

## **SERIOUS CRIME ACT 2007**

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### **EXPLANATORY NOTES**

#### **COMMENTARY ON SECTIONS**

#### **Part 2: Encouraging or Assisting Crime**

##### **Inchoate offences**

##### ***Section 44: Intentionally encouraging or assisting an offence***

144. This section creates a new offence of intentionally encouraging or assisting an offence.
145. *Subsection (1)* sets out what a person must do to commit the offence. He must do an act capable of encouraging or assisting the commission of an offence and intend to encourage or assist its commission.
146. *Subsection (2)* provides further definition as to what is meant by “intention” in this clause, making it clear that foresight of consequences is not sufficient to establish intention.

##### ***Section 45: Encouraging or assisting an offence believing it will be committed***

147. This section creates a new offence of encouraging or assisting an offence believing it will be committed. The person commits the offence if he does an act capable of encouraging or assisting an offence and he believes both that the offence will be committed and that his act will encourage or assist its commission.

##### ***Section 46: Encouraging or assisting offences believing one or more will be committed***

148. This section creates a new offence of encouraging or assisting offences believing that one or more will be committed.
149. *Subsection (1)* sets out what a person must do to commit the offence. He must do an act capable of encouraging or assisting one or more offences believing that one or more offences will be committed and that his act will encourage or assist one or more of them.
150. *Subsection (2)* provides that it is not necessary for a person to have a belief as to which offence will be encouraged or assisted.
151. *Subsection (3)* requires an indictment for this offence to specify a number of the offences that it is alleged the accused believed might be committed. For example, if D lends a van to P believing that one of robbery or arson will be committed, the indictment must specify robbery and arson. However this does not mean that every offence that could have been encouraged or assisted must be specified (*subsection (3)(b)*).

##### ***Section 47: Proving an offence under this Part***

152. This section sets out what needs to be proved to establish guilt for each of the offences in clauses 44, 45 and 46.

*These notes refer to the Serious Crime Act 2007 (c.27)  
which received Royal Assent on 30th October 2007*

153. *Subsections (2) to (4)* set out that in order to establish that a person did an act capable of encouraging or assisting an offence under Part 2, it is sufficient to demonstrate that he did an act intending to encourage or assist an act which would amount to the commission of an offence, or believing that an act would be done which would amount to the commission of an offence.
154. *Subsection (5)* sets out what must be proved under sections 44, 45 and 46 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of fault, circumstances or consequences. In such cases, it must be proved that the person who provided encouragement or assistance either believed that, were another person to do the act, that person would have the necessary fault (*subsection (5)(a)(i)*) or he was reckless as to whether or not another person would have the necessary fault (*subsection (5)(a)(ii)*) or he himself would have the necessary fault (if he were to do the act himself) (*subsection (5)(a)(iii)*).
155. *Subsection (5)(b)* sets out what must be proved under sections 44, 45 and 46 if the offence that it is alleged a person intended or believed would be encouraged or assisted requires proof of particular circumstances or consequences. In such cases, it will also be necessary to demonstrate that a person who provides encouragement or assistance either believed, or was reckless as to whether, were another person to do the act, that person would do so in those circumstances or with those consequences.
156. Requiring some degree of belief in relation to circumstances ensures that a person would not be guilty of an offence of encouraging or assisting a strict liability offence unless he believes or is reckless as to whether those circumstances exist. For example, D asks P to drive him home from the pub as he has had too much to drink. P is insured to drive D's car but unknown to D and P, P was disqualified from driving the day before. P is committing the principal offence of driving whilst disqualified, despite the fact he is not aware that he is disqualified, as this is an offence of strict liability. However it would not be fair to hold D liable in such circumstances.
157. Requiring some degree of belief in relation to consequences ensures that a person would not be guilty of an offence that requires certain consequences to arise for it to be committed, unless he believes or is reckless as to whether those consequences should arise. For example, D gives P a baseball bat and intends P to use it to inflict minor bodily harm on V. P however uses the bat to attack V and intentionally kills V. It would not be fair to hold D liable for encouraging and assisting murder, unless he also believes that, or is reckless as to whether, V will be killed.
158. *Subsection (6)* makes it clear that where subsection (*5)(a)(iii)* is relied upon (i.e. where fault required for conviction for offences is established because the person who has done an act capable of providing encouragement or assistance has the necessary fault element for commission of the offence himself), a person cannot escape liability purely because it is impossible for him/her to commit the offence.
159. For example, D (a woman) encourages P to penetrate V with his penis (rape) and believes that if P were to do so, it would be without V's consent. P reasonably believes that V does consent so does not have the mental element required for conviction of rape. Therefore, D's fault is determined under section 47(5)(a)(iii) in that if she were to commit the act, she would do it with the fault required. However it is not possible for a woman to commit the act of penetration with a penis so were it not for this subsection, D would escape liability.
160. *Subsection (7)(a)* makes it clear that, in relation to section 44 a reference to circumstances or consequences that a person believes includes circumstances or consequences that a person intends. *Subsection (7)(b)* clarifies what is meant by the word 'intent' in this regard.
161. *Subsection (8)* provides further definition as to what is meant by the phrase 'doing an act'.

