

# **BIG BROTHER WATCH**

**Submission to the Department  
of Health and Social Care's  
'Making vaccination a  
condition of deployment in  
older adult care homes'  
consultation**

May 2021

## About Big Brother Watch

Big Brother Watch is a civil liberties and privacy campaigning organisation, fighting for a free future. We're determined to reclaim our privacy and defend freedoms at this time of enormous technological change.

We're a fiercely independent, non-partisan and non-profit group who work to roll back the surveillance state and protect rights in parliament, the media or the courts if we have to. We publish unique investigations and pursue powerful public campaigns. We work relentlessly to inform, amplify and empower the public voice so we can collectively reclaim our privacy, defend our civil liberties and protect freedoms for the future.

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## **Summary**

Big Brother Watch wholly opposes proposals for mandatory vaccinations in any setting in the UK. A mandatory vaccine policy would displace fundamental modern British values: individual autonomy, dignity, privacy and equality would be subsumed by coercion, state control, monitoring and discrimination. This serious damage to British freedoms would provide no public health benefit and would likely damage trust in public health authorities among the groups where trust matters most.

On our analysis, the logic underlying this proposal would lead to a wave of division and demands for citizens' vaccination information. If healthy employees in the care sector are legally required to receive a COVID vaccination primarily for the protection of *others*, this profound legal change would rapidly lead to questions about which other employees or individuals, and in which other sectors, should have mandatory vaccination requirements – and for how many vaccines.

Mandatory vaccines were abandoned in Victorian Britain after sparking an anti-vaccination movement, mass protests and social discord. With opposition to mandatory vaccines from the unions, civil liberties groups, and hundreds of thousands of members of the public, a mandatory vaccine policy, particularly in relation to vaccinations that are new and on emergency approval, is destined to reignite distrust at a time when distrust could cost lives.

We strongly recommend that the Government rejects mandatory vaccines for care homes and indeed any setting and adopts a strategy of support rather than coercion.

## **Background**

The Government has proposed a legal change that would require older adult care home providers to only deploy workers who have received their COVID-19 vaccination, other than those who provide evidence of a medical exemption. This would include those providing direct care and those undertaking ancillary roles such as cleaners and kitchen staff. The Care Quality Commission would have the power to bring a prosecution against care home providers who cannot demonstrate that they have fulfilled this obligation. In practice, this would require all older adult care home workers to prove their vaccination status, or else have their employment terminated. It would also require all adult care home providers to record the vaccination status of all their employees.

The Department of Health and Social Care is proposing an amendment to regulation 12(2)(h) of The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 ('the Regulations'), which requires a service provider to provide care and treatment for service users in a safe way, including "assessing the risk of, and preventing, detecting and controlling the spread of, infections, including those that are health care associated." It has also proposed amending the Code of Practice on Infection Prevention and Control ('the Code of Practice') and its associated guidance, to which providers must have regard when complying with their obligations under regulation 12 of the Regulations.

We support the new requirement within the Code of Practice for providers to ensure that "staff are provided with the appropriate support to access vaccination." However, we have significant concerns about mandating vaccination for any form of employment, including for staff in older adult care homes. The necessity and proportionality of such a step should be carefully considered and balanced against the rights of employees. We are also concerned by the requirement to verify and store the vaccination status of employees, which as well as engaging data protection issues, could normalise health surveillance by employers.

## **Efficacy of a mandatory vaccination policy**

Vulnerable older adults are at greater risk of serious illness and death from Covid-19. After widespread failures to protect residents of older adult care homes from two waves of coronavirus, we fully support reasonable and evidence-based steps to ensure the protection of vulnerable older adults. However, we believe that mandatory vaccination of staff not only raises serious ethical issues but would be an unnecessary and ineffective approach to protecting residents.

