



Justice Committee

Oral evidence: [Joint enterprise: follow-up](#), HC 310

Wednesday 3 September 2014

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Written evidence from witnesses:

Panel 1

- Gloria Morrison and Janet Cunliffe, Joint Enterprise: Not Guilty by Association (JENGbA) ([JEF 10](#))
- Rachel Stevenson, Bureau of Investigative Journalism ([JEF 04](#))
- Melanie McFadyean, freelance journalist ([JEF 02](#))

Panel 2

- Adam Pemberton, Assistant Chief Executive, Victim Support ([JEF 16](#))
- Saj Tufail

Panel 3

- Dr Matthew Dyson, Faculty of Law, University of Cambridge ([JEF 07](#))
- Dr Ben Crewe, Institute of Criminology, University of Cambridge ([JEF 14](#))

[Watch the meeting](#)

Members present: Sir Alan Beith (Chair); Jeremy Corbyn; John Cryer; Mr Elfyn Llwyd; Andy McDonald; and John McDonnell

Questions 1–64

Witnesses: **Gloria Morrison**, Joint Enterprise: Not Guilty by Association, **Janet Cunliffe**, Joint Enterprise: Not Guilty by Association, **Rachel Stevenson**, Bureau of Investigative Journalism, and **Melanie McFadyean**, freelance journalist, gave evidence.

Chair: Welcome to our witnesses, both for the current session and for the later parts of the session. I should first explain that in this public session we have to abide by the sub judice rules, which preclude reference to live criminal cases before the UK courts from the time that charges are made, and in relation to appeal proceedings from the time that application is made for leave to appeal until the proceedings are concluded.

We are very glad to see Rachel Stevenson, from the Bureau of Investigative Journalism; Melanie McFadyean, a journalist also working in this area; and Gloria Morrison and Janet

Cunliffe from Joint Enterprise: Not Guilty by Association. We look forward to hearing from you. I invite Jeremy Corbyn to open the questioning.

Q1 Jeremy Corbyn: Thank you, Chair. Thank you very much for coming to give evidence this morning and for the written evidence that you have given us.

In your written evidence, you argue that the impact of the new guidance introduced by the DPP has been minimal or non-existent on the CPS practice in taking decisions on charging. Is that because the guidance is ineffective, or is it because of the practices adopted by the police and Crown Prosecution Service in this matter? This is a question for you all.

Gloria Morrison: I shall start. We think the guidance is ineffective because joint enterprise is a doctrine based on the law. If you have a serious charge of homicide, you need to use joint enterprise to convict a large group of people. To put guidance on a doctrine does not make sense: either the doctrine is applicable to the law or it is not.

When Janet and I had representations with Kier Starmer, we said to him that it is not semantics and that the doctrine is either applicable to the law or it is not. To try and put guidance on joint enterprise does not make any sense. We don't believe that it has had any impact whatsoever, because we have cases and cases still coming to us where families are absolutely distraught and don't understand why their loved ones have been convicted of serious charges of homicide—particularly of homicide. It is being used across the board in lots of other areas of law, but they don't understand, and this is common people just not understanding a complex area of law.

The last time we were here we thought that it was a complex area of law, but it is not complex. Either you have committed a crime, and you are charged for that crime, or you have not. Aiding and abetting, and all of that, seems to have gone. It has been such an easy area of law to use that they have used it sweepingly—and when I say “they” I am talking about the police and the prosecutors. It is joint enterprise, and that means they do not have to prove what each individual has done.

So, to go back to your question, Jeremy, I don't think that the guidance has had much impact, because prosecutors are not using it. The one area where we did think that we had some measure of success after your last inquiry was that we asked for it to be raised for children.

Janet Cunliffe: It was to raise the test applicable to charging of children, and to take vulnerability into account. Certain children have disabilities, and they do not understand the charge. To be charged with murder, and being the kind of child that is not knowledgeable about the world or the law and what is going on—taking a 13 or 14-year-old and charging them with murder when they do not understand what is going on, and neither do their parents, because obviously their parents would not have been at the scene when this happened—they place their trust in the courts to find the answer.

There was a case in Liverpool where the answer at the end of the trial was that one person was the perpetrator, yet five people were convicted, with the youngest being 14 years of age. We found that the young ones in this particular case had learning disabilities. The parents had

asked social services to help them throughout the years, but they have not had any help, and then this happened and they are now facing life sentences.

Q2 Chair: I meant to say at the beginning that the only area in which you have seen a change was in the willingness to use joint enterprise in relation to children.

Janet Cunliffe: The DPP put that into the guidance, and we thought that that would help in some way. That is obviously in the guidance, but it has not happened. It has not been taken any notice of.

Q3 Chair: Perhaps we should give others the opportunity to contribute.

Rachel Stevenson: I would say on behalf of the Bureau that, as part of our research, we did a survey of barristers and solicitors. It was quite a small number of people who responded, but it is quite a specialist field given the number of people who actually practise. We were specifically looking at murder cases and asking for respondents who had dealt with joint enterprise murder cases.

The feedback that came back about the guidelines was that 63% of respondents said that they had had no impact whatsoever. That was from 43 responses; nine people said that they did not know what impact they had had, and four people said that they had not even heard of the guidelines. That is just an indication, from some leading firms of solicitors and barristers, of the level of impact that the CPS guidelines have had. Other evidence that we heard from talking to QCs was that it is just not coming up as part of discussions with prosecutors.

Melanie McFadyean: I do not have any real handle on this, except to say that two prosecution barristers that I spoke to, who are both quite prominent and were dealing with cases, said that they did not think they would make much difference at all—but I can't quote them by name.

Q4 Jeremy Corbyn: Specifically, has there been any change in the practice of prosecutors in overcharging as a result of the guidelines that have come forward?

Melanie McFadyean: That is the sort of thing that needs more work done on it. I certainly do not have the answer, and I am not going to make a guess. There might be something coming out of the Bureau that Rachel can address, but I have spoken to quite a few lawyers and nobody has any idea as yet. I would hope that it would come up in research done by somebody else.

Rachel Stevenson: We submitted a Freedom of Information Act request to the CPS, and got figures for the number of prosecutions involving four or more defendants. That was the closest approximation that we could get of where joint enterprise must have been used in a prosecution. If you have four people in the dock, the chances are that joint enterprise was used. The figures show a very slight rise in the number of four-handed murder cases from 2012 to 2013; i.e. since the guidelines were introduced, there has been a slight rise in the number of those prosecutions.

Melanie is right: the fact is that we just don't know. We were not able to find out. The question exemplifies the huge gaps in our knowledge of how joint enterprise is prosecuted and what other things happen. They are not reflected in any data that we could find.

Q5 Jeremy Corbyn: Have you detected any growth in plea bargaining by either side because of the guidelines that have been brought in?

Rachel Stevenson: We could not examine that. I do not know whether those data exist.

Gloria Morrison: Given the campaign, one of the things that we would ask for is an independent review of charging. How is the CPS charging people? Since the film, we have anecdotal evidence—I know that you do not like anecdotal evidence—that charging is changing, that people are not being found guilty of murder when they have not actually committed murder. It seems that there has been a kind of shift change, but we would really like to have an independent review of the CPS's charging.

Q6 Jeremy Corbyn: Could you produce any evidence to support that?

Gloria Morrison: The prison network is quite tight, and we get a lot of information back. People are talking to us and they are saying that.

One thing that I find really shocking is how many people are put on remand when they are not actually guilty of an offence. We thought that people were guilty until proven innocent, but they are put on remand for long periods of time. This is young people as well whose lives are destroyed. They are put into a remand system for nearly a year before they go to court.

It seemed that we were getting a lot more guilty people coming to us; the problem with a campaign like ours is that people were coming to us afterwards because they could not understand why their loved ones had been sent to prison. Now we are getting more people coming to us beforehand, and saying, "What is joint enterprise? How does it work? What is it all about?"

