

BIG BROTHER WATCH

**Big Brother Watch Briefing on
the Health and Social Care Act
2008 (Regulated Activities)
(Amendment) (Coronavirus)
Regulations 2021 – House of
Lords**

July 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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INTRODUCTION

We welcome the opportunity to provide this briefing to the House of Lords ahead of the debate on the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 on 20th July 2021.

Big Brother Watch wholly opposes proposals for mandatory vaccinations in any setting in the UK. A brief consultation, which in our view was heavily skewed towards the introduction of mandatory vaccines in care homes, preceded the introduction of these Regulations, to which Big Brother Watch responded.¹ Nevertheless, 57% of all responses opposed the introduction of mandatory vaccines in care homes² - although these views have not been described or addressed by the Department of Health and Social Care. A mandatory vaccine policy would displace fundamental modern British values, and care values: individual autonomy, dignity, privacy and equality would be subsumed by coercion, state control, monitoring and discrimination.

No evidence has been produced to show that this serious damage to British freedoms and workers' rights would provide any public health benefit, despite parliamentarians' requests for it. In fact, evidence shows that vaccine coercion damages trust in the vaccination programme and public health authorities among the groups where trust matters most.³

We are concerned that the House of Commons voted on these Regulations in absence of the required information, making scrutiny "impossible", as noted by the Secondary Legislation Scrutiny Committee.⁴ Similarly, vital information has not been provided to peers in good time for this debate. **This vote should be deferred.**

¹ Submission to the Department of Health and Social Care's 'Making vaccination a condition of deployment in older adult care homes' consultation – Big Brother Watch, May 2021: <https://bigbrother-watch.org.uk/wp-content/uploads/2021/05/Big-Brother-Watch-submission-to-Making-vaccination-a-condition-of-deployment-in-older-adult-care-homes-consultation.pdf>

² Making vaccination a condition of deployment in care homes: government response – DHSC, 16 June 2021, Section 2

³ COVID-19 vaccination beliefs, attitudes, and behaviours among health and social care workers in the UK: a mixed-methods study - Sadie Bell, Richard M Clarke, Sharif A Ismail, Oyinkansola Ojo-Aromokudu, Habib Naqvi, Yvonne Coghill, Helen Donovan, Louise Letley, Pauline Paterson, Sandra Mounier-Jack; medRxiv 2021.04.23.21255971; doi: <https://doi.org/10.1101/2021.04.23.21255971>

⁴ Secondary Legislation Scrutiny Committee, 8th Report of Session 2021–22 - 8th July 2021: <https://committees.parliament.uk/publications/6644/documents/71512/default/>

RECOMMENDATIONS

RECOMMENDATION 1: Parliamentarians should vote against these unnecessary, coercive and counter-productive Regulations.

RECOMMENDATION 2: These Regulations will profoundly and permanently change public health norms, erode workers' rights and impact human rights in our country. The motion to approve these Regulations is inappropriate in absence of the Government's impact assessment and full evidence case, without which effective parliamentary scrutiny is impossible. This Motion must be deferred.

EFFECT OF THE REGULATIONS

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 would require those working in care and nursing homes in England to be fully vaccinated against coronavirus in order to retain their roles. It is a permanent legal change – there is no sunset clause.

The Regulations amend the regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, which stipulate that in order to ensure “care and treatment must be provided in a safe way for service users”, a registered person must assess “the risk of, and preventing, detecting and controlling the spread of, infections, including those that are health care associated.”⁵ This amendment to these Regulations require that a “registered person” in respect of a care home which provides nursing or personal care does not permit anyone to enter the premises unless they are a resident, a visitor of a resident or they have provided the registered person with “evidence” that they have completed a course of an authorised coronavirus vaccine, or that they are clinically unable to be vaccinated.⁶

There are also exemptions for a person providing emergency assistance, a person providing urgent maintenance, a person attending the premises as part of their duty as an emergency service worker, a friend or relative of a resident, a person who is visiting a resident who is dying, a person is providing comfort or support to a resident in response to the death of a resident’s friend or family member and those under the age of 18.⁷

The Secretary of State is required to annually review whether “the extent to which those objectives are achieved, taking into account clinical advice, and availability and accessibility of authorised vaccines” and to “assess whether those objectives remain appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.”⁸

⁵ The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, reg 12(2)(h)

⁶ Regulation 5

⁷ Regulation 5

⁸ Regulation 7(2)

IMPACT ASSESSMENT

The provision of an impact assessment for any legislation that has a “significant impact on business, voluntary organisations or the environment” is a convention of constitutional importance, as set out in Erskine May’s Parliamentary Practice (26.16).⁹ The government is also required to undertake and publish an equality impact assessment for such legislation.

The Explanatory Memorandum to the Regulations, which were laid on 22nd June 2021, states “A full Impact Assessment has been prepared”.¹⁰ The Explanatory Note to the Regulations similarly states, “A full impact assessment of the costs and benefits of this instrument is available”.¹¹ However, the impact assessment was not available before the debate and vote on the Regulations in the House of Commons on 13th July. According to Vaccines Minister Nadhim Zahawi, an impact assessment has not in fact been prepared and will not be available until the end of July – after both Houses have been asked to vote on the Regulations, and Parliament is on recess:

“(…) it is important that we have an impact assessment, which we are working on. We will have that, I hope, by the end of July. I am also hoping, if the committee will support this, to be able to do an impact statement before the Lords debate on this, because it is really important. That will mean having to work all the hours of the night between now and then (…)”¹²

This shocking admission to the Secondary Legislation Scrutiny Committee would seem to confirm that Parliament has been misled by the repeated claim, on parliamentary papers, that an impact assessment had been prepared – it had not. The Minister’s indication of the work involved to prepare an impact assessment for the end of July indicates that an impact assessment is nowhere near completed.

This is an abuse of the conventions of parliament that would be unacceptable in relation to any legislation, but in relation to legislation of such significance for rights and freedoms, of a type unseen in our country for over a century, it is entirely unacceptable.

On 30th June, Sir Christopher Chope MP tabled a written parliamentary question asking for an impact assessment of “the costs, benefits and alternatives” to the mandatory vaccination policy, to which the Minister said DHSC would “publish an impact

⁹ Erskine May, Paragraph 26.16: <https://erskinemay.parliament.uk/section/4986/impact-assessment/>

¹⁰ Explanatory Memo to The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, page 6: https://www.legislation.gov.uk/ukdsi/2021/9780348224993/pdfs/ukdsiem_9780348224993_en.pdf

¹¹ The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021: <https://www.legislation.gov.uk/ukdsi/2021/9780348224993>

¹² Secondary Legislation Scrutiny Committee, oral evidence: Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, 13 July 2021, p.10

assessment on the vaccination of staff in care homes as soon as possible.”¹³ On 12th July, the day before the debate, Sir Christopher Chope MP asked the House of Commons Library to ask the Department of Health where the impact assessment was and “the Department informed the Library that it was about to present the impact assessment. It did not say that the assessment was still under preparation.”¹⁴

However, in the debate, Health Minister Helen Whately said “the impact assessment is being worked on” and spoke of the “challenges in coming to an impact assessment that we can share with colleagues”,¹⁵ contradicting the stated claim accompanying the Regulations that such an assessment had been undertaken and was available.

