

Written evidence from the Bingham Centre for the Rule of Law (CVC 881)

Public Administration and Constitutional Affairs Committee Covid 19 Vaccine Certification inquiry

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

Summary

3. Our evidence does not seek to address whether a vaccine certification scheme should or should not be introduced. Instead, we discuss why, from a Rule of Law perspective, there is a need for a comprehensive legislative framework governing the use of vaccine certificates, in the event that the Government decides to adopt such a scheme. It is our view that any proposed vaccine certification scheme should be introduced via new primary legislation, rather than delegated legislation. Delegated legislation will not provide Parliament with a sufficient opportunity to scrutinise, debate, and amend Government proposals on this matter.
4. We understand that the Government does not currently intend to mandate the use of vaccine certificates in all domestic settings.³ However, it would be unsatisfactory for Parliament to enact legislation governing the use of vaccine certificates only in areas where the state intends to mandate or prohibit their use. This would leave a gap in the law for circumstances where vaccine certification is neither compulsory nor prohibited. Legislation governing the use of vaccine certificates should both:
 - i. Specify the domains in which vaccine certificates are compulsory, and the domains in which individuals cannot be required to produce vaccine certificates or other proof of their Covid-status; and

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³ UK Parliament, Michael Gove, COVID-19 Update, Statement UIN HCWS947 (29 April 2021) <<https://questions-statements.parliament.uk/written-statements/detail/2021-04-29/hcws947>>

- ii. In circumstances where vaccine certification is neither compulsory nor prohibited, set out a framework with which an organisation must comply if it wishes to require individuals to provide proof of Covid-status.
5. In addition, the administrations in England, Scotland, Wales and Northern Ireland should cooperate in the drafting of UK-wide legislation, to ensure as far as possible that the rules governing vaccine certificates are consistent across the UK. Not doing so could lead to different rules, regulating different applications, being applicable in different parts of the same state.
6. In order to assist Parliament's scrutiny of potential vaccine certification schemes, we have outlined the following key questions to be considered when the Government's proposals on vaccine certificates are reviewed:
 - a) What are the intended domains of use for vaccine certificates (e.g. international travel; non-essential domestic services; essential domestic services; employment)?
 - b) Has the Government provided Parliament with sufficient scientific, economic and other evidence to enable proper scrutiny of the effectiveness of vaccine certification in each of these domains?
 - c) Considering the available evidence, has the Government made out its case for the need to introduce vaccine certificates in each domain?
 - d) How will individuals' rights and freedoms under the European Convention on Human Rights ("ECHR") be protected, and is the introduction of vaccine certificates a necessary and proportionate interference with those rights and freedoms?
 - e) What are the potential discriminatory impacts of the certification scheme and how will these be addressed?
 - f) How will vaccine certificates work in practice?
 - g) How will data protection and privacy concerns be addressed?
 - h) How far does proposed legislation protect against mission creep?

The need for a comprehensive legislative framework

7. From a Rule of Law perspective, it is imperative that any policy on vaccine certificates is brought into force via new primary legislation, in order to ensure legal

clarity and give Parliament an adequate opportunity to scrutinise the proposed scheme.

8. To date, very few coronavirus measures have been introduced using primary legislation. Most coronavirus laws have instead been made using delegated legislation. As of 27 April 2021, the Government had laid 424 coronavirus-related statutory instruments before the UK Parliament.⁴ 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.⁵ Several of these instruments also came into force before they had even been laid before Parliament.⁶
9. 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 any basis for using the urgency procedure to implement vaccine certificates. The introduction of vaccine certificates does not require prioritising a rapid response over adequate legislative scrutiny.
10. From a Rule of Law point of view, any vaccine certificate scheme must be introduced using new primary legislation. 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.⁷ 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.⁸ In addition, Parliament spends far less time debating secondary legislation than it spends debating primary legislation.

⁴ Hansard Society, 'Coronavirus Statutory Instruments Dashboard'

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

⁵ 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/>>

⁶ For example, it was only 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).

⁷ 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).

⁸ 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.

11. 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.⁹ However, 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,¹⁰ or create regulations that will have a major impact on an individual’s right to respect for private life.¹¹

12. In our view, it would be inappropriate and concerning for a vaccine certificate scheme to be introduced using delegated, rather than primary, legislation. 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 will involve the processing of a large amount of health-related personal data, raising privacy and data protection issues, which require careful consideration. 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 ECHR. It is likely that other rights and freedoms protected by the ECHR will also be engaged if a domestic vaccine certificate scheme is introduced that limits people’s ability to access public or private services. 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 in the ECHR without discrimination (Article 14). A careful assessment will need to be carried out to ensure that any 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.