162. *Subsection (9)* provides further definition as to what is meant by the phrase ‘anticipated offence’ in relation to sections 44 and 45.

#### ***Section 48: Proving an offence under section 46***

163. This section provides further rules in relation to what needs to be proved to establish guilt for an offence under section 46.
164. *Subsection (2)* makes it clear that it is sufficient to establish that a person who provides encouragement or assistance had the required belief or recklessness as to fault, consequences and/or circumstances (as required by section 47(5)) in relation to one offence only.
165. *Subsection (3)* provides that the offence for which the elements mentioned in section 47(5) are proved must be one of those specified in the indictment. But this is subject to those rules which permit a person accused of one offence to be convicted of another and in particular to section 57 (alternative verdicts and guilty pleas).

#### ***Section 49: Supplemental provisions***

166. *Subsection (1)* sets out that the offences can be committed regardless of whether or not the encouragement or assistance has the effect which the defendant intended or believed it would have.
167. *Subsection (2)* sets out that if a person’s act is capable of encouraging or assisting a number of criminal offences, and he either intends or believes that each of those offences will happen, he can be prosecuted and convicted in relation to every offence that he intends to encourage or assist, or believes will be encouraged or assisted.
168. For example, if D lends P a knife and intends P to use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and intends or believes that minor harm will result), D can be prosecuted for encouraging and assisting three burglaries and an assault under section 44. Likewise if D lends P a knife and believes he will use it to enter three different properties as a trespasser (burglary) and to attack V (assault) (and believes that minor harm will result), D can be prosecuted for encouraging or assisting three burglaries and an assault under section 45.
169. *Subsection (3)* sets out that a person may, in relation to the same act, commit an offence under more than one provision of Part 2.
170. For example, D lends P a knife and believes that he will enter one property as a trespasser (burglary). He also believes that P will use it to commit another offence which will either be to enter another property as a trespasser or to attack V (assault) (and minor harm would result). D could be convicted under section 45 of encouraging and assisting burglary. He could also be prosecuted and convicted under section 46 of encouraging and assisting burglary or assault.
171. *Subsections (4) and (5)* set out that a person cannot be guilty of encouraging or assisting an offence under section 45 or 46 believing that an offence under section 44, 45 or 46 or one of those offences listed in Schedule 3 will happen. The offences listed in Schedule 3 are generally statutory forms of incitement.
172. This means it will not be an offence to encourage or assist another person believing that that person will commit the offence of encouraging or assisting another to commit an offence. For example, D does an act capable of assisting P to encourage or assist X to commit robbery and D believes that P will encourage or assist X to commit robbery. It matters not whether P intends or believes that X will commit robbery. However if D intended to encourage or assist P to encourage or assist X to commit robbery, D would be guilty of an offence under section 44.
173. *Subsection (6)* confers power on the Secretary of State to amend Schedule 3.

