

INCHOATE LIABILITY and the SERIOUS CRIME ACT 2007

Contents

OVERVIEW OF PART 2, SCA 2007	3
Background to the enactment of Part 2 and some general points	3
The Serious Crimes Act: but not an Act that is limited to serious crimes.....	3
The pre-existing position	4
What has changed?	4
What Part 2 of the SCA 2007 does not do	5
The potential breadth of the Part 2 offences	5
The potential impact of Part 2 on ‘fraud cases’	7
Labelling: are the Part 2 offences truly “inchoate”?	7
What was wrong with the pre SCA2007 position?.....	8
Enacting an offence of “facilitating the commission of an offence”?	11
The three inchoate offences: in outline	12
Approaching Part 2 offences: do’s and don’ts	13
Materials and aids to interpretation: comprehending the rationale.....	14
Words and phrases.....	15
General points.....	15
Encouraging	15
Assisting	16
“Doing an act that is capable of encouraging or assisting the commission of an offence”	16
“Encouraging or assisting the commission of an offence”	16
Other points relating to “encouraging” or “assisting”	17
“Anticipated offence”	17
THE THREE INCHOATE OFFENCES	18
Intentionally encouraging or assisting an offence: s.44 SCA2007	18
The “virtual certainty” conundrum: s.44(2) and s.47(7)(b)	19
The meaning of “intention”	19
The concept of ‘virtual certainty’	21
The apparent ambiguity of the Law Commission’s position.....	22
Further incoherence	23
The application of s.44(2) and s.47(7)(b) if the virtual certainty concept applies.....	24

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Encouraging or assisting, believing an offence will be committed: s.45 SCA2007	25
Encouraging or assisting more than one offence: s.46	26
WIDENING THE REACH OF THE THREE OFFENCES	28
Immaterial that the anticipated offence was committed	28
Immaterial that the prosecution cannot prove whether D himself committed the full offence...	28
D can be liable (s.44 only) if the anticipated offence is itself an inchoate offence.....	29
Indirect encouragement or assistance	30
Conspiracies and attempts to commit a Part 2 offence.	32
Alternative offences	33
The potential impact of Part 2 on 'fraud cases'	34
DEFENCE: ACTING REASONABLY: S.50 SCA2007.....	36
JURISDICTION.....	37
APPENDIX A: Extracts from the Serious Crime Act 2007	38
APPENDIX B: Listed offences.....	44
APPENDIX C: Which sections are in force?	47

OVERVIEW OF PART 2, SCA 2007¹

1. This handout focuses on the enactment of three inchoate offences of ‘encouraging or assisting crime’ under Part 2, SCA2007.
2. Extracts from Part 2 of the SCA 2007 appear at **Appendix A**.
3. Note that for the purposes of this handout, the following letters denote the parties to the Part 2 offences:
 - ‘D’ = the accused.
 - ‘P’ = the person (sometimes described as the “perpetrator” or “principal offender”²) who will commit (or has committed) the substantive offence.
 - ‘D1’, ‘D2’, ‘D3’ etc, = denote persons who act inchoately (jointly or in a chain).
4. It will be seen that s.66 of the SCA 2007 uses the descriptors ‘D1’ and ‘D2’. It would seem – but, alas, the Act does not tell us – that ‘D2’ is capable of referring to either a perpetrator (in the sense described above) or a person acting inchoately with D1.

Background to the enactment of Part 2 and some general points

The Serious Crimes Act: but not an Act that is limited to serious crimes

5. The Serious Crime Bill was a government Bill that was introduced in the House of Lords, by Baroness Scotland of Asthal, on 16 January 2007. The Bill received Royal Assent on the 30th October 2007. The Serious Crime Act 2007 consists of 95 sections, in four Parts, and 14 Schedules. Part 2 of the Act consists of 24 sections and schedules 3-6. The bulk of the Act is now in force: commencement dates are set out in **Appendix C**.
6. Despite the reference in the short title of the 2007 Act, to ‘Serious Crime’, a significant number of its provisions apply to *all* crimes (not just so-called “serious crime”). This is particularly true of Part 2 of the 2007 Act (encouraging and assisting crime which came into force on the 1st October 2008) which enact rules that apply across the spectrum of criminal offences.

¹ The author expresses his considerable gratitude to Professor David Ormerod for the many discussions that we have had concerning Part 2 SCA2007.

² That is to say, the person whose act is act is the most immediate cause of the *actus reus*, (see p.180, Smith and Hogan, *Criminal Law*, 12th ed) and therefore excludes so-called ‘principals in the second degree’ who are secondary parties (s.8 Accessories and Abettors Act 1861).

7. Part 2 of the SCA 2007 (ss.44–67) builds on the Law Commission’s Report *‘Inchoate Liability for Assisting and Encouraging Crime’*³, as well as the draft Bill appended to that report. However, a number of significant differences exist between the Law Commission’s draft Bill and Part 2 of the Act.⁴

The pre-existing position

8. The pre-SCA 2007 position was concisely described by Professor Glanville Williams in his celebrated *Textbook of Criminal Law*:⁵

“...the mere supplier of an instrument of crime does not commit any offence at common law if the crime is not committed. It is true that, by a somewhat anomalous extension of the law of complicity, he will become a party to the crime if it is committed, unless after supplying the instrument he makes quite strenuous attempts to prevent it being used. *But even if he makes no effort to prevent the crime, he escapes liability if it happens not to be committed, unless he happens to be guilty of some specific statutory offence, or unless the would-be perpetrator attempts to commit the crime—in which case the supplier will be an accessory to the attempt.* The analysis appears to be the same where a person upon request gives information helpful for the commission of a crime....”

What has changed?

9. Part 2 of the SCA2007 alters that state of affairs. Part 2 holds a person [D] criminally liable *on an inchoate basis*, if he/she (with the requisite *mens rea*) helps another person [P] to commit an offence (the ‘anticipated offence’) by encouraging or assisting its commission. This will usually be in circumstances where, for whatever reason, the offence is not committed but, as we shall see, the effect of s.49(1) of the Act is to make D liable on an inchoate basis even if the full offence is committed by P.
10. The common law offence of incitement has been repealed by s.59 of the SCA 2007, but many statutory offences of incitement, assisting, encouraging (‘inciting’), conspiring, or attempting, the commission of a crime, have been retained. This aspect of the legislation is considered in greater detail later in this handout.
11. Because s.59 abolishes the common law offence of incitement, s.63(1) SCA 2007 provides that a reference to incitement (however expressed) in the provisions mentioned in Part 1 to Schd.6 of the Act, are to be read as referring to the offences in Part 2 of the SCA 2007. For example, the restrictions on instituting

³ Law Com No 300.

⁴ These differences are identified and discussed, in detail, in Ch 6 of “*The Serious Crime Act 2007*” (R. Fortson, OUP, Blackstone’s Guide, 2008); and see Smith & Hogan, *Criminal Law*, 12th ed., pp.446-464 (Professor David Ormerod).

⁵ 1978, published by Stevens, p 387; and see Smith & Hogan, *Criminal Law*, 12th ed., pp 438-446 (incitement at common law) and pp.183-235 (secondary participation).

proceeding on spouses and civil partners, imposed by s.30(4) of the Theft Act 1968, which had applied to “incitement”, now include the offences under Part 2 of the SCA 2007.

12. A typical case under Part 2 SCA 2007 would be where D does an act that is capable of encouraging or assisting the commission, by P, of a *substantive* offence. The commission of the substantive offence would thus be the ‘anticipated offence’. However, as we shall see, for the purposes of the s.44 offence alone, it is possible for D to act inchoately-upon-inchoately: *e.g.* where D1 intentionally encourages D2 [s.44] to intentionally encourage P [s.44] to commit an offence. In this situation, the “anticipated offence” that D1 intends will be committed is another inchoate offence while, in the case of D2, the “anticipated offence” will be the substantive offence.

What Part 2 of the SCA 2007 does not do

13. Part 2 of the SCA 2007 does not:
 - a. Repeal or replace s 8 of the Accessories and Abettors Act 1861. Part 2 of the SCA2007 does *not* give statutory force to the Law Commission’s recommendations and draft Bill in its Report No 305 (Participating in Crime), i.e. secondary liability where the principal offender commits the offence anticipated by D.
 - b. Alter the position where D and P act as ‘joint principals’, ie where both parties participate in the *actus reus* of the offence, and share the requisite fault element for the offence in question.
 - c. Alter rules relating to secondary liability for a collateral offence that is committed by the principal offender (eg a joint venture to assault V, but P goes on to kill V), see *Rahman*,⁶ *Rafferty*,⁷ *Chan Wing Siu*, line of cases.

The potential breadth of the Part 2 offences

14. The wording of ss.44-46 is potentially misleading because, in respect of each offence, Parliament (unlike the Law Commission) uses the expression “commission of an offence”.⁸ Thus, s.44 requires that D *intended* to encourage or assist the commission of an “offence”. But, it is not until one reaches s.47(2) that it becomes clear that D’s intention relates to “an act” that would be done by P which constitutes the *conduct element* of the *actus reus* of the anticipated offence. Thereafter, D’s actual liability turns on *his* state of mind – not P’s – in relation the

⁶ [2008] UKHL 45; [2007] EWCA Crim 342, CA

⁷ [2007] EWCA Crim 1846

⁸ The Law Commission used the expression “criminal act” – a reference to the conduct element of the *actus reus* of the anticipated offence.

fault element (if any) that is required to be proved in connection with the anticipated offence: see s.47(5)-(7) which specify alternative states of mind that D may have had at the time that he gave encouragement or assistance. The fault elements might encompass *conduct* (e.g. appropriating property), *circumstances* (e.g. belonging to another) and *consequences*.

15. One of the staggering features of Part 2 SCA 2007 is the fact that D may be liable notwithstanding that he/she had *different* states of mind with respect to conduct, circumstances, and consequences, that must be proved in relation to the anticipated offence in question. A similar state of affairs exists in relation to the offences in ss.45 and 46.⁹
16. The potential reach of the Part 2 offences is breathtaking and graphically illustrated by way of an example given by Professors John Spencer QC and Graham Virgo (slightly modified here).¹⁰ Suppose D gave goods to X, believing that X is unaware that D had in fact stolen those goods. On those facts, one would not ordinarily say that D *intended* to encourage or to assist X to commit the offence of handling stolen goods (s.44), nor did D *believe* (s.45) that the offence “will be” committed by X. But, if a s.44 offence is being considered, it is necessary to have regard to s.47(2) which states that it is sufficient to prove that D intended to encourage or assist the “*doing of an act*” [by P] which would amount to the commission of that offence. This is a reference to the *conduct element* of the anticipated offence. The *conduct element* of the actus reus of the offence of handling stolen goods includes *receiving* such goods and D *did* intend to encourage X to *receive* them. So, whereas we had expected the Act to say that D must intend to encourage X to commit the “*offence*”, s.47(2) takes us to a different starting point. If the anticipated offence requires proof of fault (e.g. handling stolen goods), D will be guilty of the s.44 offence if the prosecution can prove that D had one or more of the requisite states of mind set out in s.47(5)-(7). These include proof that, were D to perform the conduct element of the anticipated offence, *he* would do it with the fault required for that offence: s.47(5)(a)(iii). Accordingly, were D to confess that - had he been in X’s shoes - he would have received the goods knowing them to be stolen, then D would be guilty of the s.44 offence.
17. It is immaterial that the anticipated substantive offence was impossible to commit.
18. The offences are widened by s.49(1) [immaterial whether the anticipated offence is committed], s.56 [immaterial that the prosecution cannot prove whether D himself committed the full offence], s.49(4) [inchoate-upon-inchoate liability (s.44 only),

⁹ And see s.47(3) SCA 2007.

¹⁰ *Encouraging and Assisting Crime: Legislate in Haste; Repent at Leisure*, Archbold News, Issue 9, 6th November 2008.

that is to say, D can intend to encourage or to assist D2 to commit a Part 2 offence], and by s.66 [indirect encouragement or assistance]. These sections are considered in greater detail under separate headings in this handout. As we shall see, it is also possible to attempt or to conspire to commit any of the Part 2 offences.

*The potential impact of Part 2 on 'fraud cases'*¹¹

19. Part 2 of the Act embraces all 'acquisitive crimes', fraud offences, and money laundering offences (including, it is submitted, doing an act that is capable of encouraging or assisting another person to 'tip off'). Indeed, Part 2 is of general application in relation to all offences, including conspiracy to defraud (see Part 3 to schedule 3 of the Act: at **Appendix B**).
20. Note that there is no individual liability under Part 2 in respect of corporate manslaughter: s.52 SCA 2007.

Labelling: are the Part 2 offences truly "inchoate"?

21. The three Part 2 offences are usually described as being "inchoate" and, indeed, s.56(1) describes them as such. But, in *R v R*,¹² the Court of Appeal described s.14 of the Sexual Offences Act 2003 (arranging or facilitating commission of a child sex offence) as a "substantive offence" notwithstanding that the acts criminalised by s.14 SOA 2003 are acts of preparation. The Court's reasoning was that it is possible to attempt to commit the s.14 offence.¹³ Accordingly, given that a person can *attempt* to commit¹⁴ or *conspire* to commit¹⁵ any of the Part 2 offences, the latter may also be described as "substantive offences", but that does not mean that they are not also "inchoate".¹⁶
22. Perhaps one ought not to quibble over a label. As the authors of Smith and Hogan's *Criminal Law* point out, "inchoate" means "just begun, incipient; in an initial or early stage" adding that "inchoate offences always relate to a substantive offence".¹⁷ Nobody has quarrelled (or surely would) with that description of

¹¹ Examples are provided later in this handout.

¹² [2008] EWCA Crim 619.

¹³ Judgment, paras.11 and 12.

¹⁴ Under the Criminal Attempts Act 1981.

¹⁵ Under the Criminal Law Act 1977.

¹⁶ It is true that for the purposes of ss.45 and 46, s.49(4) SCA 2007 requires offences under Part 2 and the listed offences in schedule 3 of the Act, to be "disregarded", but that provision applies only to prevent a charge being brought under s.45 or s.46 if the *anticipated offence* was either a 'listed offence' [see Appendix B of this handout] or a Part 2 offence. It is submitted that s.49(4) does not inhibit the charging a statutory attempt, or a statutory conspiracy, to commit a Part 2 offence.