There has been a sea change there, but, in terms of whether it is going to be more about plea bargaining, I agree that we are trying to go the American way. I think that 95% of cases in America are plea bargained before they get to court. That is a shocking thing; that is absolutely shocking, because it means that vulnerable people will take the plea, and nearly every single prisoner that I know—and I visit a lot of them—who is sitting in prison doing a life sentence for murder they did not commit, would say that if they had been given manslaughter they would have taken it. That is wrong. If they did not commit the offence, then it was not even manslaughter.

To this day, no one can tell me how you get joint enterprise manslaughter. Manslaughter means no mens rea, no actus reus. How do you get joint enterprise, when everyone has to share the intent and the foresight? It does not make sense. If you plea bargain down to a manslaughter charge, you are still shifting the goalposts beyond what the rule of law should be.

Melanie McFadyean: Jeremy, can I say something? One of the things that will probably come out of this session, and certainly I feel this quite strongly, is that a certain amount of

data have been collected as a result of your previous inquiry. The CPS collected some figures, but I understand that it is not going to continue collecting them. I am trying to think of a polite way of saying it, but it seems entirely misjudged to expect any of us to come up with the kind of answers that you need in order to reform this law and deal with its iniquities or inequities—I think I mean inequities. That research all needs to be done to the questions that you are asking. My answer is that it needs review; it needs an overhaul; it needs research; it needs understanding. It needs evidence, not anecdotes, not feelings.

All of what Gloria says comes straight from the horse's mouth. That is really important, but it is up to official bodies to put resources into examining what we at the Bureau have started to examine.

Q7 Jeremy Corbyn: This will be the last question from me, because we are under time pressure with having three groups of witnesses this morning. I suspect that I know the answer, but I would like to have it on record.

Would it be fair to say that the CPS guidance is of minor importance compared with the fundamental issue of the doctrine of joint enterprise?

Melanie McFadyean: I would say yes, in one word.

Rachel Stevenson: From the evidence that we have gathered and the weight of concern that we have received from extremely senior people in the judiciary—from people such as Lord Phillips down to solicitors dealing with young guys coming into their offices every day—the level of concern out there stretches the whole way through the legal profession.

Q8 Mr Llwyd: Following up on what Ms Morrison said, in the scenario where a young person in the cells is waiting to go up to the Crown court hearing room, he will be advised by a solicitor and a barrister, surely. They may well be vulnerable—I have grave concerns about this area; don't think that I am in any way dismissing what you say—but surely if they are advised by two professionals they are not absolutely by themselves, are they?

Janet Cunliffe: To a certain degree, when you get a young person who has not committed murder, and they are not the person who has committed the crime, the legal professionals will have to run the defence that that person asks them to run. If their understanding of what they have done on that day is, "I didn't kill anyone," they are still going to run a defence of not guilty of murder, without understanding that what they have to prove when they get in the courtroom is that they did not have foresight to it and that they did not have any knowledge whatsoever of what the other person was going to do.

It is only in recent times that even those in the legal profession are getting their heads around the fact that foresight comes into the equation. Joint enterprise changes with every case, and you may think that one kind of defence is going to help a particular defendant, but by the time you get to court months later the law will have shifted again. It is not static; it moves and shifts, and the burden of proof gets lower and lower with every case. Whatever the advice is from the legals, because the burden of proof is so low, it would be very difficult for

them to give the correct advice, especially to a young person who categorically says, “I didn’t kill anyone, and I am pleading not guilty.”

Q9 John McDonnell: Rachel, thanks for the work that you have done. Will you draw out for us the main conclusions of your research?

Rachel Stevenson: We were on a search for the facts. Your previous report highlighted the complete absence of any data about how widespread joint enterprise is in the criminal justice system. We found that it is a significant part of it. We specifically tried to focus on homicide defences, where most of the concerns lie, because of mandatory life sentencing.

When you look at cases from 2005 to 2013 where four or more defendants were in the dock, it is more than 1,800 people. When you use the CPS’s methodology, that jumps to about 41% of all homicide prosecutions. We produced a more conservative estimate than the CPS. It is not a marginal piece of the criminal justice system; it is used very heavily, and that is just on homicide prosecutions. So the first thing I would say is that we think a lot of people have been prosecuted using this doctrine.

Another major thing is that there is still so much that we do not know, and so much that we could not find out, including some of the things that Jeremy mentioned about plea bargaining. We did find data about the rising use of inchoate offences. These were offences brought in under the Serious Crime Act 2007. There is a dramatic rise in the number of cases being prosecuted for inchoate offences, but it is still tiny. We also do not know how many people are still being charged with murder as well as with those lesser offences.

Some of the data also show some other interesting things. For instance, the more defendants there are in a prosecution, the more likely there will be acquittals. There is another correlation. The more defendants there are in a prosecution, the more likely it is that the CPS will offer no evidence at trial and the case is subsequently dismissed. That picks up on something that Gloria said. Somebody may have spent 14, 15 or even 18 months on remand only for the CPS to offer no evidence. Why were they being charged in the first place?

As I said, we were able to canvass a range of legal opinion from people such as Lord Phillips, Professor Ormerod and Professor Jeremy Horder, who has spoken to you before. We also did a survey of solicitors and barristers practising in these cases. The same concerns come up again and again—that the net is cast too wide, that sentencing is disproportionate to the act committed by the individual offender, and that the foresight test is said by many people to be too weak a principle to convict somebody of the most serious crime, the consequence of which is the most serious punishment that the state can impose—that of life imprisonment.

That is a summary of some of the things that we found, but it shows what we still do not know.

Q10 John McDonnell: Let me put this statistic to all of you. We received evidence from the Institute of Criminology at Cambridge in its current study of young prisoners serving lengthy sentences. The statistic is that 37.2% of those convicted of joint enterprise in

its sample were black or black British, three times the proportion of black or black British in the overall prison population. What is your comment on that?

Gloria Morrison: When my son's best friend was first convicted, no one had heard of joint enterprise. If you Googled it, you would get an arm surgeon, which I need at the moment anyway.

He is a black man, and I instinctively thought, "This is racist." It's got to be, because he was with five black boys in the dock. He was unconscious on the floor. So my instinct then was that it was racist. Now, four years after we started the campaign, we are pushing to over 500 cases, and that is only the 500 people who have contacted us; they all have co-defendants, so we are getting into the thousands here. Nearly 80% of them are from the black and ethnic minorities, so we know exactly who this law is targeting, and they are nearly all working class. It is a very clear indication that this law is used to target the most marginalised people in our society because they can get away with it, and those people particularly.

One of the most compelling arguments against joint enterprise that I have learned is how it is breaking communities. Communities have been living together, side by side for years, but now families are fighting each other; once it gets into the courtroom, everyone starts blaming one another and it becomes a cut-throat defence. I know—this is not anecdotal—that communities are being broken down by this law.

Janet Cunliffe: There is also the use of the word "gang" every time, regardless of whether the evidence proves it, particularly with young black men and young Asian men. To describe them as gang members without any proof or fact that that is what they are is almost saying that you are only a member of a gang if you are from a black or Asian community. That kind of thing will break those communities. If that is not the case, there will be factions—"Are they? Are they not?" It is wrong to do that without the evidence to prove it.

Once a group of people has been charged with joint enterprise and the case goes to court, the media are calling them gang members. As the trial progresses, it is too late for that to be taken away. The rest of the world sees them as just gang members who really did the crime, and there is no going back from that. It tarnishes whole communities.

Q11 John McDonnell: Has the guidance on that had no impact whatever? The guidance is very specific that association with or membership of a group alone will not satisfy the evidential test.

Janet Cunliffe: The question is how they define it. Even in my son's case, the term "gang member" was used. They were children coming home from the chip shop. When we got halfway through the trial, the judge said, "You mustn't use that term any more," but now, seven years on, the media are still calling my son and his friends gang members. It is not necessary. Once the word is used, it is almost a cover, a blanket, to use that term; it almost makes the prosecution easier because the public will say, "Ah! We don't care about them then."

