

BIG BROTHER WATCH

**Big Brother Watch Briefing on the Health
Protection (Coronavirus Restrictions)
(No.5) (Wales) (Amendment) (No.19)
Regulations 2021**

November 2021

About Big Brother Watch

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

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

Contact

Silkie Carlo

Director

Direct line: 020 8075 8478

Email: silkie.carlo@bigbrotherwatch.org.uk

Madeleine Stone

Legal & Policy Officer

Direct line: 07864733785

Email: madeleine.stone@bigbrotherwatch.org.uk

INTRODUCTION

We welcome the opportunity to provide this briefing to the Senedd ahead of the debate on the Health Protection (Coronavirus Restrictions) (No.5) (Wales) (Amendment) (No.19) Regulations 2021 on 9th November 2021.

RECOMMENDATIONS

RECOMMENDATION 1: Given the serious impact Covid passes have on rights, the Welsh Government must publish an Equality Impact Assessment and Human Rights Impact Assessment before the vote on the Health Protection (Coronavirus Restrictions) (No.5) (Wales) (Amendment) (No.19) Regulations 2021 on 9th November 2021.

RECOMMENDATION 2: All Senedd Members should vote against the unevidenced expansion of the Covid pass scheme, which as well as being discriminatory and unnecessary, will have a serious detrimental impact on businesses.

EFFECT OF THE REGULATIONS

The Health Protection (Coronavirus Restrictions) (No.5) (Wales) (Amendment) (No.19) Regulations 2021 seek to amend and expand Regulation 16A of The Health Protection (Coronavirus Restrictions) (No.5) (Wales) Regulations 2020.

Regulation 16A requires specified venues to only allow persons to be “present on the premises” of specified venues “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.¹ Currently, venues hosting live events of various sizes are required to request Covid passes for entry as well as “premises where music is provided for dancing.” The amendment to Regulations replaces “premises where music is provided for dancing” with “specified hospitality and entertainment venues and premises,” and adds cinemas, theatres and concert halls to the list of premises.² ‘Drive-in’ venues are excluded. This amendment opens the door for further hospitality venues to be added to the Regulations at a later date.

According the Explanatory Memorandum, a summary impact assessment (which includes an Equality Impact Assessment and Human Rights Impact Assessment) has been prepared, but it has not yet been published.

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¹ The Health Protection (Coronavirus Restrictions) (No. 5) (Wales) (Amendment) (No. 17) Regulations 2021, reg 2(2)

² The Health Protection (Coronavirus Restrictions) (No.5) (Wales) (Amendment)(No.19) Regulations 2021

UNNECESSARY

There is no evidence that the Covid pass scheme is making an impact on the transmission of coronavirus in Wales and no evidence that the expansion of the scheme will change this. Indeed, Wales' Chief Medical Officer, Dr Frank Atherton, said the "actual direct impact" of Covid passes "is probably quite small".³ Instead, Dr Atherton said that their impact is as a "reminder to people that we're not out of the woods yet." Given the scheme's serious impact on rights and its discriminatory nature, it cannot be justified simply as a "reminder" to the public.

Covid passes do not prove that an individual does not have coronavirus or cannot spread coronavirus. Vaccination status primarily tells the individual about their own risk of illness from the virus, while test results have accuracy issues.

The available vaccines are not able to prevent infections or transmission of the virus. Whilst the vaccines have drastically cut severe illness, hospitalisations and deaths, Imperial College's REACT study found they have little over 50% efficacy in preventing infections.⁴ The same study found that almost half of Covid cases in mid-July were among people who had received two vaccinations. Therefore, during a wave of infections, transmission of the virus is highly likely in vaccinated-only environments. A paper by researchers at Oxford University found that peak viral load of the Delta strain of the virus is similar in unvaccinated people as it is in vaccinated people, meaning there is a similar risk in an infected vaccinated person spreading the virus as an infected unvaccinated person.⁵ More recent studies suggest that an individual's vaccination status makes little to no difference in the rate of coronavirus transmission within households,⁶ and data published regularly by the UK Health Security Agency indicates that infection rates are similar, if not higher, in those who have been vaccinated to those who have not.⁷

