

# TECHETHOS

FUTURE ○ TECHNOLOGY ○ ETHICS

## Annex 9.9 National legal case study: Digital Extended Reality in the UK

### D4.2 Comparative analysis of national legal case studies December 2022

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## D4.2 National legal case studies: Digital Extended Reality in the UK

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## The TechEthos Project

TechEthos is an EU-funded project that deals with the ethics of the new and emerging technologies anticipated to have a high socio-economic impact. The project involves ten scientific partners and six science engagement organizations and runs from January 2021 to the end of 2023.

TechEthos aims to facilitate “ethics by design”, namely, to bring ethical and societal values into the design and development of new and emerging technologies from the very beginning of the process. The project will produce operational ethics guidelines for three to four technologies for users such as researchers, research ethics committees, and policymakers. To reconcile the needs of research and innovation and the concerns of society, the project will explore the awareness, acceptance, and aspirations of academia, industry, and the general public alike and reflect them in the guidelines.

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## Definitions and abbreviations

Table 1: List of Definitions

Term	Explanation
Digital Extended Reality technologies (XR)	Refers to AI-powered digital technologies (hardware and software) capable of perceiving and processing human sensorial outputs, and allowing extended or mixed virtual scenarios to be tailor-made or “customized” based on the user interest and behaviour (and thus profile, model, predict, discriminate, and influence the user’s behaviour or nudge their choices)

Table 2: List of Abbreviations

Term	Explanation
AIA	Artificial Intelligence Act (AIA)
APPG	All Party Parliamentary Group
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CPRMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CPS	Criminal prosecution service
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DoA	Description of Action



DSA	Digital Services Act (EU)
ECHR	European Convention on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
GDPR	(UK or EU) General Data Protection Regulation
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MP	Member of Parliament
MR	Mixed Reality
NLP	Natural language processing
VLOP	Very large online platforms
VR	Virtual reality
WP	Work package
XR	Digital extended reality

# Abstract

This report provides a review of the current state of the law and legal responses to Digital Extended Reality in the UK, as evidenced in legislation, regulation, and case law. It focuses on those issues affecting and/or contributing to fundamental human rights and freedoms, socio-economic inequalities, and stimulation of innovation. Most relevant legal domains and regulatory bodies, and their views on the application of existing and proposed regulatory provisions relevant for XR, and significant legal cases are discussed in the report. The on-going discussions on gaps and challenges of these provisions is also provided, to feed into the TechEthos ethical, legal and social analysis and the design of ethics-by design guidelines for extended digital reality technologies.

A summary overview of the main findings and legal issues surrounding XR in the UK is provided in section 5.1.3 of the TechEthos D4.2 Comparative analysis of national legal case studies. This report is primarily aimed at informing the UK government and UK policy makers regarding the regulatory challenges of XR in the UK. Furthermore, it provides further background to readers to the specific UK context of the main points and key regulatory challenges identified in the comparative analysis to which this report is annexed.

# 1. Introduction

Digital Extended Reality (XR) is a cluster of different technologies (virtual reality, augmented reality, mixed reality, and natural language processing (NLP)) that mediate users' experience with digital technologies. These technologies pose significant legal issues that will impact on human rights, privacy, and social engagement with others. This study provides an overview of those legal issues and challenges.

This report analyses relevant laws and policies from the UK legal system concerning XR technologies. For the purpose of the TechEthos project and this national legal case study, we have used the following definition for XR technologies<sup>1</sup>:

**Digital Extended Reality technologies** refers to AI-powered digital technologies (hardware and software) capable of perceiving and processing human sensorial outputs, e.g., voice, gestures, language, movement, emotions, and other elements of human communication, allowing extended or mixed virtual scenarios (e.g., visual, audio, linguistic or haptic) to be tailor-made or “customized” based on the user interest and behaviour (and thus profile, model, predict, discriminate, and influence the user’s behaviour or nudge their choices).<sup>2</sup>

## 1.1 Purpose of the UK case study

The objective of this case study is to review the current state of the law and legal responses on XR in UK, as evidenced in policy, legislation, case law and regulation. We prepared this study through desk research.

Whilst there are no specific laws and policies on XR in the UK, many existing laws and policies (including human rights law, privacy and data protection law, use in criminal, civil and evidence law) are relevant and are likely to apply to the use of such technologies, including any harms resulting from them (covering tort, contract and criminal law in relation to liability for harms).

This report is part of a series of national legal case studies prepared in the TechEthos project covering three technology families: climate engineering, digital extended reality (XR), and neurotechnologies. A complementary report covers the international and European Union law dimensions of the three technology families. The following table provides an overview of the nine national legal case studies conducted as part of the *Comparative analysis of national legal case studies* (D4.2 of the TechEthos project):

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<sup>1</sup> For more information about the TechEthos technology families and their innovation ecosystems, visit <https://www.techethos.eu/resources/>.

<sup>2</sup> Buchinger E., Kinegger M., Zahradnik G., Bernstein M.J., Porcari A., Gonzalez G., Pimponi D., Buceti G. (2022). In short: Digital Extended Reality. TechEthos Project Factsheet based on TechEthos technology portfolio: Assessment and final selection of economically and ethically high impact technologies, Deliverable 1.2 to the European Commission. Available at: [www.techethos.eu](http://www.techethos.eu).



