason for a difference in the figures, but because I do not have the figures I cannot give you a complete answer.

Q5 Mr Llwyd: In effect, what you are saying, quite rightly, is that joint enterprise very often is a belt-and-braces process where an individual might be charged in the indictment in that capacity but also as part of the joint enterprise.

Keir Starmer: “Joint enterprise” is a very unhelpful term. Some academics do not use it. For example, David Ormerod does not use that description. He distinguishes, rightly I think, between liabilities as a principal and liability as an accessory and limits his analysis to those two doctrines. What is possible, and arguably ought to be done, is that where the prosecution cannot clearly establish whether someone is a principal or an accessory they charge essentially both, and to that extent they do not have to nail their colours to the mast until slightly later in the process.

Q6 Mr Llwyd: You will be aware that recently there have been many appeal cases about joint enterprise both as to conviction and sentence.

Keir Starmer: Yes.

Q7 Mr Llwyd: A very important case is pending in the Supreme Court which I cannot name for obvious reasons.

Keir Starmer: Yes; that is our case.

Q8 Chair: We cannot discuss it.

Mr Llwyd: No, indeed.

Keir Starmer: No, but I am obviously well aware of it.

Q9 Jeremy Corbyn: What evidence would you expect prosecutors to have when alleging that a young defendant is part of a gang? This is a pejorative connotation. How do you define “gang” in this situation?

Keir Starmer: For the purposes of charging as a principal or accessory you would not need to define “gang”. Broadly speaking, you would charge a member of any group, gang or otherwise, as a principal if there was evidence that their conduct amounted to the full criminal offence. You would charge as an accessory if their conduct in itself did not amount to the full primary offence but in some way assisted, aided or abetted, et cetera. That would be the distinction. In an ordinary case, where what is contemplated happens, it does not make much difference because the charge will have within it both the principal and accessory liability. It will be open to us to charge an individual as a principal and, if we fail on that, to succeed in convicting as an accessory. There are no special rules here for gangs, but for groups that is the distinction we would be making.

Q10 Jeremy Corbyn: You will be aware that prosecutors have been accused of taking a dragnet approach to charging young people. I know it is difficult to collect statistics on it, but how do you counter the argument that it is just a simplistic way of pulling in a very large number of young people, often with quite limited evidence?

Keir Starmer: The general rules of principal and secondary liability remain the same. Whatever concerns are expressed, if the charge is improperly brought, it will fail either at the close of the

prosecution or the end of the case. That has not been happening in large numbers, so I conclude from it that whatever charges are being brought are proper charges; otherwise, the court would halt the case at the end of the prosecution case or the conviction would not follow.

Q11 Jeremy Corbyn: Do the CPS take any account of the way in which public concerns over gangs are expressed, perhaps often in ignorance of the reality of young people’s lives and the easy accusation that they are members of a gang? From my observations, there seems to be an increase in the number of prosecutions of gang-related offences when often evidence of gang membership is very flimsy indeed.

Keir Starmer: The answer is no because we do not approach it by asking whether it is a gang case. We approach it by asking, “What is the primary offence here?” In relation to all the individuals we are considering, is there evidence that they were party to the main offence itself? If not, is there evidence that they aided, abetted, encouraged, et cetera? If the answer to both questions is no then any reference to gangs is irrelevant. They are the two legal questions. There is then the question of whether it is in the public interest to prosecute.

Q12 Chair: What was the final question to which you referred?

Keir Starmer: The first question is, “Is there enough evidence against them as principals? Is there enough evidence against them as accessories?” If the answer to those two questions is no, there is nothing further to ask. If the answer is yes, the question is whether it is in the public interest to pursue the case. It rather depends on the circumstances, but if it is a serious assault or murder, the public interest would usually require a prosecution to be brought. But there is no special rule for gangs here. These are ordinary principles of liability as principals or accessories. They do not change; we do not approach them any differently, nor could we, because they are legal principles.

Q13 Ben Gummer: You discussed earlier the academic distinctions that have been drawn about how you might define joint enterprise or otherwise. How does that permeate into your decision making at CPS and decisions that courts are making? There does not seem to be a close definition with which you are happy.

Keir Starmer: I think the rival positions are these. Everybody accepts that you should calibrate culpability. The question is at what stage in the process you do it. Using the law as it is now, the calibration exercise usually happens towards the end of the trial, probably at the sentencing stage. Those who argue that that is too broad or generous to the prosecution would rather have culpability calibrated earlier in the process and thus have more specific offences for the prosecutor to choose specifically what it is they allege against the particular individual. They are the two rival positions. Our approach is simply to apply the law as it is now, but I accept that to some extent that allows us at the outset to prosecute

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someone both as a principal and, in the alternative, as an accessory.

Q14 Ben Gummer: Is there not another calibration going on concerning those defendants who might act as witnesses against their co-principals?

Keir Starmer: In the sense that they are not prosecuted because we want them as witnesses?

Q15 Ben Gummer: Yes; and they might be dealt with more leniently if they act as witnesses against their co-principals.

Keir Starmer: This is a very difficult question to answer. In each case, one will have to consider what powers are available to prosecute. If there is evidence that someone may have participated in the offence and there is any kind of immunity from prosecutorial action, broadly speaking, that is now codified in the law. There would have to be agreement as to how we would use anybody in that situation, which is a different area of the law.

Q16 Ben Gummer: Let me turn it on its head.

Keir Starmer: In other words, you are asking whether, if you have a main participant whom you think can give evidence against the other members of the group, in certain circumstances, you would not prosecute that individual so that you can secure them as a witness. The answer is that that is legally available to us but it is now regulated by statute. It happens but only in the circumstances permitted by the statute. I am afraid that, without considerable research, I am not able to tell you, if at all, the extent to which those agreements are used in joint enterprise cases. To some extent they are bound to be used in cases where there is more than one offender.

Q17 Ben Gummer: We will move on to this later, but I know there is a public perception that these agreements happen and that damages confidence in the process.

Keir Starmer: That was why it became regulated.

Q18 Ben Gummer: Do you think that is having a beneficial impact on public perception?

Keir Starmer: It is difficult to measure. The fact that there is a statutory regime in which the circumstances in which agreements can be made are clear, with internal guidance about the level of authority, ought to give a degree of confidence that these agreements are being made in accordance with the law. On occasion, we have been asked for the figures showing the number of cases where agreements have been reached with witnesses who have participated in crime. They were broken down in an answer to a parliamentary question tabled just before the summer to drive at that question of how often they are being used and how that affects public confidence, but, as I understand it, the idea of putting this on a statutory footing is that it makes clear when such agreements can be struck and where the level of authority lies. My view is that that does give a greater degree of confidence than to leave it to arrangements which have developed over time but are not regulated by statute.

Q19 Ben Gummer: That is helpful. On the other side, do you think that at any time the doctrine of joint enterprise acts to deter witnesses?

Keir Starmer: Do you mean pure witnesses or those who have participated?

Q20 Chair: Let us say I am around when the attack happens. I have been out drinking with the same group all evening, but I have not been charged or brought into a joint enterprise. Do I go to the police and say, "I was there and I have a pretty good idea of what happened, but of course I held back when the trouble really started", or do I just stay out of the way and avoid the risk of a joint enterprise prosecution being brought against me, in case I have helped to plan it?

Keir Starmer: I see the argument. The honest truth is that I do not know. I can see an argument can be made that some people may be reluctant to come forward lest they have unknowingly crossed the line into criminality.

Ben Gummer: I was groping for a situation, but Sir Alan shows more familiarity with it.

Q21 Chair: I am not sure it is a very convincing example.

Keir Starmer: It is one of those questions that is very difficult to answer. Did the witness not come forward for the following reason? The fact they did not come forward means you are probably unlikely to find out. I accept the point that, if the net is cast wide on joint enterprise, broadly speaking, people may have crossed the line in circumstances where they did not appreciate they had. I accept that concern, but it is pretty difficult to answer the question.

Q22 Mr Buckland: To develop that, the obvious and proper point we need to explore is whether or not there is a wider public policy interest in maintaining a law of joint enterprise to send a message to people who get involved in enterprises, whether they be burglaries in which people act as lookouts or getaway facilitators or other types of crime where perhaps people are holding back who potentially can assist and prevent an assault. A message is being sent out that just because you have a minor role does not mean you should not take your fair share of responsibility, but your degree of involvement will be reflected in sentence. Is there not a wider public policy interest in that respect?

Keir Starmer: I do understand that. There is also the very practical advantage, which needs to be considered if options are to be examined by the Committee, that in a fairly complicated set of circumstances, it is very difficult at the outset necessarily to pinpoint the precise acts of each individual when a number of people are acting as a group. If you require that to be done, as it were, up front and before the prosecution starts, you run the risk of an overly technical prosecution which may fail to prove the particular act, but during the trial it is pretty clear that the individual, though not guilty of the acts specified, is guilty of other acts. These things may be catered for. I do not think anybody says there is no alternative model, but there are advantages and

disadvantages in the current approach and any changed approach. My greater concern would be genuinely those cases where you have a reasonably large number of people and it is very difficult at the outset to say that is precisely what is alleged and nothing else and everything else is clear. That is quite difficult in those cases.

Q23 Mr Buckland: One can imagine trying to settle an indictment which potentially could become impossibly overloaded, confusing and unhelpful to a jury, or anybody, as part of a case.

Keir Starmer: I agree with that. You have to add to that the prospect that the individual may give evidence to say he foresaw *x* but not *y*, and that may change the position. The current approach allows all of that to be accommodated within the trial and the sentencer then to sentence according to culpability if there is a conviction. There is that advantage in the current approach.

Q24 Mr Buckland: I suppose the one exception would be murder and the mandatory life sentence. There are tariff issues as well, are there not?

Keir Starmer: The current approach, broadly speaking, calibrates culpability at the end of the exercise through sentence. Most of the time that ought to work reasonably well. It obviously does not work well with fixed sentences, murder being the obvious one. There is the tariff within the life sentence, but for everything else you can calibrate much more carefully according to the individual. I can see the disadvantages of the current approach, one of which is that, if someone has played a very minor part in a very serious offence but is none the less convicted, they are convicted of that very serious offence. I think some juries may feel that it simply does not feel fair to convict someone for playing a very small part in a very serious offence, so it may be slightly counterproductive. I do not think this is an area where the arguments are all one way.

Q25 Mr Buckland: You will be aware that the Law Commission published its report "Participating in Crime" back in 2007 at about the same time the Serious Crime Act was enacted which changed the law in some measure with regard to some inchoate offences. I believe sections 44 to 46 changed the law.

Keir Starmer: Yes.

Q26 Mr Buckland: First, how effective do you think those provisions have been? Are they used often?

Keir Starmer: They are not used very often. Because it is a specific offence, we are able to give some statistics. I have them somewhere and will happily provide them to the Committee. What I can say in broad terms is that they have not been used very often.

Q27 Mr Buckland: Second, do you think that perhaps it would have been good then, or now, to have widened the reform to put the law of joint enterprise, common purpose, primary liability, principal liability—whatever you want to call it—on a statutory footing?

Keir Starmer: I can see the argument that what the Law Commission was really driving at was a narrowing of the liability of principals but a broadening of the circumstances in which there could be liability of secondary parties. Part 2 of their analysis has been put, broadly speaking, on a statutory footing, but part 1 has been left unimplemented or not acted upon. I am neutral as to whether that should be done. There are advantages and disadvantages, and it may depend on how it is done. If it is proposed that the law is narrowed to the point where the prosecution have to particularise the very act up front, you run a risk. You can see the fairness argument on both sides. If you are a victim of crime and someone appears to be acquitted because technically they did not do the act that the prosecution sought to prove but it is pretty clear they were involved, there will be a perceived injustice on the part of the victim. On the other hand, I can see the argument that, if you are a defendant, it is only fair that you know in as great a detail as possible precisely what is alleged against you at the earliest possible moment and you are judged on that. I can see the perceived injustice. My only concern about putting part 1 of the Law Commission's proposals on a statutory footing is that, if it makes the law overly technical, you may run the risk of injustice. I am sure that if Parliament decides that is what needs to be done it is possible to come up with a scheme, but it really is not straightforward.

Q28 Yasmin Qureshi: Is it right that normally when people are considering whether or not there is a joint enterprise, if there is evidence to suggest that the person on the periphery of the group was in some way aiding, assisting, counselling, procuring, or even lending encouragement, according to case law they can be properly convicted anyway? Therefore, the law as it currently stands is not completely at a tangent, is it?

Keir Starmer: No. There are two big issues here. The first is whether you should be convicted of a serious offence even if you have participated only in some very small way by encouraging, aiding, abetting, et cetera. The second big issue is what happens when what everybody contemplates does not happen and somebody does something that nobody really expected them to do. The classic example is the gang that goes out for a fight, one or more members pull out a knife and there is a murder. There, the current approach allows an individual who may have started out as a principal, as it were, to drop into a secondary role and none the less be convicted as a secondary party, depending on the circumstances. Broadly speaking, that works certainly from the point of view of prosecution. That is why there needs to be some caution if there is any amendment to it, but one accepts that this is complicated and one can understand the concerns on either side.

Q29 Chair: Would you regard it as a serious limitation on your ability successfully to prosecute culpable people of very serious crimes if you did not have the joint enterprise routes to take?

Keir Starmer: Yes, I think it would be.

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Chair: We will turn now to another issue. I ask Mr Corbyn to talk about private arrest warrants for offences of universal jurisdiction.

Q30 Jeremy Corbyn: Thank you for coming today. You will be aware of the debates about universal jurisdiction and the way in which the law was changed to remove the opportunity for a private arrest warrant to be sought at the magistrates court. We had before us the Attorney-General, who assured us that the Director of Public Prosecutions would issue guidelines on the use of private prosecution for offences that qualified for universal jurisdiction. What will these guidelines say, and for whom are they written?

Keir Starmer: The guidelines are now in draft and I intend to make them public so that everybody can see them. They are written for our prosecutors to apply, but they are to be made available to the public so that they can understand the basis on which we seek to make decisions. They are in draft form at the moment. We have a panel of interested parties and groups with which we liaise on questions of universal jurisdiction, including Amnesty, Redress and so on. I think we have a meeting with them in mid-November. The guidelines are in draft until we have had a chance to walk through them with that group and any other interested party.

The guidelines in draft reflect the evidence that I gave to the Bill Committee indicating that consent for an arrest warrant would be given, broadly speaking, only if the code test was satisfied, namely, that there was a realistic prospect of a conviction based on the evidence, with a caveat for urgent cases. That is the approach I said I would take, and that is in the draft guidelines. They will be in draft for a few weeks more, but once they are finalised they will be made public.

Q31 Jeremy Corbyn: What opportunities do you envisage for members of the public to approach you or your office to mount an arrest warrant, for example, in a case where somebody living here in a diaspora community becomes aware of someone against whom there is prima facie evidence of war crimes, or crimes against humanity, in their own country, perhaps arriving at very short notice or unexpectedly in this country where it could be possible to arrest them? Would you be prepared to receive representations from a private citizen under those conditions?

Keir Starmer: Yes, and we have. What we encourage, which is why we have a dialogue with the most interested groups, is that they come to us much earlier because, whatever your perspective, working at 24 or 48 hours' notice is not ideal, for very obvious reasons. We encourage them to come early and, if possible, to allow the police to do an investigation, as long as it is a proper one to carry out, because it is far better for the police to do it.

Q32 Jeremy Corbyn: That was to be my next question. Would you automatically pass a case over to the police, or would you take a marginal decision in a particular case to grant the arrest warrant but that is

it, and not pass it over to the police to investigate to collect the relevant evidence?

Keir Starmer: It depends. Our preference is to pass it to the police because in a proper case they have coercive powers: they can search and seize, and they can interview. A private individual cannot. There is a huge advantage, if there is a proper case, if it is investigated by the police in terms of evidence that is admissible in court. But some individuals come to us either too late in the day or do not want the police to investigate, because they believe they have already assembled enough evidence and ask us to assess it there and then. They tend to be the ones that come late in the day. In those cases, we have assessed it as best we can in the time available. But we have created a dialogue. In one example a few weeks ago, for about 48 hours or so we were working very closely with the private individuals in constant dialogue about the case.

Q33 Jeremy Corbyn: Both the last Government and current one have said in the House in terms that foreign policy considerations should have a bearing upon the potential, or otherwise, for an arrest warrant to be issued. That was one of the reasons they gave for removing the direct access of the private citizen to Westminster magistrates court in this case. Do you have any foreign policy considerations, or do you take a strictly legal view of prima facie evidence of war crimes or crimes against humanity?

Keir Starmer: Under the code we are bound to ask whether there is sufficient evidence and then to go on to consider the public interest. Within the public interest there are a wide number of factors. I think it is inevitable that at the stage the Attorney-General would come to give consent to a prosecution in these cases—he must consent in all of them—he would want to take into account any relevant policy considerations in terms of international relations. That creates a situation where I am being asked to consent to an arrest warrant at a stage very shortly before one is granted, if it is. The Attorney-General will then be asked whether he consents to the prosecution. As I told the Bill Committee, in those circumstances I would in most, if not all, cases want to consult the Attorney-General about the approach he might take to consent, because I do not think it is to anybody's benefit for an arrest warrant to be issued followed promptly by a refusal by the Attorney-General to consent.

Q34 Jeremy Corbyn: Do you think it is healthy that you as the DPP would consider there to be appropriate evidence against an individual from another jurisdiction against whom there is evidence and you then consult someone who is a politically appointed Minister who may well have many other considerations to bear in mind other than the strictly legal ones?

Keir Starmer: I think it is an inevitable consequence of our arrangements.

Q35 Jeremy Corbyn: Are you comfortable with that?

Keir Starmer: So far, yes. We have had only one case since the new arrangements were put in place. I have always been neutral on this. I have never put forward the view that the DPP ought to have to consent to an application for an arrest warrant or otherwise, but, having been given the powers, all I can do is exercise them in the way I indicated I would. First, we will be publishing open guidelines so that everybody knows the approach we are going to take; second, we will require sufficient evidence before we consent to a warrant; and, third, I think it is inevitable under the current arrangements that I will consult the Attorney-General.

Q36 Chair: On that point, it is perhaps worth saying that in this Committee previously, when the discussion about the relationship between the DPP and the Attorney-General took place, it was strongly of the view that it was the Attorney-General who had to take political responsibility for wider considerations rather than the DPP.

Keir Starmer: Yes.

Q37 Chair: You would not be comfortable if it was your job to bring in such considerations of foreign policy?

Keir Starmer: No, and it would not be. On one view, I could proceed to accede to an arrest warrant without consulting the Attorney-General, and I am not bound by what he says. That is the current arrangement which applies in many very sensitive cases day in, day out when we have a lot of communications. It is not something that applies only to universal jurisdiction. We are well aware of our functions and the fact I consult but I am not bound; so is the Attorney-General. My view is that there may be circumstances, but I cannot presently envisage them, in which it would be sensible for me on Monday to consent to an arrest warrant and on Tuesday for the Attorney-General to say he is not prepared to prosecute because he does not see that it will achieve very much.

Q38 Jeremy Corbyn: We were assured on the change that handing it over to the DPP to decide on an arrest warrant was, in part, trying to remove it from the political arena, but the procedure you have outlined seems to me to throw it straight back into that arena. Without public access, it is solely the view of the Attorney-General presumably on some kind of foreign policy consideration.

Keir Starmer: I think it will depend on a case-by-case basis. The decision is mine and mine alone. In the

recent case, I made it absolutely clear that it was my decision and responsibility. I consulted the Attorney-General, not least because, in that particular case, an unusual form of immunity arose. The wider considerations are for the Attorney-General and it may well be that he is not in a position to consider those wider issues at the point I consult him. These things tend to happen in very quick time. To that extent, it is insulated but, given that for all these offences, the Attorney-General must consent, the decision whether there is a prosecution is his, not mine. This was the reason we went for the code test.

With a private prosecutor, there are no coercive powers, so whatever you have to put before the magistrate for the arrest warrant is probably your case to prosecute, because you cannot search, interview, seize or add to your evidence. Obviously, this is a general proposition. Your file of evidence is the basis upon which you have to decide whether to issue an arrest warrant, and it is probably the basis on which you will have to decide whether to prosecute, unlike every other case where the police arrest and there is an opportunity to add to the evidence. That was why I took the view that you had to be pretty well satisfied that a prosecution would follow before you decided to arrest an individual, because that is the practical reality. If they are arrested and are in custody, they will be brought before the court the same day or next day. We are talking about very short periods of time, and the Attorney-General's consent will come very quickly in the process. Those are the arrangements.

Q39 Jeremy Corbyn: Will the draft procedures that you are drawing up now after consultation be open for public comment by this Committee or the public in general?

Keir Starmer: The way we have approached it is to work with our panel of interested parties, but I have no issue about sharing them with the Committee or anyone else who wants to comment on them. We have what we call a community involvement panel which is comprised basically of individuals or organisations who have been particularly concerned about their ability to bring private prosecutions. We meet them every four or six months. They seem to us to be the obvious group with which to walk through the guidelines, but that is not a hard and fast rule and I have no issue with anybody else commenting on them.

Chair: Thank you very much. I think we would now like to move on to more aspects of the subject we were discussing earlier. We are very grateful to you, Mr Starmer, for the evidence you have given us this morning.

Examination of Witnesses

Witnesses: Jean Taylor and Christine Jones, Families Fighting for Justice, gave evidence.

Chair: Mrs Taylor and Mrs Jones, welcome to you both. We very much appreciate your coming in front of the Committee today. We know that you have both had dreadful family experiences having been victims of crime and, therefore, that you have a very important perspective on these matters. I will ask Yasmin Qureshi to ask some questions.

Q40 Yasmin Qureshi: Thank you very much for coming to the Committee. You heard the Director of Public Prosecutions talk about how the CPS approach the issue of joint enterprise. How has a lack of clarity about the doctrine of joint enterprise affected your families and the crimes against members of your families? I do not mean your families but generally.

Chair: I just have to give the warning that as a Committee we cannot investigate individual cases, only the broad experience. You have also now met many other people with similar experience, have you not?

Christine Jones: My case involved my son Andrew and a gang. The CPS said they couldn't take it into court because it wasn't in the public interest. I can't understand how some people can be important and some can't. Why isn't everybody in the public interest? At the end of the day, that person is dead the same as a person who is in the public interest is dead. Why can't the person who has no public interest have justice the same as the person who has?

Q41 Chair: Was that the full extent of what they told you?

Christine Jones: Yes, it was.

Q42 Chair: That it was not in the public interest?

Christine Jones: It was, yes.

Q43 Yasmin Qureshi: Did they go into any details as to why they said it was not in the public interest?