¹⁷ OUP, 12th edition, p.379.

inchoate. Doing an act that is “capable of encouraging or assisting the commission of an offence” warrants the adjective ‘incipient’ and therefore Part 2 offences are “inchoate offences”. Nevertheless, if - as the Court in *R v R* appears to imply - the test for the existence of a substantive offence is whether a person can be convicted of attempting to commit it, then the Part 2 offences are arguably substantives. It is not the case, as one might have thought, that the terms “substantive offence” and “inchoate offences” are mutually exclusive. Hopefully the courts will not get into a debate over this issue: it would rarely serve a useful purpose to do so.

What was wrong with the pre SCA2007 position?

23. Whether the inchoate offences enacted under Part 2 of the 2007 Act were needed, and the extent to which those offences have created a less coherent scheme than might have been achieved, is the subject of a detailed article to be published shortly in the *Criminal Law Review* 2009, by Professor David Ormerod and R. Fortson. The issue is only touched upon in this handout.
24. Except for the offences of conspiracy¹⁸ and incitement, in any other situation where D assists P to commit an offence, *which P neither commits nor or attempts to commit*, D incurred no liability at common law.
25. A classic example is that of D, who sold an item to P, knowing that the latter would use it to commit an offence, but P was arrested before he could do so. D’s sole purpose in supplying the item was to profit from the sale. In that example, D and P had not conspired to commit the anticipated offence (no agreement that the offence shall be committed). There is no derivative secondary liability under s.8 of the Accessories and Abettors Act 1861 given that the anticipated offence was not committed by P. However, had the offence been committed, D would be liable as a secondary party under s.8 AAA 1861 because although it was not his *purpose* that P should commit the anticipated offence, he would nonetheless have had the intention sufficient for the purposes of s.8 AAA 1861.¹⁹

¹⁸ Section 1 of the Criminal Law Act 1977, or the common law offence of conspiracy to defraud (consider *Hollinshead* (1985) AC 975; and consider *GG and others* (2007) EWCA Crim 2659). Charges of conspiracy are popular with prosecutors because: (a) the ambit of the offence is broad; (b) evidence is perceived to be more readily admissible; (c) pre-trial severance of defendants is less likely; and (d) the charge can embrace, in a single count, criminal acts that otherwise could only be reflected in multiple substantive charges and some of those might attract an application ‘to sever’.

¹⁹ See Smith and Hogan, *Criminal Law*, 12th ed., p.194. As Devlin J said in *National Coal Board v Gamble* [1959] 42 CAR 240 at 250: “If one man deliberately sells to another a gun to be used for murdering a third, he may be indifferent whether the third man lives or dies and interested only in the cash profit to be made out of the sale, but he can still be an aider and abetter.”, and see *Bryce* [2004] EWCA Crim 1231.

26. Conspiracy will often be apt to deal with cases where D encouraged or assisted P to commit an offence, which the latter ultimately did not commit. But such a charge might not be capable of being preferred in circumstances where D lacked the fault element for conspiracy (e.g. where D gives a torch to P but D does not share a common intention with P that the latter shall commit burglary).
27. Professor Spencer QC has argued that some offences, notably conspiracy, have been distorted in order to fill a gap in the law that had been created by the absence of inchoate liability for assisting crime:
- ... the lack of an inchoate offence of facilitation creates a theoretical gap in the criminal law through which undeserving rogues threaten to escape, and (which) the courts regularly plug...by bending other offences, with baleful side effects.²⁰
28. The argument runs that the House of Lords in *Anderson* (1986) AC 27 distorted the offence of conspiracy when it held that there could be a criminal conspiracy *which none of the conspirators intend to carry out*.
29. In *Anderson*, D1 agreed to help P to escape from HMP Lewes. D1 received £2,000 of the agreed fee of £20,000. His admitted intention was to acquire diamond wire, capable of cutting through metal bars, and to give the wire to P. D1's further intention was to insist on being paid a further £10,000, on receipt of which he would have left the country and gone to live in Spain, taking no further part in the scheme to effect D2's escape. However, D1 was injured in a road accident and the plan was not put into effect. D1 was charged with conspiracy to effect the escape of a prisoner. D submitted that he could not be convicted of the offence because, although he had intended to provide the equipment, he had never intended that the escape plan should be carried into effect. In the course of his opinion Lord Bridge said:²¹
- “I am clearly driven by consideration of the diversity of roles which parties may agree to play in criminal conspiracies to reject any construction of the statutory language which would require the prosecution to prove an intention on the part of each conspirator that the criminal offence or offences which will necessarily be committed by one or more of the conspirators if the agreed course of conduct is fully carried out should in fact be committed.”
30. The decision of the House of Lords in *Hollinshead* (1985) AC 975 ('black-box' case) “makes it possible to convict of conspiracy to defraud those who contemplate that the execution of their agreement will facilitate a third party to

²⁰ per Professor Spencer QC; and see para 3.9, Law Com No 300.

²¹ Lord Scarman, Lord Diplock, Lord Keith and Lord Brightman concurred with the opinion of Lord Bridge.

perpetrate a fraud” (per Law Com No 300, para 3.17).²² The decision has been criticized not least on the basis that D’s purpose was not to perpetrate a fraud but to make a profit.

31. Arguably, the distortion of which complaint has been made, has been minimized in practice. This is because *Anderson*, on this point, has been more breached than honoured.²³ It is true that *Hollinshead* has not been overruled but, even without Part 2 of the SCA 2007, the conduct complained of in that case arguably gives rise to liability under s.7 of the Fraud Act 2006.²⁴
32. Sullivan has argued²⁵ that the Law Commission’s proposal for an inchoate offence based on conduct capable of assisting the commission of a crime “bridges a significant gap” and that

“[it is] wholly insupportable that, under the current law, encouragement and pressure on the part of D aimed at inducing one or more crimes committed by P are (rightly) proscribed²⁶ whereas forms of putative assistance-providing, without more, the weapon or plan not in the event used to commit an offence-may not necessarily incur liability²⁷.”
33. But cases of the kind that come within the latter situation, mentioned by Sullivan above, are arguably adequately covered by the broadly drawn offences enacted under, for example, the Terrorism Acts, and the Proceeds of Crime Act 2002.²⁸ Experience has shown that prosecuting agencies have not been slow to prosecute under those enactments. Other statutory offences employ language that cast the

²² The Law Commission cite Professor Spencer QC as saying that the House of Lords made that possible by making ‘an offence which was already vague and amorphous even more so’ (*Trying to help another person commit an offence* in P Smith (ed) *Essays in Honour of JC Smith* (1987) 148, 156)). The need to do so would have been obviated had there been an inchoate offence of assisting crime.

²³ See Law Com No 300, footnote 14, para 3.13, and the cases there cited, namely, *McPhillips* (1989) NI 360; *Yip-Chiu-Cheung* (1995) 1 AC 111; *Edwards* (1991) Crim LR 45; *Saik* (2006) UKHL; (2006) 2 WLR 993;²³ and see Smith & Hogan, *The Criminal Law*, 12th edn, chapter 13.

²⁴ My thanks to Professor Ormerod for making this point. Section 7 provides: “A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article (a) knowing that it is designed or adapted for use in the course of or in connection with fraud, or (b) intending it to be used to commit, or assist in the commission of, fraud.”; and see Smith & Hogan, *Criminal Law*, 12th ed., p.875; and see the comprehensive article by Professor David Ormerod “*The Fraud Act 2006 - Criminalising Lying?*” [2007] Crim LR.193.

²⁵ G.R. Sullivan, *Inchoate Liability for Assisting and Encouraging Crime-the Law Commission Report* [2006] Crim.L.R. 1047.

²⁶ *Invicta Plastics v Clare* [1976] R.T.R. 251

²⁷ See Spencer, “*Trying to help another person to commit a crime*” in P. Smith (ed.), *Essays in Honour of J. C. Smith* (1987), at p.148

²⁸ There is some evidence of concern about the broad use of even such specific examples of facilitation offences in jurisdictions in which they have been enacted: see N. Abrams, “*The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code?*” (2005) *Jnl of National Security Law and Policy* p.5. See also the controversial ruling on the facilitation offence in Canada in *R v Khawaja* (2006) Ontario Sup Court, 24th October 2008.

net of criminal liability widely over persons who assist or encourage offending conduct e.g., “being knowingly concerned in” the principal wrongdoing.²⁹

34. What we now have in the form of Part 2 of the SCA 2007, differs in a number of respects from the Law Commission’s draft Bill that is appended to the Law Commission’s Report No. 300,³⁰ on which Part 2 is based.
35. Furthermore, the government has enacted a fraction of only *one* Law Commission Draft Bill that was intended to be part of a wider package of reforms (in relation to liability for participating in crime) that is set out in three reports, namely Law Com No.300, 304 and 305.³¹ Those reports proposed some eight offences in respect of persons who assist and/or encourage the commission of a criminal offence.³²

Enacting an offence of “facilitating the commission of an offence”?

36. Rather than enacting Part 2 of the SCA 2007, it had been open to Parliament to enact a ‘facilitation offence’ in order to deal with the case where D assisted P (but without also encouraging him to commit the anticipated offence) in circumstances where P did *not* then go on to commit the anticipated crime, e.g. because P changed his mind, or because he was arrested before he could commit the offence.³³
37. But the enactment of a “facilitation” offence would have been an imperfect solution. It would have given rise to justifiable concerns about its limits, its potential overlap with other offences, and whether it might have rendered obsolete the range of existing facilitation offences in English criminal law. We have, for example, s.14 of the Sexual Offences Act 2003 that makes it an offence

²⁹ The most obvious example is under the Customs and Excise Management Act 1979, and s.4 of the Misuse of Drugs Act 1971 (“to be concerned in”), but there are hundreds of examples of this form of words in statutory offences.

³⁰ *Inchoate Liability for Assisting and Encouraging Crime*, hereafter, LC 300. See also the HL Research Paper, 07/52, and the Home Office Paper, *New Powers Against Organised and Financial Crime* (2006) CM 6875, p.24 et seq.

³¹ LC 300; Law Commission Report No. 305, *Participating in Crime* (2007) (hereafter LC 305); Law Commission Report No. 304, *Murder Manslaughter and Infanticide* (2006) hereafter LC 304. See W. Wilson, “A Rational Scheme of Liability for Participating in Crime” [2008] Crim. L.R.3; D. Ormerod, *Smith and Hogan, Criminal Law* (12th ed. 2008), p.447.

³² Some commentators suggest that this offers a coherent package: Wilson, “A Rational Scheme of Liability for Participating in Crime” [2008] Crim. L.R. 3. See also G.R. Sullivan “*Inchoate Liability for Assisting and Encouraging Crime*” [2006] Crim. L.R. 1047 (regarding LC No.300).

³³ See G. Williams, *Textbook of Criminal Law* (1978), p.387; R. Buxton, “*Complicity and the Criminal Code*” (1969) 85 LQR 252; J. R. Spencer “*Trying to help another person commit an offence*” in P.F. Smith (ed) *Essays in Honour of J C Smith* (1987) p. 148; P. Glazebrook, “*Structuring the Criminal Code: Functional Approaches to Complicity, Incomplete Offences and General Defences?*” in A. Simester and A.T.H. Smith, *Harm and Culpability* (1996) p.195.

to facilitate, or to arrange, the commission of a child sex offence (an offence which Professor Ormerod has described as a “controversial ‘sweeper’ provision”³⁴).³⁵

38. In any event, how might “facilitation” be defined for the purposes of a facilitation offence? In the context of making a *Serious Crime Prevention Order* under Part 1 of the 2007 Act, the expression “facilitated the commission of an offence” appears, but the Act makes no attempt to define that expression. The Explanatory Notes to the Act say that “facilitation here takes its natural meaning of ‘to make easier’” [para.16].
39. The Law Commission proposals (Law Com No.300) go much further than merely enacting a ‘facilitation’ offence.

The three inchoate offences: in outline

40. Part 2 of the 2007 Act creates three *inchoate* offences:
- a. The first offence (s.44, SCA 2007) concerns cases where a person
 - (i) does an act that is *capable* of encouraging or assisting the commission of an offence, and
 - (ii) *intends* to encourage or to assist another person to commit an offence.
 - b. The second offence (s.45, SCA 2007) deals with cases where a person
 - (i) does an act that is *capable* of encouraging or assisting the commission of an offence, and
 - (ii) *believes* that the anticipated offence will be committed (not ‘might be’ committed) and
 - (iii) *believes* that his/her act will encourage or assist its commission.
 - c. The third offence (s.46, SCA 2007) concerns cases where a person
 - (i) does an act that is *capable* of encouraging or assisting the commission of *one or more of a number of offences* and
 - (ii) he/she *believes*:
 - (a) that one or more of those offences will be committed (but he has no belief as to which); and
 - (b) that his act will encourage or assist the commission of one or more of those offences.

³⁴ Smith and Hogan, *Criminal Law*, 12th edition, p.716.

³⁵ Eg POCA, s.328; TA 2000 s.18; Immigration Act 1971, s.25(1)

41. Although each of these three offences can be shortly stated, and may appear to be straightforward in their construction and elements, each offence is complicated by the additional *mens rea* requirements set out in the convoluted rules enacted in s.47 of the Act (considered below).

Approaching Part 2 offences: do's and don'ts

42. Practitioners will need to establish whether the case is one to which:
- (a) Part 2 of the SCA 2007 applies (or might apply), or
 - (b) it is governed by s.8 of Accessories and Abettors Act 1861, or
 - (c) it is governed by rules relating to conspiracy or attempts, or
 - (d) the defendant can be charged with a statutory offence of 'incitement' (e.g. s.19 of the Misuse of Drugs Act 1971) or with a statutory offence of 'assisting' or 'soliciting'.
43. When considering Part 2 of the 2007 Act, it is important to distinguish between different categories of persons who can be parties to a crime (principals, secondary parties,³⁶ and those who act inchoately).
44. It is also important to bear in mind the differences in *mens rea* that exist in relation to those various parties. This is a complex area of law that is helpfully explained in Smith and Hogan, *Criminal Law*, 12th ed., chpt.8, "Parties to Crime". A judge will almost invariably be required to give different directions to a jury relating to *mens rea* if Part 2 offences are joined on the same indictment with other inchoate or substantive offences. And different defendants, tried jointly in respect of one or more counts on the indictment, may have different states of mind in relation to each count.
45. At the heart of the Law Commission's proposed scheme for codifying rules relating to inchoate liability, is the requirement that D 'does an act capable of encouraging or assisting the doing of a *criminal act*'.³⁷ The expression "criminal act" is arguably useful if the *actus reus* of an offence is viewed as comprising of *up to three* external elements, namely:
- (a) the conduct element;
 - (b) the circumstance element;
 - (c) the consequence element.