Table 3: Overview of nine national legal case studies (TechEthos WP4)

Climate Engineering	Neurotechnologies	Digital Extended Reality
Australia	Germany	France
Austria	Ireland	Italy
United Kingdom	United States	United Kingdom

## 1.2 Structure of the study

**Section II** explores the existing and proposed laws and policies that specifically address XR. **Section III** explores the legal implications of XR in relation to specific domains, including human rights law, privacy and data protection, use in legal systems, and liability for harms. **Section IV** provides an overview of the gaps and challenges in relation to the regulation of XR. **Section V** concludes the case study.

## 1.3 Scope and limitations

This national legal case study of the UK was prepared as part of the TechEthos project's work package 4 on policy, legal and regulatory analysis. Therefore, the scope is demarcated by the project task's workplan. Like the technology itself, the potential legal issues in relation to XR are still emerging. Therefore, the purpose of this national legal case study is to provide a high-level overview of the legal implications of XR in the UK, focusing on a pre-defined range of topics and legal frameworks with significant human rights and socio-economic impacts that are of high policy relevance.

## 1.4 Introduction to the UK legal system

### UK devolution

The United Kingdom (UK) is made up of four distinct territories: England, Wales, Scotland and Northern Ireland. Scotland and Northern Ireland have independent legislative assemblies where they can make their own laws. Scotland, Northern Ireland and Wales are devolved administrations, with only certain, differing powers passed on to them through UK Acts of Parliament. Those powers not devolved to them, are called 'reserved powers' and still sit with the UK Parliament. Devolved administrations do not have the legal competence to legislate in these areas, only the UK Parliament. Relevant Acts of Parliament are: the Scotland Act 1998, the Northern Ireland Act 1998, and the Government of Wales Act 1998, the Government of Wales Act 2006, and the Wales Act 2017. The Sewel Convention provides that the UK Parliament can legislate on devolved matters, but will not normally do so without consent of the devolved administrations.

### UK Parliament

There are 650 members of parliament (MPs), each representing a constituency from the four countries: England, Wales, Scotland and Northern Ireland. Scotland has a devolved Scottish Parliament (*Pàrlamaid na h-Alba*), as does Northern Ireland through the Northern Irish Assembly (Stormont). Finally, Wales has the Welsh parliament (Senedd Cymru).

The UK parliament is bicameral, meaning it is comprised of an upper and a lower house. The lower house is called the House of Commons and has democratically elected representatives for each constituency known as Members of Parliament (MPs). The House of Commons dates from the second half of the 13<sup>th</sup>

century to represent the interests of property owners.<sup>3</sup> The House of Lords is the upper House of Parliament, a non-elected body where members' role is to scrutinise bills. Appointed or hereditary members of the House of Lords have a range of titles (e.g., Lords, Ladies, Baroness, Countess, Duke, Marquess) and are often collectively referred to as peers.

The UK is described as a constitutional monarchy, a status which denotes that whilst acting as the head of state, the role of the monarch is limited, and its powers are mostly exercisable on the basis of advice from ministers.<sup>4</sup>

### UK legislative process

In the UK laws are called Bills while in the legislative stages, and only become Acts if they are approved by the two Houses of Parliament and receive Royal Assent. Legislative proposals can be initiated in either of the Houses and go through various stages: first reading, second reading, committee stage, report stage, and third reading, where upon a bill is transferred to the other House for its first reading or consideration of any amendments, depending on where it started. Before a bill can be enacted as an Act of Parliament, each of the Houses considers any amendments proposed by the other. In the event of disagreement, proposed amendments and counter-amendments will be exchanged in a process of 'ping pong' unless and until both Houses consent to the bill.<sup>5</sup> The final stage of the legislative process involves the grant of Royal Assent by the monarch in exercise of a prerogative power determined by constitutional convention to be a mere formality.<sup>6</sup> During the legislative process there is normally a consultation phase, with experts invited to participate. This can take place prior to the development of bills, or during the readings. Members of the public participate in these consultations either by attending specific APPG (All Party Parliamentary Group – normally invitation only), or via online consultations.

### Sources of law

The UK has no codified constitution. Instead of a single written constitution, sovereignty is the most important principle of UK constitutional law, the UK constitution comprises various statutes, conventions, judicial decisions and treaties. Parliamentary sovereignty is the most important principle of UK constitutional law, which provides that the UK Parliament is the ultimate legal authority to create or revoke laws.<sup>7</sup> The UK has a well-established legal framework of Common law (reliance on court precedence). Main sources of law:

- Common law / case law
- UK legislation (Acts of Parliament or the Parliaments of devolved administrations)
- Retained EU law
- International law

### Retained EU law

The UK is no longer a member of the European Union following the passing of the European Union (Withdrawal) Act 2018. Despite the UK leaving the European Union, the UK (all four territories) are still

<sup>3</sup> Britannica, n.d. House of Commons: British Government [Online] Retrieved 28.10.22  
<https://www.britannica.com/topic/House-of-Commons-British-government>

<sup>4</sup> Le Seur, A., Sunkin, M., and Murkens, J.E.K. (2016) *Public Law* (3<sup>rd</sup> edn. Oxford University Press, Oxford, UK) pp.261-263.

