



## **Soliciting the Creation of Sexually Explicit Deepfakes: analysis of the current criminal law, loopholes and reform options**

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**Background:** The Government has [announced](#) plans to introduce a new offence criminalising the creation of sexually explicit deepfakes. It has rejected calls for this new measure to include a specific offence of solicitation, namely assisting and encouraging another to commit an offence including creating or distributing of an intimate image. The Parliamentary Under-Secretary of State at the Ministry of Justice, Alex Davies-Jones, is on [record](#) stating that no such specific offence is required as once a creation offence has been introduced, soliciting and procuring will be captured in the law. This confirms the [statement](#) of Lord Ponsonby in the House of Lords when responding to Baroness Owen's proposed [Non-Consensual Sexually Explicit Images and Videos \(Offences\) Bill 2024](#).

### **Executive Summary**

1. **The Government's position does not fully accord with our understanding of the current law.**
2. **Some cases of solicitation will be covered by existing law** but only where (a) the creator is in E&W or (b) where the location of the creator is known, and they are in a country where it is an offence to create/distribute a sexually explicit deepfake.
3. Therefore, **most cases of solicitation will not be covered** because (a) most often, the creator is anonymous and we do not know their location and (b) even if we know their location, they are most likely to be in a jurisdiction that does not criminalise these activities.
4. There are therefore **significant gaps in the law**.
5. A **specific offence of solicitation is therefore essential** to enable prosecution of a known individual (usually in E&W) where there is evidence they asked another to create sexually explicit deepfakes. This must include **specific provisions on the extraterritorial effect** of the offence.
6. There are **significant mis-understandings of the law among police and victims**. The law is exceptionally complex. Therefore, as with new offences on spiking, the 'rough sex' defence and similar, there is a clear benefit in introducing clarity to the law by creating new, specific offences.
7. The new law on encouraging or assisting serious self-harm in the Online Safety Act 2023 (sections 184-185) is an example to be followed as it understands the online context and sets out its extra-territorial effect.

## Analysis of current law, identification of gaps and options for reform

8. In this briefing we:
  - a. examine the current law, identify the loopholes and demonstrate why an offence of solicitation is needed<sup>1</sup>;
  - b. draw on the experiences of survivor-activist [Jodie](#) and the organisation #NotYourPorn to explain how even the current law, which is limited in scope, is not well understood by police or victims;
  - c. emphasise that specific consideration needs to be given to the nature of deepfake abuse, in particular its [commercial and community elements](#) which mean that soliciting, trading, creating and sharing sexually explicit deepfakes is commonplace and key to understanding the nature and extent of the abuse. The law must reflect this reality.

### Does the current law extend to cover soliciting (asking another) to create a sexually explicit deepfake?

9. In this brief the Defendant (D) is the person who solicits the creation of the deepfake (DF) (described in the current law as 'encouraging or assisting') and the Principal (P) is the person who is encouraged or assisted to commit the substantive offence of creation of a DF.
10. Under the current law liability of D for the soliciting of a DF would depend on whether P goes on to commit the substantive offence or not. If P creates the DF, D may be liable under common law rules as an accessory to P. If D does not commit the substantive offence or this cannot be proven, then D is liable in the alternative for the inchoate offence of 'assisting and encouraging'.

#### Accessory Liability (under common law)

11. D will be liable as an accomplice if he 'assists or encourages' P to commit a principal offence, and P does so. For the courts of England and Wales to prosecute D they must also have jurisdiction to prosecute P. This is regardless of whether a prosecution of P does in fact take place. The courts will have jurisdiction over an offence if a 'substantial measure' of the activity occurred in England and Wales. If P is located outside of England and Wales when the DF is created, the courts would not have jurisdiction over the offence. It follows that there would be no liability for D.

#### Liability under the inchoate offence of 'Assisting and Encouraging'

12. The Serious Crime Act 2007 also provides that D may be liable for assisting or encouraging an offence. Under this statute it is irrelevant whether P goes on to commit the principal offence. The offence is complete as soon as the acts amounting to encouraging or assisting occur. The statute sets out rules on the jurisdictional ambit of assisting and encouraging.

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<sup>1</sup> This note draws upon the [International Cooperation and Extradition Scoping Review project](#) for the Law Commission which is led by Gemma Davies and due to be published in February 2025.

### 13. Cases where the current law on encouraging or assisting a crime will apply:

- a. D in E&W asks P in E&W to create a DF: section 44 of Serious Crime Act 2007 law on encouraging/assisting a crime applies;
- b. D in X country asks P in E&W to create a DF: D commits an offence, section 52 Serious Crime Act 2007 applies. D likely only prosecutable with support of country X law enforcement and if extradition is sought.
- c. D in E&W asks P to create a DF in a country where creating/distribution of DF is an offence: Schedule 4, paragraph 2 of the Serious Crime Act 2007 will apply. Note that Scotland and Northern Ireland would have to criminalise creation of a DF for D in E&W to be liable for soliciting someone in Scotland or Northern Ireland to create a DF.
- d. Despite the provisions of the SCA 2007, we have been told of cases where police have not brought charges under the relevant law at the time on the basis that solicitation was not an offence. Secondly, we are aware of cases where the principal perpetrator (who created/distributed the image) was prosecuted but the abuse continued online as others continued to solicit further images and videos. The police did not further investigate, and no charges were brought.

### 14. Cases where jurisdiction for the offence of encouraging or assisting a crime will NOT be found:

- a. D in E&W asks P to create a DF in a country where creating/distribution of DF is **not** an offence:
- b. D in E&W asks P to create a DF where the place of creation/distribution is **not known**.
- c. This would clearly create a liability gap. Solicitation of images primarily takes place on online forums/platforms where individuals share information to facilitate the creation of an image and/or request that others create or share an image. We have been made aware of several cases where it is not known who a perpetrator asked to make the image, so the location of the creator is unknown.