³⁶ So-called "oblique intention" applies here: see *NCB v Gamble* [1959] 1 QB 11; *Bryce* [2004] EWCA Crim 1231.

³⁷ See clauses 1 and 2, and cl.17(2), Draft Bill, Law Com No 300.

46. However, Parliament has not followed the language of the Law Commission. Sections 44–46 of the SCA2007 refer to acts that are capable of encouraging or assisting the commission of ‘*an offence*’. This is wide enough to embrace acts that are referable to *all* the elements of an offence, including ‘fault’.
47. The use of the expression “offence” in ss.44-46, creates a potential ‘trap’. For example, although s.44 states that D must “intend to encourage or assist [the commission of an offence]” it is sufficient to prove that D intended to encourage or to assist P to perform the *conduct element* of the actus reus of the anticipated offence: s.47(2). Any additional elements of the defendant’s mens rea, which must be proved in relation to the anticipated offence, are specified in s.47(5)-(8). Not all of these additional elements necessitate proving intention on D’s part (belief, or even recklessness, might suffice). This illustrates the importance of legal practitioners having regard to each of the aforementioned elements of the actus reus of the anticipated offence.

Materials and aids to interpretation: comprehending the rationale

48. The Bill was debated and examined in the House of Lords on 16th Jan 07 (1st reading), 7th Feb 07 (2nd reading), 7th-27th Mar 07 (Committee), 25th-30th Mar 07 (Report), 9th May 07 (3rd reading); and in the House of Commons on the 10th May 07 (1st reading), 12th Jun 07 (2nd reading), 26th Jun-10th Jul 07 (Committee), 22nd Oct 07 (Report and 3rd reading); 24th Oct 07 (‘Ping-pong’ amendments) and 30th Oct 07 (Royal Assent).
49. Explanatory Notes relating to the Serious Crime Bill were printed on 17 January 2007 and on 11 May 2007. A final set of Explanatory Notes was printed on 7 November 2007, following Royal Assent, but these give little insight into the operation of Part 2.
50. An informative 86-page Research Paper 07/52 was published by the Home Affairs Section on 8 June 2007,³⁸ and which compliments the House of Lords Library Note ‘The Serious Crime Bill’.³⁹
51. For the purposes of understanding and interpreting Part 2 of the SCA2007, practitioners will find it helpful to read the Law Commission’s Report ‘*Inchoate Liability for Assisting and Encouraging Crime*’ (Law Com No 300)—or at least to read

³⁸ Miriam Peck, Alexander Home and Grahame Danby; Home Affairs Section, House of Commons Library, 07/52.

³⁹ By Patrick M. Vollmer (2 February, 2007); LLN 2007/001. This paper is particularly informative in its treatment of Serious Crime Prevention Orders. It only briefly discusses Part 2 of the Act (encouraging and assisting crime) - which is understandable, given the complexity of a topic that is the subject-matter of two detailed Reports by the Law Commission (Nos.300 and 305).

the Draft Bill appended to that Report and the accompanying commentary⁴⁰— and, if time permits, to read Law Com 305 (*Participating in Crime*). See also Ch 6 of “*The Serious Crime Act 2007*” (R. Fortson, OUP, Blackstone’s Guide, 2008), and Smith & Hogan, *The Criminal Law*, 12th edition, chapter 13 (Professor David Ormerod).

52. It has been stated by the appellate courts that the primary task of the court is to “construe the statute” - and not to analyse a report of the Law Commission: see *R v Y* [2008] EWCA Crim 10. Nevertheless, the Law Com Reports shed light on the operation of Part 2 of the SCA2007. Merely to “construe the statute” without having the recommendations of Law Com 300 and 3005 in mind, is a recipe for muddle.

Words and phrases

General points

53. A number of key words are not defined in the Act, notably ‘capable of’, ‘encouraging’, and ‘assisting’.
54. *Beware!* Care needs to be taken over the expressions, ‘the act’, ‘his act’, ‘an act’, ‘does an act’, and ‘doing of an act’ as they appear in Part 2 of the SCA2007. This is because the expressions are not used consistently throughout Part 2. In some places, an expression (e.g. ‘an act’) refers or appears to refer to the alleged offender (‘D’) but, in other places, the same expression refers to the perpetrator of the anticipated offence.

Encouraging

55. The word ‘encouraging’ is not defined by the 2007 Act, so it will be left to the courts to define it. Presumably, Parliament is confident that the courts, like the Law Commission, will conclude that ‘encouraging’ should have the same broad meaning which inciting had acquired at common law (Law Com 300, para 5.37; *Goldman* (2001) Crim LR 822), and see *Invicta Plastics Limited v Clare* (1976) RTR 251, where the Divisional Court adopted the definition of ‘incitement’ given by Lord Denning MR in *Race Relations Board v Aplin* (1973) 1 QB 815, namely, ‘to spur on by advice, encouragement or persuasion’. But, not every act of encouragement necessarily amounts to incitement.⁴¹ For a wider discussion about the current preference for ‘encourage’ over ‘incite’, see the article by Professor William Wilson, ‘*A Rational Scheme of Liability for Participating in Crime*’ (2008) Crim LR.3.

⁴⁰ App A, Law Com No 300.

⁴¹ See Smith & Hogan, *The Criminal Law*, 12th ed., p.438.

56. Note that by s.65(1) SCA2007, a reference to a person's "*doing an act* that is capable of encouraging the commission of an offence *includes* a reference to his *doing so by threatening another person or otherwise putting pressure on another person* to commit the offence". It will be seen that s.65(1) is confined to "encouraging" the commission of an offence.⁴²

Assisting

57. The word 'assisting' is not comprehensively defined by the Serious Crime Act 2007.⁴³ The Law Commission's Consultation Paper said that assisting in its normal sense 'extends to any conduct on the part of D that, as a matter of fact, makes it easier for P to commit the principal offence' (Consultation Paper No 131, para 4.48; para 5.46, Law Com No 300).
58. Note that the act of assistance or encouragement need not be substantial.

"Doing an act that is capable of encouraging or assisting the commission of an offence"

59. References to "doing an act that is capable of encouraging or assisting the commission of an offence" include:
- Taking steps to reduce the possibility of criminal proceedings being brought in respect of that offence (s.65(2)(a), SCA 2007).
 - A person may 'encourage' or 'assist' by failing to take reasonable steps to discharge a duty (s.65(2)(b), SCA 2007).
 - A person does not do an act that is 'capable of encouraging or assisting the commission of an offence' merely by failing to respond to a constable's request for assistance in preventing a breach of the peace (s.65(3), SCA 2007).⁴⁴

"Encouraging or assisting the commission of an offence"

60. Note that by s.64, the expression "encouraging or assisting the commission of an offence" is to be read in accordance with s.47. Section 47 is a convoluted provision that is principally concerned with proving alternative states of mind of the accused.

⁴² See Law Com. No. 300, para 5.37.

⁴³ For further discussion concerning the use of the word 'assist' in the context of secondary liability, see the article by Professor William Wilson, '*A Rational Scheme of Liability for Participating in Crime*' (2008) Crim LR 3.

⁴⁴ See the recommendations of the Law Commission ((Law Com No 300, para 5.46)); and see *Attorney-General v Able* (1984) QB 795.

Other points relating to “encouraging” or “assisting”

61. An act of encouragement or assistance need not be inherently illegal.
62. Actual encouragement or assistance need not be proved – the act need only be capable of encouraging or assisting.
63. The fact that the anticipated perpetrator (e.g. the may be unaware of the fact that he/she has been given (or is being) encouragement or assistance, is immaterial.

“Anticipated offence”

64. This expression is often used as ‘shorthand’ to mean simply the offence which D is alleged to have encouraged or assisted. For most purposes, this interpretation is sufficiently accurate.
65. However, it is as well to note that the expression “anticipated offence” is formally defined by s.47(9) of the 2007 Act to mean (unless otherwise provided):
 - (a) in relation to an offence under s.44, an offence mentioned in s.47(2) [i.e. the offence in respect of which D *intended* to encourage or assist in its commission]; and
 - (b) in relation to an offence under s.45, an offence mentioned in s.47(3) [i.e. the offence in respect of which D *believed* that he would be encouraging or assisting in its commission].
66. In relation to an offence under s.46, the meaning of the expression “anticipated offence” varies slightly depending on the context of the section where that expression appears but, it tends to mean “one of the offences specified in the indictment” [noting s.48(3) and (4)]. Thus “anticipated offence” means:
 - a. for the purposes of s.50 (defence of acting reasonably): “the offences specified in the indictment”.⁴⁵
 - b. For the purposes of s.54 (institution of proceedings): “any offence specified in the indictment”.⁴⁶
 - c. For the purpose of s.56 (persons who may be perpetrators or encouragers): “an offence specified in the indictment”.⁴⁷
 - d. For the purpose of schd.4, para.4 (extra territoriality) “any of the offences specified in the indictment”.

⁴⁵ See s.50(3)(a), SCA 2007.

⁴⁶ See s.54(3) SCA 2007.

⁴⁷ See s.56(3), SCA2007.

THE THREE INCHOATE OFFENCES ⁴⁸

Intentionally encouraging or assisting an offence: s.44 SCA2007

67. Section 44 of the SCA 2007 provides [emphasis supplied]:

- “(1) A person commits an offence if—
(a) he *does an act* capable of encouraging or assisting the commission of an offence; and
(b) he intends to encourage or assist its commission.
(2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.”

68. Section 44 must be read together with s.47(2), (5), (7), (8), and s 49(1) and (2), and s.67 ^[49].

69. Broadly, stated, the ingredients of the s.44 offence are:

(1) D must do an act that is capable of encouraging or assisting the commission of an offence [s.44(1)(a)];

(2) D must *intend* to encourage or to assist [P] to commit the anticipated offence, that is to say, it is D’s purpose⁵⁰ to do so [s.44(1)(b)].

IT IS IMPORTANT TO NOTE that although s.44 clumsily uses the phrase “commission of an *offence*”, s.47(2) makes it clear that it is sufficient to prove that D intended to “encourage or assist the doing of an act” [i.e. done by P] “which would amount to the commission of that offence”. This is a reference to the *conduct element* of the actus reus of the offence.

IT MUST ALSO BE PROVED THAT....

(3) D must have one of the states of mind set out in s.47(5):

- (a) if the offence is one requiring **proof of fault**, it must be proved that:
- (i) D *believed* that, were the act to be done, it would be done with that fault;
 - (ii) D was *reckless* as to whether or not it would be done with that fault; or
 - (iii) D’s state of mind was such that, were he to do it, it would be done with that fault; and

⁴⁸ The rules and elements relating to these three offences are considered in detail in chapter 6 of “*The Serious Crime Act 2007*” (Blackstone’s Guide, OUP, 2008), and see Smith & Hogan, *Criminal Law*, 12th ed., p.446-464.

⁴⁹ A reference to “an act” in Part 2 of SCA 2007, “includes a reference to a course of conduct”.

⁵⁰ See the heading “The virtual certainty conundrum: s.44(2) and s.47(7)(b)” below.

- (b) If the offence is one requiring proof of particular *circumstances* or *consequences* (or both), it must be proved that:
 - (i) D *intended or believed*⁵¹ that, were the act to be done, it would be done in those circumstances or with those consequences; or
 - (ii) D was *reckless* as to whether or not it would be done in those circumstances or with those consequences.

- 70. D can face multiple counts under s.44 flowing from one act of encouragement or assistance (eg where D provides P with an official ‘stamp’ that assists P to ostensibly ‘authenticate’ a number of instruments, which are in fact false): s.49(2).

- 71. Section 49(1) states, in effect, that a person may commit an offence under s.44 whether or not the anticipated offence is actually committed.

- 72. Note that for the purposes of this offence, D1 will be held *indirectly liable* if he arranged for D2 to do an act that was capable of encouraging or assisting the commission of an offence, and D2 did that act: s.66: see the paragraphs under the heading “*Indirect encouragement or assistance*” (below).

- 73. Note that for the purposes of the offence under s.44 (*but not for the purposes of s.45 or s.46*), D may also be convicted under this section if, for example:
 - a. D does an act that is capable of encouraging or assisting D2 and D3 to *conspire* to commit an offence; or
 - b. D does an act that is capable of encouraging or assisting another person (D2) to *attempt* to commit an offence; or
 - c. D does an act that is capable of encouraging/assisting D2 to do act which is *capable of assisting or encouraging* P to commit a crime. For example, D (intentionally) encourages D2 to hire P to firebomb V’s house, but P is arrested before he can commit the offence of arson.

The “virtual certainty” conundrum: s.44(2) and s.47(7)(b)

The meaning of “intention”

- 74. It is a requirement of s.44(1)(b) that D intends to encourage or to assist the commission of an offence. The issue of what constitutes “intention” arises again if the anticipated offence is one to which s.47(5)(b)(i) applies.

⁵¹ See s 47(7)(a) of the Serious Crime Act 2007, which modifies the wording of s 47(5)(b)(i) for the purposes of s 44 of the Act.

