



House of Commons
Justice Committee

Joint enterprise: follow-up

Fourth Report of Session 2014–15

*Report, together with formal minutes relating
to the report*

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The Justice Committee

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Summary

In this Report we return to follow up the Report which we published in January 2012 on the operation of the common-law doctrine of joint enterprise, which forms part of the criminal law relating to secondary liability. The types of cases which we consider are those in which P and D participate together in one crime and in the course of it P commits a second crime which D had foreseen he might commit: in such cases, under joint enterprise, D may also be charged and convicted of the second offence.

We consider in this report the impact of the guidance for prosecutors in joint enterprise cases which the Crown Prosecution Service (CPS) produced in response to one of our 2012 recommendations, taking into account statistics on murder and manslaughter cases with two or more defendants in 2012 and 2013 which the CPS also produced. We conclude that the guidance contains a comprehensive and detailed account of the law as it stands, but we say that on the limited information available it is not possible to reach any but the most tentative conclusions about whether use of the guidance has caused prosecutors to avoid the risk of overcharging taking place. We conclude that the level of concern about the operation of joint enterprise, especially in murder cases, is such that it is no longer acceptable for the main authorities in the criminal justice system to give such limited attention and priority to the recording and collation of information about the use of the doctrine. We recommend that the Ministry of Justice establish a system to enable the production of regular statistics on joint enterprise prosecutions, convictions and appeals. We also recommend that the Crown Prosecution Service commission research into the use by prosecutors of the guidance on joint enterprise charging decisions.

We focus in our Report particularly on murder cases, where the mandatory life sentence for those convicted of murder removes much judicial discretion to hand down appropriate sentences to secondary participants who may have played a minor role and may have had no intention that a murder or grievous bodily harm should take place.

Our report sets out a range of other concerns and questions which continue to be raised about the application of the doctrine, including the scale of use of joint enterprise, the question as to whether joint enterprise is being used as a social policy tool, the high number of Black and mixed race young men who have been convicted of joint enterprise offences, the appropriateness of the mental element threshold for culpability of foresight (as opposed to intention, knowledge or belief), and the views of victims and the public.

The evidence which we have heard in this our second inquiry into the subject has increased our disquiet at the functioning of the law on joint enterprise. We are no longer of the view that it is satisfactory for a consultation to be held on the Law Commission's previous proposals on joint enterprise. We now recommend that the Government should request the Law Commission to undertake an urgent review of the law of joint enterprise in murder cases, considering the appropriateness of the threshold of foresight and considering the proposition that it should be possible to charge secondary participants in joint enterprise cases with manslaughter or a lesser offence, but not murder, if they did not encourage or assist the murder.

[N.B. in this report, Committee conclusions are in bold text, recommendations are in bold italics.]

1 Background to this inquiry

Our 2011 inquiry and its aftermath

1. In late 2011 we held a short inquiry into the operation within the criminal justice system of the common law doctrine of joint enterprise. That inquiry was prompted by concerns expressed to us that the complexity and opacity of the doctrine could be the cause of injustice, whether to victims and their families, or to defendants. We reported in January 2012,¹ making three main recommendations:

- noting the lack of information about the extent of use of joint enterprise, we recommended the collation of data on the number of joint enterprise cases and the number of appeals
- we recommended, in light of evidence we received that there was a risk of over-charging of secondary participants in joint enterprise cases, that the Director of Public Prosecutions should issue guidance on the proper threshold at which association potentially becomes evidence of involvement in crime, dealing specifically within the guidance with murder cases
- we recommended that the doctrine should be enshrined in statute, and that the Government should consult on the legislative proposals on joint enterprise contained in the Law Commission's 2007 report *Participating in Crime*,² which we described as an "excellent starting point".³

2. In December 2012 the then Director of Public Prosecutions (DPP), after consultation, published guidance for prosecutors on joint enterprise charging decisions.⁴ Following an exchange of correspondence with us, the DPP also agreed to collate and provide information to us on numbers of homicide cases in 2012 and 2013 involving two or more defendants. This information is published on the Crown Prosecution Service's website and on our own webpages.⁵ In its response to our report the Government indicated its preference to await an assessment of the impact of guidance to prosecutors before taking any decisions on consulting on new legislation.⁶ It was always our intention to return to the subject of joint enterprise when the DPP's statistics on homicide cases in 2013 had been published, in the expectation that a comparison with those for 2012 might enable some conclusions to be drawn about the impact on prosecutorial practice of the December 2012 guidance.

1 [Joint Enterprise, Eleventh Report from the Justice Committee of Session 2010–12, HC 1597](#)

2 [Cm 7084](#)

3 [HC \[Session 2010–12\] 1597, para 42](#)

4 [CPS Guidance On: Joint Enterprise Charging Decisions, December 2012](#)

5 http://www.cps.gov.uk/publications/performance/joint_enterprise/
<http://www.publications.parliament.uk/pa/cm201314/cmselect/cmjust/writev/keirstarmer.pdf>

6 [Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12, First Special Report from the Justice Committee of Session 2010–12, HC 1901, March 2012](#)

3. Concerns about the operation of the joint enterprise doctrine have not diminished since our original report was published. Campaigners, foremost among whom are JENGbA (Joint Enterprise Not Guilty by Association), continue to advance the case that the application of the joint enterprise doctrine has resulted in widespread miscarriages of justice. The Bureau of Investigative Journalism reported in April 2014 the results of a major project to unearth more data about the extent to which joint enterprise is used within the criminal justice system, and to investigate the implications.⁷ In July 2014 the BBC screened a drama written by Jimmy McGovern, *COMMON*, and followed this with a documentary *Guilty by Association*: both programmes, in their different ways, looked at the position of victims' families and defendants in joint enterprise murder cases. Evidence submitted to this follow-up inquiry shows that joint enterprise remains a highly controversial subject among lawyers, academics and others.

4. As we spell out later in this Report, the concerns surrounding the application of the joint enterprise doctrine are particularly acute in relation to murder cases, where the combination of the mandatory life sentence and the low threshold of culpability for secondary participants is behind the sense of injustice harboured by many of those convicted of murder under the doctrine and their families and supporters. Research being undertaken by the Institute of Criminology at Cambridge University has shed new light on the extent to which many young men serving very long sentences for joint enterprise offences do not accept the legitimacy of their convictions or sentences, including in cases where they admit to having participated in a lesser criminal offence than murder. This research also demonstrates the disproportionate impact which the law of joint enterprise has had on black and minority ethnic communities (see paragraphs 18 and 24 below).