13. The use of vaccine certificates also raises issues relating to equality and non-discrimination, especially if certificates are required as a precondition for participation in everyday social activities. The Nuffield Council on Bioethics has warned that the negative impacts of a certification system “are likely to fall disproportionately on those who are already socially marginalised and disadvantaged”.¹² According to the Office for National Statistics (“ONS”), when categorising persons by self-reported ethnic group, the (first dose) vaccination rates of

⁹ Ruth Fox and Joel Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (Hansard Society, 2014), p. 28.

¹⁰ 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.

¹¹ 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)

¹² Nuffield Council on Bioethics, ‘COVID-19 antibody testing and ‘immunity certification’ (18 June 2020) <<https://www.nuffieldbioethics.org/news/new-briefing-covid-19-antibody-testing-and-immunity-certification>>

adults living in England aged 70 or over are: 91.3% for White British, 86.2% for Indian, 76.7% for Chinese, 74% for Pakistani, 72.7% for Bangladeshi, 68.7% for Black Caribbean, and 58.8% for Black African (data from 8 December 2020 to 11 March 2021).¹³ The ONS statistician comments that “[v]accination rates are markedly lower amongst certain groups, in particular amongst people identifying as Black African and Black Caribbean, those identifying as Muslim, and disabled people. These differences remain after accounting for geography, underlying health conditions and certain indicators of socio-economic inequality”.¹⁴ In addition, many individuals are unable to be vaccinated due to medical conditions, such as allergies,¹⁵ and as of 13 April 2021, no vaccines had been approved for use in those under-18.¹⁶

14. Stephen Reicher and John Drury, members of the Government’s advisory group on behavioural science (“SPI-B”), warn that certification schemes may create a form of “vaccine apartheid”, where “[m]embers of marginalised groups, who are less likely to be vaccinated, are thereby more likely to be excluded from participation in everyday social life”.¹⁷ This problem cannot wholly be solved by using negative coronavirus tests as an alternative to proof of vaccination. There are practical issues with the use of a negative test as proof of Covid-status, including the small window of time during which a negative test result is a reliable indicator of a person’s Covid-status. The Institute for Government also notes that “the availability of testing across the country is highly variable”.¹⁸ Moreover, any certification scheme runs into the problem of unequal access to digital technology, digital literacy and forms of identification.¹⁹ These are all matters that require the type of careful consideration by Parliament that can only be provided by the introduction of new primary legislation.

15. The Cabinet Office has recently indicated that the Government’s COVID-Status Certification Review is likely to recommend that vaccine certificates should not be required in smaller domestic settings, such as pubs or restaurants, as opposed to large

¹³ ONS, ‘Coronavirus and vaccination rates in people aged 70 years and over by socio-demographic characteristic, England: 8 December 2020 to 11 March 2021’ (29 March 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/healthinequalities/bulletins/coronavirusandvaccinationratesinpeopleaged70yearsandoverbysociodemographiccharacteristicengland/8december2020to11march2021#ethnic-group>>

¹⁴ *ibid.*

¹⁵ CDC, ‘Information about COVID-19 Vaccines for People with Allergies’ (25 March 2021) <<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/allergies.html>>; WHO, ‘The Oxford/AstrZeneca COVID-19 vaccine: what you need to know’ (11 February 2021, updated 17 March 2021) <<https://www.who.int/news-room/feature-stories/detail/the-oxford-astrazeneca-covid-19-vaccine-what-you-need-to-know>>

¹⁶ Joint Committee on Vaccination and Immunisation, ‘JCVI final statement on phase 2 of the COVID-19 vaccination programme: 13 April 2021’ (13 April 2021) <<https://www.gov.uk/government/publications/priority-groups-for-phase-2-of-the-coronavirus-covid-19-vaccination-programme-advice-from-the-jcvi/jcvi-final-statement-on-phase-2-of-the-covid-19-vaccination-programme-13-april-2021>>

¹⁷ Stephen Reicher and John Drury, ‘How to lose friends and alienate people? On the problems of vaccine passports’ (BMJ Opinion, 1 April 2021) <<https://blogs.bmj.com/bmj/2021/04/01/how-to-lose-friends-and-alienate-people-on-the-problems-of-vaccine-passports/>>

¹⁸ Tom Sasse and Rosa Hodgkin, ‘Covid passports: Key questions for the government’ (Institute for Government, 13 April 2021) <<https://www.instituteforgovernment.org.uk/publications/covid-passports>>

