

**EMERGENCY POWERS AND
CIVIL LIBERTIES REPORT
[JUL - SEP 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 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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July-September Emergency Powers & Civil Liberties Report

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INTRODUCTION

We are now 18 months since the start of the pandemic and 80 weeks since we entered a “three week” lockdown to “flatten the curve”. This, our 12th report, is a reflection on how rapid the pace of legislative change has been during this period, how fast the goal posts have shifted, and how vital our scrutiny work has been.

One of our first policy calls in relation to emergency powers was made on publication of the Coronavirus Bill in March 2020: to remove Schedules 21 and 22 of that Bill. These extraordinary powers gave Ministers the ability to single-handedly ban any type of gathering – even protests, and gave police officers the ability to indefinitely detain “potentially infectious” adults and even children in undisclosed facilities. Every month, we have scrutinised the exercise of these powers, drafted parliamentary questions, sent Freedom of Information requests, met MPs and peers, and sent briefings to parliament. Our concerns were vindicated. These reckless powers were used exclusively unlawfully, resulting in the record-breaking rate of 100% unlawful prosecutions affecting hundreds of people, many of whom were vulnerable individuals. Our campaign has been vindicated too. Following our sustained pressure, the indefensible Schedules 21 and 22 are finally set to be scrapped from the renewed Coronavirus Act.

As we anticipated in March 2020, the emergency mode and its perks – rapid law-making without scrutiny and a ratcheting of executive powers – has persisted, often without justification. That is clear from the fact that, in October, the Coronavirus Act is set to be renewed once again. And whilst lockdown restrictions were finally lifted on 19th July, their imposition has created a muscle memory for the nation and they remain on standby for when Government planning fails and public health institutions under-perform during winter. We have always accepted the need for exceptional measures in times of crisis, but we cannot accept our rights becoming the price paid for prolonged Government mismanagement. We must demand more of our lawmakers.

The introduction of vaccine passports in Scotland and Wales signals a permanence to our new state of emergency and the authoritarian crisis our democracy has fallen into. This new digital identity document is being introduced at a time of exceptionally high vaccine uptake, as we are exiting the acute stage of the coronavirus pandemic. That means they are very likely here to stay – unless and until we are successful in our campaign to consign them to the pages of British history. This will likely be the prevailing story of our subsequent Emergency Powers and Civil Liberties reports. We urge all readers, parliamentarians and public alike, to reject and resist the introduction of domestic vaccine passports. It is a fight for rationality, equality and fairness – it is a fight for the future.

RECOMMENDATIONS

RECOMMENDATION 1: Health Protection Regulations which allow Ministers in the UK Government and devolved administrations and local authorities to impose restrictions on premises, gatherings and outdoor places without parliamentary approval must be revoked.

RECOMMENDATION 2: The Crown Prosecution Service must review all prosecutions to date under the Single Justice Procedure in relation to the Health Protection Regulations and the Coronavirus Act.

RECOMMENDATION 3: The use of the Single Justice Procedure for prosecutions under the Health Protection Regulations and the Coronavirus Act must immediately be suspended.

RECOMMENDATION 4: The National Police Chiefs' Council should continue to publish the number of Fixed Penalty Notices issued under Health Protection Regulations to ensure accountability and transparency of coronavirus-related powers.

RECOMMENDATION 5: The hotel quarantine requirements for travellers must be overturned, absent the publication of a full, scientifically-informed analysis explaining why this would be a strictly necessary measure and that no more proportionate options are available to pursue the same legitimate aim.

RECOMMENDATION 6: Data sharing between NHS Test and Trace, local authorities and police forces should be prohibited in to protect medical privacy and prevent intrusive and excessive health policing.

RECOMMENDATION 7: The Government must urgently assess how unlawful prosecutions under Schedule 22 of the Coronavirus Act have been able to proceed and act to ensure that any convictions are immediately overturned.

RECOMMENDATION 8: Mandating vaccination is unnecessary, counterproductive, authoritarian and discriminatory. The Government should not seek to extend or encourage mandatory vaccination in any setting.

RECOMMENDATION 9: Unfettered access to information and debate is critical, particularly during a global public health crisis in which public policy and scientific knowledge is constantly changing and updating. It is inappropriate for social media companies to seek to censor lawful content and restrict debate around coronavirus and restrictions.

RECOMMENDATION 10: The coronavirus pandemic has led to a crisis of censorship online, which will be exacerbated by the Online Safety Bill. MPs must seek to remove provisions that would result in the suppression of lawful speech from the Bill entirely, in order to protect freedom of expression online.

RECOMMENDATION 11: Domestic Covid passports would infringe on our privacy, perpetuate discrimination, and pave the way to a two-tier, checkpoint society with no benefit to public health. The UK Government and devolved administrations should reject Covid-status certification.

RECOMMENDATION 12: 'Spot checking' individuals' Covid-status will lead to discrimination and targeting of marginalised groups and should be strongly advised against in all relevant Government and local authority guidance.

EMERGENCY LAW

Mid-July saw the expiration of the bulk of the Health Protection Regulations which have governed almost every area of our private and public lives since March 2020. The vast majority of these regulations faced no scrutiny or prior approval from Parliament – most were floated in the press before coming into law days later, often only days or even hours after being published online. Nationwide restrictions preventing religious services from going ahead, preventing protests and vigils, and preventing people from attending their loved ones’ weddings or funerals are no longer on the statute books, but Ministers have repeatedly refused to rule out reviving these powers despite high rates of vaccination uptake and antibodies. The Government must commit to no longer using criminal law to manage public health.

To date, 506 pieces of secondary legislation have been passed by the UK Government that relate to coronavirus.¹ Of these, 32, or 6%, were subject to the draft affirmative procedure, which requires the approval of the House of Commons and the House of Lords before becoming law. However, 364 were made using the made negative procedure, meaning they come into law immediately and can only be revoked by an annulment motion.

These pieces of legislation have been laid under 134 Acts of Parliament, 7 Orders, 5 EU Regulations (which are now retained EU law in the UK) and 1 Church Measure. Only 26 coronavirus-related statutory instruments have been made under the Coronavirus Act 2020.

Across the UK, 1,018 pieces of legislation have been laid which contain the word ‘coronavirus’.

The Justice Committee’s report into Covid-19 and criminal law is the latest to criticise the Government’s rushed lawmaking, noting:

“Parliament plays an important role in making sure that the law and any new criminal offences are so far as is possible intelligible, clear and predictable. It is not satisfactory in this context that Parliament was not always able to fulfil its function when Members were required to consider statutory instruments already superseded.”²

HEALTH PROTECTION REGULATIONS

At the start of July, England was subject to the Health Protection (Coronavirus, Restrictions) (Steps) (England) Regulations 2021 (‘Steps Regulations’). These Regulations contained the framework for the Government’s roadmap to exiting lockdown, as was announced on 22nd February: three ‘steps’, which the Government initially indicated would occur no

¹ Coronavirus Statutory Instrument Dashboard – Hansard Society (accessed 1st October 2021): <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

² Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>

sooner than 29th March, 12th April and 17th May. Step 4, which would see the expiry of most (but not all) of the legal restrictions, was initially dated at “no earlier than” 21st June.³ Aside from Step 1, which came into force with the Regulations on 29th March, there was no time frame contained within the Regulations, allowing the Government to extend the length of any ‘step’ at will. Indeed, Step 4 was pushed back multiple times.

On 28th June, Health Secretary Sajid Javid announced the introduction of Step 4 would be pushed back, likely to 19th July,⁴ and on 12th July, the Prime Minister confirmed with a week’s notice that 19th July would see restrictions lifted.⁵ The Steps Regulations were expired, which allowed nightclubs, hostess bars, shisha bars and sexual entertainment venues to re-open, removed limits on the size of gatherings and removed the requirement for venues serving alcohol to provide table service. Also expired were regulations mandating the wearing of face coverings in certain settings (The Health Protection (Coronavirus, Wearing of Face Coverings in a Relevant Place) (England) Regulations 2020 and The Health Protection (Coronavirus, Wearing of Face Coverings on Public Transport) (England) Regulations 2020), regulations that required certain businesses to collect contact tracing details of customers (The Health Protection (Coronavirus, Collection of Contact Details etc. and Related Requirements) Regulations 2020), regulations that imposed social distancing requirements in hospitality venues (The Health Protection (Coronavirus, Restrictions) (Obligations of Undertakings) (England) Regulations 2020) and regulations that gave local authorities additional enforcement powers for coronavirus-related offences (The Health Protection (Coronavirus, Restrictions) (Local Authority Enforcement Powers and Amendment) (England) Regulations 2020). These restrictions have broadly been replaced with guidance – it is still advised to wear a face covering on public transport and crowded public places, to meet outdoors if possible and to keep a distance from people you do not live with.⁶

We welcome the overdue shift from legal restrictions towards public health guidance. However, it is clear that Ministers are not willing to rule out the reintroduction of lockdown restrictions, in spite of earlier pledges that the relaxing of restrictions would be irreversible.⁷ Even before the introduction of Step 4, Ministers began to row back on the promise that 19th July would be the “terminus date”.⁸ Solicitor General Lucy Frazer said: “of course if we get into a situation where it’s unacceptable and we do need to put back further restrictions, then that of course is something the government will look at.”⁹ Justice

3 HC Deb (22nd February 2021), vol. 689, col. 625: <https://hansard.parliament.uk/commons/2021-02-22/debates/7F26D493-AF6A-46A4-A1C3-61A39DD527CE/Covid-19RoadMap>

4 Sajid Javid Confirms Step 4 Will Not Be Brought Forward But Is Hawkish On End To All Covid Restrictions On 19 July – Alain Tolhurst, PoliticsHome, 28th June 2021: <https://www.politicshome.com/news/article/sajid-javid-confirms-step-4-will-not-be-brought-forward-but-is-hawkish-on-end-to-all-covid-restrictions-on-19-july>

5 Prime Minister confirms move to Step 4 – Prime Minister’s Office, GOV.UK, 12th July 2021: <https://www.gov.uk/government/news/prime-minister-confirms-move-to-step-4>

6 Coronavirus: how to stay safe and help prevent the spread – Cabinet Office, GOV.UK, 14th September 2021: <https://www.gov.uk/guidance/covid-19-coronavirus-restrictions-what-you-can-and-cannot-do>

7 HC Deb (22nd February 2021), vol. 689, col. 625: <https://hansard.parliament.uk/commons/2021-02-22/debates/7F26D493-AF6A-46A4-A1C3-61A39DD527CE/Covid-19RoadMap>

8 COVID-19: Setting 19 July as a ‘terminus date’ for restrictions is risky for Boris Johnson – Kate McCann, Sky News, 15th June 2021: <https://news.sky.com/story/covid-19-setting-19-july-as-a-terminus-date-is-risky-for-boris-johnson-12332715>

9 Chris Whitty warns England could be plunged back into lockdown curbs in just 5 weeks – Rachel Wearmouth, the Mirror, 15th July 2021: <https://www.mirror.co.uk/news/politics/chris-whitty-warns-england-could-24546061>

Secretary Robert Buckland also refused to rule out further lockdowns, telling Times Radio: “you can’t ever say mission accomplished.”¹⁰ More recently, a No. 10 spokesperson told reporters that lockdown measures could “be reintroduced as a last resort to prevent unsustainable pressure on our NHS.”¹¹ As we have stressed through the pandemic, restrictions on the population’s public and private lives can only be justified in the most extreme circumstances. 18 months after the UK’s first lockdown and with extremely high levels of antibodies and vaccinations, lockdown measures enforced by policing and fines, rather than additional support and updated guidance, cannot be justified.

Remaining restrictions

Three sets of Health Protection Regulations remain in force in England: the Health Protection (Coronavirus, Restrictions) (No. 3) (England) Regulations 2020, the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020, and the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021. They, respectively, grant Ministers and local authorities the power to issue restrictions on premises, events and public places, create the requirement to self-isolate after testing positive for coronavirus or being in contact with an individual who has tested positive (with exemptions), and detail restrictions around isolation and testing after international travel.

The Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020 were laid before Parliament on 17th July 2020 and came into force the following day. They were not debated in the Chamber of the House of Commons, but rather by the Commons Delegated Legislation Committee on 7th September and in the House of Lords on 3rd September – over 6 weeks after they came into force. At the time, Shadow Health Minister Justin Madders MP said: “These regulations are too important to be dealt with as an afterthought. They demand full parliamentary scrutiny.”¹² However, over a year later these significant powers remain in force, despite never having received full parliamentary scrutiny and approval. On 18th July 2021, the Regulations were extended to 27th September 2021 by The Health Protection (Coronavirus, Restrictions) (Steps etc.) (England) (Revocation and Amendment) Regulations 2021.

The Regulations contain extremely broad powers which allow local authorities to make directions relating to “entry into, departure from, or location of persons in” a premises, including closing the premises, restricting access or restricting the location of people within the premises.¹³ Local authorities can also issue “prohibitions, requirements or

¹⁰ Covid: Minister doesn’t rule out winter lockdown after PHE expert says ‘we may have to’ reimpose measure – Chiara Giordano and Jon Stone, the Independent, 20th June 2021: <https://www.independent.co.uk/news/health/covid-uk-lockdown-delta-variant-winter-b1869259.html>

¹¹ No 10 not ruling out ‘firebreak’ lockdown if Covid cases rise – Rowena Mason and Nicola Davis, the Guardian, 7th September 2021: <https://www.theguardian.com/world/2021/sep/07/no-10-not-ruling-out-firebreak-lockdown-if-covid-cases-rise>

¹² Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020 debate, Delegated Legislation Committee (7th September 2020): [https://hansard.parliament.uk/Commons/2020-09-07/debates/553c85ab-529e-477e-9f73-d5c18de3787c/HealthProtection\(CoronavirusRestrictions\)\(England\)\(No3\)Regulations2020](https://hansard.parliament.uk/Commons/2020-09-07/debates/553c85ab-529e-477e-9f73-d5c18de3787c/HealthProtection(CoronavirusRestrictions)(England)(No3)Regulations2020)

¹³ The Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020, reg. 4

restrictions” on an event or type of event,¹⁴ and restrict access to public outdoor land.¹⁵ The Regulations also give the Health Secretary the power to direct local authorities to order said restrictions. Directions must be reviewed every 7 days and revoked if no longer necessary. On 22nd September, the Regulations were amended to expire on 24th March 2022.¹⁶

We warned when these Regulations were passed that the safeguards on these powers were weak and that they allowed Ministers and local authorities almost total discretion over restrictions and prohibitions.¹⁷ Indeed, the updated guidance for local authorities suggests that the Regulations could be used to close venues and cancel events if there are “a number of outbreaks in the area” or if local services are under pressure. It also suggests that the Regulations could be used to require face coverings to be worn in certain settings if businesses were failing to follow the Government’s advice that face coverings are worn indoors.¹⁸ This guidance highlights the danger of these Regulations – allowing local authorities or Ministers to reimpose restrictions at will, without scrutiny or approval from Parliament, based on subjective thresholds. As of 17th September, these powers have been used 330 times by local authorities.¹⁹

Equivalent powers have also been retained in Scotland and Wales.

The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 allow local authorities to issue directions in relation to premises, events and public outdoor places.²⁰ They also allow Scottish Ministers to direct local authorities to make such a direction.²¹ Directions may impose “prohibitions, requirements or restrictions” in relation to “the entry into, departure from, or location of persons in, specified premises”, the “holding of a specified event” and “access to a specified public outdoor place”.²² As in England, restrictions must be reviewed every 7 days. On 22nd September, the Regulations were amended to expire on 25th March 2022.

