**SERIOUS CRIME ACT 2007: IMPLEMENTATION OF PART 2**

**Summary**

1. The purpose of this circular is to draw your attention to arrangements for implementing Part 2 of the Serious Crime Act 2007. This covers section 44 to
section 67 of the Act and associated Schedules. These provisions will be commenced on 1 October 2008.

2. Section 44 to 46 create three new offences: intentionally encouraging or assisting an offence (44); encouraging or assisting an offence believing it will be committed (45); encouraging or assisting offences believing that one or more will be committed (46). Sections 47 and 48 set out what is needed to prove the elements of an offence contained in sections 44 to 46. Supplemental provisions are contained in section 49. There is a reasonableness defence in section 50, while section 51 limits liability to exclude victims. Section 52 and Schedule 4 set out jurisdiction and procedure. The requirement for consent to prosecution in certain circumstances is contained in section 53. Other procedural matters are covered in sections 54 to 57, relating to institution of proceedings, mode of trial, persons who may be perpetrators or encouragers, alternative verdicts and guilty pleas. Section 58 explains the penalties which will apply. Sections 59 to 63 relate to consequential alterations to the law and sections 64 to 67 deal with interpretation.

3. This circular provides an overview of the new offences. This document should not, however, be regarded as providing legal advice. Legal advice should be sought if there is any doubt as to the application or interpretation of the legislation.

Section 44: Intentionally encouraging or assisting an offence

4. **Section 44** creates an offence of intentionally encouraging or assisting an offence. **Section 44(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.

5. **Section 44(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

6. **Section 45** 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

7. **Section 46** creates a new offence of encouraging or assisting offences believing that one or more will be committed.

8. **Section 46(1)** sets out what a person must do to commit an offence under this section. 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.

9. **Section 46(2)** provides that it is not necessary for a person to have a belief as to which offence will be encouraged or assisted.
10. **Section 46(3)** requires an indictment for this offence to specify the offences that it is alleged the accused believed might be committed. For example, if D lends a van to P believing that offences 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 (**Section 46(3)(b)**).

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

11. **Section 47** sets out what needs to be proved to establish guilt for each of the offences in sections 44, 45 and 46.

12. **Sections 47(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.

13. **Section 47(5)(a)** 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. 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 (**Section 47 (5)(a)(i)**) or he was reckless as to whether or not another person would have the necessary fault (**Section 47(5)(a)(ii)**) or he himself would have the necessary fault (if he were to do the act himself) (**Section 47(5)(a)(iii)**).

14. **Section 47(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.

15. Requiring some degree of belief in relation to circumstances or consequences may ensure 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 or consequences 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. **Section 47(5)** may mean that D is not guilty of encouraging or assisting P to drive whilst disqualified if he did not know or was not reckless as to whether P was disqualified from driving.

16. **Section 47(6)** provides that where **Section 47(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.

17. **Section 47(7)(a)** provides that, in relation to section 44 a reference to circumstances or consequences that a person believes includes circumstances or
consequences that a person intends. **Section 47(7)(b)** clarifies what is meant by the word 'intent' in this regard.

18. **Section 47(8)** provides further definition as to what is meant by the phrase 'doing an act'.

19. **Section 47(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**

20. **Section 48** provides further rules in relation to what needs to be proved to establish guilt for an offence under section 46.

21. **Section 48(2)** provides 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.

22. **Section 48(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**

23. **Section 49(1)** provides that offences under Part II of the Act can be committed regardless of whether or not the encouragement or assistance has the effect which the defendant intended or believed it would have.

24. **Section 49(2)** provides 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.

25. 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 may 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 may be prosecuted for encouraging or assisting three burglaries and an assault under section 45.

26. **Section 49(3)** sets out that a person may, in relation to the same act, commit an offence under more than one provision of Part 2.

27. 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 may be convicted under section 45 of encouraging
and assisting burglary. He may also be prosecuted and convicted under section 46 of encouraging and assisting burglary or assault.

28. **Sections 49(4) and 49(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.