SAGE guidance, which has been used to justify the proposed legislative change, suggests that "an uptake rate of 80% in staff and 90% in residents in each individual care home setting would be needed to provide a minimum level of protection against outbreaks of COVID-19. This is for a single dose against the current dominating variant."<sup>1</sup> As of 13<sup>th</sup> May, the percentage of eligible (those who have not contracted coronavirus within the last 28 days) staff of older adult care homes reported to be vaccinated with at least

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<sup>1</sup> Making vaccination a condition of deployment in older adult care homes – Department of Health and Social Care, GOV.UK, 17<sup>th</sup> May 2021: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes>

one dose currently stands at 82.1%.<sup>2</sup> The percentage of staff who have received their second dose is currently 55.9%. The percentage of eligible residents of older adult care homes reported to be vaccinated with at least one dose currently stands at 94.9%, and 77.9% have received their second dose. These statistics suggest that concerns around vaccination uptake in the social care sector have been somewhat overstated and that those working in the care sector are taking up vaccinations in large numbers.

The Department of Health has argued that these extremely encouraging statistics mask "significant variation at a regional, local and individual care home level", as 89 local authorities have not met the 80% uptake rate in staff. Given the positive national picture, it seems likely that as the vaccine roll-out progresses some of these local authorities will reach an 80% uptake rate. A more targeted approach, focusing on education, encouragement and facilitating vaccination for the remaining care homes which have not reached this level, would be a less intrusive approach than mandating vaccination for all older adult care home workers. Indeed, unions have highlighted a range of measures that they believe would be more effective, such as allowing appointments during working hours,<sup>3</sup> increasing statutory sick pay so those suffering from side-effects will not lose out,<sup>4</sup> further education,<sup>5</sup> opportunities to ask colleagues who have vaccinated questions, taking vaccinations into communities and workplaces,<sup>6</sup> and campaigns that debunk vaccine misinformation.<sup>7</sup>

The World Health Organisation has warned mandatory vaccination policies should not be used over less invasive approaches:

"If such a public health goal (e.g., herd immunity, protecting the most vulnerable, protecting the capacity of the acute health care system) can be achieved with less coercive or intrusive policy interventions (e.g., public education), a mandate would not be ethically justified, as achieving public health goals with less restriction of individual liberty and autonomy yields a more favourable risk-benefit ratio."<sup>8</sup>

Indeed, one case study shared by the Department of Health shows the benefits of targeted encouragement. Gbemisola Akinyemi, Registered Branch Manager of MiHomeCare, shared how sharing research and a video of her being vaccinated saw a significant increase in vaccination uptake in her place of work, after initial reluctance from some staff members.<sup>9</sup> The Government's approach to increasing vaccination uptake so far has focused on working in partnership, removing barriers to access, sharing data and information, and conversations and engagement.<sup>10</sup> It has been extremely successful, with the UK having one of the highest levels of trust in vaccinations in the world.<sup>11</sup> Abandoning this approach for a small section of the public would be misguided.

### **Creating public distrust**

There is also significant risk that such a policy would lead to decreased trust in the vaccinations, not only among those working in the care sector, but amongst the wider population. Vageesh Jain, NIHR Academic Clinical Fellow in Public Health Medicine at University College London, said of mandatory vaccination policies:

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<sup>2</sup> COVID-19 weekly announced vaccinations – NHS England, 13<sup>th</sup> May 2021:  
<https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2021/05/COVID-19-weekly-announced-vaccinations-13-May-2021.xlsx>

<sup>3</sup> Government must try harder on vaccines before leaping to the law, says UNISON – UNISON, 23<sup>rd</sup> March 2021:  
<https://www.unison.org.uk/news/press-release/2021/03/government-must-try-harder-vaccines-leaping-law-says-unison/>

<sup>4</sup> Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15<sup>th</sup> April 2021:  
<https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>

<sup>5</sup> Forced jobs are counterproductive, says UNISON – UNISON, 3<sup>rd</sup> March 2021:  
<https://www.unison.org.uk/news/2021/03/forced-jobs-counterproductive-says-unison/>

<sup>6</sup> Less than half of companies giving staff paid time-off to get vaccinated – TUC, 22<sup>nd</sup> March 2021:  
<https://www.tuc.org.uk/news/less-half-companies-giving-staff-paid-time-get-vaccinated-tuc-poll>