Points of order were raised and several MPs, including Chair of the Public Administration and Constitutional Affairs Committee William Wragg MP and former Chief Whip Mark Harper MP, queried the accuracy of the information the House had been given. Mark Harper asked for the motion to be withdrawn, and said:

“Ministers need to give accurate information to the House, so if that is not correct and is misleading, it should be corrected immediately. It is not good enough to say that something will come along afterwards; we are being asked to vote on these regulations today. (...) It is not good enough to expect us to vote on something that is difficult, controversial and complicated and not share with the House the information that the Minister has at her disposal.”¹⁶

He later added:

“I am afraid it is an abuse of the House to ask us to vote without that information.”¹⁷

Sir Graham Brady MP also asked for the motion to be withdrawn:

“I hope that the Minister will, on reflection, accept that it is simply wrong to bring these measures forward without giving the House the impact assessment in advance.”¹⁸

Labour MP Rachael Maskell told the Minister:

¹³ Written parliamentary question by Sir Christopher Chope MP, 30th June 2021, UIN 24894: <https://questions-statements.parliament.uk/written-questions/detail/2021-06-30/24894>

¹⁴ HC Deb (13th July 2021), vol. 699, col. 274: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

¹⁵ HC Deb (13th July 2021), vol. 699, col. 271: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

¹⁶ HC Deb (13th July 2021), vol. 699, col. 272: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

¹⁷ HC Deb (13th July 2021), vol. 699, col. 287: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

¹⁸ HC Deb (13th July 2021), vol. 699, col. 284: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

“The Minister is, in effect, asking us to make a decision on information that we have not yet been able to see. Would it not therefore be more sensible to withdraw this statutory instrument and ensure that we have the right data in front of us, so that we can then make an informed choice?”¹⁹

Sir Charles Walker MP, who was Chairman of the Procedure Committee for seven years, raised a point of order after the division to request that the Speaker’s Office conduct an investigation into the accuracy of the Explanatory Memorandum and whether the House had been misled. The Deputy Speaker agreed to raise it with the Speaker. As of 15th July, we understand that Sir Charles Walker’s office had not received further communication from the Speaker’s Office.

Scrutiny “impossible”

The lack of an impact assessment reflects the unacceptable manner in which these Regulations have been presented to parliament.

The Secondary Legislation Scrutiny Committee recommended that the debate be deferred pending publication of the impact assessment and operational guidance.²⁰ However, the debate in the House of Commons proceeded.

The Committee expressed concern that:

“The Explanatory Memorandum lacks all practical detail about what evidence is acceptable, and how a “registered person” “may process” that information. (...)

“(...) no analysis is given of the number of current staff and others who may not comply or the potential impact on care homes if they become ineligible for work.

“(...) This information and the operational guidance are crucial to the House’s understanding of how the policy underlying these Regulations will work—for both individuals and on a sector wide basis. Without this, effective Parliamentary scrutiny is impossible.”²¹

The legal change is being pursued via a statutory instrument, and the parliamentary debate is a standard, 90 minute debate. This is wholly insufficient for parliament to scrutinise such a major legal change with serious impacts on human rights and worker protections in England. Furthermore, the House of Commons debate was scheduled only one day before it took place. In the House of Commons debate, Mark Harper MP said:

¹⁹ HC Deb (13th July 2021), vol. 699, col. 273: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

²⁰ 8th Report of Session 2021-22 - Secondary Legislation Scrutiny Committee, 8th July 2021, p.6

²¹ Ibid.

“The proposals will have a very significant impact on hundreds of thousands of people and many thousands of businesses—it is a significant step; it is the first time that we will have mandated in law effectively compulsory vaccinations—and it is frankly offensive that it is being debated in a 90-minute statutory instrument debate in the House. From the name of the regulations it does not leap out as to what they are, and I think many colleagues were unaware of the fact that we were being asked to vote on this measure today until it was drawn to their attention.”²²

William Wragg MP said:

“We could perhaps have a painting next to me of Munch’s “The Scream” to get a sense of how I feel about the conduct of Government business in this House. The Government are treating this House with utter contempt: 90 minutes on a statutory instrument to fundamentally change the balance of human rights in this country is nothing short of a disgrace. It is a disgrace, too, that no impact assessment exists. (...)

“It is an insult to care workers in this country that all they merit is 90 minutes on a motion that nobody here seemed to know anything about last week but which we are discussing this afternoon.(...)

“This instrument is an abomination. It should be withdrawn, and the Government should stop treating this House with contempt.”²³

Big Brother Watch shares these concerns – the missing impact assessment, the last minute scheduling, the brevity of debate, and the obscurity of the Regulation title, combined with proxy voting, is obstructive to the thorough parliamentary scrutiny this major legal change requires. We noted that David Davis MP’s proxy vote was initially recorded as an Aye – despite the fact he has advocated against the measure. When we alerted his office, the vote was corrected to a Noe. Whilst the Tellers count is 319 Ayes and 246 Noes, the correct number recorded by clerks is 317 Ayes and 247 Noes.²⁴

²² HC Deb (13th July 2021), vol. 699, col. 284: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

²³ HC Deb (13th July 2021), vol. 699, col. 291: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

²⁴ Division 53: held on 13 July 2021 at 19:19: <https://votes.parliament.uk/Votes/Commons/Division/1078>

WORKERS' RIGHTS, BEYOND CARE HOME PREMISES

The impact of this major legal change is to require not only double vaccination evidence from carers, but from everyone who enters the care home for work. This includes NHS and other health care workers as well as cleaners, kitchen staff, volunteers, agency workers, tradespeople, delivery drivers, hairdressers, beauticians, charity trustees and Care Quality Commission inspectors.²⁵

As a result, the effect of these Regulations extends far beyond care home premises - employers in various sectors are likely to demand vaccination information of employees, despite the long precedent of protections for workers' medical privacy. With the growth of the gig economy, zero hours contracts and agency employers, it is likely that people in insecure employment are particularly likely to face intrusive medical questioning as standard. Such employers and agencies will seek to advertise a "fully vaccinated" workforce, both complying with mandatory vaccination requirements and implying lower rates of sick leave, for a competitive edge.

Where an individual is not recommended to receive a vaccine they are expected to disclose clinical reasons for their exemption, undermining long-held protections for medical privacy and disabilities rights in employment contexts.

²⁵ The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, Regulation 5; See also, Everyone working in care homes to be fully vaccinated under new law to protect residents – Department of health and Social Care, GOV.UK, 16th June 2021: <https://www.gov.uk/government/news/everyone-working-in-care-homes-to-be-fully-vaccinated-under-new-law-to-protect-residents>

UNNECESSARY

The Government has failed to make the case for the necessity of this measure, despite the serious rights impact and implications for the care sector. Devolved administrations in Wales, Scotland and Northern Ireland are not pursuing mandatory vaccines in care homes or any other setting. Writing in the BMJ, Professor Allyson Pollock of Independent SAGE and Professor Lydia Hayes described the proposals as “unnecessary, disproportionate, and misguided.”²⁶

There is no doubt that high protection in care homes is critical. The UK’s approved covid-19 vaccinations reduce, though do not eliminate, the risk of transmitting the virus. Research shows that those who became infected after receiving one dose of the Pfizer-BioNTech or AstraZeneca vaccine were between 38% and 49% less likely to pass the virus on to their household than those who were unvaccinated.²⁷ However, before making a serious, rights-altering legal change with serious and wide-ranging consequences, it is important to ascertain what protection is needed, how much protection already exists in care homes, and what the most effective methods are to improve it.

What coverage is needed?