Christine Jones: They said it was not in the public interest to take it back into court.

Q44 Yasmin Qureshi: To take it back into court?

Christine Jones: Yes. Only one out of 10 went into court and he walked out of court for lack of evidence. When we asked why they couldn't all go in, they said it wasn't in the public interest.

Jean Taylor: Andrew Jones, the son of Christine Jones, was on his own walking down a side street in Liverpool city centre. He was making his way home after an evening out with his friends. He was confronted on that side street by a group of youths, and in that group were two females. They decided to pick on Andrew. One punched him—that was witnessed—while another one stamped on his head as he lay on the floor dying of his injuries. All members of that group were then held by a Merseyside police officer who came along. He knew the whole group was there, and someone in that group, no matter which one at that stage, should have been taken into custody and spoken to, because the officer knew that Andrew

was seriously ill or dying on the floor. Instead, the officer got hold of one of them and said to that group, "I saw you strike a blow at this gentleman." The female who was the girlfriend of the perpetrator said, "No. I think you've made a mistake", and the officer let that perpetrator go. It wasn't until several days later that they were all rearrested. DNA evidence was lost. My argument here is that joint enterprise has been used in more serious high-profile cases. That is a word we do not like to use in Families Fighting for Justice. In a high-profile case, all of them would have been arrested and no doubt charged with joint enterprise. My argument is that, with a joint enterprise, it is either a shared intention or foresight. In the case of Andrew Jones, it was not a shared intention but foresight, because prior to the perpetrator punching him, he frogmarched him backwards down that side road. With the foresight of that group, the intention was to cause Andrew Jones some harm.

I fail to see how joint enterprise works in those cases where they are all taken in just for standing by and watching and yet in this case joint enterprise wasn't used. We cannot allow joint enterprise. Law must be seen to be a fair law in this country. I am not here to judge any particular case and say joint enterprise should or should not have been used. My argument here is, "What about the likes of this group who did that?" There are many cases up and down this country where a group or gang has been allowed to walk free, and still do so today. They have not been charged with joint enterprise.

We know this law is 300 years old; we know it is time for change. We know there is a growing gang culture. At the moment, Families Fighting for Justice are delivering workshops up and down Liverpool. We believe that those workshops deter youngsters from gang culture. It is not done by delivering it through the police but through families who know what is needed and who carry the pain of losing a loved one. Furthermore, to go back to joint enterprise, I strongly believe that it is time for change with joint enterprise. I am not saying we should do away with it altogether. Maybe we could introduce another law or tweak the one that is there already. It is 300 years old and it is time for change. We cannot say that, because one group is more in the media light, shall we say, it should be charged with joint enterprise. Yet some of them may not be members of a gang. I remember that when I had a meeting with Iain Duncan Smith, the question was asked how we could say they are part of a gang. We can easily say they are part of a gang. The local police will know whether they are part of a gang. They have a uniform that we all know they wear to say they are part of a gang. We know what they wear and know if they are part of a gang. There are groups that in some cases are not part of a gang, but in more high-profile cases, they are charged with joint enterprise. Some have just stood idly by watching, maybe afraid to give evidence. Should they have been charged with aiding and abetting?

Q45 Chair: You have made the point several times that high-profile cases have involved joint enterprise.

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It could be that we are aware of those cases because they have a lot of media attention.

Jean Taylor: Yes.

Q46 Chair: Do you have any reason to believe that something about the high-profile nature of the case leads prosecutors to use joint enterprise, rather than simply different practice between different police forces and different branches of the Crown Prosecution Service?

Jean Taylor: Yes, I do.

Q47 Chair: You think that in some way prosecutors are attracted to use joint enterprise if they are aware that there is a big media interest in the case.

Jean Taylor: Yes, I do.

Q48 Yasmin Qureshi: What specific reforms would you like to see to the doctrine of joint enterprise?

Jean Taylor: For instance, what if there was not premeditation in the case of Andrew Jones? Take that family and the Lavelle family in my group. Kevin Lavelle was left dying while he was on the phone to his fiancée. That group, again, was allowed to walk free. Maybe we need to introduce a new law; maybe we need Andrew's Law; maybe joint enterprise needs to change. It most definitely needs to change. As Sir Alan says, it is so easy to have high-profile cases where police officers say, "Okay. They're shouting. It's in the public interest. Let's charge them all with joint enterprise." The law must be seen to be fair. I am afraid that if it is there to be used some will use it that way, and that is wrong.

Q49 Yasmin Qureshi: I am only exploring this question with you. Is there a possibility that, because there has not been proper communication between the families of the victims and the Crown Prosecution Service or the police to explain why they took a specific decision in a specific case, perhaps this could be the reason why there is a misunderstanding and why in a particular case a prosecution does not take place and in another case it does?

Jean Taylor: I strongly believe there is a lack of communication among the CPS, police and the families. There is a huge gap and lack of information. They should be working together more closely. I see families who have carried the pain of no justice, and yet I say to myself, "Insight? Foresight? Why wasn't it given?" It is always in the public interest. We owe it to ourselves to help make society a safer place, but this country must be seen as having a law that is fair and also that we do not lose deterrence. I believe there is lack of communication with the CPS, the police and victims' families, but we must always say that, of course, it is in the public interest. In Liverpool, the public are aware of the perpetrators who did what they did to Andrew Jones that night, yet they are allowed to walk free. Why? Because there is no law under which they could have been sentenced. Did joint enterprise fit? Was it good enough? Why wasn't it good enough? They were all there and still they remained silent; they built up that wall of silence. That wall of silence must not be allowed to continue.

Q50 Mr Llwyd: First, perhaps I may say to both of you that we are in complete sympathy with you. We understand the trauma that both families have gone through, and we are trying to look at both sides of the argument, so do not think that we are being in any way antipathetic if I ask a question.

Jean Taylor: No, not at all; I fully understand that. Thank you.

Q51 Mr Llwyd: You will know, for example, that the Metropolitan Police have publicly said that joint enterprise is a useful tool in dealing with gang crime.

Jean Taylor: Yes.

Q52 Mr Llwyd: Therefore, you believe that it has a deterrent role in deterring young people from gang culture. Do you believe that to be right?

Jean Taylor: Yes.

Q53 Mr Llwyd: Earlier you said that joint enterprise did not fit the bill in terms of what happened to Mrs Jones's son. You will also appreciate that there are many stages to look at the evidence in order to found a proper prosecution for joint enterprise.

Jean Taylor: Yes.

Q54 Mr Llwyd: There must have been foreseeability. There must have been a real issue as to an immediate degree of violence occurring which would have been reasonably foreseeable, and so on. I do not know the circumstances, but it is possible, is it not, that some of those who were bystanders, as it were, were not in the know as to what was going to happen that evening?

Jean Taylor: I will not mention any particular case, but I know there are cases where they could not foresee what was going to happen. You cannot foresee something unless it has been arranged prior to it happening. If it happens instantly, how could the rest of that group see that, all of a sudden, there is this fight or attack? How could they foresee that if it happened instantaneously? Again, if it goes into the media as high profile, they will be charged.

I have many other cases; I am not just going to talk about Andrew Jones. I have the Kevin Lavelle case. There are a lot of other cases up and down this country. I know the Committee can't get involved in any one particular case or do anything about what happened. I am not asking for that. But, just to educate you a little further on the Andrew Jones case, one of the group stated that the perpetrator had tried to cause some trouble earlier in the evening with some other innocent victim. Her words in that statement were, "He was out for trouble. We could tell he was out for trouble." By frogmarching Mr Jones backwards down that side street, that was the foresight about what was going to happen. With aggression, that is foresight, yet because the Andrew Jones case was not high profile enough they were not charged with joint enterprise. We cannot allow joint enterprise to be charged at random just because it is thick in the media and to say, "Right; we've got convictions." This is

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what's happening. We have given these workshops, which are funded by the Home Office, in areas of Liverpool where there is a growing gang culture. I know that for gangs it is a deterrent, but we are also talking about groups.

Q55 Chair: Following on from Mr Llwyd's question, you work a lot with young people who might be caught up in these situations?

Jean Taylor: Yes.

Q56 Chair: Do you think deterrence works in the sense that they are aware, "If I get involved in that or if I am on the scene, they might get me for joint enterprise"? I am perhaps a little sceptical that young people think in those terms and are even aware of the legal process to which they might be subject if they stay in the crowd where this is happening. Do you think there is a deterrent awareness where people say, "I must stay away from there or I might be done for joint enterprise"?

Jean Taylor: To be honest with you, Sir Alan, I think they need to be educated further on joint enterprise. You would be extremely surprised how many youngsters don't understand joint enterprise. That is something I include in the workshops that I deliver in and around Liverpool. I strongly believe there are no better people to do that tour. It is no good a police officer getting up there, because they don't like the police; they don't welcome the police. Families go in and do these workshops. There needs to be far more education on joint enterprise for those who are members of a gang.

Q57 Mr Llwyd: Following on from that point and Sir Alan's question, is misunderstanding of joint enterprise leading to witnesses not coming forward?

Jean Taylor: Yes, I would say so. I know of a case—again, I won't disclose names—where one member of the group went with one or both parents to the police station and gave evidence of what he saw when the gentleman was attacked. He later died. Yet he thought that by doing so he was doing the right thing. Again, it was a high-profile case, but that gentleman is now serving time in prison, yet he helped the police; he gave a statement. Does that steer them away? What message are we sending out? If they give statements, will they still be charged with joint enterprise?

Q58 Mr Llwyd: Some evidence we have had from the university of Oxford suggests that only 21% of the public consider that murder convictions based on the doctrine of joint enterprise are things they can support. In other words, only 21% of the public support convictions for murder based on joint enterprise. If you do not have a comment, it does not matter.

Jean Taylor: I don't know what to say really, to be honest. Do you have any comment to make on that, Christine?

Christine Jones: It is because a lot of them don't understand what it really means. They are scared to give their comment and to support it because they barely understand what it means.

Q59 Mr Llwyd: I have a final question that I suspect should be to both of you. How do you believe public confidence in joint enterprise can be strengthened? You are doing workshops in Merseyside and so on. How do you believe that things can be improved in terms of public confidence?

Jean Taylor: I am not sure of the figure. It may be that £18 million has been pumped into deterring youths, gangs and guns. I think that right across the board there needs to be education on the whole thing by ordinary families, but, going back to joint enterprise, it must be seen that it will not just be thrown around and used. I know that there are young men who have been convicted of joint enterprise, maybe rightly so, and are members of a gang, but I also believe there are those inside prison who maybe should have been charged only with aiding and abetting and not given the lengthy sentence they were given. That is why we have to be careful. I have read quite a lot about joint enterprise and, to be honest, it is a very complicated common law.

Q60 Elizabeth Truss: I want to ask about the specifics on legislation. It seems to me that a lot of this issue is to do with the way it is being interpreted by the police and the CPS. Is it the case that, rather than necessarily needing new legislation, guidance could be offered to those organisations on the way joint enterprise ought to be applied? I just want to add to Mr Llwyd's point about the Oxford study. Maybe more flexibility is required within joint enterprise so that lesser charges, such as being an accessory, can be included within it. Maybe the police can be given more flexibility. I do not know your view on that. Is the mechanism really a new law, because it seems that the law on joint enterprise is being applied correctly in some cases? It is just a question of the consistency of its application.

Jean Taylor: The local police would know where the gangs are and who they are. If that gang is in front of the courts then it can be joint enterprise, but what if they are not part of a gang? If they are not part of a gang, how can you throw joint enterprise at them? I think a lot of faith has been lost.

Q61 Mr Buckland: That is a very fair point, Mrs Taylor. If there is not evidence of a pre-conceived purpose, as you would have with a gang, it will depend on the facts of the case. If a group of people who were not part of a gang all knew that the principal had a knife, that would be foreseeability and a joint enterprise.

Jean Taylor: Yes.

Q62 Mr Buckland: It would then depend on the facts of the case, would it not?

Jean Taylor: Yes, and then we could go back to the case of Andrew Jones. That involved foresight, yet joint enterprise was not charged. I think it needs to be used only in certain cases. If it is going to be used, maybe it should apply to gang members, but not when it is proven they are not part of the gang. If they were out causing a fracas on the night, it should be aiding and abetting. We should not be sending somebody to

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prison for 15 or 17 years because he stands there and because it is high profile.

Q63 Jeremy Corbyn: Thank you both very much for coming and giving evidence; it is extremely helpful to our inquiry.

Jean Taylor: Thank you.

Jeremy Corbyn: What response would you give to criticisms that joint enterprise is sometimes used as a dragnet leading to young people being wrongly described as gang members and, therefore, convicted of involvement in an offence? Since you have been involved in this for quite a while, what suggestions would you make for any legal changes to deal with this issue?

Jean Taylor: I think that, if it was to be used in that way, where it was thought they were part of it, they would need proof. The police officers would know if they were part of a gang or not; they operate in those areas. Last night in Liverpool alone, there was an incident involving two young men. How old were they, Christine?

Christine Jones: They were between 18 and 21.

Jean Taylor: There was crossfire in the street; there were children there. It was not only there but in the area where Rhys Jones was shot. That was only last night in Liverpool.

Q64 Jeremy Corbyn: But the point is that, if the joint enterprise law is used, anyone who was present at that incident, or any other incident where gangs were involved, can be accused of being part of a joint enterprise. You and I know perfectly well that young people growing up in difficult environments feel the need to be involved in a gang for their own security. It does not make them criminals; it does not make them bad, but it means they are in a society where they are worried. They can then end up being prosecuted for something about which they perhaps knew nothing but just happened to be in the vicinity of the incident at the time. Do you think that is a problem with the law?

Christine Jones: Yes, it is a problem.

Jean Taylor: It is a problem but I think they should be educated further. If you are going to walk around with your hood up and a mask across your face, you are part of a gang. That gang, I'm afraid, is out to do some harm, whether it is the gang across the road or whatever. They need to be educated about the seriousness of it and what it could lead to.

Q65 Jeremy Corbyn: Nobody is condoning gangs; certainly I do not, and I do not think anybody round this table is. But the point I am making is that the use of the joint enterprise law consolidates membership and strengthens the cohesion of a gang rather than reducing it and breaking it apart, because the evidence required to get prosecution of joint enterprise is rather less than the forensic evidence required for the primary prosecution.

Christine Jones: Joint enterprise should be used for breaking down walls of silence. There are people out there at the moment who know what has been going on; they just keep it to themselves and do not come forward and tell. You should be able to go into a

police station, give a statement and then come out. If you are willing to give a statement of what you have seen and tried to stop you should not be put away, but if you have kept quiet behind a wall of silence for so many years why shouldn't you be put away? You are part of that gang, and that is why you are keeping quiet.

Q66 Jeremy Corbyn: That is really helpful. Do you feel that local, regional and national media have a role to play in this and could do quite a lot to change attitudes towards this, or not?

Jean Taylor: Yes.

Q67 Jeremy Corbyn: In which case, what advice would you give them?

Christine Jones: I would tell them that specific people are not more important than others. They are highlighting some people and making them high profile. There is pressure on the CPS, the police and everyone to find somebody to convict. There is no pressure for a conviction in those cases where there is no publicity. That is why some are being prosecuted and some are not.

Jean Taylor: It then becomes an unfair law.

Q68 Ben Gummer: I want to take further the point about high-profile cases and your contention that because they are high profile the CPS put in the effort to try to prosecute. Does that mean that you think their failure to do so elsewhere is because they cannot be bothered, because it is too difficult or because the resources are not there? In your minds, what is the reason for them not doing so when there is no media interest?

Christine Jones: In my mind, the CPS decide who to prosecute. Nobody has a say in whether or not they are going to go to court; it is up to the CPS to decide who goes to court. It should not be. As far as I am concerned, everybody should go through the court. It is up to the jury or judge to find them guilty or not guilty, not the CPS. Why should they decide who goes through and who does not?

Q69 Ben Gummer: Mrs Taylor, you also made a point about high-profile cases. Why do you believe that in low-profile cases the CPS are not making the effort? What is the reason they are not doing so in low-profile cases?

Chair: If it is the case.

Ben Gummer: If it is the case.

Jean Taylor: It could be cost-effective as well. There is more pressure on them when it is high profile. The public want answers. Christine has reasons why she thinks that is so that she does not wish to disclose here. They know they have a job to do, and when it is in the public interest and it is out there in the media they have got to be seen to do that job properly.

Q70 Chair: Although the Director of Public Prosecutions has given his oral evidence today, we will draw to his attention your belief that high-profile cases are more likely to be the subject of joint enterprise than other cases where it is appropriate. We

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will give him the opportunity to respond to us on the point you have raised.

Jean Taylor: Thank you very much.

Chair: We are very grateful to you for the evidence you have given us and the thorough way you have done it. We very much appreciate it.

Examination of Witnesses

Witnesses: **Dr Andrew Green** and **Gloria Morrison**, Joint Enterprise: Not Guilty by Association (JENGbA), gave evidence.

Q71 Chair: Dr Green and Ms Morrison, welcome. Are you both involved in Joint Enterprise: Not Guilty by Association? My note does not make that quite clear.

Gloria Morrison: Yes, we are.

Chair: We are grateful to you for coming to give evidence. We know that you are looking at the matter from a different perspective from that of the previous witnesses, namely, those who get caught up in joint enterprise cases, perhaps inappropriately or unjustly so. I ask Elizabeth Truss to open the questioning.

Q72 Elizabeth Truss: We have just heard from the two previous witnesses that, in prosecuting cases, joint enterprise is sometimes used and sometimes not. Do you think it is used in a consistent way across the country? What would be your observation about its present use?

Dr Green: My response to what we have just been hearing is that, of course, we do not know of that particular case. The cases that come to our attention are those where people have been prosecuted; those are the only ones of which we know. To me, it sounded significant that one of the witnesses said the police had lost DNA evidence in the case. I wondered whether it was a case of incompetence rather than making a judgment on the degree to which it was a high-profile case. Our impression is that the police are extremely keen to clear up every murder case and put whatever effort they think is necessary into doing so. It would be very unusual for them to make any distinction between something they deem high profile or otherwise.

Q73 Elizabeth Truss: You mention murder cases, but what about across the board in other cases as well? We heard from the DPP that, in theory, joint enterprise could be used to prosecute all kinds of cases. Can you tell me a little more about where you think it is being used, where it is being used inappropriately, and where it is not being used?

Gloria Morrison: Very worryingly, joint enterprise is being used for the rioters. You are putting together a group of people who might have gone out to do something, which was to protest, but you did not do that with the students. They were not prosecuted under joint enterprise but the rioters are. You have a case involving 19 people, so you are saying they are all involved in the same enterprise. To me, it is such an abuse of the law that you are making it more elastic so that you can group together as many people as possible. As you will be aware, in the Victoria case, 20 young people have all been convicted of one murder. Are 20 young people all culpable to the same

extent for that one murder? It is a high-profile murder, but we do not know anything about it.

We also have a lot of low-profile cases. There are high-profile joint enterprises but a lot of low-profile ones that no one has ever heard about where people have gone to prison for something they did not foresee, they didn't intend, and they are serving life sentences.

Q74 Elizabeth Truss: I am interested in what you say about prosecution to the same extent in that prosecution. Do you think there could be more flexibility within joint enterprise so that there is a different extent? Why are all people being prosecuted to the same extent?

Gloria Morrison: I think the law of joint enterprise is a mess—the idea that you are going to have everybody knowingly having the same foresight in an incident that could take seconds. I met a family at the weekend. Four family members were walking home: the mum, her boyfriend and two 15-year-old girls. Chelsea crossed the road to a known drug dealer in the area, because she thought he was waving at her. Chelsea was slashed *there* and *there*; it required 35 stitches. She is serving a life sentence.

Q75 Elizabeth Truss: Is not the whole point that we want people to have more foresight and this should act as a deterrent to getting involved in riots or gangs? If there is a failure by people to take responsibility for their own actions, that is something being addressed by this law. Surely, the converse is that people are not expected to have any foresight.

Gloria Morrison: I am very interested to know how many of you actually understood what joint enterprise was until, thankfully, you began this brief inquiry. Young people are completely ignorant of this law. Most of the people we are supporting have never heard of joint enterprise until they are in the dock. Most of them, because they are innocent and have not done anything, or have no culpability, are told by their lawyers that they will not go to prison because they have not done anything. I want to move you away from the idea that this is targeting gangs. It is not. It is targeting anyone who is on the periphery of a crime or—not even on the periphery—on the end of a telephone. You can have a child who has sent a text message to their friends saying, “Let's go and get them feds”, because of the riots. That is enough under joint enterprise to convict them.

Q76 Elizabeth Truss: Presumably, a jury will be there to make the decision whether or not that individual is culpable. You have mentioned the riots as well as gang membership. If the issue is that people

are not educated about the potential for being charged under joint enterprise, is that not an argument for educating people and making it clearer to people that they could be held responsible if they are involved on the periphery of a riot or a gang? Is that not an argument for better education?

Gloria Morrison: There is definitely an argument for better education.

Dr Green: There are a number of things. Education is patchy. Where I live in Sheffield all the children already seem to know about joint enterprise. I am not sure what effect it has; maybe it makes them stay in and play computer games rather than go out with their friends. It is also a question of the nature of deterrence in these circumstances. I think someone else on the Committee referred earlier to fast-moving incidents where anger flares up. I am not sure people develop ideas about foresight or their role in it in the time. It seems very unfair that they should be convicted of anything at all merely through inferences being drawn from the fact that they are present at a scene.

Q77 Elizabeth Truss: But we are not talking about people going out with their friends but about situations where a crime has been committed. I think it would be preferable that people were playing computer games at home rather than hanging around the periphery of a crime being committed. To me, it seems like a strange comparison to make.

Gloria Morrison: We have too many cases where you can talk about people going out with their friends. They are with their friends, not a gang, and something can kick off spontaneously, whether it is a punch or a fight. This has always happened, but should everybody be involved in that, or not involved in it, if someone has made a phone call? If you have a law like this, the police are using it not just as a deterrent but as a threat. Young people take a plea, say, to the lesser charge of manslaughter because they know that under joint enterprise they can get them all for joint enterprise. We have cases like that. There is one case involving nine boys in Liverpool. All of them took a plea of manslaughter because the police said, "We can get you for 25 years on joint enterprise." It is not an effective law that really roots out the guilty person and the not guilty person.

The evidential bar is now lowered so much that you do not need to use any real evidence to prove that someone had the same foresight and intention. All you need to do is say they were there. It isn't about gangs. You need to get away from the idea that this is about targeting gangs. My 12 year-old son came home with a DVD from the Met Police saying, "Did you know that, if you are with someone and they commit an offence, you too can be convicted of it?" He's 12. Should that be what the police do? That is not education or keeping the peace; that is threatening them.

