

[Open consultation COVID-Status Certification Review - Call for evidence](#)

Question 1 Which of the following best describes the capacity in which you are responding to this call for evidence?

I am a: h) Academic or researcher

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This submission was prepared with inputs from fellow co-investigators Prof. Lilian Edwards (Newcastle University), Dr Claudia Pagliari (University of Edinburgh), Dr. Anjali Mazumder (Alan Turing Institute), Reema Patel (Ada Lovelace Institute and Dr. Jan van Zyl Smit (Bingham Centre for the Rule of Law).

SUMMARY

We make the following arguments:

1. *It is essential there be an a priori debate about introducing such a technology, rather than “doing it because it can be done”*
2. *A key point is what domain of use is intended if it is agreed a digital health certificate scheme is needed. One size will not fit all.*
3. *The Government should thus first consider what the case is for a CSCS a priori before considering commissioning new technologies and with a view to legislating or clarifying existing law where necessary to protect fundamental rights and freedom, as well as preserve public trust. Draft Data Protection Impact Assessments, and Equalities Impact Assessments must be prepared before trials.*
4. *Any CSCS scheme should be an interim, emergency solution to guard against scope creep and mission creep.*
5. *The government must clarify what the legal bases for different uses of CSCS are*
6. *The government must clarify that they are meeting legal standards around equality and non-discrimination, and around privacy and data protection in any scheme.*
7. *It should be forbidden that a workplace requires use of a health pass for access unless no alternative safeguard – e.g. proof of negative test, is possible.*
8. *Any digital health certificate scheme presumptively should not incorporate biometric surveillance such as face recognition which has severe issues for human rights as well as accuracy and discrimination.*

9. Any CSCS presumptively should not incorporate biometric surveillance such as face recognition which has severe issues for human rights as well as accuracy and discrimination
10. Any award of a contract related to a CSCS to the private sector must be accompanied with a full procurement process, full transparency and a data protection and equality impact process.
11. Continuing public engagement is required to help guide the government as to the acceptability of using CSCS systems under different circumstances, as threat levels change.

Question 2 In your view, what are the key considerations, including opportunities and risks, associated with a potential COVID-status certification scheme? We would welcome specific reference to:

Digital health certificate or not: first essential question

The UK Government [is assessing](#) the potential for a COVID-Status certification scheme (CSCS) and its potential uses in enabling access to settings or relaxing COVID-secure mitigations'. According to news reports technologies for such [are already being trialled](#) and have been since at least January, despite many previous statements that the UK government was not interested in "vaccine passports". **It is essential there be an a priori debate about introducing such a technology, rather than "doing it because it can be done"** with the best of intentions and picking up the legal and societal pieces afterwards.

The key primary consideration is whether it makes sense to have a CSCS at all and what are the potential benefits and harms of this within the current stage of the pandemic and ongoing. On the one hand there is clearly a pressing public desire to return safely to society, including pubs, shops, sports events, entertainment, and domestic and international travel and an equally pressing need to rescue some parts of the economy. There is also a need to work out how to make all places of employment and public service delivery safe. For all of these, a CSCS scheme of some kind may both mitigate against outbreaks of infection and reinstate public trust essential to opening the economy. (These are dependent on proof of vaccines retarding transmission - something currently not certain but likely. See (c) below).

On the other hand, there is considerable worry that any persistent digital scheme (and the devil is very much in the detail) may install a regime of digital identity monitoring 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. The question: has the pandemic shifted the window such that a scheme of this kind is on balance a necessary, proportionate and legitimate response which society will feel reassured by rather than threatened.

In the [Coronavirus Safeguards Bill](#) which was drafted partially by one member of the Team (Prof. Lilian Edwards) and a team of international data protection and human rights experts in April 2020 this question was considered. Our 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 non-essential shops, places of entertainment and sport, arguably there is no fundamental human right to access these venues in person. We call these 'desirable' services. Passporting may thus 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 be needed - see below). It can be argued therefore that a digital health passport is acceptable so long as its use falls within constraints of hard law, ethics and human right explored below. We formulated in the Safeguards Bill that in these domains use be subject to a necessity, proportionality and legitimacy test, a scrutiny familiar in 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.

