Joint Enterprise Charging Decisions: Consultation Summary of Responses

December 2012

Contents

Introduction

This is a summary of the responses to: draft Joint Enterprise Charging Decision guidance document.

It sets out:

- the background to the targeted consultation;
- a summary of the responses;
- a summary of the responses to the specific questions; and
- our conclusions.

Copies are also available on the CPS website: www.cps.gov.uk

Joint Enterprise Charging Decisions
Consultation on Draft Guidance
Summary of Responses

Background

On 17 January 2012 the House of Commons Justice Committee published its Report on Joint Enterprise.

The report recommended that the Director of Public Prosecutions (DPP) issue guidance on the use of the doctrine of joint enterprise when charging. In particular, it stated that it would welcome guidance on the relationship between association and complicity which, it observed, is of vital importance in gang-related violence and homicides.

In response, the DPP undertook to produce guidance on the approach the CPS will take to cases of joint enterprise, and to consult with interested parties on the draft guidance. The primary purpose of the guidance that has been produced is to assist prosecutors in making charging decisions in cases where the doctrine of joint enterprise may apply.

A targeted consultation with interested parties was launched on 11 September 2012. As the law of joint enterprise and its practical application is a complex area, we targeted the consultation at those already familiar with joint enterprise, such as lawyers, academics and campaigners.

The consultation period closed on 19 October 2012. Any responses received after this date were also given full consideration. A list of respondents can be found at Annex A.

All replies have been considered in drafting this summary of responses, although the summary does not attempt to address each and every point made by the respondents.

In light of the responses received, we have revised the guidance and the final version will be published with this summary.

We have not made changes to the guidance to reflect all of the responses we received. Some comments were based on a misunderstanding about the purpose of the guidance, which is to assist prosecutors to make charging decisions. For instance, a number of respondents observed that the guidance should raise the evidential threshold for charging secondary parties with a criminal offence (this is addressed in more detail below). However, setting the evidential threshold for charging secondary parties is not a question for the CPS but for Parliament or the courts.

Overall summary of responses

We received a total of 16 responses to the consultation. They were as follows:

Table 1: Table of respondent type

Category of Respondent	Number
Academics	2
Campaign Groups	5
Legal profession	2
Parliament	1
Public Sector	6
Total	16

Each individual response has been reviewed carefully by CPS Strategy and Policy Directorate. Not all respondents addressed the specific sections of the guidance, but we have endeavoured to reflect their views in the above tables and the detailed analysis of the responses that follow.

Unless otherwise stated, references to paragraph numbers in the guidance refer to the revised final version.

Themes that emerged from the responses

In addition to comments on the content of individual sections of the guidance, we received a number of comments on other matters. Some of these were outside the scope of the guidance and not relevant to this summary. We summarise the main themes to emerge from these comments below.

Guidance welcomed / not welcomed
Four respondents welcomed the guidance being issued, and one did not. The respondent who did not welcome guidance being issued commented that the Code for Crown Prosecutors should be sufficient to guide prosecutors on how to apply the law when making charging decisions.

Guidance does not address the concerns of the Justice Committee

The Justice Committee expressed concerns that:

- Prosecutions under the law of joint enterprise risk fostering gang mentality or drawing people into the criminal justice system inappropriately; and
- Overcharging under joint enterprise risks deterring potential witnesses to an offence, impeding the justice process and failing to assist the task of trying to deter young people from becoming involved in gangs.

Six respondents indicated that they did not think the guidance addressed the Committee's concerns. Respondents suggested for instance that the guidance will not prevent miscarriages of justice, and that the problem is not just overcharging but the conviction of innocent persons.

The responses broadly suggested that the concerns should be met by:

- The DPP introducing through policy a higher charging threshold than that permitted by existing law (this includes the degree of participation required by a secondary party and the threshold at which association potentially becomes evidence of involvement in crime); and / or
- By applying the public interest stage of the Full Code Test in a way which would limit the number of persons charged under the joint enterprise doctrine, in particular those who only play a minimal role in an offence.

