



House of Commons  
Justice Committee

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# Joint Enterprise

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**Eleventh Report of Session 2010–12**

***Volume II***

*Additional written evidence*

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## 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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### Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the internet via [www.parliament.uk](http://www.parliament.uk).

### Publication

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/justicecttee](http://www.parliament.uk/justicecttee). 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 Piaquiardo (Committee Support Assistant), Frances Haycock (Sandwich Student) and Nick Davies (Committee Media Officer).

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# List of additional written evidence

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# Written evidence

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## Written evidence from Dennis Demery

(a) *An out-dated 300 year old law:*

Joint Enterprise can result in many innocent people being found guilty as a result of a *jury* not having a full understanding of this law and its intended application. Especially in cases where one person admits guilt then implicates other co-defendants in an attempt to get a reduced sentence.

(b) *The law on Joint Enterprise and Murder:*

In a normal murder charge the prosecution have to prove the defendant intended to kill or cause serious bodily harm. The law on Joint Enterprise is much looser effectively allowing someone to be prosecuted for murder if they foresaw that someone might kill or inflict serious harm. There is concern that this sets the bar too low for the prosecution, in some cases leading to people on the fringes being prosecuted when they are too morally remote from the murder to be charged with it. This may also result in deterring a witness from coming forward for fear of being jointly accused.

(c) *Joint Enterprise resulting in innocent people going to prison:*

Joint Enterprise does lead to innocent people going to prison. Who can foresee another persons actions? Are we now prosecuting so called mind readers I ask? To fill our already over crowded prisons on a presumption they have a god given gift to see into the future.

(d) *Joint Enterprise and Fraud:*

Joint Enterprise for some reason seems to be used rather selectively with it being reserved on the whole for violent crime. Why is it not extended to those swindling public funds from the tax payers of this country.

### TO SUMMARISE

This out-dated law is open to much interpretation lowering the bar for the prosecution and far too loose, leading to many unsafe convictions especially where a jury has to consider co-defendants. It is not clear if English Law supports a separate notion of “Joint Enterprise” or “common purpose”. An alternative view is that if the offenders have a common purpose, they will “aid & abet” each other thus the existing law of “Accomplice” is in place.

September 2011

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## Written evidence from Dr Peter Freeman

1. Each and every person is in control of his or her own actions (unless under duress and threat to life and limb). In a case of joint enterprise in a murder case, it could be that only one person commits the murder, while the other is convicted of murder under the joint enterprise law, by encouraging the act. There has been a case where a female admitted killing the wife of someone she was having an affair with, pleaded guilty and was convicted of murder with a minimum tariff of 12 years, whereas the husband of the murdered woman pleaded not guilty, but was convicted of murder by joint enterprise and got a minimum tariff of 18 years, although he was nowhere near the scene of the murder.

2. If two people are found guilty of the same murder, it would be fairer if a mandatory life sentence was given to the person who committed the murder, and a determinate sentence to the other person or persons involved, especially if they are not even present at the scene of the crime. If the person charged with joint enterprise is nowhere near the scene of the crime, then it is perfectly possible for the murderer to have changed his or her mind before committing the crime.

3. Many people are ignorant of the law of joint enterprise. It cannot therefore be a deterrent, as many people do not know that they are breaking the law.

4. In a case of joint enterprise, it can be difficult for someone to prove that he was not consciously involved in the crime. It seems at times that he has to prove his innocence rather than the prosecution having to prove his guilt.

5. In trials involving joint enterprise, each co-defendant is aware that, if he can implicate another or others in the crime, then the chances are that he will get a lesser sentence because his guilt is diminished. This has obvious dangers.

SUMMARY

The law of Joint Enterprise is too harsh. The person committing the crime has greater responsibility for the crime than for someone aiding or abetting him or her. The person aiding or abetting may be far away from the scene of the crime. In a trial, co-defendants will try to blame other co-defendants.

It would be fairer if the Joint Enterprise law was abolished, and those encouraging or helping the person committing the crime were charged with aiding and abetting the crime.

August 2011

**Written evidence from Emeritus Professor Lee Bridges**

EXECUTIVE SUMMARY

A survey of public opinion carried out in 2010 found that there was only minority support (21%) for murder convictions based on typical scenarios involving joint enterprise. This indicates that recent developments in the interpretation and application of joint enterprise, which have served to widen its scope and those caught in its net, runs contrary to majority public views as to what is fair and just in such situations.

1. The purpose of this submission is to bring the Committee’s attention to relevant findings from research into public attitudes to the law and sentencing on murder, carried out in 2010 by Professors Barry Mitchell of Coventry University and Julian Roberts of Oxford University. This research was funded by the Nuffield Foundation and published by them in 2010 (see *Public Opinion and Sentencing for Murder: An Empirical Investigation of Public Knowledge and Attitudes in England and Wales* at:

[http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder\\_Mitchell&Robertsv\\_FINAL\(1\).pdf](http://www.nuffieldfoundation.org/sites/default/files/files/Public%20Opinion%20and%20Sentencing%20for%20Murder_Mitchell&Robertsv_FINAL(1).pdf).

2. The research involved a sample of public opinion, based on over 1,000 interviews conducted at over 100 sampling points across England and Wales. The sample was scientifically designed to be representative of the general population on basis of such factors as age, gender and working status. As part of the survey, respondents where given two scenarios involving the potential application of the law of joint enterprise. These were:

Case A:

Jim and Pete, two 16 year old schoolboys, were walking home when they met Steve, also 16. Jim didn’t like Steve and they argued. A fight began during which Jim pulled out a knife and stabbed Steve to death. Pete shouted to Jim “Go on mate”, but otherwise simply stood and watched, making no attempt to intervene. Jim was subsequently convicted of the murder of Steve.

Case B:

Bob and Mike decided to rob a bank. Bob drove them to the bank and waited outside in the car. Mike went in, waved a gun and demanded that the cashier hand over money. The cashier pressed the alarm bell. Mike shot her dead and ran out of the bank. He jumped into the car and was driven away by Bob. Bob knew that Mike had a loaded gun with him. Mike was subsequently convicted of the murder of the cashier and robbing the bank.

In both instances, respondents to the survey were asked whether they considered that the third party—Pete in Case A and Bob in Case B—should be found guilty of murder, guilty of manslaughter (it being explained that this would carry a lesser sentence than murder), or not guilty of either murder or manslaughter.

3. The results are reproduced in the following table:

PUBLIC VERDICTS IN AIDING AND ABETTING MURDER SCENARIOS		
<i>Support for Verdict of</i>	<i>Case A: Pete</i>	<i>Case B: Bob</i>
Murder	21%	22%
Manslaughter	58%	41%
Not guilty of either murder or manslaughter	21%	37%

The authors note that, on the basis of the overall number of responses to these questions in the survey and applying standard statistical tests, there is a 95% chance that the figures reported here are an accurate reflection of general public opinion in the country within no more that + or -4%.

5. These finding would appear to contradict what at least some have assumed to be wide public support for the current law of joint enterprise, under which individuals in very similar positions as Pete and Bob have been found guilty of murder and received mandatory life sentences, including very substantial period of imprisonment. As the authors of the research have noted:

With respect to *joint enterprise murder* the results are crystal clear: the vast majority of both samples rejected a conviction for murder, even having been told that the lesser and included offence of manslaughter carries a less severe sentence. Only approximately one fifth of both samples favoured a murder conviction.

6. This indicates that the ways in which the law on joint enterprise has been interpreted by the courts and applied by the police and prosecution over recent years, so as to widen its scope and those caught in its net, runs counter to majority public notions of justice and fairness.

September 2011

### Written evidence from Janet Cunliffe

#### EXECUTIVE SUMMARY

- The use of JE has increased in recent years.
- It has been used mainly in murder prosecutions.
- It is much easier to convict using JE, due to the use of foresight as reliable evidence.
- The Law Commissions proposals do not offer measures that would prevent miscarriages of justice or raise the burden of proof so that would make it less likely for an innocent person to be convicted.

#### 1. *How often and in what types of cases is Joint Enterprise used?*

1.1 Joint Enterprise is referred to as a legal doctrine or legal principle, I will refer to it as joint enterprise law (JE).

1.2 I have extensive knowledge of my son's case, Jordan Cunliffe, and as this is a subject close to my heart I have taken the time to learn about the law including joint enterprise law and to inform myself by listening to others who I now know have suffered similar experiences. As a member of JENGBA and Innocent I have come into contact with many families all with a loved one in prison convicted under Joint Enterprise law (JE). I am unable to calculate the exact numbers that I have directed to JENGBA or the exact numbers that have contacted me through JENGBA, but I am aware that there are over 200 cases and I have also due to my connection with Innocent and JENGBA found that this number is growing with each passing month.

1.3 Of the cases I am aware of, the prisoners maintaining innocents say they are not responsible for any crime at all, and took no part in the crime for which they have been convicted.

1.4 My research has brought me to the conclusion that in these cases it is often just one person who is actually guilty of the offence, multiples are charged, and on average there seems to be a ratio of three to every one death that are convicted. Joint enterprise is not about finding the actual guilty person, and suitably punishing them, but about administering the blame on all defendants and punishing them all.

1.5 The majority of cases revolve around murder allegations; I would argue that in many cases the allegation should have been manslaughter. This is evident in cases when no weapon is used and a spontaneous outburst of violence occurs. I am aware of cases in which one blow has caused death, the victim was not known to those convicted, the blow was not planned by the perpetrator and yet multiples have been convicted of "murder".

1.6 If the definition of Murder is the unlawful premeditated killing of one human being by another (murder with intent) and manslaughter is the illegal killing of a person by someone who did not intend to kill them. Then perhaps the reasoning behind charging people with murder in the first instance is because it would be difficult to convince a jury that a JE can exist in a manslaughter case, if manslaughter is not deemed a premeditated or a planned form of killing. In essence the use of murder when all the evidence points to manslaughter is altering the true meaning of words that are already defined in the English language. I have been told by many who are maintaining innocents that the use of the word murder, in hindsight, for them acted as a smoke screen, to the seriousness of their predicament. If you are innocent you believe the trial process will prove correctly that you are innocent, and due to not having taken part, planned or encouraged murder the feeling is that the prosecution will not be able to prove otherwise. This means defendants relax in the knowledge that they are innocent and have nothing to prove, only to then find themselves being found guilty of JE murder.

1.7 Simon Foy, Head of the Metropolitan Police Serious Crime Squad in an article published 21 April 2011 that joint Enterprise is "... mostly used in murder..." This is due to a murder charge being applied in nearly all cases where a death has occurred.

1.8 The application of JE law is increasingly being used against young people, Boris Johnson, Major of London in an article published on the internet agreed that JE was something most people did not consider. This article also informs that MP's are targeting the young via radio broadcasts that JE was something they must consider before becoming involved in "gang" violence. This is considered as a form of education. However, as the message is about gang violence and being involved in that violence, MP's need to be aware of how the JE law is being misapplied and convicting the innocent who are not and never have been members of gangs. To speculate gang membership as a way of gaining a conviction is unfair to all defendants particularly when all other evidence points to a single perpetrator.

1.9 In the web article Boris Johnson says "Be warned, there are no excuses for anyone involved in a horrific gang violence. If you stand by whilst a friend commits a serious crime, you are as guilty as them in the eyes of the law. Hanging around with people who carry weapons and get into trouble could result in a long prison sentence regardless of your involvement. My advice is think twice, don't get involved or you could spend the

rest of your life regretting it.” This is a rather confusing message and yet again reinforces the incorrect message. Mr Johnson says “... regardless of your involvement...” then says “... do not get involved”.

1.10 He is correct, as many people have been found guilty who did not get involved, they walked away, or “disengaged” prior to the death occurring but they are still serving life sentences for someone else’s crime. People are serving life sentences who did not know a friend carried a knife. In my sons case he was unable to make the decision to disengage or walk away as the disability of being blind meant he was unaware of the short burst of spontaneous violence that occurred. Violence that involved no weapon. Mr Johnson is correct but he offers no coherent advice to those young people who have no intention of committing a violent crime. What he does do in this is confirm what the JENGBA campaign and myself have been saying for sometime, which is that JE does convict innocent people of serious crimes regardless of guilt or involvement. And that the present use of JE law does not distinguish between the innocent and the guilty or focus on individuals, rather it focuses on convincing a jury they are a gang and that due to the knowledge they have of each other, do have the foresight that the crime would be committed, prior to it being committed. In effect young people are being punished for making the wrong choice of friends.