The Government reports SAGE guidance as advising 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.”²⁸ The Government is referring to advice published by the Social Care Working Group (SCWG) within SAGE, which in fact advised:

“There is no certain threshold for protective vaccine coverage levels, the 80% to 90% coverage values previously calculated were based on single dose reported AZ efficacy rates.”²⁹

SCWG’s advice was based on one vaccine (AstraZeneca) and in the context of single doses, months earlier in the vaccine roll-out. With many more staff and patients having

²⁶ Mandatory covid-19 vaccination for care home workers: Unnecessary, disproportionate, and misguided, Allyson Pollock and Lydia Hayes, BMJ, 8 July 2021: <https://www.bmj.com/content/374/bmj.n1684>

²⁷ One dose of COVID-19 vaccine can cut household transmission by up to half – GOV.UK: <https://www.gov.uk/government/news/one-dose-of-covid-19-vaccine-can-cut-household-transmission-by-up-to-half>

²⁸ Making vaccination a condition of deployment in older adult care homes – Department of Health and Social Care, GOV.UK, 17th 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>

²⁹ Social Care Working Group consensus statement, March 2021 (updated 16th June 2021) – Department of Health and Social Care: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/social-care-working-group-consensus-statement-march-2021>

received two doses, protection levels are changing and the advised uptake rates must also be revised.

Further, naturally acquired immunity is not considered at all in the SCWG's advice, and significant research on natural immunity has since been published in major journals³⁰ and by the WHO.³¹

The SCWG added:

"The calculations on recommended coverage should therefore be taken as the best estimate at the time of writing (March 2021). Given the changing epidemiological situation, they should be continually reviewed as evidence emerges."³²

However, SCWG's recommended periodic review has not happened.

What coverage is there?

The statistics show that concerns around vaccination uptake in the social care sector have been overstated and that those working in the care sector are taking up vaccinations in large numbers. As of 11th July, 87% of eligible staff (and 96% residents) within older adult care homes had been vaccinated with at least one dose.³³ Given the data lag and the fact that vaccination was only opened to all over-18s on 18th June, this number is likely to increase further still. It should also be noted that medically exempt individuals are included within the dataset (though the number has not been recorded and is unknown).³⁴

The same dataset shows that of 150 upper tier local authorities (UTLAs) in England, only 8 (or 5%) have first-dose staff vaccination rates below 80%, 4 of which are 79%. All but one local authority has a staff uptake rate of 75% or more - Wandsworth, which is an outlier with the lowest recorded rate at 70.1%. This data should be checked for accuracy and delays, and local interventions considered if necessary. However, a national

³⁰ A long-term perspective on immunity to COVID – Andreas Radbruch and Hyun-Dong Chang, 14th June 2021, Nature: <https://www.nature.com/articles/d41586-021-01557-z>

³¹ COVID-19 natural immunity – WHO, 10th May 2021: https://www.who.int/publications/i/item/WHO-2019-nCoV-Sci_Brief-Natural_immunity-2021.1

³² Social Care Working Group consensus statement, March 2021 (updated 16th June 2021) – Department of Health and Social Care: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/social-care-working-group-consensus-statement-march-2021>

³³ Covid-19 weekly announced vaccinations 15 July 2021 – NHS England: <https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2021/07/COVID-19-weekly-announced-vaccinations-15-July-2021.xlsx>

³⁴ Written parliamentary question by Sir Christopher Chope MP, Coronavirus vaccination, UIN 28055, answered 15th July 2021: <https://questions-statements.parliament.uk/written-questions/detail/2021-07-06/28055>

legislative change to mandate vaccinations and reconfigure workers' rights clearly is not justified on the basis of these figures and SAGE's advice.

Further, many more care workers are likely to have immunity acquired via infections. Given the large outbreaks of Coronavirus that happened under DHSC's disastrous policy to discharge untested hospital patients to care homes at the start of the pandemic,³⁵ some care home workers may have acquired natural immunity and wish to delay or decline a vaccination. Recent WHO advice states that "natural infection may provide similar protection against symptomatic disease as vaccination"³⁶ - however, immunity acquired via prior infection is not accounted for in these statistics. We believe this is an oversight.

In the debate on these Regulations in the House of Commons, the Minister claimed that "only 65% of older-age care homes in England were meeting that safe minimum level [of 80% staff vaccination uptake], and the figure fell to 44% in London."³⁷ These statistics appear to be completely at odds with the latest data showing an 87% overall uptake rate among care staff in older adult care homes, and 95% of local authorities reaching 80%+ staff uptake (many of the rest of which have reached 79%). The statistics were also queried by Mark Jenkinson MP, who noted they were out of date.³⁸ **These statistics must be checked and dated to ensure that the Minister did not mislead the House.**

What further protection is needed?

Scientific advice is required to provide a renewed analysis of protective immunity rates within care homes. The advice should account for natural immunity as well as vaccination rates.

However, according to the high bar set by prior SAGE (SCWG) advice, almost all local authorities already have a sufficiently high carer vaccination rate. Wandsworth is the only outlier, at 70.1% - a targeted intervention could be considered here.

A mandatory vaccination law is unlikely to be found compatible with protected rights, such as the Article 8 right to a private life, if it is not strictly necessary or not proportionate. A proportionality test may include whether less intrusive means of protecting public health have been pursued. Whilst the Government makes much of its

³⁵ Patients were sent back to care homes without Covid test despite bosses' plea – Michael Savage and James Tapper, The Guardian, 29th May 2021: <https://www.theguardian.com/society/2021/may/29/patients-were-sent-back-to-care-homes-without-covid-test-despite-bosses-plea>

³⁶ COVID-19 natural immunity – WHO, 10th May 2021: https://www.who.int/publications/i/item/WHO-2019-nCoV-Sci_Brief-Natural_immunity-2021.1

³⁷ HC Deb (13th July 2021), vol. 699, col. 275: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

³⁸ HC Deb (13th July 2021), vol. 699, col. 277: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

communications campaigns,³⁹ a more effective and unintrusive approach than resorting to mandatory medical intervention would be to provide material support to increase accessibility to vaccines in targeted areas.

Vaccine accessibility is vital.

- Care workers should be offered fully paid leave to receive vaccinations and to recover from any short term side effects. This would be a far more time and cost effective measure than coercion, sacking and redundancies.
- Wandsworth council should provide walk in clinics for all to be offered covid vaccinations, regardless of migration status, and advertise these services in multiple languages to care homes.

Indeed, unions have highlighted a range of measures that they believe would be more effective, such as allowing appointments during working hours,⁴⁰ increasing statutory sick pay so those suffering from side-effects will not lose out,⁴¹ further education,⁴² opportunities to ask colleagues who have vaccinated questions, taking vaccinations into communities and workplaces,⁴³ and information campaigns.⁴⁴

However, as stated by Prof. Allyson Pollock in the BMJ, "vaccination is not a panacea for safety".⁴⁵ The SAGE social care working group (SCWG) further cautioned that:

"Vaccine is not a silver bullet, just part of our armoury against COVID-19. There is a risk that vaccination may lead to a reduced use of testing, PPE and IPC at a time that vigilance is needed against new variants with poorer vaccine efficacy."⁴⁶

³⁹ Explanatory Memo to The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, page 4:
https://www.legislation.gov.uk/ukdsi/2021/9780348224993/pdfs/ukdsiem_9780348224993_en.pdf

⁴⁰ Government must try harder on vaccines before leaping to the law, says UNISON – UNISON, 23rd March 2021: <https://www.unison.org.uk/news/press-release/2021/03/government-must-try-harder-vaccines-leaping-law-says-unison/>

⁴¹ Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15th April 2021: <https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>

⁴² Forced jobs are counterproductive, says UNISON – UNISON, 3rd March 2021:
<https://www.unison.org.uk/news/2021/03/forced-jobs-counterproductive-says-unison/>

⁴³ Less than half of companies giving staff paid time-off to get vaccinated – TUC, 22nd March 2021:
<https://www.tuc.org.uk/news/less-half-companies-giving-staff-paid-time-get-vaccinated-tuc-poll>

⁴⁴ Government must try harder on vaccines before leaping to the law, says UNISON – UNISON, 23rd March 2021: <https://www.unison.org.uk/news/press-release/2021/03/government-must-try-harder-vaccines-leaping-law-says-unison/>

⁴⁵ Mandatory covid-19 vaccination for care home workers: Unnecessary, disproportionate, and misguided, Allyson Pollock and Lydia Hayes, BMJ, 8 July 2021: <https://www.bmj.com/content/374/bmj.n1684>

⁴⁶ Social Care Working Group consensus statement, March 2021 (updated 16th June 2021) – Department of Health and Social Care: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes/social-care-working-group-consensus-statement-march-2021>

It is important that care homes continue to implement a range of measures to ensure the safety of staff and residents.