## Jurisdiction in England and Wales (extraterritoriality)

15. The presumption in England and Wales is that a statute does not have extraterritorial effect unless expressly stated. This means that *only* conduct falling within the 'territory' of England and Wales would be prosecutable. In *Smith (Wallace Duncan) (No. 4)* ([2004] QB 1418), Lord Woolf reviewed conflicting authorities on the ambit of territorial jurisdiction and recognised (criminal) '*jurisdiction if either the last act took place in England or a substantial part of the crime was committed here and there was no reason of comity why it should not be tried here*'. The latter has been referred to as the 'substantial measure' test.
16. Accordingly, if an image is created by someone physically in this jurisdiction, then the courts would clearly have jurisdiction. If someone outside of England and Wales creates an image, then it is likely that this would not meet the 'substantial measure' test even if the victim is in England and Wales.
17. This is problematic as the liability of D for soliciting the deepfake as an accessory is dependent on the liability of P. Accessorial liability is a common law doctrine but is codified in section 8 of

the Accessories and Abettors Act 1861. The provisions are complex and can produce unfair results. D must 'aid, abet, counsel, or procure', the commission of an offence. This is interpreted as requiring D to have assisted or encouraged P or to have caused P's offence to come about. D's liability for the principal offence is derivative of P's conduct although P does not have to be convicted of the principal offence or even be identified.

18. However, if a substantial measure of P's conduct has not occurred in England and Wales, then P has not committed an offence and there is no possibility of deriving liability for D.

### **Is the act of soliciting adequately covered by the Serious Crime Act 2007?**

19. The inchoate offences of assisting or encouraging an offender are contained in Part 2 of the Serious Crime Act 2007. Unlike with accessorial liability, D is liable as soon as the conduct capable of assisting or encouraging is complete. It is irrelevant whether P goes on to commit the principal offence. Three separate offences were created by the Act in ss 44-46.
20. Under the Act if D is in E&W and he solicits P, also in E&W to commit an offence then D has committed an offence.
21. The provisions on assisting and encouraging also operate to extend liability if D asks someone in E&W to create the image, regardless of the location of D. Section 52(1) of the Serious Crime Act 2007 Act allows D to be convicted of an offence of encouraging or assisting a principal offence *wherever* D's relevant conduct occurred, so long as D "knows or believes" that the "anticipated" conduct element of the substantive offence "might" be committed "wholly or partly" in England or Wales.
22. As an example, if D, in the US, requests P, in the UK, to create or share an image D has committed a criminal offence in E&W regardless of whether P goes on to create the deepfake. The prosecution of D however would be reliant on the cooperation of US law enforcement in the investigation of the offence and the subsequent extradition of D to the UK to stand trial.
23. The position is more complicated if D is in E&W and solicits a deepfake from P, who is outside of E&W. This scenario is provided for in schedule 4 of the 2007 Act. There are two ways in which jurisdiction may be extended. Firstly, schedule 4, paragraph 1 provides jurisdiction if D does an act in England and Wales capable of encouraging or assisting and knows or believes that what he anticipates might take place outside of England and Wales. Liability can *only* be established if the offence is one which the perpetrator could be tried for in England and Wales if the anticipated offence were committed outside England and Wales. The principal offence of making a sexually explicit image would therefore need to extend extraterritorial jurisdiction and whatever requirements provided for in the Act (such as the perpetrator must habitually be resident in the UK) would need to apply.
24. Schedule 4, paragraph 2 provides an alternative way of establishing jurisdiction. If D has done the act capable of encouraging or assisting in England and Wales, and D knows or believes that what he anticipates might take place in a country outside of England and Wales and what he anticipates is also an offence under the law in force in that country then liability can be established.

25. There are unfortunately many states that do not currently criminalise the creating of sexually explicit images without consent. This creates a significant loophole in the law. A perpetrator would only have to reach out on an online forum to find a willing creator in a country that does not criminalise creating sexually explicit deepfakes and they would not be committing an offence. It is clearly unacceptable that a person in England and Wales who asks someone overseas to create a sexually explicit image escapes liability. This is also incompatible with the position that a person who is overseas and asks someone in England to create the image would have committed an offence.

### **Why create a specific offence of soliciting?**

26. If the Government criminalises the creation of sexually explicit deepfakes but does not create an express criminal offence of soliciting a deepfake with accompanying provisions on its extraterritorial effect, then there will be a **significant gap in the law**.
27. If the statute expressly criminalises solicitation, importantly, it could provide for its jurisdictional reach. This could make it an offence to solicit a deepfake regardless of the location of the person requested to make the image and regardless of whether it is known which person was in fact assisted and encouraged.
28. A recent example of the creation of a specific inchoate offence with its own jurisdictional reach can be found in the Online Safety Act 2024. s. 184 criminalises encouraging or assisting serious self-harm. The offence is committed regardless of the location of the person who is encouraged or assisted. The offence can also be committed extraterritorially (outside of the UK) but only if the relevant conduct is done by an individual habitually resident in the UK.
29. The creation of so called deepfakes are a profitable business, as [reported](#) by the BBC. It is therefore vital that requesting or paying someone to make a sexually explicit image be a criminal offence regardless of the location of the person who makes the deepfake.
30. Secondly, the law on assisting and encouraging is complicated and the experience of survivors is that it is consequently misunderstood by police and underutilised. Creating a specific solicitation offence will make it clearer to perpetrators and the police that it is a criminal offence to request someone else create a sexually explicit image.

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