Part 1: The Great Vaccination Passports Debate: "ID Cards on Steroids" or the Rational Way Forward?

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This is a two-part blog series. In Part 1, Prof. Lilian Edwards discusses if there is a case for vaccine passports at all. In Part 2, Dr. Irene Pietrapaoli discusses the legal and practical detail of such schemes if it is decided to proceed.

The UK Government recently consulted on setting up a "COVID-Status certification scheme" (CSCS), looking "to consider the ethical, equalities, privacy, legal and operational aspects of a potential certification scheme, and what limits, if any, should be placed on organisations using certification" . Such certifications are more commonly, and controversially, described as vaccination passports or digital health certificates (to cover where status as COVID-safe is attained other than by vaccination eg by proof of prior infection, or negative test). Vaccine passports are one of the great debates of the end days (we hope) of the pandemic : recently described by Ian Dunt as "ID cards on steroids" but also reportedly backed by almost 4 in 5 Britons for front line NHS workers.

We submitted our response on the closing date of March 29. Remarkably, Michael Gove announced a day later that NHS, the NHS's digital agency, was already working on such a scheme. Indeed according to news reports, such technologies are already being trialled and have been since at least January, Furthermore Gove reportedly plans to produce an interim report on the outcome of the consultation on April 5, a remarkably short turnaround especially given the period contains the Easter long weekend (and given that only a month or two ago the Vaccines Minister was explicitly denying plans to move in this direction). However, in the firm belief this consultation will nonetheless be carefully examined, we present our key proposals below.

It is essential there be an a priori debate about introducing "vaccine passports", rather than 'doing it because it can be done' as a populist policy and picking up the legal and societal pieces afterwards. A key point is what domain of use is intended if it is agreed a CSCS is needed. One size will not fit all.

The most striking part of the consultation is that there is no first question which asks whether it is useful, desirable or ethical to launch such a scheme at all. There is clearly a pressing public desire to return safely to society, including shops, sports events, entertainment, and domestic and international travel, and an equally pressing need to rescue some parts of the economy. People want to go to the pub and, a bit less so, the gym. Workplaces and sites of public service delivery want to be, and to be seen to be, safe. Vaccine passports seem an obvious "hurrah" solution. Polling, on a rather broad-brush level, understandably shows considerable support. However, there are a considerable number of questions first needing unpacked.

First, it is trite to note that we still await definite proof of vaccines retarding transmission - something currently not certain, but likely. Nor do we have much idea of the duration of protection. It is thus still unclear whether a CSCS will be able, as the Government aims , 'to confirm in different settings that individuals have a lower risk of getting sick with or transmitting COVID-19 to others.' As the Ada Lovelace Institute therefore concluded, '*any deployment of vaccine passports prior to there being clear evidence about the impact of vaccines on the transmission of COVID-19 is premature and not justifiable.*'

Second there is little attempt in the consultation to separate out normatively different use cases for vaccine passports. In the Coronavirus Safeguards Bill, drafted by a team of international data protection and human rights experts in April 2020 this question was considered. Their view after much thought was that a key point is what domain of use was intended. One size will not fit all. In relation to international travel, there is already an established norm of passporting and indeed of passports linked to biometrics and digital databases as with the US ESTA visa. In relation to international travel and holidays, there are already a large number of private operators moving into the field (as discussed further in part 2). The WHO originally said they did not recommend proof of COVID-19 vaccination as a condition of departure or entry for international travel. In March, however, the WHO released the first version of an 'Interim guidance for developing a Smart Vaccination Certificate'. The issue here seems to be not if it should happen but how. To a large extent it may in any case be out of the control of the UK as we will need to fit in with the international and regional schemes from the EU, WHO and elsewhere mentioned below. It is essential however, as we discuss below, that we try not

to effectively hand over to private operators the right to police the freedom of movement over borders of the UKs citizenry. But these passports are, whether the UK likes it or not, likely to happen.