The availability of effective vaccines means that those most vulnerable to Covid-19 are highly protected from serious illness. In Wales, over 89% of people aged over 12 years old have received a first dose and over 82% have received their second dose.⁸ 90% of the population has antibodies.⁹ Despite this, coronavirus is still circulating amongst the

³ Wales' top doctor says the 'direct impact of Covid passes is probably quite small' – Will Hayward, Wales Online, 3rd November 2021: <https://www.walesonline.co.uk/news/politics/wales-top-doctor-says-direct-22053885>

⁴ English study finds 50-60% reduced risk of COVID for double-vaccinated – Alistair Smout, Reuters, 3rd August 2021: <https://www.reuters.com/world/uk/english-study-finds-50-60-reduced-risk-covid-double-vaccinated-2021-08-03/>

⁵ Impact of Delta on viral burden and vaccine effectiveness against new SARS-CoV-2 infections in the UK – Koen B. Pouwels et al, The National Institute for Health Research Health Protection Research Unit in Healthcare Associated Infections and Antimicrobial Resistance at the University of Oxford: <https://www.ndm.ox.ac.uk/files/coronavirus/covid-19-infection-survey/finalfinalcombinedve20210816.pdf>

⁶ Jabs do not reduce risk of passing Covid within household, study suggests – Nicola Davis, the Guardian, 28th October 2021: <https://www.theguardian.com/world/2021/oct/28/covid-vaccinated-likely-unjabbed-infect-cohabiters-study-suggests>

⁷ COVID-19 vaccine surveillance report: 4 November 2021 (week 44)- UK Health Security Agency, 4th November 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031157/Vaccine-surveillance-report-week-44.pdf

⁸ Vaccination in Wales (accessed 5th November 2021): <https://coronavirus.data.gov.uk/details/vaccinations?areaType=nation&areaName=Wales>

⁹ Antibodies against coronavirus (COVID-19), Office for National Statistics, 27th October 2021: <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/antibodies>

public. Clearly, proof of prior infection or vaccination is not proof that an individual cannot transmit coronavirus.

Displaying proof of a lateral flow test is permitted as an alternative to presenting vaccine status or proof of prior infection. However, the safeguards around verifying a negative test result are non-existent. An individual can produce a negative test certificate whether or not they have taken a test, and whether or not they have tested positive. Furthermore, the UK's medicines regulator, the MHRA, stressed that lateral flow tests should not be used as a green light for people to attend events, and that doing so was "stretching" their authorisation.¹⁰ The FDA, the US health agency, recently recommended that the lateral flow tests used in the UK be "thrown in the bin" due to well documented issues with their accuracy.¹¹

There are also suggestions from the UK Government that lateral flow tests will not be provided for free indefinitely. This means individuals who have not been vaccinated will in the future be required to pay for the tests needed to validate their Covid pass, putting them at an economic disadvantage. Given that vaccination uptake rates are lower in more deprived areas of Wales, requiring a lateral flow test to enter a venue could effectively exclude the poorest in society from increasing numbers of venues and events in Wales.¹²

The Welsh Government has failed to provide any material to support their claim that Covid passes are reducing the rate of coronavirus transmission. The only parliamentary committee in the UK to analyse Covid passes in detail, the UK Parliament's Public Administration and Constitutional Affairs Committee, concluded that there is "no justification for them in the science and none in logic".¹³ Given this lack of evidence, the Welsh Government should be reconsidering the merits of the scheme, not seeking to extend it into other sectors.

IMPACT ON INDUSTRY

Leaked documents from the UK Government's Department of Cultural Media and Sport reveal that Covid-status certification will reduce turnover for event organisers and require the hiring of thousands of new stewards, which may be difficult for some venues.¹⁴ The documents suggest that turnover could be reduced by £345 million and £2.067 billion.