However, two responses did not support this view. One commented that guidance should not pre-empt prosecutor's decision making; the other observed that it is not workable to try and restrict potential charging decisions on a policy basis by reference to a threshold.

These points are addressed separately below but because of the apparent misunderstanding about the purpose of the guidance it is appropriate to address the issue more fully here.

<u>Evidential threshold</u>

It is not the purpose of the guidance to fetter a prosecutor's discretion or restrict potential charging decisions on a policy basis. The aim of the guidance is that it accurately summarises and clarifies the law on joint enterprise, including the evidence required for the liability of secondary parties.

The Justice Committee's report recommended that the common law doctrine of joint enterprise should be enshrined in legislation. If the evidential threshold for charging a secondary party on the basis of joint enterprise is to be raised, the appropriate vehicle would be through legislation, or development of the common law by the courts.

We are not aware of the CPS overcharging in cases of joint enterprise. However, we recognise that there is a perception that some suspects are overcharged in such cases, but this seems to be linked to the concern that the evidential threshold is too low.

The Justice Committee specifically requested that the DPP issue guidance on the proper threshold at which association potentially becomes evidence of

involvement in crime. The guidance clarifies that a person's association with a principal offender or a gang cannot, on its own, amount to complicity in a joint enterprise. There is therefore no threshold, as such, at which association potentially becomes evidence of criminality.

Public interest

A number of responses commented on paragraph 62 bullet 5, which states that where the suspect's role is minor or peripheral but the offence is serious, prosecutors should consider whether a less serious charge than that charged against the principal is more appropriate. (This is demonstrated by way of examples in the subsequent sections on "charging group assaults" and "charging murder or manslaughter in group assaults without a weapon".) However, where no appropriate lesser charge is available, the public interest will usually require a prosecution, as only in exceptional cases would it be appropriate not to charge a suspect who has participated in the commission of a serious offence.

Some respondents suggested that in such circumstances prosecutions are not in the public interest, or would only be so exceptionally. As a matter of policy, the CPS would not wish to restrict potential charging decisions in advance, so that those responsible for a serious offence face no charge at all. However, in light of the responses, we have reconsidered the wording of this paragraph, and we have amended the final sentence as follows:

> *In the vast majority of cases there is likely to be an appropriate lesser charge available. However, in the unlikely event that no lesser charge is available, prosecutors must weigh carefully the merits of proceeding with a charge for the serious offence, or not proceeding at all. The decision as to where the public interest lies will depend on the facts of each case.*

Having considered carefully all of the responses on these issues, we remain of the view that we should not seek through policy to raise the charging threshold in cases of joint enterprise. However, as indicated below, we have revised some of the relevant sections in the final version of the guidance, so as to further clarify the law and its application in this area, and to meet some of the concerns that have been expressed.

Guidance should not be seen as a substitute for law change

Closely related to the issue of the charging threshold is that of change in the law. Four respondents acknowledged that guidance should not be seen as a substitute for change in the law. Comments included:

- An unintended consequence may be the perception that the DPP is creating "soft law", as the media and public are likely to see the guidance as authoritative.
- It may decrease the likelihood of statutory reform, as the Government may be encouraged to think that legislation is unnecessary, as guidance has filled the gap.

- Reform of this area of law can only sensibly be achieved by the legislature. This includes a greater degree of discretionary sentencing and the abolition of the mandatory life sentence for murder.
- The fault element of a secondary party can only be addressed through legislation or the development of case law.
- The DPP cannot be expected to use the guidelines to reform the law by the back door.

We have addressed this concern by clarifying in the second paragraph that the guidance does not have the force of law.

The Guidance is written primarily for lawyers, and is not accessible to the public

Five respondents indicated that the guidance should be made more accessible to the public, or more easily understood. Moreover, various respondents made specific suggestions to clarify the wording or meaning of the text, including through its presentation.