<sup>5</sup> Le Seur, A., Sunkin, M., and Murkens, J.E.K. (2016) *Public Law* (3<sup>rd</sup> edn. Oxford University Press, Oxford, UK) pp.451.

<sup>6</sup> Le Seur, A., Sunkin, M., and Murkens, J.E.K. (2016) *Public Law* (3<sup>rd</sup> edn. Oxford University Press, Oxford, UK) pp.451.

<sup>7</sup> *Parliament's authority / UK Parliament*, [Online]. Retrieved 28.10.22. Available at:  
<https://www.parliament.uk/about/how/role/sovereignty/>.



bound by some retained EU-derived domestic legislation, such as the Data Protection Act 2018, which implements the EU General Data Protection Regulation (GDPR). Furthermore, the UK is still a member of the Council of Europe and accepts the jurisdiction of the European Court of Human Rights. The European Convention on Human Rights (ECHR)<sup>8</sup> is implemented into UK domestic law through the Human Rights Act 1998.

## 1.5 Current state of digital extended reality (XR) in UK

There are no UK laws specifically developed or being developed to deal with XR. However, the UK government is in the process of debating the Online Safety Bill (hailed as the 'world-first online safety law'). Moreover, the UK will not sign up to the EU AI Act<sup>9</sup>, but instead is developing a Data Protection and Digital Information Bill that covers some of the concerns embedded in the AI Act.

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<sup>8</sup> ECHR (1953)

<sup>9</sup> EU AI Act. Retrieved 28.10.22 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206>



## 2. XR-specific legal developments

This section provides an overview of the legal and policy developments pertaining to XR in the UK. It examines relevant policies and laws in relation to XR and identifies the national authorities involved in the implementation and enforcement of such laws and policies.

### Existence of dedicated laws on XR

At present there are no UK laws that explicitly mention the regulation of XR. However, the Online Safety Bill<sup>10</sup> is still under discussion (with activists aiming to stop it for fears it will harm free speech) and is considered in greater detail in section IV.

### Proposals for dedicated law on XR

The Online Safety Bill (hailed as the 'world-first online safety' bill) is legislative proposal currently under discussion. This bill introduces a 'duty of care' for big technology companies who will have to follow its regulations to ensure a safe environment for their users. This includes the responsibility to amend their Terms and Conditions to be in line with the new directives, while removing all the harmful content posted on their platforms. Furthermore, it will give governments the right to fine (up to ten per cent of revenues) for illegal material, material relating to terrorism, and child sexual exploitation and abuse. Provisions will be made to address named categories of legal but harmful material accessed by adults.<sup>11</sup>

The bill will distinguish between adult and child users and ensure content is appropriately accessed by different age categories. Adults will be given rights to restrict their personal access to harmful (but legal) data (e.g., eating disorders, self-harm). Platforms will be required to report any child sexual exploitation and abuse content to the National Crime Agency and assist with law enforcement.<sup>12</sup>

The other significant legislation under discussion is the Data Protection and Information Bill<sup>13</sup> which is seen as a replacement to the European law of GDPR.

### Responsibility for enforcement

The Office for Communications (Ofcom) is the regulator for the communications services that the UK would use as a safety regulator for enforcement of the law. Fines of up to ten percent of income for companies will be made payable if the law is broken.

### Significant legal cases

A recent case in the UK where a child (Archie Battersbee<sup>14</sup>) imitated a game on Tik Tok and injured himself and then died.

<sup>10</sup> Online Safety Bill. Retrieved 28.10.22. Available at <https://bills.parliament.uk/bills/3137>

<sup>11</sup> The Draft Online Safety Bill and the legal but harmful debate: Government response to the Committee's Eight Report. Fifth Special Report of Session 2021-22. House of Commons, Digital, Culture, Media and Sport Committee. Retrieved 28.10.2022 Available at/

<https://committees.parliament.uk/publications/9408/documents/161169/default/>

<sup>12</sup> Online Safety Bill: factsheet. 19<sup>th</sup> April 2022. Retrieved 28.10.2022 Available at/

<https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet>

<sup>13</sup> Data Protection and Information Bill. Retrieved 28.10.2022. Available at <https://bills.parliament.uk/bills/3322>

<sup>14</sup> BBC (2022). Archie Battersbee: How did life support battle end up in court? 6<sup>th</sup> August 2022. [Online] Retrieved 28.10.22 Available at/ <https://www.bbc.co.uk/news/uk-england-essex-61829522>



A court case is underway by the parents of Molly Russell<sup>15</sup> (14 years old) who accessed self-harm images and material around depression and suicide on Instagram and Pinterest.

