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28 September 2017

**LCCSA Response to CPS Consultation: Legal Guidance on
Secondary Liability**

The London Criminal Courts Solicitors' Association (LCCSA) represents the interests of specialist criminal lawyers in the London area. Founded in 1948, it now has almost 750 members including lawyers in private practice, Crown prosecutors, freelance advocates and many honorary members who are circuit and district judges.

The objectives of the LCCSA are to encourage and maintain the highest standards of advocacy and practice in the criminal courts in and around London, to participate in discussions on developments in the criminal process, to represent and further the interest of the members on any matters which may affect solicitors who practice in the criminal courts and to improve, develop and maintain the education and knowledge of those actively concerned with the criminal courts including those who are in the course of their training.

This response to the consultation on Legal Guidance on Secondary Liability has been prepared by 2 members of the LCCSA. If you have any queries about it, or would like to engage in follow-up discussion, please contact:

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Consultation on CPS Legal Guidance of Secondary Liability

We welcome the opportunity to offer comment on the CPS Legal Guidance on Secondary Liability (Interim Guidance) [*The Guidance*] following the decision of the Supreme Court in *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; UKPC 7 [*Jogee decision*].

We consider that the Guidance is going in the right direction but further work is needed to fully take into account the *Jogee* decision.

The structure as presented which breaks down the Guidance into sections is helpful. Where we have specific comments we have addressed each of these sections in turn.

Agreement

Further clarification is needed – the Guidance should emphasise that there may be acts of assistance albeit not amounting to agreement.

On the section on *Conditional intent cases* we do not consider the law is clearly presented. The tone of the approach taken is one that was taken *pre-Jogee* with a “myopic” focus on foresight. The *Jogee* decision repeatedly emphasises that an inference is best arrived at by taking into account *all* the facts and circumstances as opposed to *a* fact or circumstance.

Foreseeability as evidence of conditional intent

We consider that this is the one of the key areas where the Guidance does not fully take into account the *Jogee* decision.

The Guidance does not go far enough in clarifying that foresight is just one factor to be taken into account when looking for evidence of intent. The Guidance should set out that foresight is just one factor indicating intention to assist and cannot be taken alone. It should confirm that all the facts and circumstances of the case should be properly considered in order to establish “assent and intentional support”. [94]

The Guidance infers that foresight alone does not evidence intent but it does not properly assist CPS lawyers to draw the distinction accurately. For instance the guidance could provide examples of other fact and circumstances that might evidence or disconfirm foreseeability and or conditional intent.

Recording the basis for the charging decision

We welcome the move to record the basis of the charging decision. We would expect that this record charting the decision (or the content of the decision) will be made available to the defence.

Presence at the scene

We have concerns as to the examples used here. Inaction is not a crime. There is no clear legal basis here for prosecution.

Examples of association

In light of the Lammy Review of Black, Asian and Minority Ethnic (BAME) representation in the Criminal Justice System, we have concerns as to this section and how it is presented/drafted. The examples here seem to target the communities/young BAME in a way that could lead to a disproportionate decision.

Please see further comments below in respect of matters arising from the Lammy Review.

Statutory Offences

It is now well established that good practice demands the use of a specific statutory provision where one is available. The foundation was expressed by Binham LJ in *R v Rimmington and Goldstein* (2005) UKHL 63:

I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.

More recently, in *R v Dady (Marc)* [2013] EWHC 475 (QB) Coulson J (as he was then) considered that:

...the court must look, first, at whether there is a relevant statutory offence and, if so, how and why the Crown has chosen not to prefer conspiracy charges by reference to that offence, and whether it is proper in all the circumstances to allow the common law allegation of conspiracy to defraud to be maintained.

It is respectfully submitted that the position is no different when deciding whether to prefer a charge using the principles of secondary liability or under the statutory provisions of the *Accessories and Abettors Act 1861*, the *Criminal Law Act 1977*, or the *Serious Crime Act 2015*.

Accordingly, we would recommend that the statutory provisions are listed at the beginning of the CPS guidance as they will require consideration before a decision is taken to prefer charges under the Common Law.

Lammy Review

The Lammy Review was published in September 2017 includes specific recommendations that may assist the guidance and will no doubt be taken into account in the final guidance. It is anticipated that implementation of Recommendation 6, will have a significant effect on the content of the proposed legal guidance. Of specific relevance to the matters above is the need to ensure that prosecutors identify and weigh all the relevant facts, using all the available evidence, to determine matters of secondary liability. This is particularly so when the evidence from the police, as evidenced in the Lammy Review, is likely to include overt or covert bias, for instance descriptions of “gangs” rather than “groups”. In so far as it is possible, it would improve the guidelines to see specific reference to the ways in which prosecutors are required to check for bias generally and in respect of BAME suspects and victims specifically. Implementation of Recommendations 2 -4 to collect and publish information about the impact of decisions at this stage of the Criminal Justice System is the litmus test for the guidance.