DISCRIMINATION

The equality impact assessment for these Regulations acknowledges that:

“The effects of this policy could be significant, as it could lead to dismissal of, or penalisation of, staff who work in care homes who refuse to or cannot be vaccinated or could lead to such workers feeling pressured to consent to vaccination.”⁴⁷

Unvaccinated employees or prospective employees, who are disproportionately young, on low incomes and from black and minority ethnic groups,⁴⁸ are likely to be treated as less employable.

The care home policy will disproportionately affect women, who make up 84% of care workers;⁴⁹ migrants, who make up 16% of care workers;⁵⁰ and people on low incomes, as the majority of care staff earn below the National Living Wage.⁵¹

This means the policy also targets groups that may have particularly sensitive obstacles to vaccination that would be exacerbated, rather than removed, by mandatory vaccination requirements.

Disabilities

People who are ineligible for covid-19 vaccinations for clinical reasons are exempt from the vaccine requirement under the Regulations (Reg. 5(b)(ii)). The government does not know, and has not made an estimation, of how many care workers are clinically unable to receive a covid-19 vaccination.

⁴⁷ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf.

⁴⁸ Anti-vaccine attitudes and risk factors for not agreeing to vaccination against COVID-19 amongst 32,361 UK adults: Implications for public health communications – D. Fancourt, E. Paul, A. Steptoe, medRxiv, 23rd October 2020: <https://www.medrxiv.org/content/10.1101/2020.10.21.20216218v1>

⁴⁹ More male care workers needed, says providers' chief – BBC News, Aug 2015: <https://www.bbc.co.uk/news/uk-34103302>

⁵⁰ Workforce Intelligence 2019/20: <https://www.skillsforcare.org.uk/adult-social-care-workforce-data/Workforce-intelligence/publications/Topics/Workforce-nationality.aspx>

⁵¹ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.20: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf.

The policy will require care workers to disclose health issues and disabilities to their employer that they otherwise would not. This could in turn result in discrimination. This is acknowledged in the equality impact assessment:

“(…) the policy could force staff to disclose their disabilities to management, with the risk of less favourable treatment by their employer or colleagues.”

A potential mitigation is suggested, to “allow staff to provide their employer with proof of medical exemption, without revealing the reason for it.”⁵² However, given that health reasons are the *only* exemption, workers’ medical privacy is still compromised and they are put at risk of discrimination.

Moreover, given the introduction of mandatory vaccination checks during recruitment, and a mandatory vaccine requirement across the workforce, it is likely that an unvaccinated candidate (who may have health problems and/or disabilities) will be treated less favourably than vaccinated candidates. Such discrimination in recruitment would be hard to prove or challenge. This has not been acknowledged or addressed in the equality impact assessment. This is an unacceptable oversight.

Religion

Some people with religious or other protected beliefs may be discriminated against, if they are disproportionately affected by the policy.

Data up to April 2021 shows that vaccine uptake was lowest among Buddhists and Muslims, who had 3-4 times greater odds respectively of not being vaccinated than Christians.⁵³ Low uptake among Buddhists is not examined, or even noted, in the equality impact assessment.

Religious objections or hesitancy towards vaccines can be rooted in various different reasons, including for some, the use of foetal cell cultures to manufacture the vaccine, as noted in the equality impact assessment.⁵⁴

Mandatory vaccination is particularly problematic for Christian Scientists, who typically reject medical intervention in favour of prayer. Sir Graham Brady MP raised the case of

⁵² Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.8: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf.

⁵³ Coronavirus and vaccination rates in people aged 50 years and over by socio-demographic characteristic, England: 8 December 2020 to 12 April 2021 – ONS, 6th May 2021: <https://www.ons.gov.uk/people-populationandcommunity/healthandsocialcare/healthinequalities/bulletins/coronavirusandvaccination-ratesinpeopleaged70yearsandoverbysociodemographiccharacteristicengland/8december-2020to12april2021#identity-and-cultural-factors>

⁵⁴ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.14: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf.

the Christian Scientist care home, Lime Tree House, in his constituency, which is one of only two in the country:

“I want to focus in the brief time available on a specific point: the importance of respecting religious freedom. (...) Christian Scientists responded to the consultation in May. Since then, they have written to the Minister and indeed the new Secretary of State—obviously, that was very recently—but have not received a response. Clearly, there is no provision in the legislation to protect this important principle. (...)

“I am talking about two small care homes, a handful of residents and a situation in which both residents and carers might prefer not to have a medical intervention inflicted on them against their will, but a very big principle is at stake.”⁵⁵

The Secondary Legislation Scrutiny Committee raised concerns about the unexamined impact on human rights, such as freedom of religion and belief. Referring to the consultation responses, the Committee noted:

“(...) a significant number of people take the view that the policy is contrary to the European Convention on Human Rights on the ground, they say, that it infringes their bodily autonomy or is contrary to their beliefs.

“(...) Although the EM [explanatory memorandum] contains the standard Ministerial statement that this legislation is compatible with the Convention, we would have expected DHSC to have provided stronger supporting evidence and, in particular, its response to the human rights issues raised in response to the consultation.”

However, no such evidence has been provided.

When summoned to answer questions to the Committee, Nadhim Zahawi MP said:

“we chose not to go down the route of making that [religious] exemption, not least because I think it would also create tensions within the workforce in this sector as to why people are exempt.”⁵⁶

The risk of “tensions” among staff who do not respect other’s religious practice is not a legitimate reason to withhold individuals’ right to freedom of religion, protected by Article 9 of the European Convention on Human Rights. The Minister’s answer was illogical, wholly unsatisfactory and is likely to be tested in the courts.

⁵⁵ HC Deb (13th July 2021), vol. 699, col. 288: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁵⁶ Secondary Legislation Scrutiny Committee, oral evidence: Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, 13 July 2021, p.12

However, it is right that this policy will force some to disclose their religious beliefs to employers, which may lead to disadvantageous treatment. As noted in the equality impact assessment:

“Staff may also face a situation in which they have to reveal their religion or beliefs to employers against their will, potentially exposing themselves to stigma or harassment from employers and colleagues who do not hold the same beliefs.”⁵⁷

These Regulations will erode religious rights in our country. The equality impact assessment notes that, without a religious exemption, “mitigating this impact entirely will not be possible” and so “effective communications”⁵⁸ are needed to improve uptake. However, this is not a serious impact mitigation strategy - communications will not replace individuals’ firmly held religious beliefs. The result is that people risk losing their jobs on the basis of their religious beliefs and some care homes, such as the Christian Science care homes, risk becoming completely redundant.

Pregnancy

Women risk being coerced, and/or sacked, due to their vaccination choices during pregnancy and maternity, rolling back decades of equality rights if these Regulations are passed.