In Wales, The Health Protection (Coronavirus Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020, which came into force on 18th September 2020, allow local authorities to issue directions in relation to premises, events and public places. While Welsh Ministers do not have the power to direct a local authority to issue directions, local authorities must have regard to “any guidance issued by the Welsh Ministers about

14 The Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020, reg. 5

15 The Health Protection (Coronavirus, Restrictions) (England) (No.3) Regulations 2020, reg. 6

16 The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) (No. 3) Regulations 2021, para. 3

17 For more details see our Emergency Powers and Civil Liberties Report (July 2020), p. 77: <https://bigbrotherwatch.org.uk/wp-content/uploads/2020/07/Emergency-Powers-and-Civil-Liberties-Report-JULY-2020.pdf>

18 Local authority powers to impose restrictions: Health Protection (Coronavirus, Restrictions) (England) (No 3) Regulations 2020 – Department of Health and Social Care, GOV.UK, updated 5th August 2021: <https://www.gov.uk/government/publications/local-authority-powers-to-impose-restrictions-under-coronavirus-regulations/local-authority-powers-to-impose-restrictions-health-protection-coronavirus-restrictions-england-no3-regulations-2020#best-practice-examples-of-use-of-the-regulations-from-19-july-2021>

19 Explanatory Memorandum to the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (No. 3) Regulation 2021, p. 5: https://www.legislation.gov.uk/uksi/2021/1073/pdfs/uksiem_20211073_en.pdf

20 The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020, reg. 3

21 The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020, reg. 4

22 The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020, reg 5(1), 6(1), 7(1)

directions”.²³ Directions must be reviewed every 7 days. The Regulations were amended on 6th August to expire on 26th November 2021.

RECOMMENDATION 1: Health Protection Regulations which allow Ministers in the UK Government and devolved administrations and local authorities to impose restrictions on premises, gatherings and outdoor places without parliamentary approval must be revoked.

Enforcement

In all of our Emergency Powers and Civil Liberties Reports, we have warned of the risk of confusing legislation, a lack of distinction between law and guidance, disproportionate fines, erroneous enforcement action and the lack of safeguards around prosecutions and convictions. Fundamental flaws with coronavirus-related offences have been consistent from their conception to their enforcement.

A new report from the House of Commons’ Justice Committee reiterates many of these concerns. ‘Covid-19 and the criminal law’ was published on 24th September and drew on Big Brother Watch’s submission to the inquiry.²⁴ While the Committee was uncritical of the Government’s decision to use criminal law to manage a public health crisis, it recommended that the Government commission a study to “examine how effective the creation of covid-19 offences was in achieving compliance with public health regulations and protecting public health.”²⁵ The Committee also highlighted, similarly to all other parliamentary committees that have opened enquiries into the use of emergency powers, that guidance and legislation had too often become blurred:

“(…) blurring the line between government guidance and the law has potentially damaging long-term consequences, including for the rule of law.

“In a free society that respects the rule of law, only legislation can criminalise conduct, and it should be open to a person to decide whether to follow government guidance. The Government has a responsibility to ensure that the public and the police have a clear understanding of the distinction between guidance and the law.”²⁶

It is this blurring that has led to erroneous enforcement from police officers and unlawful prosecutions and convictions. Since our last report, the Crown Prosecution Service’s (CPS) monthly reviews of coronavirus-related charges (instigated due to widespread concerns over unlawful prosecutions) has uncovered a further 77 unlawful charges and prosecutions. June saw an additional 21 unlawful charges, representing 25% of all charges

²³ The Health Protection (Coronavirus Restrictions) (Functions of Local Authorities etc.) (Wales) Regulations 2020, reg. 9(ii)

²⁴ Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>

²⁵ Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021, p. 33: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>

²⁶ Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021, p. 15: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>



In a free society that respects the rule of law, only legislation can criminalise conduct, and it should be open to a person to decide whether to follow government guidance. The Government has a responsibility to ensure that the public and the police have a clear understanding of the distinction between guidance and the law.

- Justice Committee



heard in June.²⁷ The CPS is no longer publishing its monthly reviews, but in correspondence with us reported that the total number of incorrect charges as of the end of August totals 445 out of 2,098, an additional 56 and 21% of all charges. In its evidence to the Justice Committee, Fair Trials said that these unlawful charges “are putting fundamental rights and justice at risk in this crisis and threatening trust in the criminal justice system”.²⁸ The Justice Committee noted that this “high error rate of charges” demonstrates a need for pandemic planning to consider the role of criminal law. In reality, it demonstrates the need for a different approach to public health that does not rely on criminal sanctions.

This error rate does not account for prosecutions heard under the Single Justice Procedure (SJP), which are not captured by the CPS’ review. As of 24th June, according to Justice Minister Lord Wolfson, 7,234 coronavirus-related offences have been heard under the SJP – although the Justice Committee notes that this number has not been independently verified.²⁹ An HMCTS review, dealing with cases heard between 1st September and 30th October 2020, found errors in 10% of SJP cases, considerably lower than the 28% error rate found in the CPS review. Lord Wolfson told the Justice Committee this was because the “CPS was deliberately going through and looking for errors, so it is more likely that they are going to spot them” – it is unclear what the purpose of the HMCTS service review was, if not to deliberately look for errors. Even an error rate of 10% would mean over 700 unlawful prosecutions, and it is likely that the error rate is higher than this. Despite most of the Health Protection Regulations having been revoked, cases will still be working their way through the criminal justice system over coming months. We repeat our previous recommendations.

RECOMMENDATION 2: The Crown Prosecution Service must review all prosecutions to date under the Single Justice Procedure in relation to the Health Protection Regulations and the Coronavirus Act.

RECOMMENDATION 3: The use of the Single Justice Procedure for prosecutions under the Health Protection Regulations and the Coronavirus Act must immediately be suspended.

The Committee also noted and concurred with our recommendation that £10,000 Fixed Penalty Notices (FPNs) should not be issued by police officers. The Committee recommended the Government review whether FPNs were an effective and appropriate tool for managing a pandemic.³⁰ The National Police Chiefs’ Council is no longer publishing updated figures on the number of FPNs issued by forces, despite multiple sets of Regulations remaining in force.

²⁷ June’s coronavirus review findings – Crown Prosecution Service, 30th July 2021: <https://www.cps.gov.uk/cps/news/junes-coronavirus-review-findings>

²⁸ Written evidence from Fair Trials to the Justice Committee’s inquiry into Covid-19 and criminal justice – Justice Committee, published 24th September 2021: <https://committees.parliament.uk/writtenevidence/25692/html/>

²⁹ Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021, p. 26: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>

³⁰ Fourth Report of Session 2021–22: Covid-19 and the criminal law – Justice Committee, HC 71, 24th September 2021, p. 20: <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/71/71.pdf>

RECOMMENDATION 4: The National Police Chiefs' Council should continue to publish the number of Fixed Penalty Notices issued under Health Protection Regulations to ensure accountability and transparency of coronavirus-related powers.

The need for a different approach to public health that is not based on policing and criminal justice is explored in the Institute for Race Relations' report into policing during the pandemic: 'A threat to public safety: policing, racism and the Covid-19 pandemic'.³¹ The report examines how, amid the context of racialised policing, "non-Covid-specific forms of policing have combined with Covid-specific police powers to compound the disproportionate impact of policing upon racially minoritised groups".³² Researchers found "a general consensus that Coronavirus and associated police powers have further enabled the police in stopping and harassing racially minoritised individuals in public places", with interviewees reporting how coronavirus restrictions often felt like an excuse for "bored" police officers to stop young people of colour who were in public:

"Even though you do get stopped a lot, it's just now they feel like, oh, we can now, because we can say it's down to Covid, and that's what's really sticking like right there, it's like, I can drive out to the shop now, you know, I could go to, for example, McDonald's, and it's like, why are you out of your house?"

"I think it decreased the culpability because I think, within that time period, they were allowed to stop people without giving them any real reason. It was just like, yeah, this is Coronavirus, this is Covid, what are you doing out of your house. Like, then it's like you are stopping the same people that you would have stopped anyway, so, it just became a tool rather than you lot trying to protect public safety or whatever."³³

With the lifting of many restrictions, enforcement action has naturally reduced. However, cases from previous periods of lockdown continue to work their way through the criminal justice system. Cafe owners in Plymouth have been fined £42,000 for failing to prevent customers from eating inside their premises in November 2020, contrary to regulations 15(1) and 20(1)(a) and (2) of the Health Protection (Coronavirus, Restrictions) (England) (No 4) Regulations 2020.³⁴ During this period, cafes were permitted to serve customers for takeaway only. A pub in Blyth has been fined £2,290 for allowing patrons to drink past 10pm in October 2020.³⁵ At the time, hospitality restaurants were required to

31 A threat to public safety: policing, racism and the Covid-19 pandemic – Scarlet Harris et al, The Institute of Race Relations, September 2021: <https://irr.org.uk/wp-content/uploads/2021/09/A-threat-to-public-safety-v3.pdf>

32 A threat to public safety: policing, racism and the Covid-19 pandemic – Scarlet Harris et al, The Institute of Race Relations, September 2021, pg. 6: <https://irr.org.uk/wp-content/uploads/2021/09/A-threat-to-public-safety-v3.pdf>

33 A threat to public safety: policing, racism and the Covid-19 pandemic – Scarlet Harris et al, The Institute of Race Relations, September 2021, pg. 12-3: <https://irr.org.uk/wp-content/uploads/2021/09/A-threat-to-public-safety-v3.pdf>

34 Plymouth Finla Coffee owners 'could face prison' if they don't pay £42,000 – Carl Eve, Plymouth Live, 7th July 2021: <https://www.plymouthherald.co.uk/news/plymouth-news/plymouth-finla-coffee-owners-could-5621192>

35 Blyth pub manager fined for failing to pay fixed penalty notice for Covid breach – David Sedgwick, News Post Leader, 1st July 2021: <https://www.newspostleader.co.uk/health/coronavirus/blyth-pub-manager-fined-for-failing-to-pay->

stop serving alcohol at 10pm, but police officers visiting the pub “witnessed customers still drinking close to 11pm”. These cases, where individuals and businesses have been fined vast sums for technical infractions of regulations that lack both logic and compassion, call into question the utility of such an approach to public health.

Devolved nations

While England revoked the bulk of its Health Protection Regulations in early July, the devolved administrations have done so at a slower pace and have held onto some lockdown powers. Wales, Scotland and Northern Ireland have not revoked the statutory instruments which contain lockdown measures, but instead have revoked certain parts of them. This approach to law making swerves scrutiny, as it allows lawmakers to retain measures without the need for parliamentary approval via a vote.

In Wales, the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, which came into force on 20th December 2020, remain in force. These Regulations have been amended 16 times since they were introduced. They contain requirements relating to self-isolation,³⁶ requirements for businesses to follow guidance relating to coronavirus transmission,³⁷ requirements “to take all reasonable measures to minimise the risk of exposure to coronavirus when election campaigning”³⁸ and the requirement to wear a face covering in certain indoor settings and on public transport.³⁹ Wales’ system of ‘Alert Levels’ is retained in these Regulations, making it possible to re-introduce sweeping new restrictions simply via an amendment to the Regulations.

In Scotland, the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 came into force on 5th August. These contain requirements for hospitality businesses to collect and retain contact tracing details,⁴⁰ and to wear face coverings in certain indoor settings⁴¹ and on public transport.⁴² On 1st October, the requirement that certain venues and events only admit those who have been double vaccinated came into force, via an amendment to the regulations: The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021. These regulations were not voted on, although there was a motion on the principle of vaccine passports before the Regulations were published.. This amendment also removed limits on the size of live events.

In Northern Ireland, the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, which came into force on 9th April 2021, remain in place. Gatherings cannot exceed 15 people from more than 4 households indoors, whilst there are no restrictions on the number of people who can meet in private gardens.⁴³ Raves and “large

fixed-penalty-notice-for-covid-breach-3292457

36 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, reg. 6(1)

37 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, reg. 16(1)

38 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, reg. 18A

39 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) Regulations 2020, reg. 19(1), 20(1)

40 The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, reg. 3(1)

41 The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, reg. 5(1)

42 The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, reg. 7(1)

43 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, reg. 12(1)

house parties” of more than 30 people are prohibited.⁴⁴ Indoor gatherings of more than 15 and outdoor gatherings of more than 30 (outside of domestic settings) must carry out a risk assessment.⁴⁵ Nightclubs remain closed⁴⁶ and indoor dancing is not permitted, except for weddings and civil partnerships.⁴⁷

INTERNATIONAL TRAVEL REQUIREMENTS

On 8th July, the Transport Secretary Grant Shapps announced that from 19th July, “residents who are fully vaccinated through the UK vaccine roll-out will no longer have to self-isolate when they return to England.”⁴⁸ Initially, this applied only to those vaccinated in the UK and excluded those vaccinated abroad, but on 28th July, the Government announced that those arriving from amber countries and vaccinated in Europe or the USA would not have to quarantine from 2nd August.⁴⁹ Arrivals had to show an NHS Covid Pass, a letter from the NHS, an EU Digital COVID Certificate or a CDC card alongside proof of US residency.⁵⁰ Double vaccinated individuals were still required to take a PCR test prior to their arrival in England, and take a test of the second day after their arrival. The decision to only allow those vaccinated in the UK, Europe or USA discriminates against residents of non-Western nations. Guidance states that “If you cannot (or prefer not to) show proof that you’ve been fully vaccinated you must follow the rules for those who are not fully vaccinated.”⁵¹ Given the considerable evidence that vaccinated individuals can still catch and transmit coronavirus, denying additional ‘privileges’ to the unvaccinated is divisive, discriminatory, and will not prevent the spread of coronavirus.

The decision to waive amber list quarantine rules led to a rush of people seeking their second dose of the coronavirus vaccine, before the 8 week gap that is recommended by the Joint Committee on Vaccination and Immunisation.⁵² NHS staff and vaccinators have reported abuse and threats, with some sites being forced to contact the police or hire security guards, as individuals have demanded early vaccinations in order to travel abroad.

There was confusion when France was placed on an ‘amber-plus’ list, meaning that those who had received two doses of a coronavirus vaccine would still be obliged to self-isolate for 10 days on their return to England.⁵³ This new category meant that over the summer,

44 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, reg. 10(1)

45 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, reg. 9(2)-(3)

46 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, sch. 1, para 1(1)

47 The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, reg. 5(1)(f)

48 HC Statement (8th July 2021), vol 698, col. 1085: <https://hansard.parliament.uk/commons/2021-07-08/debates/BA6E7D0C-D3DB-4AFC-9A23-53248DDB30B2/InternationalTravel>

49 UK travel update: government waives quarantine for arrivals fully vaccinated from Europe and USA while also confirming international cruise restart – Department of Health and Social Care and Department for Transport, GOV.UK, 28th July 2021: <https://www.gov.uk/government/news/uk-travel-update-government-waives-quarantine-for-arrivals-fully-vaccinated-from-europe-and-usa-while-also-confirming-international-cruise-restart>

50 Quarantine and testing if you’ve been in an amber list country – Department of Health and Social Care and Department for Transport, GOV.UK: <https://www.gov.uk/guidance/how-to-quarantine-when-you-arrive-in-england>

51 Quarantine and testing if you’ve been in an amber list country – Department of Health and Social Care and Department for Transport, GOV.UK: <https://www.gov.uk/guidance/how-to-quarantine-when-you-arrive-in-england>

52 NHS staff abused by people seeking second Covid jab early for holiday – Denis Campbell, the Guardian, 10th July 2021: <https://www.theguardian.com/society/2021/jul/10/nhs-staff-abused-by-people-seeking-second-covid-jab-early-for-holiday>

53 Fully vaccinated arrivals from France to England must continue to quarantine – Department of Health and Social Care and Department for Transport, GOV.UK, 16th July 2021: <https://www.gov.uk/government/news/fully-vaccinated-arrivals-from-france-to-england-must-continue-to-quarantine>

four categories of countries existed: red, amber-plus, amber and green, as well as amber countries that were on the 'red watchlist' (meaning they could be rapidly placed on the red list with little advanced warning) and for a brief period, the suggestion of an 'amber watchlist' as well (green countries at risk of being placed on the amber list). The amber watchlist was never introduced, after backlash from Conservative MPs,⁵⁴ including the Chair of the Transport Committee who said the proposal was "adding further complexity, uncertainty and anxiety".⁵⁵ On 5th August it was announced that the amber-plus list would also be scrapped.⁵⁶

Further rule changes were leaked to the media in mid-September. The Speaker of the House was highly critical of the Government's failure to announce the new policy in the House of Commons, where scrutiny could be ensured:

"I want to put on record my disappointment and frustration that, despite repeatedly making it clear that Ministers should make important statements to this House first, the media apparently knew the contents of the Transport Secretary's policy announcement at the end of last week, before Members of this House.

