

**RESPONSE TEMPLATE FOR CONSULTATION ON LEGAL GUIDANCE ON SECONDARY LIABILITY**

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| 1. Does the section on <i>Principles of Secondary Liability</i> cover all the main principles accurately? |
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**We have confined our comments to section 4**

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| 2. Does the section on <i>Conditional intent cases</i> provide clear guidance that accurately reflects the law post- <i>Jogee</i> ? |
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3. Do the sections on charging group assaults provide clear guidance on how to approach charging decisions in such cases post-*Jogee*?

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4. Do you have any further comments on the *Legal Guidance on Secondary Liability*?

In partnership with Birkbeck, the Prison Reform Trust published a report by Jessica Jacobson, Amy Kirby and Gillian Hunter in 2016 – “Joint Enterprise: Righting a Wrong Turn”.

[Righting a Wrong Turn](#)

The report drew on original research, kindly facilitated by the CPS and funded by the Nuffield Foundation. It involved a detailed review of CPS case files and made a number of recommendations designed to enhance clarity and transparency. We welcome the consultation on this guidance, which should assist in that endeavour. Our comments are limited and we have not sought to offer a view on the way the points of law are explained.

## **Terminology**

The guidance includes the phrase 'joint enterprise' only twice: in the statement that the guidance 'replaces the previous guidance on Joint Enterprise' and in commenting that 'the live issue in a joint enterprise case is often whether D2 has participated in the venture'. We support the general move away from the use of the term 'joint enterprise' (as we recommended in our report), but feel that the general avoidance of the term in this document – and the use of 'secondary liability' as a term which encompasses the contentious aspects of joint enterprise - should be explicitly noted and explained.

We note several references to 'gang' membership in the interim guidance, including, for example, in the statement 'Where a death or serious assault occurs at the hands of a group or gang, prosecutors should seek to determine the exact role played by each suspect'. The reference here to 'gang' adds nothing to the point of law being made, and the elision of group with 'gang' offending provides scope for unconscious bias in charging practices. Further, it should be remembered that one of the significant criticisms of the way the JE doctrine had evolved prior to Jogee (and as articulated in the Jogee judgment itself) was that policy concerns with tackling 'gang' criminality had contributed to the 'wrong turn' taken by the law.

We think this is especially unfortunate given the recent publication of the Lammy Review and would suggest that confidence in this guidance could be seriously undermined if these references remain in their current form.

## **Recording**

We are pleased to see that the section on 'recording the basis for charging decisions' closely reflects the first and second recommendations in our report on charging decisions and recording (the relevant section of our report is shown below alongside the relevant section of the draft guidance)]. With respect to the point that information on 'the role played by the D' should be recorded on the MG3 form, we think that this should be elaborated to provide a (non-exhaustive) list of options for describing the role that the D is alleged to have played). It should also be clarified that the allegation may encompass several differing accessory roles for the D. As it stands, the guidance may not facilitate as precisely as it could the gathering of information about how it is being used and interpreted.

## **Communications**

Our report highlighted the importance of explanations to all parties of the nature of the charges faced (our recommendation 5) in cases involving multiple defendants and possible secondary liability. The guidance should highlight the prosecutor's role in this regard, and that any such explanations are dependent on proper recording of the charging decision, as above.

In light of the current complete absence of national information about the extent and nature of multi-defendant cases (including those involving secondary liability), it would be helpful if the guidance pointed to the need for collation and publication of data on convictions (as per our recommendation 4 relating to the Common Platform), even if the primary responsibility for this lies beyond the CPS.

## **CPS draft guidance**

[Recording the basis for charging decisions](#)

In multiple offender cases, the basis on which each defendant is charged for each offence should be clearly set out in the charging decision, recorded on the MG3 form. Where possible, the following information should be included:

- Whether the D is charged as a principal, an accessory, or as either a principal or an accessory.
- The role played by the D. For example: assisting or encouraging the offence; assisting the offence despite not being present at the scene; procuring the offence.

The same information should be recorded whenever charges are amended during proceedings.

The role of each D should also be made as clear as possible in the case summary or opening note.

### **Recommendations in ICPR/PRT report**

#### Charging decisions and recording

1. The CPS should ensure that, in all cases in which more than one defendant is charged with the same offence in relation to the same incident(s), the alleged basis of liability is identified and recorded on file. This should entail routine notification, as part of completion of the charging decision form, of the following information with respect to each defendant:

a) Whether the defendant is charged as a principal, accessory or as either a principal or accessory

b) If charged as a (possible) accessory, the basis of this – for example:

- Having participated in the offence to assist its commission
- Having assisted the commission of the offence without being present
- Having encouraged the commission of the offence
- Having counselled or procured the offence
- A combination of any of the above

2. The recording of alleged principal and/or accessorial liability should be updated where charges are amended during the prosecution process and at the verdict.

How did you hear about this consultation?

- CPS Website