29. **Section 49(6)** confers power on the Secretary of State to amend Schedule 3.

30. **Section 49(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.

31. 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**

32. **Section 50** 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.

33. **Section 50(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 intended to be exhaustive.

**Limitation on Liability**

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

34. **Section 51** is intended to set out in statute the common law exemption from liability established in the case of *R v Tyrrell (1894) 1QB 710*. In *Tyrrell* P, an adult, had unlawful sexual intercourse with D, a child aged between 13 and 16. It was alleged that D had encouraged P to commit the offence. It was held that D could not be convicted of committing the offence as an accessory or of inciting the offence because the offence had been enacted for the purpose of protecting a category of persons and D fell within the category.

35. 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 **Section 51(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.

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

36. **Section 52** and **Schedule 4** set out the rules that will govern jurisdiction over the offences in Part 2.

37. **Section 52(1)**, together with **Section 52(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.

38. For example, D in Belgium sends a number of emails to P in London, encouraging him to plant a bomb on the tube. D may be prosecuted in England and Wales or Northern Ireland despite the fact he was outside the jurisdiction when he did his act.

39. **Section 52(2)** sets out that if it is not possible to establish the circumstances required for jurisdiction to arise under **Section 52(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**.

40. **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.

41. **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.

42. 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.

43. **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.

44. **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.

45. **Section 52(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.
46. The effect of Section 52(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

47. Section 53 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 her consent before any prosecution falling under this Schedule.

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

48. Section 54 provides that any powers that apply to a substantive offence will apply to an offence of encouraging and assisting that substantive offence.

49. Section 54(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) provides that this consent is in addition to any required by virtue of section 53 (Attorney General's consent for extra-territorial jurisdiction prosecutions).

50. Section 54(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.

51. Sections 54(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.

52. Section 54(3) sets out how this section operates in relation to section 46 (encouraging or assisting offences believing that one or more will be committed).

53. Sections 54(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
54. **Section 55(1)** provides 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.

55. **Section 55(2)** provides that an offence under section 46 will be tried on indictment.

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

56. **Section 56** provides 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**

57. **Section 57** provides 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 intended 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.

58. **Section 57(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.

59. **Section 57(2)** provides 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.

60. **Section 57(3)** provides 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.

61. **Section 57(4)** provides 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 **Section 57(5)** is met.

62. The condition in **Section 57(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. **Section 57(6)** 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.
63. 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.

64. **Section 57(8)** provides 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.

65. **Section 57(10)** provides that person may plead guilty to an offence which would be encompassed by the offence with which he was charged.

66. 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**

67. **Section 58** provides the penalties that will apply to the offences created in Part 2.

68. **Section 58(2)** provides that the maximum penalty for encouraging and assisting an offence of murder will be imprisonment for life.

69. **Section 58(3)** provides 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)).

70. 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).

71. **Sections 58(5) to 58(7)** provide the rules that apply to determining the penalty where a conviction under section 46 is in relation to more than one offence.

72. **Section 58(5)** sets out that where one of the reference offences is murder, the maximum available penalty is imprisonment for life.

73. **Section 58(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.
74. **Section 58(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**

75. **Section 59** abolishes the common law offence of incitement.

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

76. **Section 60** 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**

77. **Section 61** 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**

78. **Section 62** 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**

79. **Section 63** 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. **Section 63(3)** allows this list to be amended.

80. **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**

81. **Section 64** provides 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**

82. While this Act does not contain a definition of conduct which is capable of encouraging or assisting, **Section 65** provides 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

83. **Section 66** 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.

Section 67: Course of conduct

84. **Section 67** makes it clear that an "act" includes a course of conduct.

Commencement

85. These provisions will apply in England and Wales and in Northern Ireland from Wednesday 1 October 2008. The commencement order (The Serious Crime Act (Commencement No. 3) Order S.I. 2008/2504) bringing these offences into force can be viewed on the Office of Public Sector Information website at: [www.opsi.gov.uk/si/si2008/uksi_20082504_en_1](http://www.opsi.gov.uk/si/si2008/uksi_20082504_en_1).