5. Our initial reason for coming back to the subject of joint enterprise was to consider whether the publication of CPS guidance, in accordance with our recommendation, had solved any of the problems we identified in our previous inquiry. We also wanted to find out whether any other developments since the publication of our 2012 Report had a bearing on the case for enshrining joint enterprise in statute. We therefore asked for submissions to give views in response to two main questions:

- What impact has the CPS Guidance on joint enterprise charging decisions had on prosecutorial policy?
- What recent developments have affected the case for the Government to hold ... a consultation [on the Law Commission's proposals relating to joint enterprise in its Participating in Crime report]?

In addition we asked for information on any disproportionate effect of the use of joint enterprise on certain communities and ethnic groups.

6. In the course of our inquiry we received 20 written submissions and we held two oral evidence sessions, hearing from Gloria Morrison and Janet Cunliffe of JENGbA, Rachel Stevenson from The Bureau of Investigative Journalism (TBIJ) and Melanie McFadyean; Adam Pemberton of Victim Support and Mr Saj Tufail; Dr Matthew Dyson and Dr Ben

⁷ [Joint Enterprise: an investigation into the legal doctrine of joint enterprise in criminal convictions, The Bureau of Investigative Journalism, April 2014](#)

Crewe from the University of Cambridge; the Director of Public Prosecutions, Alison Saunders CB; and Rt Hon Mike Penning MP, the Minister for Policing, Criminal Justice and Victims, and Ministry of Justice officials. We are grateful to all those who gave evidence to us in this inquiry.

7. One piece of written evidence, from Charlotte Henry,⁸ refers extensively to a case in which appeal proceedings were under way for much of the duration of our inquiry. Before the end of our inquiry, leave to appeal in the case was refused.

2 The Crown Prosecution Service's guidance

The purpose and content of the guidance

8. In its December 2012 guidance, the Crown Prosecution Service identifies three types of joint enterprise –

- where two or more people join in committing a single crime in circumstances where they are, in effect, all joint principals
- where D assists or encourages P to commit a single crime
- where P and D participate together in one crime and in the course of it P commits a second crime which D had foreseen he might commit.⁹

9. Dr Matthew Dyson, from the Faculty of Law at the University of Cambridge, argued that it was unhelpful for the guidance to classify all these types of offence as joint enterprise, as this elided the distinction between traditional or basic secondary liability, and joint enterprise proper.¹⁰ Professor Graham Virgo from the University of Cambridge also criticised conflation of joint enterprise with other secondary liability cases.¹¹ The focus of our previous and current inquiries, and the continuing public controversy and debate, is on the third type of joint enterprise referred to in the CPS guidance, which is sometimes described as “parasitic liability” or “parasitic accessory liability”. A hypothetical example provided in the CPS guidance is as follows:

D and P carry out a burglary (offence A). P acts as principal, entering the premises and stealing. D assists or encourages P by acting as a lookout. However, In the course of the burglary, P kills householder V, with intent to kill or do really serious harm. P is liable for murder of V as a principal. D may also be liable for murder, as a secondary party, if D foresaw when participating in the burglary with P, that P might commit a criminal act (use unlawful force) with intent to kill or do really serious bodily harm: *Chan Wing-Siu v R* [1985] A.C. 168, PC; *R v Powell, R v English* [1999] 1 A.C. 1, HL; *R v Rahman* [2008] UKHL 45; *R v Yemoh* [2009] EWCA Crim 930; *R v Mendez and Thompson* [2010] EWCA Crim 516.¹²

This is the kind of offence which we mean in this Report, and which we meant in our previous Report, when we refer to joint enterprise. It is worth noting however that it appears that a high proportion of joint enterprise cases involve more than two participants and concern criminal activities associated with groups or gangs of young people.

10. Among other things, the CPS guidance considers the two main defences which may be advanced by a secondary party against charges of joint enterprise: that the offence

9 [CPS Guidance On: Joint Enterprise Charging Decisions, December 2012, para 10](#)

10 [JEF 07](#)

11 [JEF 11](#)

12 [CPS Guidance On: Joint Enterprise Charging Decisions, December 2012, para 10](#)

committed by the principal is “fundamentally different” from anything foreseen by the secondary party; and that the secondary party had withdrawn from the joint enterprise before the offence was committed. The guidance explains the application of the evidential and public interest stages of the Full Code Test in joint enterprise cases, and contains a number of useful provisions setting out matters which prosecutors should take into account in deciding on whether to bring charges in such cases, and, if so, what charges to bring. At various points the guidance emphasises the importance of the exercise of discrimination and proportionality by prosecutors in matching charges to available evidence about the degree of involvement or culpability of secondary participants. Extended consideration is given to charging in cases of group assaults which lead to fatalities, when weapons are involved and when there are no weapons.

11. The Director of Public Prosecutions described the purpose of the guidance as follows:

the guidance explains for prosecutors, and goes into some detail, as you will see from the guidance, what the law is on the doctrine of joint enterprise. It is there in one place; it is easily accessible and it has some of the case references. It goes through the different scenarios, but of course the aim of the guidance is to help prosecutors in their role, and to be able to help and guide them around the thought processes they should have when making decisions which are impacted by joint enterprise, and, therefore, improve the way in which they operate. That is not to say that we did not think that they were operating it properly to begin with, but we think that the guidance helps them in relation to their decision making, and it should improve consistency as well, of course.¹³

12. With some caveats, most of our witnesses considered that the guidance provided a reasonably reliable and accurate explanation of the current state of the law surrounding the doctrine of joint enterprise.¹⁴ Unsurprisingly, those with fundamental objections to the doctrine did not see the promulgation of guidance as an answer to those objections. JENGBA saw the content of the guidance as confirming the “ability to convict people on very tenuous evidence, with no element of intention needed”.¹⁵

13. Our view is that the CPS’s guidance contains a comprehensive and detailed account of the law as it stands. While it can evidently be contested in certain respects, it goes a long way to clarifying the complex state of the accrued case law bearing upon joint enterprise, and in setting out and exposing to public view the internal processes of decision-making which should be followed by prosecutors in cases in which the joint enterprise doctrine is relevant.

