

# COVID-19 and free speech: 'gagging' NHS staff is not proportionate and lawful



**George Letsas** and **Virginia Mantouvalou** explain why any blanket restriction on NHS workers' freedom of speech in the light of the pandemic is unlikely to pass the legal test of proportionality, or fit the image of a democracy that values transparency and accountability.

'I never thought I lived in a country where freedom of speech is discouraged', wrote an NHS doctor to *The Lancet*. The journal receives many messages from front-line health workers who are being threatened with disciplinary action if they raise concerns about their safety at work. According to *The Guardian*, some NHS staff are altogether forbidden from speaking out publicly about the coronavirus. Intimidation techniques reportedly include threatening emails, monitoring of social media and disciplinary action.

This unprecedented restriction takes place against the background of secrecy surrounding the government's response to the pandemic. There has so far been limited information both on the situation in hospitals and on the scientific evidence upon which the government acts. With Parliament in recess, the need for public scrutiny is even more pressing.

What is more, wars and pandemics have a substantial degree of a so-called 'chilling effect' on free speech: people typically rally behind their leaders and feel reluctant to voice their criticisms, adopting a stance of self-censorship. Even in the absence of any legal restrictions, a pandemic is therefore likely to result in suppression of information and decreased levels of accountability.

## NHS workers' freedom of expression

Governments' response to the pandemic across Europe, and the rest of the world, has been accompanied by unprecedented restrictions on freedom of movement and assembly. Such restrictions are in principle justified in a context of a public health emergency. Yet they cannot go unchecked. The Council of Europe released [guidance](#) to its 47 Member States on how to respond to the pandemic while respecting human rights.

The right to free speech is protected in Article 10 of the European Convention on Human Rights (ECHR). In *Handyside v UK*, the European Court of Human Rights said that its 'supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man'. In *Lingens v Austria*, the Court stressed that the press has a right 'to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.'

NHS workers, like all workers, have a right to free speech. Restrictions on their rights through intimidation, monitoring of their social media, and disciplinary action may violate the ECHR directly, since the NHS is a public sector institution. Their right is protected strongly both when they speak to mainstream media and when using [social media](#). It can be limited only if there is a legitimate aim (such as public safety and public health) and insofar as the limitation is proportionate. When applying the test of proportionality in assessing violations of the Convention, the European Court of Human Rights (ECtHR) has [accepted](#) that the special nature of some professions must be taken into account.

While certain restrictions on the right to free speech may legitimately be grounded on a duty of loyalty of the worker towards the employer, other restrictions are illegitimate. This is best exemplified by the strong protection of whistleblowers, in the UK [Public Interest Disclosure Act 1998](#), the case law of the ECtHR and the Council of Europe [Recommendation CM/Rec2014\(7\)](#). The information that whistleblowers share has to reveal a threat or harm to the public interest. The recent [guidance](#) of the Council of Europe explicitly states that 'the pandemic should not be used to silence whistleblowers'. Workers' speech that reveals information on a harm to public interest is afforded maximum legal protection.

But what about NHS workers who simply share stories of the situation as they experience it, without seeking to make a public interest disclosure? The guidance accepts that free speech during the pandemic may be limited. It gives the following example: 'exceptional circumstances may compel responsible journalists to refrain from disclosing government-held information intended for restricted use – such as, for example, information on future measures to implement a stricter isolation policy'. Here, a restriction on press freedom is justified because it prevents imminent harm. If journalists disclosed such information, then many people would try to make the most of the last few days or hours before the measures, spreading the virus and putting lives at risk.

### **Is the restriction proportionate to a legitimate aim?**

By contrast to the example above, there is no necessary link to harm in allowing NHS staff to share their day-to-day experiences. In fact, there is a lot to be gained: any shortcomings in the government's approach (such as shortage of protective equipment) will come to light, putting it under pressure to correct them. It may also mobilise [civil society](#) to help the NHS effort. Finally and crucially, it will contribute towards holding the authorities into account. Pluralism is crucial not just for a democratic society, but also for a healthy society.

As there has been no official justification for why restricting the free speech of NHS staff is necessary, we can only hypothesise about the rationale. [The Guardian article](#) suggests that the aim is to 'stop scaremongering when communications departments are overloaded with work at a busy time'. While this is legitimate, there is little reason to think that NHS staff can exaggerate the scale of the situation, not least because we know hospitals around the world are being tested to their limits. The issue countries face, including the UK, goes in the opposite direction: several people do not take the threat of the virus seriously enough, flouting the lockdown measures.

Another possible rationale is the protection of patients' privacy. This is obviously legitimate, but NHS staff are well aware that they should not reveal patients' identities. Sharing their accounts about their overall experience in the pandemic, however, does not necessarily involve revealing individual patients' information.

But perhaps the real rationale behind gagging is this: if NHS workers start sharing their horrific experiences, this will undermine the public's morale and trust in the NHS, and may even lead to social unrest. This rationale is very old, going back to the heavy restrictions on reporting during wartime.

Yet are not really at war and the analogy is problematic on many levels. It suggests that criticisms of the government's approach are [unpatriotic](#), because we all have to be united against an external threat. But the coronavirus is not a foreign enemy who will take advantage of any publicly available information about the shortcomings of the government. On the contrary, more information leads to increased scrutiny which, in turn, strengthens – rather than weakens – our ability to fight the epidemic.

As to the argument that sharing information about the situation in hospitals will undermine morale, it is deeply paternalistic. It assumes that the nation is not mature enough to understand that even the most advanced and prepared healthcare systems will be stretched by this horrible pandemic and that even the most professional and committed health workers will be challenged, physically and mentally, to treat all the patients. There is nothing unpatriotic about letting healthcare workers share their experiences, horrific as they might be, with the public, whose health they are desperately trying to protect.

It is legitimate, of course, to worry about the danger of civil unrest. If the government is perceived – in the eyes of the public – to be wholly incompetent to deal with the pandemic, we could conceivably be led to instances of unrest, violence or riots. But legal principles here are clear: there must be evidence of a clear and present danger before any drastic measures are taken to limit free speech and no such evidence exists at the moment. And the ban on some NHS staff speaking out appears to be indiscriminate: it does not only apply to images or reporting that may shock or outrage the public. It applies to *any* comment some NHS staff might want to make about their experiences in hospital. According to well-established human rights case law, [indiscriminate and blanket restrictions](#) on human rights are likely to be disproportionate, even if the aim is legitimate.

NHS workers need to be open about the challenges they face. [Powerful testimonies](#) help citizens understand the seriousness of the situation and emphasise the immeasurable contribution of NHS workers; they also help NHS staff themselves, many of whom are faced with [a risk of post-traumatic stress disorder](#).

Even assuming that there is a legitimate aim, then, we are not convinced that gagging NHS workers passes the legal test of proportionality. The ban does not fit the image of a democracy that values freedom, transparency, and accountability. The chilling effect that the reported intimidations and threats of disciplinary action has on NHS workers' speech has to be recognized and alarm us all. It raises questions about how open the government is to accountability and how much it values people's lives.

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Note: a longer version of the above was first published on the [UK Labour Law Blog](#).

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