As noted, 84% of care staff are women and as a result, as acknowledged in the equality impact assessment:

“The impact of a vaccine as a condition of deploying staff to work in a care home could lead to women being disproportionately at risk of facing enforcement action at work and potentially losing their jobs.”⁵⁹

The majority of pregnant women (58%) have declined covid vaccination⁶⁰ - and whilst health authorities now advise women to receive covid vaccinations in pregnancy, the WHO still recommends that a decision is made on the basis of an individual risk-benefit

⁵⁷ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.14: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf

⁵⁸ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf

⁵⁹ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.8: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf

⁶⁰ Maternity Colleges express concern over vaccine hesitancy in pregnant women – Royal College of Obstetricians and Gynaecologists, 10 June 2021: <https://www.rcog.org.uk/en/news/maternity-colleges-express-concern-over-vaccine-hesitancy-in-pregnant-women/>

analysis.⁶¹ The Royal College of Obstetricians and Gynaecologists currently advises women healthcare workers that “the decision whether to have the vaccination in pregnancy is your choice”.⁶² However, pregnancy is not a clinical exemption in the UK, meaning that choice will be taken away for carers who are pregnant, breastfeeding or trying to conceive if these Regulations for mandatory vaccines are passed.

The equality impact assessment acknowledges that:

“There is a serious risk of discrimination against those who do not wish to take the vaccine due to pregnancy or maternity issues, such as breastfeeding.”⁶³

And that,

“A requirement to have the vaccine would be likely to cause significant anxiety in pregnant and breastfeeding staff.”⁶⁴

And:

“It is likely that the policy could negatively impact women who are trying to conceive, or planning to do so in the future.”⁶⁵

However, these risks are not justified or mitigated. The assessment only repeats that there are “no specific safety concerns” with covid vaccines in relation to pregnancy,⁶⁶ overlooking the fact that some pregnant women simply want more long-term safety data and to make this choice themselves.

There is a real prospect of unvaccinated women now having to disclose their pregnancy status to employers, in attempting to justify their personal health choices. The equality impact assessment says, “we will work through how the exemptions process can ensure women can inform their employer that they are exempt without disclosing the reason for it”- although no operational guidance has been published whatsoever - in the same paragraph that notes there is no exemption for pregnancy or maternity. The equality impact assessment is not fit for purpose.

⁶¹ The Moderna COVID-19 (mRNA-1273) vaccine: what you need to know – WHO, 25th June 2021: <https://www.who.int/news-room/feature-stories/detail/the-moderna-covid-19-mrna-1273-vaccine-what-you-need-to-know>

⁶² COVID-19 vaccines, pregnancy and breastfeeding – RCOG, 28 May 2021: <https://www.rcog.org.uk/en/guidelines-research-services/coronavirus-covid-19-pregnancy-and-womens-health/covid-19-vaccines-and-pregnancy/covid-19-vaccines-pregnancy-and-breastfeeding/>

⁶³ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.15: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf

⁶⁴ Ibid.

⁶⁵ Ibid, p.16

⁶⁶ Ibid., p.15

Ethnicity

The policy will have a disproportionate effect on people from ethnic minority backgrounds.

Ethnic minority groups are over-represented in the care sector - 1 in 5 care workers are Black, Asian or from another ethnic minority, a higher proportion than in the overall population of England (1 in 7). The equality impact assessment acknowledges that:

“A higher proportion of staff from ethnic minority groups could therefore face action from their employers or lose their jobs for refusing to take the vaccine.”⁶⁷

Again, the only mitigation offered is communications and multi-lingual messaging, seeming to assume total compliance as a result. However, not only will the policy remain to disproportionately affect ethnic minority groups, the coercion is likely to further deteriorate trust.

This is acknowledged, though not addressed or mitigated, in the equality impact assessment which notes:

“there is a risk that issues such as lack of trust could be exacerbated by this policy. There is likely to be a significant effect on this cohort regardless of mitigations carried out, with regards to Public Sector Equalities Duties 1, 2 and 3”.⁶⁸

It is wholly unacceptable that this particularly serious impact has not been weighed against the proportionality of the policy. The policy is disproportionate, ineffective, and harmful for ethnic minorities.

Age

The policy is likely to disproportionately affect young people, among whom hesitancy is higher due to a lower risk of adverse outcomes from coronavirus infections. Hesitancy is highest among 16-29 year olds (17%) and women.⁶⁹ The equality impact assessment estimates that 15% of the adult social care workforce is comprised of women under 30, which could mean a significant impact both on young women and staffing in the sector.⁷⁰ Other than “communications”, which assumes total compliance as a result, no mitigation strategy is offered.

⁶⁷ Ibid. p.10

⁶⁸ Ibid. p.11

⁶⁹ Equality Impact Assessment form – Department of Health and Social Care, 16th June 2021, p.12: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1001051/vaccination-as-a-condition-of-deployment_public-sector-equality-duty2.pdf

⁷⁰ Ibid.

Migrants

Many of the estimated 1.2 million undocumented migrants in the UK are unable to access health services due to punitive data sharing as part of hostile environment policies. Although the Government committed to ensuring everyone can receive covid vaccinations regardless of immigration status, a new investigation by the Bureau of Investigative Journalism found that 76% of GP surgeries in the UK refuse to register undocumented migrants, making vaccinations difficult to access.⁷¹

⁷¹ Most GP surgeries refuse to register undocumented migrants despite NHS policy – BIJ, 15th July 2021: <https://www.thebureauinvestigates.com/stories/2021-07-15/most-gp-surgeries-refuse-to-register-undocumented-migrants>

BODILY AUTONOMY

Bodily autonomy is a precious feature of our democracy. Mandating vaccination (either directly or indirectly) is a “**profound departure from public health norms**”⁷² that poses a serious threat to the principle of personal and bodily autonomy, leading to discrimination and the widening of inequalities as a result.

Personal and bodily autonomy are key rights and a principle of individual liberty. These Regulations would make an individual’s employment contingent on a medical procedure. As Dr Rosen Allin-Khan MP told the House of Commons,

“Forcing carers to choose between losing their job and taking a vaccine that they are afraid of is inhumane.”⁷³

A choice between a mandatory medical intervention and unemployment is no choice at all for many, particularly low paid workers.

Bodily autonomy is particularly significant in the context of new treatments. As the ethicist Professor Jonathan Wolff from Oxford University stated in oral evidence to the Public Administration and Constitutional Affairs Committee:

“I think it is worth remembering that we have only emergency use authorisation for the vaccines. We don’t have full authorisation in the way that we would have for other vaccines, so it may be that some health workers are more cautious about the vaccines and are waiting for full authorisation before they take it”.⁷⁴

Given the likelihood that ‘booster’ vaccinations will be required to support ongoing immunity,⁷⁵ these Regulations would pave the way for a continuous intrusion in bodily autonomy, with those working in care homes forced to receive regular medical procedures in order to retain their employment.

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.

⁷² Mandatory covid-19 vaccination for care home workers: Unnecessary, disproportionate, and misguided, Allyson Pollock and Lydia Hayes, BMJ, 8 July 2021: <https://www.bmj.com/content/374/bmj.n1684>

⁷³ HC Deb (13th July 2021), vol. 699, col. 280: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁷⁴ Covid Vaccine Certification HC1315, Public Administration and Constitutional Affairs Committee, 23 March 2021, Q12: <https://committees.parliament.uk/oralevidence/1936/pdf/>

⁷⁵ There’s still ‘a high level of uncertainty’ on autumn booster Covid jabs, warns vaccines adviser – Leah Sinclair, MSN News, 25th June 2021: <https://www.msn.com/en-gb/news/news/there-e2-80-99s-still-e2-80-98a-high-level-of-uncertainty-e2-80-99-on-autumn-booster-covid-jabs-warns-vaccines-adviser/ar-AALrdHf>

EXPANDING MANDATORY VACCINE REQUIREMENTS

Since the consultation on mandatory vaccines in older adult care homes, the policy has already widened to impact not only care workers but all workers on care home premises, and not only older adult care homes but all care homes.

