

BIG BROTHER WATCH

**Big Brother Watch Briefing on the Health
Protection (Coronavirus, Restrictions)
Regulations (Northern Ireland) 2021
(Amendment No.19) Regulations
(Northern Ireland) 2021**

December 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 Members of the Legislative Assembly ahead of the debate on the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No.19) Regulations (Northern Ireland) 2021 on 13th December 2021.

RECOMMENDATIONS

RECOMMENDATION 1: All Members of the Legislative Assembly should vote against unevidenced mandatory Covid-status certification, which as well as being discriminatory and unnecessary, will have a serious detrimental impact on businesses.

RECOMMENDATION 2: Due to the serious impact on rights, the Department of Health must urgently publish any evidence it has assessed on the efficacy of mandatory Covid-status certification, as well as an Equality Impact Assessment.

EFFECT OF THE REGULATIONS

The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No.19) Regulations (Northern Ireland) 2021 amend the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021, introducing mandatory Covid certification for entry to certain events and premises.

Mandatory Covid certification requires certain venue or events operators to ensure individuals “can evidence their Covid status” prior to entry of a course of an authorised vaccine, a negative test (via the NHS Covid-19 reporting app), prior infection alongside an ID card, confirmation of their participation in a vaccination trial or evidence (via the “Covid Certification process”) of medical exemption.¹ Licensed venues, theatres, concert halls, cinemas, indoor premises used for performances, recordings or rehearsals, premises used for conferences or exhibitions are required to check Covid status. Covid certification is also required for events of more than 10,000 people, unseated outdoor events of more than 4,000 people and unseated indoor events of more than 500 people, with exemptions for funerals, weddings, receptions, drive-in events, pickets, illuminated trails, communal religious worship activities “at a place where beliefs are practised” and outdoor non-ticketed public events without fixed entry or exit points.

There is no explicit protection for protests. It is also unclear whether events held by religious communities that do not involve “communal religious worship” will be required to check Covid status, or if communal worship not held “at a place where beliefs are practised” will also require screening.

PARLIAMENTARY PROCEDURE

¹ The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2021 (Amendment No.19) Regulations (Northern Ireland) 2021, reg 7

It is unacceptable and undemocratic for the Health Minister to introduce mandatory Covid-status certification without a prior vote in the Assembly. This policy represents one of the most significant changes in approach to public health seen in modern 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 Northern Irish Assembly, not a vote after the Regulations have been in force for several weeks.

Since March 2020, multiple sets of Health Protection Regulations, made via the Public Health Act (Northern Ireland) 1967, have introduced restrictions and requirements in relation to the spread of Covid-19. All of these Regulations were passed without a draft having been laid before, and approved by a resolution of, the Assembly, in accordance with section 25Q of that Act. Section 25Q permits this only "by reason of urgency". A procedure which swerves democratic accountability must only be used in the most urgent of situations.

The use of section 25Q to introduce regulations relating to the introduction of mandatory Covid-status certification cannot be justified. The Health Minister gave no legitimate reason to exclude the Assembly from such significant decision-making, particularly when proposals for the introduction of a mandatory Covid pass system were first discussed by the Executive in September.² Bringing a Covid certification scheme into law by ministerial decree is an assault on democratic principles.

The Bingham Centre for the Rule of Law has stated that any vaccine passport policy should be subject to the highest form of 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."³

It is unacceptable that the Health Minister has failed to give the Assembly the opportunity to meaningfully scrutinise and oppose mandatory Covid certification prior to its introduction. A vote on the same day that Covid certification will be enforced signals to the public and the Assembly that the Department of Health believes a democratic mandate for Covid certification is superfluous.

RECOMMENDATION 1: All Members of the Legislative Assembly should vote against unevicenced mandatory Covid-status certification, which as well as being discriminatory and unnecessary, will have a serious detrimental impact on businesses.

UNNECESSARY

² 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>

³ Vaccine passports must be legislated for properly through Parliament -Dr 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>

There is no evidence that Covid-status certification will make an impact on the transmission of coronavirus in Northern Ireland. Despite similar schemes being introduced in Wales and Scotland, devolved administrations have failed to produce evidence that the schemes are reducing the transmission of coronavirus. Indeed, Wales' Chief Medical Officer, Dr Frank Atherton, said the "actual direct impact" of Covid passes "is probably quite small".⁴

Covid certification does 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.⁵ 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.⁶ More recent studies suggest that an individual's vaccination status makes little to no difference in the rate of coronavirus transmission within households,⁷ and data published regularly by the UK Health Security Agency indicates that infection rates are similar, and across some age groups higher, in those who have been received two doses of a vaccine to those who have not.⁸ There are also initial suggestions that vaccinations may be less effective against the Omicron variant of coronavirus.⁹