75. A troublesome question is, what is meant by “intention”? Is intention confined solely to D’s purpose, or is it enough to prove that (a) the offending *consequence* was a virtual certainty (barring some unforeseen intervention) as a result of D’s actions, and (b) that D appreciated that such was the case?
76. Section 44(1)(b) is to be read together with s.44(2). The latter provides:
“But [D] is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act”?
77. Section 47(5)(b)(i) is to be read together with s.47(7)(b). The latter provides:
“D is not to be taken to have intended that an act would be done in particular circumstances or with particular consequences merely because its being done in those circumstances or with those consequences was a foreseeable consequence of his act of encouragement or assistance”?
78. What is the effect of s.44(2) and s.47(7)(b)? The Explanatory Notes to the SCA 2007 shed little light, merely stating that the provisions make “it clear that foresight of consequences is not sufficient to establish intention” [paras.146, 160]. Home Office Circular 2008/04 is expressed in identical terms. Unhappily, both documents are capable of two interpretations that are mutually exclusive, namely:
- (i) That s.44(2) and s.47(7)(b) merely give effect to the *Woollin / Nedrick* approach (i.e. the virtual certainty concept, see below);
 - (ii) That the concept of virtual certainty has no application for the purposes of Part 2!
79. The learned editors of *Blackstone’s Criminal Practice 2009* (A6.16) state [emphasis added]:
Section 44(2) states that a consequence is not intended merely because it was foreseeable; *but that is trite law, since the CJA 1967, s.8, has for many years laid down such a rule...*The explanatory notes to s.44 suggest that s.44(2) (and s.47(7)(b)) were meant to distinguish between direct intent (aim or purpose) on the one hand and oblique intent on the other, only the former sufficing for liability; but arguably they state a different rule. Some kind of oblique intent might therefore suffice; but if D’s intent is unclear it would probably be easier to charge him under s.45 or s.46.
80. If “some kind of oblique intent might...suffice” then it is difficult to state what kind of intent that is. Part 2 is incoherent enough without further complexities being added to it.
81. Section 8 of the CJA 1967 provides as follows:
A court or jury, in determining whether a person has committed an offence,—

- (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
- (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.
82. Section 8 CJA 1967 does not import mens rea into an offence – it merely states how intention or foresight is to be proved. Did Parliament really enact s.44(2) and s.47(7)(b) SCA 2007 to state “trite law” or, were those provisions meant to convey something more? The latter seems to be the case.
83. The debates in Parliament firmly suggest that the government proceeded on the basis that “intention” *excluded* the concept of “virtual certainty”. When (what is now) s.44(2) was examined as part of the Bill by the House of Commons General Committee, the Parliamentary Under-Secretary of State for Justice (Maria Eagle) said:⁵²
- “I hope that it assists...if I say that what we are trying to get at is that intention should be interpreted in a narrow way, *and should exclude the concept of virtual certainty*. It is equivalent to meaning that D’s purpose must be to assist or encourage the offence. The measure was a recommendation from the Law Commission following a lengthy debate and much concern. Following consultation, we have followed that recommendation.”
84. A statement to the same effect was made in the House of Lords by Baroness Scotland of Asthal on the 21st March 2007 in the context of both s.44(2) and s.47(7)(b): see *Hansard*, col.1236/37.⁵³
85. If that was Parliament’s reasoning behind those two provisions then it is to be regretted that Part 2 did not make it explicit that “intention” is synonymous with “purpose”.
86. It will be noted that Part 2 makes no express reference to “virtual certainty” at all - but it does seem that ss.44(2) and 47(7)(b) are concerned with that concept.

The concept of ‘virtual certainty’

87. There can be cases where it is not D’s purpose that P will engage in the *conduct element* of the principal offence, but that “D may nevertheless believe that it is ‘virtually certain’ that P will do so” [LC 300, para.3.84]. For example, D may assist P by selling a hammer to him. It is not D’s purpose that P should use it as a

⁵² *Hansard*, 3rd July 2007, col.211.

⁵³ “[s.44(2), s.47(7)] should be taken to mean D’s “purpose” and exclude the concept of virtual certainty. That was recommended, as I say, by the Law Commission, and we have followed it because we think it is sound.”

weapon but he foresees that P would be ‘virtually certain’ to use it in order to assault V. In the context of the law of homicide,⁵⁴ the following rule has been developed at common law [*italicised words in square brackets added*]:⁵⁵

“...in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm [*the consequence*] was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case. Where a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen. The decision is one for the jury to be reached upon a consideration of all the evidence.”

88. It is submitted that the concept of “virtual certainty” goes further than s.8 CJA 1967 because, in cases where the concept applies, it marks the level of awareness that has to be proved.
89. The burden was on Parliament to spell out whether, for the purposes of s.44(2) and s.47(7)(b), “intention” was to be interpreted in accordance with s.8 of the CJA 1967 or, that some higher test of oblique intention was required (e.g. building on the *Woollin* formula) or, whether “intention” means “purpose”. The statements made in both Houses of Parliament suggest that the latter is what Parliament had in mind.

The apparent ambiguity of the Law Commission's position

90. Law Com 300 says very little about the concept of virtual certainty – which is a pity given that s.44(2) and s.47(7)(b) are based on clause 18 of the Law Commission's Draft Bill⁵⁶ which is explained in a single sentence at para.A100:

“[cl.18] provides, in effect, that the word “intention” as used in [s.44] of the Bill excludes the criminal law concept of foresight of a virtual certainty. In other words, references to D's intention are references to his purpose.”

⁵⁴ And also in the context of having a firearm or ammunition in D's possession with intent to endanger life, contrary to s.16 of the Firearms Act 1968.

⁵⁵ per Lord Lane in *Nedrick* (1986) 83 Cr.App.R. 267, at p.271, [1986] 1 W.L.R. 1025, approved in *Woollin* [1999] 1 AC 82; and see *Jones* [1997] 1 Cr.App.R.46 in the context of the firearms legislation where the same principle can apply.

⁵⁶ Appended to Law Com 300.

91. By contrast, in Law Com 305, the Law Commission recommended that the *Woollin* /*Nedrick* concept of ‘virtual certainty’ *should apply* in respect of its recommendations for codifying derivative secondary liability:

“...if a jury found that D believed that, with his or her assistance or encouragement, it was ‘virtually certain’ that P would engage in the *conduct element* of the principal offence, they would be entitled - but not compelled - to find that D ‘intended’ that P should do so. As with determining P’s liability, foresight of virtual certainty is a basis for finding ‘intent’ but it is not a substitute for ‘intent.’” [LC 305, para. 3.88]

92. Unfortunately, para.3.88 of LC 305 ends with a confusing footnote⁵⁷ that reads “[this] is *consistent with the meaning of ‘intention’ set out in cl.18 of the Crime (Encouraging and Assisting) Bill appended to the first report. See also para A.100 of the first report.*”
93. It is submitted that regardless of the correct interpretation of footnote 93 (Law Com 305), the Law Commission did *not* intend that the concept of foresight of a virtual certainty should apply both to cases of inchoate liability and derivative secondary liability (i.e. in circumstances where a crime had been committed).
94. We can elaborate on the Law Commission’s reasoning a little further. In Law Com 305, the Law Commission recommended that for the purpose of *derivative secondary liability* “a jury should be directed that an intention to bring about a result may be found if it is shown that the defendant *believed* that the result was a virtually certain consequence of his or her action”.⁵⁸ However, there may be cases where the jury find that D did have the requisite belief but it declines to convict D on that basis. In such a case, D can be convicted of a Part 2 SCA offence. This puts into context para.3.90 of Law Com 305 [emphasis added]:

...where a jury, despite being of the view that D *believed* that it was ‘virtually certain’ that P would commit the conduct element of the principal offence, declined to make a finding of ‘intent’...our recommendations would enable D to be held *inchoately* liable for assisting or encouraging P to commit the principal offence.

Further incoherence

95. As if things are not difficult enough, there is a further twist. Although the Law Commission recommended that “intention” should be narrower in relation to *inchoate liability* for encouraging or assisting crime (as opposed to derivative secondary liability) it also recommended that there should be a “good purpose defence” in respect of the inchoate offences, namely, preventing the commission of any of those offences or, preventing/limiting the occurrence of harm, where

⁵⁷ Footnote 93.

⁵⁸ Law Com 305, para.3.87.

D's conduct was reasonable in the circumstances (see Law Com No 300, para A.57).⁵⁹ However, the 'good purpose' defence does not appear in Part 2 of the SCA 2007.

96. The Law Commission also recommended that there should be a defence of "acting reasonably" in respect of what are now the ss.45 and 46 offences, *but not in respect of the s.44 offence*. The justification for this was said to be that "If D intends his or her encouragement or assistance to lead to the commission of an offence, it ought not to be possible for D to have a defence by claiming that what he or she did was within the bounds of reasonableness" [para.1.32, Law Com.300]. The defence would be available in the following circumstances:

"...[to] prevent D being held liable for acts which, in the circumstances, D could reasonably have expected to be able to engage in free from the taint of criminality. In other words, it ought to be open to D to say that his or her conduct was reasonable in the circumstances" [para.6.19, LC 300].

97. However, Parliament went its own way and provided that the defence of "acting reasonably" applies to *all* offences in Part 2: section 50 SCA 2007 (see below).
98. Given the breadth of the defence in s.50 SCA 2007, there might be a debate about whether it matters whether s.44(2) or s.47(7)(b) excludes or embraces the concept of foresight of a consequence that is virtually certain.

The application of s.44(2) and s.47(7)(b) if the virtual certainty concept applies

99. When **s.44(2)** is read together with s.47(2), then the wording of s.44(2) becomes "D is not to be taken to have intended to encourage or assist P in the commission of the conduct element of the anticipated offence, merely because such encouragement or assistance was a foreseeable consequence of his act".
100. IF the concept of virtual certainty is relevant for the purposes of s.44(2), then the jury is not obliged to conclude that D had the requisite intent, but it may do so.

For example D, knowing that P made his money both from tobacco smuggling and as a licensed taxi driver, agreed that P could use one of his bank accounts. D foresaw that P might use the account for concealing the latter's criminal property but intended that it should be used only for P's legitimate business as a taxi driver.

101. If the jury is not sure that D had the requisite *intention* then the proper charge is that founded on *belief*, namely, s.45/46 SCA 2007.

⁵⁹ See para.6.16 Law Com No.300.

102. **Section 47(7)(b)** is capable of being read as follows, “D is not to be taken to have intended that an act performed by P which constitutes the *conduct element* of the actus reus, would be done by him/her in particular *circumstances* or with particular *consequences* merely because its being done in those circumstances or with those consequences was a foreseeable consequence of D’s act of encouragement or assistance”. For example, D is not to be taken as having intended that were P to stab V (*conduct*), that P would inflict g.b.h. on V (*consequence*), merely because D foresaw that by giving a knife to P (*assistance*) that g.b.h. would be the *consequence*. But, if the concept of virtual certainty is relevant for the purposes of this provision, then although the jury is not obliged to conclude that D had the requisite intent on that basis, it may do so if they feel sure that the g.b.h. was a virtual certainty (barring some unforeseen intervention) as a result of D’s actions *and* that the defendant appreciated that such was the case.

Encouraging or assisting, believing an offence will be committed: s.45 SCA2007

103. The accused (D) will be liable under s.45 of the SCA 2007 in the following circumstances:

- (1) D *does an act* (eg selling a gun to P) which is capable of encouraging or assisting the commission of an offence (e.g. armed robbery) [s.45(a)]; and
- (2) D *believes* that the anticipated offence *will* be committed (eg armed robbery) [s.45(b)(i)]; and
- (3) D *believes* that his act (e.g. supplying the gun to P) *will* encourage or assist the commission of “the offence” (or, more accurately, that it will assist P to commit the *conduct element* of the offence) [s.45(b)(ii)].
- (4) It is sufficient to prove (both):
 - i. That D *believed* that an act would be done [by P], e.g. that P would threaten violence with the use of the gun, which ‘would amount to the commission’ of the anticipated offence (e.g. robbery) [s.47(3)(a)]; and
 - ii. That D believed that ‘his act’ (i.e. *D’s act*) would encourage or assist the doing of ‘that act’ (i.e. *P’s act*) e.g. threatening violence with the use of the gun) [s.47(3)(b)].

IT MUST ALSO BE PROVED THAT....

- (5) At the time that he believed that the act would be done (i.e. an act done by P), D had one of the states of mind described in s.47(5), that is to say:
 - (a) if the offence is one requiring proof of fault, it must be proved that:

- (i) D *believed* that, were the act to be done, it would be done with that fault;
 - (ii) D was *reckless* as to whether or not it would be done with that fault; or
 - (iii) D's state of mind was such that, were he to do it, it would be done with that fault; and
- (b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that:
- (i) D *believed* that, were the act to be done, it would be done in those circumstances or with those consequences; or
 - (ii) D was *reckless* as to whether or not it would be done in those circumstances or with those consequences.
104. Note that for the purposes of this offence, D1 will be held *indirectly liable* if he arranged for D2 to do an act that was capable of encouraging or assisting the commission of an offence, and D2 did that act: s.66: see the paragraphs under the heading "*Indirect encouragement or assistance*" (below).
105. A number of offences which, but for s.49(4)(b) of the SCA 2007, would be regarded as 'anticipated'/principal offences for the purposes of Part 2, are to be 'disregarded'. These are the "listed offences" [**Appendix B**] in Parts 1, 2, and 3 of Sch 3 (England and Wales) and those offences listed in Parts 1, 4, and 5 (Northern Ireland) of that Schedule, as well as those created under Part 2 (ie ss.44-46). This aspect of the legislation is considered in greater detail below. Accordingly, unlike the offence under s.44 of the SCA 2007, D cannot be convicted under s.45 by, for example:
- (a) doing an act that is capable of encouraging or assisting D2 and D3 to *conspire* to commit an offence, believing that the offence (conspiracy) will be committed; or
 - (b) doing an act that is capable of encouraging or assisting another person (D2) to *attempt* to commit an offence, believing that the offence (attempt) will be committed; or
 - (c) doing an act that is capable of encouraging/assisting D2 to do act which is capable of assisting P to commit a crime (inchoate-upon-inchoate).

