

**Written evidence submitted by:
British and Irish Law, Education and Technology Association (BILETA)
Covid-19 certification inquiry**

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1. Executive summary

- 1.1. The implications of a proposed Covid-19 Vaccine Certification scheme are wide-ranging and present significant obstacles. Alongside the not insignificant concerns relating to potential discrimination from the perspective of vaccinations, there are broader inequality issues in respect of the practicalities of introducing a Covid-19 Vaccine Certificate. Full and careful consideration must be given to a holistic overview before any system is implemented.
- 1.2. The Government must ensure that any scheme meets legal standards and norms around equality and non-discrimination, labour rights and privacy and data protection, in particular.

2. Introduction

- 2.1. The British and Irish Law Education Technology Association (BILETA) was formed in April 1986 to promote, develop and communicate high-quality research and knowledge on technology law and policy to organisations, governments, professionals, students and the public. BILETA also promotes the use of and research into technology at all stages of education. The present inquiry raises technological, legal and ethical issues and challenges that our membership explores in their research. For instance, our members have contributed to the drafting of the Coronavirus Safeguards Bill.¹ As such, we believe that our contribution will add to the public discourse and the inquiry on the proposed Covid-19 Vaccine Certification scheme.

3. Scientific Pre-conditions and Terminology

- 3.1. As noted by experts, before introducing any form of vaccine certification', clear scientific pre-conditions need to be met, i.e. 'clear evidence about the impact of vaccines on the transmission of COVID-19 is premature and not justifiable.'²
- 3.2. We agree that with the proposition that the government should have a better understanding of 'vaccine efficacy and transmission, durability and generalisability.'³
- 3.3. Issues concerning the terminology of what is under consideration as a 'Certification' scheme raise some queries.

¹ <https://osf.io/preprints/lawarxiv/yc6xu/>

² <https://www.adalovelaceinstitute.org/wp-content/uploads/2021/02/COVID-19-vaccine-passports-rapid-expert-deliberation.pdf>

³ <https://www.adalovelaceinstitute.org/wp-content/uploads/2021/02/COVID-19-vaccine-passports-rapid-expert-deliberation.pdf>

- 3.4. The question of passport v certification must be addressed – clarity of terminology will go alongside clarity of intended purpose, which in turn will address some of the issues over transparency.
- 3.5. Is the ‘Certification’ scheme intended to given access to social activities and events, or is it also intended to allow access to foreign travel? If the latter, then ‘Vaccine Passport’ seems more likely to be an appropriate label, but then the issues are somewhat more pronounced in the context of data for storage, processing, and cross-border flows in particular.
- 3.6. Some have suggested that ‘certification is more of a euphemism’,⁴ and that the suggestion of certification is only to show a certain individual has a reduced risk of transmission.
- 3.7. There are other schemes in existence that address the risk of transmission for certain other infectious diseases that are prominent in international travel scenarios. For instance, travel to certain regions requires a Yellow Fever declaration that is a paper form completed mid-flight, while for other regions an actual vaccination is needed.

4. Digital Certificates, Apps, and Key Concerns

- 4.1. It is unclear in what form a Covid-19 Vaccine Certification scheme will take. While it is likely to involve some form of a digital record, such as the International Chamber of Commerce (ICC) AOKpass app being trialled by AirFrance⁵ this necessitates access to the use of a smartphone. Given that the pandemic has exacerbated the digital divide, this causes poses some significant social inequality and exclusion concerns.
- 4.2. The World Health Organisation (WHO) has highlighted its concerns about the use or requirement for COVID-19 Certification.⁶ The concerns outlined in January 2021 stipulate that at present it is only yellow fever that requires proof of vaccination.⁷ Any requirement of proof of COVID-19 vaccination for travellers can only be introduced if a vaccine has been approved by the WHO.⁸
- 4.3. In addition to the concerns over requiring proof of status, the WHO has also outlined concerns in respect of the digital vaccination certificate schemes being introduced⁹ but it should be noted that these concerns are only in respect of international travel. In March, however, the WHO released the draft of an 'Interim guidance for developing a Smart Vaccination Certificate'.¹⁰

⁴ <https://www.newstatesman.com/politics/uk/2021/04/are-vaccine-passports-threat-human-rights>

⁵ <https://www.healthcareitnews.com/news/emea/france-trial-digital-vaccine-passport-scheme>

⁶ <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>

⁷ International Health Regulations (IHR) (2005) Annex 7.

