Dear Mr Neill,

RE: CPS CONSULTATION ON LEGAL GUIDANCE ON SECONDARY LIABILITY

Thank you for your letter of 26 October 2017, on behalf of the Justice Committee.

Your feedback on the draft Secondary Liability legal guidance will be considered more fully, along with all other consultation responses, when we draft the final guidance.

However, I thought it may be useful to provide brief observations in respect of the two points that you make in your response.

1. Mens Rea
You request that we summarise the examples given in paragraph 90 of Jogee, to clarify the point made in the third bullet point of the sub-section titled “mens rea”, which deal with paragraphs 10 and 90 of Jogee. We agree that it may be helpful to do so and we shall consider doing this in the final draft. We have however received other responses that comment in some detail on these paragraphs of the Jogee decision. We shall also consider these responses before deciding on whether to include the examples.

2. The public interest test
Your second point concerns the Lammy Review Recommendation 6, that the CPS consider its approach to gang prosecutions in general, while it reworks its guidance on joint enterprise. You suggest we address this Recommendation by reference in the
guidance to the requirement in the public interest section of the Code for Crown Prosecutors to consider whether prosecution is a proportionate response. Our initial view is that since the factors listed under proportionality in the Code relate to cost and case management, reference to this part of the Code would not be the most appropriate way to address the Recommendation.

The draft guidance however contains two sections that address the approach to charging in cases of group / gang assaults, and a further section on “Participation”, which clarifies that mere association with or membership of a group or gang, without any other evidence, will not be sufficient to charge an accomplice with an offence. This section also provides guidance on the proper use of association evidence, which may form part of the overall evidence in a case.

We consider that these sections go some way to meeting the Lammy Recommendation. However, we shall revisit these sections in light of the Recommendation and your concerns, to ensure that they do not in any way contribute to the perceived disproportionate impact of joint enterprise prosecutions on BAME communities. We shall also consider whether there is any other way in which the guidance could address the Recommendation.

Additionally, we are reviewing and revising our other internal legal and policy resources on gangs for prosecutors, in line with the Lammy Recommendation.

We intend to publish a Summary of the consultation responses and a revised, final version of the guidance in early 2018.

Once again, thank you for your helpful comments in response to the consultation.

Yours sincerely,

ALISON SAUNDERS
DIRECTOR OF PUBLIC PROSECUTIONS