Q78 Elizabeth Truss: Ultimately, the jury will make the decision about whether that individual is culpable, and that will be a decision the legal advisers to those individuals take when they advise them whether or not to accept a plea bargain.

Gloria Morrison: In Laura Mitchell's case there was a 49-page route to verdict. The juries often come back to the judge to say, "We don't want to convict this person." They are very confused. They can see who is culpable and they do not want to do it. The judge will say, "No; it's a joint enterprise. You have to convict or acquit." We have several cases like that. The judge will tell the jury that it is a nod and a wink. Are you saying someone should be serving a life sentence because the judge told them a nod and a wink is enough? That is all it needs to establish that it is a joint enterprise and they knew what the other person was going to do.

Q79 Mr Buckland: Thank you for coming to give evidence. I have read the annexe to your submissions which relate to a number of accounts given by people who feel they have been wrongfully convicted of offences involving joint enterprise. Am I right in understanding—it is no criticism—that your research is based upon accounts given by individuals and their families who feel aggrieved because of convictions?

Dr Green: No.

Chair: I did not hear whether you said yes or no then.

Dr Green: Yes or no to the answer?

Chair: You may have said something else. It is just that the acoustics are not very good. What was it that you said?

Dr Green: I am sorry. I need to say that we are only starting on research. You have been supplied with some examples. They did not come from me; I have not done those. As to the cases I see, I consider them researched when we have seen the evidence. In the end, our research will not depend on accounts given by people. We will go to them for explanations of things we do not understand in the evidence at that stage.

Q80 Mr Buckland: But at this stage in the cases you have presented to us, you have not been able to see the evidence in the case, either for the prosecution or the defence?

Dr Green: I do not know the cases. Personally, I could tell you for any particular case that I have seen or know about whether I have seen all or some of the evidence and I feel I know it adequately or not.

Q81 Mr Buckland: In any of the cases that you have been referring to directly or indirectly have you seen the totality of the evidence in the case?

Dr Green: I have not talked to you about any particular case yet.

Q82 Mr Buckland: I ask Ms Morrison as well. Some of the submissions made by prisoners were letters to you on behalf of the organisation you represent.

Gloria Morrison: Yes.

Q83 Mr Buckland: Are you able to tell us whether you have seen the evidence in the cases?

Gloria Morrison: We have asked for the summing-up, but I have visited a lot of prisoners and families.

Q84 Mr Buckland: I understand and respect that, but it is the case, is it not, that you are giving evidence

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today on the basis of one side of the story? That is right, is it not?

Gloria Morrison: Yes, but especially in murder cases we never underestimate the fact there are victims involved. Jean Taylor came to speak to our families, so we know what they are saying. Our statistics show that, at the moment, for every one murder, three people are prosecuted and in prison, so the statistics will cover up the fact that there are guilty people going free. Joint enterprise is not a level playing field at all. From the data we have collected—yes, it is one-sided—we are starting to see very clear common denominators about how people can be convicted under joint enterprise. It is about the evidential bar being lowered. It can be hearsay, which is very frightening.

Q85 Mr Buckland: With respect, how do you know that if you have had only one side of the story? With the greatest respect, you cannot say that on the basis of your research to date.

Gloria Morrison: Then surely there should be research done.

Dr Green: I am sorry. I am the academic here and I do feel I should respond to that. I say again that we are only at the beginning of research. There are very few cases that we have researched to an adequate standard. We are only getting indicators of the type of evidence about which we are seriously worried. To understand cases, obviously, we look at the whole case; we look at the prosecution case and the evidence. Until we have done that, I do not think we can form an opinion. Gloria has just included those cases to give you the strength of feeling and distress and so on that many families express to us and to show why there is a powerful driving force behind us. We have 260 cases where people have come to us. Is it all right if I refer to a previous question about statistics and the preponderance of types of cases? There is an overwhelming number of murder cases; they are virtually all murder cases. I am surprised Keir Starmer was not aware of this. As to the matters we research—you have the latest figures—we take up every reference in the media to cases being prosecuted.

Gloria Morrison: There are 287 people currently charged with 87 murders. That is just murder convictions, but joint enterprise is used for ABH, GBH and burglary; it is used across the board.

Q86 Jeremy Corbyn: Where do these statistics come from?

Dr Green: It is a media trawl; that is all.

Q87 Jeremy Corbyn: Explain to me what you mean by “a media trawl.” You have just given quite a significant figure. If we are to use that as evidence, we need to know exactly where it has come from and on what basis it has been collected.

Dr Green: In a sense, these are indicators. We may miss things that are in the media. Another member of our organisation regularly Googles, I suppose, for information online and assembles that into figures for us. It is only an indicator.

Q88 Jeremy Corbyn: Have you any evidence of what happens on appeal in any of those cases?

Dr Green: Relatively few go to appeal.

Gloria Morrison: Both Andrew and I have sat in on appeals. They are heart-breaking. Often, on a joint enterprise, because there is so little evidence to convict you, you need fresh evidence so you cannot get an appeal. When you do get it, it is often based on whether the judge gave a clear direction to the jury on intent or foresight. The judges do not want to say they have made a mistake, even though it is glaringly obvious that a lot of these people should not be in prison. It is absolutely glaringly obvious.

Q89 Mr Buckland: How do you know that?

Gloria Morrison: Would you allow a 15-year-old blind boy to go to prison for something he could not see?

Q90 Mr Buckland: Are you talking about what the evidence is, because I have not been involved in the case? The point is that you are making assertions that are not based upon a full analysis of the evidence. I am not criticising you; you are not in a position to do that because only those involved in the case can do that.

Dr Green: I think you are in a position to criticise us if that is what we are doing.

Chair: I do not think that is the objective.

Dr Green: I am trying to say that we are not in a position to make these assertions as yet; we only have indicators about them. Our plea throughout is for more research.

Chair: The Committee is not in the business of criticising your campaign at all; it is simply establishing the weight of the evidence before it and on what it is based. We have to do that with all sorts of witnesses who come before us, including Ministers and civil servants.

Q91 Ben Gummer: Aside from evidence and data, there is an issue of principle here in the cases you have cited in your annexe. It occurs in all matters of joint enterprise. Someone who turns up at a crime happens to be involved. Let’s say they are not the principal in a murder. They have a number of options. They can join in that murder; they can stand by and do nothing; they can intervene and try to stop it; or they can go and tell the police. It seems to me that what is missing from your line of argument is how the law recognises the person who intervenes and who is clearly in a different moral position from the person who does nothing and, in one instance given here, says, “I was merely a witness to this crime.” Now “merely a witness to this crime” is a different degree of culpability, or non-culpability, from a case where someone actively goes in and tries to stop the crime happening. I am a bit concerned that, if we follow your line of argument, we are losing the ability to support the person who does the right thing rather than just does nothing.

Dr Green: Our concern is with people who are innocent. I think the legal position is that the person who does nothing is not guilty of anything.

Q92 Chair: That is not necessarily the case if the person had foresight that his accomplice was going to do this.

Dr Green: Then in a sense it is the point at which you become involved. If you are walking by and see something happen, you are not responsible for it. If you knew it was going to happen, I agree that you are in a different position. Our concern is with people where the court is told they have foresight on the basis of very tenuous evidence. We think that evidence is inadequate. Our concern is about the evidence in such cases.

Q93 Mr Llwyd: It may be that the doctrine of joint enterprise is not quite as blunt a tool as you say it is. For example, several dozen of the students who occupied Harrods last year were charged with a joint enterprise offence and the prosecutions were discontinued. I just make that point in passing. I disagree with Ms Morrison about appeals. In my hand, I have a whole list of cases that have gone to the Court of Appeal and we are now awaiting a very important case before the Supreme Court such is the concern of the legal establishment about the position. To say that there are very few appeals is, I am afraid, utterly incorrect. It has been suggested that the abolition of joint enterprise would allow guilty parties to go free. Do you agree, and if so, why?

Dr Green: It is a difficult question. I do not agree on the basis that people would not go free if cases were adequately investigated. Because cases can go to court so easily and be successfully prosecuted, the police neglect to do anything else in the case. They are succeeding by getting evidence of phone calls, shared car use or getting people to act as witnesses. Because they can do it that way, they do not go looking for DNA or whatever. If they investigated more thoroughly, they would be able to get prosecutions of the people precisely responsible rather than those who are caught up in it simply because they have made or received phone calls, or something like that.

Q94 Mr Llwyd: Is it right your contention is that a joint enterprise prosecution is the subject of a less stringent investigative process?

Dr Green: I think so. Certainly, I am not alone in saying that the bar to prosecution is set very low. I think someone on the Committee and numerous eminent lawyers have said it. There are a number of quotations on that subject. Everyone agrees it is much easier to get a prosecution using joint enterprise rather than prosecution of an actual perpetrator.

Gloria Morrison: We do address the idea of the wall of silence. Real gang members will know that you do not say anything; you do keep the wall of silence, whereas often the families we are supporting are people who have done the right thing. They have told the police everything they know and have given themselves up to the police; they have witnessed something and gone in; they have tried to do what they think is the right thing and tell the truth, and they have received sentences under joint enterprise. What is the right thing to do is a very murky area. I go around and talk to young people and ask whether they know about joint enterprise. Many young people do

not. They say, "What do we do if we are in a situation where somebody else is there?" I do not know what to tell them.

Q95 Mr Llwyd: When I was a youngster my father, who was a police sergeant, said that if any trouble broke out I should go away from it. That is a good line, is it not?

Gloria Morrison: Yes, but that is not necessarily going to be enough.

Q96 Mr Llwyd: Are you saying that you want to do away with this 300-year-old law altogether?

Gloria Morrison: We would like to know how many people have been convicted under joint enterprise. If you have a law being used as sweepingly as joint enterprise, surely you should be able to quantify or qualify how effective it is.

Mr Llwyd: Yes.

Gloria Morrison: At the moment, nobody has any data or statistics. All we have are the families who have contacted us. We are in a very frightening situation where nobody can tell us how many people are currently serving sentences. There are people who have served over 30 years because they maintain their innocence, which is another area of this. If you are convicted under joint enterprise and you will not admit to being guilty of an offence, that means you are a denier. If you maintain your innocence, you will serve a lot longer than the person who has committed the offence.

Q97 Chair: How do you deal with a situation where two people are present in a closed room and a very serious assault is committed against a third person? It is not clear who delivers the most serious blow and neither will explain his actions or that of the other. If one of the persons is not guilty, he can give appropriate evidence or argue in his own defence that he has not done anything, but the two remain silent so as not to incriminate themselves.

Dr Green: We have had cases that match exactly what you say. I do not think it has ever become clear in the couple of cases that have come to us. It did not become clear in court. There was one particular case where a jury apparently asked whether they could convict one and not the other, and the judge said, "No; you convict neither or both." In those cases that is the standard advice judges give to juries, but that is a small minority of the cases we deal with; normally, they involve more defendants.

Q98 Mr Llwyd: Are you saying that we need greater clarity and statistics to show how often these cases come up?

Dr Green: I would ask for the statistics to be compiled. I think it would be possible for the CPS to do it. I would like the opportunity to ask Keir Starmer whether he could do it. He could simply ask all his prosecutors—he could send them an e-mail—how many cases involving joint enterprise they had prosecuted in the last year. At least we would have some statistics. But we are more interested in evaluating what kind of evidence is used in what cases, and, hopefully, whether it was reasonable for

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inferences to be drawn from tenuous evidence. I do not know how many of those there are and what they are like. Those are the cases that come to our attention. Are they typical or not? I do not know. That is what we would like to research.

Q99 Mr Llwyd: This brings me back to Mr Buckland's point. In doing this work, you must ensure that you have both sides of the story and the full case from both perspectives.

Dr Green: Yes. There is no point in our doing research on any other basis. It is not valid and we will not help people if in cases we neglect a prosecution point. We invalidate what we do.

Q100 Jeremy Corbyn: In the research you have done so far what recommendations would you make about altering the law of joint enterprise? You mentioned the way that in your view the police do not pursue any forensic evidence once they have established that an individual was present at the scene of a crime. Do you have any thoughts on what you would suggest?

Dr Green: I am sorry.

Q101 Jeremy Corbyn: If you were doing an investigation as we are into joint enterprise—you have obviously thought about it a great deal—what sort of change would you want to see in the law?

Dr Green: I should say, first, that I am not a lawyer; I am a criminologist.

Q102 Jeremy Corbyn: Neither am I. In this Committee it is all right not to be a lawyer. Some of us are not lawyers; I am not a lawyer.

Dr Green: I preface my remarks by saying I am not a lawyer because I do not know how to frame law in practice. We are concerned with the evidence. I do not know how to put into statute that you should be careful about evidence. If we look back over the last 20 years, evidence relating to mobile phones, which is a particular concern of ours, has now come into use. They were not available previously. It is now very widely used. I do not feel that you can make a universal law about types of evidence or anything like that. The situation changes and types of evidence come and go. I do not know how to frame it. But our concern about evidence, if we are right about it, needs to be fixed in a definite way so that it cannot be

ignored in cases where juries draw unwarranted inferences, which are open to the introduction of prejudice on the part of people who think it is up to them to judge the person in the dock by the colour of his skin or whatever. I feel that the whole situation is open to that, and perhaps it explains why, as a rough estimate, 60% of our cases involve ethnic minorities.

Q103 Jeremy Corbyn: Technology has moved on a great deal and it is now much easier than 10, 15, 20, and certainly 30 years ago, to identify who was in what place at what time. Recording mobile phone calls is very easy; identifying the location of a mobile phone is not difficult. CCTV records where people are in a lot of urban locations, as does CCTV on buses, trains and so on. It is easy to prove that someone was there. My concern, and probably yours, is whether the collection of evidence of presence is simply being used to remove any requirement for any further evidence in your experience.

Dr Green: In our experience, some of the evidence is not as definite as you suggest. To identify someone's position is not that precise. Sometimes it is very precise and sometimes not, and experts still argue about this extensively. Your second point was that people are convicted on evidence of presence. On the basis of a few cases I have seen where people claim that has happened to them—I have looked at the evidence extensively—that seems to have happened in my opinion. I feel that these cases are extremely doubtful and it is happening because juries can draw all the necessary inferences from presence at the scene, if they wish to do so.

Gloria Morrison: We can provide the Committee with current data on trials or convictions.

Jeremy Corbyn: That would be very helpful. I understand some of this from what is going on in my own community, but there is a lack of evidence of what happens on appeal, and the timing and length of appeals. I have heard of cases where people are trying to get retrials or appeals; they are in prison for a very long time, and justice delayed is justice denied. Therefore, any further robust evidence that you can offer would be very helpful.

Q104 Chair: Dr Green and Ms Morrison, thank you very much. We are very grateful to you for coming this morning and giving evidence to us.

Dr Green: Thank you for hearing us.

Tuesday 1 November 2011

Members present:

Sir Alan Beith (Chair)

Mr Robert Buckland
Jeremy Corbyn
Nick de Bois
Chris Evans

Mr Elfyn Llwyd
Yasmin Qureshi
Elizabeth Truss
Karl Turner

Examination of Witness

Witness: **Professor Jeremy Horder**, Professor of Criminal Law, King's College, London, gave evidence.

Chair: Professor Horder, welcome. We are very grateful to you for coming in to give us the benefit of your capacious knowledge on the subject of joint enterprise, a subject that some of us have come to later in life, if I could put it that way. That, of course, does not apply to Yasmin Qureshi, who is going to open the questioning.

Q105 Yasmin Qureshi: Good morning, Professor Horder. The Law Commission effectively carried out two separate inquiries, one into joint enterprise and one into secondary liability. What was the thinking behind that? Would it be possible to produce one Bill to cover all aspects of those types of scenarios and problems?

Professor Horder: It is a great honour to be invited here, and I am delighted.

May I clarify one point? There were two separate investigations conducted by the Law Commission: one was on inchoate liability, which is now part of the law in the Serious Crime Act 2007; the other was on participating in crime, whether by assisting and encouraging or by joint venture.

You put a good question. The answer is that originally the investigations were meant to be part of one complete project. However, the Law Commission got bogged down, as many others have, in the problems relating to complicity in murder. We were also, during the course of the participation project, given the task of reviewing the law of murder, so it seemed sensible to shift complicity and murder over into the review of murder. That rather left doing a review of complicity and, at the same time, the serious crime aspects of inchoate liability a bit difficult to carry off. It would have been a bit like "Hamlet" without the prince, if you did complicity without murder.

As it happened, there was an opportunity—a train coming by, if you like, which the Ministry of Justice invited us to get on board—with regard to inchoate liability, because we had pretty much finished that first aspect. So we decided to get on that legislative train with inchoate liability, but fully anticipating that, when we ultimately produced our report on complicity, the two bits of the puzzle could at that point be joined together. One consequence of their not being joined together is that the language and the concepts used for inchoate—that is, incomplete—liability in the Serious Crime Act are similar but not the same as those used in common law and under the Accessories and Abettors Act 1861 for participating in crime.

The downside is that in practice that means it is too complicated for prosecutors to charge someone as having been complicit in a crime, as having committed that crime through complicity. The alternative—should the jury not find that they were complicit in the crime but none the less provided assistance and encouragement of some kind and should be guilty of that lesser offence—was what we wanted. We wanted to have inchoate liability as a way of backing up a complicity charge, if I can put it in that loose and slightly misleading way, but that cannot happen very easily at the moment.

My understanding is that the Serious Crime Act has taken on a life of its own and is not being used in complicity cases.

Q106 Chair: Not being used in which cases?

Professor Horder: Complicity—joint enterprise—cases. I am sorry; there are a lot of different terms for these things.

Chair: No, it was that the door opened just as you said it.

Q107 Yasmin Qureshi: Could you explain to us the interrelationship between different types of secondary liability? Is that interrelationship linked with the reform of the joint enterprise concept on its own. How do the two rest together?

Professor Horder: I can try. Basically, in law there are three types. I hope that this will not turn into a tutorial, because that would be a bit of a waste of your time.

Q108 Chair: No, it would be very helpful.

Professor Horder: There are three types, basically. Some scholars dispute this, but let us take it that there are three.

The first type of complicity is where you provide some assistance or encouragement without being part of a criminal venture. What would be an example? Let us suppose I support the Reds, and I see some other group of Reds supporters beating up a Blues supporter. I know that some police are coming, because I have heard them, and, without making contact in any way with the gang doing the violence, I run back to the police and I point them in the opposite direction, so that they will not be able to intervene. That makes me complicit in the crime if I intended to provide assistance and encouragement, which I did, even though I was not part of the attack. That is not really what we are concerned with here. Fortunately,

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the principles relating to that are fairly well settled, so we can leave it on one side.

The second type, where we get closer to the problems that most of you are interested in or concerned by, is what is sometimes referred to as plain vanilla joint enterprise. That is where you and I, let us say, agree to commit murder. The idea is that you will stab the victim while I keep a look out—or there is some division of labour of that kind. The point is that, although I do not do any stabbing, shooting or anything of the kind, I none the less intend that it will be our joint activity to kill the victim, and I am playing a role in that. Again, there are no real problems there. That is the normal way in which people are charged on a complicity basis. It is a settled part of the law and does not need changing.

The third way in which this situation comes about is the most controversial one, but we need to have the other two in mind, otherwise we are at risk of getting confused. Let us say that we have a joint criminal enterprise, except this time you and I are not going to commit murder; we are going to commit burglary. It is exactly the same as before, but we both intend to commit burglary. I am going to keep watch at the door while you go in and ransack the house—a straightforward case. However, I am of course aware that there may be someone in the house when you go in and ransack it.

I am also aware—saving your pardon, Ms Qureshi—that you are an unpredictable person, who is liable to respond with extreme violence if you are confronted or challenged in some way. I know that, but it is not part of the plan that you should kill anyone. I do not even know if there is someone in the house. I am just a burglar, like you, but I know that you have this propensity.

We burgle the house and, sure enough, you are surprised by the householder and you stab them to death. Let us not get into the question about householders and their rights to defend against burglars. The question now is: should I be guilty of murder, not just burglary, which is obvious because we both intended to commit it and we did commit it? Should I be guilty not only of burglary, but of murder? In that situation, what the common law says, and has consistently said, is yes. The reasons for that are, first, that we were both involved in a joint criminal venture—burglary—and, secondly, that I realised that in the course of that burglary you might, in this instance, kill somebody.

I have deliberately chosen that particular example because it is relatively straightforward, but notice that it is going a bit further than plain vanilla, because we did not set out to kill the householder. We set out only to commit burglary, but I knew what might happen and that was indeed what happened, and yet I carried on committing the burglary. That is the basis on which the common law justifies convicting me of murder, too.

None of that would be before us today or be controversial were it not for a problem that arises about the definition of murder. This is not necessarily wrong in relation to a perpetrator, to him or herself, but as you will know murder involves intentionally killing someone, or killing someone while intending

to do the person serious harm and they die. An example would be repeatedly stamping on their head or stabbing them in the thigh and hitting an artery, and the person dies. You will still be guilty of murder if you intended to do serious harm, even if you did not intend to kill the person.

That poses a problem in joint enterprise cases. Let us say that we are involved in a burglary. This time, I am aware that you might knock the householder about quite severely so that they do not put up resistance. I know that that happens because we have done it before. We have been on a burglary, you rough them up pretty severely and that enables us to complete the burglary, but it never crosses my mind that you might actually kill someone deliberately. However, we are both in a joint enterprise involving burglary. I anticipate that you may do some serious bodily harm to somebody in the course of the burglary, even though I am not aware that you may kill. That means that I am aware that you may act with a fault element for murder: you may act with an intention to kill or with an intention to inflict serious harm. The fact that I am aware that you may act with a fault element for murder means that I, too, am guilty of murder in such an example.

The courts have drawn back from convicting me in those situations. They have said that, in the case when we commit burglary or some other crime and I anticipate that you may inflict serious harm, but I do not necessarily think that you will kill someone, if you do kill someone, obviously you are guilty of murder. I would be guilty of murder only if there were no fundamental difference between what you did and what I anticipated. In some circumstances, there might be no fundamental difference. So if I thought that you would stab someone in the stomach and they would still survive, but instead you stab them in the throat and they die, there is not a sufficient fundamental difference between those two things, so I would still be convicted of murder.

How common law has tied itself in knots trying to understand or give extra detail to the meaning of “fundamental difference” is that the courts have toyed with the idea that you must use a more lethal weapon. If you do use a more lethal weapon than I anticipated, I would be able to escape or, if not, not. But that raises all sorts of difficult problems. Is a heavy boot a more lethal weapon than a small knife, for example? It is impossible to say.