⁸ <https://www.who.int/news-room/articles-detail/interim-position-paper-considerations-regarding-proof-of-covid-19-vaccination-for-international-travellers>

⁹ <https://www.smh.com.au/world/europe/who-urges-against-vaccine-passports-even-for-international-travel-20210407-p57h0d.html>

¹⁰ <https://www.who.int/news-room/articles-detail/call-for-public-comments-interim-guidance-for-developing-a-smart-vaccination-certificate-release-candidate-1>

- 4.4. The Smart Vaccination Certificate Working Group recommendations ought to be followed¹¹ – especially given the concerns in respect of interoperability standards, standards securing data access or exchange, and the need for widespread adoption.
- 4.5. The ICC AOKpass app is not the only app being trialled – the International Air Transport Association has developed its own Travel Pass app to have ‘accurate information on passengers’ COVID-19 health status’.¹² Similarly, Israel’s ‘Green Pass’ app,¹³ and China’s WeChat vaccine certificate¹⁴ are other measures already in use, alongside schemes in Iceland, Denmark, and Sweden. These are all in addition to the EU-vaccine certificate plans, supported by the European Commission President,¹⁵ and among the Digital Green Certificate Proposals adopted by EU data protection authorities.¹⁶
- 4.6. Concerns over the use of apps have led to the formation of associations, to ensure that there is some practical workability while ensuring that there is convenient but secure and trusted access to verifiable records. The Vaccination Credential Initiative¹⁷ focuses on interoperable and open standards to allow access to data-bound to an individual identity. The VCI is not the only initiative that addresses trust at its core – the Commons Project has developed the ‘Commonpass’ app¹⁸ which seeks to preserve privacy while ensuring that there is transmissible information from COVID-tests and vaccination records.
- 4.7. Privacy International,¹⁹ Liberty, and the Open Rights Group²⁰ have all outlined significant and wide-ranging concerns in respect of any scheme that falls within the broad umbrella of ‘vaccine passports’.
- 4.8. Privacy International has referred to ‘immunity passports’ as a ‘looming disaster’²¹ because of the social and exclusionary risks, but also the potential for significant harms if there is no serious consideration given to the digital identity industry more broadly. Above all else, it is not – yet – known how much, or what kind of information would be held via such systems, nor who would have access.
- 4.9. Liberty meanwhile has outlined the very real fears that voluntary immunity passports could lead – irreversibly – to a full ID system, something which has been repeatedly rejected.²²
- 4.10. Concerns are shared by the Open Rights Group, but with additional worries in respect of the general data protection obligations of any such digital system introduced in the UK.

¹¹ <https://www.who.int/health-topics/digital-health/dh-tag-membership>

¹² <https://www.iata.org/en/programs/passenger/travel-pass/>

¹³ <https://www.newstatesman.com/2021/04/there-s-app-what-britain-can-learn-israel-s-vaccine-passports>

¹⁴ <https://www.healthcareitnews.com/news/emea/france-trial-digital-vaccine-passport-scheme>

¹⁵ <https://www.healthcareitnews.com/news/emea/european-leaders-debate-eu-wide-vaccine-passports>

¹⁶ https://edpb.europa.eu/news/news/2021/eu-data-protection-authorities-adopt-joint-opinion-digital-green-certificate_en

¹⁷ <https://vci.org/>

¹⁸ <https://commonpass.org/>

¹⁹ <https://www.privacyinternational.org/long-read/4074/looming-disaster-immunity-passports-and-digital-identity>

²⁰ <https://www.openrightsgroup.org/blog/first-look-at-vaccine-passports/>

²¹ <https://www.privacyinternational.org/long-read/4074/looming-disaster-immunity-passports-and-digital-identity>

²² https://edpb.europa.eu/news/news/2021/eu-data-protection-authorities-adopt-joint-opinion-digital-green-certificate_en

The significant failings of the NHSX App and contact tracing mechanisms,²³ particularly in respect of the woeful compliance with data protection impact assessments²⁴ have not led to a high level of confidence in the Government to not repeat such failings.