The impact of the guidance

14. Publication of the CPS’s guidance represents a step forward, but the extent to which the guidance has improved prosecutorial practice in the way that we envisaged it might do, by reducing levels of overcharging, is open to question. One refrain in the evidence we

13 [Q 66](#)

14 Cf. [JEF 08](#)

15 [JEF 10](#)

received was that there was no sign of any change having taken place; another theme was that the available information on the use of joint enterprise was inadequate to make any assessment. Sam Stein QC and Andrew Jefferies QC, in their joint submission, asserted that the guidance had had no impact whatsoever, and that it had “played no part in pre-trial discussions or submissions to the CPS about the decision-making process used in coming to a decision to prosecute any individual defendant in any case in which we have been involved.”¹⁶ Andrea Edwards, whose son was convicted of joint enterprise murder in May 2013, told us that “bar a few exceptions mainly in courts outside of London the guidelines have not been followed”.¹⁷

15. We asked the Director of Public Prosecutions what evidence she could provide to demonstrate that the guidance was being followed. In response she provided five anonymised case studies, the first four of which deal with cases in which charging decisions were brought after the December 2012 guidance was published, with decisions in the fifth example having taken place before that date.¹⁸ It is surprising, and perhaps symptomatic of the complexity of this whole area of law, that the first three cases do not appear to involve joint enterprise in the sense we are considering it in this inquiry. There is evidence of a careful approach having been adopted by prosecutors, in accordance with the guidance, in deciding on charges to bring against participants in the fourth case, whereas in the fifth case the same charges, of murder, conspiracy to commit grievous bodily harm, and violent disorder, were brought against all 20 people eventually charged out of 22 arrested.

16. No record is kept of numbers of prosecutions brought, or convictions made, under the joint enterprise doctrine. When we agreed with the Crown Prosecution Service that they should provide statistical information, which eventually comprised information on murder and manslaughter cases involving two or more defendants in each of the years 2012 and 2013, it was our expectation that this would enable some progress to be made in drawing conclusions about the extent of use of joint enterprise and on any change arising from the publication of the CPS guidance. In fact it is not possible, on the basis of this information, to arrive at any but the most tentative conclusions. The CPS itself cautiously argued that the increase in the number of defendants charged only with a lesser offence, from 67 in 2012 to 95 in 2013, taken together with other factors, might “indicate that prosecutors are properly applying the principles set out in the guidance by selecting charges that properly reflect the role played by the defendant, and which allow the jury to convict the defendant of a lesser offence, where appropriate”.¹⁹

17. As part of its research into joint enterprise, The Bureau of Investigative Journalism submitted freedom of information requests to the CPS for numbers of successful and unsuccessful homicide prosecutions involving four or more defendants between 2005 and 2013. Such cases may be a better proxy for joint enterprise in the sense we are considering it in this report than the figures for cases involving two or more defendants provided to us by the CPS. The figures obtained by TBIJ show that the proportion of homicide prosecutions occurring in cases with four or more defendants has remained fairly stable

16 [JEF 08](#)

17 [JEF 13](#)

18 [JEF 21](#)

19 [JEF 09](#)

over the last nine years, while the number of prosecutions for all homicides and in cases involving four or more defendants has declined since a peak in 2008. They also show that while the total number of homicide prosecutions in cases involving four or more defendants dropped from 182 in 2012 to 165 in 2013, the number of convictions increased from 120 to 126. TBIJ have also obtained and published information about the number and proportion of Criminal Court of Appeal rulings involving joint enterprise in 2008, 2012 and 2013, and their report also contains the results of a survey they conducted with legal practitioners about their involvement in joint enterprise cases and their opinions on the subject.²⁰

18. Some other important new information about the use of joint enterprise within the criminal justice system and its impact has been made available to us in the context of this inquiry. The Institute of Criminology at the University of Cambridge shared with us preliminary results from a study it is conducting into male prisoners sentenced at a young age to life sentences with tariffs of 15 years or more.²¹ Although the study was not originally designed to focus on joint enterprise, the fact that more than half of the study's survey sample were convicted under joint enterprise has generated some important information about the impacts of the doctrine, including the only non-anecdotal response we received to the request which we made in our terms of reference for information concerning any disproportionate effect of the use of joint enterprise on certain communities and ethnic groups (see paragraph 24 below).

19. Other new information has been helpfully provided by the Criminal Cases Review Commission (CCRC) in response to some specific questions we put to it in writing about its work on joint enterprise cases.²² The CCRC identified 145 applications made to it since 2004 from people convicted under the doctrine, although it considers there are likely to have been many more such applications which cannot be identified from its records as joint enterprise: in total during this period it received 1,536 applications relating to murder convictions. Of the 145 identifiable joint enterprise-related applications, 109 were from principal parties and 36 from secondary parties. Sixty per cent of the applications related to murder convictions. The CCRC has made seven referrals on conviction and none in relation to sentence in joint enterprise cases since 2004. Only one conviction was quashed, compared to an average of 70.4% of all cases referred to the Court of Appeal in which a conviction is quashed, or a sentence adjusted. The CCRC identified three primary obstacles facing applicants to it in joint enterprise cases:

- the difficulty of assessing “new” evidence in light of conflicting testimonies from various defendants
- the difficulty of identifying and obtaining credible new evidence impacting on *mens rea* sufficient to raise a real possibility that the Court of Appeal would quash a conviction, given that the Commission cannot refer on the basis of an applicant restating evidence given at their trial to the effect that they did not foresee the relevant offence being committed

20 [Joint Enterprise: an investigation into the legal doctrine of joint enterprise in criminal convictions, The Bureau of Investigative Journalism, April 2014, Appendices C and D](#)

21 [JEF 14](#)

22 [JEF 18](#)

- the additional problem in relation to finding fresh *mens rea* evidence that often joint enterprise cases arise on the spur of the moment and the relevant state of mind may be fleeting.²³