As a result, we have:

- Increased the number of examples in the guidance to demonstrate the principles in a more user friendly manner.
- Written out some abbreviations in full.
- Updated the legal language. For instance, “assists or encourages” is substituted for “aids, abets, counsels or procures”; and “really serious bodily harm” is substituted for “GBH”.
- Amended the explanation and example given of “parasitic liability” at paragraph 10(3).
- Accepted numerous suggestions for amendments to particular wording.
- Revised the layout of the guidance.

One respondent said that from the point of view of young persons who need to know what legal risks they face, the guidance is worse than useless, as it is virtually incomprehensible to anyone lacking legal training or expertise. We take the view that because the law of joint enterprise is complex and it applies to almost any offence, it is not possible to provide a comprehensive guide to all legal risks. It is guidance to assist prosecutors taking decisions.

The same respondent commented that legal concepts such as "encouragement", "foresight", and "fundamentally different act" should be explained more fully, rather than referring to textbooks, which may be inaccessible to some readers. We have not attempted to define all legal terms referred to, as this would make the guidance overly technical and complicated. The guidance is a practical guide for prosecutors making charging decisions. As such, it strikes a balance between a legal textbook and a guide for the lay person.

Further consultation

A further consultation was requested by two respondents, one of whom was concerned that there is an opportunity to comment after publication of the new version of the Code for Crown Prosecutors.

We do not intend to hold a further consultation but we have revised the section on the public interest in line with the draft revised version of the Code (see below).

Other themes

The following matters were raised by one or more respondents but we do not intend to revise the guidance in light of the comments:

- The guidance focuses on the law rather than the principles to be applied when making charging decisions.

  More than half of the guidance is on the application of the law when making charging decisions.

- The guidance offers no explanation why in practice the use of joint enterprise is restricted to particular offences, which implies a class, race and political bias.

  We are not aware of any evidence to support this contention, and there is no restriction placed on prosecutors in their use of joint enterprise when making charging decisions.

- A high profile joint enterprise case should not be prosecuted without significant evidence simply because it is high profile.

  There is no link between a high profile case and the decision whether to charge a suspect.

- The use of the word “gang” should not be used at trial unless there is solid proof of a gang; it should not be applied to a group of friends.

  “Gang” is a word in common usage, and there is no legal requirement that the prosecution prove the existence of a gang before using the term in trials.

- The guidance lacks historical context, which is required to show how developments in the law have not been matched by any change in evidential requirements.

  The guidance is not intended to be an academic or historical study of joint enterprise law. We do not think historical context is required to assist prosecutors to make practical charging decisions.

- Various concerns about: police investigations; media coverage; self defence; and types of evidence used in joint enterprise cases, such as potentially unreliable witnesses, phone calls, cell site analysis, CCTV footage and shared car use.

  These concerns may apply more broadly, not simply to cases involving joint enterprise, and are outside the scope of the guidance.

- The response from the campaign group Joint Enterprise Not Guilty by Association (JENGbA) included a number of letters from persons convicted of offences on the basis of joint enterprise, or from members of their families. Many of these raised concerns related to the facts of the convictions.

  It would not be appropriate to address these concerns in this summary.

Summary of responses to specific sections of the guidance

The consultation did not seek responses to each individual section of the guidance. Some respondents addressed particular sections, while others made more general comments. Where general comments were made, if they appeared to relate to a specific section of the guidance, we have attempted to include them in this part of the summary.

Suggestions to improve the wording and meaning of the text are not included in this summary, although we have accepted many of them.

1. ***Introduction***
There were two responses to this section. One respondent suggested that we should insert a general disclaimer that the guidance is the CPS' understanding of the law following consultation, but does not have any authoritative status in terms of the law on secondary liability. As stated above, we have done this.

Another respondent commented that the guidance should contain an opening statement that prosecutors should acknowledge the dangers of unfair convictions, approach joint enterprise with great caution, and clarify that simple association with a crime alone cannot be regarded as sufficient to prosecute under joint enterprise principles. We do not agree that such a warning is required, and we have addressed association later in the document.

2. ***Concerns***
There were no responses on this point.