1.11 Incentives by the police again confirm that JE law is targeting the young, and is now being promoted as a deterrent to those involved in gangs or those who carry knives or guns. As criminals do not believe they will be caught when they commit a crime this approach serves little purpose other than disturbing the young, alienating, and criminalising them. The new use of the word group, as an alternative to gang is also worrying. As a deterrent the profile of particular cases are also raised through the media, however, (my sons case included), many of these cases are now known to JENGBA and have produced people who are strongly maintaining innocents. This will very likely cause a serious backlash towards the message being handed out by the Police and the reality of JE convictions.

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

2.1 Many people refer to the JE law as dating back over 300 years, as a way to stop duelling. Its use then had some structure and a purpose. To use it now can be seen as a way of stopping *gang violence* amongst the young. As gang violence and tough on crime policies are high on the agenda for most political parties JE can be seen as a way of tackling this problem.

2.2 In cases that I am aware of that date back over 10 years, often JE law in a murder charge is used when a planned robbery or burglary goes wrong and someone is killed. The bank robber scenario is an example, with the getaway driver sitting outside while the others go inside with guns. There may be no intention to shoot but the jury must decide what decision the getaway driver made and could/should have conceived prior to the robbery. In the Nuffield report in which the public were asked if the getaway driver should be found guilty of murder, the majority of those questioned said no. There are other scenarios when the plan and common purpose is to commit one crime but another happens in the process that was not planned. Many cases now involve people who made no plan to commit any crime at all, but spontaneous violence occurs, during this violence one person may take things too far in away, that no one could have anticipated.

2.3 Judges still use the bank robber scenario when explaining JE to the jury and this ties in with the notion that others should have had some knowledge, plan or awareness that a murder or really serious harm could occur. This scenario is still used even in spontaneous acts of violence. The use of the bank robber scenario reinforces the notion of an organised gang of criminals. As prosecutors are using notions of foresight as a form of prosecution, rather than strong physical evidence, they confuse the jury into thinking each knew what the other was capable of. Sometimes prosecutors use past altercations, even unreported minor altercations that can be argued had nothing to do with the defendants. This is done in order to cement the notion of foresight and propensity in the mind of the jury. Realistically no one can ever know if a person will commit murder or really serious harm unless they say they will or have already done so previously. Prosecutors are putting forward unsolved and unreported past altercations in which no defendant has even been charged as proof of propensity or foresight. Judges are allowing this, and in effect it means there are several trials running together. As propensity and foresight is the evidence they are using against many defendants, the danger here lies in whether the jury think a defendant is guilty or could have been aware of another offence however minor. It is viewed as proof of foresight/propensity, and the defendant must therefore, be found guilty of the crime they are now being charged with if there is a possibility they knew about the other offences. Juries are being invited to speculate what was in the mind of each defendant even if the perpetrator did not have the intention themselves.

2.4 JE cases are followed closely by the media, but not described in the press as JE cases. Often these cases are supported by high profile individuals prior to trial and defendants (named or not) are described as feral, as animals, as evil, as wolf packs and scum, by which they mean human beings who are innocent until proven guilty. Concern is that juries will have already been in contact with this information. The damage has already been done.

2.5 The victim/victims family in high profile cases are often raised to an almost “cult” status. Again prior to trial they are allowed to gain public sympathy with their emotional version/interpretation of events. Public sympathy is understandable, but this style of reporting, coupled with derogatory descriptions of defendants and misleading information leads to public hatred of those charged before trial.

2.6 These cases become an act of revenge and are used in setting an example, even as a way of gaining support in raising the minimum tariff. I have read countless newspaper articles about JE prisoners maintaining innocents along with evidence from the court case and the stark differences are very disturbing. This was also the case with my son Jordan Cunliffe. Public interest was fired up to a burning frenzy of hatred based on inaccurate information from the press. This occurs before, during and after the trial. This has to affect the jury.

2.7 My research brought up tithes' dating back over a 1000 years in which one of the first common laws acknowledged and noted, was that at 12 years of age, a person was old enough to be accountable for his criminal actions. It encouraged 12 years to join, a "gang" or "group" of 10. These tithes said that if one of the ten committed a crime then it was up to the other nine in the group to bring them to justice. If the other nine failed in bringing them to justice then the other nine would also be held responsible for the crime. All as guilty as the perpetrator. This seems to be how the law is yet again developing, or more to the point regressing. However, tithes no longer exist, groups of ten people are not recorded in any way as they were back then. So how can it be proved that a person is tied even in common law to nine other people, when it is not documented. Also if tithes were abolished in the 19th Century how can the common law notion that if one in a group commits the crime and that one is not brought to justice by the other nine, that, they must all be made accountable. As a common law this no longer exists, and in the 21st Century with a sophisticated justice system this cannot be expected to be reasonable.

### 3. *What would be the advantages and disadvantages of enshrining the doctrine into legislation?*

3.1 As it stands there would be no advantage, unless you were an MP with a "Tough on Gang or Crime" policy that was either flawed, corrupt, or based on unachievable targets that had to be met. An uncaring legal professional or if you had a financial stake in a National newspaper. Encouraging it in its current form will lead to further miscarriages of Justice, which of course leads to utter misery and devastation for entire families.

3.2 Whole communities are being unsettled by the effect of JE as it stands. Confidence in the police and the justice system has been lost. JE cases are high profile and derogatory description are used. Joint enterprise law is focusing on inner cities and underprivileged communities. These tend to be black or Asian communities, so already there is a shift in the public view of these minorities, a view that they are criminals, gangsters and in the words of the press "Scum".

3.3 Kenneth Clarke worryingly referred to some of the August rioters as a "feral Underclass". It is a well know that many of the August rioters, were black youths, so does Kenneth Clark believe that black youth are a "feral underclass" These types of descriptions are dangerous and have been pushed into the public psyche through the media and I would say more so during JE cases, making it normal to talk this way about all young people who are innocent until proven guilty.

3.4 As awareness to JE grows people are pleading guilty to lesser offences, offences they still did not commit and not the actual crime they are being threatened with. This is out of fear of being given a life sentence for a crime they are innocent of, and a fear of a law that shows no balance or fairness. It is wicked and immoral to expect a person to go to prison for a lesser charge simply because they are blackmailed through fear and mistrust of the justice system. If this becomes legislation as it stands every person in the country can be viewed as having their freedom and liberty taken away from them. There will be no innocent until proven guilty and it will open the doors to further corruption and misery.

### 4. *What would be the impact of implementing the Law Commissions proposals as set out in Participating in Crime*

4.1 Many JENGBA cases say they were not participating in crime as a JE, so the proposal is only of use to those who really are criminal associates. People need to be investigated and proven beyond reasonable doubt to be known criminal associate before even being charged as criminal associates, otherwise just assuming or saying that this is what people are is not enough to be put before a jury. At the moment the CPS are assuming guilt and levels of association before trial. This is why the JE law is being misapplied; families and friends are being classed as criminal associates by the CPS who then allows a JE trial with no real evidence.

4.2 More innocent people will be wrongly convicted if this happens.

4.3 As this is geared towards the young, more young people will feel under threat and alienated from what the rest of society believe are our basic legal and human rights.

4.4 When people are excluded and demonised and then treated unfairly by the Police and then through the justice system, resentment builds and this resentment leads to action by communities who are the most affected. Most people who have the current application of JE law explained to them are shocked and horrified. Common sense alone draws people to the conclusion that this is wrong and as convictions increase and more people speak out it is quite reasonable to expect full public support.



4.5 The Law Commission's proposals read as if they would encourage lowering the burden of proof even more. In effect this would further damage the presumption of innocent until proven guilty. This would heighten concerns:

4.5.1 There is very little truth, transparency or even a simple interpretation regarding JE law, and certainly no acknowledgement of those maintaining innocents. As it stands they are guilty and the law is working. That is the message from the authorities. However, no reasonable person, with a true understanding of how JE law is being applied would consider this fair. The lies and unfairness have been shrouded in such a way that the public are unaware of the serious flaws and its continued misapplication and the law commissions proposal further shrouds this.

4.5.2 The Nuffield report found that those questioned knew very little or nothing at all about JE. To continue this but in legislation would in my opinion lead to major problems in the future not just because of the misery it causes to families and communities, or the massive expense to the tax payer but because of the social unrest/disturbance that something so profoundly immoral could cause. This is a human rights issue and cannot continue to be ignored.

4.6 It will allow real criminals to bargain and lie in and that will allow them to escape Justice whilst blaming an innocent person who will be convicted instead. The terrifying thought that comes with this, is that if someone gets away with murder, and it was easy for them to do so, what are they from then onwards capable of doing? The message is to real criminals that if the innocent can be convicted on evidence of foresight, hearsay and speculation then so can the guilty, and that is not a sustainable message in a civilised society.

4.7 It appears to ignore the issue of intent, which is part of the interpretation of murder, and will reinforce the application of speculation during trials and again cause many more miscarriages of justice.

September 2011

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### Written evidence from Tim Moloney QC and Simon Natas

#### INTRODUCTION/EXECUTIVE SUMMARY

1. We are criminal practitioners who have provided legal advice and support to JENGBA (Joint Enterprise—Not Guilty by Association), a group campaigning on behalf of defendants convicted under the law of joint enterprise. The vast majority of these defendants were convicted of murder. By far the most serious concerns about the law of joint enterprise law relate to the application of the doctrine to homicide. Accordingly, these submissions are focussed in this area.

2. We believe that many of the concerns raised by campaigners about the Joint Enterprise law are justified. At root, these problems stem from the fault element of secondary liability (referred to by the Law Commission as the *Chan Wing-siu* principle).<sup>1</sup> This principle is particularly problematic when applied in murder cases. Moreover, the principle can give rise to the risk of wrongful conviction.

3. Furthermore, there is an inherent potential for unfairness in the imposition of the mandatory life sentence on both principal and secondary participants, where the secondary participant is convicted on the basis of foresight as to what the principal *might* do as opposed to any intention to kill/cause serious harm on his part (*ie the Chan Wing-siu principle*).<sup>2</sup>

4. In practice, the law of joint enterprise frequently gives rise to difficult questions. For example, when does a defendant's presence at the scene amount to assistance or encouragement, thus attracting criminal liability? How can the scope of a joint enterprise be defined? When does a secondary participant withdraw from a joint enterprise? These questions have not always been satisfactorily answered. Consequently, there is too great a risk that alleged secondary participants will be wrongly convicted.

5. As currently formulated, the law of joint enterprise is overly complex and gives rise to confusion. Attempts to define the scope of the *Chan Wing-siu principle* in order to reduce the risk of unfairness (notably the "fundamental difference test") have proved difficult to apply and have created new difficulties in their turn. These issues are analysed below in the context of three recent Court of Appeal judgements.

6. 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 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*.

7. We suggest that both the law of homicide and the law of joint enterprise are in urgent need of reform. We would suggest the following:

- (i) That a three tier structure of homicide should be adopted along the lines of the Law Commission's Report "Murder Manslaughter and Infanticide".<sup>3</sup>

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<sup>1</sup> "Participating in Crime" (Law Com No.305) paragraph 3.133.

<sup>2</sup> R v Chan Wing-siu[1985] AC 168.

<sup>3</sup> Law Com No.304.

- (ii) That the law of joint enterprise be reformed in order to make the law clearer and more accessible to juries and to provide greater protection to defendants. This could be achieved by limiting the scope to found liability on the basis of foresight.

8. It follows that we do not believe that the position would be improved were the Law Commission's proposals as set out in "Participating in Crime" to be adopted. Rather, the deficiencies of the common law principle in *Chan Wing-siu* would be enshrined in statute.

9. Insofar as the law of joint enterprise is increasingly seen to be unjust, particularly amongst black and minority ethnic communities, it cannot be an effective weapon against the threat of gang violence. On the contrary, the perception of injustice which arises in such communities can only harm public confidence in the criminal justice system, adversely affecting the fight against violent crime. Nor does the Law Commission advance any evidence that a legal regime which is "severe" on secondary participants is better able to reduce gang violence than one in which it is more difficult to found liability on the basis of foresight.