Encouraging or assisting more than one offence: s.46

106. Section 46 must be read together with s.47(4), (5), s.48, and s.49(4).

107. The accused (D) will be liable under s.46 of the SCA 2007 in the following circumstances:

- (1) D *does an act* (eg giving bolt-croppers to P) which is capable of encouraging or assisting the commission of one or more of a number of offences (eg one or more burglaries) [s.46(1)(a)]; and
- (2) D *believes* that one or more anticipated offences *will* be committed (but has no belief as to which one will be committed) [s.46(1)(b)(i)]; and
- (3) D *believes* that his act (eg giving bolt-croppers to P) *will* encourage or assist the commission of at least one offence [s.46(1)(b)(ii)].
- (4) For the purposes of (3) above, it is sufficient to prove that:
 - (a) D *believes* that at least one *act* will be done [i.e., *by P*], e.g. P uses bolt-croppers to enter property belonging to another, which ‘would amount to the commission’ of at least one anticipated offence (eg burglary) [s.47(4)(a)]; and
 - (b) D *believed* that ‘his act’ (i.e. *D’s act*) would encourage or assist the doing of one or more of ‘those acts’ (e.g. P would use the bolt-croppers to enter property) [s.47(4)(b)].

IT MUST ALSO BE PROVED THAT....

- (5) At the time that D *believed* that at least one of those acts would be done (ie by D2), D had one of the states of mind described in s.47(5), that is to say:
 - (a) if the offence is one requiring proof of fault, it must be proved that—
 - (i) D *believed* that, were the act to be done, it would be done with that fault;
 - (ii) D was *reckless* as to whether or not it would be done with that fault; or
 - (iii) D’s state of mind was such that, were he to do it, it would be done with that fault; and
 - (b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that:
 - (i) D *believed* that, were the act to be done, it would be done in those circumstances or with those consequences; or
 - (ii) D was *reckless* as to whether or not it would be done in those circumstances or with those consequences.

108. Note that for the purposes of this offence, D1 will be held *indirectly liable* if he arranged for D2 to do an act that was capable of encouraging or assisting the commission of an offence, and D2 did that act: s.66: see the paragraphs under the heading “*Indirect encouragement or assistance*” (below).

WIDENING THE REACH OF THE THREE OFFENCES

Immaterial that the anticipated offence was committed

109. A person can be held liable under Part 2 of the SCA 2007 notwithstanding that the anticipated offence *has been* committed (s.49(1), SCA 2007). This is in line with the Law Commission’s recommendations.⁶⁰ This might occur if the prosecutor formed the view that there was insufficient evidence to convict D as a secondary party to the commission of a substantive offence, or if it is perceived that it would be easier to secure a conviction against D for an inchoate offence rather than for a substantive offence on the basis that D was an accessory.

Immaterial that the prosecution cannot prove whether D himself committed the full offence

110. To prevent D securing an acquittal in respect of an inchoate offence (brought under Part 2 of the Act), on the grounds that D *might have* committed the full offence, s.56 provides:

- “(1) In proceedings for an offence under this Part (‘the inchoate offence’) the defendant may be convicted if—
- (a) it is proved that he must have committed the inchoate offence or the anticipated offence; but
 - (b) it is not proved which of those offences he committed.
- (2) For the purposes of this section, a person is not to be treated as having committed the anticipated offence merely because he aided, abetted, counselled or procured its commission.
- (3) In relation to an offence under s.46, a reference in this section to the anticipated offence is to be read as a reference to an offence specified in the indictment.”

111. It is submitted that s.56(3) SCA2007 is intended to make clear that the words “committed...the anticipated offence” as they appear in s.56(1)(a), mean ‘committed the anticipated offence as a *principal offender*, i.e. not as an accessory pursuant to s.8 of the Accessories and Abettors Act 1861’.

⁶⁰ See Fortson “*The Serious Crime Act 2007*”, Blackstone’s Guide, para.6.124. See also, Law Com No 300, paras 5.8, A.45; and see footnote 3 (para A.3), footnote 56 (para A.45), footnote 60 (para A.47), footnote 77 (para A.52), footnote 79 (para A.53) and footnote 80 (para A.53).

D can be liable (s.44 only) if the anticipated offence is itself an inchoate offence

112. Although the common law offence of incitement has been repealed by s.59 of the SCA 2007, many statutory offences of incitement, soliciting, assisting, encouraging ('inciting'), conspiring, or attempting, the commission of a crime, have been retained. These are the "listed offences" set out in Parts 1, 2, and 3 of Sch.3 to the SCA 2007 for England and Wales [see **Appendix B**], and Parts 1, 4, and 5 of that Schedule for Northern Ireland. The offences retained include: solicitation of murder, attempting an act calculated or likely to cause sedition or disaffection,⁶¹ assisting unlawful immigration to a member State,⁶² inciting the commission of an offence contrary to the Misuse of Drugs Act 1971,⁶³ statutory conspiracy under s.1(1) of the Criminal Law Act 1977,⁶⁴ and criminal attempts under s.1(1) of the Criminal Attempts Act 1981.⁶⁵

113. However, for the purposes *only* of ss.45 and 46 of the SCA 2007, the aforementioned "listed offences" are to be "disregarded" *as well as any of the three inchoate offences enacted under Part 2 of the 2007 Act.*⁶⁶ There is no such exemption in relation to the s.44 offence.⁶⁷

114. Accordingly:

- a. A person can commit a s.44 offence by *intentionally* doing an act that is capable of encouraging another person to *conspire* to commit an offence (conspiracy being, in this instance, the anticipated/principal offence). It is not possible for a person to be convicted under either s.45 or s.46 of the SCA 2007, if he/she gave encouragement or assistance merely *believing* that a conspiracy (or some other inchoate crime) would be committed.
- b. Similarly, a person can commit a s.44 offence by *intentionally* doing an act that is capable of encouraging another person to *attempt* to commit an offence (the statutory attempt being the anticipated/principal offence).
- c. A person can commit a s.44 offence by *intentionally* doing an act that is capable of encouraging another person to commit any of the aforementioned "listed offences" in Sch 3 to the 2007 Act.

⁶¹ Contrary to s 3(1) of the Aliens Restriction (Amendment) Act 1919; see para 5, Part 1 of Sch 3 to the SCA 2007.

⁶² See s 25 of the Immigration Act 1971; para 11, Part 1 of Sch 3 to the SCA 2007.

⁶³ Section 19, MDA 1971.

⁶⁴ para 32, Part 2 of Sch 3, SCA 2007.

⁶⁵ para 33, Part 2 of Sch 3, SCA 2007.

⁶⁶ See s.49(4) SCA 2007. The reasoning for this is explained at paras.6.92-95, Fortson "*The Serious Crime Act 2007*", Blackstone's Guide. See also Law Com No 300, paras.7.16 -7.18.

⁶⁷ See s.49(4), SCA 2007.

- d. A person can commit a s.44 offence by *intentionally* doing an act that is capable of encouraging another person to commit one of the Part 2 SCA 2007 offences.

Indirect encouragement or assistance

115. By s.66 of the SCA 2007, “*if a person (D1) arranges for a person (D2) to do an act that is capable of encouraging or assisting the commission of an offence, and D2 does the act, D1 is also to be treated for the purposes of this Part as having done it.*”
116. The word “arranged” is left undefined in the SCA 2007, and the Act does not tell us what must be proved in relation to D1’s awareness of circumstances. It would seem – but, again, the Act does not tell us - that the reference to D2 could be a reference to the anticipated perpetrator of the substantive offence [P] or a person acting inchoately.
117. Section 66 of the SCA 2007, which mirrors cl.16 of the Law Commission’s draft Bill, was enacted so that “...a person such as a gang leader can be held liable for the encouragement or assistance provided by a member of his gang in carrying out his instructions”: para A.95, Law Com No 300.
118. It is submitted that there can be a hefty degree of overlap between facts that disclose indirect encouragement or assistance under s.66, and a case where D acts inchoately-upon-inchoately to commit a Part 2 offence. Nevertheless, in practice, this may matter little. Consider the following situations:
 - a. Indirect liability (s.66) and inchoate-upon-inchoate. Suppose D1 asks D2 to obtain a gun and to deliver it to P in circumstances where both D1 and D2 *intend* that P will use the gun to carry out a robbery. D2 acts as instructed. The act of providing the gun to P is an act that is capable of assisting P. Given the existence of the arrangement between D1 and D2, and the operation of s.66, D1 is guilty of the s.44 offence on that basis: i.e. ‘indirect liability’. As it happens, on the facts of this scenario – there would also be a conspiracy to commit robbery.

But, D1 has surely acted contrary to s.44 by intentionally encouraging D2 to commit the s.44 offence by intentionally assisting P (providing the latter with a gun) for the purpose of committing a robbery: i.e. inchoate-upon-inchoate liability.
 - b. Indirect liability (s.66). Suppose D1 asks D2 to obtain a chainsaw and to deliver it to P (D1 intending or believing that the chainsaw will be used by P to commit a robbery *but D1 does not tell D2 of that*

purpose: D2 is thus an innocent agent). Quite apart from any other route by which D1 is inchoately liable under Part 2 of the Act, D1 is also caught by s.66, namely, having “arranged” for D2 to do an act that was capable of assisting P to commit the anticipated offence of robbery. It is submitted that, for the purposes of s.66, it is immaterial that D2 was unaware of what was afoot. What matters is that there was an arrangement between D1 and D2 to act in a particular way.

- c. Neither ‘indirect liability’ nor inchoate-upon-inchoate liability?
Suppose D1 sells a gun to D2 in circumstances where D1 *believes* (but does not intend) that he is *assisting* D2 to *assist* P to commit robbery with the use of the gun. D1 cannot be held liable under s.44 (no intention – D1’s purpose is to effect a sale).

But is D1 liable under s.45 on an inchoate-upon-inchoate basis? The answer has to be ‘no’. It is true that D1 has done an act *believing* that it is capable of assisting D2 to commit a Part 2 offence (i.e. that D2, with the requisite *mens rea*, will do an act that is capable of assisting P to commit an offence). However, s.49(4) requires a Part 2 offence (or a ‘listed offence’) to be left out of the reckoning for the purposes of ss.45 and 46. D1 would have been liable under s.45 had he believed that D2 (rather than P) would commit robbery with the gun.

But, can it be said that D1 is *indirectly liable* for one of the Part 2 offences on the grounds that he has “arranged for a person (D2) to do an act that is capable of encouraging or assisting the commission of an offence” within the meaning of s.66 of the Act? Once again, this must turn on what we mean by “arranged” and what must be proved in relation to D1’s awareness of circumstances.

On one analysis of the situation in (c), D1 has not only done an act that is *capable* of assisting D2 but, by using D2, he has also done an act that is *capable* of assisting P. Nothing in ss.44-46 expressly limits each offence to the involvement of only two parties (D and P). But, is s.49(4) to be construed as having that effect in relation to offences under s.45 and s.46? If the answer is in the affirmative, then there is an argument for questioning the wisdom of that result. If D *believes* that P wishes to occasion V a.b.h., then it would seem that D can commit the s.45 Part 2 offence by sending, through an innocent intermediary, a hammer to P (which D believes P will use for that purpose). The result should not be different merely because D had used an intermediary who himself acted inchoately under s.45 having been encouraged by D to assist P to commit the anticipated offence.

Conspiracies and attempts to commit a Part 2 offence.

119. For the purposes of each of the three Part 2 offences, there can be inchoate-upon-inchoate liability by, in this instance, attempting (Criminal Attempts Act 1981) or conspiring (Criminal Law Act 1977) to commit the Part 2 offence. An example given by the author of Smith & Hogan, *Criminal Law*, is where D1 and D2 agree that D1 will do an act that is capable of encouraging or assisting P to commit an offence against V.⁶⁸ A further example is given below (example 3).
120. The reader must be careful not to confuse this form of inchoate-upon-inchoate liability (attempt or conspiracy to commit a Part 2 offence) with inchoate-upon-inchoate liability that moves in the opposite direction – i.e. committing a Part 2 offence where the anticipated offence is a statutory attempt or a statutory conspiracy. It is in the latter situation only that regard must be had to s.49(4) SCA 2007 which requires offences under Part 2, and the ‘listed offences’ [see **Appendix B**] in schedule 3 of the Act, to be “disregarded”. It is submitted that s.49(4) does not inhibit the charging a statutory attempt, or a statutory conspiracy, to commit a Part 2 offence.
121. There is a further trap here that must be avoided. This concerns s.47(8)(c) which states that the reference in s.47 to the ‘doing of an act’ includes reference to “*an attempt to do an act (except an act amounting to the commission of the offence of attempting to commit another offence)*”. It is easy to fall into the trap of thinking that the actions referred to in s.47(8) are actions performed by D. However, when s.47 is read in context, it is plain that the phrase ‘doing an act’ for the purpose of that section, refers to an act performed by the perpetrator [P] - and not by D.
122. To reinforce the point made in the preceding paragraph, s 47(8)(c) of the SCA 2007 follows the wording of cl.17(3)(b) of the Law Commission’s draft Bill. By cl.17, the “doing of a criminal act” includes a reference to “(b) an attempt to do an act (except in relation to an offence of attempting to commit another offence)”. The Law Commission explained c.17(3)(b) in the following terms:⁶⁹
- “D can be liable under [s.45, SCA 2007] in relation to the principal offence of burglary if he sells P a jemmy in the belief that it will be used to attempt burglary, even though he believes that the attempt will fail”.
- The Law Commission added:
- “If the principal offence in question is itself the offence of attempt, contrary to s.1 of the Criminal Attempts Act 1981, then clause 17(3)(b) is inapplicable. This explains the words in parentheses”.

⁶⁸ 12th edition, p.457, Professor David Ormerod.

⁶⁹ Paragraph A.99, Law Com.300.

