

Written Evidence
Proposal for mandatory COVID certification in a Plan B scenario
Department of Health and Social Care, UK Government

October 2021

Bingham Centre for the Rule of Law

About the Bingham Centre

1. The Bingham Centre for the Rule of Law is an independent, non-partisan organisation that exists to advance the Rule of Law worldwide. Established in 2010 as part of the British Institute of International and Comparative Law (BIICL), the Centre was brought into being to pursue Tom Bingham's inspiring vision: a world in which every society is governed by the Rule of Law "in the interests of good government and peace at home and in the world at large". One of our strategic aims is to increase discussion about the meaning and importance of the Rule of Law in the political process.
2. This evidence submission has been prepared by Katie Lines¹ and Dr Richard Mackenzie-Gray Scott.²

Introduction

3. The Government invites submissions of evidence on the proposed COVID-19 vaccine certification regime which may be introduced as part of its "Plan B scenario." Our evidence addresses the final question in the consultation document, which is an open-ended call for any comments relating to the consultation.³
4. We do not aim to evaluate the merits of the Government's proposed policy on vaccine certificates. Instead we show why, from a Rule of Law perspective, there is a need for primary legislation regulating the use of Government-mandated COVID-19 vaccine certificates for venues and events, in the event that the Government decides to adopt such a scheme.⁴ We have provided a summary of our evidence in under 500 words, followed by a more in-depth analysis.

Summary of evidence (under 500 words)

5. The Government's proposal states that "certification would be implemented by making regulations under Section 45C of the Public Health (Control of

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³ See the call for evidence at: <https://www.gov.uk/government/consultations/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario-call-for-evidence/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario-call-for-evidence>

⁴ For further details see *Written evidence from the Bingham Centre for the Rule of Law* (CVC 881), Public Administration and Constitutional Affairs Committee Covid 19 Vaccine Certification inquiry (April 2021) <<https://committees.parliament.uk/writtenevidence/26945/pdf/>>

Disease) Act, 1984”.⁵ It is our view that regulations are not an appropriate means of introducing mandatory vaccine certificates for venues and events. Instead, any such scheme should be implemented via new primary legislation.

6. The introduction of a Government-mandated COVID-19 vaccine certification scheme for venues and events will have a significant impact on businesses and individuals, and there are concerns that any scheme may be discriminatory and infringe upon individuals’ rights. The use of vaccine certificates involves the processing and digital storage of many individuals’ health-related personal data, raising privacy and data protection issues, which require careful consideration.⁶ The collection, storage and use of health data falls under the right to privacy protected by Article 8 of the European Convention on Human Rights (“ECHR”). It is likely that other rights and freedoms protected by the ECHR will also be engaged if a mandatory COVID-19 vaccine certificate scheme is introduced. For example, the ECHR protects freedom of assembly (Article 11), the right to practice one’s religion (Article 9), and the enjoyment of the rights and freedoms under the ECHR without discrimination (Article 14). It is constitutionally inappropriate for a policy with such wide-ranging potential impacts to be introduced via delegated legislation. Parliament would not have sufficient opportunity to scrutinise, debate, and amend Government proposals on this matter.
7. The Government states that vaccine certificates may need to be implemented “at short notice in response to concerning data”.⁷ We emphasise that Parliament is able to pass primary legislation rapidly where circumstances require it to do so. For example, the Coronavirus Act 2020 passed through Parliament in four sitting days.
8. It is not only the Bingham Centre that believes mandatory vaccine certification should be introduced via primary legislation. The Public Administration and Constitutional Affairs Committee (“PACAC”) expressed concern in its *Covid-Status Certification* report that the Government may be attempting to avoid the appropriate levels of public scrutiny by introducing a COVID-19 vaccine certification scheme through delegated legislation.⁸ PACAC stated: “Given that the Government has not made the scientific case for a Covid-status certification system, and in its own assessment the case is ‘finely balanced’,

⁵ See the proposal at: <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

⁶ R. Davies, ‘Undisclosed private companies analysing facial data from NHS app’ (*The Guardian*, 24 September 2021) <<https://www.theguardian.com/society/2021/sep/24/undisclosed-private-companies-analysing-facial-data-from-nhs-app>>

⁷ <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

⁸ House of Commons, PACAC, *Covid-Status Certification*, Second Report of Session 2021-22 (HC 42), para. 80.

the introduction of such a system must be by way of primary legislation. This would allow for the full implications and ramifications of the proposals to be fully and properly considered by the Government and would also allow Parliament the appropriate amount of time to consider, scrutinise and where necessary amend the Government's proposals".⁹

9. We endorse and echo PACAC's recommendation that any Government-mandated COVID-19 vaccination scheme should be brought into force via primary legislation.