20. There has been some improvement in publicly-available information about the nature and extent of use of joint enterprise, but it remains patchy and *ad hoc*. The Crown Prosecution Service needed to undertake retrospective manual examination of files to provide us with data about joint enterprise murder and manslaughter cases in 2012 and 2013, and there does not appear to be any intention on its part to continue doing so in 2014 and subsequent years.²⁴ The Director of Public Prosecutions told us that crime statistics were the responsibility of the Ministry of Justice.²⁵ When we asked her whether she saw value in the collection of more detailed and regular statistics on joint enterprise, she replied:

If there were concerns about particular issues, there is obviously value either in some sort of research project or in having some sort of regular data that can satisfy questions that are being asked. You have to weigh that against how easy or not it is to compile those types of figures, and I do not know.²⁶

We also pressed Mr Penning, the Minister, on this point. He said

One of the things I will do is to find out what we can produce and how we can produce it, and the cost implications of doing that, and the workload involved. There will be huge cost implications of gathering that information in that way. Let's be honest about that. It has significant cost implications.²⁷

We have received no further indication from the Ministry of the cost implications, and we do not consider that they will be prohibitive if a new recording system is introduced.

21. Given the degree of concern which exists about the operation of joint enterprise, particularly in murder cases, which we explore further in the next Chapter of this Report, we do not think it is acceptable for the main authorities in the criminal justice system to give such limited attention and priority to the recording and collation of fundamental information about the extent and nature of use of the doctrine. It is not surprising that it is time-consuming and costly to retrieve information from individual case management files after the event, even though it is clearly possible to do so. If joint enterprise cases were properly identified and recorded at the outset then production of information about them would subsequently be much easier. We believe that it is the responsibility of the Ministry of Justice and the other authorities within the criminal justice system to introduce arrangements for the compilation and publication of information which will ensure a sound factual basis for the public debate on joint enterprise.

23 [JEF 18](#)

24 [Q 72](#)

25 [Q 80](#)

26 [Q 81](#)

27 [Q 129](#)

22. *We recommend that the Ministry of Justice, in co-operation with the Crown Prosecution Service and Her Majesty's Courts and Tribunals Service as necessary, establish a system which records homicide cases brought under the joint enterprise doctrine. Information recorded should enable regular statistics on joint enterprise to be produced which would include: the number of cases in which any joint enterprise prosecutions are brought for murder and manslaughter; the number of defendants in each case charged as primary and secondary participants; the number charged with each offence and with lesser offences; the number of prosecutions which result in convictions for each offence as a primary or secondary offender; the number of appeals brought against conviction and/or sentence and the number of those which are successful; and a breakdown by age, ethnicity and gender of those prosecuted. We also recommend that the Ministry of Justice commission research to produce this information retrospectively from case management files for the last five years, although we recognize that there will be greater cost implications in this course of action. We further recommend that the Crown Prosecution Service undertake research to monitor and analyse the extent to which prosecutors are following the guidance in relation to cases where charges are brought under the joint enterprise doctrine. This will require prosecutors to record their reasons for charging decisions in joint enterprise cases, in so far as they do not already do so.*

3 Continuing questions about joint enterprise

The scale of use of joint enterprise

23. In the absence of reliable official information concerning those convicted of joint enterprise offences, other sources give a partial picture. In their written evidence JENGBA say they know of over 400 people serving life sentences for joint enterprise offences.²⁸ Home Office figures obtained by TBIJ show 497 secondary parties convicted of murder between 2005/06 and 2012/13.²⁹ CPS figures obtained by TBIJ show 1,853 homicide prosecutions in cases where there were four or more defendants in the period between 2005 and 2013. These account for nearly 18% of all homicide prosecutions over that period. 1,356 convictions during that period resulted from prosecutions in those cases with four or more defendants. Figures for numbers of prosecutions brought and convictions are much higher for cases where there were two or more defendants.³⁰ Although those cases are likely to be a less reliable proxy for joint enterprise, a proportion of them will involve use of the doctrine. Finally, just over half the sample of 294 young prisoners serving very long life sentences in the Cambridge Institute of Criminology research study were convicted of joint enterprise offences.

24. It is clear that a large proportion of those convicted of joint enterprise offences are young Black and mixed race men. In the Cambridge research sample, 37.2% of those serving very long sentences for joint enterprise offences are Black/Black British, eleven times the proportion of Black/Black British people in the general population and almost three times as many as in the overall prison population. There is also a much higher proportion of mixed race prisoners convicted of joint enterprise offences than there are in the general prison population (15.5% compared to 3.9%). Janet Cunliffe of JENGBA claimed that an even higher proportion of people convicted of joint enterprise who had contacted JENGBA were from the BAME community, about 80%, and nearly all working class. She drew the conclusion that joint enterprise was being used to target the most marginalised sections of society, and was having the effect of breaking communities apart.³¹ Dr Ben Crewe from the Cambridge Institute of Criminology said that there were probably two main reasons for the disproportionate impact of joint enterprise on young Black men, the first being that “BME men may be over-represented in the kinds of communities where young men typically hang around in groups that are labelled by outsiders as gangs” and the second that “an association may exist unconsciously in the minds of the police, prosecutors and juries between being a young ethnic minority male and being in a gang, and therefore being involved in forms of urban violence”.³²

28 [JEF 10](#). In oral evidence Gloria Morrison said that 500 people had contacted JENGBA, all with co-defendants, “so we are getting into the thousands here”. [Q 10](#)

29 [Joint Enterprise: an investigation into the legal doctrine of joint enterprise in criminal convictions, The Bureau of Investigative Journalism, April 2014, Appendix B](#)

30 [Ibid, Appendix C](#)

31 [Q 10](#)

32 [Q 53](#)

25. There is even less information on the age distribution of those convicted of joint enterprise offences, although it appears clear that a huge proportion of them are young. Following representations made by JENGBA in relation to the CPS guidance when it was put out to consultation, the provisions concerning the application of the evidential stage of the Full Code Test to joint enterprise cases were amended to enjoin prosecutors to exercise particular care in assessing cases involving “[y]ouths and mentally disordered suspects”.³³ JENGBA claimed that no notice had been taken by prosecutors of this part of the guidance;³⁴ the Director of Public Prosecutions, though, said that prosecutors were taking into account the maturity and age of defendants³⁵.