### Current debates and future policy and/or legal developments

The current debate and key message from child rights campaigners is to restrict harmful material to and of children. A counterargument put forward by activists is that the bill will harm legitimate freedom of speech by imposing restrictions on certain types of content. There is a range of debates where there is no social agreement and social media has been regulated in light of this, for example, during the covid-19 pandemic there was regulation of medical voices that did not adhere to governmental public health messaging on the topic.<sup>16</sup>

### Links to other laws

The European Parliament is currently considering the proposed Digital Services Act (DSA)<sup>17</sup> to address content moderation in the EU. Similar to the Online Safety Bill in the UK, the DSA is aimed at protecting the human rights of its European citizens. The DSA requires very large online platforms (VLOPs) to perform assessments of their systemic risks, including systemic design features that threaten the exercise of fundamental rights.<sup>18</sup> Therefore, regarding legal but harmful content, the DSA is concerned only with systemic design features of user-to-user services.

Furthermore, countries such as Brazil and India have both considered much stricter regulation of content monitoring online. The Brazilian executive issued a Provisional Measure 1068 to restrict content removal by social media platforms, limiting removal only to cases of nudity, violence, narcotics, and incitement to crime, thereby preventing social media platforms from removing disinformation (such as President Jair Bolsonaro's COVID-19 disinformation removed by Facebook, Twitter, and YouTube)<sup>19</sup>. The Indian government has similarly issued several regulations, including the Information Technology Act and Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules of 2021<sup>20</sup>, which direct user-to-user services to remove a wide range of content, including material that threatens the sovereignty of the Indian state. This uses algorithmic systems to monitor and remove harmful content, and to trace encrypted messages to limit online anonymity. Activist groups have claimed that these measures are aimed at curbing dissent against the government, resulting in what they call "digital authoritarianism."<sup>21</sup>

<sup>15</sup> BBC (2022). Molly Russell inquest: Father makes social media plea. 30<sup>th</sup> September 2022. [Online] Retrieved 28.10.22. Available at/ <https://www.bbc.co.uk/news/uk-england-london-63073489>

<sup>16</sup> The Draft Online Safety Bill and the legal but harmful debate: Government response to the Committee's Eight Report. Fifth Special Report of Session 2021-22. House of Commons, Digital, Culture, Media and Sport Committee. Retrieved 28.10.2022 Available at/

<https://committees.parliament.uk/publications/9408/documents/161169/default/>

<sup>17</sup> Digital Services Act package. Retrieved 28.10.2022 Available at/ <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>

<sup>18</sup> Albert, J. 2022. "The Digital Services Act: EU sets a new standard for platform accountability". [Online] Algorithm Watch. 25<sup>th</sup> April 2022. Retrieved 28.10.22 Available at/ <https://algorithmwatch.org/en/dsa-deal-plattform-accountability/>

<sup>19</sup> Satariano. A. (2021). Youtube Pulls Videos by Bolsonaro for Spreading Misinformation on the virus. New York Times.

<sup>20</sup> Ministry Electronics and Information Technology. (2021). The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. Feb 25. 2021. Retrieved 28.10.22. Available at/ <https://prsindia.org/billtrack/the-information-technology-intermediary-guidelines-and-digital-media-ethics-code-rules-2021>

<sup>21</sup> Shahbaz, A. (n.d). "The Rise of Digital Authoritarianism" Freedom on the net 2018. Retrieved 28.10.22. Available at/ <https://freedomhouse.org/report/freedom-net/2018/rise-digital-authoritarianism>



## 3. Domain-specific legal issues

This section examines the legal implications of digital extended reality in the UK context with respect to specific legal domains with a high socio-economic impact. The legal domains covered include human rights law, privacy and data protection law, use in legal systems (criminal, civil and evidence law), and liability for harms (tort, contract and criminal).

The following sections discuss some of the ways that digital extended reality (XR) technologies are or may be governed by UK law and policy within the frameworks of human rights, privacy and data protection, use in legal systems, and liability for harms. This is a general overview of legal issues supported by discussion to existing (and proposed) law and an explanation of how the law may apply to XR in the UK. While no UK law directly addresses or explicitly mentions XR technologies, many aspects are subject to the following domains of the UK legal system.

### 3.1 Human rights law

XR technologies have the potential to impact human rights in many ways, both positive and negative. In relation to some rights in particular contexts, XR have the potential to enhance flexibility to engage with others in work and leisure. In other situations, however, such as the use of XR in courtrooms, incorrect use may interfere with the right to a fair trial or the prohibition on self-incrimination. XR technologies may also interfere with protected human rights such as freedom of speech, or the right to privacy. This section explores what impact XR may have on various human rights protected in UK law.

#### 3.1.1 Sources of UK Human Rights Law

The human rights law framework in UK includes a variety of national and international legal sources. First of all, the UK is party to a number of United Nations human rights law treaties, such as the International Covenant on Civil and Political Rights (ICCPR) (ratified 1966), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified in 2016), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (ratified March 1969), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (ratified in 1976), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), the Convention on the Rights of the Child (CRC), and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>22</sup>

- ECHR and the European Convention on Human Rights Act (UK implementation of ECHR). the UK is a Member State of the Council of Europe and subject to the jurisdiction of the European Court of Human Rights. The UK has implemented the European Convention of Human Rights through the Human Rights Act 1998.
- Charter of Fundamental Rights of the European Rights (CFREU) (The CFREU applied to the UK up until Brexit and now is no longer a law in the UK)

<sup>22</sup> International Covenant on Civil and Political Rights (entered into force 23 March 1976), G.A. Res 2200A (XXI); Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981), 1249 U.N.T.S. 13; International Convention on the Elimination of All Forms of Racial Discrimination (entry into force 4 January 1969) G.A. Res. 2106 (XX) (ICERD); International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976), G.A. Res 2200A (XXI), 993 U.N.T.S. 3; International Convention on the Protection of All Migrant Workers and Members of Their Families (entered into force 18 December 1990), G.A. Res 45/158; Convention on the Rights of the Child (entered into force 2 September 1990) GA Res. 44/25, 1577 U.N.T.S. 3; Convention on the Rights of Persons with Disabilities (entered into force 3 May 2008), GA Res. A/61/106.