3. ***The doctrine of joint enterprise***
There were five responses. Three responses requested that further explanation be given about spontaneous joint enterprises, including the care to be taken when assessing these cases. We have added an example of spontaneous joint enterprise to this section (paragraph 9), and included further guidance in other sections, at paragraphs 27, 34, 41, 43 and 55.

One respondent said we should clarify that joint enterprise is simply an aspect of secondary liability; and another response suggested that the guidance should refer to the fact that joint enterprise can include those involved sharing a common purpose. The guidance has been amended accordingly, at paragraph four.

4. ***Three types of joint enterprise***
There were six responses: one in relation to type 1; four in relation to type 2; and two in relation to type 3.

Type 1: we have amended the guidance to indicate that little or no controversy arises in these cases.

Type 2: Two responses asked for further explanation of the point that D can be convicted even where P is not convicted, or cannot be prosecuted. We have added an explanation about the use of innocent agents. One respondent suggested elaborating on D's fault element as per DPP for Northern Ireland v Maxwell [1978] 1 W.L.R. 1350 HL. This case is addressed at paragraph 85, so we have not referred to it here.

Type 3: One respondent pointed out that the example of parasitic liability is not as clear as it could be. We have therefore changed the example. Another respondent advised that special consideration needs to be given to under 18s and vulnerable adults in relation to proof of foresight, particularly those suffering from attention deficit hyperactivity disorder. We have revised the public interest section at paragraphs 55-56, to alert prosecutors to the considerations that are applicable to young and mentally disordered offenders.

5. ***Transferred malice***
There were three responses. At the suggestion of one respondent, we have removed the reference to the requirement of "foreseeable risk" of death or injury to the innocent bystander from the test in R v Gnango [2011] UKSC 59.

One respondent asked that special consideration should be given to under 18s and vulnerable adults with regard to the fault element required in certain circumstances. As stated above, we have now addressed young and mentally disordered offenders in the public interest section.

The same respondent said that we should specify whether it is in the public interest to prosecute a person for the murder of his brother by a member of an opposing group. Since each case needs to be decided on its own facts, we would not wish to interfere with prosecutorial discretion in this way.

Another respondent asked us to clarify that transferred malice will not apply where P selects a different V from that foreseen by D. We have done this at paragraph 15.

6. ***Qualifications on the scope of joint enterprise***
There were no responses on this point.

7. ***Fundamentally different act***
There were five responses. We have revised paragraphs 20-21, and included an example, as a result of the following suggestions: include the rule in R v Powell; R v English [1999] 1 A.C. 1, HL, that where P's act is fundamentally different from what D anticipated, D can be guilty neither of murder nor manslaughter; clarify that D cannot be liable where P's act is so removed from what D foresaw, and refer to the "altogether more life threatening test" used in R v Mendez and Thompson [2010] EWCA Crim 516; clarify the practical issue faced by prosecutors in cases where P produces a knife; clarify that fundamentally different act will not apply where the common purpose is achieved, but in a different manner to that contemplated by D.

One respondent said that after the "question of fact" test in R v Yemoh [2009] EWCA Crim 930, we should add that it may depend on whether it is pre-planned or spontaneous. We do not think this is necessary, as we have made a number of additional references to spontaneous joint enterprises throughout the document: see above.

8. ***Withdrawal***
There were two responses. One suggested that the paragraph that says D must make a timely communication of intention to withdraw should be replaced with the more nuanced guidance in R v Stringer [2011] EWCA Crim 1396. The other suggested that we caution that careful consideration is required in cases of spontaneous joint enterprise. We have inserted an extract from R v Stringer to meet both these points.

9. ***Prosecuting offences on the basis of joint enterprise***
There were no responses on this point.

10. ***The evidential stage applied to joint enterprise cases***
There were five responses. One commented that the evidential checklist is excellent, although two responses suggested amendments to the list. We have agreed to some amendments, which are at paragraph 33.

One respondent suggested that the guidance should indicate that particular care should be taken where: suspects are youths or suffer from mental disorder; applying the fault element, given that liability can be founded on foresight; the suspect has only minimal involvement; in homicide cases where liability arises from low-level or spontaneous violence; and prosecuting on the basis of encouragement alone.