Joint enterprise as a social policy tool and a deterrent

26. Several of our witnesses used the metaphor of a “dragnet” to describe the operation of joint enterprise, claiming that it was hoovering up young people from ethnic minority communities who have peripheral, minor or even in some cases non-existent involvement in serious criminal acts, along with the principal perpetrators of those acts, and imposing draconian penalties on them. Melanie McFadyean argued that the doctrine was:

a blunt powerful instrument operated crucially and centrally for social policy reasons as stated repeatedly in appeal court judgments and elsewhere, its remit to be tough on crime and to be seen to be so.³⁶

In oral evidence she cited a number of judgments and other sources in support of her contention³⁷. Other witnesses made similar arguments. Dr Dyson claimed that “The reason for the core of joint enterprise was almost certainly not normative or moral, but simply evidential and driven by policy. In particular, how do you deal with crimes with multiple defendants”³⁸. Simon Natas of Irvine Thanvi Natas Solicitors argued that “The use of punitive law and order policies to combat youth crime is a blunt instrument which runs the risk of making matters worse, not only because young people are much less likely to cooperate with the authorities if they perceive the legal system to be unjust, but also because custodial sentences have been shown to increase, not reduce, reoffending”³⁹.

27. A claim made in support of the use of joint enterprise is that it has the desirable effect of deterring young people from becoming involved in criminal activities associated with gangs. In 2009 the Metropolitan Police produced a video which has been shown in many schools in London to warn young people of the possible consequences for them of joint enterprise if they engage in gang activities;⁴⁰ there has also been considerable publicity about some joint enterprise cases in recent years. Nevertheless, some of our witnesses

33 [CPS Guidance On: Joint Enterprise Charging Decisions, December 2012, para 34](#)

34 [Q 10](#)

35 [Q 74](#)

36 [JEF 02](#)

37 [Q 12](#)

38 [JEF 17](#)

39 [JEF 12](#)

40 <http://vimeo.com/48406949>

expressed scepticism about the existence of a deterrent effect. Dr Crewe, for example, argued that:

For deterrence to work, at least two conditions need to be met. One is that people are aware of the sanction or the penalty. As others have said, our experience in undertaking the research is that very few of our interviewees said that they had any idea of what joint enterprise was, or they had heard of it but understood it only vaguely, which is not surprising as it is difficult to understand.

The second condition that needs to be met is that, even among those who are aware of the sanction, it would have to have some impact on their behaviour. We know from the research literature on deterrence that thinking that you will be caught has more of a deterrent effect than the length of sentence or the severity of the sanction.⁴¹

28. We put to the Minister claims that the application of joint enterprise was being driven by social policy considerations, including the aim of deterring young people from involvement in criminal gang activities because of the severity of the penalties they might face. He said:

We would all want people to think very carefully before they were involved in any crime, and the consequence of being involved in crime is the whole principle, I hope, of what we are looking at today. If it has an effect on gang culture, so be it. At the end of the day, my view—a non-legalistic view—is around justice. Justice for the victim is the most important thing⁴².

29. We consider that there is a danger in justifying the joint enterprise doctrine on the basis that it sends a signal or delivers a wider social message. The application of the doctrine should be such as to ensure that people are found guilty of offences in accordance with the law as it currently stands, which includes the threshold of foresight for secondary participants. It is self-evident that if people are aware of the risk of conviction under joint enterprise, they should also recognize that involvement in gang activities which could lead to criminal offences may result in them being charged and convicted.

The *mens rea* threshold

30. For a secondary participant in a joint criminal venture to be found guilty of a separate offence committed by another person in the course of that venture, the *mens rea* or mental element threshold is that he foresaw that the separate crime might be committed. This foresight test is sometimes called the *Chan Wing-siu* principle after the 1985 case in which it was enunciated. Many witnesses to our inquiry considered this threshold to be so low as to be unjust, with its effects particularly harsh in murder cases given the mandatory life sentence. For a person to be convicted of murder he must undertake an act resulting in a death with the intent to commit murder or really serious bodily harm. Professor Graham Virgo of the University of Cambridge emphasised that the concern about joint enterprise in murder cases was

41 [Q 60](#)

42 [Q 118](#)

not about the conviction of the principal for murder, but it is with the treatment of those on the periphery as murderers, even though they did not cause death and had a lesser *mens rea* relating to the commission of any crime.⁴³

Professor Virgo argued that conviction for murder with the imposition of a mandatory life sentence in these cases “makes a mockery of the criminal law”.⁴⁴

31. Others took a different view. Asked whether joint enterprise was fair and balanced, Adam Pemberton of Victim Support said: “I would say that the principles are sound. There are issues about what flexibility the judge has in addressing issues when it comes to sentencing”.⁴⁵ The Minister said “[n]othing is perfect within any system that we operate, but I am comfortable that cases would not have been in court and people would not have been convicted for some atrocious murders had it not been for this legislation (*sic*).”⁴⁶ It is also worth recalling that in its *Participating in Crime* report the Law Commission did not recommend any significant change in the threshold of culpability for secondary parties in joint enterprise cases, whether for murder or more generally: in light of the defences available to defendants it made no challenge to the *Chan Wing-siu* principle.⁴⁷

Victims’ and public views

32. The views of victims, both in relation to individual cases and in terms of the principles of the joint enterprise doctrine, are clearly important. In support of his argument that there was nothing fundamentally wrong with the law on joint enterprise, the Secretary of State said in his written evidence to us:

While academics and families of convicted offenders might disagree with me, relatives of victims and large sections of the law-abiding public – many of whom may not be as vocal as those groups which are calling for change - are likely to be concerned if we were suddenly to announce a review which could lead to a dilution of this important area of law.⁴⁸

33. However in oral evidence to us both Mr Pemberton and Mr Saj Tufail, whose son was killed in a drive-by shooting for which two men were convicted of joint enterprise murder, gave more nuanced views. Mr Pemberton’s response to the Secretary of State’s view was to say:

I think there would be public concern. I obviously speak on behalf of victims and, in the case of homicide, the bereaved. There may be public concern if the consultation meant that it became more difficult to prosecute people involved in serious offences such as murder. At the same time, if a consultation was based on the Law Commission’s recommendations, it would mitigate against that concern because it

43 [JEF 11](#)