- International human rights law
- Human Rights Act 1998.<sup>23</sup> This act sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic British law. The Human Rights Act came into force in the UK in October 2000.
- Equality Act 2010<sup>24</sup> brought together several distinct forms of anti-discrimination legislation including of sex, disability and race.

### 3.1.2 Human rights law implications

As XR is speech, language and communication mediated in technological platforms, laws of free speech and free expression are likely to be significantly important in XR. Therefore, the human rights of citizens and their legitimate expression within the confines of 'legal expression'. Freedom of speech is protected under Article 10 of the Human Rights Act 1998, which provides that 'everyone has the right to freedom of expression'.<sup>25</sup> However, exercising this right "carries with it duties and responsibilities", and may as such be 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'.<sup>26</sup> Thus, the right to 'freedom of expression' is not an absolute right. The UK has several laws against hate speech built into various other laws (rather than a standalone law). For example, section 4 of the Public Order Act 1986 makes it offence to use 'threatening, abusive or insulting words or behaviours that causes, or is likely to cause, another person harassment, alarm or distress'. Such distress can be caused by racial, religious hatred, sexual orientation, or language that encourages 'terrorism'.<sup>27</sup>

Other issues of human rights concerns regards data use, manipulation and surveillance of citizens. The AI ACT has values enshrined in it (e.g. opacity, complexity, dependency on data, autonomous behaviour).

Following Brexit, the UK Government has indicated it intends to update and reform the UK's data protection laws.<sup>28</sup> This led to the introduction of the Data Protection and Digital Information Bill to the House of Commons in July 2022. At the time of writing, the Bill had entered its second reading stage in Parliament, although it appears to be facing some delays.<sup>29</sup> This bill covers similar topics to the GDPR (data protection, subjects' rights, obligations of controllers and processors). It relates to customer data and business data (part 3)<sup>30</sup>.

#### Freedom of Expression

As XR is mediated through expression: speech, image, audio, text – debates around freedom of expression, free speech, hate speech and child rights, safeguarding and protections are relevant.

<sup>23</sup> Human Rights Act 1998.

<sup>24</sup> Equality Act 2010.

<sup>25</sup> Human Rights Act 1998, schedule 1, article 10 (1).

<sup>26</sup> Human Rights Act 1998, schedule 1, article 10 (2).

<sup>27</sup> CARE. (n.d.) Free Speech in the UK: what does the law actually say? Retrieved 28.10.22. Available at/ <https://care.org.uk/cause/religious-liberty/free-speech-law>

<sup>28</sup> See, *Consultation outcome: Data: A new direction – government response to consultation / Gov.uk Department for Digital, Culture, Media & Sport*, [Online]. Available at/ <https://www.gov.uk/government/consultations/data-a-new-direction/outcome/data-a-new-direction-government-response-to-consultation#:~:text=response%2Dto%2Dconsultation-Introduction,the%20UK's%20National%20Data%20Strategy>.

<sup>29</sup> See, for example, Kirsop J. (2022) *UK Data Protection and Digital Information Bill faces delay / Pinsent Masons*, [Online]. Available at: <https://www.pinsentmasons.com/out-law/news/data-protection-digital-information-bill-delay>; Woollacott, E. (2022) *UK Reconsiders Data Protection Rules (Again) / Forbes*, [Online]. Available at: <https://www.forbes.com/sites/emmawoollacott/2022/10/04/uk-reconsiders-data-protection-rules-again/?sh=27767b87207f>.

<sup>30</sup> GDPR, Section 3.



There is currently a discussion underway to develop a Bill of Rights to strengthen free of speech. This bill was introduced into parliament on Wednesday 22<sup>nd</sup> June 2022. The Bill of Rights is intended to repeal and replace the Human Rights Act 1998.

### Bill passage



Figure 1: Process of a bill's passage in the UK parliament

The bill is currently paused.<sup>31</sup>

The law aims to reduce the power of the courts (in Europe and the UK) to intervene in government policy 'the courts must give that courts must give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament' (2.c).<sup>32</sup>

In the UK, due to the Crime and Disorder Act 1998<sup>33</sup> and section 66 of the Sentencing Act 2020<sup>34</sup> both allow for an uplift in sentence if 'hate' against the categories listed above are identified.