<sup>7</sup> Government must try harder on vaccines before leaping to the law, says UNISON – UNISON, 23<sup>rd</sup> March 2021:  
<https://www.unison.org.uk/news/press-release/2021/03/government-must-try-harder-vaccines-leaping-law-says-unison/>

<sup>8</sup> COVID-19 and mandatory vaccination: Ethical considerations and caveats – World Health Organisation, 21<sup>st</sup> April 2021, p. 1-2: <https://apps.who.int/iris/bitstream/handle/10665/340841/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1-eng.pdf?sequence=1&isAllowed=y>

<sup>9</sup> UK COVID-19 vaccine uptake plan – Department of Health and Social Care, GOV.UK, 13<sup>th</sup> February 2021:  
<https://www.gov.uk/government/publications/covid-19-vaccination-uptake-plan/uk-covid-19-vaccine-uptake-plan>

<sup>10</sup> Ibid.

<sup>11</sup> Global vaccine trust rising, but France, Japan, others sceptical – Reuters, 4<sup>th</sup> February 2021:  
<https://www.reuters.com/article/health-coronavirus-vaccines-confidence-idINKBN2A408J>

“Anti-vaxxers do not trust experts, industry and especially not the government. A government mandate will not just be met with unshakeable defiance, but will also be weaponised to recruit others to the anti-vaxxer cause.”<sup>12</sup>

The chief executive at the British Society for Immunology, Dr Doug Brown, noted that compulsory policies would not be appropriate in the UK:

“What we have seen is that in countries that have introduced mandatory programmes, that’s often off the back of there being quite a high anti-vaccine sentiment in those countries and lots of misinformation floating around.

“What we need to be doing in the UK is to be tackling the issues we face, which are not around vaccine confidence, which is very high.”<sup>13</sup>

UNISON has similarly warned that the Government’s proposals could backfire:

“Encouragement and persuasion rather than threats and bullying are key to a successful programme, as ministers themselves have repeatedly indicated.

“Mandatory jabs are counterproductive and likely to make those who are hesitant even more so. This will do nothing to help health and care sectors that are already chronically understaffed.”<sup>14</sup>

Using legislation to enforce vaccination for all older adult care home workers is a blunt, coercive approach to a complex, concentrated issue and could further undermine trust.

### **Lawfulness of a mandatory vaccination policy**

There is currently no legislation in the United Kingdom which mandates vaccination for any section of the population. The Public Health (Control of Diseases) Act 1984 explicitly prohibits the creation of regulations under the Act which would mandate vaccination in England and Wales,<sup>15</sup> and the Coronavirus Act 2020 extends this prohibition to Scotland and Northern Ireland.<sup>16</sup> Vaccination has not been mandated in the UK since 1855, when riots around the mandatory smallpox vaccine led to the creation of ‘conscientious objectors,’ who were permitted to decline vaccination on the basis of personal belief.

However, there has been some confusion as to the legal status of hepatitis B vaccination, and whether it could set a legal precedent for mandating vaccination for older adult care home staff. In response to Shadow Health Secretary Jon Ashworth’s warning that “every attempt throughout history to force mandatory vaccination has proved counterproductive,” the Health Secretary said: “I gently point him to the fact that surgeons need to have a vaccine against hepatitis B. Vaccination that is tied to work in fact has a longstanding precedent in this country.”<sup>17</sup>

A hepatitis B vaccination is not legally mandated – rather, it is a health and safety policy in some NHS trusts. Isra Black, a law lecturer at the University of York specialising in healthcare law, told the BMJ:

“It has been suggested that ‘jab for job’ hep B vaccination under the health and safety policies of some health authorities creates a precedent for mandatory covid-19 vaccination. These policies exist, but to my knowledge they have not been tested legally.