123. Accordingly, if the principal offence alleged is a statutory attempt under the CAA 1981, then s.47(8)(c) is not applicable. The Law Commission concluded its reasoning by saying “It is to be noted that D can be liable under [s.44], but not [ss.45 or 46] in relation to a principal offence of attempt”⁷⁰.
124. It is a pity that the Law Commission confined its explanation to a mere footnote because, without it, s.47(8)(c) is ‘gobbledegook’. Worse, on one construction of s.47(8)(c), in every case where P has done enough to have committed an attempt to commit an offence but he is, for whatever reason, unable to complete the offence, then P’s conduct might be said to come within the words in parenthesis in s.47(8)(c) and therefore P’s acts fall outside s.47 completely! This would be absurd.
125. It is submitted that the actual purpose of s.47(8)(c) is to keep s.47 consistent with the effect of s.49(4) and thus to limit the extent to which Part 2 can be charged inchoately-upon-inchoately. Therefore, one must *have regard to D’s state of mind at the moment that he did the act complained of*. Three situations can be contrasted:
- a. If D did an act which he intended or believed would encourage or assist the commission of the full offence (e.g. theft) then the fact that P did an act which just fell short of the commission of the full offence, would not excuse D of liability under one of the Part 2 offences.
 - b. If the prosecution case is that D *intended* to encourage or assist P to commit an offence contrary to the CCA 1981, *but* D believed that the attempt would fail, then this constitutes a s.44 offence.
 - c. If the prosecution case is that D *believed* that his act would encourage or assist P to commit an offence contrary to the CCA 1981 but, D also believed that the attempt would fail, then D is not liable for any of the Part 2 offences. The offences under ss.45 and 46 SCA 2007 are unavailable by virtue of s.49(4) of that Act.

Alternative offences

126. Suppose D is charged with an offence contrary to s.44 in which the anticipated offence is alleged to be inflicting grievous bodily harm. There might be circumstances in which the jury decline to convict D on the basis of that anticipated offence. However, an alternative verdict might be permissible under s.57 SCA 2007, e.g. that D, contrary to s.44 SCA 2007, did an act that was capable of assisting or encouraging P to commit actual bodily harm (an ‘alternative’ offence - applying traditional principles, e.g. s.6(3), CLA 1967). In this example,

⁷⁰ See Law Com. No.300, para.A101, fn.111.

abh would be an alternative “anticipated offence” – confusingly called a “specified offence” for the purposes of s.57: see s.57(9).

127. However, if the proposed ‘alternative offence’ is itself a “listed offence” (within the meaning of s.49(5) – usually statutory inchoate offences) but D’s mental state is rooted in *belief*, then the constraints imposed by s.49(4) apply, i.e. that there could only be liability under s.44 (this appears to be the combined effect of s.57(8) and s.49(4)).

The potential impact of Part 2 on ‘fraud cases’

128. This is best demonstrated by way of a few examples.

129. **Example 1:** P asks D (a retailer) to supply him with a large quantity of methylated spirits and several boxes of firelighters. P confides in D that he is in financial difficulties and that his “only way out” is to burn down his [P’s] factory building and claim off the insurance. D advises P not to commit arson but he sells P the materials nonetheless. P, having doused the factory office with the methylated spirits, is arrested there whilst in the act of trying to set fire to the office door. Assuming that the anticipated offences are alleged to be (i) arson and (ii) a fraudulent insurance claim [ss.1 and 2 Fraud Act 2006].

- a. D is not guilty of the s.44 offence: it was not D’s purpose to assist P to carry out the *actus reus* of arson or fraud;
- b. D did an act that was capable of assisting P to commit arson and fraud [consideration would need to be given to charging under s.46 (two anticipated offences) rather than s.45];
- c. D *believed* that the offence (one or more offences: s.46) would be committed and that his act will assist P in that regard and s.47(3) [or 47(4) as the case may be] is satisfied.
- d. D *believed* that the application of a flame by P (*conduct element*) would be done to property belonging to another (*circumstances*) with a view to destroying or damaging property (*consequences*): see s.47(5)-(9).
- e. D *believed* that P would make a representation (*conduct*) that was false (*circumstance*) with the fault required for the Fraud Act offence: s.47(5)-(9).
- f. P (not D this time!) commits a s.44 Part 2 offence (inchoately upon inchoately) because he intentionally encouraged D to commit the s.45 or s.46 offence in relation to P!

130. **Example 2:** D occasionally buys goods from X Ltd. P is an employee with that company. In order to obtain goods at a cheaper price, D encourages P to give him a 'trade discount' to which D was not entitled (as P well knew), and that D and P would 'split the difference'. D knew that this would involve P abusing his position at X Ltd. P and D are arrested after such a sale took place.

- a. It is open to the prosecution to charge P with a Fraud Act offence (ss.1 and 4)⁷¹ and to charge D with the same offence as a secondary party (s.8 of the Accessories and Abettors Act 1861).
- b. D, by his words, encouraged P to commit the Fraud Act offence (the 'anticipated offence'): s.44(1)(a);
- c. D intended to encourage P to commit that offence: s.44(1)(b);
- d. D intended that P would 'do an act' that abused his position within X Ltd: s.47(2);
- e. D intended and/or believed that were P to abuse his position (*conduct*) that P would do so dishonestly whilst P occupied a position in which he is expected to safeguard or not to act against the financial interests of another person (*circumstances*): s.47(5)-(7) [and see s.4 FA 2006].
- f. The fact that the anticipated offence was committed does not prevent D being liable under s.44: see s.49(1).
- g. Note that there are circumstances in which even were a court to conclude that a defendant must have committed the s.44 offence or the anticipated offence, but is it not proved which of those offences he committed, the defendant may nonetheless be convicted of the s.44 offence: s.56. However, it is questionable whether on the facts of this example, s.56 is engaged at all. This is by reason of the confusing wording of s.56(2) which, it is submitted, is intended to make clear that the words in s.56(1)(a) 'committed...the anticipated offence' mean 'committed the anticipated offence as a principal offender and not as an accessory pursuant to s.8 of the Accessories and Abettors Act 1861'. In this example, D's liability for the full offence is pursuant to s.8 of the AAA 1861.

131. **Example 3:** D1 and D2 conspired to import large quantities of tobacco on which duty will be evaded. They also agree that D1, will encourage P who works in

⁷¹ Section 4 FA 2006: "A person is in breach of this section if he: (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, (b) dishonestly abuses that position, and (c) intends, by means of the abuse of that position: (i) to make a gain for himself or another, or (ii) to cause loss to another or to expose another to a risk of loss."

Casino Royale Plc, to arrange for one of the company's bank accounts to be used to facilitate the acquisition, retention, use or control of criminal property obtained by D1 and D2, contrary to s.327 POCA 2002. D1 and D2 are arrested before they do any acts that are capable of encouraging P to commit the s.327 POCA offence.

- a. There is a statutory conspiracy, as between D1 and D2, to money launder;
- b. There is a statutory conspiracy, as between D1 and D2, to commit the s.44 SCA 2007 offence and it is self-evident that the fact that no offence contrary to s.327 POCA 2002 was committed, is immaterial.

DEFENCE: ACTING REASONABLY: S.50 SCA2007

132. By s.50 of the SCA 2007, it is a defence for an accused to prove that, at the time that he did an act which was capable of encouraging or assisting another person to commit an offence, he knew, or believed (on reasonable grounds), that 'certain circumstances' existed in respect of which it was reasonable for him to act as he did (or, if s.50(2) applies, to show that he acted as he did in the circumstances as he believed them to be).
133. There are a number of statutory factors (see s.50(3)) that must be considered by the court when deciding whether the defendant's actions were reasonable in the circumstances, and these include:
 - (a) the seriousness of the anticipated offence (or, in the case of an offence under s.46, the offences specified in the indictment);
 - (b) any purpose for which he claims to have been acting;
 - (c) any authority by which he claims to have been acting.
134. The defence of 'acting reasonably' could be said to be too generous.⁷² However, there are two powerful disincentives for defendants who might be minded to run an unmeritorious defence under s.50 of the SCA 2007. First, (assuming s.50 is ECHR compliant), the burden of proving an offence rests on the accused. Secondly, in the event of a conviction for an offence under Part 2 of the Act, a defendant is likely to lose the mitigation available to those who plead guilty at the earliest opportunity.
135. The Law Commission had recommended a 'good purpose' defence which would have been available in respect of the ss.44–46 offences, namely, that D's purpose was (a) to preventing the commission of any of those offences that he or she was encouraging or assisting (or another offence); or (b) to prevent (or to limit) the

⁷² See the discussion in Smith & Hogan, *Criminal Law*, 12th ed., p.455.

occurrence of harm, and that in respect of either (a) or (b) that his conduct was reasonable in the circumstances (see Law Com No 300, para A.57).⁷³ The ‘good purpose’ defence does not appear in Part 2 of the SCA 2007.

136. Note that s 51 of the SCA2007, preserves the ‘*Tyrrell*’ exemption ((1894) 1 QB 710), that is to say it exempts from liability persons who fall within the category of persons that the principal offence was designed to protect.

JURISDICTION

137. A person (D) may be tried in England and Wales if he knew or believed that what he anticipated might take place there. It is immaterial where D was at the relevant time (s.52(1), SCA 2007). If it is not proved that D knew or believed that all or part of the anticipated offence would be performed somewhere in England and Wales, then he/she is not guilty of an offence under Part 2 of the SCA 2007 unless paras 1, 2, or 3 of Schedule 4 of the 2007 Act applies.

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⁷³ See para.6.16 Law Com No.300.

APPENDIX A: Extracts from the Serious Crime Act 2007

PART 2 ENCOURAGING OR ASSISTING CRIME

Inchoate offences

44 Intentionally encouraging or assisting an offence

- (1) A person commits an offence if—
 - (a) he does an act capable of encouraging or assisting the commission of an offence; and
 - (b) he intends to encourage or assist its commission.
- (2) But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act.

45 Encouraging or assisting an offence believing it will be committed

A person commits an offence if—

- (a) he does an act capable of encouraging or assisting the commission of an offence; and
- (b) he believes—
 - (i) that the offence will be committed; and
 - (ii) that his act will encourage or assist its commission.

46 Encouraging or assisting offences believing one or more will be committed

- (1) A person commits an offence if—
 - (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
 - (b) he believes—
 - (i) that one or more of those offences will be committed (but has no belief as to which); and
 - (ii) that his act will encourage or assist the commission of one or more of them.
- (2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted.
- (3) If a person is charged with an offence under subsection (1)—
 - (a) the indictment must specify the offences alleged to be the “number of offences” mentioned in paragraph (a) of that subsection; but
 - (b) nothing in paragraph (a) requires all the offences potentially comprised in that number to be specified.
- (4) In relation to an offence under this section, reference in this Part to the offences specified in the indictment is to the offences specified by virtue of subsection (3)(a).

47 Proving an offence under this Part

- (1) Sections 44, 45 and 46 are to be read in accordance with this section.
- (2) If it is alleged under section 44(1)(b) that a person (D) intended to encourage or assist the commission of an offence, it is sufficient to prove that he intended to encourage or assist the doing of an act which would amount to the commission of that offence.
- (3) If it is alleged under section 45(b) that a person (D) believed that an offence would be committed and that his act would encourage or assist its commission, it is sufficient to prove that he believed—
 - (a) that an act would be done which would amount to the commission of that offence; and
 - (b) that his act would encourage or assist the doing of that act.
- (4) If it is alleged under section 46(1)(b) that a person (D) believed that one or more of a number of offences would be committed and that his act would encourage or assist the commission of one or more of them, it is sufficient to prove that he believed—
 - (a) that one or more of a number of acts would be done which would amount to the commission of one or more of those offences; and
 - (b) that his act would encourage or assist the doing of one or more of those acts.
- (5) In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence—
 - (a) if the offence is one requiring proof of fault, it must be proved that—
 - (i) D believed that, were the act to be done, it would be done with that fault;
 - (ii) D was reckless as to whether or not it would be done with that fault; or
 - (iii) D’s state of mind was such that, were he to do it, it would be done with that fault; and

- (b) if the offence is one requiring proof of particular circumstances or consequences (or both), it must be proved that—
 - (i) D believed that, were the act to be done, it would be done in those circumstances or with those consequences; or
 - (ii) D was reckless as to whether or not it would be done in those circumstances or with those consequences.
- (6) For the purposes of subsection (5)(a)(iii), D is to be assumed to be able to do the act in question.
- (7) In the case of an offence under section 44—
 - (a) subsection (5)(b)(i) is to be read as if the reference to “D believed” were a reference to “D intended or believed”; but
 - (b) D is not to be taken to have intended that an act would be done in particular circumstances or with particular consequences merely because its being done in those circumstances or with those consequences was a foreseeable consequence of his act of encouragement or assistance.
- (8) Reference in this section to the doing of an act includes reference to—
 - (a) a failure to act;
 - (b) the continuation of an act that has already begun;
 - (c) an attempt to do an act (except an act amounting to the commission of the offence of attempting to commit another offence).
- (9) In the remaining provisions of this Part (unless otherwise provided) a reference to the anticipated offence is—
 - (a) in relation to an offence under section 44, a reference to the offence mentioned in subsection (2); and
 - (b) in relation to an offence under section 45, a reference to the offence mentioned in subsection (3).

48 Proving an offence under section 46

- (1) This section makes further provision about the application of section 47 to an offence under section 46.
- (2) It is sufficient to prove the matters mentioned in section 47(5) by reference to one offence only.
- (3) The offence or offences by reference to which those matters are proved must be one of the offences specified in the indictment.
- (4) Subsection (3) does not affect any enactment or rule of law under which a person charged with one offence may be convicted of another and is subject to section 57.

49 Supplemental provisions

- (1) A person may commit an offence under this Part whether or not any offence capable of being encouraged or assisted by his act is committed.
- (2) If a person's act is capable of encouraging or assisting the commission of a number of offences—
 - (a) section 44 applies separately in relation to each offence that he intends to encourage or assist to be committed; and
 - (b) section 45 applies separately in relation to each offence that he believes will be encouraged or assisted to be committed.
- (3) A person may, in relation to the same act, commit an offence under more than one provision of this Part.
- (4) In reckoning whether—
 - (a) for the purposes of section 45, an act is capable of encouraging or assisting the commission of an offence; or
 - (b) for the purposes of section 46, an act is capable of encouraging or assisting the commission of one or more of a number of offences;offences under this Part and listed offences are to be disregarded.
- (5) “Listed offence” means—
 - (a) in England and Wales, an offence listed in Part 1, 2 or 3 of Schedule 3; and
 - (b) in Northern Ireland, an offence listed in Part 1, 4 or 5 of that Schedule.
- (6) The Secretary of State may by order amend Schedule 3.

- (7) For the purposes of sections 45(b)(i) and 46(1)(b)(i) it is sufficient for the person concerned to believe that the offence (or one or more of the offences) will be committed if certain conditions are met.