¹⁹ Ada Lovelace Institute, ‘What place should COVID-19 vaccine passports have in society?’ (17 February 2021), page 6 <<https://www.adalovelaceinstitute.org/summary/covid-19-vaccine-passports/>>

events.²⁰ However, there is nothing currently preventing small businesses and other organisations from creating their own policies requiring individuals to provide proof of their Covid-status, so long as this complies with data protection, employment and equalities law. It would be unsatisfactory for the Government to create a law only governing the use of vaccine certificates in areas where the state intends to mandate or prohibit their use, and to leave organisations free to make their own rules in all other circumstances. Legislation governing the use of vaccine certificates should:

- i. Specify the domains in which vaccine certificates would be compulsory, and the domains in which individuals should not be required to produce vaccine certificates or other proof of their Covid-status; and
- ii. In circumstances where vaccine certification is neither compulsory nor prohibited, set out a framework with which an organisation must comply if it wishes to require individuals to provide proof of Covid-status.

16. Legislation that does (i) but not (ii) would create a gap in the law, and would likely lead to a patchwork situation with different organisations requiring differing proof of Covid-status in different parts of the UK, creating legal uncertainty. Public regulation provided by an Act of Parliament guards against (potentially fragmented) private regulation. There are also concerns that a lack of regulation is more likely to lead to breaches of data protection, employment and equalities law, and the Government should be mindful of its positive obligation to secure individuals' rights and freedoms under the ECHR, including respect for private life (Article 8), freedom of assembly (Article 11), and right to practice religion (Article 9). A comprehensive legislative framework can include safeguards to address these issues.

17. Finally, the Institute for Government has noted that it is unclear whether the Government intends for there to be a uniform, UK-wide vaccine certification scheme.²¹ The UK Government has stated that it is working with the devolved administrations in Scotland, Wales and Northern Ireland to seek a "consistent approach".²² However, it appears that the digital platform for vaccine certificates in England will be the existing NHS app, which is only accessible to those registered with a GP in England.²³ There has also been a divergence of opinion between Westminster and some ministers within the devolved administrations as to whether vaccine certificates should be introduced at all. The SNP in Westminster has indicated that they are opposed to the UK Government's plans.²⁴ In addition, Northern Ireland's Health Minister, Robin

²⁰ Kate Ng, 'Plans for 'Covid passports' in pubs and restaurants to be struck off menu, report says' The Independent (29 April 2021) <<https://www.independent.co.uk/news/uk/home-news/coronavirus-passports-pubs-restaurants-events-b1839263.html>>

²¹ Sasse and Hodgkin, p. 9

²² 'Covid passports: Certification is 'one option', vaccines minister says' BBC News (6 April 2021) <<https://www.bbc.co.uk/news/uk-56645208>>

²³ Guy Faulconbridge, 'Swipe my phone: UK to use health service app as vaccine passport' Reuters (28 April 2021) <<https://www.reuters.com/world/uk/uk-plans-use-health-service-app-vaccine-proof-travel-2021-04-28/>>; Simon Calder, 'England's "vaccine passport" for holidays abroad will use the NHS app' The Independent (28 April 2021) <<https://www.independent.co.uk/travel/news-and-advice/holiday-vaccine-passport-nhs-app-b1838700.html>>; Zoe Kleinman, 'Confusion over use of NHS App as Covid passport' BBC News (29 April 2021) <<https://www.bbc.com/news/technology-56928620>>

²⁴ Sasse and Hodgkin, p. 9

Swann, has said that introducing domestic vaccine certificates in hospitality venues is "not something that sits comfortably" with him.²⁵

18. It is our view that the administrations in England, Scotland, Wales and Northern Ireland should cooperate in the drafting of UK-wide legislation, to ensure as far as possible that the rules governing vaccine certificates are consistent across the UK. This legislation could take the form of a Westminster Act which extends throughout the UK, and would be preceded by legislative consent motions in Scotland, Wales and Northern Ireland. Alternatively, individual Acts could be introduced in each jurisdiction, with advance co-ordination to ensure legislative consistency.

Questions for Parliament to consider in the scrutiny of proposals for vaccine certificates

19. In order to assist Parliament's scrutiny of a potential vaccine certification scheme, we have outlined the following key questions to consider if and when the Government's proposals on vaccine certificates are scrutinised:

a) What is the intended domain of use? Is the Government intending to introduce vaccine certificates in relation to education; employment (including non-public facing roles); health and social care settings; essential domestic services (e.g. travel); non-essential services (e.g. social events); and/or international travel? The Government's consultation on the COVID-Status Certification Review makes little attempt to separate these uses, but very different considerations will apply as to the desirability, legality and practicality of vaccine certificates depending on the domain of use. Lilian Edwards has noted that, in relation to international travel, there is already a practice of "passports linked to biometrics and digital databases".²⁶ In addition, the Government has already introduced an international travel regime that involves travellers to England providing a negative Covid test, completing a passenger locator form, quarantining, and taking multiple Covid tests after arriving in the UK.²⁷ In contrast, using vaccine certificates to exclude individuals from essential domestic services would be novel, and could "severely infringe fundamental rights, exacerbate inequality and create justifiable social unrest and confusion."²⁸

b) Has the Government provided Parliament with sufficient scientific, economic and other evidence to enable proper scrutiny of the effectiveness