10. In the paragraphs below, we set out the injustice which arises from:

- (i) The mandatory life sentence for murder.
- (ii) The *mens rea* for secondary participation.
- (iii) The scope of the law of Joint Enterprise.

and make suggestions as to reforms which would act to reduce the risk of such injustice.

#### SENTENCING AND THE LAW OF HOMICIDE

11. The current homicide regime can give rise to injustice even to those defendants who are properly convicted as secondary parties (ie not necessarily victims of a miscarriage of justice within the popularly understood meaning of the term). We believe that this is in itself a compelling reason to reform our homicide laws.

12. Anyone convicted of murder faces a mandatory life sentence, regardless of the circumstances of the offence or the degree of their involvement. Schedule 21 of the Criminal Justice Act 2003<sup>4</sup> established relatively rigid guidelines for the imposition of minimum terms and Judges have relatively little discretion so far as the tariff to be imposed upon a person convicted of murder is concerned. That is so even though there may be an enormous gulf in the degree of blame to be attached to individual defendants convicted of participation in the same murder. A defendant who provided encouragement to the principal (very possibly on the spur of the moment) but who did not himself intend to cause really serious harm, let alone death, will be treated in much the same way as a principal who did intend that outcome. This can and does give rise to a perception of injustice in many cases. In our view, the mandatory imposition of a life sentence in the case of a defendant convicted on the basis of mere foresight is frequently disproportionate to the wrongdoing involved.

13. This unfairness is partly caused by the inclusion of what the Law Commission describes as "intent-to-do-serious-harm cases" within the definition of murder.<sup>5</sup> We agree with the Law Commission that this distorts the sentencing process for murder. We therefore endorse the Law Commission's proposal to create a three tier structure in which defendants who kill whilst only intending serious injury would be convicted of an offence of secondary homicide (not attracting a mandatory life sentence). This reform would ensure that a secondary participant would not be subject to the mandatory life sentence where he merely foresaw that the principal might cause serious injury with intent.

#### THE MENS REA OF SECONDARY PARTICIPATION

14. Much of the concern surrounding the law of joint enterprise arises from the perception that defendants are being wrongfully convicted of offences, and particularly murder. In our opinion, these concerns are justifiable. We believe that the risk of wrongful conviction flows directly from the practical application of the *Chan Wing-siu* principle.

15. Whilst, as we say in paragraph 13 above, we agree with the Law Commission proposal to reform the law so as to create a three tier structure to the law of homicide, in our view it would make little sense to enact this reform without also addressing the issue of fault on the part of secondary participants. The Law Commission recognises that the culpability of an offender who kills whilst intending only to cause serious injury is likely to be significantly lower than the offender who intends to kill, such that fundamental reform of the homicide law is necessary. In our view, it surely follows that one must also recognise that the culpability of a secondary participant who merely foresees what the principal *may* do (but does not himself intend it) is of a different order to the principal offender who *does* intend that outcome (be it serious injury or death).

16. Experience has shown that prosecutors are relying increasingly on the principle of joint enterprise, often focussing on the menace of gang violence. Juries are often told that defendants "*hunted in a pack*" or similar. Evidence of alleged gang affiliation (street names, clothing, phone contact) is adduced to reinforce this

<sup>4</sup> <http://www.legislation.gov.uk/ukpga/2003/44/schedule/21>

<sup>5</sup> "Murder, Manslaughter, Infanticide" paragraph 1.20.

impression. Adverse press coverage may also play a role in increasing the risk that guilt will be inferred from a defendant's association with others.

17. 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 and that such cases will be left to the jury.

18. We therefore suggest that the *Chan Wang Siu* principle be reformed so as to bring the fault element for secondary parties into line with that of principals. We therefore propose that there should be a requirement that the prosecution prove an *intention* on the part of the secondary participant that the principal should have acted as he did. The tightening of the *Chan Wing-siu* principle in that way would reduce the risk of wrongful conviction

#### THE SCOPE OF THE LAW OF JOINT ENTERPRISE

19. Reform of the *Chan Wing-siu* principle would also help to address the risks associated with other notable problems within the scope of the law of joint enterprise:

- (i) When does a defendant's presence at the scene amount to assistance or encouragement, thus attracting criminal liability?
- (ii) When does a participant withdraw from a joint enterprise?
- (iii) Difficulties with the “fundamental difference” test

(i) *Where does “mere presence” end and “assistance/encouragement” begin?*

20. In *R v Stringer and Stringer*<sup>6</sup> the two appellants had been convicted of murder. The murder had been committed when the principal, McPhee, chased the deceased into an alley, followed by the appellants. McPhee produced a knife in the alley and stabbed the deceased, who had been armed with a baseball bat. The appeal was advanced on the basis that, whilst they had clearly assisted McPhee by chasing the deceased into the alley, there was no evidence that they had assisted or encouraged him to stab the deceased.

21. Dismissing the appeals, the Court of Appeal noted that there was “*no special rule governing the criminal liability of accessories in the case of murder*”—nor could there ever be—but “*D’s conduct must have some relevance to the commission of the principle offence; there must be some connecting link*”. The jury’s verdicts meant that they must have been satisfied that the appellants knew that McPhee was armed with a knife, that he intended the deceased be caught and made to suffer at least really serious harm and that they foresaw that McPhee might use the knife to do so. With that knowledge the appellants joined McPhee in a sustained chase. The appellants had argued that there was no evidence that they did more than chase the deceased into the alley. There was no direct evidence that they had actually assisted in disarming or assaulting the deceased. However, the Court of Appeal noted that “*the distance in time and place between the events recorded on the CCTV footage (ie the first part of the chase) and the infliction of the stab wounds was small*”.

22. The case illustrates some of the difficulties juries face in dealing with “border line” cases. When does someone's presence at the scene of a killing actually amount to encouragement or assistance? One can easily see how a person who holds the victim down whilst a third stabs him will be aiding and abetting, but what of the man who participates in a chase but does not directly assist in the assault? In the case of spontaneous and unplanned violence, it might be very difficult to tell where mere presence ends and assistance/encouragement begins. However, the risk of wrongful conviction would be reduced if the prosecution were obliged to prove that the secondary party shared the principal's intention rather than merely foreseeing what he may do (with intent).

(ii) *When does a participant withdraw from a joint enterprise*

23. In *R v Mitchell*<sup>7</sup> the appellant and her friends 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. She denied that she had participated in the second (and fatal) incident in any way. The case was left to the jury on the basis that the acts of spontaneous violence that occurred during the argument over the taxi, and the second fatal assault were part of a single joint enterprise and the actions of the principal (stamping on the victim's head) fell within it. It was foreseeable and within the scope of the joint enterprise that he might intentionally inflict really serious injury or death and it was 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. The Court of Appeal upheld the conviction.

<sup>6</sup> [2011] EWCA Crim 1396.

<sup>7</sup> [2009] 1 Cr.App.R 31.

24. The Law Commission concedes that the *Chan Wing-siu* principle may be considered “severe” but argues that this is “more than compensated for” because “D has the opportunity to claim that P’s offence was too remote from the agreed offence to fall within the scope of the joint venture” and “it is always open to D to withdraw from the joint venture by negating the effect of the original agreement before P commits the principal offence”.<sup>8</sup> The case of *Mitchell* suggests that in fact, D may find it extremely difficult to argue that P’s offence was too remote and that the concept of withdrawal is highly problematic. 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.

(iii) *Difficulties with the “fundamental difference” test*

25. In *R v Mendez and Thompson*<sup>9</sup> the defendants were alleged to have taken part in a chaotic assault on a man in the street. The deceased was chased up the street by a large group who proceeded to attack him with punches and kicks and blows with pieces of wood and metal bars. He was also stabbed. He collapsed and later died from his stab wounds. The other injuries were not particularly serious. There were seven defendants at trial. Thompson was alleged to have been the stabber and Mendez part of the group who had participated in the assault. However, it was not alleged that Mendez knew there was a knife until after the fatal stabbing had occurred. Thompson denied that he had a knife but admitted chasing after the deceased with a rotten fence panel. He had tried, but failed to hit the deceased. On the basis of the “fundamental difference” test, it is unlikely that either would have been liable for the killing had they not foreseen the use of the knife.

26. The trial judge found the concept of “fundamental difference” a difficult one to elucidate.<sup>10</sup> In summing up on the facts, he painted a confusing picture: “in each part of the attack...he was assaulted by the use of weapons, pieces of wood or metal bars or poles and by feet, kicking and stamping and by fists.....some of the weapons you may think were capable of causing death if they caught D on the most vulnerable parts of the body or were used repeatedly” and concluded as follows: “It is against that factual background, as you determine it to be, that you should answer the question whether the use of the knife was fundamentally different from the enterprise any accused had joined”.

27. The question for the jury was whether the unforeseen use of the knife was so different from anything foreseen by Mendez (ie the use of fists, feet, wood or metal bars) that he should not have been liable for it. Was it altogether more life threatening? In the circumstances, it probably was but this would not have been clear from the Judge’s summing up (as the Court of Appeal recognised). The Court of Appeal offered helpful guidance as to the application of the test, but it will often cause confusion, particularly in cases involving multiple defendants.

28. The fundamental difference test was introduced in order to offer some protection to defendants against potential unfairness arising from the *Chan Wing-siu* principle, but we believe that defendants would be better protected by the wholesale reform of *Chan Wing-siu* principle itself.

## CONCLUSION

29. The criminal justice system must strive for balance. It seeks to convict and punish those guilty of crime and to protect against the risk that the innocent will be wrongly convicted. It must also try to ensure that proportionate punishment is imposed on the guilty. No system can be perfect: even in the best, miscarriages of justice will occur. However, the system will become unbalanced if it ceases to offer adequate protection to the accused or becomes excessively punitive.

30. We believe that the law of joint enterprise, particularly as it applied to homicide, has become inherently unfair. The inclusion of “intent-to-do-serious-harm cases” within the definition of murder, in conjunction with the mandatory imposition of a life sentence, has resulted in the imposition of disproportionately lengthy sentences to many defendants. That disproportionality is particularly felt in the cases of those defendants convicted on the basis that they merely foresaw that serious injury might be caused. That disproportionality requires that the homicide laws should be comprehensively reformed.

31. Moreover, the *Chan Wing-siu* principle is equally a cause of injustice. Liability based on D’s foresight as to what may happen is widely recognised as being “severe”. We do not believe that the safeguards identified by the Law Commission adequately compensate for this severity. Indeed, our view is that case law suggests the opposite. Nor do we accept that it is justified by the nature or prevalence of gang related violence. There is no reason to believe that the application of the joint enterprise laws as they are currently formulated are likely to lead to a reduction in violence crime, particularly amongst young people. On the contrary, insofar as they tend to undermine public faith in the criminal justice system (in particular, amongst communities most at risk from violent crime) they are likely to prove increasingly counterproductive.

<sup>8</sup> “Participating in Crime” Paragraph 3.146.

<sup>9</sup> [2010] 3 All E.R 231.

<sup>10</sup> When refusing an earlier submission of no case to answer on behalf of Mendez the Trial Judge said “anyone who thought that the House of Lords decision in *Rahman* had clarified the law on secondary participation in murder would have that view disabused if he had been in this court yesterday”. Later, he said “I pause only to observe how unsatisfactory it is that the question of the liability of secondary parties in the law of murder is still so difficult that appellate courts are routinely asked to review the direction of trial judges”.

32. We therefore urge reform of the *Chan Wing-siu* principle, by the introduction of a requirement on the prosecution to prove an *intention* on the part of the secondary participant that the principal should have acted as he did.

September 2011

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### Written evidence from Professor Graham Virgo

#### EXECUTIVE SUMMARY

1. The common law doctrine of joint enterprise liability is not fit for purpose.
2. Despite the best efforts of the judges to clarify the law, statutory reform is required.
3. The recommendations of the Law Commission would provide a suitable starting point for reform but certain key amendments should be made and the opportunity should be taken for more radical reform.