Reasonableness defence

50 Defence of acting reasonably

- (1) A person is not guilty of an offence under this Part if he proves—
- (a) that he knew certain circumstances existed; and
 - (b) that it was reasonable for him to act as he did in those circumstances.
- (2) A person is not guilty of an offence under this Part if he proves—
- (a) that he believed certain circumstances to exist;
 - (b) that his belief was reasonable; and
 - (c) that it was reasonable for him to act as he did in the circumstances as he believed them to be.
- (3) Factors to be considered in determining whether it was reasonable for a person to act as he did include—
- (a) the seriousness of the anticipated offence (or, in the case of an offence under section 46, the offences specified in the indictment);
 - (b) any purpose for which he claims to have been acting;
 - (c) any authority by which he claims to have been acting.

Limitation on liability

51 Protective offences: victims not liable

- (1) In the case of protective offences, a person does not commit an offence under this Part by reference to such an offence if—
- (a) he falls within the protected category; and
 - (b) he is the person in respect of whom the protective offence was committed or would have been if it had been committed.
- (2) “Protective offence” means an offence that exists (wholly or in part) for the protection of a particular category of persons (“the protected category”).

Jurisdiction and procedure

52 Jurisdiction

- (1) If a person (D) knows or believes that what he anticipates might take place wholly or partly in England or Wales, he may be guilty of an offence under section 44, 45 or 46 no matter where he was at any relevant time.
- (2) If it is not proved that D knows or believes that what he anticipates might take place wholly or partly in England or Wales, he is not guilty of an offence under section 44, 45 or 46 unless paragraph 1, 2 or 3 of Schedule 4 applies.
- (3) A reference in this section (and in any of those paragraphs) to what D anticipates is to be read as follows—
- (a) in relation to an offence under section 44 or 45, it refers to the act which would amount to the commission of the anticipated offence;
 - (b) in relation to an offence under section 46, it refers to an act which would amount to the commission of any of the offences specified in the indictment.
- (4) In their application to Northern Ireland, this section and Schedule 4 have effect as if references to—
- (a) England or Wales; and
 - (b) England and Wales;
- were references to Northern Ireland.
- (5) Nothing in this section or Schedule 4 restricts the operation of any enactment by virtue of which an act constituting an offence under this Part is triable under the law of England and Wales or Northern Ireland.

53 Prosecution of offences triable by reason of Schedule 4

- No proceedings for an offence triable by reason of any provision of Schedule 4 may be instituted—
- (a) in England and Wales, except by, or with the consent of, the Attorney General; or
 - (b) in Northern Ireland, except by, or with the consent of, the Advocate General for Northern Ireland.

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

- (1) Any provision to which this section applies has effect with respect to an offence under this Part as it has effect with respect to the anticipated offence.
- (2) This section applies to provisions made by or under an enactment (whenever passed or made) that—
 - (a) provide that proceedings may not be instituted or carried on otherwise than by, or on behalf or with the consent of, any person (including any provision which also makes exceptions to the prohibition);
 - (b) confer power to institute proceedings;
 - (c) confer power to seize and detain property;
 - (d) confer a power of forfeiture, including any power to deal with anything liable to be forfeited.
- (3) In relation to an offence under section 46—
 - (a) the reference in subsection (1) to the anticipated offence is to be read as a reference to any offence specified in the indictment; and
 - (b) each of the offences specified in the indictment must be an offence in respect of which the prosecutor has power to institute proceedings.
- (4) Any consent to proceedings required as a result of this section is in addition to any consent required by section 53.
- (5) No proceedings for an offence under this Part are to be instituted against a person providing information society services who is established in an EEA State other than the United Kingdom unless the derogation condition is satisfied.
- (6) The derogation condition is satisfied where the institution of proceedings—
 - (a) is necessary to pursue the public interest objective;
 - (b) relates to an information society service that prejudices that objective or presents a serious and grave risk of prejudice to it; and
 - (c) is proportionate to that objective.
- (7) The public interest objective is public policy.
- (8) In this section “information society services” has the same meaning as in section 34, and subsection (7) of that section applies for the purposes of this section as it applies for the purposes of that section.

55 Mode of trial

- (1) An offence under section 44 or 45 is triable in the same way as the anticipated offence.
- (2) An offence under section 46 is triable on indictment.

56 Persons who may be perpetrators or encouragers etc.

- (1) In proceedings for an offence under this Part (“the inchoate offence”) the defendant may be convicted if—
 - (a) it is proved that he must have committed the inchoate offence or the anticipated offence; but
 - (b) it is not proved which of those offences he committed.
- (2) For the purposes of this section, a person is not to be treated as having committed the anticipated offence merely because he aided, abetted, counselled or procured its commission.
- (3) In relation to an offence under section 46, a reference in this section to the anticipated offence is to be read as a reference to an offence specified in the indictment.

57 Alternative verdicts and guilty pleas

- (1) If in proceedings on indictment for an offence under section 44 or 45 a person is not found guilty of that offence by reference to the specified offence, he may be found guilty of that offence by reference to an alternative offence.
- (2) If in proceedings for an offence under section 46 a person is not found guilty of that offence by reference to any specified offence, he may be found guilty of that offence by reference to one or more alternative offences.
- (3) If in proceedings for an offence under section 46 a person is found guilty of the offence by reference to one or more specified offences, he may also be found guilty of it by reference to one or more other alternative offences.
- (4) For the purposes of this section, an offence is an alternative offence if—
 - (a) it is an offence of which, on a trial on indictment for the specified offence, an accused may be found guilty; or

- (b) it is an indictable offence, or one to which section 40 of the Criminal Justice Act 1988 (c. 33) applies (power to include count for common assault etc. in indictment), and the condition in subsection (5) is satisfied.
- (5) The condition is that the allegations in the indictment charging the person with the offence under this Part amount to or include (expressly or by implication) an allegation of that offence by reference to it.
- (6) Subsection (4)(b) does not apply if the specified offence, or any of the specified offences, is murder or treason.
- (7) In the application of subsection (5) to proceedings for an offence under section 44, the allegations in the indictment are to be taken to include an allegation of that offence by reference to the offence of attempting to commit the specified offence.
- (8) Section 49(4) applies to an offence which is an alternative offence in relation to a specified offence as it applies to that specified offence.
- (9) In this section—
 - (a) in relation to a person charged with an offence under section 44 or 45, “the specified offence” means the offence specified in the indictment as the one alleged to be the anticipated offence;
 - (b) in relation to a person charged with an offence under section 46, “specified offence” means an offence specified in the indictment (within the meaning of subsection (4) of that section), and related expressions are to be read accordingly.
- (10) A person arraigned on an indictment for an offence under this Part may plead guilty to an offence of which he could be found guilty under this section on that indictment.
- (11) This section applies to an indictment containing more than one count as if each count were a separate indictment.
- (12) This section is without prejudice to—
 - (a) section 6(1)(b) and (3) of the Criminal Law Act 1967 (c.58);
 - (b) section 6(1)(b) and (2) of the Criminal Law Act (Northern Ireland) 1967, (c.18).

58 Penalties

- (1) Subsections (2) and (3) apply if—
 - (a) a person is convicted of an offence under section 44 or 45; or
 - (b) a person is convicted of an offence under section 46 by reference to only one offence (“the reference offence”).
- (2) If the anticipated or reference offence is murder, he is liable to imprisonment for life.
- (3) In any other case he is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence.
- (4) Subsections (5) to (7) apply if a person is convicted of an offence under section 46 by reference to more than one offence (“the reference offences”).
- (5) If one of the reference offences is murder, he is liable to imprisonment for life.
- (6) If none of the reference offences is murder but one or more of them is punishable with imprisonment, he is liable—
 - (a) to imprisonment for a term not exceeding the maximum term provided for any one of those offences (taking the longer or the longest term as the limit for the purposes of this paragraph where the terms provided differ); or
 - (b) to a fine.
- (7) In any other case he is liable to a fine.
- (8) Subsections (3), (6) and (7) are subject to any contrary provision made by or under—
 - (a) an Act; or
 - (b) Northern Ireland legislation.
- (9) In the case of an offence triable either way, the reference in subsection (6) to the maximum term provided for that offence is a reference to the maximum term so provided on conviction on indictment.

Consequential alterations of the law

59 Abolition of common law replaced by this Part

The common law offence of inciting the commission of another offence is abolished.

60 Amendments relating to service law

Schedule 5 (which amends enactments relating to service law) has effect.

61 Repeal of offence of enabling unauthorised access to computer material

- (1) The Police and Justice Act 2006 (c. 48) is amended as follows.
- (2) In section 35 (unauthorised access to computer material), omit subsection (2).
- (3) In section 36 (unauthorised acts with intent to impair operation of computer, etc.), in the section to be substituted for section 3 of the Computer Misuse Act 1990 (c.18)—
 - (a) in subsection (2)—
 - (i) at the end of paragraph (b), insert “or”; and
 - (ii) omit paragraph (d) and the word “or” preceding it;
 - (b) in subsection (3) for “to (d)” substitute “to (c)”.
- (4) In section 38 (transitional and saving provision), omit subsection (1).
- (5) In Schedule 14 (minor and consequential amendments), omit paragraphs 19(2) and 29(2).

62 No individual liability in respect of corporate manslaughter

In section 18 of the Corporate Manslaughter and Corporate Homicide Act 2007 (c.19) (no individual liability for offences under that Act) after subsection (1) insert—

“(1A) An individual cannot be guilty of an offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting crime) by reference to an offence of corporate manslaughter.”

63 Consequential amendments: Part 2

- (1) In the provisions listed in Part 1 of Schedule 6, any reference however expressed to (or to conduct amounting to) the offence abolished by section 59 has effect as a reference to (or to conduct amounting to) the offences under this Part.
- (2) Part 2 of Schedule 6 contains other minor and consequential amendments.
- (3) The Secretary of State may by order amend Part 1 of Schedule 6 by adding or removing a provision.

Interpretation: Part 2

64 Encouraging or assisting the commission of an offence

A reference in this Part to encouraging or assisting the commission of an offence is to be read in accordance with section 47.

65 Being capable of encouraging or assisting

- (1) A reference in this Part to a person's doing an act that is capable of encouraging the commission of an offence includes a reference to his doing so by threatening another person or otherwise putting pressure on another person to commit the offence.
- (2) A reference in this Part to a person's doing an act that is capable of encouraging or assisting the commission of an offence includes a reference to his doing so by—
 - (a) taking steps to reduce the possibility of criminal proceedings being brought in respect of that offence;
 - (b) failing to take reasonable steps to discharge a duty.
- (3) But a person is not to be regarded as doing an act that is capable of encouraging or assisting the commission of an offence merely because he fails to respond to a constable's request for assistance in preventing a breach of the peace.

66 Indirectly encouraging or assisting

If a person (D1) arranges for a person (D2) to do an act that is capable of encouraging or assisting the commission of an offence, and D2 does the act, D1 is also to be treated for the purposes of this Part as having done it.

67 Course of conduct

A reference in this Part to an act includes a reference to a course of conduct, and a reference to doing an act is to be read accordingly.

APPENDIX B: Listed offences

PART 1: OFFENCES COMMON TO ENGLAND AND WALES AND NORTHERN IRELAND

Offences against the Person Act 1861 (c. 100)

1 An offence under section 4 of the Offences against the Person Act 1861 (solicitation etc. of murder).

2 An offence under section 21 of that Act (attempting to choke etc. in order to commit or assist in the committing of any indictable offence) so far as it may be committed with the intention of enabling any other person to commit, or assisting any other person in the commission of, an indictable offence.

3 An offence under section 22 of that Act (using chloroform etc. to commit or assist in the committing of any indictable offence) so far as it may be committed with the intention of enabling any other person to commit, or assisting any other person in the commission of, an indictable offence.

4 But references in paragraphs 2 and 3 to any other person do not include reference to the person whose act is capable of encouraging or assisting the commission of the offence under section 21 or, as the case may be, section 22 of that Act.

Aliens Restriction (Amendment) Act 1919 (c. 92)

5 An offence under section 3(1) of the Aliens Restriction (Amendment) Act 1919 (acts calculated or likely to cause sedition or disaffection amongst HM forces etc.) consisting in attempting an act calculated or likely to cause sedition or disaffection in contravention of that subsection.

6 An offence under section 3(2) of that Act (promoting or attempting to promote industrial unrest) consisting in attempting to promote industrial unrest in contravention of that subsection.

Official Secrets Act 1920 (c. 75)

7 An offence under section 7 of the Official Secrets Act 1920 (soliciting etc. commission of an offence under that Act or the Official Secrets Act 1911 (c. 28)).

Incitement to Disaffection Act 1934 (c. 56)

8 An offence under section 1 of the Incitement to Disaffection Act 1934 (endeavouring to seduce members of HM forces from their duty or allegiance).

Misuse of Drugs Act 1971 (c. 38)

9 An offence under section 19 of the Misuse of Drugs Act 1971 (inciting any other offence under that Act).

10 An offence under section 20 of that Act (assisting or inducing commission outside United Kingdom of offence punishable under corresponding law).

Immigration Act 1971 (c. 77)

11 An offence under section 25 of the Immigration Act 1971 (assisting unlawful immigration to a member State).

12 An offence under section 25B of that Act (assisting entry to the United Kingdom in breach of deportation or exclusion order).

Representation of the People Act 1983 (c. 2)

13 An offence under section 97(1) of the Representation of the People Act 1983 (public meetings) consisting in the incitement of others to act in a disorderly manner for the purpose of preventing at a lawful public meeting to which that section applies the transaction of the business for which the meeting was called.

Computer Misuse Act 1990 (c. 18)

14 An offence under section 3A(1) of the Computer Misuse Act 1990 (making etc. article intending it to be used to commit, or to assist in the commission of, an offence under section 1 or 3 of that Act).

15 An offence under section 3A(2) of that Act (supply or offer to supply article believing it is likely to be used to commit, or to assist in the commission of, an offence under section 1 or 3 of that Act).

16 An offence under section 3A(3) of that Act (obtaining an article with a view to its being supplied for use to commit, or to assist in the commission of, an offence under section 1 or 3 of that Act).