²⁵ 'Coronavirus: Swann "uncomfortable" with vaccine certificates for hospitality' BBC News (4 March 2021) <<https://www.bbc.co.uk/news/uk-northern-ireland-56277669>>

²⁶ Lilian Edwards, 'Part 1: The Great Vaccination Passports Debate: "ID Cards on Steroids" or the Rational Way Forward?' BIICL Blog (1 April 2021) <<https://www.biicl.org/blog/22/part-1-the-great-vaccination-passports-debate-id-cards-on-steroids-or-the-rational-way-forward>>; See also Irene Pietropaoli, 'Part 2: Getting Digital Health Passports Right? Legal, Ethical and Equality Considerations' BIICL Blog (1 April 2021) <<https://www.biicl.org/blog/23/part-2-getting-digital-health-passports-right-legal-ethical-and-equality-considerations>>

²⁷ The Health Protection (Coronavirus, International Travel) (England) Regulations 2020

²⁸ Edwards, 'Part 1: The Great Vaccination Passports Debate: "ID Cards on Steroids" or the Rational Way Forward?'

of vaccine certification in each of these domains? A report published by the House of Commons Science and Technology Committee earlier this year found that, when responding to the pandemic, the Government has not been sufficiently transparent in publishing the advice and evidence upon which its decisions have been based, and explaining how and why policy positions have been reached.²⁹ In order to scrutinise the Government’s proposals, Parliament will need to be provided with the evidence and advice underpinning the Government’s position, including the relevant scientific evidence, the cost of administering the scheme, and any technology that may be used to create digital certificates.

- c) Considering the available evidence, has the Government made out its case for the need to introduce vaccine certificates in each domain?** In other words, what are the problems that the Government wishes to solve, and are vaccine certificates a useful part of that solution? We note that there is currently no clear scientific evidence showing the effect of vaccination on the transmission of SARS-CoV-2. A recent editorial in *The Lancet* states that preliminary reports suggest the Moderna and Pfizer-BioNTech vaccines could reduce SARS-CoV-2 transmission, but “until these data have been peer-reviewed and their validity confirmed, uncertainty will remain around the epidemiological utility of relying on vaccine certificates”.³⁰ In addition, any benefits of introducing vaccine certificates domestically are likely to greatly diminish should population-level herd immunity be achieved.³¹ What is the Government’s predicted time frame for achieving herd immunity via vaccination, what is the likely timeframe for the introduction of vaccine certificates and, in light of the answers to these questions, is there any role for a domestic vaccine certification scheme?
- d) How will individuals’ rights and freedoms under the ECHR be protected, and is the introduction of vaccine certificates a necessary and proportionate interference with those rights and freedoms?** Parliament must consider how far the Government’s proposals will interfere with individuals’ rights and freedoms under the ECHR, in particular the right to a private life (Article 8), freedom of assembly (Article 11), the right to practice one’s religion (Article 9), and the enjoyment of the rights and freedoms in the ECHR without discrimination (Article 14). Restrictions can only be placed on Articles 8, 9 and 11 in order to meet a limited number of legitimate aims, including where the restriction is in the interests of public safety, or is for the purpose of protecting health or the rights and freedoms of others. Parliament must be satisfied that the proposed vaccine certification scheme serves a legitimate aim, and that any restrictions on the rights and freedoms protected

²⁹ House of Commons Science and Technology Committee, ‘The UK response to covid-19: use of scientific advice’ (2019-2021, HC 136).