10 Covid-19: MHRA is concerned over use of rapid lateral flow devices for mass testing – Gareth Iacobucci, BMJ, 28th April 2021: <https://www.bmj.com/content/373/bmj.n1090>

11 Rapid Covid tests used in mass UK programme get scathing US report – Natalie Grover and Aubrey Allegretti, the Guardian, 11th June 2021: <https://www.theguardian.com/world/2021/jun/11/us-health-agency-gives-innova-lateral-flow-covid-tests-scathing-review>

12 Public Health Wales report analyses inequalities in COVID-19 vaccination uptake in Wales – Public Health Wales, 18th February 2021: <https://phw.nhs.wales/news/public-health-wales-report-analyses-inequalities-in-covid-19-vaccination-uptake-in-wales/>

13 No justification for Covid passports, say Committee – UK Parliament, 12th June 2021: <https://committees.parliament.uk/work/1104/covid-19-vaccine-certification/news/155788/no-justification-for-covid-passports-say-committee/>

14 Vaccine passports could fuel Covid and cost venues millions, says leaked government report – Ben Riley-Smith, the Telegraph, 25th October 2021: <https://www.telegraph.co.uk/politics/2021/10/25/vaccine-passports-could-fuel-covid-cost-venues-millions-says/>

Earlier this year, the UK Cinema Association, which represents most cinema owners in the UK including Cineworld, Curzon and Vue Entertainment, said there was “widespread opposition” across the industry to the requirement for customers to show proof of vaccination or a negative test result and such a scheme would make economic recovery harder.¹⁵ It later reiterated:

“The Association does not believe that it appropriate to ask someone to prove they have undertaken a medical procedure or to undergo a medical test to access what is supposed to be a place of entertainment and enjoyment.”¹⁶

The Association said the introduction of Covid passes in Wales would be “hugely damaging” and was “illogical”. Phil Clapp, CEO of the Association, warned that this could lead to the closure of many smaller venues:

“This is not scare-mongering – where similar schemes have been introduced in other European territories, we have seen admissions drop by as much as 50%.

(...)

“Already we are hearing of older and disabled customers telling our members that this move means that they will not now want to return. This is especially concerning when for many of these groups in particular, cinemas are a vital source of community connection and mental well-being.”¹⁷

Pauline Burt, chief executive at Ffilm Cymru Wales, said the organisation was not aware of any outbreaks of Covid that were linked to cinemas and said that the scheme should be voluntary, rather than mandatory. She also warned of a reduction in admissions:

“We are particularly conscious that many venues rely on ‘walk-in’ rather than advance bookings, which, coupled with a potential hit to consumer confidence, will likely mean reduced income when the Covid Pass is implemented.”¹⁸

DISCRIMINATORY

The effect of Covid passes is to socially and economically exclude people without a proof of their Covid status and to deny them basic freedoms. In doing so, all citizens would be treated as potentially infectious and some of the most marginalised in society would suffer either direct or indirect discrimination.

It is unlawful and wrong to discriminate against people with ‘protected characteristics’, many of which are engaged by the Covid pass scheme, including age, disability, pregnancy and religion or belief. Article 14 of the European Convention on Human Rights and the Equality Act 2010 protect individuals from unlawful discrimination.

15 Curzon cinema looks into vaccine-only and no-jab-only screenings – Mark Sweney, the Guardian, 25th March 2021: <https://www.theguardian.com/film/2021/mar/25/curzon-cinema-looks-into-vaccine-only-and-no-jab-only-screenings>

16 UK Cinema Association reiterates opposition to use of COVID-status certificates – UK Cinema Association, 1st April 2021: <https://www.cinemauk.org.uk/2021/04/uk-cinema-association-reiterates-opposition-to-use-of-covid-status-certificates/>

17 Wales Covid pass plans could be “hugely damaging”, says UK Cinema Association – Ben Dalton, Screen Daily, 29th October 2021: <https://www.screendaily.com/news/wales-covid-pass-plans-could-be-hugely-damaging-says-uk-cinema-association/5164716.article>

18 *ibid*

Introducing segregation according to Covid status would result in discrimination against the following groups:

Young people would be discriminated against, since there will be lower and slower vaccine uptake as young people are both generally at a low risk of serious illness from Covid and last in line to be offered a vaccination. Further, if vaccines are required annually/periodically, young people could be discriminated against on a corresponding cycle as they will always be last in line to receive vaccines.