Gloria Morrison: The really awful thing is that this is political, and it should not be. We were talking about feral youth and broken Britain when this law started to be used quite heavily. That means that the law becomes political, and it should not be. It should not be

that the media can use cases, and families and victims, on both sides—victims of miscarriages of justice and those who have lost someone—to make a political point. That is why it is very dangerous.

Melanie McFadyean: It starts before politics. My idea in coming here today, and the reason why I wanted to come today, is that it seems to me—may I address this question now?

My contention is that there is policy driving the law, and that the idea of the gang is a very easy one for the public to identify with. It is a very easy one for politicians to work on, and it gets votes—“We are going to deal with these gangs. We have this trouble on the streets.” It creates a kind of fear. We are all frightened; we all think that we are going to be on the receiving end of it, but actually most of us are not. The people on the receiving end of it are the people who are called gangs, some of whom are in gangs and some of whom are not.

As Gloria says, they are young people from marginalised societies. They live in exclusion zones. They live in what they themselves feel are war zones. If you talk to them, you will find that they are frightened; they start off in a disadvantaged position from a very early age, and by the time they are 15 they are excluded from school and have gone into an alternative economy where it pays to run drugs, to have a gun—they are cheap and easy to get, apparently—or to wield a knife because they are frightened. Most kids who carry knives will tell you that they do it for protection.

What has happened is that the law, instead of understanding that and getting into the heads of those people, few of whom actually kill, sweeps them all up and says to everybody in the room if I have killed Rachel—but you are all here—that you can all go down for it as well. It says that you are all part of a gang, that you are part of a joint enterprise, and we will punish you all because it gets you off the streets, and it looks good.

Q12 Chair: Despite the evidential test.

Melanie McFadyean: It comes from—I shall quickly read it out to remind us—Powell and English, where Lord Mustill said that practical and policy considerations are important and that, “Intellectually, there are problems with the concept of a joint venture, but they do not detract from its general practical worth...”

He was backed up by Lord Hutton, who said: “But the rules of the common law are not based solely on logic but relate to practical concerns and, in relation to crimes committed in the course of joint enterprises, to the need to give effective protection to the public against criminals operating in gangs.”

Lord Steyn said: “In the real world proof of an intention sufficient for murder would be well nigh impossible in the vast majority of joint enterprise cases.”

That is enough to tell us that the law is policy driven, which is dangerous. That was in 1999.

Fran Robertson made a film called “Presumed Guilty” about joint enterprise, and I worked with her. I interviewed Sir Anthony Hooper, who will be familiar to many people in this room. Anthony Hooper said: “There is a risk of juries convicting people when they ought not

to be convicted. Even if they rightly convict, the doctrine is too wide and should be limited so that only a person who intends to kill or cause grievous bodily harm is guilty of murder.” He goes on in that vein. He was then presiding over *R v. Gnango* in the Appeal Court, a most bizarre joint enterprise case, with which I am sure you are all familiar. It was overthrown by Sir Anthony Hooper and other judges in the Appeal Court, but it went to the Supreme Court, which reinstated the conviction, saying: “In resolving the point of law it would be appropriate to have regard to policy.” This is really dangerous.

What happens is that the people affected by this are those under secondary liability, possibly hundreds and maybe thousands. Our figures at the Bureau, and to some extent those of the CPS, showed that these are the numbers of people, but we do not know who has been disproportionately sentenced and we do not know who is innocent. All we know is that there are a lot of people.

The thought behind it was encapsulated by Lord Falconer, formerly Blair’s Lord Chancellor, in 2010 on the radio. He said it was justifying the law as it stands and demonstrating a completely casual contempt—it was called “cavalier” by the Institute of Criminology—for these people who are locked up as if they were really not people at all but a problem. Locking up a problem is not going to make it go away. It is going to make for a lot of people in jail.

I shall read out what he said: “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.” That, I think, encapsulates the idea that the state is driving policy. I could go on, but I am probably hogging too much time.

Another quick one came from David Cameron in 2006. He was said to have said, “We should hug a hoodie.” He didn’t say that. He said: “We, the people in suits, often see hoodies as...the uniform of a rebel army of young gangsters. But, for young people, hoodies are often...defensive rather than offensive. They’re a way to stay invisible in the street.” In other words, people who start out life like that are very frightened.

I spoke to Anthony Powell of Powell and English—he has done 20 years—and he said that you have to get to these kids at an early age.

Q13 Chair: Order. I think that we should rely on witnesses to give their own evidence.

Melanie McFadyean: I am sorry. All right; I won’t quote him.

Cameron spoke after the riots, which were arguably an expression of some of that anger, fury and violence that is so frightening and damaging, but it is not dealt with by locking it up. It is dealt with by getting into the heads of these young people, addressing them at an early age and addressing the issues, understanding what that ghetto life is like and putting the

resources into trying to stop them, derailing them at that point, rather than having them become a problem, where they are killing each other and ruining their own lives.

Q14 Chair: That is not unfamiliar territory to this Committee.

Melanie McFadyean: I am sure.

Q15 Chair: We have published some reports saying that.

Janet Cunliffe: What Melanie is saying is right, but we have gone beyond that now. You can have a man and a woman out in a pub going for a drink, and something happens. We are talking about families. We have gone far beyond the deterrent to gangs. It is now ordinary people who are being affected, like a mother and a father and their son coming home from somewhere, with two brothers who were not even in that spot any more. We have stretched far beyond that. What Melanie is saying is right, and maybe that is where it began, but now it is affecting ordinary people who at normal times are law-abiding and are not a problem to society.

Melanie McFadyean: My point was only to say that the law should be impartial and not driven by policy.

Chair: I want to move on to Mr McDonald.

Q16 Andy McDonald: Could I move it on a little? Do you think that joint enterprise should be enshrined in statute? If so, what form should it take?

Rachel Stevenson: I can only speak about the evidence that we gathered as part of our research. All the evidence we gathered certainly suggests that case law has not done a particularly good job. As Janet said earlier, every ruling seems to stretch and change the scope of participation, so you have this spider's web of liability.

Many of the people that we spoke to when talking about legal professionals suggested various things, such as whether the Supreme Court could have the right case in front of it, and Gnango clearly was not the right case. Many people in the legal profession find that very bizarre. One option is whether the Supreme Court, with the right case in front of it, could clear up some of the definitions in the scope of participation in joint enterprise.

Overwhelmingly, the evidence that we found from legal professionals was that something further needed to be done—that you needed to have a gradation of murder offences. Even getting rid of mandatory sentencing for murder is not enough. It would still make people killers who most people would think are not killers. They would still have a homicide conviction even if they did not receive a life sentence.

Q17 Chair: On that point, is it your view that the mandatory sentence for murder adds a further dimension?

Rachel Stevenson: I would say that the evidence that we found shows that it is a very serious concern among a lot of people—and it is not mandatory sentencing, because the minimum tariffs have gone up so significantly. A lot of sentences start at 25 or 30 years.

Gloria Morrison: You ask whether joint enterprise should be put into statute. No, it is not a law. It is a doctrine. It is not actually law. What needs to be considered is homicide, and the Law Commission said in 2006 that it needs to be examined. It is still common law, but people do not realise it. Homicide, which is the most heinous crime in our country, is common law, so it is down to the judges.

There will always be mandatory sentencing; they will not change that if someone commits murder, and I do not think there is a person in the land who will not agree with that. If someone commits a murder, if they deliberately kill somebody, they should go to prison for life, but don't put the people that we support in prison for life for the idea that they had the same foresight and intention as somebody else. That is what is wrong.

We cannot answer this as campaigners, because it is obviously for the law makers. As Melanie said, it should not be policy driven, but it needs a serious overhaul. What about all the people who have been convicted and are doing mandatory sentences for something that they did not do?