We are not persuaded that we need to highlight all these factors. However, we have added a note of caution about the approach to cases involving youths and mentally disordered suspects, and to spontaneous joint enterprise cases, which was also requested by another respondent in relation to the section on "the doctrine of joint enterprise".

One respondent argued that because of the low evidential standard for secondary parties, prosecutors should assess whether there is sufficient evidence to provide a realistic prospect of a safe conviction, or the probability of convicting innocent defendants. We do not propose to introduce a modified or bespoke version of the evidential stage of the Full Code Test for joint enterprise cases.

11. ***Participation***

There were eight responses. This section, in particular paragraph 33, attracted a number of comments. For instance, one respondent said that it is "inadequate and badly drafted"; and others indicated that the meaning was unclear.

In light of the responses, paragraph 33 has been removed and this section has been revised. In particular, it now clarifies:

- What needs to be proved in relation to D's participation;
- Liability does not depend on D being present;
- Mere accidental presence at the scene of an offence is not sufficient to satisfy the evidential stage;
- There is no definitive legal formula for whether D's conduct amounts to assistance or encouragement, because the facts of different cases are infinitely variable.

One respondent commented that if the CPS is saying that in order to satisfy the evidential stage, evidence of participation need only be minimal and can include mere presence and association, then the evidential threshold is too low. As stated above, we have not as a matter of policy raised the evidential threshold for assessing whether a secondary party has participated in an offence.

12. ***Presence at the scene of an offence as evidence of participation***

There were four responses. Two of the respondents asked for examples to clarify when culpability may be based on presence. We have now provided two examples, at paragraph 42.

Two respondents said the section should clarify that D's presence must amount to assistance or encouragement and an intention to assist / encourage. One response suggested that an additional factor to consider when deciding whether D assisted or encouraged P was whether it was a spontaneous joint enterprise. We have revised the guidance accordingly, at paragraphs 41 and 43.

One respondent said that the references to case law in legal textbooks are not helpful, as the authorities cannot easily be applied to multi-handed murder cases. We have retained the references, as the principles do apply to all joint enterprise cases.

One respondent commented that the guidance should limit the scope for charging on the basis of presence at the scene. As stated above, we do not intend to limit a prosecutor's scope for charging decisions on a policy basis. However, we have added a new paragraph (44) to caution that where evidence of D's assistance or encouragement is based solely or primarily on D's voluntary and purposeful presence at the scene of the offence, prosecutors should consider carefully whether a prosecution is required in the public interest.

13. ***Association with P or a group or gang as evidence of participation***

There were six responses. Two respondents thought that the guidance failed to meet the recommendation of the Justice Committee, namely to clarify the relationship between association and complicity, in particular the threshold when association becomes evidence of involvement in crime. One respondent said that association evidence should not be used in order to charge suspects. As stated above, the guidance clarifies that a person's association with a principal offender or a gang cannot, on its own, amount to complicity in a joint enterprise. There is therefore no threshold, as such, at which association potentially becomes evidence of criminality.

Three respondents made points relating to the proper weight to be given to association evidence: that association evidence must give rise to the inference that D assisted/encouraged P; that association evidence is only circumstantial; and that association is taken to imply knowledge of another's propensity to violent behaviour, and it is impossible for defendants to disprove foresight in such circumstances. In light of these observations, we have added paragraph 49, to caution that where association evidence is relied on, the circumstances of the association of D with P, together with the other evidence in the case, must give rise to the inference that D was assisting or encouraging P's offence.

One respondent observed that the problem is not that persons accidentally at the scene may be prosecuted, but that those voluntarily at the scene for innocent reasons may be prosecuted. We have addressed this issue by way of additional text at paragraphs 41and 48i.

The same respondent expressed concern that prosecutors should consider the factors of youth and mental disorder when considering association and participation. As stated above, the section on the public interest has been amended to include these factors.

Two respondents thought that we should define what we mean by terms such as "communication", "awareness" and "involvement", in paragraph 48i. We have not done this because the example is intended to apply to a broad range of situations and each case will depend on its own facts and context.