174. *Subsection (7)* sets out that the requirement that a person believes that a criminal offence, or a number of criminal offences, be committed is satisfied if he believes that the criminal offence, or that one or more criminal offences, would be done if certain conditions are met.
175. For example, D gives P some money and tells him to give it to X to persuade X to lend them his car. However D tells P that if X will not lend them the car, P should take it anyway. In this situation D believes that a criminal act will be done if certain conditions are met (i.e. if X will not lend them his car).

## **Reasonableness defence**

### ***Section 50: Defence of acting reasonably***

176. This section sets out that it will be a defence to the offences in Part 2 if the person charged with those offences acted reasonably, that is that in the circumstances he was aware of, or in the circumstances he reasonably believed existed, it was reasonable for him to act as he did.
177. *Subsection (3)* sets out a number of factors that the court could consider when determining whether an act was reasonable in the circumstances. This list is not exhaustive.

## **Limitation on Liability**

### ***Section 51: Protective offences: victims not liable***

178. This section sets out in statute the common law exemption from liability established in the case of *R v Tyrrell (1894) 1QB 710*.
179. A person cannot be guilty of the offences in sections 44, 45 and 46 if, in relation to an offence that is a “protective” offence (defined in *subsection (2)*), the person who does the act capable of encouraging or assisting that offence falls within the category of persons that offence was designed to protect and would be considered as the victim.
180. For example, D is a 12 year old girl and encourages P, a 40 year old man to have sex with her. P does not attempt to have sex with D. D cannot be liable of encouraging or assisting child rape despite the fact it is her intent that P have sexual intercourse with a child under 13 (child rape) because she would be considered the “victim” of that offence had it taken place and the offence of child rape was enacted to protect children under the age of 13.

## **Jurisdiction and Procedure**

### ***Section 52: Jurisdiction and Schedule 4***

181. This section and Schedule 4 set out the rules that will govern jurisdiction over the offences in Part 2.
182. *Subsection (1)*, together with *subsection (3)*, sets out that a person may be convicted of the offences in Part 2, regardless of his own location, if he knew or believed that the act which would amount to the commission of an offence would take place, at least in part, in England and Wales or Northern Ireland.
183. For example, D in Belgium sends a number of emails to P in London, encouraging him to plant a bomb on the tube. D can be prosecuted in England and Wales or Northern Ireland despite the fact he was outside the jurisdiction when he did his act.
184. *Subsection (2)* sets out that if it is not possible to establish the circumstances required for jurisdiction to arise under *subsection (1)*, it may be possible to convict a person of an offence under Part 2 if the facts of the case fall within paragraph 1, 2 or 3 of Schedule 4.