Another law of significance is the Equality Act 2010. It protects people from discrimination in the workplace and wider society, particularly in respect of the following protected characteristics: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.<sup>35</sup> The Public Sector Equality Duty requires public authorities to "have due regard to the need to–

- eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act;
- advance equality of opportunity between people who share a protected characteristic and people who do not share it; and

<sup>31</sup> Elgot, J. 2022. "Liz Truss halts Dominic Raab's bill of rights plan. [Online] The Guardian. 7 September 2022. Retrieved 28.10.22. Available at/ <https://www.theguardian.com/law/2022/sep/07/liz-truss-halts-dominic-raab-bill-of-rights-plan>

<sup>32</sup> Bill of Rights Bill. Retrieved 28.10.22 Available at/ <https://publications.parliament.uk/pa/bills/cbill/58-03/0117/220117.pdf>

<sup>33</sup> Crime and Disorder Act 1998.

<sup>34</sup> Sentencing Act 2020.

<sup>35</sup> Equality Act 2010, s. 4.



- foster good relations between people who share a protected characteristic and people who do not share it.”<sup>36</sup>

The UK until recently also faced controversy for recording non-crime hate incidents. A total of 120,000<sup>37</sup> incidents were recorded in the last five years. A non-crime hate incident is when no crime has been committed but a specific individual feels offended by speech. Some critics such as campaign group Fair Cop compare this to a pre crime scenario, a term coined by science fiction writer Philip K. Dick. Similarly, comparisons with George Orwell’s 1984 ‘thought crimes’ are invoked in leading campaigns for free speech in the UK.

Harry Miller<sup>38</sup> took the College of Policing to court and won at the Court of Appeal against his record of non-crime hate speech (he put a limerick about sex and gender on twitter). The UK Home Office with the support of the College of Policing published new guidelines in mid 2022 about recording and retaining personal data related to non-crime hate incidents.<sup>39</sup>

The guidance states that:

- “non-crime hate incidents should not be recorded where they are trivial, irrational, or if there is no basis to conclude that an incident was motivated by hostility.
- individuals who are commenting in a legitimate debate – for example, on political or social issues – should not be stigmatised because someone is offended.
- if a record is made, it must be done in the least intrusive way possible – for example, it may not be necessary to record the name of an individual or the location of an incident”.<sup>40</sup>

There is also a Higher Education (Freedom of Speech) Bill under discussion in Parliament and is at committee stage in the House of Lords. The Bill makes it law for higher education institutions to protect freedom of speech and will make provision for ‘academic freedom’ 2.(6):<sup>41</sup>

(6) In this Part, “academic freedom”, in relation to academic staff at a registered higher education provider, means their freedom within the law— (a) to question and test received wisdom, and (b) to put forward new ideas and controversial or unpopular opinions, without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).”

## 3.2 Privacy and data protection law

This section considers how personal and secondary data collected through the use of XR technologies is protected in UK law.

<sup>36</sup> Equality Act 2010, s. 149.

<sup>37</sup> Tettenborn, A. (2022). Wil the police finally see sense on ‘non-crime hate incidents’? The Spectator. Retrieved 28.10.22. Available at/ <https://www.spectator.co.uk/article/will-the-police-finally-see-sense-on-non-crime-hate-incidents->

<sup>38</sup> Harry Miller. Fair Cop. <https://www.faircop.org.uk/case-studies/harry-miller/>

<sup>39</sup> Fair Cop. 2022. Non Crime Hate Incidents – Updated Guidance. Thursday 21<sup>st</sup> July 2022. Retrieved 28.10.22 Available at/ <https://www.faircop.org.uk/non-crime-hate-incidents-updated-guidance/>

<sup>40</sup> College of Policing. 2022. “Protecting Freedom of Expression – updated guidance’. 21 July 2022. Retrieved 28.10.22 Available at/ <https://www.college.police.uk/article/protecting-freedom-expression-updated-guidance>

<sup>41</sup> Higher Education (Freedom of Speech) Bill Retrieved 28.10.22 Available at/ <https://bills.parliament.uk/publications/46799/documents/1952>



## UK General Data Protection Regulation 2018 (GDPR)

The UK GDPR is the domestic version of the EU GDPR retained in accordance with the European Union (Withdrawal) Act,<sup>42</sup> and as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations (2019).<sup>43</sup> It applies to the processing of personal data<sup>44</sup> by organisations operating within the UK,<sup>45</sup> as well as organisations outside the UK that offer goods or services to individuals in the UK, or that monitor the behaviour of data subjects based in the UK.<sup>46</sup> The GDPR was developed based upon seven principles of data processing: 1) lawfulness, fairness and transparency; 2) purpose limitation; 3) data<sup>47</sup> minimization; 4) accuracy; 5) storage limitation; 6) integrity and confidentiality (security); and 7) accountability.<sup>48</sup> See also

## Data Protection Act 2018<sup>49</sup>

The Data Protection Act 2018, as amended by the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, is the domestic implementation of the EU GDPR. It prevents people or organisations from holding and using inaccurate information on individuals. This applies to information regarding both private lives and business. This given sensitive information such as race, health, sex life or orientation.

## Privacy and data protection challenges

Issues related to the protection of privacy and data protection in relation to XR include; right to privacy, autonomy (i.e., individual control over how data is collected, stored and how it is used); anonymity; right to restrict access/use; right to erasure; transparency; informed consent; data ownership and control; surveillance; data security; misuse and malicious use of data. The Online Safety Bill aims to serves as a duty of care to all users who use online platforms to ensure protection of their personal data.