Janet Cunliffe: The intention to do it was never proven. If it is a one-to-one murder case, the most important thing for the prosecution to prove is the mens rea, the intent. With joint enterprise, that is not necessary. You can get five people going to prison for life for murder, and if it is a knife or gun crime you are looking at 20 or 30 years. You are putting people in prison for that length of time when intention was never proved, and never needed to be proved.

For me, if it is murder, you need to prove that whoever committed the crime had the intention. Even if it is two people who plan it together, and one pulls the trigger but the other supplies the gun, or procures that person into the room so that they can kill him, there is proof of intention.

Q18 Chair: In that sort of case, are you saying that joint enterprise is appropriate?

Janet Cunliffe: To me, the term joint enterprise would not need to be used. It would be a murder by two people. It would be about proving the intention and the plan and the purpose of those two people as individuals, and it would be ignoring what the other people being charged had actually done.

There are different levels, and to accuse someone of murder if they had not planned or had any intent, and not needing to prove it, means that you are getting people loosely on the periphery who have not committed the crime.

Q19 Andy McDonald: Are you saying that the reforms that you want to see opposite joint enterprise depend upon a change in the law opposite homicide? Is that the point?

Gloria Morrison: We had the felony murder rule in 1957, using joint enterprise, under which Derek Bentley was killed. We had the death penalty then. If we still had the death penalty, we would have a lot of people, like Derek Bentley, who are then exonerated.

The Government abolished the felony murder rule, although it is still applicable in the United States. That is quite interesting, because the Americans look at our justice system and think that at least we do not have the felony murder rule, but we say, “Do you know what? We have something worse.” The felony murder rule meant that you had to prove that people were part of the felony and took part all together.

Janet Cunliffe: A dangerous felony is one that you would have known with foresight. If you rob a bank with a gun and the gun is fired, then you are liable, but with joint enterprise now it can be spur of the moment and spontaneous, and you will still be convicted of murder because you are supposed to have had some kind of foresight.

Whatever that group of people was doing at that moment was not actually a serious felony, because you were just out with friends or whatever. It is as if joint enterprise has all the worst aspects of the felony murder rule, and does not take into account that nothing dangerous was being embarked upon in the first place, yet you are punished as if it was. That detracted from the felony and caused another one.

Q20 Andy McDonald: If you are talking about the reform of homicide, do you agree with the Law Commission’s view that we should have first and second degree murder charges? Does that chime with you?

Janet Cunliffe: That, to me, would be quite worrying, because you may find people being charged with murder who are known not to have actually committed the murder, and that then opens the door for a plea bargain again.

Melanie McFadyean: Earlier, I think that it was Gloria who said that it is a very straightforward and simple case, but we think that joint enterprise is very complicated. It has become complicated because it is common law and it has gone through case law, and it has become barnacled with complexities.

I have spoken to QCs who say, “I boil my head to understand what these people are saying.” It is so complicated, and the defence and the prosecution have become so complicated. It seems to me that you have to start from scratch. You have to make it quite clear, as Anthony Hooper said, that you cannot convict people of murder when you cannot prove that they had the intention to murder. If you do that at the same time as re-examining the homicide laws, you are beginning to move forward.

Forgive me, I am not a lawyer, but, as I understand it, some are participating in the 2006 Law Commission document. If you enshrine that in statute without taking it to pieces and unpicking it, you are in danger of enshrining some of the worst aspects of what currently goes under the name of joint enterprise. I am not an expert, but I understand it thus far. To me, it seems that you should strip it down and start from the beginning, that you do a lot of research and produce evidence, and that when you construct this law you do it in a way that takes account of what has happened to what the Bureau has discovered are thousands of people.

Chair: Thank you very much indeed. We have more witnesses to hear from this morning. Thank you for your assistance. Please feel free to send us a note if there is something that you feel needs to be amplified, particularly once you have read the transcript of the hearing, and we shall take cognisance of it.

Examination of Witnesses

Witnesses: **Adam Pemberton**, Assistant Chief Executive, Victim Support, and **Saj Tufail** gave evidence.

Chair: Mr Pemberton, assistant chief executive of Victim Support, and Mr Tufail, thank you very much for coming here this morning. I ask Mr Llwyd to start our questions.

Q21 Mr Llwyd: Inevitably, there will be some overlap with our questioning of the previous panel, but can I ask you, to begin with, what your view is on this?

The Secretary of State has written to us saying that “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.” What is your view on that?

Adam Pemberton: That was the Secretary of State’s comment, was it not?

Mr Llwyd: Yes.

Adam Pemberton: 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 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.

Q22 Mr Llwyd: Does that statement not confirm what the previous panel said—that this appears to be an area of policy-driven law?

Adam Pemberton: I represent a charity that supports victims, and I would not want to comment on whether or not I think it is a policy issue.

We are proceeding on the experience of the bereaved and victims going through cases. It is a complex area, and that complexity, in terms of the victims’ experience, means that people often do not have enough communication at one of the most traumatic times of their lives—about what has happened to their loved ones, and what the options are going through the case,

what might happen as that case plays out and, frankly, what happens afterwards if there is a conviction, in terms of helping them to understand what it means and what the outcome of the case has been. It is a complex area, and a consultation provides an opportunity to try and clear some of that up and give a bit of clarity.

Q23 Mr Llwyd: Mr Tufail, do you wish to add anything to that?

Mr Tufail: Yes. 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.

Q24 Mr Llwyd: The overall view coming through is that it is far too complex. Even lawyers are pretty bemused by what is going on, let alone members of the public, who are not professionally trained. What you are saying is that we need to go back to the beginning, to start again and look at the whole issue. Is that right?

Mr Tufail: It needs to be looked at, but the other thing that we perhaps need to address is at what stage and how we lose control of our young kids, why they have been involved in the things that they have been involved in, and what we can do to resolve the situation. Joint enterprise has worked as a deterrent, I would say, in some cases but not in all, and we need to address the deeper issues around youngsters.

Q25 Mr Llwyd: Speaking as a barrister, I have prosecuted and defended joint enterprise cases. The only real trouble occurs principally over manslaughter and murder. With the average burglary, it is quite obvious that one guy is outside keeping an eye on the street while someone else is going in through the window. That is simple; that is fine, and there is no problem.

Mr Tufail: They are jointly involved, yes.

Q26 Mr Llwyd: But neither of them will go down for life, will they?

Mr Tufail: No, they won't. However, as I said, in my son's case it certainly worked for us. There was conclusive evidence to convict the accomplice under joint enterprise, but that was in my son's case. I cannot speak for other cases. Having said that, given some of the stories that I have heard, I agree that there needs to be a review of some sort. I am not legally minded, so that will be left to yourselves and the judicial system.

Adam Pemberton: The only thing that I would add is that, whatever comes of a review, it is likely—and, to be honest, desirable—that there is still the opportunity to prosecute people involved in a multi-handed attack. That option should still be there, whether it is called joint enterprise or is reformed in some way. The option presented to prosecutors to prosecute in that way needs to be maintained because of the nature of some of the cases we have seen.

Q27 Mr Llwyd: But subject to a review of the whole area of law, basically, not proceeding as we are at present.

Adam Pemberton: Certainly in terms of trying to get some clarity around the issues, and that is clarity for victims and the bereaved as well, because it is a very difficult area to get your head round. It is very difficult to get your head round it when you are looking at it dispassionately and are not involved.

Q28 Mr Llwyd: Yes, but there are cases, are there not—I know of them; I have read the newspapers, as we all do—where victims’ families feel very badly about what has happened to some of the youngsters who have gone down? They realise that they were distant from the whole event, but they have gone to prison for a long time.

Mr Tufail: I am one of them, unfortunately. I do feel sorry for some of the youngsters that have gone down as a result of joint enterprise. They should perhaps be convicted under a different law and should serve some time, but, if they were not involved in the actual blow that caused the fatality, they should not be convicted of murder.