You could just say, “Oh well, let the jury decide in each case whether there is a fundamental difference,” and that is what the Ministry of Justice’s draft Bill purported to do when it said that the question would be, “Did you—the perpetrator—‘go so far beyond’ what I anticipated that it would not be right to convict me?” Unfortunately, the courts have not been able to leave it alone in that way, and every time the thing has come back to the Appeal Court in the House of Lords they have added a little extra qualification or rule, such as whether I was aware that you were carrying the relevant weapon, even if I did not know you would use it. The whole law has got very complicated.

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Q109 Yasmin Qureshi: Would you say therefore that the courts are now applying it narrowly and more restrictively than they should be, or do you think they have the balance right?

Professor Horder: There are two solutions. One is a wishful thinking solution, which is that you could tinker a bit with the fault element in murder and, if you did that, the problems would go away; but we know we cannot do that because although the Law Commission recommended a change, the Government decided not to take it forward, and I do not suppose that the present Government will take it forward either, so that is a closed door. I should mention that, though, if only because the law of complicity on joint enterprise is being distorted or twisted by the need to account for a defect in the law of murder—I have to say that because I know many of my colleagues share that view—and what we are doing now is only trying to put a bit of sticking plaster over a problem in a different part of the law.

None the less, and taking that on board, the courts first tried to do justice in a rough and ready way by introducing the fundamental difference rule—that is where I saw that you might do serious bodily harm but, in fact, you killed and the courts say, “Is there a fundamental difference?” That was meant to be generous to the secondary party, in an understandable way. However, as I said, they have not been able to resist the temptation to add on qualifications that narrow the scope of the fundamental difference rule a little bit, so the policy of the law is rather unclear at the moment. What is that rule meant to be doing? Is it meant to be convicting more people or acquitting more people, and in what way? The courts have lost their grip on what the policy of the law should really be, which is why we need a fresh start.

Chair: I think we need to move on, in view of the time.

Q110 Mr Llwyd: Good morning, Professor Horder. Your response takes me back to my student days. I had flashbacks of “Smith & Hogan” and all kinds of things. That is not a criticism, by the way. It is very interesting.

With regard to secondary liability, the Law Commission report “Participating in Crime” stated: “The doctrine of secondary liability has developed haphazardly and is permeated with uncertainty”—so much so, in fact, that the Commission said that it should be resolved by legislation. The report also acknowledges that there were severe problems with the parity of culpability. I presume those problems are still with us. If not, have they moved on at all due to case law?

Professor Horder: Not much, no. As I was trying to explain, I think that case law has provided some extra clarifications, but my belief is that the courts have lost a grip a little bit on what the policy is meant to be. They have not been able to resist the temptation to introduce extra little rules that have to be given in every direction up and down the land in complicity cases, particularly in murder. The whole of the law is being distorted by what is necessary in order to do justice in murder cases, which I think is very undesirable, so I do not believe that the situation has

improved. I know that Sir Richard Buxton, for example, thought that the problems were all solved by that decision of the House of Lords in Rahman in 2008, but he would find very few supporters in that view. It seems to me that that decision opened up a fresh set of questions, and I think most commentators agree, so it is still a bit of an open, festering wound, unfortunately.

Q111 Mr Llwyd: In effect, you are saying that there is still a call for legislation to clarify all the issues?

Professor Horder: Yes, there is, except if you are going to take the view, which broadly I would support, that juries listen to all the rush of words, look at what would do justice and then try to do that, because they know that if they tried to follow the rules they would get into an awful muddle. That, though, in the end is not really a very satisfactory outcome, I think. I could not put my hand on my heart and say, “This is causing injustices up and down the land”—that would be an exaggeration—but, yes, I think everyone would agree. Lord Phillips said in a speech on this matter that he thought there was certainly a need for legislation to address the problem.

Q112 Mr Llwyd: On what you said just now about injustice probably not being done all over the place, do you believe that public policy considerations—public concern about gang-related violence, for example—have affected the development of joint enterprise?

Professor Horder: Inevitably, because almost all the cases of any significance coming to the Court of Appeal and the House of Lords have involved, in one way, shape or form, gang activity, so murders arising out of such activity have helped to shape and determine the law, essentially. We have to be careful here, though, because, of course, gang activity includes, in one sense, two people going out and committing a crime together, in one sense or another. I do not know that a gang has to include more than two people in order to be a gang. Of course, the decision central to this whole area of the law is Chan Wing-siu and the conjoined appeal in English, and one of those cases involved just two defendants—but putting that point to one side, yes, the law is inevitably being driven by concerns about that because all the cases are about that.

Chair: We will come to Chan Wing-siu in a moment.

Q113 Mr Llwyd: Yes, we are all looking forward to Chan Wing-siu.

Finally, given that there is legal uncertainty at the moment, do you believe that we should be looking for greater certainty, first, to prove as an effective deterrent and, secondly, to encourage witnesses who might be on the periphery of events to come forward and give evidence?

Professor Horder: The point about deterrence can be a bit of a red herring, because in order to be deterred you have to know what the law is, and although the police message on this is very strong—if not necessarily 100% accurate, but one would not expect it to be—I am not sure how much deterring this really does, to be honest.

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Q114 Chair: We had two witnesses who represented victims in front of us last week; they came from Liverpool and, perhaps slightly to our surprise, they believed that awareness of joint enterprise and the likelihood of being done for it was quite widespread among young people.

Mr Llwyd: They talk of little else on the Anfield omnibus.

Professor Horder: Yes, it may be. I have no better basis than they do for making the claim that I do, so I will not pretend to be more expert than they are. I do not know. It is hard to say, really. The reality is that when a confrontation is going on—shouting, pushing, shoving—and it begins to escalate, I would have thought that the last thing on your mind is going to be the rules of joint enterprise. The reality is, I think, that it is not likely to be a big deterrent, but it may be.

I have not mentioned one serious problem related to the deterrence point that means that, in fact, the law may not be deterrent enough. In the situation, if I may go back to it, where I anticipate that in the course of a burglary you may rough up the householder quite severely but I have no idea that you are going to kill them, which is what you do, the law currently says that not only am I not guilty of murder, but I am also not guilty of manslaughter. I am not guilty of any homicide offence because the killing takes place outside the scope of the joint venture, so I am only guilty of burglary.

That might surprise a lot of people, and it certainly surprised us when the decision came out at the Law Commission when I was there. We proposed a provision to fill that gap, so that in that example I would be guilty of manslaughter, if not murder, and the Ministry of Justice followed that up with such a provision. I would have thought that actually, if a potential witness knew anything about the rules, it would be a worry that the person might in fact escape liability for both murder and manslaughter in that situation.

We have to think about vulnerable witnesses or witnesses who need protection as a slightly separate problem, however, because that is about the way that they give evidence and the protection that they are given by the police, and it is more to do with criminal procedure and evidence. While those are important supporting elements to the joint enterprise rules, they are the substantive rules of law, which I am primarily concerned with. I do not underestimate the importance of rules protecting witnesses, although you will know that that gives rise to a number of problems about the right to confront evidence against you and so forth.

Q115 Chair: Might a witness fear that they could go along to the police, having been on the periphery of a crime, and offer to be a witness and then get done for joint enterprise anyway?

Professor Horder: That is a possibility, yes. It is always possible that a would-be witness then becomes a suspect. That is possible not least because your aim might be to get your story in first and try to deflect attention from yourself, so you might have a not-very-good reason for doing it. On the other hand, of course, you might be just trying to do your civic duty and find that it gets thrown back at you. All of those are

possibilities, but I simply do not know how common they might be.

Q116 Jeremy Corbyn: First of all, thank you for coming, Professor Horder. It is very helpful. Can I take you back to the Chan Wing-siu principle? Why has it been retained? Perhaps you could explain exactly what it is, because it is a new concept to many of us.

Professor Horder: Yes, I am glad you mention that, because it is a controversial but ultimately I believe sound principle. The principle is pretty much as I explained in the example, and I will keep using the same example, because I find that it is helpful for us all to concentrate, but do tell me if you are not finding it helpful.

The Chan Wing-siu doctrine says that if you and I go along to commit a burglary and you commit a murder, what is it that has to be shown about my state of mind to make me guilty of murder as well? Do I have to have agreed to commit the murder as well as the burglary? Do I have to have thought to myself, “Well, if you commit murder in the burglary, so be it”? What exactly is the fault element? Or, at the other end, could it be, as it is in some American states, merely that it would have been obvious that you might commit murder, whether I realised it or not? That is a purely objective form of fault. What they settled on in the decision in Chan Wing-siu was that if you commit the murder in the course of the burglary, I must have foreseen that that the murder might occur as a realistic possibility, not a purely fanciful one, yet I carried on to commit the burglary along with you and sure enough, that is exactly what happened. I must have anticipated that it might occur.

Now, those who criticise that as too remote a basis for liability—in other words, I am not being required to be sufficiently culpable—may make a number of different claims, the strongest of which would be that if I am going to be complicit in a murder, I should have intended that that is what you commit. That would be the strongest form of restriction on complicity. Although I can see why somebody might make that claim, ultimately I think it is not very persuasive because it is inevitably part of a criminal enterprise that we all take part, knowing that we have different roles to play—I may be the person waiting in the car, someone else may be keeping a look out, and so on and so forth—and murders often occur in the context of activity jointly co-ordinated by more than one person, where it is unrealistic to expect that everyone involved intended that there should be a killing, if I can put it that way. It could be, for example, that I know perfectly well that you are going to do it and I carry on none the less, and that is enough to make me liable, even though I did not intend it. That is the principle, for example, in international law.

Q117 Jeremy Corbyn: But we are talking about numbers here. If three young people go down the road together to sort somebody out for some previous dispute and one person ends up assaulting a victim who subsequently dies, you can kind of work out how a court might decide that the other two were complicit, because it had been discussed beforehand.

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In another example, however, of 30 or 40 people on a bus, travelling together and going to the same place, and somebody gets on the bus who is perceived to be a member of another gang, so a fight breaks out and the other gang member ends up being killed, it is difficult to say that there had been a prior discussion between 30 or 40 young people about what might happen to someone else who gets on the bus. The circumstances are not that different, only the numbers.

Professor Horder: Those are good examples, and there are two points on them, which I will make to distinguish them. One is the question whether there needs to have been planning or discussion beforehand. The law says no, for a good reason. If we go back to my example where I am a Red and I see a group of Reds attacking a Blue, suppose I go up and just join in with the rest of them in the beating up of the Blue. I will be guilty of complicity in that crime, even though there was never any discussion or agreement; there just acceptance that I joined in on the spur of the moment.

Q118 Jeremy Corbyn: The evidence would be that you joined in.

Professor Horder: Yes indeed, but there would not have been any discussion or agreement beforehand. It has never been the law that there has to have been that. If people join in full-bloodedly in the course of a fight, they are complicit.

The question of numbers is problematic. The laws on complicity were not drawn up with the kinds of scenarios in mind where you have large numbers of people either on a bus or milling around in a particular place where a fight or something of that nature is going on. They were not drawn up to accommodate that.

Q119 Chair: What were they drawn up to accommodate?

Professor Horder: They were drawn up to accommodate the notion that people have different roles in the commission of an offence and, more worryingly, the fact that there are more people involved will increase the risk of the offence occurring. There is a string of cases about duelling, in which the question is whether the doctors and seconds attending the duel are also guilty of murder. Of course, in applying the principles I have just explained, the answer is yes, they are all guilty of murder, because they all foresaw—even though they did not intend—what would, or might, happen. The more important point about those examples is that the very fact that seconds and doctors are attending will make the duel more likely to go ahead, or it may well do, because the participants will feel they cannot back out.

What is true about human nature in relation to those old duelling cases is, I would suggest, pretty much true of human nature now. Where you have people with a role to fulfil, and everybody is expecting and ready to go, it is difficult to pull out. That is one of the justifications for having a joint enterprise system of liability. However, I completely accept what may be your implicit point, and please correct me if I am wrong, which is that there is a terrible temptation to charge—I do not say indiscriminately—everyone

involved in the gang or who has some association with it.

Q120 Jeremy Corbyn: That is exactly my point. The police have a difficult job identifying a killer, in the event of that happening. Perhaps they get CCTV on an individual carrying out the act, and that is then constructed as appropriate evidence. My concern is that the police are then in a position to make a very wide number of arrests of just about everybody who was anywhere near the scene, and they can charge them all under joint enterprise. The police do not have to provide vast amounts of evidence of any sort, other than that those people were present at the scene, even though they may have barely known each other.

Professor Horder: I shall assume that everyone here—the police and prosecutors—all act in good faith, but even if they do, the problem that you mention is a serious worry. I completely agree with you, and in one of my questions here, there is a suggestion that guidelines might do a lot to ameliorate some of the harshness of the law. It is in exactly that kind of example that they could. I do not think you can change the substantive law to address the problem you are dealing with. Obviously, it would be arbitrary to say, “If there are more than six people...”. That does not make sense—it reminds me of the old days of the sixth picket, or whatever it was.

Q121 Jeremy Corbyn: Yes, I was thinking of the picket line being more than six—that was completely arbitrary.

Professor Horder: Yes, but if the people involved—the Director of Public Prosecutions, the Attorney-General, and so on—could get together and decide what threshold must be met before it would be appropriate to charge people on that basis, I, for one, would be very relieved. It is there, I think, that there is a real risk of injustice, because it is inevitable that everyone who is arrested in that scenario will say, “It wasn’t me. It was the other person.” That is also what the perpetrator will be saying, of course. It will be very difficult for a jury to distinguish between the credibility of those claims unless the police and the prosecution exercise—I do not say greater restraint than they are doing, as I am sure that would be controversial—restraint in accordance with principles. That is very important.

May I make an important observation? Despite the real problems involved in joint enterprise, we need it, otherwise there will be serious cases of injustice where the perpetrator has fled. There was a case in which two men entered a jewellery store, and the jeweller was stabbed to death. The perpetrator absconded and has never been seen or heard of, and we were just left with the secondary party, who was convicted of murder. It would be appalling if, merely because the alleged primary party were not around, you could not still convict secondary parties in such a situation.

Q122 Jeremy Corbyn: This is the last point from me, because others want to come in. Do you not accept that there is a perverse effect in this law? The general wish of society is to reduce and break up gang

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culture, for all kinds of fairly obvious reasons, but the law of joint enterprise means that it is possible for a prosecution to be made successfully against a young person, however peripherally involved, who was in the wrong place at the wrong time and followed a crowd down the street. They then end up with a criminal conviction and probably a sentence, as a result. That actually creates greater solidarity among young people who are frightened of the use of the law and therefore they stick together, rather than the other way around, where there has to be detailed, specific, forensic evidence against each individual.

Professor Horder: I completely agree that if someone were convicted in that circumstance it would be appalling and a travesty of justice, and it may well have the effects that you suggest. I would just make the point that of course merely following the crowd would never be enough to convict you; you would have to know the substance of what is going on, because otherwise you cannot foresee that the offence may be committed, and that should be a tough burden for the prosecution to surmount—at least in theory.

The other point of course is on forensic evidence. I do not know of any instances, or at least none that come to mind, whereby a case has to turn on such evidence. The law has always taken the view that testimonial evidence is as good as any other evidence, subject to whatever warnings may have to be given to the jury about the unreliability of it, so I am not sure I would want to go down that road. I completely agree however that that is exactly kind of case in which guidelines have to be followed, and the police and prosecutors take the utmost care to ensure that injustices do not occur, especially in murder cases, where they all get the mandatory life sentence.

Q123 Mr Buckland: Professor, are we not we really dealing here with rules of evidence, rather than rules of law? There is a difference between the two, isn't there?

Professor Horder: Yes.

Q124 Mr Buckland: Rules of evidence depend on the evidence in each case. For example, in burglary it has been well established that if somebody is caught in recent possession of items that were the subject of a burglary, that could be used, but not solely used, to prove his or her participation in the burglary. It is a rule of evidence, rather than a rule of law.

Professor Horder: Yes, that is right.

Q125 Mr Buckland: The same goes for the principles that we have been talking about. For example, mere presence at a scene will never be enough for anybody to bring home a case against a gang member or somebody on the periphery of a particular scene. Isn't the point that we are quite rightly debating and discussing some of the fringe issues that relate to these matters and cause problems on the fringes, but if we try to elevate them into a statutory code, we are in danger of perhaps either missing things or proscribing things that really are the province of evidence in each particular case?

Professor Horder: There is a risk of that. We started, right at the beginning, by talking about the substantive

law and the problems with it, and I think those problems are very real. They are not just evidentiary problems. The question of whether you can convict someone in my burglary example when a murder has been committed is a question of substantive law, not just a question of evidence, because the question is, what is the evidence there to prove? At the moment, it has to prove this rather complicated set of conditions: that I foresaw that serious bodily harm might be done and that there was no fundamental difference between what I foresaw and what was done. Those are rules of substantive law to which the evidence relates, so we have to get those right before we can turn to the law of evidence. As the discussion moved along, Mr Corbyn started to talk about large gangs, and then we start to move into the territory of evidence.

You mentioned the question of presence at the scene of the crime, and that is a classic example of where it would be unhelpful to have a provision in legislation that said, for example, presence is never enough, because, as you rightly say, it depends on the evidence in a particular case. Suppose I am a minor gang member and my job is to beat someone up until they reveal that they have turned Queen's evidence or something in relation to some criminal enterprise. I am slapping this person about a bit, trying to get the evidence, and suddenly in walks the boss through the door—the boss of bosses. The head of the gang just walks through the door. Is my response to say to the victim, "Well, we've been doing this for about an hour and you're obviously not going to give up any information, so I'll tell you what, let's shake hands and you can go off. Just don't do it again"? I do not think that that will be my reaction actually. The very presence of that individual will mean that I will try even harder to get the confession or whatever out of the person.

You may say that that is an unusual case, but the point is that in some circumstances, presence could be enough to constitute assistance and encouragement—in some circumstances. The problem is—this comes back to Mr Corbyn's point—that clearly in the bus cases and many other cases, it does not even begin to be sufficient really and that is the difficulty. That is why you need guidelines in relation to evidence, rather than hard and fast rules.

Q126 Mr Buckland: That is why the word "mere" presence is actually quite important, because that deals with the particular circumstance you mentioned about the particular importance of that individual.

Professor Horder: Yes.

Q127 Elizabeth Truss: Can I respond to Mr Corbyn's point about involvement in gangs or riots? Is not the whole point of joint enterprise more to encourage foresight before getting involved in those kinds of activities? So it is not just about being tarred with the same brush once a crime takes place, it is trying to discourage people from supporting potential enterprises that would lead to criminal activity.

Professor Horder: Well, that is a complicated question. What you are effectively asking me is whether the law of joint enterprise, and this little bit

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of it in particular, exists in order to deter. It is dangerous to say, “Yes, it does exist for that purpose” because it is very difficult to prove whether it does have that effect. In my view, the primary purpose of the law is to do justice and to make sure that the right people are convicted for the right offence on the right basis. Great injustice would occur if there was no joint enterprise liability, but it is also the case that at present some injustices may well be being done because of the width of the rules.

Q128 Elizabeth Truss: Earlier you seemed to be saying that you wanted to see more flexibility. So, for example, under joint enterprise, some could be charged with manslaughter rather than murder.

Professor Horder: Yes.

Q129 Elizabeth Truss: Could you see that happening in a non-legislative way? Would it be possible for guidance to be issued such that in this type of case someone who participated, but was not the murderer, could be charged with manslaughter? How would that work and how could that be done?

Professor Horder: It is very tempting to think that one could go down that line. It may be that the courts could develop such a doctrine. They got quite close in the late 1960s to developing exactly that doctrine, but standing in the way of it is the decision of the House of Lords in the cases of Powell and Daniels, and English, which says that if the intentional killing was not what you anticipated, then you may not be convicted of murder or of manslaughter. It is very difficult for the courts to row back from that. The House of Lords—the Supreme Court now—has, of course, sometimes overturned its own decisions. That has happened, but my best guess would be that it would not do that and this would require legislative intervention. That was supported not only by the Law Commission but by the Ministry of Justice and, indeed, by Lord Phillips when he was giving a talk on this area.

Q130 Elizabeth Truss: So it could not emanate from the Law Commission? It would have to emanate from the courts?

Professor Horder: It would, yes. One could leave it and hope for the best but, as I am sure you know, courts do not legislate for solutions. They just decide individual cases and so you cannot actually say that the rule that emerged would be the right one. The only thing that I would say, because I can see you are searching for a bit of support on this, is that I have noticed a number of cases, not least the very prominent one in which the Chelsea banker was stabbed to death in his own hallway, where the jury has brought in a verdict of manslaughter in spite of these rules, if you like. I am not saying there was not a basis for manslaughter in that case; there must have been because they found it. But there have been a number of cases in which manslaughter verdicts have been reached. So, in fact, juries are reaching for that solution because that seems like the common-sense solution, which it is, even though in strict law and logic they are not meant to go down that road.

Q131 Elizabeth Truss: What about guidance for prosecutors? Could that help?

Professor Horder: I would be reluctant to do that because it would involve guidance that is effectively telling prosecutors to charge manslaughter where the House of Lords has in fact indicated that neither murder nor manslaughter is an appropriate verdict. You are going down the wrong road, but just a little less far than if you charged murder, if I can put it that way.

Q132 Elizabeth Truss: Finally, are you critical about the way the courts have behaved? You talked about all the trimming and adding little bits on they have been doing. Do you think that has been a problem and how can that be addressed? Are you saying legislation is the only solution to this?

Professor Horder: Legislation is the only solution because of the knots the law has tied itself in, if you think it is a big enough problem in point of justice to be worth the agony of trying to get it right. Sometimes you can make a bad situation worse by legislating. I know that will come as no surprise to anyone here, however it is true. Although the situation is bad, there is the risk it could get worse, particularly if reform of the law of murder and manslaughter—the joint enterprise principles—are not properly integrated with other areas of the law. Going back again to my example of the burglary and murder, it would be a funny situation if the judge had to give one set of directions under statute as to what constitutes complicity in murder, but a second set of directions drawn from the common law as to what counts as complicity in burglary. That would be pretty baffling.

Mr Llwyd: An obvious facet of the common law system is that cases often eventually make law. We all live by that rule, don't we?

Q133 Chair: One of our witnesses thought that a number of cases should have been dealt by joint enterprise, but that prosecuting authorities and the police tend to use joint enterprise in what they call high-profile cases. You have looked at a lot of cases. Have you come across any evidence or indication that that might be so?

Professor Horder: Across the board, I do not believe that is so, because joint enterprise, as I mentioned earlier, is a perfectly ordinary normal doctrine that is going on day in, day out with thieves, burglars, robbers, sexual offenders, and in relation, for example, to sex trafficking. It is central to the commission of that last offence. It is going along perfectly normally and not causing any trouble and never getting into the appeal courts in all those other cases. It is just the murder ones that keep coming back and forth.