³⁰ ‘Vaccine certificates: does the end justify the means?’ *The Lancet Microbe Vol 2, Issue 4* (1 April, 2021) <[https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247\(21\)00067-7/fulltext#](https://www.thelancet.com/journals/lanmic/article/PIIS2666-5247(21)00067-7/fulltext#)>

³¹ Ada Lovelace Institute, ‘What place should COVID-19 vaccine passports have in society?’, page 6

by the ECHR are necessary and proportionate. A restriction will only be proportionate if the interference goes no further than is necessary to address the legitimate aim in question. When assessing the proportionality of vaccine certification, Parliament should consider alternative solutions to the problems the Government seeks to address, although we note that vaccine certification may help avoid the severe restrictions on rights and freedoms caused by lockdowns.³²

- e) What are the potential discriminatory impacts of the scheme and how will these be addressed?** As discussed above, vaccine hesitancy appears to be greater among certain groups, and there is unequal access to technology, digital literacy, and forms of identity documents. In addition, many individuals are unable to be vaccinated due to medical conditions, such as allergies,³³ and as of 13 April 2021, no vaccines had been approved for use in those under-18.³⁴ Parliament should ensure that any discriminatory impacts of a proposed vaccine certification scheme have been identified and properly addressed. The Government must conduct an Equality Impact Assessment, and ensure that this Assessment is made available to Parliament when it scrutinises the Government's proposals.
- f) How will vaccine certificates work in practice?** The Government has been vague on the practicalities surrounding vaccine certificates. It is our current understanding that any introduction of vaccine certificates is likely to involve both digital and non-digital options, and that the NHS app is perhaps the most likely platform for digital certification. We also understand that the Government is planning to make any vaccine certification scheme available both "to vaccinated people and to unvaccinated people who have been tested".³⁵ Yet many questions remain. How will proving test status work in practice, when tests are limited, expensive and time-sensitive? Are lateral flow tests a sufficiently reliable indication of Covid-status? How will the scheme treat people who have only had the first dose of the vaccine? What type of personal

³² Adam Wagner recently discussed this matter in 'Are vaccine passports a threat to human rights?' *New Statesman* (7 April 2021) <<https://www.newstatesman.com/politics/uk/2021/04/are-vaccine-passports-threat-human-rights>>

³³ CDC, 'Information about COVID-19 Vaccines for People with Allergies' (25 March 2021) <<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/specific-groups/allergies.html>>; WHO, 'The Oxford/AstrZeneca COVID-19 vaccine: what you need to know' (11 February 2021, updated 17 March 2021) <<https://www.who.int/news-room/feature-stories/detail/the-oxford-astrazeneca-covid-19-vaccine-what-you-need-to-know>>

³⁴ Joint Committee on Vaccination and Immunisation, 'JCVI final statement on phase 2 of the COVID-19 vaccination programme: 13 April 2021' (13 April 2021) <<https://www.gov.uk/government/publications/priority-groups-for-phase-2-of-the-coronavirus-covid-19-vaccination-programme-advice-from-the-jcvi/jcvi-final-statement-on-phase-2-of-the-covid-19-vaccination-programme-13-april-2021>>

³⁵ UK Government, 'COVID-Status Certification Review - Call for evidence' (29 March 2021) <<https://www.gov.uk/government/consultations/covid-status-certification-review-call-for-evidence/covid-status-certification-review-call-for-evidence>>

data will be collected and stored, and for how long? How will the Government protect against fraud? What technology would be used to create a digital route to demonstrating Covid-status, and would this be developed with private sector partners? The Institute for Government notes that creating a digital certificate via an app would be a “major technological challenge”, and has called upon the Government to be clear about “how difficult developing a Covid passport app will be, whether it has the requisite capability and what timeframe is realistic”.³⁶

- g) How will data protection and privacy concerns be addressed?** As we noted above, the Government’s proposal raises a number of privacy concerns, especially in relation to digital certificates. Parliament must ensure that the processing of personal data via any vaccine certification scheme will be compliant with privacy and data protection law under Article 8 ECHR and the GDPR, including ensuring that the minimal amount of data necessary is stored, and that there are adequate protections around data sharing and deletion.³⁷ The Government must conduct a Data Protection Impact Assessment, and ensure that this Assessment is made available to Parliament when it scrutinises the Government’s proposals.
- h) How far does proposed legislation protect against mission creep?** The Rule of Law requires powers introduced in response to emergency situations to be limited in duration, circumstance and scope.³⁸ 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 vaccine certificates may be used for “different or expanded purposes” in the future.³⁹ Parliament should strive to prevent this happening by ensuring that any legislation introducing vaccine certificates is narrow in scope and strictly time limited, with a sunset clause.

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³⁶ Sasse and Hodgkin, ‘Covid passports’

³⁷ See Nyasha Weinberg’s discussion in relation to contact tracing apps: ‘Parliament must legislate on the government’s plans for contact tracing apps’ UK Constitutional Law Blog (4 May 2020) <<https://ukconstitutionallaw.org/2020/05/04/nyasha-weinberg-parliament-must-legislate-on-the-governments-plans-for-contact-tracing-apps/>>

³⁸ 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>

³⁹ Ada Lovelace Institute, ‘What place should COVID-19 vaccine passports have in society?’, page 7.