Mr Llwyd: No.

Mr Tufail: As I said, I keep going back to my son. It was a completely different situation. It was explained to me, and I wanted the QC to convict both under joint enterprise, because there was conclusive evidence.

Q29 Chair: You were a party to the discussion about whether it was appropriate.

Mr Tufail: It was explained to his mum and me, and I quite clearly understood it, although it was in layman’s terms because, as I said, I am not legally minded. For me, it was the right thing to do.

Q30 Mr Llwyd: In your son’s case, how many defendants were involved?

Mr Tufail: Two.

Q31 Mr Llwyd: In which case, it is probably not quite the same as some of the cases that we have been discussing today, where a group of youngsters walk down the street and one of their number does something daft, without anybody knowing.

Mr Tufail: Yes.

Q32 Mr Llwyd: Mr Pemberton, referring to your written submission, you said that it would be premature to judge the effectiveness of the CPS’s 2012 guidance on this area of law. Do you detect any change in the approach adopted by prosecutors on joint enterprise charging since the guidance was published?

Adam Pemberton: We are not party to charging decisions, and we do not maintain our own independent data on this, so we are looking at the same information as you. On that basis, my senses suggest a largely unchanged picture. It is too early to tell what impact the guidance is having, if any.

Q33 Mr Llwyd: My final question is one that I am sure you will be able to address. Are the views of victims and their families taken into account by the Crown Prosecution Service in reaching joint enterprise charging decisions, as the guidance indeed says they should be?

Adam Pemberton: Saj can speak from personal experience about it, but I think it is important to be really clear about what the guidance says. It is not about victims or the bereaved having a say in the decision or determining the decision; it is about making sure that the prosecutors are taking account of the harm caused to the victim or the bereaved, and taking that impact into account in their thinking. That is not the same as having a say or it being determining of it.

Q34 Mr Llwyd: No; my question did not imply that. I am asking whether, in your work, you come across families who say, “Our views were not taken into account whatsoever,” or others who say, “Yes, they did interview me, and they did take account of what I had to say.”

Adam Pemberton: You then get into a much broader debate about victim personal statements, victim impact statements, and the use of those, because those are obviously the key methods by which prosecutors in any case should be taking account of the impact. There are significant variations across the country in people being even offered to make a victim impact statement. For example, on the latest figures you are twice as likely in Northumbria to be offered the opportunity to make one as you are in London, and that is across any case.

The broader point is that the evidence is still that the harm and the impact are not being taken account of sufficiently by practitioners. It is set out in the new victims’ code, but there is no process for monitoring or enforcing that yet. From our perspective, as a charity trying to make sure that victims get the respect they deserve, we think there needs to be a much greater push around making sure that impact statements are given, taken and looked at by prosecutors.

Q35 Mr Llwyd: I make a final point, Mr Tufail, going back to your experience. You said earlier that the QC explained it to you, and that you had a discussion. Would that have been at court or before the court hearing?

Mr Tufail: It was during the case, at an early stage.

Q36 John Cryer: You both mentioned the possibility of joint enterprise acting as a deterrent. Is there any way in which it can act as a deterrent to keep young people away from gang culture or discourage them from getting involved in gang culture?

Mr Tufail: I am involved in a number of sessions with a couple of organisations, where we talk to young members, at the moment primarily in Lambeth. First, they are not aware of joint enterprise; when you mention it, it comes as a shock to them.

It raises some sort of awareness with the youngsters, and that is what it is about. It is about making sure that you raise awareness of the fact that, as a result of your involvement, whether it be direct or indirect, you could be convicted, which potentially could be the end of your life. You may have taken someone else's life, but, equally, you will end up in prison for the rest of your life. It works to an extent, but it is fairly early, because I have only just started doing these sessions for about a year or so, and I have been involved in three or four. It certainly comes as a shock to the youngsters, and some take it on board.

Adam Pemberton: I very much agree. It is difficult to make a real assessment. There is not a lot of research in this area, but whether or not it acts as a deterrent itself slightly misses the point. The issue is that people do not even know about it, and the expanded educational programmes so that young people, particularly, understand the legal realities are absolutely key. The Met has had a programme since 2009 going out and presenting to young people, to ensure that they are aware of the consequences, and that needs to be much broader so that people understand it.

Q37 John Cryer: You seem to be saying that it can be used to educate young people, but are there not better ways to educate them on the dangers of getting involved in gang culture?

Mr Tufail: It is about early intervention. The youngsters that I deal with during these sessions are aged from about 11 up to 17 and possibly in their late teens. We may need to address it at an earlier age, perhaps at primary stage. It may seem harsh, but we need to raise some sort of awareness. It may be a case in areas where there may potentially be a lot of gang activity. Just talking to youngsters there may raise some awareness.

Q38 John Cryer: There has been a lot of discussion this morning about the complexity of joint enterprise. Is joint enterprise sufficiently capable of distinguishing between spontaneous actions and planned, premeditated activities?

Mr Tufail: It certainly worked in my son's case because it was premeditated; it was planned. I can't discuss the details of the evidence, but it was conclusive. As I say, it worked in my son's case. Overall, I am not sure whether you can get conclusive evidence.

Adam Pemberton: Again, this is a question more for prosecutors than it probably is for us, although it is worth pointing out that the CPS guidance does talk about these issues. Paragraph 34 explicitly talks about exercising particular care when it is a spontaneous joint enterprise. That probably makes it clearer than it was before the guidance, but, other than that, it is not a question I can answer.

Q39 John Cryer: My next question is about victims' families, and I imagine you have had a lot of experience of that. In many cases, it is not possible to establish who actually delivered the fatal blow. We are obviously talking about manslaughter and murder because

that is largely what we have been talking about. What sort of effect does the fact that it has not been able to be established have on victims' families?

Adam Pemberton: That is all part and parcel of the complexity issue. The prosecutors often need to test this out in the case and, as a consequence, as I understand it, need to have various avenues that they can explore. That obviously makes it difficult to explain to the bereaved, in the case of a homicide, what is going on in the case. Obviously, people are looking for some clarity.

Again, the code talks about meetings with bereaved families through prosecutors, and the CPS has now set up a series of victim liaison units—you probably know about them—which is designed to improve its performance in this area. The key thing to me is communication, communication, communication. It is not just, “Well, we’ll have one meeting at the start of the case and that ticks the box, job done.” In these cases, there needs to be a real continuing and genuine engagement, explaining that things will change potentially as the case goes on. It requires a real investment of effort to put the victim or the bereaved at the centre of this process and at the centre of the communications. I do not think it is ever going to be able to be completely simplified, but we could clearly do better than we do now in terms of keeping the victims and the bereaved involved in those discussions, and in understanding what is going on.

As you say, we hear time and again from victims that they do not understand the process. When it gets to the end of the process and potentially there is a conviction, and there are voices from their own communities, as we heard earlier, saying that it is unjust, that casts doubt into the minds of the victims and the bereaved about what has just happened. That is hard, all over again, on top of having had to go through the court process. Some of this is not rocket science, in the sense that it is about sharing information and communicating over the whole length of a case.

Q40 John Cryer: This will be my final question. You mentioned earlier that it is still fairly obscure, but there is a rise in public awareness of joint enterprise. As the public become more aware of it, I get the impression—it is purely anecdotal—that there is a fair amount of shock that people can be convicted on the basis of joint enterprise. There is a general feeling, as people become aware, that it is unjust. Is there any way, in your view, that public confidence in joint enterprise can be increased, or is that just not going to happen?

Adam Pemberton: Speaking on behalf of the victims' experience, we have to be very careful how we talk about these cases. In some of the most troubling cases, where there has been commentary about joint enterprise convictions, we see the victim's or the deceased person's intentions and actions being called into question as part of addressing these issues, and that is problematic from our perspective.

