

Response to Department of Health and Social Care consultation on ‘Making vaccination a condition of deployment in older adult care homes’

21 May 2021

<https://www.gov.uk/government/consultations/making-vaccination-a-condition-of-deployment-in-older-adult-care-homes>

Dr Isra Black (University of York) and Dr Lisa Forsberg (University of Oxford)

Below are our responses to the DHSC consultation on vaccination requirements for staff in older adult care homes. The consultation took place by way of web form. Since not all questions were addressed to us, our numbering is not the same as that of the consultation.

1. **How do you feel about the proposed requirement for workers in older adult care homes to have a COVID-19 vaccination?**

*Supportive/Rather supportive/Neither supportive nor unsupportive/Slightly unsupportive/Not supportive/I don't know/Not applicable*

**Please provide details to support your answer.**

**Rather supportive.** We agree that a vaccine requirement for workers in care homes may be a necessary and proportionate measure given the impact of the Covid-19 pandemic on residents, including the high rate of infection and the high case fatality rate.

Vaccination is a key public health tool for the purposes of pandemic and endemic disease control. It is not obvious that individuals have a right to refuse vaccination for infectious diseases when such refusal poses a significant threat to the health and lives of others, including in situations in which those at risk are unable to avoid exposure. However, the government has not engaged with or articulated in the course of this consultation a justification for a care homes vaccine requirement in human rights law terms. That is, its compliance with article 8 of the European Convention on Human Rights, which provides for, among other things, extensive freedom to refuse medical treatment such that any measure that interferes with this freedom requires legal justification (see eg *Pretty v United Kingdom* (2002) 35 EHRR 1).

Three further reasons why we are rather, as opposed to fully, supportive of the proposed requirement. First, given the interference with important interests protected by human rights law, the government should take care to ensure that the evidence base for mandating vaccination in care homes is contemporary, as opposed to historical. Second, while the government in the consultation document has explained why it thinks other adult care home settings may warrant Covid-19 vaccine requirements compared to other care settings (we return to this below), it has not sufficiently explained why care settings are relevantly different to health settings. There are health settings in which Covid-19 vulnerable populations are treated—for example, oncology services—and there are health settings in which patients, like care home residents, have limited ability to leave—for example, inpatient and forensic mental health services. Third, we would express concern as to the means of legal change. Vaccine requirements are a public health measure that is likely to provoke controversy. As such, it is preferable for the government to introduce primary

legislation so that a rigorous public justification can be offered for a change in the law, and so that the measure, if passed, would enjoy greater democratic legitimacy compared to the use of secondary legislation.

2. A) **Do you agree with using this definition to determine which care homes this regulation would apply to?**

*Yes/No/I don't know/Not applicable*

**What concerns do you have about this definition?**

No. See comment about limitation below.

B) **Do you have any concerns about the proposal to limit this policy to older adult care homes?**

*Yes/No/I don't know*

**Please explain your answer.**

**Yes.** One concern about limiting a vaccine requirement to older adult care homes (as opposed to all care homes) goes to clinical justification. It is plausible that there are other care home settings in which Covid-19 transmission would give rise to bad outcomes that are on a par with those in older adult care home settings, for example, those facilities that provide residential or supported living care to individuals with Down's syndrome. A further concern relates to care homes in which there are residents who lack capacity and for whom it has been determined that vaccination is not in their best interests (see eg the recent case of *SS v LB Richmond on Thames and SWL CCG* [2021] EWCOP 31). These individuals in particular cannot be protected by vaccination and as such it is incumbent on care providers to take protective measures.

Even if we assume that there is an adequate direct justification for limiting vaccine requirements to older adult care home settings, we have a worry in respect of the policy that is indirect in nature. As the consultation document observes, a high proportion of care home staff are from a minority ethnic background, who for various reasons may be more vaccine hesitant [para 37]. The consultation document also proposes that care home staff who refuse Covid-19 vaccination may be ineligible for work [para 39]. Clearly, the government is alive to the risk of staff exit from the care home sector [para 40]. However, if Covid-19 vaccination is not mandated across the entire care sector, it seems more plausible that older adult care home staff who are unwilling to be vaccinated as a condition of employment will move to care providers in areas where there is no vaccine requirement. This will transfer risk onto other vulnerable populations elsewhere in the sector. But it perhaps also undermines any thought that individuals will accept vaccine requirements because they need work. It is well known that the care sector faces severe staff shortages, and as such the notion of 'job for job' reflects a false, binary choice available to older adult care home staff, when more options would be available to them.