The trouble is what makes a case high profile. I don't know. Is it that the media pick it up? That is a hard thing to answer.

Chair: Thank you, Professor Horder. We have all benefited from the clear and careful way you have answered our questions.

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Examination of Witnesses

Witnesses: **Mr Crispin Blunt**, Parliamentary Under-Secretary of State for Justice, **Keir Hopley**, Deputy Director in charge of criminal law and legal policy, and **Michael des Tombe**, Senior Legal Adviser, Ministry of Justice, gave evidence.

Chair: Minister, welcome. You are becoming a regular before us, this time on a different subject. You have brought with you Mr Hopley, deputy director for criminal law and legal policy, and Mr des Tombe, one of your legal advisers. We welcome all three of you.

Q134 Jeremy Corbyn: Minister, thank you for coming again to the Committee. You will be aware of the concerns of victims' groups and organisations about miscarriages of justice in relation to the joint enterprise doctrine. Our concern is that it does not seem that the Ministry of Justice collects specific statistics on the use of joint enterprise in obtaining convictions. Could you let us know if that is going to change?

Mr Blunt: It is unlikely to change in the near future. The feasibility test of whether we are able to collect that data on a system would have to change in order to acquire it. The amount of resources we would have to devote to it needs to be linked to the prospect of us making a significant change in that area.

Q135 Jeremy Corbyn: But have you been following the issue of joint enterprise and the concerns? The problem we have is with statistics. The number of convictions related to joint enterprise appears to be considerable, so I am frankly surprised that the Ministry has not studied that a bit more.

Mr Blunt: You would need to do a manual trawl of individual cases to identify where joint enterprise had been present in that case. The court and CPS systems do not individually record joint enterprise, and it would be impossible in those circumstances to do an electronic trawl of cases. You would have to go back to the cases individually and manually to do that. If there were an immediate prospect of an issue to address—I understand the scale of how often joint enterprise is used—we would, obviously, have to consider whether to devote that scale of resources to it, but I would be misleading you if I suggested that that were an immediate prospect.

Q136 Jeremy Corbyn: Do you think that the DPP follows this? Would they be in a position to give you information that would be helpful?

Mr Blunt: The CPS systems have the same issues as the Ministry of Justice court systems. The convictions are not recorded as joint enterprise convictions.

Q137 Chair: They could if you asked them, couldn't they?

Mr Blunt: Well, we would then have to change the systems in order to do so.

Q138 Mr Llwyd: There is an immediate concern. The Law Commission has twice reported on the matter since 2007. I would not say that it is a burning issue, but it is an immediate issue that needs some form of research.

Mr Blunt: We said to the Law Commission that there is no prospect of addressing it in the course of this Parliament. Listening to the evidence that you have just taken on changes in the area, if we were going to proceed through a Law Commission review process, we wouldn't simply look at the issue in isolation. We would obviously have to look at the law of murder. Again, with that review, we have made it clear that there is no prospect of doing that in the course of this Parliament.

Q139 Jeremy Corbyn: Would you be prepared either to collect some information from now-ish onwards or to undertake a commissioner's study on a sample of cases in order to get some kind of picture?

Mr Blunt: I am completely open-minded about acquiring evidence. If it is your Committee's recommendation, having examined this, we will obviously look at that recommendation, but it comes back to the issue of availability of resources. If it is possible to get a better fix on this without it costing an arm and a leg in terms of either people or money, it is an area where we could do with better data. I notice that your interrogation of some of the witnesses last week made it clear that some of the evidence being presented was at a pretty early stage of development, if I can put it like that.

Q140 Nick de Bois: Minister, it has been suggested that the joint enterprise doctrine has a role in deterring young people from becoming involved in criminal activity. We have heard about gangs. Do you think it is clearly understood by young people what the doctrine is, and do you believe that it is a deterrent?

Mr Blunt: This is difficult. How many young people actually understand the details of sentencing? The answer is probably "Not very many", but there is a central tenet that can be communicated to people, and it goes with the wider agenda of responsibility that the Government is trying to inculcate: you shouldn't be able to walk by on the other side and do nothing about it. If, even worse than that, you are party in some sense to what is going on, what is meant by joint enterprise is that you want to look out, because you are going to be responsible.

I was reading some evidence from one of your witnesses from Sheffield, who made it clear that in their part of the community, kids understood the notion of joint enterprise. We heard in Mr Corbyn's questioning just now a sense that this could cut both ways. It means you are responsible, but, if the doctrine is then used by the CPS in bringing prosecutions, does that reinforce gang identity, or does it help society make it clear to people that they are responsible for the actions of their associates when they know perfectly well what is going to happen?

Q141 Nick de Bois: But what is your opinion of those two choices?

Mr Blunt: My opinion is that I want a responsible society, and it should be a society in which—in a sense, this has nothing to do with crime—you do not walk by on the other side. Certainly, if you are associated with an offence taking place and you could foresee that offence taking place, you have to look out because you are responsible.

Q142 Nick de Bois: Looking at it from the other end of the telescope, do you think it might now effectively be a deterrent for people coming forward—that they think they might get caught up in it unfairly: in other words, that they might come forward to the police, get unfairly caught up in it and, as a result, be charged? Is there evidence for that, and if not can you collect such evidence?

Mr Blunt: In preparation for this and in going into the detail of it, I have not come across any evidence that suggests that people would be. Frankly, it would be slightly strange if evidence was being brought forward to prosecutors and police by members of the community on a voluntary basis, where they were helping the police and the prosecution with their inquiries and processes and they ended up finding themselves on the wrong end of a charge leading to very serious consequences, unless there were very strong reasons for doing so.

In effect, those people would be turning Queen's evidence and, in terms of public policy, you would want to reward that in some degree. That obviously has to be set alongside whatever their criminal liability is, and there the police and the CPS have to come to an appropriate balance of judgment.

Q143 Nick de Bois: Just one final question, if I may: given the Government's announcement today, launching their thoughts on the gangs strategy, will you and your Department be highlighting the issues we have discussed around this specific issue, for example, and will you be inputting that into the gangs strategy?

Mr Blunt: I have noticed that the debate around joint enterprise seems quite finely balanced. You have a group of victims representatives saying that it does not go far enough and that it needs to be extended, and you have prisoners who have been on the receiving end of these judgments giving their accounts to the people who gave evidence to you last week. So there is a sense in which we are in roughly the right place in terms of public policy. Joint enterprise exists, and you have a responsibility in that you want to look at what is actually going on: if you belong to a gang, and you can foresee what that gang is going to do, you want to be conscious that you potentially have a criminal liability.

Q144 Nick de Bois: May I just press you on that? You have summed up the situation as it is, given that the gangs strategy points to more work that schools can do and so forth, but my question was specific: will you be inputting into that your view that, for example, people need to be made aware of their responsibilities, or are you satisfied that the position is fine as it is?

Mr Blunt: I think that is not necessarily a matter for the Ministry of Justice; it is more a matter for the

police. There is a collective Government view that inculcating a sense of responsibility and making children aware of their responsibilities under the doctrine of joint enterprise—however it is then presented to 13, 14 and 15-year-olds in school, for example, on programmes that already exist—is an appropriate thing to do. You can always educate people better in almost any area of life, and this is no exception. It may well be an appropriate part of the gangs strategy to make that clear.

I know from what I saw on a visit to the United States that, in a sense, their gangs are rather more developed, certainly in terms of their firepower, the hold they have over communities and their identity, compared with what exists here. I was briefed in Austin, Texas, by the chief of police about the strategy they take. They go out to children in their school system—11, 12, 13-year-olds—to begin to deal with all the issues that potentially arise out of the consequences of gang membership falling on their communities, and to try to catch them before they get into gangs.

Within a process like that, I find it extremely commendable if that is part of the gangs strategy that falls out. It is obviously largely down to the police in different local areas what strategy they take, and it is entirely appropriate. The doctrine on joint enterprise and the fact that you are responsible the moment you decide to get engaged in a gang is a good way of bringing the message home.

Q145 Jeremy Corbyn: Were you growing up in an urban community—say, London or Birmingham—and surrounded by postcode gangs who dominate their geographical area, and have very little social activities or alternatives, it is very hard for a young boy, in particular, not to be sucked into some kind of gang if only for their own identity and protection. Unless we offer some kind of societal alternatives to that, young people will be sucked into this and end up in a vortex and criminalisation.

Mr Blunt: I have considerable sympathy with your view, which is why the whole of the Government's policy needs to be addressed in a complete social justice agenda that actually joins up interventions that will happen early to support mothers of very young children in areas where they are at risk of ending up in gangs if something were not done to divert them from that course. That has to sit alongside the fact that you have to exercise responsibility for the choices that you make.

In social terms, we understand how people get led into crime and why there are so many people in our prisons who have challenges around mental health, addiction and the circumstances in which they grew up. It becomes terribly predictable that many such people have ended up in our prisons, but the fact is that they were criminally responsible for the sentence they received, and at the wrong end of that process is a victim whom, the courts will have decided, they chose to create. People are responsible for their actions even if they are in difficult circumstances, but this has got to be part of a wider social justice agenda—to then try to address those difficult circumstances and to make it easier for those people not to exercise the wrong

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choice. I accept that, but that is absolutely part of the Government's wider social justice strategy.

Q146 Mr Llwyd: Can I take you back to something you said earlier? I agree wholeheartedly that if a member of a gang goes out of an evening and something occurs, and that person has foresight, clearly that is an easy one. Part of our concern, however, is for the peripheral young person who is somewhere in the grey area, who does not have the foresight or any evidence to suggest that anything untoward will occur, but is actually at the scene. That is the sort of area that concerns us more than anything else. As much as we might not like the idea of gangs, mere membership of a gang does not make for liability. Joint enterprise, as you put it, is very easy in terms of foresight—we know that. Our concern is for the others on the periphery. That is where we need to be looking.

Mr Blunt: The public policy issue for me and for the Justice Secretary is whether we then attempt to go down the path of codification—we invite the Law Commission to look at the product of its four studies it has undertaken and then go through a very substantial programme of seeing whether we can codify and clarify the law in area and deliver the clarity that you are seeking. The previous witness made it clear that it was perfectly possible that codification would make things worse rather than better, and the public policy advantage of moving in very short order to that kind of review and potential codification escapes me. I actually think that the position we are in, with the doctrine drawn from the common law, leaves us in the right place for the judgments that are made when people are on the periphery. A jury has to be convinced of the merits of someone being convicted under joint enterprise in such circumstances. I think that, with the restrictions and the directions that should come from a judge to a jury in those circumstances, we are in a pretty reasonable place for justice to be done and for us to get those decisions at the periphery as right as we reasonably can.

Q147 Mr Llwyd: Two points arise from that. I note, Minister, that you were not here for the whole first evidence session, but Professor Horder said that it is a bit disconcerting that the Appeal Court is adding bits on as if it were extending a house without planning permission—extension on the extension, and so on—and it is getting a bit unwieldy. That is the point he made. He did not actually say that statute would be out of the question—he was a member of the Law Commission anyway.

Secondly, if, as you say, it is all okay and we are fine, why are there so many cases before the Court of Appeal? As we speak at this very moment, there is a pending case before the Supreme Court. There have been several appeals over the past 12 months, and in many of those appeals people have been acquitted on the very fact of the lack of clarity in this area of law.

Mr Blunt: I did not hear the beginning of the professor's evidence.

Chair: Which was paraphrased by Mr Llwyd.

Mr Llwyd: I hope fairly.

Mr Blunt: I obviously heard the latter end of it, and, from what I could hear, he was painting a very reasonable, balanced picture of the situation—one that I certainly recognise from the briefing and the research that I have undertaken. I think he was saying that there is a significant number of appeals where people are found guilty of murder, which is a regular source of appeal, as one would expect that, not least because of the mandatory sentence. Given the range of offences for which this is used, though, in other, less serious, offences there is not quite such a range of appeals as your question might imply.

Q148 Chair: If I may add another point, and I am paraphrasing too, some of the argument on joint enterprise is a proxy for an argument about jurisprudence on murder and manslaughter. That probably needs to be sorted out, but it cannot be sorted out by altering the position on joint enterprise.

Mr Blunt: Yes, I agree with you.

Q149 Mr Llwyd: What do you think are the potential benefits if the recommendations of the Law Commission were to be incorporated into statute?

Mr Blunt: It goes back to the Chairman's point. You would have to look at a wider codification, so you would have to be prepared to look at a re-examination of the law of homicide, perhaps looking more carefully at the Law Commission's recommendations on a three-tier law of homicide. Again, that is a very substantial amount of work and we do not want to start down that path now.

Q150 Mr Llwyd: I suggest to you, with regard to what you describe as lesser offences, that joint enterprise is very often used in burglaries and can be used in drug smuggling and many other things. Apart from burglary, obviously, in several of those other kinds of crime there will be a paper trail, so it will be easier to prove. The area of contention appears to be where you have a group of young people out on the streets and something occurs. Those are mainly the appeals that are going up to the Court of Appeal, and the one in the Supreme Court at the moment. There would appear to be a perfectly adequate framework for joint enterprise applying to many offences, but there may be a difficulty with gangs of people, and so on. That is the way I look at it.

Mr Blunt: I am happy to look at the conclusions of the Committee.

Mr Llwyd: We have not reached any conclusions yet.

Mr Blunt: What I am saying is that I will look at the conclusions the Committee comes to on the back of your taking the time to examine this area.

Q151 Mr Buckland: There is one obvious solution to dealing with cases where there is clear evidence of agreement and gang organisation and that is to use the law of conspiracy, where you can prove and use as evidence acts and declarations made by parties to that conspiracy, even though particular people who are party to it are not present. Conspiracy can be used to deal with particular cases where there is strong evidence of gang participation.

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Mr Blunt: Since you are a lawyer, Mr Buckland, I will allow my lawyer to answer that one.

Michael des Tombe: The simple answer to that is yes. If the prosecutors wish to go down that route, there is nothing stopping them.

Q152 Mr Buckland: Yes, we must not forget that. Sometimes, there is almost a fear of charging conspiracy. It is now rather an archaic sounding word to many people, but all it means is agreement, does it not?

Michael des Tombe: Generally that is right. I am not sure what the prosecutors' view on using the law of conspiracy is, so I cannot answer that part of that question, but the law of conspiracy still exists and can still be charged, so there is nothing stopping prosecutors doing that if that is what they want to do.

Mr Llwyd: We faced the same situation 20 years ago on conspiracy as the position we are in now. The perception was that it was overused and used as a rather rough-edged tool.

Yasmin Qureshi: As a former prosecutor, our opinion about conspiracy used to be that it was generally a last excuse and the last thing to use in a case where there was perhaps not enough evidence for a substantive charge. I am just talking off the record.

[Interruption.]

Chair: Order. I was handing over the questioning to Mrs Qureshi.

Q153 Yasmin Qureshi: We understand that the Ministry of Justice has actually written to the Chairman of the Law Commission to say that the chances of their recommendations being implemented into legislation are virtually non-existent.

Mr Blunt: In this Parliament.

Q154 Yasmin Qureshi: Exactly. We have the Legal Aid, Sentencing and Punishment of Offenders Bill coming through. Was any thought given to perhaps encompassing in that Bill some of the recommendations regarding joint enterprise and so on? If not, was it because this area is just too complicated and people do not understand it properly or fully; or was it that there genuinely is not enough time?

Mr Blunt: There was a discussion at various earlier stages of what would make up the legislation that is now before the House. One of the steers that the Department was seeking from Ministers was what we

were going to do about these Law Commission reports. The answer to that was in February's letter to Lord Justice Munby. However, some time before then, in framing the Green Paper "Breaking the Cycle", which led into the sentencing elements of the reforms in the LASPO Bill, it was decided that we had quite enough to do without embarking on an exercise of the scale required here. We certainly would not have been in a position to bring forward legislation now, even if we had started on 15 May last year. It is not a priority item, I think, in either of the manifestos of the coalition parties. I may be corrected on that, but it certainly did not appear in the coalition agreement.

Q155 Mr Llwyd: Did you take into account the views of the Director of Public Prosecutions on the Law Commission's proposals on joint enterprise?

Mr Blunt: I am reasonably certain that they will have informed it, but Mr Hopley may say exactly how.

Keir Hopley: I think the DPP's view, as indeed he said when he gave evidence to you last week, is that the law is working reasonably well. As the Minister said, we looked at the issues and we looked carefully at the Law Commission report, but, in the light of everything else that needed to be done the Government concluded that this was not a priority for legislation.

Mr Llwyd: To be utterly fair, the DPP said that there was some lack of clarity in some of the things being proposed by the Law Commission.

Q156 Yasmin Qureshi: Do you think some of these issues regarding clarity or consistency in the use of joint enterprise could be satisfied through the introduction of better guidance for the CPS and police?

Mr Blunt: That is more a matter for the CPS and the police than for me. It would be better if your questions were addressed there.

To reflect on the point just made by Mr Llwyd, if you compare the Law Commission's report on joint enterprise with its review on homicide, its recommendations on homicide are pretty clear. There is not the same clarity in its report on these issues, which leads to the conclusion that if we had embarked on the process, it is possible that we would not have ended up any further forward than we are now.

Chair: Thank you very much, Minister and your colleagues. We are grateful to you for coming today.

Written evidence

Written evidence from Joint Enterprise: Not Guilty by Association

JENGBA is a national NGO founded in 2010 in response to large numbers of people seeking help from organisations which assist those claiming to be innocent of crimes of which they have been convicted.ⁱ It provides assistance to these individuals where possible, and campaigns for the abolition or reform of the joint enterprise law.¹

EXECUTIVE SUMMARY

- The use of joint enterprise law in criminal prosecutions has greatly increased in recent years.
- It has mainly been used in murder prosecutions.
- Joint enterprise was formerly based on an exclusionary principle using a test of whether the crime had been “authorised” by a co-defendant of the actual perpetrator but is now based on systematic inclusion of anyone believed to have “foresight” of what the perpetrator might do.
- As a consequence, it is now much easier for prosecutors to obtain murder convictions.
- Current proposals for changes to the law, are driven by policy based on supposition rather than on evidence.
- JENGBA’s own (incomplete) research indicates that the law at present encourages the drawing of unwarranted inferences from minimal evidence, leading to the conviction of numerous individuals who are actually innocent of the crime of which they have been convicted.
- The law has been transformed by judges without reference to parliament.
- The Law Commission’s proposals would exacerbate the problem.
- The consequences of implementing the Law Commission’s proposals would be that:
 - actual perpetrators of serious crimes will escape prosecution,
 - more innocent individuals will be wrongly convicted,
 - those individuals will be drawn from the young, the poor, and the socially excluded,
 - young people who socialise in public places will feel under threat from the police,
 - huge additional costs will be incurred by prosecuting and incarcerating large numbers of innocent people, and
 - criminal law in general will be corrupted and the presumption of innocence nullified.

1. *How often and in what types of cases is joint enterprise used?*

1.1 Joint enterprise and similar expressions are referred to as “legal doctrine”, or are left with an uncertain status. JENGBA will refer to the subject as joint enterprise law.

1.2 We have no doubt this law is used extensively and that usage is increasing. JENGBA has at 8 September 2011 records of 256 people who claim to be innocent of the crime of which they were convicted through use of the joint enterprise law. Members of JENGBA have investigated in depth approximately 50 of these cases. We will refer to these cases as JENGBA cases.ⁱⁱ

- 1.2.1 Of these, a large proportion claim to have been not responsible for any crime at all at the time when the crime of which they were convicted occurred.
- 1.2.2 51% of those convicted in JENGBA cases are from black and other ethnic minorities.
- 1.2.3 Frequency of use of joint enterprise law is hard to assess. The Ministry of Justice does not measure the use of joint enterprise in prosecutions. JENGBA has compiled a list of cases not yet determined which on 28 July 2011 stood at 233 charged or on trial for the murder of 82 victims.ⁱⁱⁱ The ratio of accused to victim seems to be fairly static at 3:1. If it is assumed there is one actual murderer per case, that leaves about 151 people with secondary or no culpability for the deaths.
- 1.2.4 Of the 233, 12% are known to be under 18.
- 1.2.5 The list of those *convicted* JENGBA has compiled from internet media trawls shows that of 112 people jointly charged with murder, 80 were then convicted (71%). This is higher than the conviction rate in England and Wales of 55% for offences against the person in 2010.^{iv}

1.3 A BBC News report of 7 September 2010 states that since 2008, more than 350 defendants have been prosecuted in just 116 murder cases, and joint enterprise law has been applied in all of them.^v

1.4 The overwhelming majority of joint enterprise cases known to JENGBA result from allegations of murder:

- 1.4.1 Commander Simon Foy, head of the Metropolitan Police Serious Crime Squad, said in an

¹ This submission was written by Dr Andrew Green and approved by JENGBA on 7 September 2011

interview published on 21 April 2011: “Joint Enterprise has a lot of popularity around murder. It’s mostly used in murder...”.^{vi} Development of the law by judges (see below) is followed closely by the police who have found it useful.

2. *Has the use of joint enterprise in charging defendants changed in recent years?*

2.1 JENGBA cases have occurred over the last 10 years and longer. Court practice and appeal decisions have changed the law significantly so as to makes its use attractive to police and prosecutors. The change and the increased popularity (and hence application) of this law has resulted in many people convicted through use of this law claiming to be actually innocent of the crime of which they have been convicted.

2.1.2 Beatrice Krebs^{vii} argues that the joint enterprise doctrine formerly required the use of an exclusionary principle using a test of whether the crime had been “authorised” by a co-defendant of the actual perpetrator,^{viii} but is now based on systematic inclusion of anyone believed to have “foresight” of what the perpetrator might do.

2.2 Krebs argues the change has been determined by policy considerations. This is agreed by most authorities. Anita Davies, of Matrix Chambers, writes on the Supreme Court website: “joint enterprise law and public policy have become closely linked—some might say uncomfortably so. The broad nature of joint enterprise as it stands has often been justified on the basis that it is a deterrent to gang violence”.^{ix} Lord Mustil said in his House of Lords judgment in *Powell and English* (1997) that the law is determined by “practical and policy considerations”, and Lord Hutton was prepared to abandon logic in the application of this law: “In my opinion there are practical considerations of weight and importance related to considerations of public policy ... which prevail over considerations of strict logic”.

2.2.1 The effect of developing the law is that proving guilt in joint enterprise cases has become much easier. It is generally recognised in the legal community that it is far easier for prosecutors to obtain murder convictions by using joint enterprise law than through conventional prosecutions.^x

2.2.2 Currently, proof of intent, presence at a crime scene, or positive identification of a perpetrator are not required. Since *Powell & English* (1997), proof of foreknowledge of a potential perpetrator’s possible state of mind and capability of causing serious harm are all that are needed.