There have already been indicators that these Regulations will pave the way for a wide scale roll-out of mandatory vaccination legislation, covering other workforces and other vaccinations. This concern was raised by Sir Graham Brady MP in the House of Commons debate:

“(...) it sets a serious precedent (...) As yet, we are not talking about compulsory vaccination for flu, but once we begin down that road, where does it end?”⁷⁶

Former Health Secretary Matt Hancock stated that the Government would be consulting on also making coronavirus vaccinations mandatory for NHS staff and was “looking at” making flu vaccines mandatory for care home staff.⁷⁷ This was also stated in the government’s response to the consultation on mandatory vaccination in older adult homes:

“We are therefore considering whether this should be an ongoing requirement which could be applied across health and social care. There is also the question of whether the policy should be extended to other vaccines, such as the flu vaccine.”⁷⁸

This intention was reiterated by Vaccines Minister Nadhim Zahawi recently:

“We should be consulting on effectively widening the requirement to the rest of the healthcare sector and the rest of the social care sector, such as domiciliary care.”⁷⁹

It is sadly inevitable that the introduction of mandatory vaccines to English law will expand both in terms of the people to whom it applies and the vaccinations made compulsory.

⁷⁶ HC Deb (13th July 2021), vol. 699, col. 287: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁷⁷ HC Deb (16th June 2021), vol. 697, col. 333-4: <https://hansard.parliament.uk/commons/2021-06-16/debates/B58EB442-0F87-4C09-A314-4486B938DD43/Coronavirus>

⁷⁸ Making vaccination a condition of deployment in care homes: government response – DHSC, 16 June 2021, Section 4.2 Policy Scope.

⁷⁹ Secondary Legislation Scrutiny Committee, oral evidence: Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, 13 July 2021, p.7

MANDATORY VACCINATION AND THE LAW

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,⁸⁰ and the Coronavirus Act 2020 extends this prohibition to Scotland and Northern Ireland.⁸¹

Hepatitis B vaccines

Hepatitis B vaccines are not mandated under the law for health care workers or anyone else.

There has been significant 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. Former Health Secretary Matt Hancock has previously claimed that it does, stating "(...) surgeons need to have a vaccine against hepatitis B. Vaccination that is tied to work in fact has a longstanding precedent in this country."⁸²

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 'job 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."⁸³

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 direct contact with patients' blood or blood-stained body fluids."⁸⁴ The Department of Health's "Health clearance for tuberculosis, hepatitis

⁸⁰ Section 45E

⁸¹ Section 25E

⁸² HC Covid-19 update, vol. 692, col. 660: <https://hansard.parliament.uk/commons/2021-04-19/debates/29C5F76D-1AA5-408F-A2D2-824ECB3A65FB/Covid-19Update>

⁸³ Covid-19: Is the UK heading towards mandatory vaccination of healthcare workers? – Jacqui Wise, the BMJ, 21st April 2021: <https://www.bmj.com/content/373/bmj.n1056>

⁸⁴ 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

B, hepatitis C and HIV” guidance of March 2007 is clear that the “vast majority of nursing and medical duties do not pose a risk of infection to patients, provided that normal infection-control precautions are observed” and that those in roles undertaking exposure prone procedures (i.e. surgeons) should be “offered” hepatitis B vaccinations and it is “suggested” that this takes place early in recruitment.⁸⁵ In the case of the current proposal, on the other hand, a novel vaccination will be made mandatory for not only prospective staff but existing staff, raising many more ethical issues.

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, which is entirely novel.

Victorian coercion

In the UK, vaccinations have not been mandatory since Victorian Britain. In 1853, the Vaccination Act made smallpox vaccinations of infants compulsory; in 1867, vaccinations were made compulsory for all under-14s. The new laws resulted in fines, prosecutions, court challenges and mass protests. Mandatory vaccinations also sparked an anti-vaccination movement and the emergence of the National Anti-Vaccination League. Eventually, in 1898, the law was changed so that vaccines were no longer mandatory and the anti-vaccination movement subsided. Today, the Public Health Act 1984 specifically prohibits forced vaccinations and the UK has some of the highest vaccine uptake rates in Europe. It would be backwards and counter-productive for the UK to make the same mistakes of coercive Victorian medicine policies. If these Regulations are passed, the Government could no longer claim that no one is “forced” to receive a vaccination in this country and vaccine scepticism will become more deep rooted.

Human rights

These Regulations could be open to challenge under human rights law. These Regulations engage 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 care and nursing home workers to be vaccinated is not proportionate, particularly as there are less intrusive methods of protecting those living in care homes, less intrusive methods of supporting vaccination uptake, and as vaccine uptake is currently only below target in Wandsworth.

⁸⁵ Health clearance for tuberculosis, hepatitis B, hepatitis C and HIV: New healthcare workers – Department of Health, March 2007, pp.6-7: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/382152/health_clearance_tuberculosis_hepatitis_hiv.pdf

Further, the government's failure to fully assess the impact of these Regulations and set out a risk management strategy are certain to result in seriously diminished care standards, calling into question whether it is upholding its obligations to protect the right to life and the right to be free from inhuman and degrading treatment, protected by Articles 2 and 3 of the Human Rights Act respectively.

HEALTH SURVEILLANCE

The Regulations state that workers entering a care home must provide "evidence" that they have received two doses of an approved coronavirus vaccine or that they are clinically unable to receive the vaccine.⁸⁶ The Regulations do not state what this evidence should consist of, how it should be presented, or how entry should be policed.

A proposed amendment to the Infection Prevention and Control 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"; and that providers are obliged to hold "a record of medical exemption for staff who are unable to receive a COVID-19 vaccine due to health reasons."⁸⁷

Workers will be obliged to present sensitive health information to employers, either to prove their vaccination status, or to prove a medical exemption. This will normalise invasive checks of employee health status and would likely set a precedent that would impact other sectors and other forms of health checks.

⁸⁶ Regulation 5

⁸⁷ Making vaccination a condition of deployment in older adult care homes – Department of Health and Social Care, GOV.UK, 17th 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>

STAFF SHORTAGES

There is growing concern that forcing workers to make such a choice will lead to an already struggling care sector lose even more of its workforce. Carers may leave the sector whether or not they are vaccinated, due to concerns over their diminishing rights and bodily autonomy. More than a third of GMB Union carers are considering leaving the profession if vaccines become mandatory, leading to warnings of a staff “exodus”.⁸⁸ In an evidence session of the Secondary Legislation Scrutiny Committee to which Vaccines Minister Nadhim Zahawi was summoned, the Minister claimed only 0.5% of staff resigned from Barchester care homes after it announced its own mandatory vaccination policy.⁸⁹ However, this cannot be taken as a representation of the full impact on staffing – this figure, at best, represents an immediate reaction to a policy that did not have the force of the law. It is also important to bear in mind that, given the wide scope of the Regulations, over a million healthcare workers could be affected and many more in other sectors. The prospect of 0.5% immediate resignations across such a wide workforce is a very serious one that could represent thousands of job losses, in an already understaffed, critical sector.