In relation to international travel, there is already an established norm of electronically read passporting and indeed of passports linked to digital databases as with the US ESTA visa. While WHO originally said they [did not recommend](#) proof of COVID-19 vaccination as a condition of departure or entry for international travel, due to these uncertainties. In March, however, the WHO released the first version of an '[Interim guidance for developing a Smart Vaccination Certificate](#)'. In relation to international travel and holidays, there are already a large number of private operators moving into the field. The issue here seem to be not if it should happen but how. To a large extent it may also 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 as we discuss below that we are not effectively handing it to private operators to police the freedom of movement over borders of the UK's citizenry.

The hardest issues arise with 'essential' domestic services such as work, education (higher and school) and public domestic transport. To be excluded from any of these is likely to severely infringe rights, exacerbate inequality and create justifiable social unrest and confusion. This is all the more true as evidence shows vaccine hesitancy is greatest among BAME communities and to some extent the young, and so making access to such services dependent on vaccination proof risks indirect discrimination (see g below). It is, however, possible that they could be made dependent in some circumstance on other profs such as of negative PCR or LFT testing or proof of recent infection.

The Government should thus first consider what the case is for a CSCS *a priori*, certainly before considering commissioning new technologies and with a view to legislating or

clarifying existing law where necessary to protect fundamental rights and freedom, as well as preserve public trust. We strongly suggest no technologies should be trialled (something which has already happened) before **this and before draft Data Protection Impact Assessments, Equalities Impact Assessments are prepared** (see below). Trust is vital to public uptake and sincere use rather than gaming or fakery of health credentials. The story of the COVID-9 NHSX contact tracing app v 1.0 is salutary here; although that app may possibly have been superior to the Google/Apple app which replaced it in protecting the public, it failed to convince them their privacy and other rights were being adequately protected, trust was lost and in the end the new GAEN scheme never recovered sufficient support to hit the desired 80% of population target. After that experience it seems strange to go back again to a potential health or vaccination passport which will decidedly be identifying and privacy invading.

We suggest the distinction between desirable and essential services within the UK, and international travel services be clearly and separately explored prior to any roll out. We continue this in section c (practical issues of delivery) but one point needs clearly made; **any CSCS scheme should be an interim, emergency solution to guard against scope creep and mission creep.** By originally September, now possibly earlier, the government plans to have fully vaccinated the entire adult population with two shots. At that point a CSCS for even desirable services becomes nugatory. Yet we have already argued that this is the domain for which domestic CSCS passports are most easily justified in the proportionality assessment. This points to an interim conclusion that if the costs and difficulties of putting in a CSCS scheme are higher even medium then it is unlikely to be justified as by the autumn it may not be justified and we do not yet know what form an international travel scheme may take. 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 we need or desire.

Issues if a certificate is found on balance to be the (a) way forward

b) Legal considerations

The government must clarify what the **legal bases** for different uses of CSCS are - the Coronavirus legislation, or other legislation or regulations. A legal basis is also necessary for companies already rolling out vaccine passport schemes – see also Question 3 below. The Government should create clear guidelines around any appropriate uses, mechanisms for oversight and enforcement, and possible remedy. It should also clarify the time frame of CSCS use - whether CSCS will be used only during the pandemic or their use may be prolonged – for example until when a certain percentage of the population has been vaccinated, or herd immunity has been reached in the UK. There should be a presumption

enshrined in law that any COVID CSCS scheme is terminated at the end of the emergency as defined in Coronavirus legislation and a majority vote in both Houses of Parliament required to continue it. Trust will be enhanced if there is no possibility of mission creep.