The availability of effective vaccines means that those most vulnerable to Covid-19 are highly protected from serious illness. In Northern Ireland, over 86% of people aged over 12 years old have received a first dose and over 80% have received their second dose.¹⁰

4 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>

5 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/>

6 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>

7 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>

8 COVID-19 vaccine surveillance report: 2 December 2021 (week 48)- UK Health Security Agency, 2nd December 2021, p 34: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1037987/Vaccine-surveillance-report-week-48.pdf

9 COVID-19: Antibodies from Pfizer vaccine may be up to 40 times less effective against Omicron, first lab tests suggest – Tom Clarke, Sky News, 8th December 2021: <https://news.sky.com/story/covid-19-first-lab-tests-on-omicron-in-south-africa-suggest-pfizer-vaccine-may-be-up-to-40-times-less-effective-against-new-variant-12489417>

10 Vaccination in Northern Ireland (accessed 8th December 2021): <https://coronavirus.data.gov.uk/details/vaccinations?areaType=nation&areaName=NorthernIreland>

31% have received a booster dose. 92% of the population has antibodies.¹¹ Despite this, coronavirus is still circulating amongst the 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.¹² 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.¹³

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 may in the future be required to pay for the tests needed access venues and events, putting them at an economic disadvantage. Given that vaccination uptake rates are lower in more deprived areas of Northern Ireland, requiring a lateral flow test to enter a venue could effectively exclude the poorest in society from increasing numbers of venues and events.¹⁴

The Department of Health has failed to provide any material to support the claim that Covid certification will "help push down infections".¹⁵ 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".¹⁶

RECOMMENDATION 2: Due to the serious impact on rights, the Department of Health must urgently publish any evidence it has received on the efficacy of mandatory Covid-status certification, as well as an Equality Impact Assessment.

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

¹¹ Antibodies against coronavirus (COVID-19), Office for National Statistics, 8th December 2021: <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/articles/coronaviruscovid19latestinsights/antibodies>

¹² 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>

¹³ 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>

¹⁴ Covid-19: 'Social deprivation a factor' in low vaccine uptake – BBC News, 24th August 2021: <https://www.bbc.co.uk/news/uk-northern-ireland-58314388>

¹⁵ Covid-19 passport not needed for unlicensed premises in NI – Jayne McCormack, BBC News, 26th November 2021: <https://www.bbc.co.uk/news/uk-northern-ireland-59428140>

¹⁶ 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/>

venues.¹⁷ The documents suggest that turnover could be reduced by £345 million to £2.067 billion.

Colin Neill, the chief executive of Hospitality Ulster said the decision to introduce mandatory Covid certification “sends a clear signal that we are of no value or concern”:

“The majority of our sector have voiced opposition.

“There is real concern from our industry that businesses owners, who are already struggling to recover and now facing the most critical period of the year, will be the ones who must be the enforcers of the scheme, and it is our staff that will face the abuse.”¹⁸

After the scheme was introduced, Mr Neill said it had been a “catastrophic” week for the hospitality industry.¹⁹ Michael Deane, a Michelin starred restaurant owner in Belfast, told reporters that “business has completely started to dry up” after the introduction of Covid certification, and Bill Wolsey, managing director of hotels, pubs and restaurant group Beannchor, said that businesses was down by 15%.²⁰

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 certification 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.

Introducing segregation according to Covid status results 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.

¹⁷ 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/>

¹⁸ Decision to impose passports without support sends clear signal we are of no value or concern – Hospitality Ulster, 17th November 2021: <https://hospitalityulster.org/hospitality-news/voice/decision-to-impose-passports-without-support-sends-clear-signal-we-are-of-no-value-or-concern>

¹⁹ Speculative and unnecessary comments causing havoc with hospitality christmas trade – Hospitality Ulster, 3rd December 2021: <https://hospitalityulster.org/hospitality-news/voice/speculative-and-unnecessary-comments-causing-havoc-with-hospitality-christmas-trade>

²⁰ Vaccine passports threaten last orders for Northern Ireland’s pubs and restaurants – Russell Lynch, the Telegraph, 5th December 2021: <https://www.telegraph.co.uk/business/2021/12/05/vaccine-passports-threaten-last-orders-northern-irelands-pubs/>

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.²¹ 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.²² 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 access²³ 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.

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 certification is not a solution to coronavirus transmission and will widen inequalities. Rather than expanding the Covid pass scheme, the Department of Health should withdraw it in its entirety.

21 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>

22 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>

23 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>