- 4.11. We share legitimate concerns over ‘scope creep’,²⁵ and the danger of a persistent digital scheme linked to sensitive health data to produce a regime of digital identity monitoring and surveillance. This has repeatedly been opposed by UK society, and 'ID cards' have been rejected many times in Parliament and society.
- 4.12. There have been reports of facial recognition being suggested as a means of verification at some venues, which raises further legal and ethical concerns. We agree that legislation should make it clear that any certification scheme should not incorporate biometric surveillance, as this creates significant human rights concerns, as well as issues of accuracy and discrimination.²⁶
- 4.13. Religious leaders from Christian denominations have also raised concerns and opposed the “divisive, discriminatory, and destructive” mechanism, calling this “one of the most dangerous policy proposals ever to be made in the history of British politics” with the “potential to bring about the end of liberal democracy as we know it”.²⁷ They have raised legitimate ethical and social concerns that should be considered by the Government, such as the potential for the system to create a two-tier society. In secular and legal terms, we also refer to the dangers of potential discrimination and inequality.
- 4.14. The Government must ensure that any Covid-19 Certification Scheme puts protecting data at its core. The uses of data must be safe, transparent, secure, and above all else, such systems must not give access to more data than is necessary.

5. Specific Human Rights Concerns

- 5.1. Post-Brexit the EU-UK Trade and Cooperation Agreement supports the UK’s commitment to remain subject to the ECHR, and the oversight of the ECtHR. Article 14 read together with Article 1 of Protocol No 12 to the ECHR includes the protection against discrimination. The principle of non-discrimination is of a fundamental character and highlights the values of social peace and tolerance, as well as the rule of law (*S.A.S v France* [GC], 2014, § 149). Thus, for instance, if an individual’s Covid-19 status certificate was required without considering their medical condition, or ethnicity, this may result in not only stigmatisation but also discrimination issues.
- 5.2. In *Kiyutin v Russia*, 2011, § 57 the ECtHR observed that a distinction made based on a person’s health status may well lead to prejudice and stigmatisation as individuals living with infectious diseases such as HIV infection were considered a vulnerable group. Thus, States must be given only a narrow margin of appreciation in selecting policies, which singled out this specific group of people for differential treatment on account of their

²³ <https://www.openrightsgroup.org/blog/demand-strong-legal-safeguards-for-contact-tracing/>

²⁴ <https://northumbriajournals.co.uk/index.php/iltt/article/view/1006>

²⁵ <https://www.adalovelaceinstitute.org/wp-content/uploads/2021/02/COVID-19-vaccine-passports-rapid-expert-deliberation.pdf>

²⁶ <https://www.biicl.org/blog/23/part-2-getting-digital-health-passports-right-legal-ethical-and-equality-considerations?preview=true>

²⁷ <https://www.theguardian.com/world/2021/apr/17/uk-church-leaders-warn-against-dangerous-vaccine-passport-plans>

health status (*Kiyutin v Russia*, 2011, § 64). Similarly, excluding a group of individuals who may be unable to take the vaccine, such as those carrying an EpiPen due to a serious allergy or some women being pregnant²⁸, is likely to lead to a particular risk of stigmatisation.