1. I have conducted academic research into the interpretation and development of the doctrine of joint enterprise liability. I have published a number of papers on the doctrine, primarily in *Archbold Review*, most recently (2010) issue 5 page 5 and issue 10 page 9, and I am a contributor to Simester and Sullivan's *Criminal Law: Theory and Doctrine* (4th edition, 2010).

#### *The use of joint enterprise liability*

2. From the reported cases it is clear that joint enterprise liability is primarily deployed in respect of murder and typically involves gangs. But it is also applied in other contexts, as illustrated recently by *Gnango* (on appeal to the Supreme Court) involving a shoot-out between two men in the course of which an innocent passer-by was killed. The doctrine may also be of wider international significance, for example relating to accessory liability in respect of unlawful detention in other jurisdictions. I was invited by the Detainee Inquiry to give a presentation on the Domestic Criminal Law Principles of Secondary Liability at a seminar organised by the Inquiry in June 2011.

#### *The nature of joint enterprise liability*

3. The core case of joint enterprise liability arises where D1 and D2 agree to commit one crime, crime A, and in the course of doing so D1 commits a different crime, crime B. D2 will be a party to crime B if he or she contemplated its commission. This is known as "joint enterprise" liability, since liability for crime B arises from the enterprise to commit crime A.

4. 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 or she will have sufficiently associated him or herself with the commission of crime B such that he or she should be regarded as a secondary party to that offence: see *R v A* [2010] EWCA Crim 1622, [2011] 2 WLR 647, at [27].

5. Although the doctrine is called "joint enterprise" it actually concerns a departure from the joint enterprise.

6. D2 will be liable for crimes A and B as principal if he or she contributed to the harm with the necessary mens rea for the offence. This has been described as "plain vanilla joint enterprise" but it has nothing to do with the joint enterprise doctrine, since D2's liability arises in its own right regardless of D1's involvement.

7. The joint enterprise is defined as a common shared intention or a common purpose to commit crime A. Normally this involves an express agreement, but it may arise from a tacit understanding between the parties. This was examined in *Gnango* [2010] EWCA Crim 1691 where it was recognised that just because two people are guilty of the same offence it does not follow that they had a common purpose. The common purpose might arise from a prior agreement or on the spur of the moment when they met.

8. The *mens rea* for joint enterprise liability is that D2 foresaw the possibility of D1 committing crime B and with the necessary *mens rea* for that offence: *R v A* [2010] EWCA Crim 1622, [2011] 2 WLR 647. What this means in the context of homicide is that D2 must have foreseen that D1 might kill and that D1 might intend either to kill or to cause serious injury to the victim.

9. Although the matter is not free from doubt, the preferable view is that joint enterprise liability forms part of the general law on accessory liability. This was recognised in *Ahmed and Ahmed* [2011] EWCA Crim 184, at [42]. See also *Mendez and Thompson* [2010] EWCA Crim 516: joint enterprise liability is not doctrinally different from the ordinary principles of secondary criminal liability. This was not the view of the Law Commission: *Participating in Crime* (Law Com No. 305, 2007).

10. The general law on accessory liability involves one party being convicted for aiding, abetting, counselling or procuring the principal to commit a crime. It follows that liability is derivative and so the defendant is convicted of the same offence as the principal. But it must be established that crime B has been committed by somebody even if that person cannot be identified by name. This is true of joint enterprise liability as well: liability is derivative and crime B must have been committed by somebody.

11. The *mens rea* for joint enterprise liability appears to be the same as for accessorial liability generally, namely foresight of the substantive offence being committed. Again, this is not free from doubt and the Law Commission has recommended a different test of fault for accessorial liability as opposed to joint enterprise liability.

12. In the context of joint enterprise liability it is not necessary to show that D2 aided, abetted, counselled or procured the substantive offence; this can be assumed from the fact that there was a joint enterprise to commit crime A. It is for this reason that joint enterprise liability cannot in fact be fully assimilated within the law of secondary liability; some distinct identity is still required and so it remains useful to identify whether there has been a joint enterprise to commit a crime.

13. D2 will not be liable for crime B if D1's deliberate act was unforeseen by the accessory and could be regarded as being "altogether more life-threatening than acts of the nature" intended or foreseen by the defendant: *Mendez and Thompson* [2010] EWCA Crim 516, at [48]. So if D2 foresees a beating of the victim by D1 and D1 stabs him to death, this might be considered to be fundamentally different according to this formulation.

14. D2 will not be liable for crime B if he or she has withdrawn from the joint enterprise. This requires timely communication and unequivocal notice. What is required for withdrawal will turn on the facts and the nature of the encouragement and assistance.

#### *Problems with joint enterprise liability*

15. The most significant problem with joint enterprise liability in its typical application in respect of homicide is that both D1 and D2 are convicted of murder and obtain the mandatory life sentence, even though D2 did not cause death and D2 had a less culpable mental element than D1. The nature of this criticism needs to be considered carefully. It does not follow that D2 should not be convicted at all. It must not be forgotten that D2 must at the very least have a common purpose with D1 that crime A be committed and D2 must have foreseen the commission of crime B. But, in the context of murder, whereas to convict D1 of murder it must be shown that he or she caused death and intended either to kill or to cause serious injury, to convict D2 of murder it is not necessary to show any causation or even any assistance or encouragement of murder, it being sufficient that D2 foresaw killing as a possibility and that D1 either intended to kill or to cause serious injury. D2 is convicted of murder and the mandatory life sentence is imposed. It is the imposition of that sentence in this context which is the cause of concern.

16. Whilst the judges have attempted to reform the law on joint enterprise liability, the complexity of the law is such that they may have done more harm than good. For example, the use of "joint enterprise" liability to encompass liability as joint principals, is a source of confusion. There is also inconsistent analysis of the *mens rea* for joint enterprise liability, with some cases assuming that D2 need only foresee the commission of the harm of offence B without mentioning that D2 must also foresee D1's own *mens rea* e.g. ambiguous dicta in *Rahman* [2008] UKHL 45, [2009] 1 AC 129. It has also been suggested that D2 is only liable because he or she will have caused D1 to commit crime B (*Mendez and Thompson* [2010] EWCA Crim 516); but this is inconsistent with fundamental principles of causation that the voluntary acts of the person in the position of D1 will break the chain of causation (*Kennedy (No. 2)* [2007] UKHL 38, [2008] 1 AC 269).

17. The law on certain aspects of joint enterprise liability is unclear and difficult to apply. For example, as seen in *Gnango*, establishing whether there was a common purpose to commit crime A can be difficult, especially where the parties have just met and there is no evidence of any prior plan. The law on whether the commission of crime B is fundamentally different from that contemplated by D2 is also complex. For example, if D2 foresees that D1 might shoot the victim in the knee, but D1 shoots the victim in the head, or stabs the victim or kicks the victim, it remains difficult to determine whether this is fundamentally different. There is also some uncertainty in the case law as to whether D2 can be convicted of a less serious offence than D1 and, if so, when such a conviction will be available. For example, if D2 foresaw that D1 would beat up the victim to cause actual bodily harm but death resulted, then D2 can probably be convicted of manslaughter.

18. All of this uncertainty makes the task of the judge in directing the jury unnecessarily difficult.

19. To make matters even more complicated, the law on joint enterprise forms part of a complex web of criminal liability. There may be evidence that D2 had aided, abetted, counselled or procured the principal, so the jury will need to be directed on that as well as the common purpose to establish joint enterprise liability. Where it might not be established that the substantive offence has been committed, it will also be necessary to direct on the inchoate offences of assisting and encouraging crime contrary to the Serious Crime Act 2007 (although these offences are so complex and convoluted it appears that they will be rarely charged).

#### *Reform of joint enterprise liability*

20. Whether the law on joint enterprise liability requires statutory reform will need to be assessed after the decision of the Supreme Court in *Gnango*, although the issues in that case are very specific and unusual, relating to the identification of a common purpose, so it is probable that the state of the law will not be very different after that decision.

21. 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.

22. The recommendations of the Law Commission in *Participating in Crime* (Law Com No 305) would provide a useful foundation for statutory reform. I support the use of the language of assisting and encouraging and the test of agreeing to commit an offence or having a shared common intention to do so (subject to what is decided in *Gnango*), although the language of joint criminal ventures is unnecessary. I am also concerned that the complexity of the detailed proposals would expand the problems created by the Serious Crime Act 2007.

23. In addition to the core proposals of the Law Commission, statutory reform would provide an important opportunity to take reform further, especially in the context of homicide. I would not advocate a statutory reform of the law of joint enterprise liability only in the context of homicide, since this would make the task of the judge in directing the jury even more difficult in those cases where it is not clear that D1 had committed murder but may only be liable for causing serious injury, because then there would need to be a direction on the statutory test of joint enterprise in respect of murder and on the common law test as regards serious injury. Any statutory reform must be of the whole of joint enterprise liability and would also need to be of the whole of secondary liability too.

24. But the key criticism of the existing law, namely that parties to a joint enterprise are convicted of murder with the imposition of the mandatory life sentence, could be dealt with by a relatively simple provision that they should only be convicted of murder if they foresaw an intentional killing as a possibility. If they foresaw death as a possibility but that D1 only intended to cause serious injury, then they should be convicted of manslaughter. The judge would then be able to impose an appropriate sentence to fit the crime, which would almost always be custodial, but the distinct culpability and contribution to the harm of D2 could then be reflected in the sentence, as well as in the name of the offence. It would still be possible for the police and others to inform gang members that participation in criminal conduct which results in death could result in very serious criminal consequences, but not treating this as murder in every case would make the law much more understandable and, frankly, just. Whilst there is an argument that D2 who foresaw the possibility of an intentional killing should also be convicted of manslaughter, my view is that the conviction of murder in such circumstances with the imposition of the mandatory life sentence is entirely appropriate.

25. The language of “joint enterprise” should be avoided as confusing, especially because we are not concerned with liability for the enterprise but with liability for the departure from it. Where D2 is not a principal offender, he or she should only be convicted as a secondary party to the relevant offence. This accessory liability requires the defendant to have foreseen the commission of the relevant offence. But mere foresight by itself is not enough; something more must be shown before criminal liability can be visited on the defendant. This additional requirement can be established either by the defendant and the principal sharing a common purpose to commit crime A to which crime B is incidental or by the defendant having aided, abetted, counselled or procured the commission of crime B. This provides a sensible basis for directing the jury and, crucially, does not require any reference to be made to joint enterprise. It would follow that, despite the recommendations of the Law Commission, no distinction should be drawn between the *mens rea* of those who aid, abet, counsel or procure and those who share a common purpose; in both cases foresight of crime B being committed with the appropriate *mens rea* should suffice. There is an argument, advocated by the Law Commission, that a lesser *mens rea* is justified where there is a common purpose to commit crime A for which foresight should suffice, whereas knowledge or belief that crime B will be committed should be required for D2 who aids, abets, counsels or procures. This may well be justified to deal with D2 who sells a knife to D1 in a supermarket, suspecting that D1 might use the knife to stab somebody and D1 does do. Presumably we do not want D2 to be convicted of homicide in such circumstances save if D2 knew that D1 would use the knife to kill or believed that D1 would do so.

September 2011

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## Written evidence from Progressing Prisoners Maintaining Innocence

### EXECUTIVE SUMMARY

- The number of prisoners convicted using joint enterprise has increased significantly in the last 10 years and is set to rise. There is a consequent impact on the prison system and within the prison population affecting prisoners maintaining innocence.
- We would request a full public enquiry into the application of the joint enterprise laws and a retrospective review of all cases of joint enterprise conviction and cases where there is legal uncertainty regarding the status of the conviction but where the charging was clearly joint.
- We are working closely with Joint Enterprise—Not Guilty by Association (JENGBA) and are aware of the indication in terms of figures that they have provided.
- A number of cases known to PPMI and JENGBA are significantly over tariff and were under 21 at the time of their custody.

## 1. *Background to Submission*

1.1 Progressing Prisoners Maintaining Innocence (PPMI) is a working network composed of prison chaplains and visitors, support groups, campaigning organisations, prison lawyers, investigative journalists, academics and those involved in the education and personal development of young people. PPMI advocates particular changes in the processes of the Criminal Justice system. The members of the Group are volunteers who are familiar with the legal requirements placed on the Prison Service.