"(...) The Government need to get their business through, but the Government also have to respect the Members who are elected here. (...) In the end, constituents knock on the doors of Members, not the Secretary of State's."⁵⁷

Transport Secretary Grant Shapps MP announced that travel restrictions would move away from country-specific restrictions, but would instead be based on "an individual's status".⁵⁸ All countries will either be designated green or red list. If travelling from a country on the red list, all travellers regardless of vaccine-status will have to isolate in Government-managed quarantine hotels for 10 days and pay for three PCR tests over a period of 8 days. For all other countries, double vaccinated people from certain countries (50 in total) will be permitted to waive quarantine and will no longer have to take PCR tests prior to departure for England. Only a day 2 PCR test will be required, which Transport Secretary Grant Shapps announced would be replaced by a new system of lateral flow tests "later in October."⁵⁹ However, unvaccinated travellers will still have to pay for 3 PCR tests and will have to self-isolate for 10 days.⁶⁰ The rules for unvaccinated travellers have become more, not less severe. We can find no logical public health justification for this policy. Unvaccinated individuals must now isolate regardless of where they have travelled

54 Travel updates: Boris Johnson scraps plans for new amber watchlist after Cabinet revolt – Richard Vaughan, iNews, 2nd August 2021: <https://inews.co.uk/news/travel-updates-boris-johnson-refuses-to-rule-out-new-amber-watchlist-amid-anxiety-of-foreign-covid-variants-1132117>

55 Amber watchlist: Government faces revolt over new travel plan amid warning it will cause summer holiday chaos – Poppy Wood, iNews, 2nd August 2021: <https://inews.co.uk/news/politics/amber-watchlist-new-travel-list-government-revolt-warning-summer-holiday-chaos-1131359>

56 International travel: country listings update – Department for Transport, GOV.UK, 4th August 2021: <https://www.gov.uk/government/news/international-travel-country-listings-update>

57 HC Statement (20th September 2021) vol. 700, col. 42: <https://hansard.parliament.uk/commons/2021-09-20/debates/42EC0566-BBD2-4620-8E7E-3F2C95E7CB5A/InternationalTravel>

58 HC Statement (20th September 2021) vol. 700, col. 43: <https://hansard.parliament.uk/commons/2021-09-20/debates/42EC0566-BBD2-4620-8E7E-3F2C95E7CB5A/InternationalTravel>

59 HC Statement (20th September 2021) vol. 700, col. 44: <https://hansard.parliament.uk/commons/2021-09-20/debates/42EC0566-BBD2-4620-8E7E-3F2C95E7CB5A/InternationalTravel>

60 Red, amber, green lists: check the rules for travel to England from abroad – Department of Health and Social Care and Department for Transport, GOV.UK, 23rd September 2021: <https://www.gov.uk/guidance/red-amber-and-green-list-rules-for-entering-england#new-rules>

from, whereas previously, they were only required to self-isolate when returning from an amber or red list country.⁶¹ Given the high vaccine uptake in the UK, making rules for the unvaccinated more burdensome, rather than less, seems illogical. The Government must ensure that its travel restrictions are based around public health metrics, rather than attempts to punish and coerce unvaccinated people.

Within just three months, the already complex system has undergone considerable changes, many of which have been illogical, arbitrary or discriminatory. While restrictions may be less onerous for those who can prove they have been vaccinated and are travelling from green list country, for the rest of population, the restrictions are expensive, complex, and a de facto ban on international travel.

Quarantine hotels

The price of isolating in a government-run facility for those returning from 'red list' countries increased by 30% - from £1,750 to £2,285.⁶² From 12th August, individuals must now pay more than £200 per night for 11 days. The price of a stay for a teenager increased from £650 to £1,430. This increase means that a family of four, with two teenagers, will now be charged £6,575, an increase of 78% from £3,700.⁶³ This is despite continued reports (covered in our previous Emergency Powers and Civil Liberties Reports) that the quarantine accommodation has resulted in coronavirus transmission and sexual harassment, does not cater to dietary requirements and has failed to make access arrangements for people with disabilities. Further media reports have found evidence of rodent infestations in some hotels. One traveller told Sky News: "It's hell. It's shocking. It's a health & safety hazard... The hotel has to be shut down."⁶⁴

Syrian journalist Zaina Erhaim described to The Times how she experienced post-traumatic stress disorder symptoms after being required to self-isolate in a government hotel. She was forced to pay the equivalent of three months salary and described feeling he felt like she was:

"suffocating (...) and treated like a criminal.

"We got only 20 minutes 'breathing time' in a fenced off car park. We went there for a briefing and my daughter asked, 'Are we in prison?'

"In the room next door was a mother with four children. I don't know how she could cope."⁶⁵

61 Red, amber, green lists: check the rules for travel to England from abroad – Department of Health and Social Care and Department for Transport, GOV.UK, 23rd September 2021: <https://www.gov.uk/guidance/red-amber-and-green-list-rules-for-entering-england#green-list-rules>

62 Quarantine hotel bills rocket to £200 a NIGHT: Cost of isolation on returning to UK is set to soar after ministers agreed to hike prices to 'reflect increased costs involved' – the Daily Mail, 5th August 2021: <https://www.dailymail.co.uk/news/article-9862751/Quarantine-hotel-bills-rocket-200-NIGHT.html>

63 Ibid.

64 'It's hell': Traveller finds rodents in £1,750 hotel quarantine at Heathrow airport – Joe Pike, Sky News, 3rd August 2021: <https://news.sky.com/story/its-hell-traveller-finds-rodents-in-1631750-hotel-quarantine-at-heathrow-airport>

65 Syrian journalist freed from Heathrow quarantine after PTSD recurs – David Rose, the Times, 10th September 2021: <https://www.thetimes.co.uk/article/syrian-journalist-freed-from-heathrow-quarantine-after-ptsd-recurs>

Zaina was only released from the hotel after she shared her situation on social media and a barrister who happened to see her posts agreed to represent her: “It took one email for a lawyer, but I had made at least six hours of phone calls and wrote two very detailed emails with no response.”

Refugees evacuated from Afghanistan were also subject to hotel quarantine and reported similar conditions to Zaina. However, many refugees have been forced to remain in the hotels for longer than the legally required 10 days, with Hasib Nooram, a former director at the attorney general’s office in Afghanistan, reporting to The Guardian from a hotel that he had already been detained in for 20 days:

“We are prisoners inside here, but even prisoners are allowed to go outside for an hour or two a day,” he said. “In 24 hours, we’re allowed out for just 15 minutes. There are a lot of children inside this hotel too. People are fed up and crying.”⁶⁶

Another refugee said: “We can’t even open the windows for fresh air ... There are children, many people who can’t speak English, they can’t make any complaint. There’s nobody to hear their voice.”

Quarantine hotels are an unnecessary, expensive and, at times, cruel approach to border control and public health. The Government should support citizens to self-isolate in their own homes, rather than subjecting them to state-managed isolation facilities.

RECOMMENDATION 5: The hotel quarantine requirements for travellers must be overturned, absent the publication of a full, scientifically-informed analysis explaining why this would be a strictly necessary measure and that no more proportionate options are available to pursue the same legitimate aim.

SELF-ISOLATION REQUIREMENTS

On 6th July it was announced that from 16th August, double vaccinated people and under 18s would no longer be required to self-isolate if they come into contact with someone who has tested positive for coronavirus.⁶⁷ The regulations which brought this into force were published on 15th July: The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) Regulations 2021.

The Regulations allow an individual who has come into contact with someone with coronavirus and “has completed a course of doses of an authorised vaccine”, which was “administered [...] in the United Kingdom” to waive self-isolation requirements, provided the individual’s second dose was 14 or more days prior.⁶⁸ Under 18s are also exempt from self-isolation, as well as individuals who are “able to provide evidence that, for clinical

⁶⁶ Afghan refugees in UK quarantine hotels treated like ‘prisoners’ - Aubrey Allegretti, Jessica Murray and Amelia Gentleman, the Guardian, 13th September 2021: <https://www.theguardian.com/world/2021/sep/13/afghan-refugees-in-uk-quarantine-hotels-treated-like-prisoners>

⁶⁷ Self-isolation to be eased for fully vaccinated adults in step 4 – Department of Health and Social Care, GOV.UK, 6th July 2021: <https://www.gov.uk/government/news/self-isolation-to-be-eased-for-fully-vaccinated-adults-in-step-4>

reasons, [they] should not be vaccinated with any authorised vaccine.”⁶⁹ The regulations also add posting a home test for the detection of coronavirus antibodies to the list of reasons as to why an individual is permitted to live their home during a period of self-isolation.⁷⁰ Two other sets have amendments to the Regulations have been published, which clarify dates around self-isolation and exempt individuals with two different vaccine doses from the requirement to self-isolate. The Regulations were also extended to expire on 24th March 2022.

Allowing those who can prove a medical exemption from vaccination, but not those who have chosen not to receive a vaccine or cannot prove that they are medically exempt, to waive self-isolation once against raises questions as to the public health reasoning behind the new approach.

The ‘pingdemic’

There was nationwide chaos in July, termed by national media outlets as a ‘pingdemic’, as millions of people were notified, either via the NHS Covid-19 app or by NHS Test and Trace, that they would have to self-isolate. Factories across England were required to close, while many hospitality businesses struggled to operate due to a high number of staff self-isolating.⁷¹

Amid the significant pressure on workers across the country, ministers and civil servants in the Cabinet Office, 10 Downing Street, and some officials in the Home Office and Department for Transport were permitted to waive self-isolation as part of a “daily contact testing workplace pilot.”⁷² Initially the scheme was not widely publicised, but when the Prime Minister, Cabinet Secretary and Chancellor all announced they would not be self-isolating due to participation in the ‘pilot’, there was widespread backlash. Leader of the opposition, Sir Keir Starmer MP, accused the Government of “fixing the rules to benefit themselves, and only backtracking when they were found out.”⁷³ As many as 20 large businesses were also selected to join the pilot, which allows staff who have been in contact with someone who has tested positive for coronavirus to skip self-isolation provided they take daily tests. Chair of the Public Administration and Constitutional Affairs Committee, William Wragg MP, criticised the scheme:

“This seems to be an ‘us and them’ approach. It should not be like a Monopoly board when some people have a ‘get out of jail free card’.

⁶⁹ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) Regulations 2021, reg. 2(3)(e)

⁷⁰ The Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) (Amendment) Regulations 2021, reg. 2(2)(a)

⁷¹ Chaos of the pingdemic: bin collections halted, ferries cancelled and guests clean own hotel rooms - Lizzie Roberts, Alan Tovey, Max Stephens, Steve Bird and Ben Butcher, the Telegraph, 15th July 2021: <https://www.telegraph.co.uk/news/2021/07/15/chaos-pingdemic-bin-collections-halted-ferries-cancelled-guests/>

⁷² Ministers secretly take part in ‘get out of jail free’ Covid trial to avoid self-isolation - Christopher Hope, the Telegraph, 13th July 2021: <https://www.telegraph.co.uk/politics/2021/07/13/ministers-secretly-take-part-get-jail-free-covid-trial-avoid/>

⁷³ Covid-19: PM and chancellor self-isolate after rapid U-turn - Joseph Lee, BBC News, 19th July 2021: <https://www.bbc.co.uk/news/uk-57879730>

“I would hope that the Government could lead by example and subject itself to the same inconveniences as other people.”⁷⁴

An evaluation of the pilot was published on 13th August – while the list of organisations taking part in the pilot did include the Cabinet Office, it did not include the Prime Minister’s Office or the Treasury.⁷⁵

The Government announced that “critical workers”, specifically supermarket depot workers and food manufacturers, would be exempt from self-isolation requirements due to pressure placed on the food supply chain.⁷⁶ Guidance stated that, until the new Regulations removed the obligation for double vaccinated people to self-isolate from 16th August, “a limited number of named workers may be able to leave self-isolation under specific controls for the purpose of undertaking critical work only.”⁷⁷ However, no amendment to the Regulations was published, leading to confusion as to the legal backing for this advice. Human rights barrister Adam Wagner said of the advice:

“What I think the government is trying to say is that there can be no offence because the government has said that there is a “reasonable excuse”. Technically, it is correct that there can be no offence with a reasonable excuse.

“But...this is a legally bizarre way of going about things when it is easy for the government to add a new exception to the self-isolation requirements. It also leads to a dangerous lack of clarity for police and the workers themselves”.⁷⁸

Since those who breach self-isolation are liable for a £10,000 Fixed Penalty Notice, it is unacceptable for the Government to fail to provide a clear legal basis for the scheme.

Enforcement

On 11th July, Greater Manchester Police officers arrived at the house of a 12-year-old girl to check that she was self-isolating.⁷⁹ The girl’s mother, Kathryn Crook, said the officers arrived at the family home and asked to speak directly to her daughter Charlotte, who was hiding out of fear. After the family complained to their local MP, police officers returned the following day, in a riot van, to check again that Charlotte was self-isolating. Her mother said: “It was terribly upsetting again for my daughter and she had another meltdown, again thinking the police were going to arrest her.” It emerged that the family had been visited twice after Ms Crook had declined to give her daughter’s details to a Test and Trace

74 Ministers secretly take part in ‘get out of jail free’ Covid trial to avoid self-isolation – Christopher Hope, the Telegraph, 13th July 2021: <https://www.telegraph.co.uk/politics/2021/07/13/ministers-secretly-take-part-get-jail-free-covid-trial-avoid/>

75 <https://www.gov.uk/government/publications/workplace-daily-contact-testing-pilot>

76 Covid: Food exemption scheme delayed until Monday – BBC News, 23rd July 2021: <https://www.bbc.co.uk/news/business-57937342>

77 NHS Test and Trace in the workplace – Health Security Agency, GOV.UK (accessed 23rd July 2021): <https://www.gov.uk/guidance/nhs-test-and-trace-workplace-guidance#critical-services>

78 Adam Wagner, Twitter, 23rd July 2021: <https://twitter.com/AdamWagner1/status/1418522833358053377?s=20>

79 As up to 900,000 Brits languish in pandemic lockdown-by-stealth that’s crippling the country, mother demands apology after police turn up in a riot van to check petrified daughter, 12, was self-isolating after positive Covid test – James Tozer, the Daily Mail, 16th July 2021: <https://www.dailymail.co.uk/news/article-9793547/Police-riot-van-quiz-petrified-girl-12-self-isolating.html>

contact tracer, over fears that her daughter's data would be shared. Test and Trace passed on Charlotte's details to Rochdale council, who then passed the her details to Greater Manchester Police. The force has since apologised to the family.

RECOMMENDATION 6: Data sharing between NHS Test and Trace, local authorities and police forces should be prohibited in to protect medical privacy and prevent intrusive and excessive health policing.

CORONAVIRUS ACT

The Coronavirus Act 2020, made in March 2020 and renewed twice by Parliament at 6 month intervals, remains on the statute books 18 months after it was passed. Big Brother Watch campaigned for, and won, a 6 monthly vote on the renewal of the provisions of the Act. The next (third) vote is scheduled for 19th October 2021.

Two-monthly reviews

Section 97 of the Act requires the Health Secretary to report to Parliament on key provisions in the Coronavirus Act every two months. The eighth and ninth reviews were published on 21st July and 22nd September.