## 3.3 Consumer Protection law

The Consumer Rights Act 2015 is the UK's primary piece of legislation in relation to consumer protection.<sup>50</sup> The Act offers consumer protection in relation to goods as well as digital content.<sup>51</sup> The

<sup>42</sup> European Union (Withdrawal) Act 2018, Art.3.

<sup>43</sup> The Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019, Schedules 1 and 2.

<sup>44</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), Art.2.

<sup>45</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), Art.3(1).

<sup>46</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), Art.3(2).

<sup>47</sup> ICO. (n.d.) Key definitions. Who does the UK GDPR apply to? Retrieved 28.10.22. Available at/ <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/>

<sup>48</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation), Art.5(1)(a)-(f).

<sup>49</sup> Data Protection Act 2018

<sup>50</sup> Consumer Rights Act 2015, c. 15.

<sup>51</sup> Consumer Rights Act 2015, c. 15, chapter 2 and 3.



Act provides that consumers have a right to remedies, such as repair, replacement, a price reduction or a refund, if their consumer rights under a goods or digital content contract are not met.<sup>52</sup>

Following Brexit, UK consumer protection law remained largely unchanged due to the retained EU law. However, ongoing legal developments at the EU level, such as the Digital Services Act and the Digital Markets Act, will not apply in the UK.<sup>53</sup> In the long run, it is thought that UK and EU consumer rights law will diverge further, which will likely have various implications on producers and sellers of XR technologies in the UK and EU.<sup>54</sup>

## 3.4 Use in legal systems

### Criminal law

The UK criminal law sets out the definitions of criminal offences and the rules and procedures that apply when: the police investigate an offence they allege you have committed then the prosecuting authorities charge you, and you must appear in a criminal court. If you admit the offence or are found guilty, the court will impose a punishment on you, ranging from fines, community orders and imprisonment. Sentencing guidelines are set by the Criminal Prosecution Service (CPS).

### Civil law

This is part of the legal system that deals with people's relationships, property, and business agreements, rather than with criminal activity.

Examples can include the use of XR material such as image, texts, audio recordings which can be investigated in civil law disputes

### Evidence law

The law of evidence encompasses the rules and legal principles that govern the proof of factual matters in both criminal and civil proceedings. It is the evidence that helps the parties prove or disprove their case and, in turn, assist the court in fairly determining the outcome of those proceedings.

Issues to consider include evidence and expert witness standards, could the use of digital systems be used to help in providing evidence to the case. Juvenile defendants are being tried over evidence provided by social media footage of the crime. In this way the use of XR can remove some of the challenges faced over jury competency or judicial bias. Furthermore, the issues around eliciting memories and impeaching witnesses to determine guilt is helped through the evidence provided by XR.

<sup>52</sup> Consumer Rights Act 2015, c. 15, Chapter 3, s. 42-45.

<sup>53</sup> Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (15.12.2020, COM(2020) 825 final), [Online]. Available at: <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=COM:2020:825:FIN>; Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

<sup>54</sup> Conway, L. (2021) *Brexit: UK consumer protection law* / UK Parliament: House of Commons Library [Online]. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9126/#:~:text=In%20effect%2C%20consumer%20protection%20law,as%20they%20did%20before%20Brexit.>



## 3.5 Liability for harms

### 3.5.1 Sources of law

#### Tort law:

- Products Liability in the UK<sup>55</sup>
- Liability for Consumer Protection Act 1987, implementing the Product Liability Directive (85/374/EEC);
- Issues can include big tech companies who will need to take responsibility of their products/system algorithms and ensure that harmful material is removed

#### Contract law:

- Sale of Goods Act 1893 and the Sale of Goods and Supply of Services Act 1980;
- European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003

#### Criminal:

- General Product Safety Regulations 2005
- Consumer Rights Act 2015<sup>5</sup>
- The Children Act 1989
- Domestic Abuse Act 2021<sup>56</sup>
- Animal Welfare Act 2006<sup>57</sup> (images in XR that involve animal harm could potentially be used).

### 3.5.2 Implications for XR technologies

The Consumer Protection Act 1987 is the primary piece of legislation relating to product liability in England and Wales, and implements the EU Directive on liability for defective products.<sup>58</sup> Furthermore, as a common law jurisdiction, the tort of negligence is a recognised doctrine in the UK. A breach of contract may also give rise to liability.<sup>59</sup> Finally, alleged product safety issues may also result in criminal

<sup>55</sup> Product Safety advice for business. Retrieved 28.10.22 Available at/<https://www.gov.uk/guidance/product-safety-advice-for-businesses>

<sup>56</sup> Domestic Abuse Bill Factsheet. Retrieved 28.10.22/ Available at/<https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet>

<sup>57</sup> Animal Welfare Act. Retrieved 28.10.22. Available at/<https://www.legislation.gov.uk/ukpga/2006/45/section/4>

<sup>58</sup> Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (7.8.1985, OJ L210/29).

