

BIG BROTHER WATCH

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

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 Commons ahead of the debate on the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 on 13th July 2021.

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 and workers' rights would provide little public health benefit and would likely damage trust in public health authorities among the groups where trust matters most.

RECOMMENDATIONS

RECOMMENDATION 1: It is unacceptable that the Government is attempting to introduce a radical change in approach to healthcare via secondary legislation. MPs should vote against these Regulations.

RECOMMENDATION 2: The small number of local authority areas that have not reached the recommended rate of care home staff vaccination should receive targeted support and education. A legal mandate for all care home staff is not proportionate or necessary.

EFFECT OF THE REGULATIONS

The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 bring into force the Government's announcement that those working in care and nursing homes will be required to be fully vaccinated in order to retain their roles.

This would include those providing direct care and those undertaking ancillary roles such as cleaners and kitchen staff, as well as volunteers, agency workers and those coming into care homes to do other work – such as tradespeople, health care workers, hairdressers and beauticians, and Care Quality Commission inspectors.¹ This means that employers in various sectors are likely to demand vaccination information of employees, despite the long precedent of protections for workers' medical privacy. As a result, unvaccinated employees or prospective employees, who are likely to be disproportionately young and/or from black and minority ethnic groups, are likely to be seen and treated as less employable.

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."² 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.³

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 18.⁴

The Secretary of State is required to 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

¹ 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>

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

³ Regulation 5

⁴ Regulation 5

appropriate and, if so, the extent to which they could be achieved with a system that imposes less regulation.”⁵

RECOMMENDATION 1: It is unacceptable that the Government is attempting to introduce a radical change in approach to healthcare via secondary legislation. MPs should vote against these Regulations.

SUPPORT, NOT COERCION

SAGE guidance 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.”⁶ **As of 24th June, 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 one dose currently stands at 84.8%.⁷** The percentage of staff who have received their second dose is currently 72%. The percentage of eligible residents of older adult care homes reported to be vaccinated with at least one dose currently stands at 95.5%, and 92% 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.

Writing in the BMJ, Professor Allyson Pollock of Independent SAGE and Professor Lydia Hayes described the proposals as “**unnecessary, disproportionate, and misguided.**”⁸ Out of 149 local authority areas, only 31 local authority areas have not met SAGE’s goal of having 80% of care home staff receiving one dose of the vaccine.⁹ The vast majority of these local authority areas (as of 24th June) have between 77-79% of staff members vaccinated. Just 8, or 5% of, local authority areas have less than 75% of staff members recorded as vaccinated. However, this could be a data collection error, as noted in the Government’s own guidance which describes the statistics as “badged as experimental

⁵ Regulation 7(2)

⁶ 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>

⁷ COVID-19 weekly announced vaccinations – NHS England, 24th June 2021: <https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2021/06/COVID-19-weekly-announced-vaccinations-24-June-2021.xlsx>

⁸ 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>

⁹ COVID-19 weekly announced vaccinations – NHS England, 24th June 2021: <https://www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2021/06/COVID-19-weekly-announced-vaccinations-24-June-2021.xlsx>.

statistics [which] are undergoing development and further assessment of quality”, also expressing warning that “the number of individuals who have not received the vaccine cannot be directly derived from data published in these statistics”, owing to the fact that “data is self-reported by care providers for their staff and residents and as a result a proportion of staff and residents will have an unknown vaccination status.”¹⁰

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,¹¹ some care home workers may have acquired natural immunity and wish to delay or decline a vaccination. Natural immunity provides comparable protection to vaccination, and the length of protection offered by both vaccination compared to natural immunity is as yet unknown. **Vaccination is not a panacea for safety**¹² and a range of factors, including testing, PPE, risk assessments, training, equipment, and staffing levels – which could be actively harmed by this policy – must be factored when evaluating safety.