1.2 In 2003 following Kevin O'Neill's (Appendices 1) request in Inside Time for fellow prisoner contact regarding prisoner progression and correspondence between himself and Ray Gilbert (Appendices 2) a small group came together on the "outside" and a conference on the subject of progression was held in February 2004. Subsequent to this PPMI was formed. We have held public meetings with speakers from the Judiciary, the legal profession, Academia and the Media. We have entered into dialogue with the Parole Board and Criminal Cases Review Commission besides Prison Service staff. We are engaged in offering training to solicitors, barristers and legal representatives working with prisoners, whose maintenance of innocence impedes their progress. In November 2011 we are holding an invited meeting on the subject of Over Tariff Prisoners, hosted by Kate Hoey.

1.3 The route to progressing through the prison system by successfully completing offending behaviour programmes is largely closed to so called "Deniers". Among those prisoners are a significant number who have been charged/convicted by the use of joint enterprise charges, many of whom will be known to Joint Enterprise Not Guilty by Association (JENGBA) and United Against Injustice (UAI) with whom we have a close working relationship. As an indicator of the problems facing prisoners convicted by the use of joint enterprise we would note that JENGBA report ten prisoners over tariff; ranging from prisoner Wyndam Thomas, over a 10 year tariff by four years for a robbery associated manslaughter conviction through to lifers Kevin O'Neill who is five years over tariff, having served 25 years and Ray Gilbert 15 years over tariff, who has served 30 years

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

2.1 It has been suggested that the use joint enterprise has increased since the 70s and "The Troubles" and certainly the 1990s saw the release from The Court of Appeal of a number of joint enterprise cases including The Birmingham 6, Cardiff 3, Tottenham 3 M25 3 and the Bridgewater Appellants leaving aside the issues of the Guildford 4 and the Maguire 7 that were not heard in the Court of Appeal. Also lesser known cases such as that of Prem Sivalingham and Sam Kulyasingham who were the last of, I believe, six men who had originally stood trial.

2.2 Joint enterprise has regularly used in criminal gangland cases. Many of these cases sought to bring cases using the sort of evidence used in some of these high profile appeals which has led to the "tightening of the buckle" of the Appeal Court. Cases that are brought to trial should rely on good police investigation.

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

3.1 This has been dealt effectively with by JENGBA in their submission given that we have no access to necessary figures in respect of joint enterprise charges and convictions; prisoners maintaining innocence or over tariff prisoners.

3.2 The significant increase in joint enterprise convictions in the last ten years of young people engaged in "street—gang violence" is set to rise further following the Victoria Murder case of Soyfen Belamouadden: the largest joint enterprise trial, now at the third trial. August events on English streets means that already existing problems within the prison will be further exacerbated.

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

4.1 A full public inquiry into the application of the law of joint enterprise is long overdue in order that a proper view can be taken on the way forward. If justice is to be seen to be done then a retrospective review of all cases must be undertaken.

4.2 There are significant problems in getting cases to the Appeal Court, especially in joint enterprise cases which leaves the Prison Service with prisoners who they have to regard as guilty and for whom there is no guidance or informed policy on how to deal with. Clearly this leads to significant problems for individual prisoners to deal with:

- Programmes requiring admission of guilt, those who maintain their innocence cannot complete them and maybe penalised. In the Incentive and Earned Privileges Scheme (IEPs) they are often downgraded.
- The lower the IEPs level, the lower the prisoner's wage and the fewer his/her entitlements to such privileges as letters, phone calls, visits, choice of work and escorted town visits.
- Failure to comply with the sentence plan, through not completing offending behaviour programmes, prevents progression from Category A (high security) to Category D (eligibility for open prison)



- Release from prison after expiry of tariff (recommended sentence length) is usually from Category D (unless exceptional circumstances apply), thus jeopardising release for those maintaining innocence.
- Positive progress reports and risk assessments are written according to criteria based upon admission of guilt.

4.3 Please also refer to Appendix 3 The Causes of Non Progression: the findings of a survey carried out in 2005 by PPMI communicating to prisoners via personal connection and Inside Time. This has informed the work of PPMI.

4.4 Initially factually innocent and wrongly accused prisoners are dealing with the shock/trauma of their conviction and are initially less likely to become aware the impact of this on their progress through the prison system. They are initially concerned to enter an appeal within the given time limit of twenty eight days and then to have news of progress made by friends and families in the seeking of “fresh evidence”. It is unhelpful for the fabric of both our society and the health of prisoner/offender alike to have been charged, in some circumstances, for a more serious one than they committed.

4.5 It is acknowledged that young people who are excluded or do not attend school are particularly vulnerable to engagement in criminal activity. Many of these young people regardless of whether they were convicted 30 or three years ago are possibly affected by difficulties such as dyslexia, autism, attention deficit or Tourettes syndrome. The affects of this not only impact on behaviour but coping with stressful situations such as police custody, trial and prison.

4.6 Solicitors and the Criminal Justice System would appear to be significantly unprepared to acknowledge the implication of the issues involved and understand that any appeal using evidence related to any conditions recognised in 4.5 would need to be case specific and evidence requested accordingly. There have been significant advances in our understanding of the human brain and how it functions in the last 30 years

4.7 Please find attached a report (Appendix 3) by Dr Harry Chasty, formerly head of the Dyslexia Institute which is predominately diagnostic, which indicates the problems affecting one prisoner charged using the joint enterprise law. Each case needs to be viewed and understood separately but this report by indicates the specific problems faced by one person and may give insights for the necessity of a full inquiry to be undertaken.

4.8 Also find attached a report, (Appendix 4),1992, from Southwark Council’s Community Right’s Unit in conjunction with Southwark Irish Forum which indicates historical problems for one community.

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### Written evidence from the Prison Reform Trust

The Prison Reform Trust is an independent UK charity working to create a just, humane and effective prison system. We do this by inquiring into the workings of the system; informing prisoners, staff and the wider public; and by influencing Parliament, government and officials towards reform. We welcome the opportunity to make a submission to the Committee.

#### SUMMARY

The Prison Reform Trust welcomes the Justice Committee’s decision to hold a brief inquiry into the use of Joint Enterprise in England and Wales and is pleased to be able to respond. The Prison Reform Trust is concerned that the doctrine of joint enterprise is being used in a way in which it was never envisaged. In line with the Law Commission, legal practitioners and others, we would welcome an urgent review of the legislation and its application in the courts.

1. Statistics on the use of joint enterprise as a legal doctrine are not collected centrally. Neither is information relating to the number of convictions secured using joint enterprise which are subsequently appealed, whether successfully or not. This lack of transparency is a matter of concern.
2. 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.
3. In its Eleventh Programme of Law Reform submitted to Parliament earlier this year, the Law Commission cited the number of appeals to joint enterprise murder cases as evidence that “*experienced practitioners are finding the existing law very difficult to apply*”. It is worrying that the most experienced legal experts appear to find the doctrine of legal enterprise complex, given that many children and young people charged under joint enterprise will not have access to expert legal representation and will not have their cases heard by high court judges but rather members of the magistracy who are volunteers. We support the Law Commission in its conclusion that “*legislative reform is therefore needed*”<sup>11</sup> and call on the Government to institute an urgent review of the application of joint enterprise legislation.

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<sup>11</sup> [http://www.justice.gov.uk/lawcommission/docs/lc330\\_eleventh\\_programme.pdf](http://www.justice.gov.uk/lawcommission/docs/lc330_eleventh_programme.pdf)

4. We are further concerned that individuals charged under joint enterprise spend extended periods in custody on remand due to the legal complexities of cases involving large numbers of co-defendants and that inadequate information is made available to defendants and their families as to the law under which they have been charged.
5. Research conducted by the Nuffield Foundation on sentencing in murder cases suggests that public opinion does not support murder convictions for individuals who fail to intervene<sup>12</sup>.
6. It is a matter of concern that joint enterprise may have been resurrected by the police and Crown Prosecution Service as a tool to tackle gang membership and group violence without necessarily having evidence to show that this approach is effective. Addressing the reasons why young people join gangs, better understanding the links between victimisation and offending, providing safe exit routes for young gang members wishing to leave, and improving relations between young people and the police are examples of the ways in which youth violence and group disorder might better be tackled.
7. At the very least, questions need to be raised about the severity of sentencing for those on the edges of a serious crime compared to those most culpable. The lack of precision and clarity, fairness and proportionality of this doctrine indicate the need for a proper review.

8. In addition to the Inquiry terms of reference already set out, we would ask the Committee to consider the following additional questions:

- Are children and young people disproportionately affected by joint enterprise?
- Does being charged under joint enterprise lead to extended periods of remand in custody?
- Is information provided to defendants and their families in regard to this penalty?
- Is the use, and impact, of joint enterprise being monitored? If so, by whom?
- Will the Sentencing Council be considering a guideline on the use of joint enterprise in the future?

The following examples of joint enterprise cases have been provided for inclusion in this submission by Just for Kids Law,<sup>13</sup> a charity providing support, advice and representation to young people who find themselves in difficulty.

#### *Murder*

9. 17 youths were charged with murder and conspiracy to commit grievous bodily harm (GBH). All 17 were seen on a bus travelling to an estate in Ealing; some were seen holding weapons, others with bandanas and hoods. The prosecution case was that this was an organised gang attack. A young man was killed on the estate and all 17 were charged with murder even though some had not been present when the victim was actually killed as when the group had arrived they had dispersed and different people had gone off in smaller groups. The position of the police was that all 17 on the bus had the intention to kill or cause grievous bodily harm. Although the police were aware that not all 17 youths were in the same place on the estate when the victim was killed, their position was that it was a joint enterprise.
10. Lawyers for some of the 17 successfully argued for the murder charge to be dismissed; they remained on a charge of conspiracy to commit GBH. The trial was split into two for logistical purposes. At the first trial all defendants were charged with murder and conspiracy to commit grievous bodily harm (GBH). At the conclusion of that case three were convicted of murder and all were convicted of conspiracy to commit GBH, including those that the prosecution could not prove were near the alleged incident at the time the young man was killed.
11. At the second trial, all the defendants were facing the charge of conspiracy to commit GBH; none of them were convicted of the charges.

#### *Grievous bodily harm*

12. Two boys were stabbed outside a 24-hour food shop in Acton. Neither died but both were hospitalised. CCTV showed that one boy had stabbed both of the victims, however all his friends (five youths) were charged with two counts of grievous bodily harm (GBH) and violent disorder, the GBH on the basis of joint enterprise.
13. Our client's instructions were that he was out with some friends going to the shop when he bumped into the perpetrator who was an acquaintance. The perpetrator had asked if he could come to the shop with them—the boys all agreed. Outside the shop the perpetrator saw a young man with whom he had had a previous altercation. An argument broke out between the perpetrator and victim 1. One of victim 1's friends joined in and a fight began and punches were thrown. The perpetrator then pulled out a knife and stabbed victim 1. The group dispersed and the perpetrator chased one of the other boys, who stumbled and fell and was also stabbed.
14. Our client said that he had no idea that his acquaintance was carrying a knife when they bumped into him and had no idea he was carrying a knife until he stabbed victim 1.

<sup>12</sup> <http://www.nuffieldfoundation.org/sentencing-murder-cases>

<sup>13</sup> <http://www.justforkidslaw.org/>

15. All five boys were charged with the GBH on the basis of joint enterprise as the prosecution were aware, from the CCTV, that only one boy had actually stabbed both victims.

*September 2011*

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### **Further written evidence submitted by Emeritus Professor Lee Bridges**

#### **EXECUTIVE SUMMARY**

The purpose of this further submission to the Committee is to fully endorse the submission covering legal issues relating to the application of joint enterprise in murder cases presented by Tim Moloney QC and Simon Natas, Solicitor. However, one further change in the law as relates to joint enterprise may be suggested, so as to preclude convictions under this doctrine solely on the basis that a person was in contact with the principal offenders or present in the vicinity of the scene of the crime. The Committee may also wish to take into account the recent decision of the Government not to proceed with proposals to reform Schedule 21 of the Criminal Justice Act 2003 in order to provide judges with wider discretion in setting the minimum terms to be served under mandatory life sentences for murder. Finally, a suggestion research strategy is put forward to enable firmer statistical data on the use of joint enterprise to be obtained.