44 [Ibid.](#)

45 [Q 42](#)

46 [Q 113](#)

47 [Cm 7084](#)

48 [JEF 15](#)

would still allow there to be prosecutions within the three or four broad categories of joint enterprise. It is possible to proceed with a consultation, but on those terms.⁴⁹

Mr Tufail commented:

In my son's case, there was clear evidence that the accomplice had intent. It certainly worked in our case. Having said that, I have heard of a number of cases where there needs to be a discussion; there needs to be a balance; and perhaps there needs to be a review. If someone does not have intent, and is not involved from the offset, perhaps they should not be convicted under joint enterprise. That is my personal view.⁵⁰

34. We note that The Bureau of Investigative Journalism's survey of the attitudes of legal practitioners towards joint enterprise demonstrated, albeit from a small sample, some lack of confidence in the application of the doctrine within the criminal justice system.⁵¹ As far as the wider public is concerned, in our previous inquiry we received evidence that public support for mandatory life sentences being imposed in typical joint enterprise scenarios was scant.⁵² On the other hand, some cases, such as the Stephen Lawrence case, cited by Mr Penning,⁵³ or the Ben Kinsella case, are widely referred to as examples where the use of the doctrine of joint enterprise has secured convictions which have met with widespread public approval and support. In relation to the Stephen Lawrence case Dr Matthew Dyson submitted evidence towards the end of our inquiry in which, returning to the sentencing remarks made by the judge in the case, he questioned whether joint enterprise, in the sense we are discussing it in this report, was a factor in the case.⁵⁴ The views of the general public about joint enterprise, like those of victims, do not seem to be homogeneous, but dependent on the circumstances of individual cases, and they are also inevitably influenced by an unfortunate degree of misunderstanding and misinformation about a complex and sometimes impenetrable law.

Appeals in joint enterprise cases

35. We have cited above (see paragraphs 17 and 19) statistical information which has been produced about appeals in joint enterprise cases, and about applications to the CCRC in relation to such cases. These statistics provide some succour to those on both sides of the argument about the inherent justice of the joint enterprise doctrine. The figure obtained by TBIJ of just over 22% for the proportion of all Court of Appeal rulings in 2013 which related to joint enterprise cases was described by Dr Matthew Dyson as a "terrifying statistic and evidence of the constant appeals against this doctrine".⁵⁵ Other witnesses pointed to the very low number of convictions overturned on appeal as evidence that the doctrine was being correctly applied by prosecutors and the courts. The DPP said that the

49 [Q 21](#)

50 [Q 23](#)

51 [Joint Enterprise: an investigation into the legal doctrine of joint enterprise in criminal convictions, The Bureau of Investigative Journalism, April 2014, Appendix D](#)

52 [Joint Enterprise, Eleventh Report from the Justice Committee of Session 2010–12, HC 1597, Eww2](#)

53 [Q 117](#).

54 [JEF 22](#)

55 [JEF 07](#)

small number of convictions being overturned made her feel reassured,⁵⁶ and Mr Penning said:

It is very robust in the appeals, which I like to see as a Justice Minister, not least because that would mean that the courts are getting it right. If we see lots of decisions overturned on appeal, we have a serious problem within the original decisions.⁵⁷

Joint enterprise and murder

36. One of the main influences on opinions about the fairness of the joint enterprise doctrine is the fact that, when a jury finds a secondary participant guilty of murder, a life sentence has to be imposed. Although the sentencer has some discretion in determining the tariff (the minimum term which must be served before a person is eligible for parole), a life sentence is potentially what its name indicates and release on completion of tariff is far from certain. The requirement to impose a life sentence in murder cases makes it all the more important that prosecutors exercise discriminatory judgment in deciding which charges to bring against each individual in cases where groups of people are involved and a death occurs. Because life sentences must be imposed on all those convicted of joint enterprise murder in such cases, it compounds the sense of injustice on the part of those who believe that a convicted person did not intend that murder or serious harm should take place. They and their families contrast their secondary participation not only with person who dealt the fatal blow but also with murderers in other cases, and do not see it as appropriate that they have the same sentence. The mandatory life sentence also magnifies concerns over the *mens rea* threshold of foresight, through the contrast between the lowness of that threshold with the severity of the sentence on conviction. This contrast has been accentuated by the rise in the average minimum term of imprisonment imposed for a mandatory life sentence, from 12 years in 2003 to 21 years in 2013.⁵⁸

37. We asked the Minister whether the lack of flexibility and discretion in sentencing murder cases meant that it would be sensible to consider whether the doctrine of joint enterprise should be employed in those cases. He replied:

That has been looked at, not only after previous reports from the Committee, but also by previous Secretaries of State. It is a really difficult decision. When people go to prison for a very long time, it has a huge effect on them and their families, but we have to balance that against their involvement under the legislation (*sic*). I understand where you are coming from, but it is a balance that has to be made to protect the public and to protect the victims.⁵⁹

Miscarriages of justice?

38. Has use of the doctrine of joint enterprise led to miscarriages of justice? The usual definition of a miscarriage of justice is a case in which somebody is convicted for a crime

56 [Q 82](#)

57 [Q 111](#)

58 [Q 59](#)

59 [Q 126](#)

which they did not commit. The low rate of success of appeals against joint enterprise convictions is seen by some, including the DPP, as giving comfort that miscarriages of justice in this sense are not taking place to a significant degree. However, we have already noted, in citing the three obstacles described by the CCRC in their written evidence (see paragraph 19 above), that there are particular difficulties with bringing successful appeals in joint enterprise cases. Furthermore, concerns about the impact of the joint enterprise doctrine are not primarily focused on whether it is being misapplied in individual cases. The concerns are, rather, with whether the doctrine, as it has developed through case law and is now being applied, is leading to injustices in the wider sense, including through a mismatch between culpability and penalty. The subjective and objective information which has been accumulated through JENGBA's campaigning, the work of the TBIJ, and the research by the Cambridge Institute of Criminology all call into question, in their different ways, the compatibility of joint enterprise with a wider conception of justice.