14. ***The public interest stage applied to joint enterprise cases***

There were five responses. Two respondents raised concerns about young and vulnerable suspects, including the duty of prosecutors to consider the “best interests” of a suspect who committed the offence in question as a child. One response said it is important to have regard to the interests of Vs.

In light of these responses, the section has been amended in line with the draft revised Code for Crown Prosecutors, at paragraphs 52-56. This includes a reference to other CPS guidance, on youth offenders and mentally disordered offenders.

Another respondent was concerned with the wider but related issue of the draft revision of the Code for Crown Prosecutors, and its failure to state that a prosecutor should take into account the following, when assessing the seriousness of an offence: the level of injury suffered by V; recurring offending; escalation in D’s behaviour; repeat victimisation; and serious financial loss to V. We do think it necessary to highlight these factors in the public interest section of the guidance.

A further response suggested that because of the low evidential standard in joint enterprise cases, the public interest stage should require an additional assessment of whether D could have a fair trial. We do not propose to introduce a different version of the public interest stage of the Full code Test for cases involving secondary parties.

15. ***Selecting charges: principal, secondary and inchoate liability***

There were eight responses on this point.

As stated above, there were a number of comments on now paragraph 62 bullet 5, which deals with cases where D plays a minor role in a serious offence. Four respondents disapproved of the final sentence of this bullet, which states that where no appropriate lesser charge is available, the public interest will usually require a prosecution, as only in exceptional cases would it be appropriate not to charge a suspect who has participated in the commission of a serious offence. The comments included:

- It would not be in the public interest to prosecute D for murder where his role is minor and the charge, and the mandatory life sentence, is disproportionate to D's culpability.
- A less serious charge, such as a public order offence, is likely to be appropriate.
- There is no guidance on the specific public interest considerations that apply where there is minimal involvement.
- The final sentence is highly contentious and should be deleted or the presumption reversed, so that only in exceptional cases would D would be charged with a serious offence if no lesser charge is available.
- There should be a presumption that it is not in the public interest to charge any offence, where D's role is minor, the offence is serious (eg murder), as there will be no lesser charge available.

However, one respondent agreed with the guidance, observing that any further narrowing of the prosecutor's charging discretion would be inappropriate and risk injustice.

Another respondent pointed out that the fact that an offence carries a mandatory minimum sentence would normally be a public interest factor in favour of selecting it rather than rejecting it: R v Brereton [2012) EWCA Crim 85 (firearms case); and queried whether the CPS should depart from this principle when charging secondary parties.

Having considered all the responses, we still consider that the guidance at paragraph 62 bullet 5 sets out the correct approach to making charging decisions. However, as stated above, we have sought to clarify the decision making process by replacing the final sentence with the following:

> *In the vast majority of cases there is likely to be an appropriate lesser charge available. However, in the unlikely event that no lesser charge is available, prosecutors must weigh carefully the merits of proceeding with a charge for the serious offence, or not proceeding at all. The decision as to where the public interest lies will depend on the facts of each case.*

Other comments on this section were:

Three respondents said that prosecutors and police should not charge a more serious offence than is justified in order to plea bargain, obtain information or persuade D to provide evidence against a co-defendant. We have amended the guidance at paragraph 60, to reflect the Code.

One respondent cautioned that the principle of presenting the case in a clear and simple way should not prevent alternative charges being presented. We have not amended the guidance, as it already makes clear that alternative charges should be considered where appropriate.

The guidance omits to say that charges should be dropped if the police investigation proves a person must be innocent. Since all prosecutors would

be aware of this, we do not consider this necessary, although paragraphs 59 and 63 address changes in circumstances post charge.

Paragraph 62 bullet 2 (where D could be charged as an accomplice or with a Serious Crime Act 2007 offence): there should be a presumption that there is an accomplice charge. We have reconsidered this point in light not only of this comment but also a similar one in respect of the section on “charging common law offences or Serious Crime Act 2007 offences”: see below. As a result, we have amended both this bullet and that section - at paragraph 83 - to indicate that D should be charged as a secondary participant, unless it is not possible to charge a substantive offence.