Disabled people could be discriminated against as some medical conditions prevent individuals from being able to receive a vaccination.

Women who are pregnant, breastfeeding or attempting to conceive are also more unlikely to have received a coronavirus vaccine. The Royal College of Obstetricians and Gynaecologists has found that 58% of pregnant women have not received a coronavirus vaccine.¹⁹ It is unacceptable to exclude pregnant women from venues at such a high rate.

Some people with religious or other beliefs may be discriminated against, if those beliefs deter them from receiving a vaccine.

Discrimination, inequality and unfairness would be caused not only by medical eligibility for vaccination but by accessibility of vaccinations. Research indicates that people from ethnic minority groups, people with lower levels of education and people on lower incomes are the most 'hesitant' or unlikely to receive COVID vaccines.²⁰ It would be wrong to exclude sections of society based on vaccination status.

Further, many of the estimated 1 million undocumented migrants in the UK are either unable to access²¹ or fearful of accessing health services and may be more apprehensive still if vaccine certificates, akin to internal passports, become an everyday requirement.

While those who cannot be vaccinated are able to provide a Covid test result or proof of prior infection as an alternative, these options require repeat testing, which as previously noted, is unlikely to remain free of charge.

During Plenary earlier this week, Russell George MS asked the Welsh Health Minister what would be done to improve access to Covid passes for more vulnerable individuals:

"I've also been contacted with regard to the use of the COVID pass. Some have described the process as confusing and feel that a step-by-step guide is needed. I appreciate there are people of all ages and abilities that will be trying to obtain a COVID pass. Can I ask whether the Welsh Government is doing anything to

¹⁹ Fifty-eight per cent of pregnant women are refusing Covid vaccines – Danielle Desouza, Evening Standard, 15th July 2021: <https://www.msn.com/en-gb/news/newslondon/fifty-eight-per-cent-of-pregnant-women-are-refusing-covid-vaccines/ar-AAMbyhe>

²⁰ Anti-vaccine attitudes and risk factors for not agreeing to vaccination against COVID-19 amongst 32,361 UK adults: Implications for public health communications – Elise Paul, medRxiv, 23rd October 2021: <https://www.medrxiv.org/content/10.1101/2020.10.21.20216218v1>

²¹ Most GP surgeries refuse to register undocumented migrants despite NHS policy – Rachel Hamada and other, the Bureau of Investigative Journalism, 15th July 2021: <https://www.thebureauinvestigates.com/stories/2021-07-15/most-gp-surgeries-refuse-to-register-undocumented-migrants>

improve the functionality of the COVID pass system, particularly to help the elderly and vulnerable with access to COVID passes?

"And I say that in regard to some of the information that's required, such as passport details, driving licence details, mobile phone, because there are some groups of people that don't have any of those items, and there is clearly an obvious discrimination issue in that regard."²²

The Health Minister did not reply. Helled Fychan MS also raised the concerns of the families of people with autism:

"A number of people living in the South Wales Central region have been in touch with me who have family members who have autism and who are refusing to have a vaccine for all sorts of reasons, including being too concerned about visiting a vaccination centre because of inexperienced staff not dealing sensitively with their needs. Many too either can't or won't take a lateral flow test. And they're concerned about the impact of expanding the COVID pass to include more settings."

The Health Minister said she would look into this, but no solution has been forthcoming.

RECOMMENDATION 2: All Senedd Members should vote against the unevidenced expansion of the Covid pass scheme, which as well as being discriminatory and unnecessary, will have a serious detrimental impact on businesses.

There is no silver bullet out of the pandemic. Free and fair access to vaccines, healthcare, quarantine support, test and trace, and proportionate safety measures are needed to protect public health and make venues as safe as possible. Covid passes are not a solution to coronavirus transmission and will widen inequalities. Rather than expanding the Covid pass scheme, the Welsh Government should withdraw it in its entirety.

²² Plenary – Senedd, 2nd November 2021: <https://record.assembly.wales/Plenary/12491>