Proposals for reform of joint enterprise

39. Various arguments have been advanced by the Government, in its response to our previous Report and in its evidence to this inquiry, in support of its position that it is not desirable to bring forward proposals to reform joint enterprise. The Government's main argument has been that the law is working satisfactorily, and associated with that has been a concern about the reaction of victims and the general public to any prospect that the law might become diluted. The Government has also argued that reform of the doctrine of joint enterprise cannot realistically be undertaken without reform of the law on murder, and of the wider law on secondary liability.⁶⁰

40. Some witnesses to our inquiry who are critical of the doctrine of joint enterprise also called for wider reform of the law on homicide⁶¹ or the law on secondary liability as a means of resolving some of the problems with the joint enterprise doctrine. JENGBA called for a full inquiry into all the cases which they have on their books, with a review carried out by legal experts of the sentences being served by secondary participants in joint enterprise cases.⁶² Others put forward proposals for reform which they considered could realistically be introduced in the short term. We rehearse below the main proposals put forward on the *mens rea* threshold and ways of addressing the effect of the mandatory life sentence for murder.

41. Professor Virgo argued that statutory reform was needed to clarify the *mens rea* for joint enterprise liability and to require conviction for manslaughter and not murder in cases where D1 and D2 have a common purpose to commit a crime and D1 commits murder in the course of that common venture. Such reform would not apply to cases where D2 had encouraged or assisted D1 to commit murder, which fall in other secondary liability categories and are not joint enterprise cases as we are considering them in this Report. While recognizing that there was a case for the Law Commission being asked to undertake a general review of the law on accessory liability, Professor Virgo considered

60 [Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12](#), HC 1901, First Special Report from the Justice Committee of Session 2010–12

61 Cf. [JEF 12 \[Simon Natas\]](#)

62 [JEF 10](#)

that a more urgent priority was a review by the Law Commission of the law relating to joint enterprise liability in so far as it applies to murder, encompassing the law itself, prosecution policy and process.⁶³

42. Victim Support said that while they supported the holding of a consultation on joint enterprise on the basis of the Law Commission's proposals – the position adopted by us in our previous Report – they felt that extreme care needed to be taken in bringing forward any subsequent reforms “to avoid the risk of replacing perceived injustices on one side (the defendant's) with injustices on the other (the victim's).”⁶⁴

43. Dr Dyson, in supplementary written evidence, proposed a number of interlocking reforms to the law on secondary liability, his main option being to raise the threshold of foresight to require belief or intention on the part of a secondary party that a second crime will take place in the course of a joint criminal venture.⁶⁵

63 [JEF 11](#)

64 [JEF 16](#)

65 [JEF 18](#)

4 The doctrine of joint enterprise

44. We referred in the previous Chapter to the incompleteness of publicly available information about the use of the joint enterprise doctrine and recommended the introduction of a much-improved system of recording, compilation and publication of information, together with retrospective research to shed light on the use of the doctrine over the last five years. We consider it very important that that recommendation is adopted. At the same time, our re-examination of the subject of joint enterprise in this inquiry has convinced us that merely improving the amount of information available is not sufficient, and further steps need to be taken urgently to address the problems which have arisen with the application of the doctrine.

45. In light of the evidence we have heard in this inquiry, and the other developments which have taken place since our previous Report, our disquiet at the functioning of the law on joint enterprise has grown. Notwithstanding the positive development of the publication of the CPS's guidance on joint enterprise charging decisions, there seems to be no willingness on the part of the Government to recognize that there may be negative effects from the operation of the doctrine, for the reputation of the justice system and for wider society, as well as for the interests of some of those convicted under the doctrine and for the victims of crimes.

46. We are no longer of the view that it is satisfactory for a consultation to be held on the Law Commission's previous proposals on joint enterprise as contained in their *Participating in Crime* report, as we recommended in our 2012 Report. The evidence which we have received in this inquiry has persuaded us that the doubts over the appropriateness of the Chan Wing-siu principle, as it has emerged and then developed in case law since 1985, are sufficiently serious to mean that its retention should not be taken as a starting point for any consultation, which was the Law Commission's inclination.

47. *We now recommend that the Government should request the Law Commission to undertake an urgent review of the law of joint enterprise in murder cases. This review should consider the appropriateness of the threshold of foresight in the establishment of culpability of secondary participants in joint enterprise cases. It should also consider the proposition that in joint enterprise murder cases it should not be possible to charge with murder secondary participants who did not encourage or assist the perpetration of the murder, who should instead be charged with manslaughter or another lesser offence. The Law Commission should be asked to present proposals for the codification in statute of the law of joint enterprise, together with any proposed changes arising from its review. We consider that the Law Commission should be asked to report on these matters by the end of 2015. We also recommend that the Justice Committee in the next Parliament should return to this issue.*

Formal Minutes

Tuesday 9 December 2014

Sir Alan Beith, in the Chair

Nick de Bois
John Howell
Mr Elfyn Llwyd

Andy McDonald
John McDonnell

* * * * *

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

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

Paragraphs 1 to 47 read and agreed to.

Summary agreed to.

Ordered, That further consideration of the Chair's draft Report be now adjourned.

Report to be further considered tomorrow.

[Adjourned till tomorrow at 10.00am.]

Wednesday 10 December 2014

Sir Alan Beith, in the Chair

Christopher Chope
Jeremy Corbyn
John Howell

Andy McDonald
John McDonnell

Consideration of the Chair's draft Report (*Joint enterprise: follow-up*) resumed.

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

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

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

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[Adjourned till Tuesday 16 December at 10.00am.]

Witnesses

The following witnesses gave evidence. Transcripts can be viewed on the Committee's inquiry page at www.parliament.uk/joint-enterprise-follow-up.

Wednesday 3 September 2014

Question number

Gloria Morrison, Joint Enterprise: Not Guilty by Association, **Janet Cunliffe**, Joint Enterprise: Not Guilty by Association, **Rachel Stevenson**, The Bureau of Investigative Journalism, and **Melanie McFadyean**, freelance journalist [Q1-20](#)

Adam Pemberton, Assistant Chief Executive, Victim Support, and **Saj Tufail** [Q21-46](#)

Dr Matthew Dyson, Faculty of Law, University of Cambridge, and **Dr Ben Crewe**, Institute of Criminology, University of Cambridge [Q47-64](#)

Tuesday 22 October 2014

Alison Saunders CB, Director of Public Prosecutions, Crown Prosecution Service [Q65-108](#)

Rt Hon Mike Penning MP, Minister of State for Policing, Criminal Justice and Victims, Ministry of Justice, **Scott McPherson**, Director, Law, Rights and International, Ministry of Justice, and **Chris Munro** [Q109-141](#)

Published written evidence

The following written evidence was received and can be viewed on the Committee's inquiry web page at www.parliament.uk/joint-enterprise-follow-up.