The eighth review revealed that the Government was considering the role of Schedules 21 and 22, two of the most draconian sections of the Act. Schedule 21, which gives police, immigration officials and public health officers the power to detain 'potentially infectious' people, has primarily been used to unlawfully detain healthy and innocent people. Schedule 22, which gives the Secretary of State extraordinary powers to issue directions relating to events and gatherings, has also been used to unlawfully charge people, despite the fact that it has never been activated in England. The review published in July stated:

"Schedule 21 has not been used since October 2020, and schedule 22 has never been used which gives testament to the efforts and sacrifices people have made in order to slow transmission. As such, the Government will thoroughly review all powers as part of the six-month review in September, retaining only those that are absolutely essential."⁸⁰

In the ninth review, the Government confirmed it would be expiring Schedules 21 and 22:

"Alternative legislative powers exist under Part 2A of the Public Health Act, which act as a justifiable and legitimate deterrent to non-compliance. Public Health England were consulted in making this decision. The Government's assessment is the benefit of retaining the measures set out in Schedule 21 of the Act is low at this stage in the pandemic. The intention is to expire the powers following the review.

"(...) To date, most legal restrictions have been achieved under the Public Health Act, and so these powers have not been required. As such, the Government feels it would be disproportionate to retain [Schedule 22] powers and the intention is to expire them following the review."⁸¹

⁸⁰ Two Monthly Report on the status on the non-devolved provisions of the Coronavirus Act 2020: July 2021 – Department of Health and Social Care, GOV.UK, 21st July 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1004541/The_Coronavirus_Act__2020__Eighth_Two_Monthly_Report.pdf

⁸¹ Two Monthly Report on the status on the non-devolved provisions of the Coronavirus Act 2020: September 2021 – Department of Health and Social Care, GOV.UK, 22nd September 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1019668/coronavirus-act-2020-ninth-two-monthly-report.pdf

We welcome this decision, which we have been campaigning for since March 2020, but note these powers should have been expired as soon as it became apparent that they were unnecessary and were being used unlawfully.

Unlawful prosecutions

Since our last report, the Crown Prosecution Service's (CPS) reviews into charges under the Coronavirus Act have found an additional 9 unlawful charges, a total of 295. The rate of 100% unlawful charges has been maintained since the introduction of the Act. However, these figures do not represent the full scale of unlawful prosecutions under the Coronavirus Act. As previously noted, some prosecutions under the Act are being heard under the Single Justice Procedure, meaning they are not captured by the CPS' review.

It is particularly concerning that individuals are being prosecuted under Schedule 22 of the Act, given that it has never been 'activated' by Ministers. On 20th July, Justice Minister Chris Phillips responded to a Written Parliamentary Question from Shadow Justice Minister Alex Cunningham on the use of Schedule 22 of the Coronavirus Act. He acknowledged that prosecutions under Schedule 22 had occurred.⁸² It is unacceptable that Ministers have acknowledged these unlawful prosecutions, yet have not taken steps to ensure that these prosecutions are being stopped.

Alex Cunningham MP attempted for a second time to raise these concerns at Justice Questions in the House of Commons:

"At the last Justice questions, I raised the issue of the wrongful prosecution and conviction of British citizens under schedule 22 to the Coronavirus Act 2020, an issue that has been publicised by Big Brother Watch, Fair Trials, and The Guardian newspaper.

"Sadly, the Minister blamed the Crown Prosecution Service and did not promise to correct this injustice, and more people might have been wrongly convicted since then. That said, following our intervention, the Government have expired the schedule. I am grateful for that, but can the Lord Chancellor tell us what action he is taking to quash all the illegal convictions?"⁸³

The Lord Chancellor, Robert Buckland MP, said he should "ask the Law Officers these questions."

RECOMMENDATION 7: The Government must urgently assess how unlawful prosecutions under Schedule 22 of the Coronavirus Act have been able to proceed and act to ensure that any convictions are immediately overturned.

⁸² <https://questions-statements.parliament.uk/written-questions/detail/2021-07-15/33912>

⁸³ HC Justice Questions (14th September 2021), vol. 700, col. 802: <https://hansard.parliament.uk/commons/2021-09-14/debates/O37F79EC-D995-49B7-8CCF-D530908CF703/OralAnswersToQuestions>

'NO JAB, NO JOB' POLICIES

In our last Emergency Powers and Civil Liberties report, we analysed in detail the proposals to mandate vaccination for all care home workers, as well as the Regulations which brought the requirement into force, the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021.⁸⁴

On 12th July, the Secondary Legislation Scrutiny Committee recommended that the vote on the Regulations be delayed, due to concerns including:

“the lack of clarity and practical detail about how the legislation is to operate; the absence of any assessment of the impact on the care home workforce and care homes in general; the confusing analysis of current vaccination levels in the sector, and the absence of any clear explanation of the policy choices made, making effective scrutiny of the instrument impossible.”⁸⁵

Committee member Lord German said:

“We have repeatedly made clear to Departments that it is unacceptable to present legislation for scrutiny without sufficiently, detailed explanatory material.

“Equally we have consistently made clear our view that all key definitions and criteria on which decisions that might affect a person’s welfare or livelihood will be made, should be included in legislation and not in guidance which cannot be subjected to appropriate Parliamentary scrutiny or approval.

“In this case, DHSC has laid this instrument without providing sufficient detail.”⁸⁶

The Committee summoned the Vaccine Minister to give evidence the following day, before the vote in the House of Commons. The Chair of the Committee, Lord Hodgson, warned that “the road the hell is paved with good intentions,” flagging multiple concerns:

“firstly, a blurring of the difference between regulation and guidance; secondly, a failure to produce guidance of sufficient granularity to be helpful or sometimes any guidance at all in time for the scrutiny of the parent regulation; thirdly, a failure to produce impact assessments on time; and, fourthly and finally, a tendency to mission creep and an ability to extend the reach of powers, in an as-yet-unspecified way, at a future date.”⁸⁷

84 May-June Emergency Powers and Civil Liberties Report – Big Brother Watch, 6th July 2021, pg. 36: <https://bigbrotherwatch.org.uk/wp-content/uploads/2021/07/Emergency-Powers-and-Civil-Liberties-Report-May-June-2021-1.pdf>

85 Lords summon Minister to address concerns about proposed vaccination of care home staff as a condition of employment - Secondary Legislation Scrutiny Committee, 12th July 2021: <https://committees.parliament.uk/committee/255/secondary-legislation-scrutiny-committee/news/156531/lords-summon-minister-to-address-concerns-about-proposed-vaccination-of-care-home-staff-as-a-condition-of-employment/>

86 Ibid.

87 Uncorrected oral evidence: Draft Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 – Secondary Legislation Scrutiny Committee, 13th July 2021: <https://committees.parliament.uk/oralevidence/2542/pdf/>

However, the Government did not defer the vote on the Regulations, despite the lack of accompanying explanatory material or detail on how the requirement would be enforced. The debate was held just an hour after Vaccines Minister Nadhim Zahawi gave evidence to the Committee. MPs from opposition parties and backbench Conservative MPs were deeply unhappy with the contents of the Regulations and the lack of impact assessment for the Regulations. Conservative backbencher Sir Christopher Chope MP raised a point of order:

“I raised a point of order earlier this afternoon about the lack of an impact assessment before the House, despite it having been referred to on 22 June as having been made available. I was informed during the course of that point of order that pressure was going to be put on the Government to explain why there was no impact assessment.”⁸⁸

When Health Minister Helen Whately responded that the impact assessment was “being worked on” there was sustained criticism from Conservative backbenchers, given that the explanatory notes in the Regulations stated “A full Impact Assessment has been prepared”. William Wragg MP said: “If it has been prepared, it cannot currently be in preparation. So where is it?”⁸⁹ Former Chief Whip, Conservative backbencher Mark Harper MP expressed his anger at the contradictory and misleading information from the Government:

“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. It is an abuse. It is not good enough.”⁹⁰

Rachel Maskell, Labour MP, agreed:

“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?”⁹¹

The Health Minister refused to withdraw the instrument or provide any more details on when the impact assessment would be published. Sir Christopher Chope MP referred to the response as “the most depressing performance from a Minister that I have listened to in this House”, showing “a cavalier disregard for the conventions and courtesies of this

⁸⁸ HC Deb (13th July 2021), vol. 699, col. 270: <https://hansard.parliament.uk/commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁸⁹ HC Deb (13th July 2021), vol. 699, col. 270: <https://hansard.parliament.uk/commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹⁰ HC Deb (13th July 2021), vol. 699, col. 272: <https://hansard.parliament.uk/commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹¹ HC Deb (13th July 2021), vol. 699, col. 273: <https://hansard.parliament.uk/commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

House”.

Labour Shadow Minister Dr Rosena Allen-Khan stated that Labour would be opposing the Regulations:

“We want everyone working in a care home to take up the vaccine, which is safe and effective, but we are not inclined to support these proposals or the case for compulsory vaccination.

“There are serious warnings from the care sector that the Government’s plan could lead to staff shortages in already understaffed care homes. This would have disastrous consequences for the quality of care.

(...)

“Further coercion and punishment through the threat of being dismissed from employment only reinforces the reasons for hesitancy in the first place.”⁹²

The Liberal Democrat party also opposed the Regulations. Health spokesperson Munira Wilson MP said:

“Coercion is not an effective way to overcome hesitancy. Compulsory vaccination is a blunt tool for a complex issue, and research has highlighted that pressuring care workers can have damaging effects leading to the erosion of trust, worsening concerns about the vaccine and hardened stances on refusing vaccination.”⁹³

Conservative MP Mark Harper warned that these Regulations are “incredibly broad”:

“The scope of these proposals is massive (...) Many of us are concerned that insisting that employers ask their staff intrusive questions about their health conditions, when there is no good reason to do so, is the thin end of a wedge.”⁹⁴

Chair of the Public Administration and Constitutional Affairs Committee William Wragg MP spoke passionately against the Regulations and denounced the Government’s approach to their scrutiny:

“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.

(...)

“A lady called me a week or so ago, and she was in tears on the phone. She has a condition that involves blood clots, and she associated the news about one or two of the vaccines with her condition. She is a care

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

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

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

worker, and she was distraught. (...) Is that what we are prepared to do to our fellow citizens as a Conservative Government? Absolute lunacy! (...)

“This instrument is an abomination. It should be withdrawn, and the Government should stop treating this House with contempt.”⁹⁵

Despite significant opposition from opposition parties and backbenchers, the Regulations were passed by 319 votes to 246.

The Regulations also faced criticism in the House of Lords, when they were debated on 20th July. An impact assessment still had not been published. Baroness Wheeler, Labour Peer, tabled a motion to regret, stating that the Regulations are “muddled, confused and disjointed and, in places, contradictory—across the SI itself, the Explanatory Memorandum and in the Government’s consultation response.”⁹⁶ She also noted that Vaccine Minister Nadhim Zahawi promised: “We are in a consultation (...) it is an honest consultation. We have to take people with us: this is not something that we can impose on people against their will.” Given that 57% of respondents to the consultation were opposed to mandating vaccinations, she asked “how does [the Minister] square it with the legislation that the Government have actually produced?”

Baroness Noakes, Conservative Peer, was also critical of both the contents of the Regulations and the approach to parliamentary procedure:

“We have become inured to the cavalier way in which the Department of Health and Social Care uses secondary legislation to interfere with citizens’ lives but this instrument reaches a new low.

“For the first time since the Victorian era, vaccination will be mandated by law. I believe that it is wholly inappropriate to use unamendable secondary legislation to cross that line. It raises deep issues of civil liberties and human rights and should have been fully scrutinised in primary legislation.

“Furthermore, the department’s contempt for Parliament is demonstrated by the lack of accompanying operational detail or an impact assessment, as has been pointed out.”⁹⁷

Baroness Foster, another Conservative Peer, also expressed concern:

“I am a great supporter of the vaccines but I will not support coercion or anyone being forced to have it to keep their job or feed their family. This debate is now moving away from public health and into the realms of state control. The goalposts

⁹⁵ HC Deb (13th July 2021), vol. 699, col. 291-2: <https://hansard.parliament.uk/commons/2021-07-13/debates/BD25E3D7-6EFB-48A9-A564-966D3898D8FC/NationalHealthService>

⁹⁶ HL Deb (20th July 2021), vol. 814, col. 208: [https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008\(RegulatedActivities\)\(Amendment\)\(Coronavirus\)Regulations2021](https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008(RegulatedActivities)(Amendment)(Coronavirus)Regulations2021)

⁹⁷ HL Deb (20th July 2021), vol. 814, col. 213: [https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008\(RegulatedActivities\)\(Amendment\)\(Coronavirus\)Regulations2021](https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008(RegulatedActivities)(Amendment)(Coronavirus)Regulations2021)

move daily. The public and businesses have no idea what is happening next.”⁹⁸

Baroness Brinton, Liberal Democrat Peer, asked why other, more effective and less coercive, approaches were not being used:

“Back in January, a GP in Newcastle was reported as saying that the single most effective tool to overcome vaccine hesitancy was getting local doctors who staff know to listen to their concerns and answer them. Care providers confirm that this technique is highly effective (...) Why are the Government not backing this route, which would appear to overturn staff hesitancy more than any other technique, and certainly more than coercion?”⁹⁹

She also warned of inevitable staff shortages in care homes:

“Social care providers say that there are already over 120,000 vacancies. They know that they will have to sack those who refuse vaccinations and will find it even harder to recruit from an ever decreasing pool. All the Government say is that it will cost the sector £100 million—much better to work with the sector to do this voluntarily.”

The operational guidance was published several weeks after the Regulations were passed.¹⁰⁰ It states that those entering a care home who are not exempt from the requirement would be expected to show their vaccine status via the NHS Covid Pass app, website or an NHS letter, and notes that “NHSX are considering how the NHS COVID Pass service could be used to support registered persons and staff to check and demonstrate vaccine status.”

Care homes are expected to retain a significant amount of personal data about staff and visitors:

“The registered person should keep a record of:

- the vaccination or exemption status of staff members and the date that the status was last checked
- the vaccination or exemption status of those entering the care home unless exempt and the date that the status was last checked.”

The guidance also lacks details on how to verify the vaccine status of those vaccinated abroad: “We are aware some individuals will have been vaccinated outside of the UK. We are working on a solution to this and will provide further guidance on this as soon as possible.”

⁹⁸ HL Deb (20th July 2021), vol. 814, col. 218: [https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008\(RegulatedActivities\)\(Amendment\)\(Coronavirus\)Regulations2021](https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008(RegulatedActivities)(Amendment)(Coronavirus)Regulations2021)

⁹⁹ HL Deb (20th July 2021), vol. 814, col. 225: [https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008\(RegulatedActivities\)\(Amendment\)\(Coronavirus\)Regulations2021](https://hansard.parliament.uk/lords/2021-07-20/debates/8154B2EF-D373-4C43-8831-A6B79BCC29CA/HealthAndSocialCareAct2008(RegulatedActivities)(Amendment)(Coronavirus)Regulations2021)

¹⁰⁰ Coronavirus (COVID-19) vaccination of people working or deployed in care homes: operational guidance – Department of Health and Social Care, GOV.UK, 3rd September 2021: <https://www.gov.uk/government/publications/vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance/coronavirus-covid-19-vaccination-of-people-working-or-deployed-in-care-homes-operational-guidance>

It acknowledges that the Regulations will lead to staff shortages: “[w]herever possible, we would expect the registered person to take reasonable steps to cover the staff shortfalls themselves in the short term through the use of bank or agency staff.” However, given that the National Care Association has warned there could be 170,000 vacancies due to the new requirement, it seems unlikely that care providers will be able to fill the gap.¹⁰¹

Meanwhile, the Government has celebrated Amazon, Sky, Santander and other companies that have “have joined forces with the government to encourage their employees to get COVID-19 vaccines.”¹⁰² Measures such as giving employees paid leave to be vaccinated and allowing staff to take paid sick leave if they experience side-effects were applauded by the Department of Health for supporting vaccinations for staff members. The Government should be encouraging these measures to be taken nationwide, particularly for care home staff, rather than introducing a coercive mandatory vaccination policy.