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185. *Schedule 4*, paragraph 1 provides jurisdiction where a person does an act in England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place outside England and Wales but the offence is one for which a perpetrator could be tried in England and Wales if the anticipated offence were committed outside England and Wales, or relevant conditions exist that would make it so triable.
186. For example, the offence of murder is triable within England, Wales or Northern Ireland regardless of where it is committed if the defendant is “a subject of Her Majesty” so jurisdiction could fall within paragraph 1 in the following situation (subject to the Attorney General’s consent (section 53)): D (a British citizen) in England sends a parcel of poison to P (a British citizen), in France encouraging him to use it to murder V (also in France). It would be possible to try D in England because, as P is a British citizen, the anticipated principal offence (murder) is one which could be tried in England, Wales or Northern Ireland.
187. *Schedule 4*, paragraph 2 provides jurisdiction where a person does an act in England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place in a country outside England and Wales but what he anticipates is also an offence under the law in force in that country.
188. For example, the offence of theft is an offence in England, Wales and Northern Ireland and also in Spain so jurisdiction could fall within paragraph 2 in the following situation (subject to the Attorney General’s consent (section 53)): D in England sends an email to P in Spain containing details of how to disarm an alarm system used by a bank in Madrid. D intends to assist P to rob the bank.
189. *Sub-paragraph (2)* provides a mechanism whereby the defence can challenge an assertion that what a person anticipates is an offence in the relevant country. *Sub-paragraphs (3) to (5)* provide further guidance on how that challenge should operate.
190. *Schedule 4*, paragraph 3 provides jurisdiction where a person does an act outside England and Wales, capable of encouraging or assisting an offence, and knows or believes that what he anticipates might take place outside England and Wales but the offence is one for which it would be possible to prosecute the person who provides encouragement or assistance in England and Wales if he were to commit the offence as a principal in that place.
191. For example, murder is an offence for which a perpetrator who is a British citizen could be tried in England and Wales or Northern Ireland regardless of where it is committed so jurisdiction could fall within paragraph 3 in the following situation (subject to the Attorney General’s consent (section 53)): D (a British citizen) in Canada sends a parcel of poison to P in France encouraging him to use it to murder V (also in France). It would be possible to try D in England because he is a British citizen and the anticipated principal offence (murder) is one which could be tried in England, Wales or Northern Ireland as it would be committed by a British citizen.
192. *Subsection (4)* sets out that references in this section and in *Schedule 4* to England and Wales should be read as if they were references to Northern Ireland in their application to Northern Ireland.
193. The effect of *subsection (5)* is that the general jurisdictional rules for Part 2 offences (contained in Section 52 and *Schedule 4* of the Bill) are without prejudice to any specific jurisdictional rules which already exist for certain offences on the statute book. For example, sexual offences have their own jurisdictional rules (provided for in the Sexual Offences Act 2003). As such, jurisdiction for encouraging or assisting an offence under the Sexual Offences Act will be governed by that Act, rather than the rules created in Part 2.



***Section 53: Prosecution of offences triable by reason of Schedule 4***

194. This section sets out that where jurisdiction is not governed by section 52 (and therefore comes within the provisions set out in Schedule 4), the Attorney General must give his consent to a prosecution in England and Wales. In Northern Ireland, the Advocate General must give his consent before any prosecution falling under this Schedule.

***Section 54: Institution of proceedings etc. for an offence under this Part***

195. This section ensures that any powers that apply to a substantive offence will apply to an offence of encouraging and assisting that substantive offence.
196. *Subsection (2)(a)* provides that if a substantive offence requires the consent of any authority (e.g. the Attorney General or the Director of Public Prosecutions) before proceedings can commence, that consent must be obtained prior to proceedings being commenced for encouraging and assisting such an offence. *Subsection (4)* makes clear that this consent is in addition to any required by virtue of section 53 (Attorney General's consent for extra-territorial jurisdiction prosecutions).
197. *Subsection (2)(b)* provides that where an authority has a power to prosecute a substantive offence, they will also have the power to prosecute an offence of encouraging and assisting that offence. For example the Revenue and Customs Prosecution Office (RCPO) has the power to prosecute the offence of money laundering. This section will also give the RCPO the power to prosecute an offence of encouraging and assisting money laundering.
198. *Subsections (2)(c) and (d)* provide that powers of seizure and forfeiture of property that apply to a substantive offence will also apply to encouraging and assisting that offence.
199. *Subsection (3)* sets out how this section operates in relation to section 46 (encouraging or assisting offences believing that one or more will be committed).
200. *Subsections (5)-(8)* give effect to that part of the e-commerce directive (Directive 2000/31/EC) which allows for a derogation, on the grounds of public policy, from Article 3(2) of that directive. The effect is that notwithstanding that the directive provides that internet service providers should be regulated by the law of the country in which they are established even when operating in other countries, a non-UK established internet service provider could be prosecuted for the offences under Part 2.