2.2.3 The Law Commission’s proposals omit all reference to intent. They explain: “D [a defendant] should not have to intend P [perpetrator] to commit the conduct element of the principal offence” (3.128). They assert that a person who joins a criminal gang thereby changes her or his normative position to that of the gang, and thus becomes responsible for any criminal acts carried out by other members of the gang.

2.2.4 Professor Jeremy Horder, a member of the Law Commission when *Participating in Crime* was published, said joint enterprise is being used to scoop up anyone who was present at the time, rather than those actually involved. “It may be that only some members of the gang endorsed or encouraged or helped the killing, others did nothing of the sort. But they’re all being scooped up in with it”.^{xi}

2.3 Policy-driven legal development requires a policy derived from empirical knowledge of a problem to be rectified. In all the discussions of the Law Commission, the Ministry of Justice, commentators like Lord Phillips, and the academic sources they choose to quote on the subject of joint enterprise and the perceived need for this “draconian law”,^{xii} no use is made of empirical, academically respectable research or careful consideration of the evidence deployed in actual cases.

2.4 JENGBA’s own research, although based on a limited number of cases, is derived from actual cases and a review of the evidence used in them to secure convictions. It shows frequent use of a limited range of types of evidence, all of which are vague, inadequate or of dubious value. Each may provide valid grounds for suspicion, but they have been elevated to the status of evidence sufficient to prove guilt of the most serious crimes. JENGBA’s argument against joint enterprise law in its current formulation and application is that it leads to the admission of evidence in trials which is inadequate to prove involvement in crimes and so leads to numerous miscarriages of justice. All other discussion of joint enterprise law ignores the actual evidence used in cases and does not question its validity and its relationship to the low standard of proof required. Only JENGBA has begun to analyse the evidence itself. We offer our preliminary conclusions below.

2.4.1 *Mobile phone use evidence*: Commander Foy, head of the Metropolitan Police Serious Crime Squad, referred to “... mobiles, Facebook and social media. Now that we understand how everyone is communicating with each other we’ve followed the communication and the evidence and we’re able to prove this pre-planning has led to Joint Enterprise”.^{xiii} In JENGBA cases, only mobile phone *usage* has been used as evidence, no doubt because the content of the calls is not recorded, so timing and frequency of calls may be misinterpreted in the absence of content which would show them to be innocent.^{xiv} There is no other evidence of his participation in the crime. Mobile phone use evidence is inherently unreliable, since there are numerous innocent reasons for making calls, and no guarantees that owners of phones are also the users of them at any particular moment.

- 2.4.2 *Cell site analysis*: cell site analysis is similarly unreliable. It enables the place where a mobile phone is used to be identified. No doubt a useful tool for investigators, as evidence it suffers from technical problems such as re-routing of signals when blind spots are encountered, or one-sided instructions to expert analysts to establish, for instance, whether a suspect's phone use is consistent with presence at a crime scene, but not whether it is also consistent with presence elsewhere.
- 2.4.3 *CCTV recordings*: at or near crime scenes, often of poor quality, are used for identification of suspects through the use of police "experts", although their expertise is no more than that of anyone else, including jury members.^{xv} CCTV recordings of cars travelling near each other are interpreted as evidence of cars in "convoys" and hence participation in a joint enterprise.
- 2.4.4 *Witnesses under threat*: joint enterprise law has been developed to cover a wide spectrum of potential participants, including persons with a very tenuous connection to other suspects, giving police investigators a means of threatening possible suspects with murder charges in the hope that they will collaborate and name others. Former Metropolitan Police Commissioner Ian Blair wants "more young people who are involved in these crimes to turn queen's evidence, to give evidence for the prosecution about what happened ..".^{xvi}
- 2.4.5 *Gang membership allegations*: mobile phone call records, cell site analysis and CCTV records are all used in support of gang membership allegations. The empirical evidence basis for the policy pursued by prosecutors, judges, and legal academics when developing the joint enterprise law consists of assumptions about the existence of gangs and how gang membership transforms the behaviour of their members. Lord Steyn said: "Experience has shown that joint criminal enterprises only too readily escalate into the commission of greater offences. In order to deal with this important social problem the accessory principle is needed and cannot be abolished or relaxed".^{xvii}
- 2.4.5.1 In *Murder, Manslaughter and infanticide*,^{xviii} the Commission refers to a summary of other research.^{xix} The Commission summarises this summary: "Individuals who perform criminal acts in groups have been shown to be more disposed to act violently than those who act alone". Former Metropolitan Police Commissioner Blair refers to "wolf pack killings" (BBC Today Programme 8 September 2010).
- 2.4.5.2 In *Participating in Crime*, the Law Commission states:
- [W]e believe that the importance of any doctrinal difference is secondary to the *normative difference* that exists between joint criminal venture liability and other forms of secondary liability. It is this normative difference which underpins the recommendations in this report (3.130).
- They quote Professor A P Simester^{xx} twice in support of this view, and again (3.58):
- Criminal associations tend to encourage and escalate criminality. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address.
- 2.4.5.3 We do not argue against the view that individuals who join organised criminal gangs may change their normative position. But in many JENGBA cases assumptions of defendants' gang membership and of the very existence of a supposed "gang" is based on highly tenuous evidence. An extensive recent research project concludes:
- Gang "members" ... included in their social networks others who not only did not see themselves as gang members but who had a different normative and behavioural orientation towards crime. This is important since socialising with gang members is considered by the intelligence community ... as a key indicator of "membership"... Young people related to gang members, attending the same school or youth provisions, and living on the same streets were in danger of being classed as gang members ...^{xxi}
- 2.4.5.4 Police "intelligence" is based on such inadequate data mentioned, supplemented by the kinds of tenuous evidence we have listed and information from informants who are invariably criminals themselves with an interest in telling the police what they think they wish to hear. Aldridge et al. show that the police "create" gangs by describing loose associations as gangs and assigning them a name. This practice appears in such cases as that of the Cohen brothers.^{xxii}
- 2.4.5.5 The validity of police "intelligence" is seriously under question as this submission being written.^{xxiii} Riots are taking place in cities across England all of which appear to have come as a surprise to police forces. These were triggered by the killing by the police of Mark Duggan, alleged to be a gang member. A family member said:
- He was not a gang member and he had no criminal record. He was from a tightly knit group of friends who did separate things during the week and met up like childhood friends do, and yet some people are trying to describe that as a gang.

At least 30% of JENGBA cases involve defendants alleged to be members of gangs or other criminal associations which exist only in the minds of police and prosecutors.^{xxiv}

2.4.6 Any hope that the inadequacy of evidence will prevent prosecution is dashed by the enthusiasm of prosecutors for the construction of cases using only the most tenuous items of police “intelligence”, often using only a single strand of such evidence to prove everything required by the court.^{xxv} No one could ever be convicted of murder on such evidence but for the joint enterprise law:

2.4.6.1 Proof of foresight of a perpetrator’s violent tendencies, encouragement, and involvement in a joint criminal enterprise requires no direct evidence, but is commonly inferred from such tenuous evidence as that listed above. The drawing of such serious inferences from such evidence cannot be regarded as legitimate.

2.4.6.2 In addition, analysis of JENGBA cases shows that juries are regularly invited to draw multiple inferences from single strands of such limited and inconclusive evidence.

2.4.7 Defence lawyers contesting joint enterprise cases face a fundamental difficulty in contesting evidence which scarcely exists. For example, it is very hard to disprove a defendant’s knowledge of a perpetrator’s proclivity to violence and possession of a weapon in cases where the perpetrator has never been identified. This is compounded by lawyers’ ignorance of how the law has developed. Experienced criminal practice solicitor Julian Young believes “...the Crown has to prove that all of those present had an intent to kill or cause serious harm to the victim”.^{xxvi} Trial lawyers in virtually all JENGBA cases advised their clients they need not fear conviction because the prosecution case included no significant evidence.

2.5 It may be pertinent for the Committee to consider how change in this law has come about. JENGBA has attempted to trace this development through its cases:

2.5.1 Following the conviction of *Pinnock and others* (tried in Sheffield in 2004),^{xxvii} the case was said to have “made legal history” because none of the nine defendants were identified as the perpetrator of the murder, yet all were convicted of murder. In *Rahman*,^{xxviii} a Leeds case in which it was accepted that the perpetrator was not amongst the defendants, the House of Lords approved the directions of the trial judge, the late Richard Wakerley, that if the jury believed that a particular defendant was present at the scene of the crime “and intended and did by his presence alone encourage the others to attack” the victim, that would amount to participation in the murder. Wakerley also tried *Pinnock*.^{xxix} We have noted that all joint enterprise cases are tried by senior judges, who usually also sit as appeal judges, and who are often not associated with the crown court in which the trial takes place. It appears that judges are somehow selected to try cases likely to be significant for the development of joint enterprise law. Lord Justice Alan Moses, known for controversial views on juries, frequently heads appeal court panels hearing appeals in significant joint enterprise cases.

2.5.2 Legal development thus overseen is based on misinformation about the nature of criminal associations and the misconception that acceptance of minimal evidence as adequate to prove serious cases against individuals is necessary to counter danger to the public. We believe that to permit this development to stand would undermine parliamentary democracy. Permitting the Law Commission’s proposals to become statutory without further research and full public debate would be to let judges go beyond their duty to administer law and to let them combine to create law.

3. What would be the advantages and disadvantages of enshrining the doctrine in legislation?

3.1 JENGBA believes that the joint enterprise law should be abolished. Other laws covering inchoate offences already exist. Enshrining the doctrine in legislation in its current form would increase the great danger in which all innocent defendants currently find themselves.

3.2 Serious research must precede any proposal for fresh legislation, to prevent the continuing use of the law to convict innocent people on highly tenuous evidence.

3.3 The reduction in the standard of proof initiated by the existing and proposed development of the joint enterprise law will corrupt the criminal law and effectively nullify the presumption of innocence.

3.4 Since it is not possible to mount a defence to the extremely tenuous evidence encouraged by any existing proposal for legislation, a trial based on such evidence cannot be fair, and is therefore in breach of Article 6 of the European Convention of Human Rights.

4. What would be the impact of implementing the Law Commission’s proposals as set out in *Participating in Crime*?

4.1 In section 2 of the Commission’s proposal any remaining uncertainty as to whether *mens rea* needs to be proven is resolved by the omission of the word “intent”. The ease of proof of participation is further increased.

4.2 The proposed s.2(4), by supporting the rounding up of the absent, the indifferent and the objectors to the crime, indicate the Commission's desire not only to embody recent developments of this law in statute, but to extend them.

4.3 The following consequences are likely:

- 4.3.1 Actual perpetrators of serious crimes are likely to escape prosecution as the police "clear up" these crimes through use of the easy option of joint enterprise allegations.
- 4.3.2 Yet more innocent individuals will be wrongly convicted.
- 4.3.3 Those individuals will be drawn from the young, the poor, and the socially excluded. They will be drawn from the cohort of individuals targeted by the police through use of inappropriate "intelligence" gathering. They are likely to include a disproportionate number of black and ethnic minority members. As a result, the sections of the population from whom these individuals are drawn will be bitterly resentful of the criminal justice system in general and the police in particular (anecdotal evidence suggests this is already happening). This will contribute to the attacks on the police that happened across the country in August 2011.
- 4.3.4 Young people who socialise in public places will feel under threat from the police.
- 4.3.5 There are huge costs incurred by prosecuting and incarcerating large numbers of innocent people who are alleged participants in joint criminal enterprises.

REFERENCES

- ⁱ Some of these are listed at <http://www.unitedagainstinjustice.org.uk/index.html#members>
- ⁱⁱ There is a fuller account of the development of JENGBA and of how those seeking its support have made contact with it in the complementary submission from the prisoner support arm of JENGBA to the Justice Committee, at para. 2.3.
- ⁱⁱⁱ This number will necessarily be less than the actual figure for joint enterprise cases, since some in the smaller provincial courts may not get reported widely online and additional defendants are added to existing cases.
- ^{iv} Ministry of Justice (2011) *Criminal Justice Statistics Quarterly Update to December 2010*, 43.
- ^v Their source is not given, but the article implies the data have been provided by the Metropolitan Police (http://www.bbc.co.uk/blogs/guysmith/2010/09/theres_little_evidence_as_to.html)
- ^{vi} Live Magazine, 21 Apr 2011; <http://live-magazine.co.uk/article/joint-enterprise/554#>
- ^{vii} Beatrice Krebs *Joint Criminal Enterprise*, *Modern Law Review* 2010 73(4): 578–604
- ^{viii} Geoffrey Lane QC, approved by Lord Parker CJ, in *Anderson and Morris* [1966] 2 QB110 (CA) at 118–119.
- ^{ix} 25 July 2011 <http://uksblog.com/case-preview-r-v-gnango>
- ^x A view expressed by Chris Sallon QC speaking at a meeting in Parliament in March 2010, and the conclusion of research reported on the BBC Today Programme of 8 September 2010.
- ^{xi} BBC News 23 November 2009 http://news.bbc.co.uk/go/pr/fr/-/panorama/hi/front_page/newsid_8366000/8366280.stm
- ^{xii} Former Lord Chancellor, Lord Falconer, speaking on the BBC Today Programme of 8 September 2010.
- ^{xiii} 21 Apr 2011, <http://live-magazine.co.uk/article/joint-enterprise/554#>
- ^{xiv} A major item of evidence against *Wesley Porter* consisted of records showing that the perpetrators of a drive-by shooting called Porter several times immediately following the murder. He was never present at the scene. He responded eventually by calling back once:
In *Pinnock, McKenzie, Lindsay, Bryan, Gordon, Brooks, Powell, McPherson and Taylor* ([2006] EWCA Crim 3119), investigators traced mobile phones used in the area of a drive-by shooting, through an aerial six kilometres away. One phone was found in a police property store: it had been seized from a car four weeks after the shooting. The driver was arrested for a motoring offence, and the phone attributed to him, although he denied it was his. This was sufficient evidence to convict him of participation in the murder.
- ^{xv} For example *Smith, Spencer, Carter, Wilkins, Parchment and Christie* [2008] EWCA Crim 1342.
- ^{xvi} BBC Today Programme 8 September 2010.
- ^{xvii} *Powell, Daniels and English* [1998] 1 AC 1, 14.
- ^{xviii} LAW COM No 304.
- ^{xix} *Rationalisation of Current Research on Guns, Gangs and other Weapons*, Jill Dando Institute of Criminal Science 2005.
- ^{xx} 122 *Law Quarterly Review* 578, in paragraphs 3.131 and 3.51.

^{xxi} Aldridge *et al*, "Collateral damage". In *Youth in Crisis?*, ed. Barry Goldson, 72–88. London: Routledge, 2011.

^{xxii} *Cohen and Cohen* ([2010] EWCA Crim 1198):

Our attempts to investigate the cases of three men convicted with others in *Dean Smith and others* ([2008] EWCA Crim 1342) are hampered by the fact that they know nothing of their co-defendants, not having met them before the trial; similar problems occur in other cases..

^{xxiii} Sir Hugh Orde, president of the Association of Chief Police Officers, said in evidence to the Home Affairs Select Committee that the police had no inkling the riots would erupt. "What we saw ... was almost nonexistent pre-intelligence".

^{xxiv} The Observer 14 August 2011. In *Pinnock and others* ([2006] EWCA Crim 3119), nine people were convicted of a drive-by shooting in Sheffield. Police investigators traced the car used in the shooting to its registered owner. They threatened to charge her with murder, but dropped the threat when she agreed to name two men as the borrowers of the car on the night of the shooting. Her statement was the only evidence against one of them. She did not attend the trial and the police claimed to be unable to find her. Trial judge Richard Wakerley admitted her witness statement as evidence because he found she had stayed away from the court through fear, a judgment based largely on his personal perception of the appearance and demeanour in the dock of the defendant, a large black male.

^{xxv} In the cases of two defendants in *Pinnock and others* [2006] EWCA Crim 3119 the minimal evidence quoted above (possession two months later of a mobile phone for one and a claim by an absent and untested witness that he had borrowed the car used by the perpetrator for the other) was held to be sufficient to prove that the defendants were present at the scene; knew the perpetrator had a gun; knew he intended to cause at least serious harm to someone; encouraged him; and were part of a gang.

^{xxvi} Law Gazette 30 September 2010.

^{xxvii} Appeal judgment [2006] EWCA Crim 3119).

^{xxviii} Rahman, Akram, Amin, and Ali [2007] EWCA Crim 342, [2008] UKHL 45.

^{xxix} *Pinnock, McKenzie, Lindsay, Bryan, Gordon, Brooks, Powell, McPherson and Taylor* [2006] EWCA Crim 3119.

September 2011

**Written evidence from Gloria Morrison, Campaign Co-ordinator, Joint Enterprise:
Not Guilty by Association**

EXECUTIVE SUMMARY

- Consideration of the Law Commission's proposals—or indeed any new legislation on common purpose—is premature. If justice is to prevail, then there must be a full public inquiry into the application of the joint enterprise laws and a retrospective review of all cases of joint enterprise conviction.
- Currently at least 256 prisoners maintain their innocence and are contesting convictions under joint enterprise. The vast majority were convicted for murder, but also manslaughter, robbery and GBH and ABH. Our evidence suggests that the joint enterprise laws are used in murder cases to secure multiple convictions, when the police and the CPS are unable or unwilling to gather evidence, including forensic evidence, that will prove categorically which individual is responsible for the crime. What the widening of the scope of the law has meant in recent years, is that people end up being charged with a crime more serious than the crime they committed.
- The government has completely failed in its duty to carry out research and provide data on joint enterprise prosecutions, particularly in relation to the impact of the application of joint enterprise on the poor (most vulnerable to poor legal representation due to cuts in legal aid); BME communities, on young people, the disabled and those with learning difficulties. Of the 256 prisoners maintaining innocence who have so far contacted JENGBA, a staggering 59% are from BME communities.
- Approximately 25% of prisoners who have contacted JENGBA were under 21 when convicted. 30% of the cases known to JENGBA involve prosecutions of young people perceived to be associated with gang-related violence, particularly knife crimes. The misapplication of the joint enterprise laws to scoop up young people at the scene of knife crimes and the subsequent disproportionate sentencing of young people (to be challenged at the European Court of Human Rights as a breach of the European Convention) is a significant contributor to the breakdown of trust between police and young people, particularly from BME communities.
- The misapplication of the joint enterprise laws is not just a subject demanding of legal remedies in the future. The families of prisoners, who have borne the emotional toil of a miscarriage of justice, have been denied legal remedies in the past.

1. Background to Submission

1.1 Joint Enterprise—Not Guilty by Association (JENGBA) is uniquely placed to give evidence to the Justice Select Committee on the application of the joint enterprise (common purpose) laws in England and Wales. As well as carrying out research (see separate submission), JENGBA provides a support network for prisoners convicted under the joint enterprise laws who maintain their innocence, and it is run by their friends and families on a voluntary basis. Initially, the families of convicted joint enterprise prisoners came together after the Panorama programme “Lethal Enterprise” which focussed on the case of Kenneth Alexander (19 at the age of conviction for the joint enterprise murder of Michael Campbell, even though the judge confirmed he did not have a weapon and did not take part in the fight) and Jordan Cunliffe (aged 15 at time of conviction for the joint enterprise murder of Garry Newlove, even though he was blind, had no contact with the victim and the court accepted he did not inflict the fatal blow). The families, then supported by London Against Injustice, sought to quantify just how many people were affected by the laws, and together with London Against Injustice organised a public forum in the House of Commons sponsored by Karen Buck MP. Following this, JENGBA was formed and officially launched in Liverpool (where a substantial number of families of convicted prisoners maintaining innocence live) in September 2010 at a ceremony where 160 red balloons, representing each prisoner who had contacted us, were released.

1.2 JENGBA is organised via a committee structure. The committee meets regularly and maintains contact via the JENGBA website and our Facebook page. We have adopted a Constitution and aims and objectives, which includes a demand for a retrospective review of all cases of joint enterprise conviction. We are working with lawyers and QCS to establish a Joint Enterprise Unit at Toaks Chambers to represent prisoners who often were the victims of poor legal representation when their cases came to trial.

2. How often and in what types of cases is joint enterprise used?

2.1 As the number of families contacting JENGBA increases, it is important to note that the government and the Home Office should be able to provide information on joint enterprise prosecutions and convictions. Yet there is a total absence of any government or other research and, in reflection of this, Lord Herman Ouseley asked a parliamentary question, the answer to which revealed the total absence of data on joint enterprise prosecutions/convictions on the Ministry of Justice’s court proceedings database.

See www.publications.parliament.uk/pa/ld201011/ldhansrd/text/101123w0001.htm

2.2 So while it is impossible to quantify how often joint enterprise is used, JENGBA can only relate what we know from prisoners maintaining innocence themselves. JENGBA has, to date, been contacted by 256 people who challenge their convictions under the laws (the vast majority of these were convicted for murder, but also include convictions for manslaughter, robbery and GBH and ABH). Of these 256 current JENGBA prisoners, 152 are from BME communities.

2.3 JENGBA established its contacts with prisoners and their families through social networking, via our monthly newsletter, and via articles placed in the prisoners’ magazine, *Inside Times*. The overwhelming number of the 256 prisoners are from poor backgrounds, male (236), female (20); of those that we know of, approximately 25% were under 21 when convicted. We also surmise, given the application of the laws to deal with youngsters, this is not an accurate reflection of people convicted under the joint enterprise laws in young offenders institutions (YOI’s). JENGBA has not been able to reach this group of prisoners because initially we had a PO box which they are not allowed to write to or they are not aware of how they can address the injustice of their convictions. However, the families of children, *Tirrel Davis*, *Jordan Cunliffe*, *Oliver Hallam* (see father’s submission attached as supplementary evidence), *Oliver Uren* (a 19-year-old autistic boy) are represented by JENGBA.

2.4 The general public perception is that common purpose is used to target major criminal conspiracies or organised gangs. But we can prove categorically that the laws are not being used as a means of tackling organised gangland violence and organised criminal conspiracies ; rather it is being used to target any group of people (particularly young people) who are perceived to be part of a gang when they are (a) in the case of young people actually behaving in ways typical of young people, ie gathering on the streets, or (b) in the case of adults, are out with friends and subsequently are present at an incidents of random violence, sometimes fuelled by drugs or alcohol, and often taking parts in deprived areas of the inner city or poor neighbourhoods where the police and the Crown Prosecution Service may have certain preconceptions about the type of people who live in those neighbourhoods Thus, teenagers and adults who live in poor neighbourhoods are particularly vulnerable to prosecutions under joint enterprise. At the same time, this is precisely the type of people who, owing to cuts in legal aid, who are failed by legal representation that often gave poor advice at the time of arrest. In the case of *Oliver Uren*; a 19-year-old autistic boy was not allowed an appropriate adult in the police station when he was taken in for questioning. He was told by the police that they had CCTV evidence and DNA evidence to prove his guilt—when this was not the case. In court the CPS used an “expert” witness who had not examined Oliver but disputed his autism (he has been diagnosed since three) Oliver was found guilty and has been given 12 years for the theft of two mobile phones.