Criminal Justice Act 1993 (c. 36)

17 An offence under section 52(2)(a) of the Criminal Justice Act 1993 (encouraging insider dealing).

Reserve Forces Act 1996 (c. 14)

18 An offence under section 101 of the Reserve Forces Act 1996 (inducing a person to desert or absent himself).

Landmines Act 1998 (c. 33)

19 An offence under section 2(2) of the Landmines Act 1998 (encouraging, assisting or inducing an offence under section 2(1) of that Act).

Terrorism Act 2006 (c. 11)

20 An offence under section 1(2) of the Terrorism Act 2006 (encouraging terrorism).

21 An offence under section 2(1) of that Act (disseminating terrorist publications).

22 An offence under section 5 of that Act (engaging in conduct in preparation for giving effect to intention to commit or assisting another to commit acts of terrorism).

23 An offence under section 6(1) of that Act (provision of instruction or training knowing that a person trained or instructed intends to use the skills obtained for or in connection with the commission of acts of terrorism or for assisting the commission or preparation of such acts by others).

24 An offence under section 6(2) of that Act as a result of paragraph (b)(ii) of that subsection (receipt of instruction or training intending to use the skills obtained for assisting the commission or preparation of acts of terrorism by others).

PART 2: OFFENCES UNDER PARTICULAR ENACTMENTS: ENGLAND AND WALES

Public Meeting Act 1908 (c. 66)

25 An offence under section 1(2) of the Public Meeting Act 1908 (inciting others to commit offences under that section).

Perjury Act 1911 (c. 6)

26 An offence under section 7(2) of the Perjury Act 1911 (inciting a person to commit an offence under that Act).

Prison Act 1952 (c. 52)

27 An offence under section 39(1) of the Prison Act 1952 (assisting a prisoner to escape).

Criminal Law Act 1967 (c. 58)

28 An offence under section 4(1) of the Criminal Law Act 1967 (assisting persons who have committed an offence).

29 An offence under section 5(1) of that Act (accepting or agreeing to accept consideration for not disclosing information about an offence).

Greater London Council (General Powers) Act 1973

30 An offence under section 13 of the Greater London Council (General Powers) Act 1973 (assaults etc. on officers) consisting in the aiding or inciting of any person to assault, resist or obstruct an officer of the Thames Water Authority duly exercising or performing any power or duty under a section or bylaw mentioned in that section.

Greater London Council (General Powers) Act 1974

31 An offence under section 21(6) of the Greater London Council (General Powers) Act 1974 (assaults etc. on officers of a borough council) consisting in the aiding or inciting of any person to assault, resist or obstruct an officer of a borough council duly exercising or performing any power or duty under section 21 of that Act.

Criminal Law Act 1977 (c. 45)

32 An offence under section 1(1) of the Criminal Law Act 1977 (conspiracy).

Criminal Attempts Act 1981 (c. 47)

33 An offence under section 1(1) of the Criminal Attempts Act 1981 (attempting to commit an offence).

Public Order Act 1986 (c. 64)

34 An offence under section 12(6) of the Public Order Act 1986 (inciting commission of offences under section 12(5) of that Act).

35 An offence under section 13(9) of that Act (inciting commission of offences under section 13(8) of that Act).

36 An offence under section 14(6) of that Act (inciting commission of offences under section 14(5) of that Act).

37 An offence under section 14B(3) of that Act (inciting commission of offences under section 14B(2) of that Act).

Terrorism Act 2000 (c. 11)

38 An offence under section 59 of the Terrorism Act 2000 (inciting in England and Wales the commission of acts of terrorism outside the United Kingdom).

PART 3 -- OTHER OFFENCES: ENGLAND AND WALES

39 An offence of conspiracy falling within section 5(2) or (3) of the Criminal Law Act 1977 (c. 45) (forms of conspiracy not affected by abolition of offence of conspiracy at common law).

40 (1) An attempt under a special statutory provision.

(2) Sub-paragraph (1) is to be read with section 3 of the Criminal Attempts Act 1981 (c. 47).

APPENDIX C: Which sections are in force?

The following provisions are in force (the table is not to be used for in-court purposes): note the transitional provisions set out in the relevant Statutory Instrument:

Section	Provision	Commencing	S.I.	Pertaining to:
1	section 1 (serious crime prevention orders);	6 April 2008	2008/755	SCPOs
2	section 2, and Part 1 of Schedule 1	6 April 2008	2008/755	SCPOs
3	section 3, and Part 2 of Schedule 1	6 April 2008	2008/755	SCPOs
4	Whole section	6 April 2008	2008/755	SCPOs
5	Whole section	6 April 2008	2008/755	SCPOs
6	Whole section	6 April 2008	2008/755	SCPOs
7	Whole section	6 April 2008	2008/755	SCPOs
8	Whole section	6 April 2008	2008/755	SCPOs
9	Whole section	6 April 2008	2008/755	SCPOs
10	Whole section	6 April 2008	2008/755	SCPOs
11	Whole section	6 April 2008	2008/755	SCPOs
12	Whole section	6 April 2008	2008/755	SCPOs
13	Whole section	6 April 2008	2008/755	SCPOs
14	Whole section	6 April 2008	2008/755	SCPOs
15	Whole section	6 April 2008	2008/755	SCPOs
16	Whole section	6 April 2008	2008/755	SCPOs
17	Whole section	6 April 2008	2008/755	SCPOs
18	Whole section	6 April 2008	2008/755	SCPOs
19	Whole section	6 April 2008	2008/755	SCPOs
20	Whole section	6 April 2008	2008/755	SCPOs
21	Whole section	6 April 2008	2008/755	SCPOs
22	Whole section	6 April 2008	2008/755	SCPOs
23	Whole section	6 April 2008	2008/755	SCPOs
24	Section 24(9) and (10)	1 March 2008	2008/219	SCPO: appeals from Crown Court; power of Sec of State
37	Section 37 (partially)	1 March 2008	2008/219	SCPO: "applicant authorities" (see s.10(4))
37	Whole section	6 April 2008	2008/755	SCPOs
38	Whole section	6 April 2008	2008/755	SCPOs
39	Whole section	6 April 2008	2008/755	SCPOs
40	Section 40(1), (2) and (4)	1 March 2008	2008/219	SCPO
40	section 40(3) and (5) to (8)	6 April 2008	2008/755	SCPOs
41	section 41 (retention of documents and interpretation);	6 April 2008	2008/755	SCPOs
42	section 42 (retention of documents and interpretation);	6 April 2008	2008/755	SCPOs

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Section	Provision	Commencing	S.I.	Pertaining to:
43	section 43 (retention of documents and interpretation);	6 April 2008	2008/755	SCPOs
44	Intentionally encouraging or assisting an offence	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
45	Encouraging or assisting an offence believing it will be committed	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
46	Encouraging or assisting offences believing one or more will be committed	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
47	Proving an offence under this Part	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
48	Proving an offence under section 46	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
49	Supplemental provisions	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
50	Defence of acting reasonably	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
51	Protective offences: victims not liable	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
52	Jurisdiction	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
53	Prosecution of offences triable by reason of Schedule 4	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
54	Institution of proceedings etc. for an offence under this Part	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
55	Mode of trial	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
56	Persons who may be perpetrators or encouragers etc.	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
57	Alternative verdicts and guilty pleas	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
58	Penalties	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
59	Abolition of common law replaced by this Part	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
60	Amendments relating to service law	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
61	Repeal of offence of enabling unauthorised access to computer material	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
62	No individual liability in respect of corporate manslaughter	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
63	Consequential amendments: Part 2	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Section	Provision	Commencing	S.I.	Pertaining to:
64	Encouraging or assisting the commission of an offence	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
65	Being capable of encouraging or assisting	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
66	Indirectly encouraging or assisting	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
67	Course of conduct	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
68	Subsections (1)-(7)	1 Oct 2008	2008/2504	disclosure of information to prevent fraud
68	Subsection (8)	1 March 2008	2008/219	Disclosure of information to prevent fraud
69	Whole section	1 Oct 2008	2008/2504	offence for certain further disclosures of information and penalty for that offence.
70	Whole section	1 Oct 2008	2008/2504	offence for certain further disclosures of information and penalty for that offence.
71	section 71(1), (2), (4) and (5)	1 March 2008	2008/219	code of practice for disclosure of information
71	Subsection (3) and (6)	1 Oct 2008	2008/2504	code of practice for disclosure of information to prevent fraud.
72	Whole section	1 Oct 2008	2008/2504	data protection rules.
73	section 73 (partially)	1 March 2008	2008/219	data Matching
73	section 73 and sched (to the extent not already in force)	6 April 2008	2008/755	data Matching
74	section 74(1)	1 March 2008	2008/219	abolition of ARA
74	section 74(2)(d) and (g) (partially)	1 March 2008	2008/219	abolition of ARA
74	section 74(3)	1 March 2008	2008/219	abolition of ARA
74	section 74(2)(a), (b), (c), (d) (now fully), (e), (f) and (g) (now fully) the rest of sched.8	1 April 2008	2008/755	abolition of ARA
74	section 74(4)	1 April 2008	2008/755	abolition of ARA
75	section 75(1) - (3)	6 April 2008	2008/755	Use of production orders for detained cash investigations
76	section 76(1) to (3)	6 April 2008	2008/755	Use of search warrants etc. for detained cash investigations
77	section 77, and paras. 9(1), (5) and (6) of Schedule 10, and para.107(3), sched.8	1 April 2008	2008/755	further provision re detained cash investigations

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Section	Provision	Commencing	S.I.	Pertaining to:
77	section 77 and schd.10 re paras.1, 2-8, 9 (to the extent not already in force), 10-13, 24, 25 (not Scotland), 26-28	6 April 2008	2008/755	Detained cash investigations
78	section 78 <i>{applies in relation to restraint orders whenever made}</i>	6 April 2008	2008/755	powers to seize property to which restraint orders apply
79	Whole section	6 April 2008	2008/755	powers to recover cash
80	Whole section	6 April 2008	2008/755	powers in relation to certain investigations, supplementary powers
81	Whole section	6 April 2008	2008/755	powers in relation to certain investigations, supplementary powers
82	section 82 <i>{s.82 does not apply to applications made under ss. 49, 51, 197 or s.199 POCA before 6/4/08}</i>	6 April 2008	2008/755	miscellaneous provisions about the proceeds of crime
83	Whole section	6 April 2008	2008/755	miscellaneous provisions about the proceeds of crime
84	Whole section	6 April 2008	2008/755	miscellaneous provisions about the proceeds of crime
85	Whole section	15 February 2008	2008/219	Disclosure of information by HMRC re proceeds of crime
87	Whole section	6 April 2008	2008/755	incidents involving serious violence: powers to stop and search
88	Whole section	15 February 2008	2008/219	extension of investigatory powers of HMRC
91	section 91(1) - in relation to paras.1-4 of schedule 13 SCA2007	6 April 2008	2008/755	SCPOs
91	section 91(1) and para.9, schd.13	6 April 2008	2008/755	Data Matching (transitional and transitory provisions and savings)
91	s.91(1) in so far as it relates to the provisions in subparagraph (g);	1 Oct 2008	2008/2504	transitional and transitory provisions and savings.
92	Section 92 (partially)	15 February 2008	2008/219	repeals and revocations
92	Re various entries in sched.14 SCA (i.e. those set out in art.2(d) SI2008/755)	1 April 2008	2008/755	repeals and revocations
92	In so far as it relates to the entries in sched.14 in sub-para.(i);	1 Oct 2008	2008/2504	Repeals and revocation,

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Section	Provision	Commencing	S.I.	Pertaining to:
schd.01	parts 1 and 2	6 April 2008	2008/755	SCPOs
schd.02	Schedule 2 (partially)	1 March 2008	2008/219	SCPOs
schd.02	paragraphs 1 to 3, 5 to 17 and 19 to 21 of Schedule 2	6 April 2008	2008/755	SCPOs
Schd.03	Listed offences	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
Schd.04	extra-territoriality	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
Schd.05	amendments relating to service law	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
Schd.06	minor and consequential amendments	1 Oct 2008	2008/2504	Inchoate liability for assisting/encouraging crime
schd.07	Schedule 7 (partially)	1 March 2008	2008/219	Data Matching
schd.08	Schedule 8 (partially)	1 March 2008	2008/219	abolition of ARA
schd.08	para.107(3), schd.8; and the rest of schd.8 (re s.74 SCA2007)	1 April 2008	2008/755	further provision re detained cash investigations
schd.09	Schedule 9	1 March 2008	2008/219	transfer of functions to SOCA or NPJA
schd.10	paras. 9(1), (5) and (6) of Schedule 10,	1 April 2008	2008/755	further provision re detained cash investigations
schd.10	paras.1, 2-8, 9 (to the extent not already in force), 10-13, 24, 25 (not Scotland), 26-28	6 April 2008	2008/755	Detained cash investigations
schd.11	schedule 11	6 April 2008	2008/755	powers to recover cash
schd.12	Schedule 12	15 February 2008	2008/219	HMRC regulation of investigatory powers
schd.13	paras.1-4 of schedule 13 SCA2007	6 April 2008	2008/755	SCPOs
schd.13	para.9, schd.13	6 April 2008	2008/755	Data Matching (transitional and transitory provisions and savings)
Schd.13	paragraphs 5, 6 and 8	1 Oct 2008	2008/2504	transitional and transitory provisions and savings.
schd.14	Schedule 14 (partially)	15 February 2008	2008/219	repeals and revocations
schd.14	various entries in sched.14 SCA (i.e. those set out in art.2(d) SI2008/755)	1 April 2008	2008/755	repeals and revocations

The Changing Face of Fraud Trials Update 2009
ENCOURAGING AND ASSISTING FRAUD: the Serious Crime Act 2007 Offences

Section	Provision	Commencing	S.I.	Pertaining to:
Schd.14	In so far as it relates to: (i) the Criminal Law Act 1977; (ii) the Magistrates' Courts Act 1980; (iii) the Magistrates' Courts (Northern Ireland) Order 1981; (iv) the Criminal Attempts and Conspiracy (Northern Ireland) Order 1983; (v) the Public Order Act 1986; (vi) the Computer Misuse Act 1990; (vii) the International Criminal Court Act 2001; (viii) the Police and Justice Act 2006.	1 Oct 2008	2008/2504	(repeals and revocation)

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