NHS staff

On 9th September, the Department of Health and Social Care launched its consultation “seeking views on whether or not to extend vaccination requirements to other health and care settings for COVID-19 and also for flu”.¹⁰³ In response, the chief executive of the NHS Confederation said that there was “no necessity for compulsion, for surveillance of people at this stage, because the staff themselves are doing the right thing.”¹⁰⁴

Many NHS Trusts have explicitly stated that receiving the coronavirus vaccine is not mandatory. The Dudley Group NHS Foundation Trust, University Hospitals of Leicester NHS Trust, Nottingham University Hospitals NHS Trust all told ITV News that vaccinations for staff were optional, while Royal Wolverhampton NHS Foundation Trust said “it is for staff members to decide whether they choose to receive it.”¹⁰⁵ Forcing NHS Trusts to reverse their positions will certainly damage staff trust.

As has been observed in the care sector, mandated vaccinations can lead to staff shortages. With the NHS expected to undergo its usual winter pressures, with the addition of increased Covid-19 patients, a staff shortage could have catastrophic implications for healthcare.

The Government has also encouraged employers to mandate vaccination for the return to the office. Transport Secretary Grant Shapps responded to questions about workplaces mandating vaccination as a condition of entry: “We are not going to make that legislation that every adult has to be double vaccinated before they go back to the office, but yes it is

101 Care workers in England leaving for Amazon and other better-paid jobs – Robert Booth, the Guardian, 4th September 2021: <https://www.theguardian.com/society/2021/sep/04/care-workers-in-england-leaving-for-amazon-and-other-better-paid-jobs>

102 Amazon, Sky and Molson Coors back vaccine rollout campaign – Department of Health and Social Care, GOV.UK, 9th July 2021: <https://www.gov.uk/government/news/amazon-sky-and-molson-coors-back-vaccine-rollout-campaign>

103 Making vaccination a condition of deployment in the health and wider social care sector – Department of Health and Social Care, GOV.UK, 9th September 2021: <https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-the-health-and-wider-social-care-sector>

104 Mandatory Covid vaccines for NHS workers are unnecessary ‘surveillance’, warns NHS boss – Sophie Barnes, the Telegraph, 5th September 2021: <https://www.telegraph.co.uk/news/2021/09/05/mandatory-covid-vaccines-nhs-workers-unnecessary-surveillance/>

105 Revealed: wide variations in Covid vaccination rates among NHS Trusts -

a good idea and yes some companies will require it.”¹⁰⁶

RECOMMENDATION 8: Mandating vaccination is unnecessary, counterproductive, authoritarian and discriminatory. The Government should not seek to extend or encourage mandatory vaccination in any setting.

¹⁰⁶ COVID-19: Jobs for jobs is 'good idea' but down to individual businesses, says minister – Sophie Morris, Sky News, 30th July 2021: <https://news.sky.com/story/covid-19-jobs-for-jobs-is-good-idea-but-down-to-individual-businesses-says-minister-12367816>

FREEDOM OF EXPRESSION

'Big Tech' censorship

Ongoing concerns about disinformation and misinformation relating to the pandemic have led to a further ratcheting of social media platforms' strict terms of use.

Last year YouTube took the decision to ban content that spreads "misinformation" about COVID vaccines. In September the platform further updated its "medical misinformation" policies to include content regarding other approved vaccines. While the platform says that it will still permit personal testimonies and attempt to update its policies based on scientific developments, it is likely that these measures will result in the censorship of free expression, as we have seen on other platforms.

YouTube's existing rules do not allow users to post content that "claims that any ... vaccination is a guaranteed prevention method for COVID-19" (i.e. users must not overplay the effectiveness of the COVID-19 vaccine) or "claims that an approved COVID-19 vaccine will cause death".¹⁰⁷ . The application of these broad rules is almost certain to hamper discussions about public health policy and will likely hinder users' ability to engage in nuanced conversations about the COVID-19 vaccine. This approach could even damage public health experts' efforts in explaining the benefits of vaccination.

Social media companies are not authorities on public health. Behaving as such poses a threat not only to freedom of expression, but to the ongoing exchange of knowledge which is so critical during a pandemic.

RECOMMENDATION 9: Unfettered access to information and debate is critical, particularly during a global public health crisis in which public policy and scientific knowledge is constantly changing and updating. It is inappropriate for social media companies to seek to censor lawful content and restrict debate around coronavirus and restrictions.

Online Safety Bill

The joint Parliamentary committee on the Draft Online Safety Bill commenced pre-legislative scrutiny of the Bill in September. The Bill forces online intermediaries to take down content under the threat of penalties, even if it may be lawful. The Government have stated their intention for the Bill to tackle "misinformation" and "disinformation" online. How this can be done without resulting in the censorship of free speech is hard to fathom.

The first meeting in the Committee's series of public evidence sessions saw the CEO and Founder of the Center for Countering Digital Hate, Imran Ahmed, give evidence. During the

¹⁰⁷ YouTube, COVID-19 medical misinformation policy: https://support.google.com/youtube/answer/9891785?hl=en&ref_topic=10833358

session, Imran Ahmad said:

“Think if the death toll from any terrorist group was in the hundreds of thousands. Anti-vaccination misinformation has taken lives—there are people who have died as a result of the misinformation they have been fed online.”¹⁰⁸

Although well-intentioned, hyperbolic claims of this nature, particularly drawing loose comparisons between anti-vaccine misinformation and terrorism, are likely to result in greater censorship and surveillance. Vaccine hesitancy must not be used to justify a clamp-down on lawful speech.

RECOMMENDATION 10: The coronavirus pandemic has led to a crisis of censorship online, which will be exacerbated by the Online Safety Bill. MPs must seek to remove provisions that would result in the suppression of lawful speech from the Bill entirely, in order to protect freedom of expression online.

¹⁰⁸ Corrected oral evidence: Draft Online Safety Bill – Joint Committee on the Draft Online Safety Bill, 9th September 2021: <https://committees.parliament.uk/oralevidence/2693/pdf/>

COVID-STATUS CERTIFICATION

July, August and September saw a rapid series of u-turns and contradictions across the four nations as to whether Covid-status certification (CSC) would be introduced and what form they would take. Currently, Wales and Scotland have introduced statutory instruments to introduce forms of CSCs, while the UK Government is holding mandatory CSC in reserve for winter in England and Northern Ireland has recommended, though not mandated, passes.

This is in the context of increasing evidence that CSC will not prevent the spread of coronavirus. As of the end of September, 85% of the UK population aged 12+ had received one dose of a vaccine, and 78.1% had received both doses.¹⁰⁹ Antibody rates are above 90% across all of the UK;¹¹⁰ the rate is 98% according to the UK Health Security Agency research.¹¹¹ Despite this, infection rates across the UK remain high and evidence increasingly indicates that an individual's vaccine-status cannot be treated as a proxy for their Covid-status. Public Health England has stated that new research suggests that "levels of virus in those who become infected with Delta having already been vaccinated may be similar to levels found in unvaccinated people".¹¹² Although the findings are exploratory, coupled with the knowledge that those who have been vaccinated can still catch and transmit coronavirus, they cast even more doubt that vaccine certification as a condition of entry is a useful public health policy.

SAGE has released a briefing paper on the ethics of Covid-status certification (CSC), raising serious ethical issues about the utility of CSC in reducing transmissions. Certification, whether as a result of a test or prior vaccination, may create a "false sense of security" leading an individual to believe "they do not present a risk to others" and therefore to "take fewer precautions, increasing their personal risk to others".¹¹³ In particular, SAGE warns that immunity from vaccination "is not the same as a guarantee that you cannot contract the disease or pass it on".¹¹⁴ This may increase rather than decrease infections as individuals fail to understand that they continue to be a transmission risk for Covid-19 and therefore decrease important behaviours such as "social-distancing and hand-washing".¹¹⁵ Indeed, SAGE does not recommend that a CSC is issued following a lateral-flow antigen test "due to the uncertain performance and interpretation of these tests".¹¹⁶ Dr Peter English, former

109 Vaccinations in the United Kingdom – Coronavirus (Covid-19) in the UK, GOV.UK, accessed 30th September 2021: <https://coronavirus.data.gov.uk/details/vaccinations>

110 Antibodies against coronavirus (COVID-19) – Office for National Statistics, 16th September 2021: <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/antibodies>

111 COVID-19 vaccine surveillance report, Week 39, 30th September – UKHSA: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022238/Vaccine_surveillance_report_-_week_39.pdf

112 COVID-19: Delta infections may produce similar virus levels regardless of vaccination status, early analysis suggests – Sky News, 6th August 2021: <https://news.sky.com/story/covid-19-delta-infections-produce-similar-levels-of-virus-regardless-of-vaccination-status-suggests-early-analysis-12374244>

113 Briefing Paper on Ethics of Certification, Jonathan Montgomery, Robert Dingwall, Michael Parker, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999171/S0966_MEAG_-_Briefing_Paper_on_Ethics_of_Certification.pdf

114 Ibid.

115 SPI-B – Health Status Certification in Relation to COVID-19: Behavioural and Social Considerations, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999172/S0961_SPI-B_Health_status_certification_in_relation_to_COVID-19_Behavioural_and_Social_considerations.pdf

116 NERVTAG Meeting Paper – Immunity Certification, Peter Horby, Andrew Hayward, Wendy Barclay, Peter Openshaw, John Edmunds, Neil Ferguson, Julian Hiscox, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020:

consultant in communicable disease control and a former editor of *Vaccine in Practice* magazine, told Channel 4 News: “We know that the sensitivity of lateral flow tests is pretty low, so having a negative lateral flow test isn’t a very good reassurance that you don’t have the disease.”¹¹⁷ The possible creation of fraudulent certificates could also mean that “the benefits to public health in minimising transmission will be undermined”.¹¹⁸ There is no way to verify that a lateral flow test is actually negative, or if an individual has even taken the test. The certification is purely based on what an individual chooses to input. One journalist reported how she went to a nightclub on the basis of a fake test result and spoke to other young people who had either not taken a test or tested positive but still managed to enter venues.¹¹⁹

Another ethical issue raised by SAGE relates to incentivisation and trust. The use of CSC based on vaccinations could be seen as “coercion” where the “certificate was required before access to essential social goods”.¹²⁰ This sense of coercion could also have the adverse impact of undermining trust in the vaccine and government, making “people suspicious that [vaccinations] were unsafe and could not be recommended on their own merits.”¹²¹ This assessment is mirrored in findings from The Vaccine Confidence Project at London School of Hygiene and Tropical Medicine, whose study found that the introduction of vaccine passports would reduce the likelihood of vaccination uptake in those already hesitant about vaccination.¹²² Younger people, black British people and non-English speakers had lower inclination to get vaccinated compared to others if passports were introduced.

Dr Alex de Figueiredo, research fellow on the Vaccine Confidence Project, wrote:

“Vaccine passports in the UK are therefore problematic for at least four reasons: they may offer little to no public health benefit; we should not introduce policies that entrench sub-optimal public health behaviours; we should not indirectly discriminate against protected characteristics; and, finally, we should not enact policy that may result in lower uptake, especially if these communities live in densely populated urban areas as this may increase epidemic risk.

(...)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999940/S0960_NERVTAG_Immunity_Certification.pdf.

117 Covid passports: public health v. civil liberties – Channel 4, 6th September 2021: <https://www.channel4.com/news/covid-passports-public-health-v-civil-liberties>

118 Briefing Paper on Ethics of Certification, Jonathan Montgomery, Robert Dingwall, Michael Parker, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999171/S0966_MEAG_-_Briefing_Paper_on_Ethics_of_Certification.pdf.

119 I faked a Covid test to cheat my way into a nightclub – Maddy Mussen, Joe, 1st September 2021: <https://www.joe.co.uk/coronavirus/i-faked-a-covid-test-to-cheat-my-way-into-a-nightclub-283059>

120 Briefing Paper on Ethics of Certification, Jonathan Montgomery, Robert Dingwall, Michael Parker, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999171/S0966_MEAG_-_Briefing_Paper_on_Ethics_of_Certification.pdf.

121 Briefing Paper on Ethics of Certification, Jonathan Montgomery, Robert Dingwall, Michael Parker, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999171/S0966_MEAG_-_Briefing_Paper_on_Ethics_of_Certification.pdf.

122 Vaccine passports may lower overall number of people in UK getting jab, study finds – Chiara Giordano, the Independent, 10th September 2021: <https://www.independent.co.uk/news/health/uk-covid-jabs-vaccine-passports-b1917959.html>



Vaccine passports in the UK are therefore problematic for at least four reasons: they may offer little to no public health benefit; we should not introduce policies that entrench sub-optimal public health behaviours; we should not indirectly discriminate against protected characteristics; and, finally, we should not enact policy that may result in lower uptake, especially if these communities live in densely populated urban areas as this may increase epidemic risk.

- Dr Alex de Figueiredo,
research fellow on the Vaccine Confidence Project



“If governments follow Israel’s lead, and start to offer third doses, people could tire of needing repeated vaccinations to exercise freedoms. I worry this will dent confidence in the government and healthcare authorities and lead to less positive health behaviours surrounding other routine immunisations. Vaccine passports need a rethink.”¹²³

A review of studies into the “behavioural responses to Covid-19 health certification” from the University of Sussex found “the evidence reviewed on the potential impact of certification or mandates on vaccination rates suggests this would not increase vaccination rates and might even reduce them.”¹²⁴

SAGE warns that CSC also raises ethical issues relating to discrimination since certification is generally “more easily accessible to socially advantaged groups and that it leads to stigmatisation of the uncertified”.¹²⁵ Since certification is most readily available digitally this also has the “potential to exclude those without access to electronic platforms” as well as those “with lower levels of trust in government and fears about the misuse of any data provided for certification, groups more likely to be those who are marginalised, from minority ethnic communities and those living in areas of high deprivation.”¹²⁶ Professor of Social Psychology John Drury, from the University of Sussex, told ITV News:

“You only need to look at the demographics of who is getting vaccinated and who isn’t yet to know that some groups are going to be more excluded than others by a passporting system.

“I mean, these are quite consistent patterns that young people, people from deprived communities and ethnic minorities are less likely than other groups to be vaccinated.

“So that would mean that those groups will be more excluded systematically from the activities that require passports.”¹²⁷

SAGE also highlighted the operational issues involved in CSC, warning that the “[e]nforcement of certification is likely to place heavy burdens on public-facing staff and police and may create dynamics that amplify social tensions.”¹²⁸

123 Vaccine passports don’t make sense for our health or society – encouraging self-isolation is more effective - Alex de Figueiredo, i, 3rd September 2021: <https://inews.co.uk/opinion/vaccine-passports-covid-dont-make-sense-for-our-health-or-society-encouraging-self-isolation-is-more-effective-1179458>

124 Behavioural responses to Covid-19 health certification: a rapid review – John Drury et al, BMC Public Health, 2021: <https://www.parliament.scot/-/media/media-folder/behavioural-responses-to-covid19-health-certification--a-rapid-review.pdf>

125 Briefing Paper on Ethics of Certification, Jonathan Montgomery, Robert Dingwall, Michael Parker, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999171/S0966_MEAG_-_Briefing_Paper_on_Ethics_of_Certification.pdf

126 SPI-B – Health Status Certification in Relation to COVID-19: Behavioural and Social Considerations, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999172/S0961_SPI-B_Health_status_certification_in_relation_to_COVID-19_Behavioural_and_Social_considerations.pdf

127 NHS Covid Pass: How can I get a ‘vaccine passport’ and which places will ask you for one? - ITV News, 3rd August 2021: <https://www.itv.com/news/2021-08-03/how-can-i-get-a-vaccine-passport-and-which-places-will-ask-you-for-one>

128 Health Status Certification in Relation to Covid-19 – Legitimacy and Enforcement Considerations, SPI-B – Policing and Security Sub-Group, Scientific Advisory Group for Emergencies, GOV.UK, 9th December 2020: <https://assets.publishing>

RECOMMENDATION 11: Domestic Covid passports would infringe on our privacy, perpetuate discrimination, and pave the way to a two-tier, checkpoint society with no benefit to public health. The UK Government and devolved administrations should reject Covid-status certification.