1. As a legal academic who has become increasingly concerned with the current application of the doctrine of joint enterprise, I would like to fully endorse the proposals put forward to the Committee by Tim Moloney QC and Simon Natas, Solicitor, for reform of the law of homicide. In particular, I support their view that merely to enact the Law Commission's proposals in Participating in Crime would only serve to enshrine in statute many of the uncertainties and difficulties currently associated with the common law doctrine of joint enterprise. Instead, it is essential that a wider approach be taken, encompassing an overhaul of the current law of homicide and the sentencing regime attached to it, as well as requiring intent (and not mere foresight) on the part of secondary participants if they are to be convicted under the doctrine of joint enterprise.

2. It is worth noting in this context that the current Government originally suggested, in its consultation paper *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* issued late last year, that Schedule 21 of the Criminal Justice Act 2003, which governs the setting of minimum tariffs under life sentences for murder, should be reformed, so as to give judges greater discretion to take into account the particular circumstances of each conviction for murder. It is possible that such a reform might have addressed some of the unfairness attached to the sentencing of those convicted of murder under the doctrine of joint enterprise (if not in the substantive convictions themselves). However, the Government has recently decided not to proceed with this proposal. In the light of this decision, the case for adopting a wider and more systematic approach to reform in this area would appear to be strengthened.

3. In addition to the proposals for reform set out by Tim Moloney QC and Simon Natas, Solicitor in their submission, the Committee may wish to consider one further change in the law of joint enterprise. As has been indicated to the Committee in other submissions, convictions under joint enterprise often appear to be based on tenuous evidence relating to the secondary party's contact with the principal defendant or defendants prior to the crime (eg by way of telephone contact) or their presence at or in the vicinity of the scene of the crime (eg as evidenced by cell phone location data). Juries can be invited on the basis of such evidence to infer encouragement or participation in the crime.

4. As a further protection for the accused and against potential miscarriages of justice, the need for a specific statutory provision relating to such evidence should be considered. This would be similar in character to the provision under section 38(3) of the Criminal Justice and Public Order Act 1994, which precludes a conviction being based solely on inferences drawn from the accused person's silence under police questioning or at court. In the same vein, there should be a specific statutory provision that a person shall not be convicted under the doctrine of joint enterprise as a participant in or as encouraging a crime, solely on the basis of evidence that that person was in contact with the principal defendant(s) at the time of or prior to the commission of the offence or present at or in the vicinity of the scene of the crime at a time in close proximity to its occurrence.

5. Finally, the need for further empirical research on the development and use of joint enterprise should be obvious. Yet, it would appear that the Ministry of Justice is reluctant, on the grounds of costs, to undertake the necessary examination of judicial records in order to provide definitive statistics on the use of joint enterprise. It may be that a more convenient means of gathering such data would be through an examination of Crown Prosecution Service records. As a starting point, the CPS might be asked to identify all cases over a specified period in which two or more defendants have been charged with the murder or manslaughter of the same victim and to examine the files relating to these cases to determine whether the charges were based on joint enterprise and how many of these resulted in convictions for murder, manslaughter or some lesser offence, or in acquittals.

*September 2011*

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### Written evidence from the Howard League for Penal Reform

The Howard League for Penal Reform is the oldest penal reform charity in the world. In 1947 we became one of the first non-governmental organizations to be granted consultative status with the United Nations.

The Howard League for Penal Reform campaigns for less crime, safer communities and fewer people in prison. Since 2002, the Howard League for Penal Reform has provided a unique legal service dedicated to representing children in custody. In 2007, the service was expanded to represent young adults under 21 in prison. Our lawyers have represented children and young adults on a wide range of issues from conditions and treatment in custody to resettlement and rehabilitation issues following release. This evidence draws in particular upon a case study prepared by one of our lawyers who has specialized in representing children who are serving life sentences. We have focused on the impact of the law on joint enterprise as it affects children in light of our experience in this area.

#### SUMMARY OF EVIDENCE

This evidence deals with our *two key concerns* that in the case of murder the law on joint enterprise as it stands has to potential to lead to:

- (i) Unjust, disproportionate, results for children.
- (ii) Practical obstacles to effective rehabilitation or the promotion of the welfare of the child under sentence.

#### (i) *The potential for unjust results*

Given that the mandatory sentence for murder committed by a child is detention for life at Her Majesty's Pleasure, the potential for a child to be convicted for murder on the basis of joint enterprise, even where there was clearly no intention to cause serious harm, may lead to unjust results. The following case study drawn from our own legal work illustrates the point:

Peter was 14 years old. He had never been in trouble with the police before. He had never drunk alcohol to excess or taken drugs. He had a loving mother and a stable home life. He is now serving a sentence of detention during her Majesty's pleasure (the juvenile equivalent of a life sentence) for murder.

The day that changed his life and tragically ended the life of another began like any other. Peter met up with some school friends and together they went to a visiting funfair. At the fair Peter's friends were joined by some older boys who Peter did not know. One of the older boys suggested that they all go to buy some fried chicken. Peter and his friends agreed. As the boys were leaving the fairground, one of the older boys asked Peter to look after a baseball bat that he had with him. Peter could also see another of the older boys further ahead asking Zac, one of Peter's friends, to look after a small sword. Peter guessed that the older boys were using him and Zac to look after these things so that if the police stopped the group the older boys would not get into trouble. But he was frightened about what would happen to him if he did not agree. He took the baseball bat, which was in a drawstring bag, and carried it with him to the chicken shop.

When the boys got to the chicken shop, Peter and his friends waited outside. Max, a boy from another group, waited with them. After a while, Max suggested that they all walk back to the estate where they lived. As the boys moved off, they saw another group of boys across the road. Max pointed to one of the boys and told Peter and his friends that he was going to rob him. Peter felt uncomfortable—he had never been around when anything like this had happened before—but he felt frightened about what would happen if he tried to get away.

Max approached the boy he had pointed to. To Peter's surprise, Zac followed and Peter saw Zac show Max the sword that he had hidden down his trousers. The boy Max had pointed to then grabbed Zac and pulled him into a nearby block of flats. Max followed them, so Peter and another of his friends went in too. As Peter entered the flats, the boy who Max had pointed to shoved Zac out of the way and tried to run out of the door. Max blocked his exit. The boy grabbed Max and, as he did so, Peter hit the boy on his back with the baseball bat he had been given earlier. This is the biggest regret of Peter's life.

Peter did not intend to hurt the boy. He had not even taken the bat out of the bag in which he had been carrying it. He acted in the heat of the moment, fuelled by the fear of how the others would react if he did nothing.

The boy ran off down the street and Peter thought that the incident was over. It was only when the boys reached a nearby park and one of the other boys who had been present pulled out a knife with blood on it that Peter realized that the situation was far worse than he had realized. Later that evening Peter learnt that the boy he had hit with the bat had died of a fatal stab wound.

Peter handed himself in to police and was ultimately convicted of murder on the basis of joint enterprise.

(ii) *Consequences for children: Practical obstacles to effective rehabilitation or the promotion of the welfare of the child under sentence*

Although the courts have underlined that the nature of the sentence of detention at Her Majesty's Pleasure as a primarily "welfare based" sentence distinct from life sentences imposed on adults,<sup>14</sup> the reality is that the restrictions of the life sentence present enormous obstacles for young people who genuinely wish to rehabilitate.

The only sense in which the sentence contains some element of flexibility is the extent to which there is a limited opportunity for a child sentenced for murder to be rewarded for *exceptional progress*. This is because the sentence of Detention during Her Majesty's Pleasure includes the right to a review of the period to be served for punishment in light of progress. However, due to the small number of child lifers within the prison population and the lack of knowledge and resources for dealing with such young people, it is extremely difficult for children to have the opportunity to demonstrate exceptional progress. For instance, there is very limited offending behaviour work available in the youth estate and those with long minimum terms are often not prioritised on the basis that they have a long time to do the work.

These children and young people are excluded from the possibility of release on licence from prison establishments so they cannot engage in community work. Within the young adult estate, they generally cannot get trusted jobs where they would have an opportunity to demonstrate progress, as regardless of how low their actual risk is assessed to be, most have usually committed the offence against peers and therefore fall foul of the automatic restrictions placed on anyone (including children) who has committed a violent offence against a child.

The mechanics of the way in which the sentence is administered are complex and inflexible. For instance, the government's policy is for a detainee to have a chance to apply for such a review at the half way point of his or her minimum term. However, the reduction tends to be fairly minimal and certainly never more than two years.

A detainee has the right to be considered for suitability for a move to open condition three years before the end of the punishment period. However, many children are given relatively short terms. Therefore, if they are successful at their half way review in reducing the minimum term, they may have already missed the earliest opportunity for a review as to suitability for open conditions. Take, for example, a young person with a ten year minimum term imposed at the age of 13. At the point of sentence, he should be entitled to a mid term review when he is 18 years old and consideration for open conditions when he is 20 years old. However, if he makes exceptional progress and has his minimum term reduced to eight years at his mid point review, he would have been eligible for a move to open conditions after five years, ie when he was 18 years old and at the time he was making his application for the mid point review rather than an application for open conditions. The mid point review process can take many months. In such circumstances, had the detainee been able to apply for a reduction of the minimum term before turning 18, he might have avoided having to be transferred to what Lord Woolf described as the "corrosive" conditions of adult prison. He would also have had a longer period in open conditions to adjust back to community life before being considered for release on life licence by the parole board.

These difficulties run counter to the very purpose of the sentence of Detention at Her Majesty's Pleasure. In *R v Secretary of State, Ex parte Maria Smith* [2005] UKHL 51, Baroness Hale commented that a key aim of the sentence should be to "promote the process of maturation, the development of a sense of responsibility, and the growth of a healthy adult personality and identity" (paragraph 25). In the case of a young person who has been convicted of murder on the basis of joint enterprise and who has not engaged in behaviour that was ever intended to result in tragic consequences, it is difficult to see how the interests of both justice and a safer society can be meaningfully served.

September 2011

### Written evidence from the Committee on the Reform of Joint Enterprise (CRJE)

#### ABOUT THE CRJE

1. The Committee on the Reform of Joint Enterprise (CRJE) is an *ad hoc* collection of lawyers, academics and otherwise concerned individuals and groups. Our regular dealings with joint enterprise liability have convinced us of the need for urgent reform. Collectively, we have wide-ranging experience teaching law, practising in the criminal courts, and supporting individuals adversely affected by the operation of joint enterprise liability. That experience leads us to propose that the current law needs to be reformed in order to bring about the following simple and long overdue changes: to make the law fairer; to make it more effective at ensuring that criminals are convicted of only those offences of which they can properly said to be guilty; and to better reflect the wrong done to victims of crime. We rely on an academic legal critique of the law of joint enterprise and practical experience to show that legislative enshrinement of the doctrine in its current form is untenable. We respond in particular to the Select Committee's question regarding the advantages and disadvantages of enshrining the doctrine in legislation.

<sup>14</sup> See, for example, Lord Hope in *Ex parte Venables* (1998) AC 407 at p 532A-D:

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## SUMMARY OF EVIDENCE

2. Many have noted that the law of joint enterprise as it stands is unprincipled, unclear and unfair. Although legislation might provide clarity, the fundamental problems of the doctrine should not simply be crystallised in statute. We submit that the doctrine should undergo a substantive review to (i) bring it into line with established English criminal legal principle and (ii) achieve its real and legitimate public protection aim. In brief, we submit that:

- (i) joint enterprise liability arises in a wide range of circumstances, which is of particular concern in the special case of murder;
- (ii) it is difficult to be certain of what the elements of liability are, in the absence of a clear mental and physical element; and
- (iii) there are no clear rules on the limit of the doctrine, which makes it difficult for ordinary members of the public to know what is and what is not lawful.

3. The evidence goes on to acknowledge the underlying policy objectives of joint enterprise liability and argues that a clearer formulation of law is required in order to meet those aims.