Each case is going to have to be dealt with separately on this, and we are concerned, given the justifiable issues and concerns that have been raised this morning, that the voice of the victim and the bereaved does not get lost in this debate. There are some instances where joint enterprise convictions seem entirely right to have identified where there is common cause and so forth. It is difficult to generalise about every case, but we are very concerned to make sure, and this is one of the reasons we wanted to come here today, that we think about joint enterprise from the perspective of the victims and the bereaved, as well as the people convicted.

Mr Tufail: From a victim's perspective, if a group of people is involved, it is important to establish who threw the final blow. Just for closure I think it is important.

Q41 Chair: Sometimes you can't; sometimes that is not possible.

Mr Tufail: Sometimes it is not, and this is where it becomes quite difficult as a victim. If it is not possible in some cases, you want everyone convicted. This is where there needs to be a bit of a balance. You have to take the emotions out of it, and you have to look at the legal aspects and the evidence, and see under which of them you can convict those individuals.

It is difficult. As I said, I am not in any way legally aware of any of this, but there needs to be some sort of balance. As everyone has said before, it needs to be addressed and reviewed.

Q42 Jeremy Corbyn: Do you think that the adoption of joint enterprise is fair and balanced, or should there be a fundamental change in the whole process, given the experience of both of you?

Adam Pemberton: 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. Our perspective is that what victims are looking for, from any case where there is a conviction, is that there is an effective and appropriate sentence, that their voice has been heard and that they have been kept informed throughout the process. Those may seem obvious things to say, but we also know that that does not happen from the victim's perspective. That needs to happen more, but I won't repeat some of the things that I have already said about that.

Q43 Jeremy Corbyn: Do you have concerns that people may appear to have been convicted of something that they did not do because of the ease of process of the joint enterprise law, as opposed to specific evidence against an individual for murder?

Mr Tufail: First, you must not forget the poor victims in this, but yes, there are concerns in some cases, and that is where it needs to be addressed. In principle, I agree with Adam.

Q44 Jeremy Corbyn: Do you think that the law on murder should be reviewed?

Mr Tufail: No, I do not think so.

Q45 Jeremy Corbyn: I am talking about the difference between first and second degree murder, which may require a view. I am just seeking your opinion.

Adam Pemberton: It is difficult to disentangle the issues between the two. It is hard to see that a reform of the murder laws is going to happen any time soon. Given the choice, I think that it would be better on balance to proceed with the consultation based on the Law Commission's proposals than to stay with the status quo.

Q46 Jeremy Corbyn: This is my final question. Do you think that joint enterprise should be enshrined in statute? If it was, would it not reduce the flexibility of the police and prosecution in dealing with a case?

Adam Pemberton: I think there are some advantages. It could address some of the controversies by enshrining it in law. Everyone would need to be careful about how they put their case when enshrining it in legislation, but I think that it could reduce some of the uncertainty in practice. There is an opportunity to refine the law through statute, but, equally, at the same time we need to be careful that it does not impose so much rigidity in what are very difficult cases. Each case will be different from the next, and that could cause a lack of justice in other areas. There is certainly merit in looking at it, but it would need to be done very carefully.

Mr Tufail: I would agree with that.

Chair: Thank you very much, Mr Pemberton and Mr Tufail. We are very grateful for your evidence this morning.

Examination of Witnesses

Witnesses: **Dr Matthew Dyson**, Faculty of Law, University of Cambridge, and **Dr Ben Crewe**, Institute of Criminology, University of Cambridge, gave evidence.

Chair: Good morning to Dr Dyson from the Faculty of Law at the university of Cambridge and to Dr Crewe from the Institute of Criminology at the university of Cambridge. We are grateful to you for coming to give evidence this morning. I ask Mr McDonald to begin.

Q47 Andy McDonald: Thank you, Sir Alan. Dr Dyson, what evidence do you have to support your argument that the lowering of the standard of fault in joint enterprise cases has spread to other secondary liability cases? Does the CPS guidance blur the boundaries between joint enterprise as generally understood and the wider categories of secondary liability?

Dr Dyson: The evidence is clear. First, the fault level for what we might call basic accessorial liability has clearly changed since the 1990s. It used to be that you clearly had to know, intend or believe that the principal would commit the crime, with the relevant AR and MR—actus reus and mens rea. It now seems to be that you must only foresee a substantial risk or a real possibility that he will do so. It has clearly changed.

As it has changed, it has changed to this position that joint enterprise uses. It has reached the same place, and in the process of it changing, the judges, when they did so, made express reference to joint enterprise. Indeed, in one of the examples, a judge saw no reason why the principles under Chan Wing-Siu should not apply to basic accessorial liability. It has changed to the same position, and as it has changed the judges have done so by express reference to joint enterprise cases and reasoning.

In my written evidence, at paragraphs 11 and 12, I set out a little more detail. I can tell you all of the cases if you would like me to; it will take about five minutes, but it is not really in doubt.

Chair: We will rely on your written evidence for that.

Q48 Andy McDonald: Dr Dyson, do you discern any impact of the CPS's December 2012 guidance on charging practices in relation to joint enterprise offences? I am particularly interested in the directive of not preferring a more serious charge in order to secure admission on a lesser charge. Perhaps you could address the guidance more generally as well.

Dr Dyson: It is early to tell at some levels, but the bigger problem is that it probably has had almost no impact at all. There are a number of reasons for that.

On the one hand, we are trying to use the CPS guidance to solve an incredibly wide—personally, I would not say complex; I would just say wide—and substantive doctrine. We have an excessive amount of criminalisation, and we are resolving it by prosecutorial discretion. The CPS guidance is trying to control that prosecutorial discretion, and that is a difficult thing to do, full stop. In the particular instance, the reason why it probably has not been very successful, according to the CPS's own statement and in evidence to the Committee, is that it just attempted to restate what the law was. One might call it a potted summary.

From the informal interviews that I have done in preparation for the Committee, it seems that prosecutors regard it as not being particularly helpful. The law was already vaguely known; it is just very harsh. It did not give them anything new to think about, except when it came to how to deal with the possibilities of different charges. They are not normally interested in making one of a series of alternatives, because it reduces the overall narrative that they are trying to present. They often do not include reference to manslaughter in the charges because, as a matter of law, it is automatically included, and the jury can find it anyway and they do not want to dilute their case.

Similarly, they do not want to rely on the Serious Crime Act 2007 for the inchoate form of secondary liability, because it is incredibly complicated, but it also makes the case overall seem less persuasive. What they are always trying to do is to argue that the defendants were “in it together.” They do not use the terminology of basic accessorial liability; they do not really use the terminology of joint enterprise. They want to argue “in it together.” That is the primary narrative for attempting to secure a conviction.

If in doubt, what do they rely on? They rely on the evidence that has come before them, but in almost all murder cases, in particular, defendants do not give any detail in their statements. Either they do not give a police statement or they give almost no detail. When

they serve a defence statement, they merely say, “I did not do it; I wasn’t there”—something incredibly short. All the prosecutor is left to do is to pick the highest possible charge and then effectively bat it over to the defence to plead something—to give some sort of evidence, saying, “I wasn’t involved; I wasn’t there, and here’s why.” At the end of the day, it will fall to the jury to make that decision.

I do not think the CPS guidance is likely to have that much impact, but there are questions about some of the nuances on whether it is entirely right and correct in some areas. Even if it was completely correct, as it only attempts to restate the law, it is not likely to be that effective. As it is slightly contradictory in what it asks prosecutors to do, given the evidence, which is probably the most significant problem with joint enterprise, I do not think that it has had much impact.

Q49 Chair: I am sorry to interrupt Mr McDonald’s questions, but in earlier evidence you probably heard a witness arguing that the law is constantly changing, and that a whole series of cases have subjected it to constant change. If that is the case—you may not agree; I don’t know—have the guidelines not given some greater certainty of what it is supposed to be?