***Section 55: Mode of trial***

201. *Subsection (1)* sets out that the mode of trial for an offence under sections 44 and 45 will be determined as if the person had been charged with committing the anticipated offence as a principal.
202. *Subsection (2)* sets out that an offence under section 46 will be tried on indictment.

***Section 56: Persons who may be perpetrators or encouragers etc.***

203. This section sets out that if an anticipated offence has been committed and it cannot be proved whether a person has either encouraged or assisted the offence on the one hand, or committed the offence as a principal on the other, he can be convicted of an offence in section 44, 45 or 46.

***Section 57: Alternative verdicts and guilty pleas***

204. *Section 57* sets out the offences in relation to which a person may be found guilty as an alternative where he has been prosecuted on indictment for an offence under sections 44, 45 and 46. This is to produce the same effect as the rules in relation to alternative verdicts in relation to a trial on indictment for the offences encouraged or assisted.

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205. *Subsection (1)* provides that a person may be found guilty of the offences of encouraging or assisting contained in sections 44 and 45 by reference to an alternative offence.
206. *Subsection (2)* sets out a similar rule in relation to an offence under section 46. Where a person is charged with that offence, and the jury find him not guilty by reference to one of the specified offences, he may nevertheless be found guilty of that offence by reference to an alternative offence.
207. *Subsection (3)* makes it clear that if under section 46 a person is found guilty by reference to one or more of the specified offences, it would also be possible to find him guilty in relation to an alternative offence. The penalty will depend on which of the offences is the more serious.
208. *Subsection (4)* sets out what is meant by the term ‘alternative offence’. The general rule, which is set out in section 6(3) of the Criminal Law Act 1967, is that an alternative verdict can be returned for another offence if the offence charged amounts to or includes an allegation of the other offence. Similarly under *subsection (4)* an alternative verdict can be returned if: (a) it is an offence for which an accused could be found guilty on trial on indictment for the other offence (for example, on a trial for murder, a verdict can be returned of manslaughter, grievous bodily harm (GBH) with intent or infanticide) or (b) it is an indictable offence or one to which section 40 Criminal Justice Act 1988 applies (this allows the inclusion on an indictment of an offence of common assault) etc and the condition in *subsection (5)* is met.
209. The condition in *subsection (5)* is that the allegations in the indictment must amount to, or include, an allegation of the commission of the Part 2 offence by reference to the alternative offence. *Subsection (7)* sets out that in relation to an offence under section 44, a reference to the allegations in the indictment includes a reference to an attempt to commit a specified offence.
210. For example, D gives P a baseball bat. The prosecution charge D with an offence under section 45 alleging that D believed that P would use the bat to commit GBH against V. The jury decide that they do not accept that D believed GBH would be committed. However they are satisfied that D believed that actual bodily harm (ABH) would be committed. Just as it would be possible, on a charge of GBH, to find an accused guilty of ABH instead, the jury could convict, as an alternative to the offence of encouraging or assisting GBH, of encouraging or assisting ABH.
211. *Subsection (8)* ensures that an offence which would be an alternative offence to one of the offences listed in Schedule 3 is to be disregarded in the same way as the substantive offences listed in Schedule 3 when prosecuting under sections 45 or 46. This means that in the same way as the offences in Schedule 3 cannot be considered for a prosecution under sections 45 or 46, neither can an offence which would be an alternative offence to one of these offences.
212. *Subsection (10)* sets out that person may plead guilty to an offence which would be encompassed by the offence with which he was charged.
213. For example, D is charged with encouraging or assisting P to rob X. D denies this but says he did realise that P was planning to steal something from X and therefore is prepared to plead guilty to assisting theft.