### *Joint enterprise liability*

4. Often, the term “joint enterprise” is used to describe any situation in which there is more than one defendant. As a doctrine, however, it has its own particular rules, quite apart from other incidents of joint offending—or secondary liability. It is helpful to clarify what we mean by “joint enterprise” liability. Essentially, the doctrine operates as follows:

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 have sufficiently associated himself with the commission of crime B and will from then on be considered a secondary party to that offence.<sup>15</sup>

5. D2 would be jointly liable for D1’s actions even if he did not enter the property that D1 was burgling, provided he was in on the burglary (for example, as look-out) and foresaw that D1 might intend to kill or seriously injure an occupant. Thus, D1’s agreement to crime A provides the basis for his liability for crime B. This is known as the “common purpose” requirement.

### *Lack of clarity*

6. The importance of a doctrine which allows convictions where a multi-handed offence takes place, but it is unclear *who* is the most responsible is self evident. The operation of the details of joint enterprise, however, is unclear. There is some confusion as to what constitutes a “common purpose”. It is usually understood to exist where D1 and D2 make an agreement—explicitly or implicitly—to commit an offence. Lord Justice Hooper, giving the Court of Appeal’s judgment in *Rahman*<sup>16</sup> made the distinction between i) the *scope* of what was agreed, and ii), what D1, despite the particular terms of the agreement, *foresaw* as a possible outcome. Lord Brown, however, in the House of Lords judgment in the same case, conflated these two distinct ideas.

7. This discrepancy highlights a fundamental problem because the first of Lord Justice Hooper’s formulations cannot found joint enterprise. This is not just because it could not sensibly deal with spontaneous cases of committing crime with a common purpose, which surely deserve attention, but also because it not be any different to normal secondary liability. Where what D1 does is within the scope of his agreement with D2—that is, it is the very act which they agreed to commit—D2’s liability is straightforward. D2’s liability for the offence is clear: his agreement constitutes the normal secondary liability requirement of counselling; joint enterprise liability is irrelevant.

8. In fact, the additional function of joint enterprise, is to attach liability to D2 for *foreseen*, but *unintended* consequences of his agreement with D1. Joint enterprise forces D2 to be punished for his creation of a risk, which he may well not have intended, but which he realized might occur. In this sense it seems sensible that crime A be required to be connected to crime B. On the Law Commission’s view,<sup>17</sup> though, crime A need not be connected at all with crime B. In this way, one rationale of the crime A requirement—that D2’s part in crime A made crime B more likely—is lost.

### *Insufficient culpability*

9. It is a basic tenant of English criminal law that liability for serious crimes is generated by a combination of a wrongful action or result and a blameworthy mental element. As the late Lord Bingham of Cornhill said:

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<sup>15</sup> *The doctrine of joint enterprise liability*, G. Virgo, Arch.Rev. (2010) 10, 6–9 at 7

<sup>16</sup> *Rahman v R* [2009] 1 Cr App R. 1 at para. 69

<sup>17</sup> Expressed in *Participating in Crime* (Law Com No 305, 2007) at para 3.47

...it is a salutary principle that conviction of serious crime should depend on proof not simply that the defendant caused (by act or omission) an injurious result to another but that his state of mind when so acting was culpable. This, after all, is the meaning of the familiar rule *actus non facit reum nisi mens sit rea*.<sup>18</sup>

10. However, joint enterprise liability makes D2 liable for crime B without any evidence of assisting or encouraging crime B and only on the basis that D2 foresaw that crime B might take place. The trigger for his liability, instead, is his agreement to the original crime A, but which need not be connected with the commission of crime B.

11. Next, in ordinary liability for accessories to crimes, D2 must know the elements of the crime committed by D1 to which he is an accessory. To be guilty, D2 must foresee, on the facts known to him at the time of his actions, a “substantial risk” or “real possibility” that D1 would commit the primary offence—for our purposes, murder. In the majority of joint enterprise cases, prosecutors and the courts focus on D2’s knowledge that the principal has a weapon which turns out to be the murder weapon, and asks the jury to decide whether D2 “must have foreseen” that it would be used. Thus, although the standard of D2’s fault is in theory a subjective one, the practical reality of jury trial is that it has become objective. D2 can be convicted of murder, therefore, if the jury think, without more, that he should have known that D1 might kill or seriously injure the victim. If it is shown that D1 acted outside the scope of what was agreed or could have been foreseen and thus was fundamentally different from what D2 foresaw, D2 will escape liability. In practice, however, the defence has the often heavy evidential burden of proving that this is what happened.

12. Ordinarily the reach of liability would be limited by the extent to which D2 is connected to the actual harm suffered by the victim. Under the doctrine of joint enterprise, far less is needed to prove such a connection. Indeed, D2’s agreement with D1 to commit an entirely unrelated crime from the subsequent murder may well be enough for him to be convicted. To enshrine this feature of joint enterprise liability in legislation would be to neglect established criminal legal principle.

#### *The special case of murder*

13. These three features result in the construction of D2’s liability from a highly tenuous basis. This is especially problematic in the case of murder, in which guilt is already constructed from the lesser intent to cause grievous bodily harm and not just death. This is compounded by the fact that the highest sentence in the English penal system—imprisonment for life—is automatically applied. The injustice of serving a life sentence for murder on the tenuous ground that D2 agreed to a separate and lesser crime is self evident and should not be preserved in legislation enshrining the doctrine in its current form. Instead, the options for conviction of a lesser offence which carries sentencing discretion should be explored.

#### *Contravening principles of criminal law*

14. Joint enterprise liability thus sits outside defensible principles of criminal law and may result in injustice. Any new legislation must consistent with well grounded principles and rules of law. The doctrine of joint enterprise, however, has been shown to contradict three fundamental principles. 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.<sup>19</sup> 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.

15. These three elements culminate in the labelling of individuals who—albeit not entirely innocent—cannot properly be called “murderers”. Yet, the law in its current form not only labels them as such but also attaches the life sentence. This contradicts the principle that requires that an individual is fairly labelled according to his fault, and that his punishment is related to that wrong and nothing more.

#### *The importance of legal certainty*

16. The function of principle is not simply academic. It serves to allow the general public to understand the rationale behind legal rules and offer them the opportunity to plan to live their lives lawfully, and within those rules. A reasonable degree of certainty in the law is a fundamental requirement for the Rule of Law. In our view, the operation of joint enterprise liability frustrates the expectation that an individual can identify how the law applies to his actions and subsequently abide by it. This problem is also found when lawyers advise defendants as to the strength of the cases that they face. Putting the doctrine into statute might make the *rules* discernible, but the requirement for certainty is not fully met if the *rationale* behind them is contorted or

<sup>18</sup> [2003] UKHL 50, [32]. The Latin text can be loosely translated as “the act does not make a person guilty, unless the mind is guilty”

<sup>19</sup> See, for instance, the complex direction proposed by the Court of Appeal in *Rahman*, involving six primary questions and multiple alternatives for just one part of joint enterprise, cited above at note 2, [69].

lacking content. Thus, a substantive review of the common-law and statutory rules relating to joint enterprise liability is vital.

#### *Public policy*

17. Joint enterprise has to be understood against the background of the public's growing fear of gang violence. The academic commentary that grapples with the legal niceties of joint enterprise has led to attention being diverted from the underlying policy discussion. The focus of legal and political debate should be whether that is (a) the right policy and (b) whether the judges or parliament should be advancing it.

18. In the foreword to the Law Commission's Consultation Paper, *Murder, Manslaughter and Infanticide: Proposals for reform of the law* it was stated that:

[t]he role of the criminal law in these cases is to ensure that justice is done and that the punishment fits the crime. In order to do this, the law needs to be clear and consistent and *in tune with current circumstances and attitudes* (emphasis added).<sup>20</sup>

19. It is commonly said among criminologists that what the public is interested in is not always in the public interest. It is to be regretted that the voice of that discipline is often stifled by the media coverage, which disproportionately influences political decisions in criminal justice in England and Wales. No one wants to be accused of being soft on crime; but ill-considered tough measures that do not work cannot satisfy the reasonable demands of the public for protection and security.

20. The Court of Appeal in *Mendez*, dissatisfied with submissions from counsel for the appellant that the current law has developed under the "[heavy influence of] practical and public considerations",<sup>21</sup> held that it would be:

...wrong to regard the law in this area as merely a product of policy considerations, for this would be to overlook the underlying principles<sup>22</sup>

21. It is submitted, however, that the breaches of established legal principle detailed above cannot be ignored. As always, the boundaries between the needs to protect the public while treating an accused fairly must be carefully balanced, but above all, it is submitted, proportionate and necessary sacrifice of principle where there is no other way to protect the public.<sup>23</sup> We suggest that the fact that many people serving life sentences for murder, who are in prison as remote "joint enterprise" accessories rather than as actual killers, is a clear indication that the law is out of balance.

22. Lord Falconer's statement in defence of the current law on the Today Programme in September 2010 offered little reassurance:

"The message that the law is sending out is that we are very willing to see people convicted if they are a part of gang violence—and that violence ends in somebody's death. Is it unfair? Well, what you've got to decide is not "does the system lead to people being wrongly convicted?" I think the real question is "do you want a law as draconian as our law is, which says juries can convict even if you are quite a peripheral member of the gang which killed? And I think broadly the view of reasonable people is that you probably do need a quite draconian law in that respect."

23. It must be acknowledged that the majority of joint enterprise cases involved young adults. 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. While criminal justice policy requires that balances and compromises are struck to ensure the public's protection, this must be in keeping with the basic principle that only those who are blameworthy are punished by the law.

24. Our justice system famously champions the individual's right to freedom. It should continue to do so. It is dangerous to suggest that the wrongful conviction of innocent people is of secondary concern. In reality the law need not be so draconian or wide in order to effectively punish those who are deserving of serious punishment and in order to protect the public from people who truly pose a risk to its safety. By rearranging the way in which the offence of murder in the context of a group attack is understood, and stripping the law back to basic principles, the law of joint responsibility can be reinstated with logic and justice.

#### CONCLUSION

25. If the law of joint enterprise is to be a just law, it must be brought into line with existing legal principles. Indeed the real and legitimate aim of protecting the public from dangerous individuals who play a real role in the cause of a victim's death is best served by rules relating to individual responsibility, causation and proportionate sentencing. Before any legislation is introduced, therefore, a review of the rules and principles applicable to this area of law must take place.

<sup>20</sup> CP19/08, 28 July 2008, at p1

<sup>21</sup> At [15]

<sup>22</sup> At [16]

<sup>23</sup> BROWN v STOTT [2003] 1 AC 681. HR



26. As individuals we and many others have written and argued on the solutions available to the problems arising with joint enterprise liability. As a committee our purpose is to improve the law in this area.

October 2011

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### Written evidence from Wrongly accused Person Organisation

After watching the evidence provided to the Justice Committee on Tuesday 25 October, I believe I may have information which would be useful in connection with the main issue being debated that day—Joint Enterprise. Wrongly Accused Person is a charitable organisation which supports wrongly accused/convicted people and their families, the main criteria in any case, Joint Enterprise or otherwise, being that the claim of innocence with respect to the charge(s)/conviction is credible. This requires that we research all of the evidence available to us, with some cases failing at various stages. We have at present very limited resources and man power, so have significantly fewer cases which we would consider to be researched to an extent which would provide meaningful information. However from those which have been, there is evidence which tends to substantiate or conflict with the evidence presented on the 25th.

Keir Starmer QC stated when asked that there is no specific guidance given to prosecutors in respect of Joint Enterprise. The CPS website however does give the following guidance, albeit vague—

#### *Joint Enterprise*

*The principle set out in R v Lane and Lane (1986) 82 Cr App R 5 and restated in R v Aston and Mason (1992) 94 Cr App R 180 is that where two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both. This equally applies to homicide offences. However, see **Familial Deaths** below for offences involving members of the same household.*

The guidance given on Familial Deaths is significantly more comprehensive despite, for obvious reasons, it being much easier to identify who can and cannot be considered responsible within a household. If the use of Joint Enterprise is to continue based on principle rather than clearly defined statute, the guidance should be seen to be transparent, fair and meaningful. There are few cases to which this guidance could apply if the unspoken word, which is nothing more than speculation, or mere presence can be taken as evidence of “acting in concert”.