Dr Dyson: The core principle of joint enterprise can be relatively neatly stated. The difficulty with a case is typically a difficulty of evidence. If you only require foresight as regards a second crime coming out of the first, the reason that we feel it is complicated or that it might be changing is because the factual patterns are going to be quite complex and difficult, but it is very easy to convict. There have been twists in that, mostly in the defences, and mostly in fundamental difference—quite a hardening of that in the 15 or so cases over the last 15 years that have gone to the Court of Appeal on fundamental difference.

I was relatively comfortable with teaching joint enterprise to students, as in being able to say what the law was, not saying that it was a good idea, for the last five years, without the CPS guidance, and I did not learn much from reading the guidance. The views of prosecutors to whom I have spoken mirror that; the guidance has not told them anything particularly new. In general, the CPS guidance that you can find available on the websites is not very detailed. How can you, in law, set out what the discretion should do, which is what the guidance needs to achieve? In truth, it can set out some legal statements, some of which are open to debate, but I do not feel personally that the law has changed so dramatically in that period. There are little cases, such as Bristow or Reardon, that defy proper explanation, but they are outliers.

Q50 Andy McDonald: This question is for both of you. Would some culprits potentially be beyond the reach of law if joint enterprise were abolished, or could convictions be secured using other forms of secondary liability?

Dr Crewe: I am not sure that I can comment on that. I am not a legal scholar.

Dr Dyson: I do not currently believe that there are cases where someone should be convicted of the crime that they would be convicted of under joint enterprise who would not be convicted of anything appropriate.

The question is, what is the link between the secondary party's conduct and fault elements, and the crime of which you are trying to convict them? On the basis of foresight, I do not see a sufficient culpability link with the ultimate wrong and, as such, they should not be convicted of it. There is no link. If that can be called a gap, it is a gap that removing joint enterprise would make obvious. However, the premise of joint enterprise is that there is a first crime and that a second comes out of it, and they can be convicted of the first crime because, ex hypothesi, they have tried to commit that crime. They have been either agreeing to it and/or actually participated in it.

There is no sufficient link with the second crime. Indeed, joint enterprise does not require you to show that they have contributed to it in any way, so you have no contribution and you have only foresight, which is an insufficient link. They will still be convicted of whatever it is that they did for the first crime, but you have not shown that they are connected to the second crime. I do not think of that as a gap.

Q51 Andy McDonald: Thank you. You have addressed some of the other issues that I wanted to raise. Finally, I ask you both whether the use of joint enterprise results in miscarriages of justice. Is that your view?

Dr Crewe: My view is that it makes it more likely, yes.

Q52 Andy McDonald: What is the degree of risk? Would you comment on the risk element of a miscarriage of justice occurring?

Dr Dyson: I would not know in what unit to express the risk, but I would say that it absolutely produces miscarriages of justice, although you would have to define the term a little. It does produce problems.

In particular, one of the following two things or potentially both of them are true. The defendant is convicted on the basis of evidence, which the jury take to believe, that he foresaw a risk, which is typically only the presence of a weapon. He knew that the principal had a weapon. Therefore, the jury are willing to believe or find that he foresaw the principal would use it to commit serious harm, and/or we do not know who actually did it, but we think that we can put this person in a group who are sufficiently close to it.

We cannot explain to these defendants why they are being convicted, and this is where some of the submissions by Dr Crewe show clearly that the defendants do not understand, when they are in prison, exactly what they have been convicted of, why they have been convicted and why it is a crime. Then they cannot engage with society's view of what the wrong is and, if appropriate, adjust their behaviour and show the remorse that leads to early release. We are just generating more and more people who do not understand why they have been convicted.

Q53 Mr Llwyd: Dr Crewe, do you have a view on the reasons why the use of joint enterprise is resulting in such a disproportionately high number of convictions of black or black British and mixed-race young people?

Dr Crewe: Let me start by saying that, with regard to the data that are publicly available on this, there is very little of it. The data that we produced in our written evidence have arisen as a by-product of a study that was about something else—prisoners serving very long sentences from an early age.

You will have seen from my submission that the disproportionate impact on BME men is clear in those figures. There are probably two main reasons for that. The first is 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.

I use that term carefully, because “gang” is a contested term. Our interviewees tended to say that what other people define as a gang is just a peer group. It may be a territorial peer group; it may be rather less than that. The term “gang” implies something well organised and criminally oriented, but for these young men the peer group often provides forms of safety, status and belonging that they cannot otherwise get in their communities.

That links to the second reason, which is 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. Our interviewees certainly felt that juries were making prejudicial inferences about them, based on a series of questionable connections between their ethnicity and a propensity for violence.

That may well be the second reason, but it is difficult for me to say that with complete confidence. The concern is that joint enterprise might be working as a kind of dragnet that pulls in disproportionate numbers of ethnic minority young men. Part of what is happening is that the normal kinds of social relations between young men, particularly ethnic minority young men in disadvantaged areas, are, in effect, being criminalised.

Q54 Jeremy Corbyn: I am very interested in what you are saying there. Do you have any evidence that joint enterprise is used less when there are groups of young white middle-class males hanging around in town centres, getting drunk and causing problems, as opposed to young black males, perhaps in Brixton or Finsbury Park, who might well be charged with joint enterprise? Do you have any evidence that joint enterprise is used less in the white middle-class community than in working-class communities?

Dr Crewe: I have no evidence on that.

Q55 Jeremy Corbyn: Do you have any evidence that it is used against better-off communities or not?

Dr Crewe: I have no evidence at all in that area.

Q56 Jeremy Corbyn: You said that it seemed to be used more as a dragnet. I agree with you; I think it probably is. But the opposite of that would be that it is used less somewhere else.

Dr Crewe: As I said, my study was not about police or prosecution practices. To some degree, I am basing what I say on interviews with prisoners serving long sentences. What I am trying to present is their perception of how joint enterprise is functioning.

Q57 Mr Llwyd: My next question probably arises from what Dr Crewe said earlier. In their written evidence, Sam Stein and Andrew Jefferies, both experienced criminal silks, say that the CPS guidance, in referring to potentially incriminating evidence of association, such as Facebook communications or knowledge that gang members carry weapons, fundamentally misunderstands the communities from which many of those charged with joint enterprise offences come. Do you agree?

Dr Crewe: Yes, I agree. I have read their submission, and I agree with almost all of it. I certainly agree with what I understand to be their suggestion that there is a certain amount of bravado and bluff involved in some of the statements made on social media by the sorts of young men caught up in joint enterprise, and that we should not be reading quite so much into those sorts of statements, with their slang and so on. Yes, I agree with their testimony.

Q58 Mr Llwyd: I am not excluding you, Dr Dyson, but it is more in criminology terms than pure law, is it not? Do you have a view on that?

Dr Dyson: The major problem with joint enterprise cases is the evidence issue, and this goes towards it. How do you solve multi-handed crime? The CPS attempted to suggest that certain types of evidence of association on social media could be used. It is grasping at ways to do it, because it is a difficult thing to do. Our solution at the moment is to have a law that enables you to convict essentially with almost no evidence of this kind of thing at all. It is mostly based on CCTV, ID and phone records, because people do not say anything, particularly in murder defence statements. I agreed with their written evidence earlier.

Q59 Mr Llwyd: Dr Crewe, your research demonstrates a considerable degree of uncertainty among those convicted under joint enterprise—a third of your sample did not know if they had been convicted as a principal or a secondary offender—as well as a predominant feeling of illegitimacy about their convictions. What is the reason for that?

Dr Crewe: The reason for not knowing whether you have been convicted as a principal or a secondary offender may well be because you were simply in shock when faced with a murder charge that you were not expecting to face. It means that taking in what is going on in court may be extremely difficult, and much of it will go over your head.