JEF numbers are generated by the evidence processing system and so may not be complete.

- 1 Andrea Edwards ([JEF0013](#))
- 2 Charlotte May Henry ([JEF0006](#))
- 3 Council of HM Circuit Judges ([JEF0001](#))
- 4 Criminal Cases Review Commission ([JEF0018](#))
- 5 Crown Prosecution Service ([JEF0009](#)) & ([JEF0021](#))
- 6 Dr Ben Crewe, Dr Susie Hulley and Ms Serena Wright ([JEF0014](#))
- 7 Dr Matthew Dyson ([JEF0007](#)), ([JEF0017](#)) & ([JEF0022](#))
- 8 Graham Virgo ([JEF0011](#))
- 9 Irvine Thanvi Natas Solicitors ([JEF0012](#))
- 10 Jengba ([JEF0010](#)) & ([JEF0019](#))
- 11 Melanie Mcfadyean ([JEF0002](#))
- 12 Ministry of Justice ([JEF0015](#))
- 13 Miss Toni Louise Murphy ([JEF0003](#))
- 14 Sam Stein QC and Andrew Jefferies QC ([JEF0008](#))
- 15 The Bureau of Investigative Journalism ([JEF0004](#))
- 16 Victim Support ([JEF0016](#))

List of Reports from the Committee during the current Parliament

All publications from the Committee are available on the Committee's website at www.parliament.uk/justicecttee.

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

Session 2010–12

First Report	Revised Sentencing Guideline: Assault	HC 637
Second Report	Appointment of the Chair of the Judicial Appointments Commission	HC 770
Third Report	Government's proposed reform of legal aid	HC 681–I (Cm 8111)
Fourth Report	Appointment of the Prisons and Probation Ombudsman for England and Wales	HC 1022
Fifth Report	Appointment of HM Chief Inspector of Probation	HC 1021
Sixth Report	Operation of the Family Courts	HC 518-I (Cm 8189)
Seventh Report	Draft sentencing guidelines: drugs and burglary	HC 1211
Eighth Report	The role of the Probation Service	HC 519–I (Cm 8176)
Ninth Report	Referral fees and the theft of personal data: evidence from the Information Commissioner	HC 1473(Cm 8240)
Tenth Report	The proposed abolition of the Youth Justice Board	HC 1547 (Cm 8257)
Eleventh Report	Joint Enterprise	HC 1597 (HC 1901)
Twelfth Report	Presumption of Death	HC 1663 (Cm 8377)
First Special Report	Joint Enterprise: Government Response to the Committee's Eleventh Report of Session 2010–12	HC 1901

Session 2012–13

First Report	Post-legislative scrutiny of the Freedom of Information Act 2000	HC 96–I (Cm 8505)
Second Report	The budget and structure of the Ministry of Justice	HC 97–I (Cm 8433)
Third Report	The Committee's opinion on the European Union Data Protection framework proposals	HC 572 (Cm 8530)
Fourth Report	Pre-legislative scrutiny of the Children and Families Bill	HC 739 (Cm 8540)
Fifth Report	Draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 927
Sixth Report	Interpreting and translation services and the Applied Language Solutions contract	HC 645 (Cm 8600)
Seventh Report	Youth Justice	HC 339 (Cm 8615)
Eighth Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013	HC 965 (HC 1119)
Ninth Report	The functions, powers and resources of the Information Commissioner	HC 962 (HC 560, Session 2013–14)

First Special Report	Scrutiny of the draft Public Bodies (Abolition of Administrative Justice and Tribunals Council) Order 2013: Government Response to the Committee's Eighth Report of Session 2012–13	HC 1119
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Session 2013–14

First Report	Sexual Offences Guidelines: Consultation	HC 93
Second Report	Women offenders: after the Corston Report	HC 92 (Cm 8279)
Third Report	Transforming Legal Aid: evidence taken by the Committee	HC 91
Fourth Report	Environmental Offences Guideline: Consultation	HC 604
Fifth Report	Older prisoners	HC 89 (Cm 8739)
Sixth Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007	HC 639 (HC 918)
Seventh Report	Appointment of HM Chief Inspector of Probation	HC 640
Eighth Report	Ministry of Justice measures in the JHA block opt-out	HC 605 (HC 972)
Ninth Report	Fraud, Bribery and Money Laundering Guideline: Consultation	HC 804
Tenth Report	Crown Dependencies: developments since 2010	HC 726 (Cm 8837)
Eleventh Report	Appointment of the Chair of the Office for Legal Complaints	HC 916
Twelfth Report	Crime reduction policies: a co-ordinated approach? Interim report on the Government's Transforming Rehabilitation programme	HC 1004
Thirteenth Report	Serious Fraud Office Supplementary Estimate 2013-14	HC 1005
Fourteenth Report	First Joint Report from the European Scrutiny, Home Affairs and Justice Committees of Session 2013–14: The Government's response to the Committees' Reports on the 2014 block opt-out decision	HC 1177
First Special Report	The functions, powers and resources of the Information Commissioner: Government Response to the Committee's Ninth Report of Session 2012–13	HC 560
Second Special Report	Post-legislative Scrutiny of Part 2 (Encouraging or assisting crime) of the Serious Crime Act 2007: Government Response to the Committee's Sixth Report of Session 2013–14	HC 918
Third Special Report	Ministry of Justice measures in the JHA block-opt: Government Response to the Committee's Eighth Report of Session 2013–14	HC 972

Session 2014–15

First Report	Crime reduction policies: a co-ordinated approach?	HC 307 (Cm 8918)
Second Report	Theft Offences Guideline: Consultation	HC 554
Third Report	Mesothelioma Claims	HC 308 (HC 849)
First Special Report	Mesothelioma Claims: Government Response to the Committee's Third Report of Session 2014–15	HC 849