Unison explained that “7% of posts in the care sector are currently unfilled, with recruitment and retention already very difficult due to low wage levels for difficult and demanding jobs”⁹⁰ – a growing problem in the context of high vacancies in the hospitality sector. Similarly, Dr Rosena Allin-Khan MP said in the debate on the Regulations:

“There are serious warnings from the care sector that the Government’s plan could lead to staff shortages in already understaffed care homes. That would have disastrous consequences on the quality of care. More than 100,000 posts in the care sector are currently unfilled, with recruitment and retention already extremely difficult due to low wage levels for difficult and demanding jobs. (...) We already have a social care crisis. Let us not deepen it.”⁹¹

Similarly, Liberal Democrat Health Spokesperson Munira Wilson MP said:

“I fear that these measures will do more harm than good and that we risk a mass exodus of staff from an already overburdened, overstretched and underfunded sector.”⁹²

⁸⁸ ‘Ill thought through’ plan to mandate vaccinations could lead to care staff ‘exodus’ – GMB Union, 16th June 2021: <https://www.gmb.org.uk/news/ill-thought-through-plan-mandate-vaccinations-could-lead-care-staff-exodus>

⁸⁹ Secondary Legislation Scrutiny Committee, oral evidence: Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, 13 July 2021, p.6

⁹⁰ Mandatory vaccines in care homes – Unison briefing, July 2021

⁹¹ HC Deb (13th July 2021), vol. 699, col. 280: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

Dr Susan Hopkins, strategic response director for Covid-19 at Public Health England, warned “people may vote with their feet (...) and that could lead to staff supply issues in care homes”.⁹³ This has not been accounted for by the government and, as discussed, an impact assessment was not provided before the House of Commons debate and has not (as of 17th July 2021) been provided for the House of Lords debate.

The Explanatory Memorandum to the Regulations merely states that government “expect Local Authorities to proactively manage these risks” without explaining how, and that the Care Act provides for contingency plans. However, no contingency plans have prepared for permanent legislative change to workers’ rights leading to unprecedented work shortages, in the context of a pandemic. The government’s failure to fully assess the impact of these Regulations and set out a risk management strategy are certain to result in seriously diminished care standards, calling into question whether it is upholding its obligations to protect the right to life and the right to be free from inhuman and degrading treatment, protected by Articles 2 and 3 of the Human Rights Act respectively.

⁹² HC Deb (13th July 2021), vol. 699, col. 286: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹³ Covid vaccine to be compulsory for England care home staff - Mary O'Connor and Marie Jackson, BBC News, 16th June 2021: <https://www.bbc.co.uk/news/uk-57492264>

THE ALTERNATIVE: MATERIAL SUPPORT, NOT COERCION

Mandatory vaccination abandons long held public health principles in this country. This would reflect the crossing of the Rubicon on medical choice, medical confidentiality and bodily autonomy - vital elements of the protected right to privacy. It would also risk undermining our high levels of vaccine support – particularly among marginalised groups As Dr Rosena Allin-Khan said in the House of Commons debate on the Regulations,

“The disproportionate use of coercive and restrictive practices on minority communities also, importantly, erodes trust in the system. (...) Further coercion and punishment through the threat of being dismissed from employment only reinforces the reasons for hesitancy in the first place.”⁹⁴

Similarly, SNP MP Dr Philippa Whitford, Chair of the APPG on Vaccinations, said that a recent report the group had published

“highlighted the dangers of making vaccination legally mandatory because while it may force uptake among some, it tends to increase distrust and suspicion of vaccines and drive those who are hesitant to become vaccine refusers.”⁹⁵

She added, “locally targeted support, information and persuasion would be more successful in convincing care home staff than heavy-handed legislation, which threatens their jobs.”⁹⁶

A recent study on vaccination behaviours among health and care workers from the London School of Hygiene and Tropical Medicine found vaccine coercion was actively counter-productive:

“Our findings emphasise the importance of Covid-19 vaccination remaining voluntary.”

“Our work shows a move towards mandating COVID-19 vaccination is likely to harden stances and negatively affect trust in the vaccination, provider, and policymakers.”

“For social care workers, pressure was exacerbated by hearing of care sector employers making Covid-19 vaccination mandatory for staff, and the vulnerability of social care worker positions (e.g. employment on zero-hours contracts). Feeling pressurised had damaging effects, eroding trust and negatively affecting

⁹⁴ HC Deb (13th July 2021), vol. 699, col. 278: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹⁵ HC Deb (13th July 2021), vol. 699, col. 282: <https://hansard.parliament.uk/Commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹⁶ Ibid.

relationships at work, and often exacerbated COVID-19 vaccination concerns and hardened stances on declining vaccination.”

This is the latest in a long line of research finding that vaccine coercion is counter-productive for uptake. EU-funded research found that compelling people to take vaccines does not necessarily result in higher uptake of vaccines in Europe.⁹⁷ Further, our analysis of recent statistics produced for the European Commission show that the top five European nations for positive attitudes towards vaccinations all have voluntary vaccination policies, whereas the European nations with the most negative attitudes are disproportionately those with mandatory vaccination policies: Hungary, Slovakia and Croatia.⁹⁸ It has long been recognised that medical coercion, aside from being unethical and often in tension with states’ human rights obligations, can be counter-productive as it lowers trust and raises suspicions.

The UK has one of the highest levels of trust in vaccinations in the world.⁹⁹ Abandoning the consensual approach whereby individuals are empowered to make their own choices about their healthcare for a section of the public would be misguided and counter-productive.

⁹⁷ Compulsory vaccination and rates of coverage immunisation in Europe – ASSET (Action plan on Science in Society related issues in Epidemics and Total pandemics), 6th September 2016: <http://www.asset-scienceinsociety.eu/reports/page1.html>

⁹⁸ State of Vaccine Confidence in the EU +UK 2020 – A. de Figueiredo, E. Karafillakis, and H. J. Larson, Vaccine Confidence Project, 2020.

⁹⁹ Global vaccine trust rising, but France, Japan, others sceptical – Reuters, 4th February 2021: <https://www.reuters.com/article/health-coronavirus-vaccines-confidence-idINKBN2A408J>

INTERNATIONAL GUIDANCE

The World Health Organisation has warned that 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.”¹⁰⁰

The Parliamentary Assembly of the Council of Europe passed Resolution 2361 (2021) which advises that, to ensure a high vaccine uptake, states should

“ensure that citizens are informed that the vaccination is not mandatory and that no one is under political, social or other pressure to be vaccinated if they do not wish to do so”

and to

“ensure that no one is discriminated against for not having been vaccinated, due to possible health risks or not wanting to be vaccinated”.¹⁰¹

The UN Declaration on Bioethics and Human Rights states:

“Any preventive, diagnostic and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned, based on adequate information. The consent should, where appropriate, be express and may be withdrawn by the person concerned at any time and for any reason without disadvantage or prejudice”.¹⁰²

International rights and ethics standards do not support mandatory vaccination in our current context.

¹⁰⁰ COVID-19 and mandatory vaccination: Ethical considerations and caveats – World Health Organisation, 21st 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>

¹⁰¹ Covid-19 vaccines: ethical, legal and practical considerations – Parliamentary Assembly of the Council of Europe, Resolution 2361 (2021), 27th January 2021: <https://pace.coe.int/en/files/29004/html>

¹⁰² Universal Declaration on Bioethics and Human Rights, 2005 (Article 6): http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html

UNIONS

Unions representing care home workers have also spoken out against the proposals, arguing that a supportive approach would be more effective and rights-respecting.

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."¹⁰³

Unite 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."¹⁰⁴

The TUC has been similarly critical:

"this approach is counterproductive, risks damaging employment relations and could be discriminatory – for example by penalising pregnant women.

"The union body believes that employers should abandon any policy of compulsory vaccination, and should instead focus on promoting and facilitating vaccination, by, for example, giving workers paid time off for their appointments."¹⁰⁵

UNISON said:

"Vaccinations are the way out of this pandemic. But forcing staff to get jabbed won't work, nor will threats and bullying.