<sup>59</sup> Sale of Goods Act 1979, c. 54; Supply of Goods and Services Act 1982, c. 29; Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (7.7.1999 OJ L171/12); *Product liability and safety in the UK (England and Wales): overview* /Thomson Reuters Practical Law [Online]. Available at:

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investigation and prosecution.<sup>60</sup> UK law provides for the offence of corporate manslaughter in the case of a gross breach of duty of care for which an organisation can be held responsible.<sup>61</sup>

Two recent UK incidents illustrate the impact of online platforms on vulnerable groups of people, such as children.<sup>62</sup> Whilst these incidents did not concern liability for harm caused by the online platforms, they will likely be informative for the ongoing debate of regulating harmful online content and responsibilities of operators and providers.

### Online Safety Bill and XR

Online Safety Bill<sup>63</sup> aims to tackle many of the challenges presented by digital technologies such as social media especially for its users. For example, for children these new potential laws will mean that all companies must assess risks and take action to handle illegal activity that threatens the safety of children. In addition, platforms likely to be accessed by children will need to; prevent access to material that is harmful for children, such as pornography. Ensure there are strong protections from activity, which is harmful to children, which we expect will include harms such as bullying.

Furthermore, for adults the Online Safety Bill will ensure that platforms tackle the presence of illegal material on their sites. Major service providers will also need to make clear in their terms of service what legal content is acceptable on their sites and provide user-friendly ways to complain when things go wrong. The categories of content that companies' terms of service will need to address will be set out in secondary legislation and approved by Parliament. On the largest sites, adults will have more control over who they interact with online, and the types of harmful content that they can see. This could, for example, mean that on a platform which allows self-harm content, individuals who feel that this content would be damaging to their mental health could choose not to be presented with it. Adults will be able to make informed decisions about the online services they use and be able to trust the platforms will keep the promises they make.

<sup>60</sup> *Product liability and safety in the UK (England and Wales): overview* / Thomson Reuters Practical Law [Online]. Available at: [https://uk.practicallaw.thomsonreuters.com/w-013-0564?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-013-0564?transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>61</sup> Corporate Manslaughter and Corporate Homicide Act 2007, c. 19.

<sup>62</sup> BBC (2022). Archie Battersbee: How did life support battle end up in court? 6<sup>th</sup> August 2022. [Online] Retrieved 28.10.22 Available at/ <https://www.bbc.co.uk/news/uk-england-essex-61829522>; BBC (2022). Molly Russell inquest: Father makes social media plea. 30<sup>th</sup> September 2022. [Online] Retrieved 28.10.22. Available at/ <https://www.bbc.co.uk/news/uk-england-london-63073489>.

<sup>63</sup> Online Safety Bill: factsheet. 19<sup>th</sup> April 2022. Retrieved 28.10.2022 Available at/ <https://www.gov.uk/government/publications/online-safety-bill-supporting-documents/online-safety-bill-factsheet>

## 4. Overview of gaps and challenges

This document provides an overview of potential and existing legal issues related to XR in the UK. The main areas of freedom of speech, human rights and liability for harms are explored with several relevant pieces of legislation currently under discussion. Data protection online securing personal data remains the most developed laws related to XR in the UK. The following provides an overview of the main gaps and challenges identified relating to the regulation of XR in the UK.

### Digital Extended Reality (XR) and the law

- Impact of XR on legal development: might XR fundamentally change concepts of legal responsibility if the Online Safety Bill is passed. Sites such as forums and messaging apps, some online games, cloud storage and the most popular pornography sites play a significant role in enabling users to access harmful content. Sites which publish pornographic content will also be required under the legislation to ensure that children cannot access age-inappropriate material.

### Human Rights Law

- There is conflict between protected characteristics in the Equality Act 2010 and Hate Crime provision. Several high profile debates around 'transgender identity' have led to discussions in the UK about legitimate speech online. With the provision 'no one has the right to not be offended' ruled by the Judge of the case of Harry Miller.
- There is also a conflict between 'legal but harmful speech' and whether this can be legitimately decided in law. If speech is legal but harmful, how can it be regulated?
- Protection categories of adults and children is a source of conflict. The Online Safety Bill aims to protect children from harmful imagery/speech/incitements but what are the provisions for adults and how will adult legal speech be protected?

### Tort Law

- There is some conflict between protected characteristics in the Equality Act 2010 and Hate Crime provision.
- The Education (Freedom of Speech) Bill will create a statutory law to sue individuals for compensation for losses suffered from an academic's institutions failure to protect freedom of speech.

### Criminal law

- Sociological evidence and criminal law – admissibility of expert evidence in criminal proceedings
- Concerns about overlap of material for adults and children and ways to restrict access to children while allowing access for adults to legal but harmful material.

## 5. Conclusion

Regulating XR technologies in the context of harmful online content appears to be an important regulatory challenge in the UK. A balance must be struck between protecting the right to freedom of expression on the one hand, and protecting against harmful online content and hate speech on the other, particularly in the context of groups with protected characteristics. XR technologies pose a unique challenge in this regard, given their immersive nature which may exacerbate possible negative impacts.

Brexit is a further area which may pose future challenges with regard to the regulation of XR technologies in the UK, versus the EU. Whilst many laws that originated in the EU are currently retained in UK domestic law, it is possible that these will diverge in the long-term. This may have wide-ranging implications on developers and providers, as well as end-users, although the exact implications remain to be seen.



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