England

The conclusion of Cabinet Secretary Michael Gove's review into the use of Covid-status certification, launched on 15th March 2021, was published on 6th July.¹²⁹ After several months, a research trip to Israel, a consultation which received 57,000 responses and roundtable meetings with (unnamed) public health experts, businesses and ethicists, the report consisted of just 7 written pages. The ethical considerations stood at less than 150 words. The report concluded:

“the Government has concluded that it will not mandate the use of COVID-status certification as a condition of entry for visitors to any setting at the present time”

“The review recognises the concerns expressed over certification. However, it is possible that certification could provide a means of keeping events going and businesses open if the country is facing a difficult situation in autumn or winter. Therefore, the Government will keep the wider application of certification under consideration.”

On 5th July, the Government announced that mandatory Covid-status certification would not be introduced as part of Step 4 measures, in line with the findings of the review.¹³⁰ Instead, the responsibility would be passed on to individual businesses, with the threat that “[i]f sufficient measures are not taken to limit infection, the Government will consider mandating the NHS COVID Pass in certain venues at a later date.”¹³¹ In response, some venues and large events have made displaying an NHS Covid Pass a condition of entry, but the implementation of the scheme has varied widely. Our research has found venues requiring evidence of a negative lateral flow test regardless of vaccine status, while other venues and events have required all customers be double vaccinated, regardless of testing or antibody status. Some venues have stated they will only accept an NHS Covid Pass, while other have allowed texts or emails from NHS Test and Trace. The Night Time Industries Association called the approach “disingenuous and unclear.”¹³² Tristan Moffat, operations director of the Piano Works, said:

service.gov.uk/government/uploads/system/uploads/attachment_data/file/999170/S0967_SPI-B_Health_status_certification_in_relation_to_COVID-19.pdf

129 COVID-Status Certification Review: Report – Cabinet Office, GOV.UK, 6th July 2021: <https://www.gov.uk/government/publications/covid-19-response-spring-2021-reviews-terms-of-reference/covid-status-certification-review-report>

130 Plans For Domestic Vaccine Passports Will Be Scrapped Under Lockdown Easing Measures – John Johnston, Politics Home, 5th July 2021: <https://www.politicshome.com/news/article/plans-for-domestic-vaccine-passports-set-to-be-scrapped-under-lockdown-easing-measures>

131 Moving to step 4 of the roadmap – Cabinet Office, GOV.UK, updated 27th August 2021: <https://www.gov.uk/government/publications/covid-19-response-summer-2021-roadmap/moving-to-step-4-of-the-roadmap>

132 Covid passes for nightclubs branded unworkable – Robert Plummer, BBC News, 13th July 2021: <https://www.bbc.co.uk/news/business-57819679>

“It’s like we’ve been given a rope to hang ourselves with. If it all goes wrong, we’ll be closed down again and the buck will be passed back to the operators.”

Peter Marks, chief executive of Rekom UK which operates nightclubs across the country, said his venues would be opening: “at full capacity and without any requirement for a negative Covid test, something we believe would create a barrier to both customer enjoyment and getting the industry back on its feet.”¹³³

Nightclubs operators Shaun Keasey and Michael Ansell in Wolverhampton have both said their venues would not be requiring Covid passes.¹³⁴ Mr Ansell, who runs Planet Nightclub, said:

“You can’t take the freedom from the person. It is a bit of a wrong that it could be possibly forced. There is a lot of questions about it really.

“I don’t feel in the position where I should enforce that because it is against the personal freewill.”

The general manager of cinema chain Vue in the UK and Ireland said the organisation would not require Covid passes:

“As an industry, we don’t believe that the use of Covid status certificates or passports will make the cinema experience a safer one, and there are also at the same time significant issues in terms of discrimination.

“We believe it will build a significant barrier between the sector, the industry and its customers, when we are trying to rebuild the business – rebuilding it safely but in an enjoyable way at the same time.”¹³⁵

Mark Davyd, founder and chief executive of the Music Venues Trust said that most music venues would not be using Covid passes:

“At our level, it’s a complete non-starter at the moment.

“Very, very few venues are going to do this. The reason is the app itself is no guarantee of anything, except that it says someone has taken a test and they’re negative.

“Fake vaccine passports are already available and online. These things are not rigorous in any way, shape or form at the moment.”¹³⁶

Tom Bott, founder of Signature Brew bars and music venues in east London, said:

133 Vaccine passports would hinder recovery, says nightclubs boss – Shropshire Star, 14th July 2021: <https://www.shropshirestar.com/news/health/coronavirus-covid19/2021/07/14/vaccine-passports-would-hinder-recovery-says-nightclubs-boss/>

134 Hard-hit club owners unlikely to demand proof of jabs – Jamie Brassington, Express & Star, 14th July 2021: <https://www.expressandstar.com/news/health/coronavirus-covid19/2021/07/14/wolverhampton-nightclubs-not-using-vaccine-passports/>

135 Cinema chain casts doubt on use of vaccine passports and says they would not make visits safer – Alex Green and Lorna Hughes, Essex Live, 15th July 2021: <https://www.essexlive.news/news/uk-world-news/cinema-chain-casts-doubt-use-5654049>

136 Venues will take precautions but not ask for vaccine passports, says music boss – Press Association, Largs and Millport, 13th July 2021: <https://www.largsandmillportnews.com/news/national/19439539.venues-will-take-precautions-not-ask-vaccine-passports-says-music-boss/>

“There’s been a few headlines from politicians suggesting it’d be a good idea but there’s no thorough guidance on how we should do that.

“I don’t think it’s for us to curate and implement complicated policies to consumers that could be construed as infringing on their personal rights.”¹³⁷

However, just two weeks later, the Prime Minister announced at a press conference “that some of life’s most important pleasures and opportunities are likely to be increasingly dependent on vaccination.”¹³⁸ Vaccine-only certificates were to be mandatory from the end of September, with no option for a negative test as an alternative. Vaccines Minister Nadhim Zahawi MP announced simultaneously in the House of Commons that vaccinations would become mandatory for nightclubs in September:

“By the end of September, everyone aged 18 and over will have had the chance to receive full vaccination and the additional two weeks for that protection to take hold. At that point, we plan to make full vaccination a condition of entry to nightclubs and other venues where large crowds gather. Proof of a negative test will no longer be sufficient.”¹³⁹

This sudden policy swerve contradicted the Government’s own review and the findings of the Public Administration and Constitutional Affairs Committee, who found “no basis in science or logic” for the introduction of Covid passes. Many politicians and commentators questioned the logic of waiting until September to introduce vaccine passes, if the policy was necessary to keep venues open and safe. It is clear that this announcement was made as a way to pressure young people into being vaccinated. Foreign Secretary Dominic Raab said: “It’s a little bit of coaxing and cajoling and also making clear that ultimately over September, when we know we’ll see as a result of coming out of the lockdown step four an increase in cases, we can control that with backstop safeguard measures.”¹⁴⁰

Through the summer, Ministers continued to affirm that the mandatory scheme would come into force at the end of September, leading some of the Government’s own MPs to announce that they would boycott the Conservative party conference if they were required to display their vaccine-status as a condition of entry.¹⁴¹ Ministers also suggested that vaccine passports could be used in settings other than nightclubs and crowded events; (then) Secretary of State for Digital, Culture, Media and Sport Oliver Dowden said “If there is a need to further extend that certification according to the public health need we will look at doing so”.¹⁴²

137 *Ibid.*

138 PM statement at coronavirus press conference – Prime Minister’s Office, GOV.UK, 19th July 2021: <https://www.gov.uk/government/speeches/pm-statement-at-coronavirus-press-conference-19-july-2021>

139 HC Covid-19 Update (19th July 2021) vol. 699, col. 688: <https://hansard.parliament.uk/commons/2021-07-19/debates/64EACE0F-A4FD-45C9-BCAF-CD14132B5366/Covid-19Update>

140 Government to use stick and carrot to encourage young people to get the Covid-19 vaccine by end of the summer – Hugo Gye, *i News*, 29th July 2021: <https://inews.co.uk/news/politics/government-to-use-stick-and-carrot-to-encourage-young-people-to-get-the-covid-19-vaccine-by-end-of-the-summer-1127422>

141 Some Tory MPs to boycott conference if vaccine passports required for entry – Aubrey Allegretti, *the Guardian*, 22nd July 2021: <https://www.theguardian.com/world/2021/jul/22/some-tory-mps-to-boycott-conference-if-vaccine-passports-required-for-entry>

142 COVID-19: Extension to use of vaccine passports will be looked at if there is a ‘public health need’, Oliver Dowden says – Sophie Morris, *Sky News*, 10th September 2021: <https://news.sky.com/story/covid-19-extension-to-use-of-vaccine-passports-will-be-looked-at-if-there-is-a-public-health-need-oliver-dowden-says-12403610>

Despite increasing Government emphasis on the scheme, flaws remain with the passes themselves. A freedom of information request found that, in England, 677,331 NHS Covid-19 passes have had to be corrected and 112,939 have had to be deleted due to errors.¹⁴³ SNP MSP John Mason raised his concerns about NHS vaccinations records for those who have received their coronavirus vaccination in another country, including other parts of the UK:

“I have constituents contacting me who had one jag [vaccination] in Scotland and one perhaps in England or Germany or some other country – so they’ve got a problem.

“And I myself had both my jags in Easterhouse in Glasgow, but the NHS system says I only had one jag, so I cannot get a certificate.

“The NHS in Glasgow said that that is a national problem, not just a local problem.

“So how robust are our records?”¹⁴⁴

The BBC has also reported on Scottish individuals being unable to prove their vaccine status due to having received a dose in England. Maura McGoldrick, a student who receive her first dose at a walk-in clinic in London and her second in Glasgow, was told “there was no data-sharing mechanism between [NHS Inform] and NHS England”. NHS Greater Glasgow and Clyde told the BBC that NHS Scotland certificates “can only contain information on vaccines administered in Scotland”.¹⁴⁵ Ms McGoldrick said:

“Selfishly speaking, I’m trying to sort this out for myself but I’m in the fortunate position where I have time to chase this up.

“But I know there are other people in the same position – NHS Inform said they had other people call about this but assumed they sorted it out. People have probably just given up as it will take more time and effort that they have to give right now.”¹⁴⁶

Similarly, individuals in Northern Ireland reported that they have been unable to receive vaccine certification if they have received a first and/or second dose outside of Northern Ireland.¹⁴⁷

Amid the confusion as to when and how the scheme would be introduced, Liberal Democrat Home Affairs spokesperson Alistair Carmichael MP asked an urgent question in the House of Commons on the implementation of vaccine passports:

“The introduction of vaccine passports will have enormous practical implications for the literally thousands of businesses across the country that will be required to gather and to hold our data.

143 Up to 700,000 vaccine passports hit by NHS blunders as officials record wrong data – Laura Donnelly, the Telegraph, 30th August 2021: <https://www.telegraph.co.uk/news/2021/08/30/700000-vaccine-passports-hit-nhs-blunders-officials-record-wrong/>

144 SNP MSP raises concerns after NHS records wrongly state he has only had one jag – Alistair Grant, the Herald, 2nd September 2021: <https://www.heraldsotland.com/politics/19553879.snp-msp-raises-concerns-nhs-records-wrongly-state-one-jag/>

145 Covid in Scotland: 'I'm double-vaccinated but can't show the proof'- Mary McCool, BBC News, 8th September 2021: <https://www.bbc.co.uk/news/uk-scotland-58475922>

146 Ibid.

147 Covid-19: NI student struggling to get vaccination certificate – BBC News, 11th August 2021: <https://www.bbc.com/news/uk-northern-ireland-58180215.amp>

“It is on those aspects that the answers are most urgently required from the Government—this must not be “in due course”, as the Minister has just said. The deadline for the implementation of this scheme is now just three weeks away.

“We must not, however, lose sight of the fact that a scheme of this sort opens the door to a major change in the relationship between the citizen and the state. Never before in peacetime have a Government in this country controlled, in this way, where we can go and with whom, and what to do.”¹⁴⁸

Vaccine Minister Nadhim Zahawi was roundly criticised by MPs from all parties as he attempted to defend the policy. Backbench Conservative MP William Wragg said:

“What a load of rubbish. (...)

“We in this House seem prepared to have a needless fight over this issue. It is completely unnecessary. We all agree that people should be encouraged to have the vaccine, and I again encourage everybody to do so, but to go down this route, which is overtly discriminatory, will be utterly damaging to the fabric of society.”¹⁴⁹

Chair of the Covid Recovery Group of Conservative MPs Mark Harper said:

“The Minister set out earlier this year that this policy was discriminatory. He was right then and that remains the case. It is a discriminatory policy.

“The vaccines are fantastically effective at reducing hospitalisation and death. They are very much less effective in reducing transmission of the Delta variant. This is a pointless policy with damaging effects.”¹⁵⁰

Jeff Smith, Labour MP and former DJ, criticised the practicality of the scheme:

“As somebody who worked in nightclubs for 25-plus years, let me tell the Minister that this is a recipe for chaos on the doors of nightclubs.

(...)

“The Night Time Industries Association has said that this will cripple the industry. This industry has been massively hard hit and it relies on walk-up trade; this is going to make it impossible for nightclubs to run.”¹⁵¹

Chris Bryant, Labour MP, called the proposal “nonsense”:

“I am 100% in favour of vaccination and 100% opposed to vaccine passports. There is no legal definition of what a nightclub is, as opposed to a place where other people might be bouncing up and down, and shouting at one another across

148 HC Deb (8th September 2021) vol. 700, col. 305: <https://hansard.parliament.uk/commons/2021-09-08/debates/6C6C1F6B-C2B2-4AF5-BC4B-643F8DEEF204/CovidVaccinePassports>

149 HC Deb (8th September 2021) vol. 700, col. 307: <https://hansard.parliament.uk/commons/2021-09-08/debates/6C6C1F6B-C2B2-4AF5-BC4B-643F8DEEF204/CovidVaccinePassports>

150 HC Deb (8th September 2021) vol. 700, col. 309: <https://hansard.parliament.uk/commons/2021-09-08/debates/6C6C1F6B-C2B2-4AF5-BC4B-643F8DEEF204/CovidVaccinePassports>

151 HC Deb (8th September 2021) vol. 700, col. 311: <https://hansard.parliament.uk/commons/2021-09-08/debates/6C6C1F6B-C2B2-4AF5-BC4B-643F8DEEF204/CovidVaccinePassports>

a Chamber in a room of 500 people. There is no legal definition that the Minister is going to be able to rely on.

“The Government will effectively be turning bouncers on the door into legal officers”.¹⁵²

Just 4 days later, another Government U-turn occurred when Health Secretary Sajid Javid announced on the BBC’s Andrew Marr Show that the Government would not be going ahead with vaccine passports:

“I’ve never liked the idea of saying to people you must show your papers or something to do what is just an everyday activity, but we were right to properly look at it.