Any CSCS would need to meet legal standards around **equality and non-discrimination**, and around **privacy and data protection** – discussed below in points g) and h). In general, CSCS requirements need to be necessary, proportionate and transparent, and there should be access to an independent body in order to challenge unreasonable restrictions. The Government should not use the emergency delegated legislation procedures used to impose lockdowns and quarantine for CSCS requirements – it should use primary legislation to ensure a process of parliamentary debate and democratic accountability that better serves the rule of law, as the [Bingham Centre has set out](#) in the context of Coronavirus lockdown regulations.

It seems likely that many private employers and businesses may require some sort of vaccine certificates, independently from whether the Government adopts a CSCS. For example, a large London plumbing company [said](#) in January it was planning to rewrite all of its workers' contracts to require them to be vaccinated. A [global survey](#) by a recruitment agency, published in March found that 25% employers are already planning to start mandating vaccination for at least some roles. Private employers can argue that it is part of their health and safety legal duties. As such, the Government needs to very clearly debate the use of CSCS or other COVID-status or vaccination certificates by employers. As the Ada Lovelace Institute [found](#) in February, it may be possible to update existing mechanisms already in place to protect workers, such as the Green Book on immunisation, which require vaccination in high-risk environments, or existing 'fit and proper person' requirements. It may in fact be illegal under labour law to require a health pass in most occupations. We suggest that subject to certain clearly stated exceptions, it be **forbidden that a workplace requires use of a health pass for access** unless no alternative safeguard eg proof of negative test, is possible.

c) operational / delivery considerations

It is 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 [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.'

The Government [clarifies](#) that the CSCS 'would be available both to vaccinated people and to unvaccinated people who have been tested' and that it refers to 'the use of testing or vaccination data to confirm in different settings that 'individuals have a lower risk of getting

sick with or transmitting COVID-19 to others'. If those are the justifications – lower risks of getting sick and lower risk of transmission- then the CSCS should reasonably also include people who have contracted COVID-19 and recently recovered from it – as they would have antibodies for a period afterwards. The [Digital Green Certificate](#) proposed by the European Commission aims to prove that a person has either been vaccinated against COVID-19, received a negative test result or recovered. The Government should consider including also people who have recovered from COVID-19 – and clarify what test should be used to prove this.

The Government should explain for how long the CSCS is valid for – and the difference between duration of a CSC showing vaccination, a negative test or, possibly, a test showing antibodies. The Ada Lovelace [recommends](#) that ‘the duration of validity of the passport will remain dynamic in response to developing scientific understanding rather than a fixed date of issue’. Additionally, as [outlined](#) by the Royal Society, any vaccine passport should include a way of accommodating ‘changes in vaccine efficacy against emerging variants’.

The Government should also consider how the CSCS will link with other similar schemes, such as the [IATA Travel Pass](#) and the EU [Digital Green Certificate](#). For example, would an EU citizen holding a Digital Green Certificate have the same rights in the UK of a CSCS-holder?

Finally, the Government needs to consider how enforcement would work in practice. For example, would employers and venues have the sole responsibility to check the CSCS credentials, and under which powers? The publican trade has already clearly stated doubts about their power or desire to do this. In Tel Aviv, the only place in the world a health certificate scheme is operating for bars, there is already anecdotal evidence that bars are not enforcing well. It seems quite possible enforcement by bars, gyms, shops etc would in reality require a digital turnstile to be anything other than security theatre. It would be very hard and expensive to roll this out for September at which point, as noted above, the whole need may vanish when the whole adult population is largely fully vaccinated.

f) ethical considerations

The government [is planning](#) to make CSCS available both ‘to vaccinated people and to unvaccinated people who have been tested’. Theoretically, this means that vaccines are not mandatory. But in practice it may become so as a negative test is valid only for a short time (72 hours). If people would need a CSCS to access employment and public venues it would not be practical for them to take a test - even a rapid test - every few days. In reality, even if the CSCS is available for non-vaccinated people, in most settings this would still amount to, at least indirectly, forcing people to be vaccinated, which raises ethical concerns. It is important that the CSCS is not used as a tool for introducing compulsory vaccination, without a clear explanation of its necessity in all settings. This, as the Ada Lovelace Institute

[finds](#) in relation to vaccine passports, may increase mistrust by marginalised groups, such as Black and Asian communities, who have higher rates of vaccine hesitancy. The Government should undertake meaningful public engagement to gather evidence in relation to what members of the public, and different communities' views on a CSCS.