The need for a comprehensive legislative framework

10. From a Rule of Law perspective, it is imperative that any policy on COVID-19 vaccine certificates for venues and events is brought into force via new primary legislation, in order to ensure legal certainty and clarity and give Parliament an adequate opportunity to scrutinise the proposed scheme.
11. Very few coronavirus measures have been introduced using primary legislation. Most coronavirus laws have instead been made using delegated legislation. As of 3 October 2021, the Government had laid 508 coronavirus-related statutory instruments before the UK Parliament.¹⁰ An unusually high number of these instruments were enacted using the made affirmative procedure, meaning that the instruments became law without parliamentary scrutiny, and required only retrospective parliamentary approval.¹¹ Several of these instruments also came into force before they had been laid before Parliament.¹²
12. In many cases, the Government has used an emergency mechanism under section 45R of the Public Health Act 1984 in order to fast track delegated legislation. This mechanism allows ministers to use the made affirmative procedure in urgent situations, when the parent Act would otherwise require Parliament to approve a draft instrument before it became law. We do not consider that there is a basis for using the urgency procedure – or any other form of delegated legislation – to implement COVID-19 vaccine certificates. The Government states that vaccine certificates may need to be implemented

⁹ *ibid.* para. 83.

¹⁰ Hansard Society, 'Coronavirus Statutory Instruments Dashboard'

<<https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard/>>

¹¹ Meg Russell, Ruth Fox, Ronan Cormacain, Joe Tomlinson, 'The marginalisation of the House of Commons under Covid has been shocking; a year on, parliament's role must urgently be restored' (21 April 2021) <<https://constitution-unit.com/2021/04/21/covid-and-parliament-one-year-on/>>

¹² For example, it was in June 2020 that regulations governing lockdown in England were first laid before Parliament in advance of their coming into force, when the original lockdown regulations were being amended for the fourth time – see the Health Protection (Coronavirus, Restrictions) (England) (Amendment) (No. 4) Regulations 2020 (SI 2020/588).

“at short notice in response to concerning data”.¹³ It is worth emphasising here that Parliament is able to pass primary legislation rapidly where circumstances require it to do so.¹⁴

13. Delegated legislation will not provide Parliament with a sufficient opportunity to review, debate, and amend the Government’s proposals. Parliament’s ability to scrutinise delegated legislation is inherently limited. Delegated legislation cannot be amended by Parliament except in exceptionally rare circumstances.¹⁵ This means that MPs and Peers are almost always presented with an all-or-nothing choice when scrutinising statutory instruments: either approve or reject the instrument in its entirety. Either House would be making a significant political statement if it rejected a statutory instrument, and this rarely happens in practice. Therefore, there is little scope for Parliament to push for changes to be made to the details of proposed statutory instruments, and little incentive for the Government to compromise in response to Parliamentary pressure.¹⁶ In addition, Parliament spends far less time debating secondary legislation than it spends debating primary legislation.
14. We recognise that there has been a general trend towards the increased use of statutory instruments to legislate in areas of principle and policy, rather than simply matters of administrative procedure or technical detail.¹⁷ This trend is concerning from a Rule of Law perspective, given Parliament’s limited ability to scrutinise delegated legislation. The Constitution Committee of the House of Lords has suggested that there should be limits to the type of laws that are made using delegated legislation, and that it is in general constitutionally unacceptable for delegated powers to institute significant constitutional change,¹⁸ or create regulations that will have a major impact on an individual’s right to respect for private life.¹⁹
15. In the view of the Bingham Centre, it would be inappropriate and concerning for a mandatory COVID-19 vaccine certificate scheme to be introduced any

¹³ <https://www.gov.uk/government/publications/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario>

¹⁴ For example, the Coronavirus Act 2020 passed through Parliament in four sitting days.

¹⁵ There are a very small number of parent Acts that allow for amendments to be made, for example the Civil Contingencies Act 2004 s.27(3) and Census Act 1920 s.1(2).

¹⁶ This point was made by the Constitution Committee in ‘Delegated Legislation and Parliament: A response to the Strathclyde Review (2015-2016, HL 116), at paragraph 25.

¹⁷ Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014), p. 28.

¹⁸ Constitution Committee, *Draft Scotland Act 1998 (Modification of Schedules 4 and 5 and Transfer of Functions to the Scottish Ministers etc.) Order 2015* (2014-2015, HL 119), para 15.

¹⁹ Constitution Committee, *Policing and Crime Bill Report* (2008-09, HL 128), paras 11-15. For more detail see Jack Simson Caird, Robert Hazell and Dawn Oliver, ‘The Constitutional Standards of the House of Lords Select Committee on the Constitution Third Edition’ The Constitution Unit (UCL, November 2017)

further using delegated, rather than primary, legislation.²⁰ Any certification scheme will likely have a significant impact on individuals' rights and freedoms, including respect for private life, especially if the scheme has a substantial digital component. The use of vaccine certificates involves the processing of many individuals' health-related personal data, raising privacy and data protection issues, which require careful consideration.²¹ Due to its sensitive and personal nature, health-related data is subject to heightened protection measures under the General Data Protection Regulation ("GDPR") and Data Protection Act 2018. In addition, the collection, storage and use of health data falls under the right to privacy protected by Article 8 of the European Convention on Human Rights ("ECHR").

