Thank you for your letter of 20 July 2017 inviting the Justice Committee to comment on the CPS’s proposed legal guidance on secondary liability offences. We are grateful to you for drawing this consultation to our attention, and for giving us the opportunity to offer our views after the end of the public consultation period.

We recognize the challenges faced by the CPS in amending its earlier guidance on joint enterprise charging decisions following the 2016 decision of the Supreme Court in R v Jogee – given in particular the complexity of this area of criminal law. Having given careful consideration to the proposed guidance, we have decided to confine our response to two points, relating to mens rea and to the public interest test.

1. Mens rea

Although we do not offer a comprehensive view on whether the proposed guidance accurately summarises the Jogee decision, we wish to comment on the third bullet point in the section headed Mens rea. This seeks to summarise Paragraphs 10 and 90 of Jogee, explaining that it is sufficient for D2 to have an intention to assist D1 to act with the requisite intent – that is, D2 does not have to intend for the criminal consequences (such as really serious harm) to occur. We believe that the accuracy and clarity of this difficult point would be assisted by summarizing the examples given in Paragraph 90 of Jogee, which concludes as follows:

“That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do. Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime [...] but having no further interest in what he does, or indeed whether he uses it at all.”

2. The public interest test

The proposed guidance includes a section on the need to consider whether a prosecution would be in the public interest; this cross refers to the questions listed in
paragraph 4.12 of the Code for Crown Prosecutors and highlights points that “may be of particular relevance in cases of secondary liability”. We do not disagree with the importance of prosecutors considering these listed factors (ie, the suspect's level of involvement, the extent to which the offending was pre-meditated, the suspect's age and maturity and any significant physical or mental health issues they may have). However, there is a notable omission of any reference to the Code's requirement that prosecutors consider whether prosecution is a proportionate response. You will no doubt be aware of the concerns raised by the Lammy review about the disproportionate impact of joint enterprise prosecutions on BAME communities, in particular those who are associated with gangs, and the recommendation by that review that, in reworking this guidance, the CPS take the opportunity of considering its approach to gang prosecutions.

Once again, thank you for inviting us to respond to this consultation. I hope that these comments are helpful.

Bob Neill MP
Chair
Justice Committee