2.5 From the families that constitute JENGBA we detect the following trends: *Murder cases*. Our case-files suggest that joint enterprise laws are being used in murder cases to secure multiple convictions, when the police and the CPS are unable or unwilling to gather evidence, including forensic evidence, that will prove

categorically which individual is responsible for the crime. In fact, in some cases there is virtually no concrete evidence provided upon which to convict the accused. In this sense, the widening application of the joint enterprise laws has taken place at the same time as the courts have been increasingly willing to entertain hearsay evidence, Queen's Council. The most frightening of these is cell site evidence; it does not need to be proven what has been said during a phone conversation just that a call was made. (See supplementary material attached to this submission from *Delphon Nicholas* who received a 30-year sentence on the evidence of a phone call made when he was already in prison).

Random incidents of violence: Spontaneous incident on streets/late night alcohol or drug fuelled incidents/disputes over minor incidents then are treated as serious criminal conspiracies where the joint enterprise laws are applied. There is also an alarming number of cases where a "defendant" is offered a deal by the CPS and they become a prosecution witness. It is their single evidence that secures multiple convictions. (See supplementary material attached to this submission from *David Taylor*).

3. *Has the use of joint enterprise in charging defendants changed in recent years?*

3.1 In recent years, we have seen the police and the CPS, gradually widening the scope of the laws. What the widening of the scope of the law has meant in recent years, is that people end up being charged with a crime more serious than the crime they committed. In many cases the Crown has already secured a guilty verdict as the "actual" perpetrator of the crime has pleaded guilty. They go on to secure convictions of numerous others and they are given more hefty sentences because they plead not guilty to something they were not responsible for. As in the case of *Laura Mitchell*; the man who pleaded guilty to kicking another man in the head was not in court when Laura and four others received life sentences for his actions. (See supplementary material attached—JENGBA interview with *Laura Mitchell*)

3.2 Since the issue of knife gangs and youth violence came to the fore, the scope of the law has been widened and joint enterprise is now used to deal with incidents of random street violence, particularly serious offences carried out by young people who are perceived to be part of a gang culture. This comprises approximately 30% of the cases known to JENGBA.

3.3 However, in relation to our point above (2.1 in relation to the total absence of government research on data) we know of not one single piece of Home Office research on joint enterprise and young people. Our evidence suggests that the joint enterprise laws, in much the same way as stop and search, are leading to alienation from the police force amongst young people, and yet we know of no government research into whether the application of the joint enterprise laws have in influencing young people's views of the police or its effectiveness in dealing with knife crime or gang activity. No research which shows the percentage of youth offenders serving life for murder, serving the tariff for joint enterprise murder. (Attached response from MOJ.)

3.4 There is a growing backlash against the joint enterprise laws amongst young people, and several challenges have, or will be made, to the European Court which will argue that the UK is in breach of the human rights of young people owing to the disproportionate sentencing of young people under the laws and our own research shows this is vastly disproportionate towards BME communities. The case of *R V Rahman 2008 (UKHL 45)* involved a challenge to the convictions of four young Asians, aged 17–22, for the joint enterprise murder of Tyrone Clarke in the Leeds suburb of Beeston in April 2004. Clarke died of a single knife wound and it is believed that the knifeman is still at large. *R V Rahman* established that a secondary party in a murder is liable for murder on the basis of foresight of the principal party's action. The judgement is contested by lawyers who plan a challenge at the European Court of Human Rights.

3.5 This extension of the laws to deal with young people is part of the police's response to gang-related violence, particularly knife crimes. Thus, in 2009–10 the Metropolitan police engaged in a major advertising campaign warning young people of the danger of knives, and explaining to them that if they are in a gang, and one person commits murder, they could all be held responsible under joint enterprise. Thus, we concur with views of Professor Jeremy Hader and former Lord Chief Justice, Lord Phillips, who expressed concern to the Panorama team that joint enterprise is unfair and is being misapplied to scoop up young people at the scene of serious crimes. To this we would add that JENGBA is seeing increasing evidence of a growing number of cases that demonstrate a lowering of the threshold—so that circumstantial evidence/hearsay evidence/cell-site evidence/Queen's evidence—is used to secure convictions.

4. *What would be the advantages and disadvantages of enshrining the doctrine in legislation?*

4.1 Before we can even begin to talk about new legislation, we need to examine what has gone wrong in the past and what can be done to rectify past miscarriages of justice. At the moment, the application of the law is being widened, with absolutely no checks and balances. Any attempt to enshrine the doctrine in legislation that would involve institutionalising the present status quo would be disastrous and would end up institutionalising discrimination against people from poor neighbourhoods, particularly from BME or poor white working class communities, who are, by and large, those maintaining their innocence after convictions of the law.

4.2 What is needed instead is a full inquiry into the application of joint enterprise as it now stands, an application which in our view shifts the scales of justice further in favour of the CPS and Police towards multiple convictions based on a lack of concrete evidence thus further institutionalising hearsay evidence.

4.3 Such an inquiry would consider whether the application of joint enterprise undermines the rule of law as it tears at the fabric of a universal justice system based on evidence proportionality.

4.4 Such an inquiry would also need to consider the relationship between the joint enterprise laws and what we identify as corrupt procedures, procedures that outweigh the long-established principle of innocent till proved guilty. In particular, whether joint enterprise has allowed a wholly inappropriate relationship to develop between police and certain sections of the media with prosecutions accompanied by high-profile media campaigns, ensuring a prejudicial atmosphere and lessening opportunities for a fair trial. As we have repeatedly stressed in the course of this submission, an individual is never actually proved guilty of the actual offence. What happens in its place is that the individual is often excluded from any possibility of a fair trial, as he or she is tried in the media even before appearing in court. (We can supply you with concrete information to prove that this took place in the cases of *Jordan Cunliffe*, *Jade Braithwaite*, *Ruby Thomas*, *Kelvin Horlock*, refer to which newspapers guilty of prejudicial coverage, *Daily Mail*, *Sun*, *Evening Standard*, *News of the World*, same newspapers time and time again!) . We have seen case after case where key information about the case appears in the newspapers in sensationalised terms, quoting unverified police sources. Often the defendants are presented as members of named gangs, which in our experience are fictitious (made up by the police or the newspapers such as “MDP”, “Abattoir Gang” and “Market Street Boys”). This guarantee a more salacious story—elevates the case into a cause celebre and establishes a prejudicial environment to secure convictions.

4.5 *What would be the impact of implementing the Law Commission’s proposals as set out in Participating in Crime?*

Consideration of the Law Commission’s proposals or new legislation on common purpose is premature. If justice is to prevail, then there must be a full public inquiry into the application of the joint enterprise laws and a retrospective review of all cases of joint enterprise conviction. The misapplication of the joint enterprise laws is not just a subject demanding of legal remedies in the future. The families of prisoners, who have borne the emotional toil of a miscarriage of justice, have been denied legal remedies in the past. There has been simply nowhere for them to turn. The role of the Criminal Cases Review Commission (CCRC) as an investigator of potential miscarriage of justice has proved wholly inadequate in joint enterprise convictions. The appeal courts are unwilling to accept that mistakes may have been made in securing a conviction which means appellants have had to go to the CCRC for assistance. However the CCRC will only investigate and send a case back to the court of appeal when there is “fresh” evidence. We argue that in many joint enterprise cases there is simply no evidence to convict and so this route for justice is simply an impossible one.

The role of JENGBA has been to highlight these unjust convictions with hugely disproportionate sentences for crimes not committed. The general public (and especially young people) are ignorant of fact that you can receive a life tariff for someone else’s actions. The prisoners are desperate for legal redress and a legal “brief” is being drafted by Andrew Green, Simon Natas, Prof. Lee Bridges and Tim Moloney QC who are also individually submitting to Select Committee. With the aid of social networking and other support we are a campaign that is growing in numbers (sadly) and also in conviction—because it is the right and only thing we can do for our loved ones.

September 2011

Written evidence submitted by the Ministry of Justice

EXECUTIVE SUMMARY

1. The following information is provided by the Ministry of Justice to assist the Justice Committee with its inquiry on the law of joint enterprise. The inquiry is seeking to answer the following questions:

- How often and in what types of cases is joint enterprise used?
- Has the use of joint enterprise in charging defendants changed in recent years?
- What would be the advantages and disadvantages of enshrining the doctrine in legislation?
- What would be the impact of implementing the Law Commission’s proposals as set out in *Participating in Crime* (Law Com 305, CM7084 2007)?

2. The Justice Committee’s announcement in July 2011, publicising the start of a new inquiry, appeared to indicate that joint enterprise and secondary liability were one and the same thing. However, we have approached the Committee’s questions on the basis that joint enterprise is but one part of the law on secondary liability (we note the academic discussion that they may even be separate and distinct doctrines. See, for example, paragraphs 3.47–3.58 of the Law Commission’s report *Participating in Crime*). We have focused our answers on joint enterprise alone, rather than secondary liability as a whole, as the Committee’s questions suggest that it is likely to be most interested in the former.

3. The Ministry of Justice cannot answer questions about charging practice, which are a matter for the Crown Prosecution Service (CPS), but we understand that they will be submitting evidence separately. We can, however, provide an overview of the law on joint enterprise and express a view on the potential advantages

and disadvantages of implementing recommendations on this subject contained in the Law Commission's Report: *Participating in Crime*.

THE LAW ON JOINT ENTERPRISE

4. Generally speaking, where two or more people are involved together as part of a joint plan or agreement, each will be liable for the acts done in pursuance of that joint plan or agreement if they foresaw that they might be committed.

5. However, if the act of the actual perpetrator was "fundamentally different" to what the other party to the enterprise foresaw that other party will not be liable (though, depending on the facts, he might be liable for other offences). So, for example, if a gang member (A) foresees that in the course of the joint enterprise serious injury will be caused to someone by punches and kicks, but another party to the enterprise (B) pulls out a gun and shoots the victim dead, A will not be liable for the offence of murder.

6. The Ministry of Justice does not hold figures on how often the joint enterprise doctrine is used in practice. The reason for this is that if, for example, three people were convicted for their part in a murder this would be recorded in the Court Proceedings Database as three convictions for murder. Figures held centrally do not record whether these convictions were on the basis of the defendants' role in a joint enterprise.

THE LAW COMMISSION'S REPORT: PARTICIPATING IN CRIME

7. On 10 May 2007, the Law Commission published a report entitled *Participating in Crime*. The report was the second part of its project on criminal liability for encouraging and assisting crime and built on a previous report on *Inchoate Liability for Assisting and Encouraging Crime* (Law Com 300). It also followed recommendations made in relation to complicity to murder contained in the Law Commission Report *Murder, Manslaughter and Infanticide* (Law Com 304) in November 2006.

8. The report on *Participating in Crime* makes a number of recommendations on making the law on secondary liability fairer and clearer. With respect to the joint enterprise doctrine, however, it does not recommend a fundamental overhaul of the existing position and acknowledges that most cases of joint enterprise, where the offence committed is the agreed offence, pose no particular problems (see paragraph 1.23). The report argues that difficulties may arise, however, where in the course of a joint enterprise "collateral offences" are committed which might not have formed part of the original plan. See, for example, the discussion in paragraphs 3.49 to 3.56 and 3.153 to 3.166. The report concludes that liability should continue to arise where a person is a part of a joint plan to commit an offence and *realises* what crimes might occur as a result of putting the plan into effect. But a party to a joint enterprise should not be liable for any offence that fell outside the scope of the venture (see paragraphs 7.9 to 7.12).

ADVANTAGES AND DISADVANTAGES OF ENSHRINING LAW COMMISSION RECOMMENDATIONS IN STATUTE

9. The recommendations on joint enterprise in *Participating in Crime* appear to offer potential benefits to the administration of justice, both in terms of facilitating prosecutions and in better targeting what behaviour should or should not be viewed as criminal. The Government would be reluctant, however, to seek to implement the recommendations on joint enterprise in isolation of the other recommendations in the report, which relate to secondary liability as a whole.

10. In January 2011 the Ministry of Justice published a report on the implementation of Law Commission reports in which it stated the Government was considering the proposals in the *Participating in Crime* report. Since then Ministers have written to the Chairman of the Law Commission to explain that whilst there may be potential benefits to implementing the report on *Participating in Crime*, this would be a major piece of work and it will not be possible to implement the report during the life time of this Parliament due to other priorities and pressures on Government resources. The Government hopes that it may be possible to return to this subject in the longer term, however.

September 2011

Written evidence from the CPS

I write further to the Justice Committee's inquiry into Joint Enterprise. I will be appearing before the Committee on 25 October 2011, when I look forward to exploring some of the issues covered by this letter in more detail.

As you will be aware, in May 2007 the Law Commission published report number 305 entitled *Participating In Crime*. The Law Commission's report addressed assisting and encouraging, joint criminal ventures, innocent agency, causing the commission of a no-fault offence, defences and exemptions, and extra-territorial jurisdiction.

When examining joint criminal ventures the Commission had regard in particular to secondary liability. The Commission recommended limiting the scope of secondary liability which the Commission felt had been over extended by the courts, with a view to ensuring comparable culpability between offenders. The Commission

also recommended increasing the scope of inchoate offences which it felt had been overly restricted by the courts.

The Commission made four recommendations specifically relating to joint criminal ventures. It would appear that the effect of those recommendations would be to potentially narrow the scope of joint enterprise so as to reduce the circumstances in which a second defendant may be found guilty of a principal offence but increase the circumstances in which that defendant would be guilty of an inchoate offence.

In general, the Crown Prosecution Service supports the proposition that there should be parity of culpability between offenders and that offenders should be punished in accordance with their culpability. An approach involving something akin to a calibrated scale of culpability would be welcome.

However, in seeking to bring about such an approach we do have concerns that the Law Commission's recommendations made at the time were somewhat complicated and might not achieve their stated aim owing to the lack of clarity around some of the wording used.

Furthermore, we would observe that the recommendations in report number 305 were published as part of a wider programme of recommendations made by the Law Commission and these should be considered in light of those other reports issued at or around the time of the report *Participating In Crime, such as Inchoate Liability for Assisting and Encouraging Crime* Law Corn No. 300 (2006); *Conspiracy and Attempt* (LCCP 183, 2007) and *Murder, Manslaughter and Infanticide* (Law Corn No. 304 (2006). Implementing the recommendations in a piecemeal and isolated fashion would not, arguably, bring about the coherent reform of the criminal law that was envisaged by these related reports.

In general we do not find that the operation of the doctrine of joint enterprise presents us with significant difficulties, although the mandatory life sentence in murder cases is sometimes cited as being a possible barrier to juries convicting those whose liability is more of a secondary nature. This issue may have been addressed by the Law Commission's separate recommendations around homicide which I understand the Government has decided not to implement for the moment.

Sections 44 to 46 of the Serious Crime Act 2007 now provide for inchoate liability across a range of situations. As an alternative to considering any new legislation, it might be helpful for us to further explore the scope for increasing the use of these offences in future.

Finally, I can confirm that the doctrine of Joint Enterprise is often used in prosecutions for a wide variety of offences, including offences against the person, offences of public disorder and fraud. It is not possible to say exactly how often joint enterprise is used as this data is not collected by the CPS, but the doctrine is well-established as a key part of prosecution decision-making.

October 2011

Supplementary written evidence from Joint Enterprise: Not Guilty by Association

Question 84 **Mr Buckland:** I understand and respect that, but it is the case, is it not, that you are giving evidence today on the basis of one side of the story? That is right, is it not?

Dr Green: Gloria Morrison answered this question, but in view of the Committee's concern about our data and our research plans, I will supply some additional information.

When someone who claims to have been wrongly convicted due to the use of the joint enterprise doctrine in their case, we ask them to complete an extensive questionnaire and supply if possible a transcript of the trial judge's summing up. If the case has been heard by the Court of Appeal, we download a copy of the appeal judgment. When we analyse a case in detail, our aim is to establish first whether there appears to be any reason why we might refer it to one of the lawyers who has agreed to take cases from us and review them to see whether there could be grounds for an application for leave to appeal or an application to the CCRC. Alternatively we might ask for it to be referred to a university innocence project through the Innocence Network UK (INUK), or we might take some other course of action requested by the person whose case it is, such as working with a lawyer already instructed by them.

Second, we extract data from the cases in order to discover any patterns that might emerge, such as the kind of prosecution evidence used in the cases, or other problems reported by those convicted, such as difficulties with legal representation.

We aim to analyse each of the cases in detail and as a whole in order to form a provisional view as to whether the person whose case it is might be actually innocent of the crime of which they were convicted, and if so, how they could have come to be wrongly convicted. In order to reach this view, we will review all case records disclosed to and produced by the defence, and we will consult those convicted as well as anyone else who can help us to understand the case. We will seek further evidence if appropriate which was not available at the trial. So far I have personally analysed ten cases (26 defendants, 17 of whom claim they have been wrongly convicted) almost or completely to this standard, and it was the concerns generated by the evidential features of these cases that informed the main submission to the Committee that I wrote on behalf of JENGBA. (We can supply any data from these cases that the Committee might require: names, appeal references where

appeals have been heard, details of our concerns relating to these cases, etc: I am not sending this data now since I suspect Committee members would not wish to be overwhelmed by the detail, and might prefer to wait for the report we will issue when we have completed our research.)

Our research project will make use of the data resulting from this process. We have also arranged provisionally to have access to data from about 20 cases held by INUK in their office at the University of Bristol School of Law. The terms of the project will be designed to show how the joint enterprise doctrine is applied in practice throughout the criminal justice process, so as to inform future policy development.

According to the evidence given on 1 November by the Parliamentary Under-Secretary of State, Crispin Blunt, legislation on joint enterprise is unlikely to happen in the near future. Professor Horder appears to favour the development of guidelines for the police and prosecution. If the Report of the Justice Committee's inquiry into joint enterprise acknowledges that empirical research into the practical operation of the joint enterprise doctrine would be useful for the drafting of prosecutorial guidelines, that would assist us when we seek support for our research project so that we can make it as thorough and well designed as possible. Crispin Blunt told the Committee that the Ministry of Justice would not be prepared to fund research even to the extent of determining the extent of use of the joint enterprise doctrine. Our research would be independently funded and would be qualitative as well as quantitative. Professor Lee Bridges of Warwick University, who advises us and who has conducted extensive empirical research into the criminal justice system, has informed us that there are methods by which the basic statistical data can be obtained from the CPS at low cost.

Question 87 **Jeremy Corbyn**: Explain to me what you mean by "a media trawl." You have just given quite a significant figure. If we are to use that as evidence, we need to know exactly where it has come from and on what basis it has been collected.

Dr Green: Our research into the current number of murder cases where the joint enterprise doctrine is used is conducted by Rosemarie Leclerc. She supplied us with the following information.

JE LIST—METHODOLOGY

1. Open <http://news.google.co.uk>;
2. search for "murder location:uk";
3. select "Pages from the UK";
4. select "Sorted by date";
5. select time range, eg "Past 24 hours";
6. look at possible reports of murder cases involving more than one person, eg Murder charged appear in court;
7. record relevant data in JE List's Accused sheet;
8. note names of victim(s);
9. Open <http://www.google.com/alerts>;
10. Create new alerts with names of victim(s) and accused, eg "John Johnson" (using "..." to narrow search for exact names);
11. Choose alert options as "Everything", "Once a day", "All results" and set desired email address for alerts; and
12. Monitor google alerts for changes/more details and amend JE List as needed.

SUMMARY

JE List data on cases is gathered by searching Google News for new and current cases where more than 1 person is charged with murder in England, Wales & Northern Ireland (also affected by English Common Law). In all cases, online media sources are cited to allow verification and further research. Accuracy of details is completely dependent upon media sources and corrected where anomalies are found.

The supplementary list, JE Convicted, is compiled from cases that have been concluded or reported in the media at appeal stage. It is not comprehensive and current status (appeals etc) are not up-to-date, but all names of convicted can be verified from cited sources. It is likely that substantially more people are currently in prison serving life for murder as part of a Joint Enterprise than this list shows.

I asked her:

Do you read the media reports, to see whether "joint enterprise" or something similar like "common purpose" is mentioned, or if it's obvious it must be JE? There are cases with multiple defendants where all defendants are directly involved (eg they all stabbed the victim) and others where they are alleged to have conspired to murder, which is similar to JE in practice but does at least require participants to have some intent to murder.

She replied:

I do read through the cited weblinks to get the date of death, location, name of deceased, names/ages/sex of accused, details of charges etc. Same with the trial outcomes, and when there's conflicting

media info I search on google where possible to get the correct info. So I do have a look through the sources—some of which make pretty lurid and unpleasant reading.

The data she supplied on 24 October 2011 was:

At least 230 people in England, Wales & Northern Ireland currently charged with/on trial for murder as part of a Joint Enterprise (87 deceased).

The ratio of murder accused to victims in JE cases is fairly static at 3:1.

9% of the 230 are female.

9% of the 230 are under 18.

In our original submission, at paragraph 1.3, we wrote:

A BBC News report of 7 September 2010 states that since 2008, more than 350 defendants have been prosecuted in just 116 murder cases, and joint enterprise law has been applied in all of them. (Their source is not given, but the article implies the data have been provided by the Metropolitan Police bbc.co.uk/blogs/guysmith/2010/09/theres_little_evidence_as_to.html).

I hope that this helps to show the scale of the current use of joint enterprise doctrine in murder cases.

November 2011

Further supplementary written evidence from Joint Enterprise Not Guilty by Association (JENGbA)

INTRODUCTION

1. This submission is made by Joint Enterprise Not Guilty by Association (JENGbA). It is a supplementary memorandum of evidence submitted at the request of the committee. It follows the oral evidence session on 25 October, and complements a previous submission. JENGbA is a campaigning organisation which aims to change the application of the Joint Enterprise law. This is to ensure that innocent people are not wrongly convicted, and that those wrongly imprisoned are released. The group is concerned by the way the law is used to permit cases based on inadequate and misleading evidence to go to trial. These cases may range from damage to property and affray, to murder or attempted murder.