“We’ve looked at it properly and whilst we should keep it in reserve as a potential option, I’m pleased to say that we will not be going ahead with plans for vaccine passports.”¹⁵³

Despite this encouraging announcement, it became increasingly apparent that vaccination passports were not being ruled out, just postponed. The Health Secretary announced that the use of vaccine certification would be held in reserve as part of the Government’s ‘Plan B’ for winter. This is despite simultaneously admitting the scheme was not supported by evidence:

“It is not something we are implementing. We are not going ahead with any plans for that. For any Government to do something like that, it would be such a big decision, and it would have to be backed up by the evidence and the data. That evidence is not there, and I hope that we will never be in the situation that it is.”¹⁵⁴

As Liberal Democrat MP Alistair Carmichael pointed out: “If the evidence is not there, why are they part of plan B?”¹⁵⁵

On 27th September, the Department of Health and Social Care published its “[p]roposal for mandatory COVID certification in a Plan B scenario” along with another “call to evidence”.¹⁵⁶ The proposals are intended to help organisations and individuals “understand the policy and [...] prepare their own contingency plans should mandatory certification be implemented”, given that the proposal might have just a week’s notice before coming into law.¹⁵⁷ As well as requiring mandatory vaccination passes to enter certain venues, the proposals also suggest that those working in these venues will be required to undergo

152 HC Deb (8th September 2021) vol. 700, col. 312: <https://hansard.parliament.uk/commons/2021-09-08/debates/6C6C1F6B-C2B2-4AF5-BC4B-643F8DEEF204/CovidVaccinePassports>

153 Covid: Vaccine passports ‘will not be going ahead’ in England, Health Secretary Sajid Javid says – ITV News, 12th September 2021: <https://www.itv.com/news/2021-09-12/covid-vaccine-passports-will-not-be-going-ahead-in-england-sajid-javid-says>

154 HC Covid-19 Update (14th September 2021), vol. 700, col. 814: <https://hansard.parliament.uk/commons/2021-09-14/debates/DC215883-A118-4E79-B329-3012F3A5F5BD/Covid-19Update>

155 HC Covid-19 Update (14th September 2021), vol. 700, col. 825: <https://hansard.parliament.uk/commons/2021-09-14/debates/DC215883-A118-4E79-B329-3012F3A5F5BD/Covid-19Update>

156 Proposal for mandatory COVID certification in a Plan B scenario – Department of Health and Social Care, GOV. UK, 27th September 2021: <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

157 Proposal for mandatory COVID certification in a Plan B scenario – Department of Health and Social Care, GOV. UK, 27th September 2021: <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

“regular, supervised” testing if they are unvaccinated. The Government proposals suggest that the following venues and events would be subject to these requirements, but notes that increasing the scope of vaccine-status certification “cannot be entirely ruled out”:

- all nightclubs and other venues open after 1am with alcohol, music and dancing
- indoor events with 500 or more attendees where those attendees are likely to stand and mix to a significant degree, or move around during the event, such as music venues or large receptions
- outdoor, crowded settings with 4,000 or more attendees where those attendees are likely to stand, or move around during the event, such as outdoor festivals
- any settings with 10,000 or more attendees, such as large sports and music stadia.¹⁵⁸

The ‘Plan B’ document also sought to clarify when a vaccine pass would be required. It gave the example of a museum – which would not be required to check vaccine-status unless it was hosting a reception or performance, in which case those attending such an event would be required to display their vaccine status, but those also in the museum but not attending the event would not be required to do so. A conference would not be required to check vaccine-status if the conference comprised fewer than 500 people and attendees remained seated, but vaccine-status would have to be checked if a drink reception were to be held. These exceptions and complications make a nonsense of the scheme and highlight its arbitrary nature.

Mandatory testing for unvaccinated employees is a concerning new proposal, one which will fundamentally reshape the relationship between workers and employers and doubtless lead to unvaccinated employees being seen as less desirable or fired. It will make employment contingent on medical testing and erode medical confidentiality for employees. Unvaccinated employees who are medically exempt from vaccination will not be required to undergo supervised testing, raising questions as to whether this policy is about preventing the transmission of coronavirus, or about punishing the unvaccinated. Given the evidence that lateral flow tests are poor at detecting asymptomatic coronavirus cases, this approach appears to be more about coercion rather than public health. Indeed, the proposals note “universal free provision of LFDs will end, and individuals and organisations using the tests will begin to bear the cost” of such testing. Consequently, many workers will face pressure from their employers to ensure they are vaccinated to avoid additional costs.

The proposals also state that legislation introducing vaccine passports would be introduced as a statutory instrument via the Public Health (Control of Disease) Act 1984. The proposals suggest that while the Government would “seek to provide a vote to Parliament ahead of any regulations coming into force” this would be subject to “the urgency of the situation

¹⁵⁸ Proposal for mandatory COVID certification in a Plan B scenario – Department of Health and Social Care, GOV. UK, 27th September 2021: <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

and parliamentary timetabling”. It is extremely alarming that the Government is already preparing an excuse to bypass parliamentary scrutiny on one of the most critical civil liberties issues in British modern history. Any regulations must face full parliamentary scrutiny and a vote before coming into law.

Businesses, the public and MPs have been repeatedly and routinely misled over the UK Government’s plans for CSC. This cynical and dishonest approach to public health will only serve to shatter public trust and disadvantage businesses who are struggling after months of forced closure. The UK Government must abandon the introduction of CSC, rather than using it as a threat.

Wales

On 10th September, at a press conference, Welsh First Minister Mark Drakeford announced that the Cabinet would look at introducing vaccine passes in Wales.¹⁵⁹ Following this announcement, during First Minister’s Questions, the leader of the Welsh Conservatives Andrew R. T. Davies asked:

“[...] given your previous position of objecting to the use of COVID passports, will you be leading the discussion in the same vein in Cabinet or has your position changed? And are we expecting a change in the Government’s overall view of vaccine passports on Friday?”¹⁶⁰

The First Minister responded that while he starts from “a position of scepticism about vaccine certification” and had raised “the ethical, the legal, and the practical issues” of such a scheme with the UK Government, the Welsh Cabinet would assess the “closely balanced set of arguments” for and against vaccine certification.¹⁶¹ On 17th September, Mark Drakeford announced that the Welsh Government would seek to introduce mandatory Covid passes in Wales from 11th October. Similarly to announcements in England and Scotland, the scheme would apply to:

- Nightclubs
- Indoor, non-seated events for more than 500 people, such as concerts or conventions
- Outdoor non-seated events for more than 4,000 people
- Any setting or event with more than 10,000 people in attendance

Individuals would be required to show the NHS Covid Pass (which operates in Wales as

¹⁵⁹ Coronavirus recap: Mark Drakeford holds press conference as cases continue to rise – Owen Evans, North Wales Live, 10th September 2021: <https://www.dailypost.co.uk/news/north-wales-news/coronavirus-live-mark-drakeford-holds-21532301>

¹⁶⁰ Plenary (14th September 2021), Welsh Parliament: <https://record.assembly.wales/Plenary/12409?lang=en-GB#A66989>

¹⁶¹ Plenary (14th September 2021), Welsh Parliament: <https://record.assembly.wales/Plenary/12409?lang=en-GB#A66989>

well as England) to prove either that they have received two doses of a vaccine or had a negative lateral flow test in the past 48 hours. Mark Drakeford said: “We hope introducing the requirement to show a COVID pass will help keep venues and events – many of which have only recently started trading again – open.”¹⁶²

Mark Drakeford rejected the Scottish and English approach of vaccine-only passes, stating there were “a series of ethical, legal and technical questions” with such a scheme.¹⁶³ However, as we have highlighted in previous reports and analysis of CSC schemes, allowing for a lateral flow test does not mitigate the exclusionary and discriminatory impacts of a Covid ID system, as not all citizens have equal access to healthcare and technology, and nor is it a proportionate or effective public health policy.

Welsh Conservative leader Andrew R. T. Davies said of the announcement, in contrast to Conservatives in Westminster:

“This is another disappointing U-turn from Labour’s First Minister who told me in July he was against the idea of people having to show a Covid passport to enter a venue or event in Wales.

“Welsh Conservatives have been against the introduction of such documentation from the outset, due to the wide-ranging ethical, equality, privacy, legal, and operational ramifications.”¹⁶⁴

The Night Time Industries Association Wales also criticised the decision:

“The timing of its implementation in Wales by ministers is also questionable and will come a fortnight after the peak in the Labour Government’s own modelling of the latest wave, and some two months after these large-scale events resumed and venues across the country.

“For many, even those who support such a restriction, this looks like another perfect example of Labour ministers in Cardiff Bay closing the stable door after the horse has bolted.

(...)

“We still feel that these measures will have a negative impact on businesses, and will create considerable market distortion.”¹⁶⁵

UK Hospitality’s executive director for Wales, David Chapman, said:

“Those affected businesses, already in a fragile state following

¹⁶² Covid pass for events & nightclubs announced – GOV.WALES, 17th September 2021: <https://media.service.gov.wales/news/covid-pass-for-events-nightclubs-announced>

¹⁶³ Covid vaccine and test passes to be introduced in Wales – BBC News, 17th September 2021: <https://www.bbc.co.uk/news/uk-wales-politics-58596128>

¹⁶⁴ Welsh Government accused of U-turn as vaccine passes planned – Express & Star, 17th September 2021: <https://www.expressandstar.com/news/uk-news/2021/09/17/welsh-government-accused-of-u-turn-as-vaccine-passes-planned/>

¹⁶⁵ Welsh Government accused of U-turn as vaccine passes planned – Rod Minchin, MSN News, 17th September 2021: <https://www.msn.com/en-gb/news/uknews/welsh-government-accused-of-u-turn-as-vaccine-passes-planned/ar-AAOzH6E>

repeated lockdowns and periods of onerous trading restrictions, now find themselves facing further economic and resourcing pressures”.¹⁶⁶

Graeme Da Silva, regional director at Rekom, which manages nightclubs in Cardiff and Swansea, said:

“Once again nightclubs are being singled out.

“There is not much difference between a club and a nightclub at midnight on a Friday or Saturday. People are dancing, people are busy and actually nightclubs are a lot safer because of the ventilation we have.

(...)

“Our venues are at a really fragile state of recovery and many hundreds of jobs are at risk.”¹⁶⁷

Adam Price MS, leader of Plaid Cymru, questioned the evidence basis behind the scheme:

“SAGE has concluded that, even with careful planning, there may not be any net benefit to COVID immunity certification, and indeed a paper of one of its sub-committees has argued that a domestic certificate—which is what we’re talking about, rather than a travel certificate—has the potential to cause harm.

(...)

“Do you accept that limiting people’s ability to engage in certain activities, based on their certified health status, sets a very uncomfortable precedent? We only have to think back, don’t we, to the AIDS epidemic to realise why.”¹⁶⁸

He also raised questions about the reliability of lateral flow tests and the ease with which a result can be forged, to which the First Minister responded that the Welsh Government planned to “make it a specific offence, a criminal offence, knowingly to falsify the results of a lateral flow device.”¹⁶⁹ Such an offence would be virtually impossible to prove and will not prevent individuals from submitting false results to the NHS Covid Pass app.

Facing opposition from the hospitality industry, Mark Drakeford revealed during First Minister’s Questions on 28th September that for “large-scale events” random checks would be permitted, since:

“the public health adverse impacts of checking everybody’s pass would outweigh the advantages of the pass itself, because you would have long queues of people spending lots of time jostling next door to one another.”¹⁷⁰

166 Covid vaccine and test passes to be introduced in Wales – BBC News, 17th September 2021: <https://www.bbc.co.uk/news/uk-wales-politics-58596128>

167 Covid vaccine and test passes to be introduced in Wales – BBC News, 17th September 2021: <https://www.bbc.co.uk/news/uk-wales-politics-58596128>

168 Plenary (28th September 2021), Welsh Parliament: <https://record.assembly.wales/Plenary/12433#C376911>

169 Plenary (28th September 2021), Welsh Parliament: <https://record.assembly.wales/Plenary/12433#C376911>

170 Plenary (28th September 2021), Welsh Parliament: <https://record.assembly.wales/Plenary/12433#C376911>

This comment highlights the illogicality of a Covid pass scheme. If Covid passes cannot protect individuals in a queue outside a venue, they cannot and will not protect individuals inside a venue. 'Random checks' of Covid passes are likely to be anything but, and will certainly see marginalised groups disproportionately targeted. This approach allows authority figures and security staff to single out groups and individuals for additional checks at will – a confrontational approach to public health which could lead to staff or customers facing aggression.

RECOMMENDATION 12: 'Spot checking' individuals' Covid-status will lead to discrimination and targeting of marginalised groups and should be strongly advised against in all relevant Government and local authority guidance.

On 27th September, the Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021 were laid. These Regulations inserted “[s]pecific measures applicable to premises where music is provided for dancing or at which specified events are held”: requiring specified venues to only allow persons to be “present on the premises if [they] possesses evidence” of a completed course of an approved vaccine, proof that they are participating in a vaccine trial, a negative test result from the last 48 hours or a positive PCR test result from more than 10 days prior and under 180 days prior.¹⁷¹ The Regulations also make it an offence to possess “false or misleading evidence relating to vaccination or coronavirus test results”.¹⁷² A vote on the Regulations was scheduled in the Senedd for 5th October.

Scotland

On 1st September, Scottish First Minister Nicola Sturgeon announced that the Scottish Government would seek to introduce “vaccine certification” for nightclubs, adult entertainment venues, unseated indoor live events for more than 500 people, unseated outdoor live events for more than 4,000 people, and “any event of any nature” of more than 10,000 people.¹⁷³ The First Minister also stated that vaccine certification for hospitality would be kept “under review”.¹⁷⁴ This statement represents a significant and rapid policy shift for the SNP-Green coalition Government, who just weeks prior to this announcement had rejected the same proposals when announced by the UK Government in England.

When asked by Conservative MSP Murdo Fraser whether the Government would consider adding the option of a negative test as an alternative to vaccination, the First Minister said that this would “effectively let people off the hook of getting vaccinated, if they are eligible”. This language is concerning and makes it plain that a vaccine-only pass is

171 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021, reg 2(2)

172 The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021, reg 2(7)

173 Covid-19 Vaccination certification – Scottish Government, 1st September 2021, GOV.SCOT: <https://www.gov.scot/news/covid-19-vaccination-certification/>

174 Official report of Scottish Parliament, 1st September 2021, Covid-19: <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=13264&i=120294>

designed to coerce people into receiving vaccination. Indeed, Scottish Health Minister Humza Yousef stated the following day that one of the main benefits of introducing vaccine-only passes would be “incentivising vaccination,”¹⁷⁵ whilst acknowledging that “if you are in these settings with both doses of the vaccine, the virus is still there – you can still catch it.”¹⁷⁶ Deputy First Minister John Swinney told the Covid-19 Recovery Committee that while there were “different opinions and contested opinions” on the subject, the Scottish Government has “concluded that [requiring vaccine passports] would be an effective way of strengthening population-wide resistance to the virus through maximising the uptake of the vaccination.”¹⁷⁷ Labour MSP Alex Rowley questioned the evidence basis, telling the Minister:

“Before [the vote] next week, you need to show us the evidence for why the specific measures that you have talked about have been chosen, what you believe will be achieved and what other options have been considered for increasing uptake among the under-40s.”¹⁷⁸

No such evidence was provided. In July, Deputy First Minister John Swinney told Good Morning Scotland that vaccine passports were “the wrong way to handle” vaccine hesitancy and that and that he “would be much more convinced by an argument that was about engaging people, taking people with us and explaining the rationale”.¹⁷⁹ The Scottish Health Minister also expressed concerns in July:

“One of the first meetings I had as cabinet secretary for health was with human rights groups and organisations and they were vehemently opposed to Covid vaccine passports, because they were concerned about the fact they might increase the inequality gap, that there would be ethical issues.