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 the small number of areas where vaccine uptake is lower than the national average, with an emphasis on education, support and facilitating vaccination, 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,¹³ increasing statutory sick pay so those suffering from side-effects will not lose out,¹⁴ further education,¹⁵ opportunities to ask

¹⁰ Adult social care monthly statistics, England: background quality and methodology – DHSC Guidance, 8th July 2021: <https://www.gov.uk/government/publications/adult-social-care-in-england-statistics-england-methodology/adult-social-care-monthly-statistics-england-methodology#accuracy-and-reliability>

¹¹Patients 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>

¹² 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>

¹³ 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/>

¹⁴ Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15th April 2021: <https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>

¹⁵ Forced jobs are counterproductive, says UNISON – UNISON, 3rd March 2021: <https://www.unison.org.uk/news/2021/03/forced-jobs-counterproductive-says-unison/>

colleagues who have vaccinated questions, taking vaccinations into communities and workplaces,¹⁶ and campaigns that debunk vaccine misinformation.¹⁷

The UK has one of the highest levels of trust in vaccinations in the world.¹⁸ 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.

RECOMMENDATION 2: The small number of local authority areas that have not reached the recommended rate of care home staff vaccination should receive targeted support and education. A legal mandate for all care home staff is not proportionate.

BODILY AUTONOMY

Mandating vaccination (either directly or indirectly) is a “**profound departure from public health norms**”¹⁹ that poses a serious threat to the principle of personal and bodily autonomy, and would likely lead 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. 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 growing concern that forcing workers to make such a choice will lead to an already struggling care sector lose even more of its workforce. Dr Susan Hopkins, strategic response director for Covid-19 at Public Health England, warned:

“people may vote with their feet, and not want to have the vaccine, and therefore not work in a care home, and that could lead to staff supply issues in care homes (...) I think where people are hesitant, we need to work harder to make them understand why the vaccines work.”²⁰

¹⁶ 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>

¹⁷ 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/>

¹⁸ Global vaccine trust rising, but France, Japan, others sceptical – Reuters, 4th February 2021: <https://www.reuters.com/article/health-coronavirus-vaccines-confidence-idINKBN2A408J>

¹⁹ 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>

²⁰ 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>

Given the likelihood that 'booster' vaccinations will be required to ensure ongoing immunity,²¹ 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.

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. 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.²²

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,²³ and the Coronavirus Act 2020 extends this prohibition to Scotland and Northern Ireland.²⁴ **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. If these Regulations are passed, the Government can no longer claim that no one is "forced" to receive a vaccination in this country.

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. In response to Shadow Health Secretary Jon Ashworth's warning that "every attempt throughout history to force mandatory vaccination has proved counterproductive," former Health Secretary Matt Hancock 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."²⁵

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:

²¹ 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/newslondon/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>

²² 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>

²³ Section 45E

²⁴ Section 25E

²⁵ HC Covid-19 update, vol. 692, col. 660: <https://hansard.parliament.uk/commons/2021-04-19/debates/29C5F76D-1AA5-408F-A2D2-824ECB3A65FB/Covid-19Update>

“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.”²⁶

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.”²⁷ 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.

These Regulations could be open to challenge under 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. These Regulations also 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 only a concern in a limited number of care homes.

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.²⁸ The Regulations do not state what this evidence should consist of.

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

²⁶Covid-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>

²⁷ 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

²⁸ Regulation 5

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.”²⁹

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.

OPPOSITION

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.”³⁰

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.”³¹

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,

²⁹ 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>

³⁰ 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>

³¹ Care worker mandatory vaccinations 'incredibly bad idea' – GMB, 15th April 2021: <https://www.gmb.org.uk/news/care-worker-mandatory-vaccinations>

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."³²

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."³³

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.

CONCLUSION

Mandating vaccination for certain sectors of society is a divisive and heavy-handed approach that abandons public health norms and crosses a rubicon for bodily autonomy and medical ethics in this country. It sets the United Kingdom on a disturbing course, in which medical procedures are no longer personal decisions, but carry the weight of the law.

These Regulations pose unacceptable risks to rights and individual liberties and could jeopardise national trust in vaccinations. The Government should continue its successful approach of educating and explaining the benefits of the Covid-19 vaccination, whilst providing individual care homes with support and education where necessary.

³² 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/>

³³ 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>

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