2. The campaigning activities of the organisation are funded by voluntary contributions and it attempts to present its case to the public and to official bodies. We are not registered as a charity and raising funds is therefore difficult. JENGbA is pleased to submit further written comments to the committee, to explain our position, and we hope this is helpful.

3. Members of JENGbA feel strongly that further written evidence is necessary for several reasons. Primarily, this is because we are a voluntary organisation with limited time and resources. Providing definitive and complete evidence is a major task, and not to be undertaken lightly. Research is costly and time-consuming. Information gained from prisoners, and from judges' "summing up" statements is being studied, but much more needs to be done to uncover the full extent of the problem. We have formed a clear impression of the cases we have studied so far, and we hope the committee may be informed by our conclusions.

BACKGROUND AND SUMMARY

4. The committee will be considering the usefulness of the law of joint enterprise. The case will be put that this is a useful and convenient mechanism in the hands of police and prosecutors. It enables all those who have contributed to the commission of a crime to be apprehended and indicted. This is the category of secondary liability, which is certainly a factor in cases such as conspiracy to commit murder. Recent violent disturbances and riots in London, and elsewhere, have raised public awareness of an incipient "gang culture". However useful the joint enterprise approach may have been, it is also open to abuse and misuse.

5. There have been few if any guidelines on its application. We are especially disturbed by its use in individual cases of murder or manslaughter. In such cases, the need for evidence and a clear motive is scarcely required, and prosecutions go forward with little more than witness statements being presented to jurors and with a scant need to prove a motive. The material we have uncovered is only a small sample of that which could be obtained, and we urged the committee to recognise the need for further examination of the evidence in detail. There is a need for a change in the law, or the provision of sound guidelines which will avoid future miscarriages of justice, and right past wrongs.

IMPACT OF THE RIOTS AND DISTURBANCES

6. The riots and violent behaviour in British cities over the summer of 2011 had a searing effect on the public mind. Whether these were caused by physical or social problems was secondary to the need for justice and severe sentencing. The advent of gang-related disturbances, often using sophisticated communications technology, was highlighted in press reports and by politicians. The use of surveillance cameras in high streets confirmed to the public that there was a strong element of co-ordinated criminal activity in the ensuing disturbances, and in the resulting widespread looting and robbery. In such cases and instances, the use of JE

may have a justifiable purpose. However, in many cases of individual crimes, the use of joint enterprise has led to the prosecution of defendants who were far from the scene of the crime, and had little or no connection. These are crucial factors.

7. There has been a fierce public debate and in the media, about the nature of the riotous behaviour of some young people. This has looked at where it came from spontaneously, and what might be the remedies. The response of the courts has been to try and teach lessons to the unruly, and to make an example of the most flagrant breaches. Magistrates courts have concluded that higher sentences were required than they could impose. Judges have seen fit to make a distinction between crimes committed in isolation and those taking place during a riotous affray. In the latter case, a more severe sentence was thought appropriate and necessary. In many cases, the context of joint action or enterprise by groups of teenage offenders was the critical and determining factor. The application of the JE doctrine may have been effective, but its use should not be seen as having a potential application elsewhere without rigorous examination. Successful prosecutions in one sphere should not be generalised to essentially unrelated situations, where a more sensitive approach is required.

ROLE OF THE MEDIA IN THE HIGH PROFILE OF CASES

8. We believe the committee has taken an interest in the role of the press and media in crime reporting, and the resulting higher profile created. This is because press interest in a case can make a difference as to the attitudes of jurors and even professional judges. It is clear that serious JE cases, such as murder, are particularly sensitive and require careful handling. The extent of press coverage and public outrage can have an influence within the courtroom environment, and even upon the final sentence given. This is relevant to joint enterprise cases because it involves those held to be associated with a felony. We know of cases where jurors have convicted a JE defendant assuming that the sentence would be relatively light. However, a JE murder conviction may lead to a “mandatory” life sentence under the Homicide Acts, with a lengthy minimum term of 20 years. Jurors have been astonished at the length of some terms.

9. High profile cases generate press and public interest for different reasons. It may be due to a particularly vicious attack, or it may be because of the amount of premeditation involved, or even because of the glamour or character of the witnesses. Public intrigue in a complex case may lead to either sympathy or antipathy towards a defendant which, as a JE case, may result in rough justice and harsh sentences.

NEED TO PROVE A MOTIVE IN JE CASES

10. The unlawful killing of an individual may be seen as murder, but in a court, this has to be proved beyond reasonable doubt. Malice aforethought and a motive must be proven unless the homicide is to be taken as manslaughter. Whether a killing can ever be lawful is doubtful.

11. We are not concerned with the intricacies of jurisprudence, or the endless and ever changing nature of the human condition. We are concerned with the application of sound common law and judicial principles to serious and potential JE cases in the United Kingdom. This soundness test requires the need for proof and for motives that can be determined and clearly annunciated. We know of cases where a guilty verdict has been returned, yet no motive was proven. This has come to light in the comments of judges upon sentencing. No motive or reason given yet a guilty verdict on a charge of murder will yield a life sentence in a joint enterprise case. The unfairness and remarkable nature of this outcome is a direct result of the uncertain and unpredictable nature of the JE doctrine. Broad scope may be helpful in circumstances where conspiracy is proven beyond doubt, but may prove fatal in other instances where inconclusiveness or doubt is rife.

NEED FOR EVIDENCE IN PROVING GUILT

12. It is our strong contention that the looseness of the JE law has aided its application. This is often in cases of street gang attacks with grievous results. The law has been used increasingly over 20 years because of its all-encompassing nature. The police have increased their level of confidence in pursuing prosecutions. Many are convicted on circumstantial evidence only. There are no guidelines for them, or for the prosecution authorities. This situation must end to avoid innocent defendants being found guilty by juries with little or no material proof beyond simple witness statements.

13. In joint enterprise cases, there should be no “presumption” of guilt by association. Evidence, such as the existence of a murder weapon, or proof of motive such as clear financial gain, should be paramount in expecting a conviction. We believe that an attitude has developed among the police, whereby JE is seen as a convenient route to conviction with little need for conclusion evidence. This misuse of JE law has become widespread and could be deemed out-of-control. Outside the sphere of youth gangs and reckless group culture, application of the principle, must be accompanied by the need for reliable material evidence.

NEED FOR RESEARCH INTO THE NUMBER OF POTENTIALLY MISJUDGED CASES

14. As a voluntary group, JENGBA has been able to carry out only limited research. It has been in contact with academic sources and individual criminologist practitioners. We have built up a database of some 250 cases where we believe wrongful convictions have been made. There may be many more, where prisoners and

families have simply abandoned hope and accepted their fate. The need for research into the misapplication of the law, and into individual cases is urgent and we look to the committee to endorse this vital need.

15. We believe the JE law is, or has become, confused, unclear and is essentially flawed. Its application is also misconceived and often disproportionate to the actual needs. Our view is based on the representations we have received from aggrieved families and from serving prisoners. However, we understand the need for rigorous examination of the overall body of evidence, and for this to lead to new practice which avoids miscarriages of justice.

NEED TO REFORM THE LAW AND JUDICIAL PROCESS

16. Our main stance is that the law itself is in need of reform and greater clarity. The application of JE has grown up without the simple principles of fairness being incorporated. Fairness to all sides is fundamental in the judicial process. The approach needs a rethink.

17. The process of conviction starts with a police investigation and then an independent prosecution evaluation. Throughout the process, the possibility of “guilt by association” will be a factor in the minds of those involved. This has become a hidden law which holds sway in the minds of the prosecution. Its usefulness in teenage gang offences may mean that abolition is unlikely. However, updating the law, in full position of its likely value and effect is essential. We look to others to suggest how the law may be improved, but we stand ready to engage in such a positive process with benefits to society at large.

NEED FOR A FRAMEWORK OF PRINCIPLES IN APPLYING THE JE DOCTRINE

18. Regardless of new legislation, there is a need for a “Framework of Principles” as guidance on the use of JE law. Its successful use in some high profile cases should not cloud the need for an objective assessment of its wider value. The guidance should not be over prescriptive, but aim to clarify matters for all parties. Such guidance can be developed in the short term, and should be subject to public consultation and discussion. The guidance should be public and apply both to the police and prosecuting authorities. A review group to consider the evidence may also be helpful, but this should not impede the process, which is overdue.

19. The guidelines should be prepared by the Department of Justice, without the need for specific parliamentary sanction. Overall, we would suggest future judicial policy should:

- Focus on a more sparing and limited use of JE.
- Recognise the difference between gang-related offences and individual crimes.
- Identify the precise conditions where JE is essential and necessary.
- Utilise the results of research and data gathering.
- Be explanatory and capable of being understood by all sides.
- Recognise the need to consider the fate of defendants in past cases, and any redress.

NEED FOR PUBLIC SUPPORT AND UNDERSTANDING OF JE APPLICATION

20. The preparation of suitable and effective guidelines would be helpful in gaining public support and approval. At present, there is little or no public understanding of the JE law. It is an opaque area, which even lawyers find difficulty in grasping. We suspect that this absence of knowledge has played into the hands of those enthusiasts of the JE approach. The law should not operate in a muddled and confused state. This must be the case, even when it can be shown that JE has had utility and success. The public would expect no less.

21. The law itself is thought to date back some 300 years to the time of pistol duelling, when it was found helpful in apprehending all parties. This blanket approach was, and may continue to be helpful, but its function must be better explained. We would emphasise the separation of gang offences and individual offences. In the latter case, the defendant may have only a remote connection with the index offence. In such cases, the public would expect a law which establishes guilt beyond doubt. They would also expect this to be reflected in the approach of the prosecution. Scooping up offenders and bystanders is not helpful to a correct functioning of the law.

22. Public knowledge may be poor in respect of the JE law. However, the public sense of fairness is strong in relation to long term sentences being served for uncertain offences.

SOCIAL IMPACT OF CRIME AND RESULTANT SENTENCING

23. The impact of crime and *punishment* is a constant factor in the public mind. This can be heightened by the instances of violent behaviour, as often depicted in the mass media. Calls for decisive action are often heard from politicians and others who may seek to whip up public anxiety. In serious cases such as murder, public concern rightly urges forthright action in the courts and by the police. Miscarriages of justice should be avoided at all costs. These are a stain on the judicial process. Encouraging and assisting serious crime cannot be tolerated, but those who are held responsible must have these cases proven on an individual basis. Sweeping them into a JE action undermines and weakens the law of the land. We look to the committee to take a detailed look at this problem and understand the dangers it poses.

24. There have been many well publicised cases of unsound or unsafe convictions. This led to the Criminal Cases Review Commission being formed. The role of the CCRC in applying due process is essential, and it has been successful in many cases of rough justice. We would commend its work, and ask the committee to satisfy itself that the CCRC remains effective and is fully resourced to undertake this complex and demanding function.

EXISTENCE OF PRISONERS WITH GRIEVANCES

25. The committee should spare a thought for those many prisoners who have been wrongly convicted of remote offences. We are in regular contact with many prisoners serving life sentences for murders which they did not commit. Justice must apply to all concerned, whether victims, offenders or those held to be associated. We cite the cases of three individuals we have noted to illustrate the problem. These are Amanda Alden, Kevin O'Neill and Wayne Briscoe. All are serving lengthy sentences for crimes which they were held to be associated with or to have encouraged. Each case is different, and each must be judged on its merits, but these cases show clearly the misapplication of the JE law. Such cases are harrowing, and require a probing review of such rough justice. There should also be a review of the role of plea-bargaining in determining appropriate sentences. In some cases, prisoners may end up serving extra time simply because they continue to plead their innocence.

OVERALL CONCLUSIONS

26. We have found it important to submit a further memorandum of evidence to this inquiry. This is because the committee must be fully apprised of the need to understand what has gone wrong. Convicting all those involved in a crime is important. This is when a clear "conspiracy" has been established, and when that element can be proven. Any lesser approach, with a blanket cover for peripheral defendants is wrong and misguided. No one should be over exercised by the prospect of applying JE law to large numbers of opportunist rioters, shop-lifters or burglars. All must be equal before the law, and all must have the burden of proof in the hands of the prosecutors. We especially believe that gang offences and individual offences should be considered separately, and prosecuted accordingly.

27. JENGBA believes that this is an important moment in the history of judicial functioning. It is a moment when the law can be changed or clarified to avoid the miscarriages of justice of which we are all painfully aware. We look forward to a satisfactory outcome, and for the long term viability of judicial criminal procedure in the United Kingdom.

Edward Dawson and Gloria Morrison

November 2011

Written evidence from the Law Commission

Thank you for allowing me to see the uncorrected draft of the transcript of oral evidence from Tuesday 1 November when my predecessor Professor Jeremy Horder gave evidence before the Committee, and for offering me the opportunity to comment on that document.

I have just two comments to make on Professor Horder's discussion of the proposals and of the Law Commission's position.

First, in relation to Q111 in the transcript of evidence, Prof Horder explains that he could not say that the current rules governing joint enterprise liability are "causing injustices up and down the country". I would respectfully disagree. The trials in which joint enterprise usually arises involve offences of murder and manslaughter and, by definition, multiple defendants. They are long, complex and costly trials, with long sentences of imprisonment imposed. The trials are conducted by the most senior trial judges with representation from very experienced advocates, often including Queens' Counsel. Despite the experience at the bench and bar in these cases, and the now commonplace use of written directions and routes to verdict for the jury, the steady flow of appeals continues. In 2010 there were eight Court of Appeal decisions on this topic. The outcomes of the trials and indeed of the appeals are often perceived as illogical or unfair. The case for legislative reform seems overwhelming.

Second, in relation to Q130, Professor Horder appears to be agreeing that a solution to the many problems posed by the joint enterprise doctrine could *not* emanate from the Law Commission but only from the courts. If that is what he meant, I would, again, have to disagree. I suspect that what Professor Horder may have been meaning to emphasise is that legislation will be required. The Law Commission still believes that legislation is the only viable solution to the difficulties in this area of law. The Commission remains committed to helping to ensure that any legislative proposals that are taken forward are the best possible.

There is no denying that this is a complex area of law. With the intention of providing as comprehensive a picture as possible to assist the Committee in its understanding of the existing law, may I add a few comments on aspects of the current law that Professor Horder touched upon? This is not to suggest that Professor Horder's

interpretation of the law is necessarily wrong, but to emphasise that the law is so complex and volatile that the most recent decisions have added to the confusion.

The relationship of joint enterprise with secondary liability

This issue is discussed by Professor Horder in answer to questions posed by Yasmin Qureshi (paras 107–108). Professor Horder suggests that there are three distinct bases of liability that are related (“complicity”, “plain vanilla” and “joint enterprise”). Over the last 12 months the Court of Appeal has rejected that view and recognised instead that the correct approach is to view joint enterprise liability as simply one form of secondary liability. It is not a separate basis of criminal liability. This was made clear in *R. v. Mendez and Thompson*² and in *R. v. Stringer*,³ where Toulson LJ stated:

“Joint enterprise is not a legal term of art. In *Mendez and Thompson* the court favoured the view that joint enterprise as a basis of secondary liability involves the application of ordinary principles; it is not an independent source of liability. “[57]

In *R. v. ABCD* Lord Justice Hughes explained “It is necessary to remember that guilt based upon common enterprise is a form of *secondary* liability”. His lordship described the circumstances in which joint enterprise liability arises:

The expressions “common enterprise” or “joint enterprise” may be used conveniently by the courts in at least three related but not identical situations:

- (i) Where two or more people join in committing a single crime, in circumstances where they are, in effect, all joint principals, as for example when three robbers together confront the security men making a cash delivery.
- (ii) Where D2 aids and abets D1 to commit a single crime, as for example where D2 provides D1 with a weapon so that D1 can use it in a robbery, or drives D1 to near to the place where the robbery is to be done, and/or waits around the corner as a get-away man to enable D1 to escape afterwards.
- (iii) Where D1 and D2 participate together in one crime (crime A) and in the course of it D1 commits a second crime (crime B) which D2 had foreseen he might commit.

These scenarios may in some cases overlap.

There is utility in the use of the expressions “common enterprise” or “joint enterprise” in each of these situations, especially to introduce a jury to the proposition that a man may be responsible for acts which his own hand did not physically commit, if those acts are within the common purpose. But, as Lord Brown pointed out in *R v Rahman* at paragraph 63, the third scenario depends upon a wider principle than do the first and second. The important difference is that in the third type of scenario, D2 may be guilty of an offence (crime B) that he did not want or intend D1 to commit, providing that he foresaw that D1 might commit it in the course of their common enterprise in crime A.

This case involves, as many murder cases do, consideration of the third type of scenario. Here, as the jury must have found, there was an agreed common purpose to commit crime A, the beating of the deceased. The question was this. If in the course of it, one or more participants inflicted not simply injury but grievous bodily harm, when had crime B (murder) been committed by those who did not themselves personally inflict it?

Fundamental difference

In answer to question 108, Prof Horder gives the example of the burglar, D, being aware that in the course of the burglary he is committing with another, P, that P might cause serious bodily harm to the householder. D is not aware that P might kill. P does in fact kill the householder intentionally. Prof Horder suggests that D would not be liable for murder if P’s act was fundamentally different from that which D foresaw and he goes on to describe the courts’ approach. Prof Horder notes that the courts “toyed with the idea” that only if P used a more lethal weapon would his acts be regarded as so fundamentally different from that which D foresaw as to prevent D being liable for murder. I think it is important to emphasise Lord Brown’s categorical restatement of the law in the House of Lords in 2008. His lordship restated the law as follows at [68]:

If D realises (without agreeing to such conduct being used) that P may kill or intentionally inflict serious injury, but nevertheless continues to participate with P in the venture, that will amount to a sufficient mental element for D to be guilty of murder if P, with the requisite intent, kills in the course of the venture *unless (i) P suddenly produces and uses a weapon of which D knows nothing and which is more lethal than any weapon which D contemplates that P or any other participant may be carrying and (ii) for that reason P’s act is to be regarded as fundamentally different from anything foreseen by D.* (The italicised words are in the original and designed to reflect the *English* qualification).⁴

² [2010] EWCA Crim 516.

³ [2011] EWCA Crim 1396.

⁴ [2008] UKHL 45.

That restatement leaves no doubt that it is only if P uses a more lethal weapon that is the fundamental difference rule might apply. Read literally, according to the majority of the House of Lords in *Rahman* who agreed with Lord Brown, the “fundamentally different” plea is likely to succeed:

- (i) Only if there is a change of weapon (or the use of a weapon when none at all was contemplated).
- (ii) Only in cases where D was unaware of the weapon which P uses to kill V. This is controversial. The courts have not previously gone as far as holding that as a matter of law D is precluded from relying on the qualification if he was aware that P had the weapon. Why should D who is aware that P has a weapon but does not foresee the possibility that P might use be in a worse position than D who is unaware of the weapon? This is driven by policy.
- (iii) Only if the weapon used by P is different from that D foresaw might be used *and* more “lethal”.
- (iv) Only if *because of* the change of weapon and its more lethal nature that P’s act may be regarded as fundamentally different. Thus, not every killing by P with an unforeseen weapon of a more lethal nature will necessarily amount to a fundamentally different act.

Subsequently, that view has been challenged in the Court of Appeal. In *R. v. Mendez and Thompson*,⁵ in relation to the fundamental difference plea and weapons, the Court concluded that: “what matters is not simply the difference in weapon but the way in which it is likely to be used and the degree of injury which it is likely to cause” (para [42] of the judgment). Having referred to the Law Commission proposals in 2005, the Court concludes that it is “helpful to concentrate *on the life threatening nature* of P’s unexpected conduct as compared with the harm foreseen or intended by D” (para [44] of the judgment, emphasis added). The court endorsed as sound in principle the argument of the appellant’s counsel:

“In cases where the common purpose is not to kill but to cause serious harm, D is not liable for the murder of V if the direct cause of V’s death was a deliberate act by P which was of a kind (a) unforeseen by D and (b) likely to be altogether more life-threatening than acts of the kind intended or foreseen by D.... The reference to “a deliberate act” is to the quality of the act—deliberate and not by chance—rather than to any consideration of P’s intention as to the consequences.” (paras [44]-[47] of the judgment).

The Court of Appeal imposed a further important limitation on the scope of the circumstances in which D can rely on the claim that P’s act was fundamentally different from that which he foresaw. In *R v Yemoh*⁶ the Court of Appeal confirmed that the fundamental difference plea only has the potential to apply if D did not intend the victim to be killed and either:

- (i) D foresaw that one of the attackers might kill with intent to kill or cause really serious bodily harm;
- (ii) D intended that really serious bodily harm would be caused; or
- (ii) D foresaw that one of the attackers might cause really serious bodily harm with intent to cause such harm.

Manslaughter

In response to the question posed by Mr Llwyd, (Q114), Prof Horder returned to his example of the burglar, D, who was aware that his fellow burglar, P, might cause serious injury (by “roughing up” the householder quite severely) but has not foreseen that P might kill. Prof Horder suggests that in such a case D would not be liable for murder or manslaughter. Some doubt must be cast on that view by the decision in *R. v. Yemoh*. In that case the Court of Appeal held that if D intended or foresaw that P might cause non-serious injury, D remains liable for manslaughter even if P kills with intent to kill or do serious injury, unless P’s manner of doing so is fundamentally different from that D foresaw. The fact that P had a more grave intention than D foresaw does not constitute a fundamental difference.

If there is any further information that I can provide, or any other assistance I can offer to the Committee, then please do contact me directly.

David Ormerod
Law Commissioner

November 2011

⁵ [2010] EWCA Crim 516.

⁶ [2009] EWCA Crim 930.

Supplementary written evidence from the Crown Prosecution Service

Thank you for your letter of 1 November in which you invited me to respond to suggestions made in evidence to the Justice Committee by witnesses for the campaign group, Families Fighting for Justice. The witnesses suggested that the Crown Prosecution Service (CPS) had a different approach to “high profile” unlawful deaths in contrast to other cases about which there had been little or no publicity.

I, of course, have sympathy for the experiences of those witnesses who gave evidence after me and for their families. However, I do not accept what they said about the way the CPS makes prosecution decisions.

Any decision made whether or not to prosecute is made in accordance with the Code for Crown Prosecutors and it is not dependent upon the level of media attention that a particular case attracts.

The Code requires there to be sufficient evidence and for a prosecution to be in the public interest before a prosecution can proceed. I should stress that by “public interest” we do not mean it is of media interest, but rather the public interest factors both for and against prosecution set out in paragraphs 4.16 and 4.17 of the Code (I enclose a copy for your information). In addition, prosecutors are also required to take account of any views expressed by the victim (or their family) when deciding the public interest.

Keir Starmer QC
Director of Public Prosecutions

19 December 2011

ISBN 978-0-215-04058-9



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