“In any event, the lawfulness of these kinds of measures is highly fact specific. The human rights and equality dimensions of mandatory vaccination cannot be avoided by the use of health and safety law.”<sup>18</sup>

Chapter 12 of the Public Health England Green Book, which provides the latest information on vaccinations, states: “Hepatitis B vaccination is recommended for healthcare workers who may have

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<sup>12</sup> Should Covid vaccines be mandatory? Two experts discuss the pros and cons – Daniel Smith, Wales Online, 26<sup>th</sup> November 2021: <https://www.walesonline.co.uk/news/uk-news/should-covid-vaccines-mandatory-two-19345538>

<sup>13</sup> Why The Government Is So Reluctant To Make Vaccinations Mandatory – Jasmin Gray, HuffPost, 28<sup>th</sup> July 2020: [https://www.huffingtonpost.co.uk/entry/uk-coronavirus-vaccination-scheme\\_uk\\_5f1ac9eac5b6f2f6c9f4f2f8](https://www.huffingtonpost.co.uk/entry/uk-coronavirus-vaccination-scheme_uk_5f1ac9eac5b6f2f6c9f4f2f8)

<sup>14</sup> Forced jabs are counterproductive, says UNISON – UNISON, 3<sup>rd</sup> March 2021: <https://www.unison.org.uk/news/2021/03/forced-jabs-counterproductive-says-unison/>

<sup>15</sup> Section 45E

<sup>16</sup> Section 25E

<sup>17</sup> HC Covid-19 update, vol. 692. col. 660: <https://hansard.parliament.uk/commons/2021-04-19/debates/29C5F76D-1AA5-408F-A2D2-824ECB3A65FB/Covid-19Update>

<sup>18</sup> Covid-19: Is the UK heading towards mandatory vaccination of healthcare workers? – Jacqui Wise, the BMJ, 21<sup>st</sup> April 2021: <https://www.bmj.com/content/373/bmj.n1056>

direct contact with patients' blood or blood-stained body fluids."<sup>19</sup> A health and safety policy in some workplaces and a recommendation from Public Health England does not constitute "longstanding precedent" for mandatory vaccinations for certain workers.

Mandatory vaccination policies would engage human rights law. The UK Government has a duty to protect the right to life, under Article 2 of the Human Rights Act, meaning that it is required to take steps to protect the lives of those particularly vulnerable to coronavirus. However, the duty involves public officials taking *reasonable* steps, not all *possible* steps. Such a policy also engages the Article 8 right to private and family life, the Article 9 right to freedom of thought, conscience and religion and the Article 14 right to be free from discrimination. Interferences with these rights are required to be necessary and proportionate. A blanket policy requiring all older adult care home workers to be vaccinated may not be proportionate if there are less intrusive methods of increasing vaccination uptake, and if vaccine uptake is only a concern in a limited number of older adult care homes.

### **Ethical issues**

Mandating vaccination (either directly or indirectly) poses a serious threat to the principle of personal and bodily autonomy and would likely lead to discrimination and the widening of inequalities.

Personal and bodily autonomy are key rights and a principle of individual liberty. The Government's proposal would make an individual's employment contingent on a medical procedure. A choice between a mandatory medical intervention and unemployment is no choice at all for many, particularly low paid workers. Care sector workers, who have been at the front line of the coronavirus pandemic, should not be made to choose between their livelihoods and their right to make decisions about their bodies.

There is a real risk of discrimination when considering such a policy, which the Prime Minister's spokesperson warned of in February: "Taking a vaccine is not mandatory and it would be discriminatory to force somebody to take one."<sup>20</sup> Many people will not receive a coronavirus vaccine, whether for health reasons, due to concerns around pregnancy, or due to religious, philosophical or other personal beliefs. There is also evidence that vaccine hesitancy is higher in black and minority ethnic groups<sup>21</sup> and in more deprived areas.<sup>22</sup> Penalising communities where there may already be deprivation and unemployment would lead to further marginalisation and distrust among these communities. The WHO has warned that mandatory vaccination policies could exacerbate inequalities:

"the coercive power that governments or institutions display in a programme that undermines voluntariness could have unintended negative consequences for vulnerable or marginalized populations (...) Such populations may regard mandatory vaccination as another form of inequity or oppression, making it more difficult for them to access jobs and essential services."<sup>23</sup>

Unite, the union has also argued that the Government's proposals are discriminatory:

"there will be a wide range of reasons why an employee would not be able to have the vaccine such as disability/medical reasons, pregnancy, race or religion, therefore any blanket policy to make vaccination compulsory will be discriminatory in many cases.