It is worth remembering that our interviewees were not generally highly organised criminals in the traditional sense of the term. They had not chosen crime as a career in a highly reflective way; their lives were much more in the moment, yet suddenly they are confronted with something that is going to destroy their lives, turn their lives upside down. It may be that they cannot take in what is going on, but, as others have said, it is possible that all of this is rather complicated. It may be difficult for them to understand what is happening to them. Legal scholars find it difficult to understand, so why wouldn't they?

Even if they grasp the distinction between being a principal and a secondary offender, if there is no distinction between the charge and the sentence that they might face, perhaps how they are being charged is immaterial to them.

The second part of your question was about feelings of illegitimacy. The simplest way of answering that is to say that the threshold for culpability is very low but the penalties are so high. It is both of those things, and also the gap between them, that is causing these feelings of injustice.

To expand on that, many of our interviewees completely denied involvement in the offence for which they had been convicted or felt that they were just bystanders while a set of things was going on that they had no control over. There were others who said, “I accept that I am guilty of something,” or, “I accept that, to some degree, I might be held responsible for someone’s death, but I cannot accept the label and consequence of being convicted as a murderer.”

That consequence is all the greater because our sentence lengths have gone up so significantly in recent years. The average minimum term for a mandatory life sentence has gone up, I think, from 12 years in 2003 to 21 years in 2013. Many feel themselves to have been involved only marginally in a situation, yet the sentence that they receive has a 25 or a 30-year starting point tariff. That gap is extremely de-legitimizing. Often they will simply say, “How was it possible for me to have foreseen this act occurring when things were happening so quickly?” and they claim to have no idea of what was going to occur. Can one ever have the kind of foresight that joint enterprise convictions can be based upon?

Those are the main reasons that I would give, plus the fact that a process of conviction may also feel illegitimate to them if they feel that decisions about their culpability were based on inferences about their ethnicity, or that there is a kind of collective punishment going on whereby they are convicted because evidence presented about co-defendants or about their general lifestyles is used to convict them.

Q60 Mr Llwyd: Finally, may I repeat a question that Mr Cryer put to an earlier panel? We know that the police and the Crown Prosecution Service say that the joint enterprise law is a deterrent against gang culture—I have used the gang word again. Is there any evidence about its effectiveness as a deterrent? Do you know of any?

Dr Crewe: I do not know of any evidence specifically about the deterrent effect of joint enterprise, but it is worth saying something about it.

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.

I suspect that awareness of joint enterprise has risen in recent years, so the term may have penetrated the streets, as it were, but I am doubtful as to how many people understand its details; and people may of course disbelieve an accurate description of it because it will feel

counterintuitive to them that they can be held equally culpable for various degrees of involvement.

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. It has to have bite. 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. That is because the severity of the sanction feels quite remote from what you are doing at the time when you are committing an offence.

There may be all sorts of other reasons why people involved in or present at the kinds of situations that are relevant to the Committee might not be thinking about the potential risks of what they are doing, or might not be able to act on them. They will include feelings of youthful invincibility, or being drunk or on drugs and not making very rational decisions about their involvement. It may be that events are taking place at a speed and with an intensity that makes it difficult to engage in rational calculation.

It is also true that these are people whose lives are being lived very much in the moment, and who are subject to intense forms of peer pressure, including the fact that if one intervenes to prevent a violent incident one is at risk oneself, either from a potential assailant or from one's own peer group whom you might be preventing from doing something. Loyalty is everything among many groups of young men, and to breach that loyalty may put you at risk.

Deterrence involves a form of future thinking that might be challenging for the kind of people that we are talking about, who are living in a sub-culture where the present and the pressures of the present may be very intense.

Q61 Chair: Dr Dyson, in your written evidence you appear to welcome the Law Commission's proposed clause, in its 2007 report, on assisting or encouraging an offence. Are you similarly favourable to its proposed clause on participating in a joint criminal venture?

Dr Dyson: I am well disposed toward the three-tier proposal of murder, second degree murder and manslaughter. I was content with the idea of the Serious Crime Act facilitation model. I am not in favour of joint enterprise—joint criminal venture. I do not think there is really such a thing as the Chan Wing-Siu principle, or that at least foresight should be sufficient for a second offence. As such, I do not see sufficient culpability for any liability based on a joint criminal venture. It should just be removed. So, no, I am not in favour of that part of the Law Commission's proposal.

Q62 Chair: Are you saying that the Chan Wing-Siu principle does not exist?

Dr Dyson: Calling it a principle seems to somewhat overinflate what it is. It is a shortcut.

Q63 Chair: Do you mean by that that courts, in practice, take little notice of whatever principle it appeared to establish about foresight, or that it is simply too weak to be of any significance?

Dr Dyson: It is the latter. To me, a principle must have some normative force; it must have some internal logic. This simply says that, if you are in some way involved in a first crime, we can convict you easily of the second.

The logics that we have attempted to come up with to justify that—one or two intelligent academics have attempted it; most have not—are either the escalation thesis or the normative change of position. With escalation, by taking part in one crime you make other crimes more likely; therefore, essentially as a form of strict liability, it should be easier to convict you of second ones. I do not particularly like strict liability, and I certainly do not see why it should be justified here potentially for murder, for instance. Normative change of position, which Andrew Simester argued for in 2006, essentially says, “You have changed your moral position by agreeing to one crime; therefore, it should be easier to convict you of later crimes.” I do not personally agree with that as a logic; it is not exact. He calls it a gateway sometimes. We removed that when we got rid of felony murder, and we do not agree with it anywhere else. I am not sure why we should agree with it in secondary liability.

Perhaps it was a little flippant, but I do not think of this as a principle. It is a shortcut to enable us to convict, originally more easily and now just easily, those people who we claim are parties to joint enterprises.

Q64 Chair: Do you have any evidence on the use of the defence of fundamental difference?

Dr Dyson: Yes. There are a few things that fundamental difference is trying to do. Essentially, it is a safety valve. We feel instinctively that the law is treating a particular defendant very harshly, so we have created a safety valve. The first reason is that murder is constructive anyway. Under *R v. Cunningham* 1982, you only need to show an attempt to cause GBH and not death. That is a little odd, but the Law Commission proposed the change. That is quite harsh. The second thing is that GBH is a broad category. Breaking a medium-sized bone can be GBH right up to putting somebody in hospital for 10 months in a coma. There is a large range of what might be involved.

The third thing is that you have only foreseen a risk of something happening, which we feel is a pretty low level of fault. The fourth thing is foresight of what somebody else will do—being an independent moral agent. The fifth thing is that it reflects the fact that you are not contributing to the second crime at all.

Defendants are keen to find some way to exploit this. We created this fundamental difference test in *Powell and Daniels* and *Powell and English* in 1998 and 1999. I personally think that it should be “fundamentally more dangerous,” but we call it fundamental difference because almost always the evidence relates to a weapon, and it is a different weapon. The defendant wants to have use of this, and, as I said, there have been more than 15 Court of Appeal cases over the past 15 years. The law does not change dramatically, though arguably it did a little in *Rahman*, but defendants are constantly pushing at the borders of it because it provides a full defence.

For some unknown reason, the House of Lords decided in 1999 that it would not convict you of a lesser offence when you have fundamental difference, which previously we had done. I pointed that out in an article in 2007, and Lord Justice Toulson, as he then was,

specifically said in *Mendez and Thompson* in 2010 that it seemed odd the House of Lords did not do that, but it seems that it has now expressly said you should not. At least fundamental difference should only step you down, for instance, from murder to manslaughter, because you foresaw GBH being caused by just a different weapon, so why should you not be liable for manslaughter?

From what I understand, it is used quite often. It is attempted as often as possible, because it provides a full defence and because it does not contaminate any other defences that you might be running. It is hard to run self-defence and loss of self-control at the same time. It is not hard to add this to any other defences that you are running.

Chair: Thank you very much. We are grateful to both of you for your evidence this morning.