16. It is likely that other rights and freedoms protected by the ECHR will also be engaged if a COVID-19 vaccine certificate scheme is introduced that limits people's ability to access public or private events and venues. For example, the ECHR protects freedom of assembly (Article 11), the right to practice one's religion (Article 9), and the enjoyment of the rights and freedoms under the ECHR without discrimination (Article 14). A careful assessment will need to be carried out to ensure that any COVID-19 vaccine certificate scheme complies with data protection and human rights law, including close consideration of the relevant scientific evidence, how data will be stored and used, and the overall proportionality of the scheme alongside alternative options.
17. The process of introducing primary legislation allows Parliament to address any mistakes before they become law. Such legislation concerning a COVID-19 vaccine certification scheme would also be able to be accompanied by an equality impact assessment, ECHR compatibility assessment, and a data protection impact assessment. Some of the very questions that the Government has raised in this consultation are those that should be posed by Parliament for the Government to answer.²² In doing so, Parliament will be able to arrive at a reasoned decision as to whether the Government's proposals are necessary, proportionate and justified in light of available evidence.

²⁰ B. Fowler, 'The care home Covid vaccination Regulations: a case study in problems with the delegated legislation system' (Hansard Society, 9 August 2021) <<https://www.hansardsociety.org.uk/blog/the-care-home-covid-vaccination-regulations-a-case-study-in-problems-with>>

²¹ R. Davies, 'Undisclosed private companies analysing facial data from NHS app' (*The Guardian*, 24 September 2021) <<https://www.theguardian.com/society/2021/sep/24/undisclosed-private-companies-analysing-facial-data-from-nhs-app>>

²² For example, as asked by the Government: "Are there any groups, particularly those with protected characteristics, that you think would be placed at a disadvantage from vaccine certification becoming mandatory in the settings listed?" (<https://www.gov.uk/government/consultations/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario-call-for-evidence/proposal-for-mandatory-covid-certification-in-a-plan-b-scenario-call-for-evidence>)

18. The Rule of Law also requires measures introduced in response to emergency situations to be limited in duration, circumstance and scope.²³ The Ada Lovelace Institute has raised concerns that digital vaccine certificates may normalise “health status surveillance by creating long-term infrastructure in response to a time-bounded crisis”, and that the digital identity scheme used for COVID-19 vaccine certificates may be used for “different or expanded purposes” in the future.²⁴ The Government and Parliament have the power to prevent this happening by ensuring that any legislation introducing a COVID-19 vaccine certification scheme is narrow in scope, strictly time limited, and includes a sunset clause.

19. We echo the view of PACAC that “it would be inappropriate for a system with such a potentially wide adverse impact to be introduced by secondary legislation. Using secondary legislation would not only not fit with the constitutional significance of the legislation but importantly it would deprive Parliament the opportunity to make amendments”.²⁵

Considerations for Government and Parliament

20. To give an indication of the constitutional significance of a COVID-19 vaccine certification scheme, in deciding whether to approve the Government’s policy Parliament will need to consider:

- a) Clarifying and limiting the intended domains of use for COVID-19 vaccine certificates, so as to ensure that the proposed domains specified by the Government remain exhaustive, with further scrutiny from Parliament being needed before any expansion into new domains.
- b) Evidence of the likely effectiveness of COVID-19 vaccine certification in achieving the Government’s aims in each specified domain.
- c) The economic cost for businesses, including the impact upon employers to manage part of a COVID-19 vaccine certification scheme.
- d) Whether the introduction of COVID-19 vaccine certificates is a necessary and proportionate interference with individuals’ rights and freedoms under the ECHR.
- e) The actual and potential discriminatory impacts of a COVID-19 certification scheme and how these will be addressed, including with

²³ Venice Commission, The Rule of Law Checklist (Council of Europe, 2016), Benchmark A6 <https://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_Law_Check_List.pdf>

²⁴ Ada Lovelace Institute, ‘What place should COVID-19 vaccine passports have in society?’ (17 February 2021), page 7 <<https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>>

²⁵ PACAC, *Covid-Status Certification*, para. 83.

respect to individuals vaccinated abroad and those that are unable to be vaccinated for health and/or other reasons.

- f) How matters of data protection and privacy will be addressed, especially considering the concerns raised by the NHS app and the current absence of a data protection impact assessment.
- g) The safeguards that will form part of a COVID-19 vaccine certification scheme to protect against mission creep (e.g. a sunset clause), including how frequently the law regulating such a scheme will be reviewed.
- h) How a COVID-19 vaccine certification scheme will protect against fraudulent exploitation.
- i) Whether a COVID-19 vaccine certification scheme will increase vaccine uptake or increase vaccine hesitancy.

Overall recommendation to Government

21. Should the Government introduce a COVID-19 vaccine certification scheme in venues and events as part of its “Plan B scenario”, we urge the Government to secure the Rule of Law by introducing any such scheme through new primary legislation. Doing so would provide Parliament with the ability to properly scrutinise the Government’s proposals. The myriad issues raised by the introduction and use of a mandatory COVID-19 vaccine certification scheme simply cannot be properly addressed unless the Government and Parliament work together.

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