"Affected workers must be given advice, information and support to ensure that any issues or concerns are resolved. For workers who are not able to have the vaccine, other options, such as frequent workplace testing, must be fully considered and utilised. We strongly believe that other options must be made available."<sup>24</sup>

It is critical that a sensitive approach is taken to vaccine hesitancy in certain demographics, rather than a heavy-handed coercive policy. Dr Veena Raleigh, a senior fellow at The King's Fund, said:

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<sup>19</sup> Immunisation of healthcare and laboratory staff – Public Health England: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/147882/Green-Book-Chapter-12.pdf#page=3](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/147882/Green-Book-Chapter-12.pdf#page=3)

<sup>20</sup> No jab, no job policies 'discriminatory', says Downing Street – Poppy Wood, City AM, 8th February 2021: <https://www.cityam.com/no-jab-no-job-policies-discriminatory-says-downing-street/>

<sup>21</sup> Covid-19 vaccine hesitancy among ethnic minority groups – Mohammed S. Razai et al, the BMJ, 26th February 2021: <https://www.bmj.com/content/372/bmj.n513>

<sup>22</sup> Poorer areas falling behind on vaccination against coronavirus – Shaun Lintern, the Independent, 17th February 2021: <https://www.independent.co.uk/news/health/coronavirus-vaccination-deprivation-nhs-b1803021.html>

<sup>23</sup> COVID-19 and mandatory vaccination: Ethical considerations and caveats – World Health Organisation, 21st April 2021, p. 2: <https://apps.who.int/iris/bitstream/handle/10665/340841/WHO-2019-nCoV-Policy-brief-Mandatory-vaccination-2021.1-eng.pdf?sequence=1&isAllowed=y>

<sup>24</sup> Compulsory vaccinations for care home staff must be thought through carefully and handled sensitively, urges Unite – Unite, 14th April 2021: <https://www.unitetheunion.org/news-events/news/2021/april/compulsory-vaccinations-for-care-home-staff-must-be-thought-through-carefully-and-handled-sensitively-urges-unite/>

"The uptake of public health messages does tend to be considerably higher in more affluent groups and the vaccine uptake is, in a way, mirroring that.

"To reach some of these communities with messages that will persuade them to alter behaviour is very difficult, but it can be done. You need to go beyond the mass national appeals and use local, culturally sensitive messages. Very often local services know their communities better."<sup>25</sup>

### **Health surveillance concerns**

The consultation information states that "workers would need to provide evidence to the manager that they have been vaccinated" and asks respondents to suggest how an individual would do so. The suggested Code of Practice states that older adult care home providers will have to "demonstrate that all eligible staff deployed in the care home have received the required doses of an MHRA approved COVID-19 vaccine within the specified grace period (...) which is kept securely by the registered manager (or equivalent person) in staff files." Providers would also be obliged to hold "a record of medical exemption for staff who are unable to receive a COVID-19 vaccine due to health reasons."<sup>26</sup>

We are concerned that workers will be obliged to present sensitive health information to employers, either to prove their vaccination status, or to prove a medical exemption. This could normalise invasive checks of employee health status and would likely set a precedent that would impact other sectors and other forms of health checks. Unions share our concerns – GMB union has said: "This policy would be the thin end of the wedge, and could lead to employers in other sectors demanding the same approach and will have profound consequences for human rights and employment rights if the Government mandates vaccination."<sup>27</sup>

### **Recommendation**

**Mandating vaccination for all workers in older adult care homes would be a heavy-handed, invasive and discriminatory approach to an increasingly diminishing risk. It poses unacceptable risks to rights and individual liberties and could jeopardise national trust in the safety of vaccinations. The Government should continue its successful approach of educating and explaining the benefits of the Covid-19 vaccination, whilst intervening in individual care homes with support and education where necessary.**

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<sup>25</sup> Ibid.

<sup>26</sup> Making vaccination a condition of deployment in older adult care homes – Department of Health and Social Care, GOV.UK, 17<sup>th</sup> May 2021: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes>

<sup>27</sup> Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15<sup>th</sup> April 2021: <https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>