3. Which people working or visiting in an older adult care home should be covered by the scope of the policy?

- Only paid staff deployed in the care home
  - No
- Staff working for the care home provider who work in a separate building but may visit the care home occasionally (for example staff working in an off-site office)
  - Yes
- Health professionals who visit the care home regularly and provide close personal care to people living in the care home
  - Yes
- Other professionals who provide close personal care to people living in the care home, for example, hairdressers
  - Yes
- All professionals who enter a care home regardless of their role, for example, electrician, plumber, art therapist, music therapist
  - Yes
- Friends or family members designated as 'essential carers' who visit regularly and provide close personal care
  - Yes
- All friends and family who may visit
  - No
- Volunteers
  - Yes
- Other (please specify)

For individuals not reliably involved in close personal care, whether they should be covered by a vaccine requirement policy depends on a judgement about their contact with individuals who provide personal care and residents. Exemption from a vaccine requirement for individuals who may be present in care homes but who do not provide care should be sensitive to best evidence about transmission (including aerosolised) and compensated for with other protected measures, for example PPE.

In respect of mandating vaccination for family and friends, we should be sensitive to the welfare benefits for care home residents of visitors (as the SAGE Social Care Working Group notes [para 23]) and the fact that not all family and friends will yet have had fair opportunity to receive a vaccine (unlike the majority of care home staff [para 10]).

In the event that the government decides to require vaccination for individuals who are not workers for care providers, it will need to ensure that the amended Regulation 12 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (or other legislation) is sufficiently broadly drawn to encompass non workers.

In the event that the government decides to require vaccination for workers only, it will need to ensure that the amended Regulation 12 is drawn sufficiently narrowly so as to reduce the occurrence of risk averse local policy-making on the part of care providers—that could, for example, deprive care home residents of valuable opportunities to receive visitors.

4. **Do you agree or disagree with the groups of people who would be exempt from this requirement?**

*Strongly agree/Tend to agree/Neither agree nor disagree/Tend to disagree/Strongly disagree/I don't know/Not applicable*

**Who else should be exempt from this requirement?**

**Tend to agree.** The government proposes to exempt only those individuals who have clinical reasons for remaining unvaccinated against Covid-19 (assuming the absence of supply issues).

The government should consider whether to permit exemption from Covid-19 vaccine requirements on religious or belief grounds and publicly explain its reasoning. This is in order to proof any vaccine requirement policy against potential challenges under the Human Rights Act 1998 or the Equality Act 2010. Even if religious or belief exemptions are not afforded, a reasoned public justification is more likely to withstand legal scrutiny. It is not obvious to us that vaccine policies for exposure prone procedures in health care that Ministers have offered as precedent for mandating vaccination in care homes are sufficiently analogous. And in any event, the equality and human rights dimensions of exposure prone procedure policies are, to our knowledge, untested. As such, there are likely to be benefits to the government providing detailed (legal) reasons that go beyond analogies.

5. **Are there particular groups of people, such as those with protected characteristics, who would particularly benefit from this policy?**

*Yes/No/I don't know/Not applicable*

**Which particular groups might be positively impacted and why?**

**Yes.** So far as the vaccine requirement extends to older adults care homes, we might expect older and disabled individuals to benefit from the policy in particular. In addition, since minority ethnic people have been impacted by the Covid-19 pandemic to a greater degree, they stand to benefit where race intersects with age and disability.

6. **Are there particular groups of people, such as those with protected characteristics, who would be particularly negatively affected by this policy?**

*Yes/No/I don't know/Not applicable*

**Which particular groups might be negatively impacted and why?**

**What could we do to make sure they are not negatively impacted?**

**Yes.** We might expect minority ethnic care home staff to be particularly impacted by this policy, given the apparently higher prevalence of vaccine hesitancy among this population. For individuals who are not vaccine hesitant, we might expect a vaccine requirement to be low cost, whereas for individuals who are vaccine hesitant, the policy is like to be perceived as high cost and an interference with their freedom to refuse medical treatment.