- 5.3. The ECtHR has also noted that even if the measure or policy might not be particularly directed at a specific group, it may however discriminate against such people in an indirect way (*Hugh Jordan v the United Kingdom*, 2001, § 154). Indeed, indirect discrimination does not necessarily involve a discriminatory purpose (*Biao v Denmark* [GC], 2016, § 103). It might originate from a neutral rule (*Hoogendijk v the Netherlands*, 2005), as well as an existing situation (*Zarb Adami v Malta*, 2006, § 76). By the same token, the adoption of a Covid-19 Vaccine Certification system may risk unfairly discriminating in attending events, insurance, housing applications, and hiring. Equally, if such a system was adopted before everyone in the UK being offered a vaccine, this could unjustly disadvantage individuals living in certain areas of the UK or youngsters. Additionally, individuals of different races are different genetically and have different levels of job hesitancy, which in turn may lead to discrimination against an individual's political or religious convictions.²⁹
- 5.4. The UK government's proposals would also trigger the public sector obligation under Section 149 of the Equality Act 2010, which requires carrying out an Equality Impact Assessment. If the duty to receive a Covid-19 jab is set out in employees' contracts, equality legislation would have to be balanced with lawful duties of care. For example, the right of workers working in healthcare facilities to decide not to be vaccinated would need to be balanced against the need to safeguard individuals at risk.
- 5.5. Secondly, according to ECtHR case law, under Article 8 of the ECHR, private life is a wide concept, which cannot be exhaustively defined (*Peck v the United Kingdom*, 2003, § 57). This involves not only the right to live privately but also without unwanted attention, thus freely pursuing the development of an individual's personality (*Brüggeman v Germany*, 1977, § 55). When considering the government's proposals, one should bear in mind the type of data being processed, which is related to an individual's health, put differently, sensitive data. Thus, the introduction of Covid-19 status certificates would entail a substantial interference with an individual's right to private life under Article 8 ECHR (see, mutatis mutandis, *Goodwin v the United Kingdom*, 2002, § 77), as well as the right to protection of personal data as per the UK Data Protection Act 2018.
- 5.6. Whether the implementation of a Covid-19 Vaccine Certification system is legitimate, largely depends on the compatibility of this policy with the three parts of the Strasbourg Court's non-cumulative test. Under the ECHR, any interference with Article 8 must firstly be 'in accordance with the law'; secondly, it must pursue one or more of the legitimate aims contained in Article 8(2) and thirdly, be 'necessary' and 'proportionate'. According to the EDPB-EDPS,³⁰ for any proposal of this kind to satisfy this test it should explicitly state that access and subsequent use of the data once the crisis is over, is not allowed.

²⁸https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961301/PHE_11843_Covid-19_vaccination_Easy_Read_guide.p

²⁹<https://www.bbc.co.uk/news/health-56125142>

³⁰https://edps.europa.eu/data-protection/our-work/publications/opinions/edpb-edps-joint-opinion-digital-green-certificate_en

- 5.7. Moreover, the scheme should also be strictly limited to the existing Covid-19 pandemic, thus not applying to future emergencies. Additionally, it should also clearly specify the type of personal data being processed, the technical and organisational confidentiality and security measures to be adopted, the types of controllers and processors, as well as the requirements concerning data retention and international data transfers.
- 5.8. Thirdly, in *Riener v Bulgaria*, 2006, § 138, the ECtHR also noted that while a policy adopted by the government might breach an individual's freedom of movement or liberty, Article 13 of the ECHR also required domestic law to afford the individual the opportunity to contest this policy in the courts. Moreover, although it could have been justified in the first place, a policy limiting a person's freedom of movement might end up being disproportionate and violate that person's rights where it is automatically prolonged for a long time (*Luordo v Italy*, 2003, § 96). Problematically, as noted above, other than the WHO questioning the need for the system, there appears to be no scientific evidence suggesting that having received a Covid-19 jab - or having recovered from the virus - provides immunity and, thus how long such immunity will last.
- 5.9. Additionally, the adoption of a Covid-19 Vaccine Certification system may additionally constitute a disproportionate interference with an individual's right to freedom of assembly and association under Article 11 of the ECHR. In *Le Compte v Belgium*, 1981, § 65, the ECtHR elaborated that even if a membership obligation was imposed by law – such as one obliging all citizens to have their Covid-19 status certificated to access public spaces - this would require compelling individuals to be subjected to a form of unjustified coercion that was rare in the Contracting States, thus violating their Article 11 ECHR rights.

6. Conclusion

- 6.1. We submit that a Covid-19 certification scheme could be acceptable as long as its design and use fall within constraints of law, ethics and human rights explored above. The Government should urgently clarify the technology, terminology, aims and policies it will pursue by establishing this scheme.
- 6.2. The Government should also conduct a Data Protection Impact Assessment (or, preferably a Human Rights Impact Assessment) and make this documentation publicly available, to reinforce public trust and enable scrutiny by researchers and the general public.
- 6.3. Ideally, the Government should also introduce primary legislation to embed adequate safeguards (e.g. Coronavirus Safeguards Bill),³¹ as well as introducing an independent oversight mechanism.
- 6.4. Finally, the Government needs to explain the longevity of this scheme and include a Parliamentary sunset clause. This would address concerns expressed by academics and civil society around function creep and the possibility of the mechanism and its infrastructure lasting longer than the public health emergency.

³¹ <https://osf.io/preprints/lawarxiv/yc6xu/>