Despite this advice, we do see cases where there is clear evidence pointing to one or more people being responsible for the crime in question but no evidence whatsoever that the person we are supporting participated or supported it in any way. In one case both the trial judge and the CCRC accept that the person now serving a life sentence for murder played no part in it and that there is no evidence which demonstrates he could have foreseen it.

In another murder case, there is clear evidence as to who committed the offence, yet another person who was alibied some distance away at the time is also convicted of murder. The person with primary liability received a significantly lower sentence in exchange for the *only* evidence against him, namely that he had told her to do it and as a result she is now serving a sentence with a tariff which is less than two thirds the tariff received by him. This clearly doesn't fit within the scenario proffered when Mr Starmer was queried on this subject, the conviction of the murderer was already certain. The risk of a miscarriage of justice in such circumstances are highlighted by the fact that in a hearing on another matter, the judge has commented that the murderer changes her account to suit her own best interests depending on the position she finds herself in at the time.

Mr Starmer stated that in some cases, the evidence would not become clear until perhaps midway through the trial and accepts that there is an argument that this is an unfair advantage to the prosecution. On the one hand, we see cases where there is no clear evidence of involvement other than perhaps varying degrees of proximity but on the other we see cases whereby it is perfectly clear at a very early stage that there is evidence which could have, and should have been sought in order to confirm or deny key facts but isn't. In effect this means, and Mr Starmer's evidence confirms, that cases are being brought under Joint Enterprise which do not, and cannot fit within the guidance and tests the CPS are specifically given to apply in all cases. Advice which the police are specifically told they should follow in all cases where the CPS is not taking the lead role.

We could say from some cases that there does indeed appear to be a perceivable non committal line of defence questioning in the early stages where multiple persons face trial and are represented by different legal teams, though obviously we could not possibly confirm that for reasons of the legal privilege of other parties. In contrast to that position, we also know of cases where particular information was available prior to trial which could have assisted in the defence of one client, such as alibi evidence which could have been further investigated but appears from the case files not to have been. Perhaps the most worrying instance of this is in a case where there was indeed an alibi witness available and mobile phone information amongst other things could have confirmed that alibi. The subscriber details were available within the first week of the investigation and it was clear that mobile phone evidence would be used in seeking to establish both association and movement but was not requested with respect to the alibied defendant when it was requested with respect of

others whose involvement was more certain. The alibied defendant was represented by the same legal team who had represented almost every suspect during police interviews and continued to represent at trial a defendant who had sought to implicate him when if his alibi evidence had been available could not possibly have been involved in any way. Clearly in the absence of this conflict, the alibied defendant's representative could have insisted upon those investigations being carried out or sought the information themselves but in the event couldn't without further implicating their other client. That information cannot now be obtained because telecom companies only preserve the information for 12 month and knowledge of it was sat on by investigating officers for 11 and a half months which perhaps demonstrates a concern which Dr Andrew Green was asked about, that being the suggestion that Joint Enterprise was an easy route and hence the police were not conducting thorough investigations because convictions can be obtained without doing so. The obvious risk in that case is that someone who was provably part of a gang participating in serious gun crime has implicated and caused the conviction of someone the evidence strongly suggests was not part of it and didn't play any part in the murder resulting in a tariff of 27 years. Furthermore, the MG6 forms in the case specifically state that there is no known significant association between the two.

Joint Enterprise cases, by their nature, particularly those involving large numbers will inevitably cause complications with such conflicts in representation while they are tried together at the same trial. The larger the numbers, the more problematic it will become with more suspects in need of representation all within the same geographical area. Clearly court schedules and other commitments of legal representation will make it more difficult to avoid such conflicts of interests as the numbers increase, something which could be avoided more easily if trials were conducted separately opening up the possibility of using different courts and also making representation from outwith the area a more viable option at the same time.

The other issue regarding representation which follows from Mr Starmer's evidence is that of the accused person's ability to instruct his/her representatives. If evidence only emerges half way through a trial, those representatives are effectively defending their clients on the hoof without the opportunity of the client being able to instruct on how to do so and there is no opportunity to evaluate whether other evidence may be available to refute that evidence or to prepare a defence against it. This is a fundamental and basic requirement in all cases as per Article 6 of the ECHR—

3. Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and the facilities for the preparation of his defence;
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; and
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

Furthermore, the present guidance and tests which the CPS must apply in ALL cases specifically states that “3. Prosecutors should only take such a decision when they are satisfied that the broad extent of the criminality has been determined and that they are able to make a fully informed assessment of the public interest. If prosecutors do not have sufficient information to take such a decision, the investigation should proceed and a decision taken later in accordance with the Full Code Test set out in this section.” (Full Code Test) and in relation to the threshold test which must be applied in cases where the not all of the evidence is known—“10. The further evidence must be identifiable and not merely speculative.” The guidance being that if the condition is not met, whether or not prosecution is in the public interest cannot be assessed and the person should not be charged. Therefore the effect of Mr Starmer's evidence, which he himself appears to accept is unfair, is that Joint Enterprise cases are being brought in circumstances where neither the Full Code Test or the Threshold Test can be met. As indicated above, this appears to be confirmed in cases we have reviewed.

There are other details within the CPS tests which tend to contradict the view that Joint Enterprise cases are being brought without existing tests being applied. For example, under the heading “Some common public interest factors tending against prosecution”:

h: the suspect played a minor role in the commission of the offence.

It would be difficult to propose that mere presence could be considered anything other than a minor role, particularly in a case such as one where the primary party is known, his shoe remaining at the scene and another is convicted on the basis that they were present, saw the offence being committed but the prosecution themselves accept that he was virtually blind. In any event there is evidence which suggests he came by the victim after the fact and that his actions were beneficial to the investigation rather than the primary party and so could not be considered to be supportive of him.

I accept that cases which have been submitted for the committee's consideration will not assist in terms of whether Joint Enterprise is being applied fairly and appropriately until they have been researched. It is possible that some of those cases will have been applied properly both morally and in law. It may be worth the committee considering however that in our experience there are also people maintaining innocence who do not realise their conviction is based on Joint Enterprise principles and consequently would not have contacted Jengba in any event. Whether across the country those cases, or indeed any who do not know Jengba exists,

would compensate for any which have contacted Jengba but cannot be considered unfair is obviously impossible to say but it should be recognised that there will be valid cases out with those submitted.

It was suggested that Joint Enterprise doctrine was being applied more so to high profile cases than those out with the media spotlight. Like Dr Andrew Green, I see no reason in particular to suspect it but rather that some of the cases which we have been unable to support were high profile and were not treated as Joint Enterprise cases when they could have been. I would prefer not to cite specific cases for reasons of confidentiality, particularly since we are no longer involved with those concerned and cannot therefore ask for their consent. You could however consider an example in similar terms along the lines that the convicted person denied murder but claims to have been present when a friend did. That friend claims to have been present but that the convicted person did. Both embarked on a series of events after the murder which could have no other intent than to delay the finding of the murdered person until they are later arrested. In the absence of any physical evidence to assist with which is telling the truth, arguably both should have been charged in order that the jury decide which played the primary part and which aided in the attempted cover up.

It would be difficult to form a view on the balance of Joint Enterprise cases which are in or out of the media spotlight based on the limited number available to us, but I would suggest that it might be one area where the list provided by Jengba could assist the committee. If a distinction between high profile and low profile were drawn between those which were reported nationally and those reported only locally if at all, the list of cases would give an indication of the balance at least.

I hope this will be of some assistance to you and apologise for submitting our concerns late in the day. Please feel free to contact us with any queries you may have or if you think there is anything either myself or Ms Sandra Lean could be of assistance with in your considerations of Joint Enterprise or any other matter.

*October 2011*

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#### **Supplementary written evidence from Gillian Phillips**

Further to our submission to the Select Committee on 12 September, we wish to add these additional observations/comments.

Being unable to attend, but having watched the opening session of the Joint Enterprise Select Committee, we were struck by the pre-conceived beliefs brought to the proceedings by some of the members. For example:

1. One member stated that “We are not talking about people with their friends”, that the focus was upon gangs. But what constitutes a gang—family groups who have been out for a meal, school children on their way home from school, a few friends in a local pub, a couple taking a taxi, someone on the other end of the “phone”? All of the above are examples of Joint Enterprise cases where people are serving long sentences in prison, all of whom were clearly not part of a gang. Ordinary, law abiding citizens caught up in unexpected violence should not be categorised as gang members, nor should they be treated as such. If the escalation of the use of this law is meant in some way to clear gang members from the streets, it is missing its target. It would be very interesting, once serious research is completed, to determine how many real “gangs” have been convicted of Joint Enterprise offences, and what percentage they form of the whole Joint Enterprise convictions.
2. Select Committee members appear to think that the general public are aware of the Joint Enterprise law, and its application. This is not the case. Our experience is that, until charged, most people are unaware of it. Certainly they did not realise how little evidence (or in some cases no evidence at all) was needed to bring about a conviction. Members of the general public we approached for signatures on our petition had never heard of it and were astonished and incredulous once they had been given a brief explanation, together with some examples. Juries, of course, are made up of members of the general public and likewise, have no knowledge of this law and yet are expected to decide the guilt or otherwise of those charged. One committee member said “the jury can make that decision”. We question whether they can arrive at an unbiased decision when the defence in a great number of cases appear to be inexperienced in Joint Enterprise application, and therefore ineffective.
3. It was said by another member that complainants were merely “aggrieved people” but the grievances were based on experiencing the misuse and abuse of this law.

In the matter of Appeals and their number, it would be interesting to discover from the proposed research, just how many cases make it to appeal, and what proportion of these are successful. If, as a Select Committee member claims, there are a lot of appeals, this would surely indicate that these cases have new evidence which should have been picked up in the first place. We believe that evidence that refutes an allegation is not pursued by the police or is “lost”. This has happened in a number of cases we have looked at and is surely more than coincidence.

Finally, we come to the matter of educating the general public, ie. the younger members of it. We are aware that members of the Police force are attending schools outlining the pitfalls of joining gangs or of being with a group of others. Surely this is scare mongering? The government is urging young people to abandon the solitary use of computer games/chat rooms/face-book etc, in favour of exercise. Most exercise involves groups of other people eg. football, rugby, boxing etc. Would not this scare mongering make young people less inclined

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to partake in group sports activities? Also, it is noted that these police talks are given in state schools particularly in socially deprived areas. Are they deemed to be unnecessary in private schools?

Because there seem to be so many areas of Joint Enterprise that are unclear and no body of research to call upon for clarity, we believe that no decision about the future of this law should be taken until research is completed and a full enquiry is undertaken.

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### **Written evidence submitted by Justice on Appeal**

I have watched the evidence session, and felt extremely disappointed. Major factors were either skimmed over or simply not taken into account. Some of those giving their evidence had clearly not done their research.

My organisation Justice on Appeal has a substantial amount of people contacting us maintaining that they are not guilty of the index offence. They have all been convicted under Joint Enterprise and many of them are serving a minimum of 20–30 yrs of a life sentence. When two or more people are clearly involved in the commissioning of the crime, then that is not our concern. While they are guilty of a lesser offence, and that should be reflected we currently concentrate on the cases where the person is most certainly not guilty. There is overwhelming evidence which confirms this.

I have had the unenviable and tedious task of sifting through several dozen of these cases since last year. I have studied the prosecutions side and the defences side in addition to the summing up. The evidence reveals that these people are being unjustifiably convicted based on several factors, the most prominent being:

- Fabricated and manufactured evidence.
- Blatant corruption.
- Judges misdirecting the Jury on the law of evidence and interpretation of the law.
- Jurys being denied their request to acquit one defendant and convict the other, thus depriving the defendant of not just a fair trial, but ANY trial. This breaches ECHR article 6. In some cases they are accepting separate verdicts for separate defendants.
- Lawyers not representing their clients properly, as they ought to under the Solicitors Act 1922, which stipulates that the Lawyer has a fundamental duty to their client at all times.
- The defence not introducing crucial evidence and telling the defendants that they can rely on this at a later appeal. This is actually flawed, as evidence which is available cannot be relied upon at a later date.

The law of Joint Enterprise does need seriously amended or even abolished. It is damaging people's faith in the Criminal Justice System, and the human impact is truly horrendous. Young people committing suicide, and Families being destroyed.

*November 2011*

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