In relation to non-essential shops, places of entertainment (including that apparent peak achievement of our culture, the pub) and sport, arguably there is no fundamental human right to access these venues in person. (Virtual viewing and socialising are still possible as we all sadly know very well.) We thus call these 'desirable' services. Passporting may arguably operate proportionally to induce vaccine hesitant populations to get vaccinated to use these facilities in a way proportionate to invasion of rights (though safeguards will still be needed, for example to prevent indirect racial discrimination). It can be argued therefore that a passport is acceptable so long as its use falls within constraints of hard law, ethics and human rights explored below. In the model Safeguards Bill, we suggested that in these domains use be subject to a necessity, proportionality and legitimacy test, a scrutiny appropriately drawn from human rights, as rights of privacy, and possibly speech, assembly, education and other rights are clearly infringed by passports. Uses could be contested either in the courts or (more cheaply and easily) to a new or relevant regulator.

The hardest issues arise with 'essential' domestic use cases such as public sector services, work, education (tertiary and secondary) and public domestic transport. To be excluded from any of these is likely to severely infringe fundamental rights, exacerbate inequality and create justifiable social unrest and confusion. This is all the more true as evidence, though not complete, seems to show vaccine hesitancy as greatest among Black, Asian and minority ethnic (BAME) communities and to some extent the young, and so making access to such services dependent on vaccination proof risks indirect discrimination as well as loss of social solidarity. (Proof of non-infectiousness might sometimes be substituted by negative PCR or LFT testing or proof of recent infection - but this will not always be practical). We do not feel it will ever be necessary or proportionate to exclude people entirely from such services because of their health status. Other equivalent protections must be substitutable, such as the current social distancing, ventilation and mask rules, a bookings system, proof of negative test or proof of recent infection.

Thus, as a first analysis, the clearest case for a UK-driven domestic vaccine passport scheme is indeed in relation to the "desirable" class: indoor hostelries, sport, cinema, theatres and perhaps non-essential shops. Yet it is precisely in these domains where creation of enforcement infrastructure would be necessary if there was to be any more than security theatre. Anecdotal evidence from Israel, the only state to have so far implemented vaccine passports, is that enforcement of COVID rules has been thin. Bars have no appetite to expose their staff to abuse, and may incur legal liability either way (for not checking certificates, or for risking heath and safety violations for staff). The publican trade has already largely protested exactly this even though it is ostensibly their trade that is being rescued. The likelihood is a passport scheme would need some kind of app roll out or repurposing of an existing app, plus kiosk or turnstile barriers, or worse still in terms of complexity and rights jeopardy, face recognition gates - none of which could happen fast and would be an extra cost to industry. (Worth noting also that the NHS App, touted as a quick way to roll out a CSCS is England only, yet visitors from the rest of the UK to England's hostelries (etc) will likely be allowed by early May). Given the government's intention to fully vaccinate the entire adult population by September - and that the young and most ardent clubbers will be the last to be fully vaccinated - is the cost of this infrastructure actually going to be recouped? The government themselves admit it will at best probably be a short-term solution.

There are of course well canvassed worries that any persistent digital scheme linked to identifying sensitive health data may install a regime of digital identity monitoring, surveillance and categorisation which goes against the long-expressed views of UK society, where 'ID cards' (actually ID databases) have been rejected several times both in Parliament and in wider society. Such worries are likely to be strongest against parts of the population already marginalised and thus run the risk again of increasing vaccine hesitancy. Such a scheme may well also be hard to shake off once implemented, just like "ordinary" passports, even after the pandemic has come under control and the emergency period ended.

The question thus becomes: has the pandemic shifted the window such that a scheme with the potential to become a permanent "digital ID", and whose most appropriate uses, and greatest benefits, may be very partial, extremely short term, and costly and unwelcome to the actual industries involved, is on balance a necessary, proportionate and legitimate response to this stage of the crisis? We are on the whole unconvinced. It would be very easy to take off down the wrong route because of understandable current desire to open up society, and discover we had either wasted a lot of time and effort or put in place a framework for a digital ID scheme after and separate from COVID which was not what the public either wanted or needed.

However, should the government decide to proceed with vaccine passports, a large number of legal, ethical and practical considerations present themselves. In the second stage of this blog we ask : if the answer is "yes" to a CSCS, what safeguards must and should be put in place?

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Lovelace Institute), and Dr. Jan van Zyl Smit (Bingham Centre for the Rule of Law).

URL: https://www.biicl.org/blog/22/part-1-the-great-vaccination-passports-debate-id-cards-on-steroids-or-the-rational-way-forward

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