“I’ll give you one example – we know that uptake of vaccines has been lower in the African and Polish communities. Therefore, would it be correct and right to deny entry where some groups may be more disproportionately affected than others?”¹⁸⁰

Just two days before the First Minister’s announcement, Patrick Harvie, co-leader of the Scottish Greens and Green minister, warned that vaccine passports posed “a real danger of generational injustice” and suggested that the Government “focus on making places safer for everyone.”¹⁸¹ Previously, the Mr Harvie had said vaccine passports risked “making the

175 Covid Scotland: Humza Yousef explains vaccine certificate plan – Angus Cochrane, the National, 2nd September 2021: <https://www.thenational.scot/news/19553773.covid-scotland-humza-yousef-explains-vaccine-certificate-plan/>

176 Covid in Scotland: Vaccine passport benefits ‘outweigh concerns’ - BBC News, 3rd September 2021: <https://www.bbc.co.uk/news/uk-scotland-58420003>

177 Official Report, Covid-19 Recovery Committee, 2nd September 2021, Session 6, col 8: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13275>

178 Official Report, Covid-19 Recovery Committee, 2nd September 2021, Session 6, col 9: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13275>

179 Think again Boris! SNP’s Swinney attacks Covid vaccine plan - ‘WRONG way to handle it!’ - Paul Withers, the Express, 28th July 2021: <https://www.express.co.uk/news/politics/1468778/snp-news-john-swinney-boris-johnson-covid-vaccine-large-events-michael-gove-latest>

180 Humza Yousef resists vaccine passports despite concern over lack of first jabs – Andy Philip, the Press and Journal, 21st July 2021: <https://www.pressandjournal.co.uk/fp/news/politics/scottish-politics/3327712/humza-yousef-resists-vaccine-passports-despite-concern-over-lack-of-first-jabs/>

181 The Times view of the SNP’s introduction of jab proof for events: Passport to Progress – The Times, 1st September

social inequality that we face today even worse” and warned they “could set a dangerous precedent for the longer term, in that people’s civil rights would be dependent on their medical history.” In July, he said they would “deepen discrimination against those who have not yet been vaccinated” and “deepen inequality.”¹⁸² His U-turn was unexplained.

Industry bodies did not welcome the announcement. The Scottish Licensed Trade Association branded the scheme a “most unwelcome development.”¹⁸³ Mike Grieve, chair of the Night Time Industries Association Scotland and owner of the Subclub in Glasgow, said the plans were “completely incoherent.”¹⁸⁴ Neil Doncaster, chief executive of the Scottish Professional Football League, told BBC Sport Scotland:

“It’s not clear what IT infrastructure will be in place, what timescales clubs will be asked to work to, or what can be done for those without smartphones.

“And it’s not clear if it’s going to cut across terms and conditions of seasons tickets already bought by people across the land.”¹⁸⁵

The Scottish Football Association released a joint statement raising concerns over the “considerable unintended consequences” of vaccine passports for the industry.¹⁸⁶ Liz Cameron, chief executive of the Scottish Chambers of Commerce, said businesses needed urgent clarity on where vaccine certifications could be required, and warned that vaccine passes could be a “deterrent” for customers.¹⁸⁷ UK Hospitality Scotland said the announcement would “cause dismay amongst businesses” and said the fact that there had been no engagement with the sector before the announcement was “extremely concerning.”¹⁸⁸ Stephen Montgomery, of the Scottish Hospitality Group, said vaccine passports should not be used to coerce young people into being vaccinated:

“Our younger people have gone through so much in the last 16 months and I don’t think they should be penalised. It is their choice.

(...)

“There are other positive ways to encourage them to get the vaccine, not holding them to ransom by saying ‘you can’t get into a nightclub.’”¹⁸⁹

2021: <https://www.thetimes.co.uk/article/the-times-view-of-the-snps-introduction-of-jab-proof-for-events-passport-to-progress-0zrmqs7wg>

182 Bought and sold for SNP gold’ - ‘Spineless’ Greens WILL back Sturgeon’s vaccine passports – Tom Martin, the Express, 3rd September 2021: <https://www.express.co.uk/news/politics/1485782/Scotland-vaccine-passport-nicola-sturgeon-green-party-deal>

183 Covid Scotland: Humza Yousaf explains vaccine certificate plan – Angus Cochrane, the National, 2nd September 2021: <https://www.thenational.scot/news/19553773.covid-scotland-humza-yousaf-explains-vaccine-certificate-plan/>

184 Scottish opposition parties outraged at vaccine passport plan – Libby Brooks, the Guardian, 2nd September 2021: <https://www.theguardian.com/society/2021/sep/02/scottish-opposition-parties-outraged-vaccine-passport-sturgeon>

185 Ibid.

186 SFA’s joint response group cynical over Celtic Park vaccine passports – Euan Davidson, 67 Hail Hail, 2nd September 2021: <https://www.67hailhail.com/news/sfas-joint-response-group-cynical-over-celtic-park-vaccine-passports/>

187 Covid in Scotland: Opposition increasing towards vaccine passports – BBC News, 6th September 2021: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-58453551>

188 Covid Scotland: Dismay as Nicola Sturgeon announces vaccine passports for nightclubs and football matches – Gina Davidson, the Scotsman, 1st September 2021: <https://www.scotsman.com/news/politics/covid-scotland-dismay-as-nicola-sturgeon-announces-vaccine-passports-for-nightclubs-and-football-matches-3367462>

189 Vaccination passports punish the young, claim pubs – Marck McLaughlin, the Times, 27th July 2021: <https://www.thetimes.co.uk/article/777d9cdc-ee5b-11eb-8f01-2c678acbb979>

Health Secretary Humza Yousaf acknowledged that “people are generally uncomfortable with the certification scheme”.¹⁹⁰

On 9th September, the Scottish Government published its “[p]roposals for a mandatory COVID-19 vaccination certification scheme for Scotland,” in advance of a vote in Scottish Parliament on a motion relating to the introduction of the scheme.¹⁹¹

The ‘COVID Vaccine Certification Scheme’ motion sought the approval of the Scottish Parliament for the “implementation of a COVID Vaccine Certification scheme [...] apply[ing] to nightclubs, sexual entertainment venues, indoor unseated live events with 500 or more attendees, outdoor unseated live events with 4,000 or more attendees and all events with 10,000 or more attendees”.¹⁹²

The motion did not provide details on how and by whom the scheme will be enforced, the “measures” that will supposedly “ensure digital inclusivity and [...] ensure that disabled people are not disproportionately impacted”, how those exempt from vaccination will be able to access events and businesses, how children will be impacted by this scheme, how privacy and personal data will be protected and what protections will be in place for the right to protest. The motion failed even to define a nightclub, leading to farcical scenes during the motion debate of SNP MSPs searching for dictionary definitions of a nightclub online on their phones and reading them aloud to the Chamber.

It is entirely unacceptable for the Scottish Government to seek to introduce a Covid Vaccination Certification scheme on the basis of a motion, rather than a vote on legislation. The policy was announced without a public or industry consultation, and the motion was published just two days before the debate on 9th September. This policy represents one of the most significant changes in approach to public health seen in modern British history and a profound change to public life, privacy norms and basic rights and liberties. It is deserving of the most rigorous and thorough scrutiny from the Scottish Parliament.

The Bingham Centre for the Rule of Law strongly recommends that any vaccine passport policy should be subject to the highest form of parliamentary scrutiny:

“Democracy requires that rules should be not simply imposed, but decided by elected representatives. When it comes to something as important as vaccine passports, it is insufficient for the law to come solely from ministers. Instead, it needs to be made through primary legislation: debated, scrutinised, justified and then enacted by parliament.”¹⁹³

¹⁹⁰ Covid Scotland: Humza Yousaf admits public ‘generally uncomfortable’ with vaccine passports – David Bol, the Herald, 5th September 2021: <https://www.heraldscotland.com/politics/19559980.covid-scotland-humza-yousaf-admits-public-generally-uncomfortable-vaccine-passports/>

¹⁹¹ Coronavirus (COVID-19): mandatory vaccine certification – GOV.SCOT, 9th September 2021: <https://www.gov.scot/publications/coronavirus-covid-19-mandatory-vaccine-certification/>

¹⁹² <https://www.parliament.scot/chamber-and-committees/votes-and-motions/votes-and-motions-search/S6M-01123>

¹⁹³ Vaccine passports must be legislated for properly through Parliament – Ronan Cormacain et al, Bingham Centre for the Rule of Law, 1st June 2021: <https://binghamcentre.biicl.org/comments/114/vaccine-passports-must-be-legislated-for-properly-through-parliament?cookieset=1&ts=1631115331>

The approval of a 200-word motion is not a substitute for full Parliamentary scrutiny of vaccine passport legislation. Despite all opposition parties voting against it, the motion passed with the support of the SNP's coalition partners, the Scottish Greens, despite their previous vocal criticism of such an approach.

On 28th September, Nicola Sturgeon announced an 18 day delay, or "grace period", until the scheme would be enforced. Scottish Liberal Democrat leader Alex Cole-Hamilton said the delay in enforcement "is an admission that businesses are nowhere near ready and there is evidence that [vaccine passports] don't even work." The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 were published on 30th September, the day before they were due to come into force. Although the Regulations would not be enforced until 18th October, this window still leaves businesses little time to prepare for a new system of checkpoints and security.

The Regulations were not voted on by Scottish Parliament and are the second amendment to Scotland's current set of Health Protection Regulations. They introduce a "requirement to ensure that persons are fully vaccinated, or exempt, when in certain places".¹⁹⁴ The 'certain places' are "late night premises" and "relevant events": a 'late night premises' is one where "alcohol is served at any time between 0000 hours and 0500 hours, there is a dancefloor, or other designated space, provided for dancing by customers, and live or recorded music for dancing is played," however the requirement only applies from midnight. 'Relevant events' are indoor events of more than 500 people where not all attendees are seated and outdoor events of more than 4,000 people where not all attendees are seated (excluding under 5s, employees and volunteers), or any event with over 10,000 attendees. The Regulations also give "a person designated by a local authority"¹⁹⁵ the power of entry if they believe "it is necessary and proportionate to enter the premises for the purposes of the investigation of, or the prevention of the continuation of, such an offence" under the Regulations. The relevant person may use "reasonable force" when exercising this power.

Venue operators are required to put in place a "reasonable system"¹⁹⁵ for checking that a person on, or seeking to enter, the premises is "fully vaccinated" against coronavirus, is under 18, is medically exempt from vaccination or is participating in a vaccine trial. Venue operators must also remove from, or refuse access to, the venue anyone who does not meet this requirement. The "person responsible for the premises" is exempt from the requirement, as well as anyone assisting them (as an employee or volunteer) and emergency responders. The Regulations state that a venue operator "must have regard to any guidance issued by the Scottish Ministers" when considering a "reasonable system" - effectively meaning that the Scottish Government can stipulate how the scheme must be run, without full legislative scrutiny or challenge. The guidance issued may "make different provision for different cases or descriptions of case," a provision which again allows Ministers total discretion as to the implementation of the scheme in different venues.

On 29th September, a court case, seeking an emergency injunction against the introduction

¹⁹⁴ The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021, reg 2(3)
¹⁹⁵ The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, reg 15(8)(b)

of vaccine passport on 1st October was heard. The Night Time Industries Association Scotland said the proposal was “neither proportionate, nor represents the lowest level of intervention possible to achieve the public health imperative, and it is therefore likely to be unlawful”.¹⁹⁶ The group’s lawyers also raised that the Regulations were being brought forward “beyond the 11th hour, in the strangest fashion”, adding: “The very fact I have had to say within 24 hours of these regulations coming into force that we haven’t seen them, is itself redolent of the problem that exists here.”¹⁹⁷ However, despite Scottish Parliament not seeing the contents of the Regulations, Lord Burns found the decision “made on the basis of principle and broad outline” was legitimate. This is a disappointing judgment which validates the Scottish Government’s anti-democratic approach to lawmaking.

Northern Ireland

In Northern Ireland, members of the public can prove their vaccine status via COVIDCert NI, a COVID Certification Service (CCS) built for international travel requirements rather than for domestic use which can be displayed on an app or a paper certificate. To apply for a certificate, users must have an nidirect account, which requires users to enter their name, address, date of birth, email address and to verify their identity with a photo of a valid UK/NI passport or driving license which is matched to a ‘selfie’ taken by the individual.¹⁹⁸ The Government’s website notes that “modern (especially recent) smart phones and tablets, will have a higher success rate than older devices” at verifying an individual’s identity.¹⁹⁹ Individuals may have to prove their identity again once they have downloaded the COVIDCert NI app. Private company Surecert manage the verification of individual’s identity,²⁰⁰ an organisation which specialises in providing background checking services for employers.²⁰¹ If an individual requests a paper certificate, they are required to prove their identity in person “at an appointed time and location.”²⁰² As is the case with all forms of Covid certification, it is clear that those without valid forms of ID will struggle or even be unable to access Northern Ireland’s scheme and that those without access to up-to-date smart devices will also be disadvantaged.

The current CCS is designed for international travel, but the app’s privacy notice states:

“the CCS has the potential to facilitate access to venues with large gatherings, such as concerts and sporting events, in the future. However, until the NI Executive confirm a policy position on these uses, the CCS will not be developed for purposes outside of international travel.”²⁰³

196 Covid in Scotland: Legal challenge planned over vaccine passports – BBC News, 22nd September 2021: <https://www.bbc.co.uk/news/uk-scotland-scotland-politics-58652868>

197 Judge refuses to delay Scots vaccine passport scheme – BBC News, 30th September 2021: <https://www.bbc.co.uk/news/uk-scotland-58747315>

198 Identity assurance – nidirect: <https://www.nidirect.gov.uk/articles/identity-assurance#toc-1>

199 Ibid.

200 COVIDCert NI – Privacy Notice – Health and Social Care Northern Ireland, 15th July 2021: <https://covid-19.hscni.net/covidcert-ni-privacy-notice/>

201 ‘Trust but Verify’, Surecert, accessed 27th September 2021: <https://www.surecert.com/>

202 Coronavirus (COVID-19): COVID certificate for NI residents – nidirect: <https://www.nidirect.gov.uk/services/coronavirus-covid-19-covid-certificate-ni-residents>

203 COVIDCert NI – Privacy Notice – Health and Social Care Northern Ireland, 15th July 2021: <https://covid-19.hscni.net/covidcert-ni-privacy-notice/>

However, the Executive remains divided over the introduction of vaccine passports for domestic use. SDLP Justice Minister Nichola Mallon has been pushing for the introduction of vaccine certificates, arguing that “the introduction of Covid passports acts as an incentive for [18-35 year olds]” to be vaccinated.²⁰⁴

DUP First Minister Paul Givan said such a scheme would have “implications around equality of access for our citizens” and that he would need to see “the evidence as to how would this work and would it achieve the desired outcome in terms of reducing the levels of transmission?”²⁰⁵

Sinn Féin deputy First Minister Michelle O’Neill said:

“We’re getting ready in terms logistically [of] being able to roll such a thing out if we decide to go there. So it’s very much on the table and I’m very open minded in terms of using it, if it’s the right thing to do and it gets us the desired outcome.”²⁰⁶

On 27th September, the Northern Irish Executive announced that social distancing measures would be eased for indoor hospitality and leisure venues, but in their place,

“we advise that additional mitigating measures are utilised, including proof of being fully vaccinated, or proof of a negative lateral flow rapid test, or proof of natural immunity from a positive PCR test undertaken in the previous 30-180 days.

(...)

“We know from our engagement with the arts, culture and events sectors that a number of venues and event organisers have already been limiting access to those who are fully vaccinated or can show the necessary test results. We welcome this approach and appreciate the willingness of the sector to work with us to achieve a safer reopening.”²⁰⁷

By passing the requirement to check customer health status onto businesses in the form of guidance, the Northern Irish Executive is opening the door to discrimination and exclusion via a scheme that will doubtlessly be enforced in an arbitrary and random fashion across the hospitality and leisure industry.

net/covidcert-ni-privacy-notice/

204 Covid-19 vaccine passport scheme to be discussed by Stormont Executive – Rebecca Black, Belfast Telegraph, 26th September 2021: <https://www.belfasttelegraph.co.uk/news/northern-ireland/covid-19-vaccine-passport-scheme-to-be-discussed-by-stormont-executive-40889474.html>

205 O’Neill ‘very opened minded’ to vaccine passports if they’re for ‘greater good’ - David Young, Belfast Telegraph, 23rd September 2021: <https://www.belfasttelegraph.co.uk/news/northern-ireland/oneill-very-opened-minded-to-vaccine-passports-if-theyre-for-greater-good-40882448.html>

206 Ibid

207 Statement on Executive decisions - social distancing – Executive Office – NI, 27th September 2021: <http://www.executiveoffice-ni.gov.uk/news/statement-executive-decisions-social-distancing>