¹⁰³ Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15th April 2021: <https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>

¹⁰⁴ 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/>

¹⁰⁵ Less than half of companies giving staff paid time-off to get vaccinated – TUC, 22nd March 2021: <https://www.tuc.org.uk/news/less-half-companies-giving-staff-paid-time-get-vaccinated-tuc-poll>

“The government should concentrate on persuasion and reassurance. The care sector is facing huge staff shortages. This already dire situation will only get worse if employees feel coerced and unsupported.”¹⁰⁶

¹⁰⁶ Care staff more likely to decline job if threatened by employers, says UNISON survey - 24th May 2021: <https://www.unison.org.uk/news/press-release/2021/05/care-staff-more-likely-to-decline-job-if-threatened-by-employers-says-unison-survey/>

CARE WORKERS' TESTIMONIES

We include here a number of testimonies from care workers who have contacted Big Brother Watch in search of support and advice. Names have been changed to protect their identities.

Julie*

I work in a dementia care home in Nottingham. I've worked there since the day it opened 8 years ago.

I do activities with all the residents - eventually we will resume normal activities just like everyone else, we will go to shops, pubs, cinema, seaside to name a few. The residents will not be stopping in life in the way many assume they will. Just because they have dementia does not mean life inside a care home forever. I care very much for my residents – they are like my own family, hence why I never stopped working all through the pandemic as being stuck inside, they would need activities even more. So I duly left my family each day, my kids went to school as key worker children, and my husband carried on working too. As a family we carried on, as I'm sure many others did too. No furlough for us.

My father died of dementia 8 years ago. He was also in a care home, so I understand how it feels to be a relative and also someone who works in a care home.

I am now faced with the awful possibility that I may lose my job if I do not get vaccinated. My anxiety is back with vengeance – have we not been through enough? I don't wish to be vaccinated and that should always remain my choice. Surely if we sign up to being jabbed at work we have to sign up to being regularly jabbed? The whole thing freaks me out.

I do not put the residents at risk. I do a test everyday before I go to work, I wear a mask all day while I'm at work, and all the residents I look after are vaccinated. Why do we need to have every single carer vaccinated when so many safety protocols are already in place? And why do you insist we get vaccinated when the residents are protected by having the vaccine? They will soon get to go back out and be exposed to unvaccinated members of the public. Many residents won't be wearing a mask either.

They will also be exposed to unvaccinated people, for example with grandchildren visiting, or a hospital visit, an eye test or a dentist visit. Why are you putting all this on care workers to be vaccinated? It makes no sense whatsoever.

When I explain all of this I don't understand how the conclusion of mandatory vaccines for care home workers has been reached. Clearly, this hasn't been thought through.

I think the government seem to think they will be locked in the home, but this is not the case at all. Just because they have dementia does not mean life is any less meaningful and I'm there to make sure they have meaningful days. As I was once a relative I wouldn't care if the carer had not been vaccinated or not, as long as the care is given - that's the priority.

I will not take the vaccine but I do not wish to lose my job or deprive these wonderful residents of meaningful activities which I provide.

I'm a healthy 45 year old and I have worked through all this pandemic without a job.

I was once clapped for being so brave and wonderful. Now I'm faced with the sack. I don't know what job I'll do if I get sacked. How will I pay my mortgage? Or my son's football fees?

I hope my voice is heard and this lunacy is stopped.

Kate*

I have worked for the same care home for over 7 years, I am extremely good at my job. I have caught COVID while looking after my residents. I am not at all against vaccines, I am pro choice. I have decided that I will not take it until I am 100% sure of it .

I personally think it's a slap in the face that I was ok to look after my residents over the last year, even classed as a hero and clapped every week, but now this government is calling me dangerous, that I have to lose my job and livelihood and rely on the government instead, and saying that I am risking my residents lives when this isn't the case.

I wear all my PPE through my 12 hour shifts, get weekly testing and have a lateral flow test before each shift .

I am actually scared to death that I will not be able to support my family or be able to pay my rent or even be able to food on the table.

People just say well if you want to keep your job get the vaccine but why should be blackmailed into something I'm not 100% sure about?

Sarah*

After being made redundant last July through covid 19, I chose a completely different profession to help my local nursing home and become a care assistant.

I can honestly say this is by far the best decision I have ever made in my career but I now fear I will now lose my job because I do not want a vaccine.

90% of staff have had the two jabs in the care home I work in, which also has a strict PPE policy with PCR testing every week.

The support I have had from fellow colleagues and managers has been fantastic. However, none of them knew about the mandatory vaccine vote on the 13th July, I had to tell them. My manager knows nothing and is confused too.

I'm good at my new career and will be very sad to have to leave, as finding good staff is really hard. My anxiety of having to look for another job at 51 years old fills me with pure dread.

It's right what people say – you don't do the job for the money (£8.91ph.) The love you have for the residents comes from deep in your heart.

James*

Working for the NHS as a nurse for 5 years now and serving my local community in a range of settings has been a tremendous privilege and joy. My job is a source of dignity, pride, provision for my family and an outlet for my drive to care and support those who need it.

The government's current proposal to mandate vaccination for people like me has come as a deep shock. I really never thought this kind of proposal would even be considered, let alone pushed through so quickly. I wasn't even aware of the consultation, which I would have liked to contribute to.

With ethics being at the core of a nursing career, I can't fathom pragmatically how this response is proportionate. Advanced, specialised risk assessment is part of my every day, so when evaluating this decision objectively, it seems poorly weighed, and unmerited, seemingly made without taking into consideration many essential details of healthcare related issues. In healthcare, we also underpin our work with core values such as transparency, good communication, oversight, consent, trust and dignity. This decision seems to discount so many of these core values, and neglects considerations of sociological, psychological, religious, or belief-based models of health, in favour of a short-sighted medical-only approach to risk evaluation.

Aside from this though, I am now terrified that I am going to lose my job, or be given the choice between vaccine and career. I love my community. I love my work and the service users I support. My wife and children depend on me financially, and throughout the many difficulties this year, my work has in turn supported others, whether charities, my wife's progress towards starting her own business, or help for wider family members who have needed it. The prospects of having to quit my job, or lose it have been personally devastating.

I've worked under the stress which has been put on the NHS by the pandemic, and gladly so to serve the community! This stress is part of serving others in this field. But I've been more scared and uncertain in the past months, since finding out about the mandatory vaccination policy, than any other time through the pandemic, so much so that I've not been able to eat or sleep properly, and for the first time have had to call my local mental health team for help. And it honestly feels like a slap in the face, to be told on the one hand that i am valued because of my work in the NHS, and at the same time coerced to be vaccinated.

To me this legal provision for mandatory vaccinations, if successful, will mark a turning point in the relationship of the UK to our NHS and workers more generally. Personal liberty, bodily autonomy, privacy and non-coercion have always been treasured values, which protect our nation against authoritarian and abusive treatment of its citizens. I'm not a conspiracy theorist. I have very good, objective reasons for not wanting to be vaccinated. I take every precaution I can to protect my service users from infection. And until the publication of the government's consultation on this issue, I had been moving more and more towards being vaccinated.

I hope that this legal process is stopped and re-considered, but i will not be coerced into being vaccinated, if only to take a stand in support of my colleagues across the country who like me are in this horrible position. My plea to any who are due to vote on this issue is to stop. Take more time, demand more scrutiny and further consultation. Speak to people like myself, who conscientiously object to vaccination. This decision is unwise and unethical, and needs to be brought into the light of public scrutiny and debate.