

Step 1

What does 'law' mean when considering whether speech is 'prohibited by law'?

'Law' means:

- Primary legislation
- Legal precedent or court decisions
- Secondary legislation or byelaws

'Law' does not mean:

- University regulations
- Contracts with employees or students

Examples 1 and 2 in the guidance

Yes

No

Proceed to step 2

You may need to consider other steps outside the scope of the duty.

Step 2: Are there any 'reasonably practicable steps' to secure the speech?

The particular circumstances will be important in considering whether a step is reasonably practicable. Reasonably practicable steps may include positive steps – doing something – and negative steps – refraining from doing something.

Step 2

Factors to consider:

Factors likely to be relevant:

- 'Legal / regulatory requirements e.g. duties in relation to harassment / Human Rights Act
- Maintaining essential functions of the institution (= learning, teaching, research, and administration and institutional resources necessary for essential functions)
- Physical safety

Factors likely to be irrelevant:

- The viewpoint that the speech expresses, including:
 - whether it aligns with the provider's aims or values
 - whether it is controversial or offensive
 - whether external or internal groups approve of the viewpoint that the speech expresses
- The reputational impact of the speech on the provider or constituent institution

See examples 3 to 23 in the guidance

No

Yes

Proceed to step 3

Take these steps. Secure the speech. Are you interfering with the speech in any way?

Yes

Proceed to step 3

No

Speech goes ahead without interference

Step 3: Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?

This step involves considering whether restriction or regulation of the speech ('interference') is compatible with the European Convention on Human Rights (ECHR).

Step 3

Are any restrictions 'prescribed by law' and proportionate under the European Convention on Human Rights?

This step involves considering whether restriction or regulation of the speech ('interference') is compatible with the European Convention on Human Rights (ECHR). In practice, you may already have considered some of these factors at step 2.

Is the interference prescribed by law?

An interference is prescribed by law if:

- there is a specific domestic English legal rule or regime which authorises the interference;
- the person affected by the interference must have adequate access to the rule in question; and
- The rule is formulated with sufficient precision to enable the affected person to foresee the circumstances in which the law would or might be applied, and the likely consequences that might follow.

Is the interference proportionate?

To assess the proportionality of a measure to interfere in lawful speech, you must consider:

- whether the objective of the measure is sufficiently important to justify the limitation of a protected right,
- whether the measure is rationally connected to the objective,
- whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and
- whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter.

See examples 24 and 24A in the guidance

The proportionality test in Article 10(2) means that, in practice, it is difficult to restrict or regulate speech in a higher education context. This is because there is a high bar for limitation of a protected ECHR right in general terms, and the particular purpose of higher education is such that limitation of Article 10 rights would undermine that purpose.

Yes

No

Your restrictions are not consistent with your free speech obligations. You will need to revise your approach.

Your regulations or restrictions are likely to be consistent with your free speech obligations. Regulations or restrictions should:

- use legal definitions where these are available
- incorporate objective tests where appropriate, for instance in relation to harassment
- avoid vague language or undefined terms
- include clear, adequate and effective 'safeguard' statements protecting academic freedom and freedom of speech within the law (for instance, to the effect that where a policy conflicts with academic freedom, the latter prevails).