Facial recognition [has been suggested](#) as one means of verification at some venues, which raises further ethical concerns. We suggest that legislation should make it clear that any digital health certificate scheme **presumptively should not incorporate biometric surveillance** which has severe issues for human rights as well as accuracy and discrimination.

g) equalities considerations

A CSCS may risk exacerbating social inequalities and discrimination in the UK. The UK Equality and Human Rights Commission [said](#) in February that vaccine certificates could lead to 'unlawful discrimination'. As minority communities have a lower rate of vaccination and testing, a CSCS may restrict access to employment and public spaces to people who are already affected by social inequality. In addition, as [reported](#) by Ada Lovelace, people have unequal access to technology, digital literacy and forms of identification, and the CSCS may reinforce such existing inequalities. A proportion of the population does not have smartphones and as such would be at a disadvantage - other digital formats, such as chip-based cards could be considered.

A survey on public attitudes towards vaccine passports published by Ada Lovelace on 25 March [finds](#) that 'people from Black, Asian and minority ethnic backgrounds, and people on an income of less than £20,000 a year, indicated higher levels of concern that they would be unfairly discriminated against than White respondents and higher-income respondents.'

In developing CSCS requirements, the Government should make reasonable exemptions for people who cannot be vaccinated – e.g. pregnant women, people with disabilities or other medical conditions that prevent them from accessing or getting a vaccine, as well as people who are too young to get it offered yet. Under the [Equality Act 2010](#) a policy indirectly discriminating against people with protected characteristics (such as race, sex, disability, and age) must show to 'be a proportionate means of achieving a legitimate aim'. As such, CSCS requirements need to clearly explain their legitimate aim and their proportionality if they result in discrimination against those groups.

h) privacy considerations

A major difference between previous vaccination requirements (e.g. the International Certificate of Vaccination or Prophylaxis, known as the 'yellow card', which the Centre for

Disease Control and Prevention still urge people to take on relevant travels) and the CSCS is its digital component, which raises additional concerns around privacy and data protection.

The WHO [recommends](#) that, along with the digital implementation of 'smart vaccination certificates', the COVID-19 vaccination status should still be recorded through the paper-based International Certificate for Vaccination. Similarly, the [EU Digital Green Certificate](#) is meant to be available in both digital and paper format. It is not clear whether the CSCS will be available also in paper format. The Government should do so, providing a paper format with a QR code.

The Government should carefully consider the risk that a CSCS may be used for different or expanded purposes than originally planned, and data stored in the CSCS may be used more broadly than intended. Once personal data is collected it may, even unintentionally, be shared with third parties, and may be repurposed. Data protection and privacy are required under the [General Data Protection Regulation](#) so a centralised database would not be allowed.

To address privacy concerns, companies developing COVID-status apps and other commercial initiatives (see also Question 3 below) [suggest](#) they can ensure there is no connection between the source of a person's data and the entity requesting it - linking people 'securely with their smartphones using biometrics and some form of government-issued identity document'. Even if privacy-preserving technology can be developed, however, it is [to be expected](#) that data will be viewed by different actors – e.g. employers, police, private companies, health care staff, etc. -, who may have different levels of experience and responsibility in handling personal data. Both private actors and public authorities have not proved to be always trustworthy at keeping personal data private and not sharing it, especially for commercial interests. The Government needs to consider the implications of the linkage of people's COVID-status credentials to the various means of identification or verification, especially when this is done via digital means.

Wherever else it may be stored, CSCS data would be at least collected in people's GP records. The Government needs to ensure that those are not going to be in any way copied or shared and that every use of data is consensual, safe and transparent. The Government also needs to guarantee that once the CSCS infrastructure is put in place to 'confirm' people's COVID-status, other health data is not added to it - e.g. HIV status. In the UK, there is a long-standing common law duty of confidentiality in relation to personal medical information, which can be [summarised](#) as follows: that information provided in confidence should be treated as such and not divulged to third parties.

