



London School of Hygiene and Tropical Medicine, London, UK

Correspondence to: M McKee

Cite this as: *BMJ* 2022;376:e0353

<http://dx.doi.org/10.1136/bmj.e0353>

Published: 10 February 2022

# England's U turn on covid-19 vaccine mandate for NHS staff

An avoidable and costly episode that raises concerning questions about governance

Martin McKee, May C I van Schalkwyk

Two years into a pandemic, with hopes of respite for exhausted healthcare workers repeatedly shattered by the emergence of new SARS-CoV-2 variants, those in charge in the NHS just want certainty. So it is little wonder that, over the past few weeks, they have become increasingly frustrated as they struggle to interpret the government's changing intentions for vaccination of their staff. But when this is over we should all reflect on what this episode says about how the country is being run.

On 9 November 2021, the health secretary told parliament that nearly all NHS staff must be vaccinated against covid-19 by April 2022,<sup>1</sup> enacting the necessary legislation in a statutory instrument laid before parliament on 6 January 2022.<sup>2</sup> Although controversial, mandates have been found to increase vaccine uptake.<sup>3</sup> Staff had until 3 February to receive a first vaccine dose or risk losing their job. Since the mandate was first announced, almost 130 000 staff have come forward to be vaccinated. But others did not, with about 5% of NHS staff expected to miss the deadline.<sup>4</sup>

Occupational health and human resources departments have had the challenging task of confirming the vaccine status of staff, some of whom may have been vaccinated abroad or under a different name from the one used at work. They then had to contact everyone who seemed unvaccinated, confirm their status, ensure they were aware of the consequences and, often, spend time providing reassurance about vaccine safety. This was a massive undertaking in a service already struggling with high rates of sickness absence related to covid-19. Universities training health professionals had to do the same for their students, at great expense.

Throughout this time, NHS employers were voicing concern about the risk of losing key staff. By late January stories were emerging that the government was considering a U turn. Meanwhile, those working to implement the policy were questioning whether the mandate would be enforced. Some sort of an answer came on 31 January when the health secretary announced that he was launching a consultation on his intention to revoke it.<sup>5</sup>

## Lack of clarity

However, the legislation remains in place for now, posing a problem for NHS employers. Should they uphold the law as it stands or pretend that it never existed and, reasonably, assume that the government will not hold them responsible for failure to implement it? Of course, the possibility remains that someone else might—through judicial review. On several occasions during the pandemic the courts have had to remind ministers that adherence to the

law—for example, on procurement of personal protective equipment—is not optional. And notwithstanding any future change in the law, the chief medical officer and others have made clear that getting vaccinated is a professional responsibility,<sup>6</sup> with implications for regulators and appraisers.

Could this unsatisfactory situation have been avoided? A report by a House of Lords committee that scrutinised the statutory instrument enabling the vaccine mandate is revealing.<sup>7</sup> The report noted how the draft instrument lacked detail on key expressions, such as “face to face” contact. It criticised the accompanying explanatory memorandum, which “lacks all practical detail,” “fails to provide an evidence based argument,” and does not mention lessons from earlier legislation on mandatory vaccination for workers in care homes.

The Lords report further questioned assumptions in the impact assessment, noting that the committee would expect to be given “very strong evidence,” given the risks, but the health department “has signally failed to do so.” It raised concerns about the lack of contingency plans for potential loss of staff. The committee then describes how, “Searching through these other documents has provided us with some understanding of what is intended” but expresses concern about how “Unclear definitions may be ‘interpreted’ ... to exceed what the legislation actually requires.”

This episode is yet another example of how the process of making policy in Westminster is broken. Ideas, developed without consulting those affected, are briefed to friendly journalists. Parliamentary scrutiny is ignored. Those on the frontline are left guessing about what to do with unworkable legislation. It seems as if our political leaders view the classic text on governance in the UK, *The Blunders of our Governments*,<sup>8</sup> written by the political scientists Anthony King and Ivor Crewe in 2013, not as a warning but as a manual for how to run the country.

Competing interests: We have read and understood BMJ policy on declaration of interests and declare that MM is a member of Independent SAGE. He also sits on the Medical Schools Council, whose members have been affected by this confusion.

Provenance and peer review: Commissioned; not externally peer reviewed.

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- 8 King A, Crewe I. *The blunders of our governments*. OneWorld, 2013.

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