**Section 58: Penalties**

214. This section sets out the penalties that will apply to the offences created in Part 2.
215. *Subsection (2)* sets out that the maximum penalty for encouraging and assisting an offence of murder will be imprisonment for life.
216. *Subsection (3)* sets out the general rule that the maximum penalty available for an offence under sections 44, 45 and 46 will be the same as the maximum available on

conviction for the relevant anticipated or reference offence. In relation to section 46 this applies where a person has been found guilty in relation to one offence only (*subsection (1)(b)*).

217. For example D lends P a van, false number plates and a gun. The prosecution argue that he believed that either burglary or murder would be committed. The jury find D guilty in relation to burglary but not guilty in relation to murder. The maximum sentence available for the conviction under section 46 will be the maximum sentence available for the offence of burglary (14 years).
218. *Subsections (5) to (7)* set out the rules that apply to determining the penalty where a conviction under section 46 is in relation to more than one offence. Such a conviction will always have been the product of a trial on indictment because before the trial it would not have been possible to determine which of the specified offences would be proved and thus what the relevant mode of trial should be.
219. *Subsection (5)* sets out that where one of the reference offences is murder, the maximum available penalty is imprisonment for life.
220. *Subsection (6)* sets out that where none of the reference offences is murder, but one or more of them is punishable by imprisonment, the maximum penalty available will be limited to that applicable to the offence that carries the highest penalty.
221. For example, D asks P to make him a van with a false panel at the back which would be capable of concealing 5 people. D makes the van and believes that it will be used for people smuggling but could also be used for theft. If D is found guilty of encouraging or assisting both of those offences, the maximum sentence available would be the maximum sentence for people smuggling as it is the higher penalty of the offences D was prepared to assist.
222. *Subsection (7)* sets out that if none of the offences is punishable by imprisonment then the maximum sentence will be a fine.

### **Consequential alterations of the law**

#### ***Section 59: Abolition of common law replaced by this Part***

223. This section abolishes the common law offence of incitement.

#### ***Section 60: Amendments relating to service law***

224. This section brings into effect the amendments to service law which are set out in Schedule 5. The amendments are necessary because of the abolition of the common law offence of inciting the commission of another offence (section 59), and the replacement of that offence with the three new statutory offences provided for in sections 44 – 46.

#### ***Section 61: Repeal of offence of enabling unauthorised access to computer material***

225. This section amends the Police and Justice Act 2006 to allow for computer misuse enabling offences created by that Act to be dealt with instead by the new offences included in Part 2 of the Bill.

#### ***Section 62: No individual liability in respect of corporate manslaughter***

226. This section prevents the offences in Part 2 from applying to corporate manslaughter. This means that an individual cannot be guilty of an offence of encouraging or assisting the offence of corporate manslaughter.



***Section 63: Consequential amendments: Part 2***

227. This section is consequential and provides that references in existing legislation to the common law offence of incitement (these references are set out in Part 1 of Schedule 6) are to be read as references to the offences in sections 44, 45 and 46. *Subsection (3)* allows this list to be amended.
228. **Part 2** of Schedule 6 contains other minor amendments to existing legislation.

**Interpretation: Part 2**

***Section 64: Encouraging or assisting the commission of an offence***

229. This section makes it clear that references to encouraging or assisting offences in this Part should be read in conjunction with section 47.

***Section 65: Being capable of encouraging or assisting***

230. While this Act does not contain a definition of conduct which is capable of encouraging or assisting, this section ensures that certain acts about which doubt may arise as to whether they fall within the ordinary meaning of that phrase are to be included. This includes omissions where the omission is a failure to take reasonable steps to discharge a duty.

***Section 66: Indirectly encouraging or assisting***

231. This section sets out that if a person (A) arranges for another (B) to do an act capable of encouraging or assisting another (C) to commit an offence, then A can be regarded as having done B's act.
232. This covers, for example, a gang leader (A) who instructs a member of his gang (B) to encourage another person (C) to kill X.

***Section 67: Course of conduct***

233. This section makes it clear that an "act" includes a course of conduct.