Further, the Government needs to consider and explain the longevity of the CSCS, as the risk is that once such requirements and related infrastructure are put in place, they will last

longer than the COVID-19 public health emergency. The risk, as Ada Lovelace [finds](#), is that a response to a time-bounded crisis may result in ‘normalising health status surveillance by creating long-term infrastructure’. Privacy organisations [fear](#) that ‘vaccine passports mean the future we are being offered bears more control, not more freedom’. The Government should consider developing CSCS tech solutions that allow people to have single-use apps or other tools, as creating long-lasting ethical technology or systems that will not store people’s data seem unlikely.

As [explained](#) by the Alan Turing Institute, privacy-enhancing technologies do offer an approach to preserve privacy. This should be done with privacy by design – i.e. with multi-disciplinary teams in the design of such technological interventions, rather than technology (computer scientists) alone.

Question 3 Are there any other comments you would like to make to inform the COVID-status certification review?

Private sector regulation

As noted above, the Government has already funded or otherwise supported the development of multiple commercial vaccine passports and COVID-status apps and other initiatives. It was [reported](#) in March that the Government has given at least £450,000 in grants to companies to develop such initiatives. For example, Verifiable Credentials, which has received government funding to develop vaccine passports, [is testing](#) an app to verify vaccine status and COVID-19 test results with dummy data at a cinema and with real data at a hospital, where it has replaced existing paper-based methods.

[**Public procurement of apps needs to be justified and accountable**](#), given the ethical duty to manage public finances wisely. For example, it is hard to evidence the benefits of recent NHS spending on contact tracing apps, albeit this may have seemed rational at the time. **Any award of a contract in this area to the private sector must be accompanied with a full procurement process, full transparency and a data protection and equality impact process.** We are no longer in an unforeseen emergency a year on and there is no reason to exempt procurement safeguards any more especially given public concern and lack of trust in this area.

The proliferation of private sector ‘passporting’ systems in relation to labour and international travel also needs attention. There is severe danger here of infringement of rights by private actors not subject to FOI or judicial review oversight. We suggest as in the Coronavirus Safeguards Bill that **a proportionality, transparency and legitimacy test be applied, and oversight be attainable by an appropriate tribunal or regulator.**

"No person may require the display of an immunity certificate for any other purpose, or as a condition of any activity, except where such requirement

- (a) is made publicly accessible
- (b) any relevant data controller has issued an appropriate policy document under DPA 2018
- (c) is in pursuit of the legitimate goal of diagnosis, containment, treatment, research into or reduction of coronavirus disease
- (d) is necessary and proportionate to the goal in (c) above
- (e) is limited in time to the minimum period necessary to achieve the goal in (c) above (3)

Any such requirement may be challenged by any person with interest to [a] relevant tribunal." [draft cl 6, slight editing]

There are ethical and business and human rights concerns in relation to the lack of regulation of commercial use of vaccine passports and other COVID-status initiatives. The Government should require companies developing to conduct proper human rights due diligence during the design and development, as required by the [UN Guiding Principles on business and human rights](#).

Public engagement

Without a public mandate national scale system with inherent privacy risks can easily fail, due to non-adherence or misuse. More public engagement is required to help guide the government as to the acceptability of using CSCS systems under different circumstances, for how long for, and so on. It will also help members of parliament to better understand the fair and appropriate boundaries of legislative powers. Ultimately the utility of such technologies has much to do with [trust](#) - that they are safe, proportionate, secure, free of bias, respect people's rights and - in the case of a pandemic, appropriately temporary. Open conversations with the public and the different communities likely to be most affected by these measures will be needed on an ongoing basis, [as threat levels change](#) (e.g. with new variants), the effects of the current vaccination programme are felt and the nature of the 'new normal' becomes evident.