Paragraph 62 bullet 4: there should be a presumption that it is not in the public interest to charge where D's role is minor and the offence is not serious. We do not consider such an assumption would be appropriate, as it may fetter prosecutorial discretion.

16. ***Charging group assaults***

There were three responses. One respondent agreed with the examples of the range of offences, and commented that the section will be helpful to those making charging decisions.

One response suggested that advising prosecutors not to overly complicate a case when selecting charges could lead to charging everyone with murder in order not to complicate things for the jury. We disagree, as the section clearly advises prosecutors to seek to select charges that differentiate the roles of suspects.

Another response said that, where it is not possible to identify who the killer is, permitting alleged participants to be charged as joint principals would seem to imply that evidence of the standard required to prosecute and convict a defendant acting on her or his own would be needed to convict each of the participants. We have not revised the guidance, as it already indicates that s8 of the Accessories and Abettors Act 1861 allows accomplices to be charged as principals. Therefore evidence that D encouraged or assisted P would be sufficient in such cases.

17. ***Charging murder or manslaughter in group assaults without a weapon***

There was one response, which said that this was a helpful section, and useful approach to the task of evidence assessment, but also suggested that we could indicate what directions would be given to a jury. We have not done this, as we have already set out the approach the prosecutor should take to charging, which is a similar to directions to a jury.

18. ***Charging offences of encouraging or assisting: Serious Crime Act 2007***
There were no responses on this point.

19. ***Charging common law offences or Serious Crime Act 2007 offences***
There were two responses. One suggested that a SCA offence should only be charged when it is not possible to charge a substantive offence. This response is supported by the similar response in respect of paragraph 62 bullet 2 in the "selecting charges" section: see above.

As stated above, we have re-considered this point and agreed to amend the guidance as suggested. There are several reasons why the common law or accomplice offence may be more appropriate than a SCA offence:

• The three bullets at paragraph 85, which address various practical scenarios, demonstrate that in practice a substantive offence will be preferable.
• SCA offences are inchoate offences (replacing incitement), so arguably should not usually be used for substantive offences.
• If other defendants are charged in the same trial with substantive offences, it will usually be preferable to charge all defendants with substantive offences on a joint enterprise basis, so that the directions to the jury are not overly complex.

However, paragraph 86 is retained, which indicates where it may be more appropriate to charge a SCA offence.

The other response welcomed guidance on the interrelationship between the SCA offences and common law secondary liability, adding that the guidance addresses all the critical distinctions.

20. ***Charging an offence under s46 Serious Crime Act 2007***
There were no responses on this point.

21. ***Charging conspiracy***
There was one response. It noted the absence of a reference to the availability of conspiracy as an appropriate charge, and suggested we remind prosecutors of this option. Accordingly, we have added a short section on charging conspiracy.

Conclusion

The CPS is grateful to all those who responded to the consultation and the time that they have taken in doing so.

We have carefully considered all the responses received, and have taken them into account when considering whether to revise the draft guidance. The changes are now reflected in the final version of the guidance.

Annex A

Response to consultation

Academics

1. Professor Jeremy Horder (former Law Commissioner)
2. Emeritus Professor Lee Bridges

Campaign Groups

3. Joint Enterprise Not Guilty by Association (JENGbA), including letters from individual JENGbA campaigners
4. Edward Dawson, in support of JENGbA
5. The Howard League for Penal Reform & Irvine Thanvi Natas Solicitors
6. Homicide Review Advisory Group (HomRAG)
7. Dr Andrew Green, Secretary of Innocent

Legal Profession

8. Lord Justice Toulson
9. Criminal Bar Association

Parliament

10. Jeremy Corbyn MP

Public Sector

11. Attorney General's Office
12. Association of Chief Police Officers (ACPO)
13. CPS West Midlands CPS
14. South West Complex Casework Unit
15. Barry Hughes – Chief Crown Prosecutor
16. Paul Whittaker – Chief Crown Prosecutor