

Call for evidence

Our response to the Covid status certification review

Details

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Background

1. The Equality and Human Rights Commission (the Commission) welcomes the opportunity to provide evidence to the Cabinet Office's review into Covid status certification. The Commission is a statutory body established under the Equality Act 2006. It operates independently to encourage equality and diversity, eliminate unlawful discrimination, and protect and promote human rights

Summary

2. The ongoing national programme to provide vaccinations against Covid-19 is an essential step in protecting the right to life and removing significant restrictions to our civil liberties. The Equality and Human Rights Commission supports its safe and rapid implementation.
3. Public debate is ongoing about the possibility for so-called 'vaccine passports', or Covid status certification, which would be required as formal proof that an individual has been vaccinated, or recently received a negative test, potentially in order to work, access services, take part in leisure activities such as visiting the pub or attending a concert, or for international travel.
4. Senior government figures have acknowledged that blanket application of such an approach would potentially be discriminatory, and that there are ethical and privacy concerns relating to mandating vaccinations or the use of Covid status certification. However, there is a risk of unlawful discrimination if decisions taken in this process disadvantage people with protected characteristics who have not received, or are notable to receive, the vaccine, unless they can be shown to be justified.
5. As we move towards re-opening society, equality and human rights standards can provide a clear and practical framework to help reassess what are reasonable restrictions and what are not, ensuring governments can navigate the delicate balance between protecting lives and safeguarding our vital freedoms and individual needs. Measures that complement or enhance our hard-won rights will maximise consent and compliance, and ultimately best safeguard public health.
6. Accordingly, we welcome the Cabinet Office's recognition of the need to consider key equality considerations associated with such a scheme. This mirrors the recent announcement by the World Health Organisation (WHO) that its Emergency Committee on Covid-19 'rapidly develop and disseminate the WHO policy position on the legal, ethical, scientific, and technological considerations related to requirements for proof of COVID-19 vaccination for international travellers, in accordance with relevant International Health Regulations provisions.¹

¹ Ada Lovelace Institute (March 2021) [International monitor: vaccine passports and Covid status apps](#)

7. There is also an opportunity for Britain to lead the way internationally on the importance of upholding human rights and equality standards within those debates, for example in discussion with WHO or in its role this year as Chair of the G7.
8. Our submission considers some of the key equality and human rights issues emerging not only in relation to Covid status certification, but also around the emerging discussions on mandatory vaccination.

Our response

9. It is necessary that protecting the right to life has been prioritised throughout the pandemic, particularly for those in the most vulnerable situations. However, the restrictions to everyday life have had significant equality and human rights implications for all of us.
10. As Britain begins to move cautiously towards returning to normal life, focus has turned to how to ease restrictions in a way that reduces the risk of transmission to acceptable levels and maintains high public health standards.
11. The UK Government's nationwide vaccination scheme should make a significant difference to all our lives, particularly to older people, disabled people, and other vulnerable groups, who have faced the most serious risks over the past year. It offers hope that we will be able to reopen society quickly and safely, so that everyone can go back to living freely and independently. The evidence suggests that the vast majority of people are willing to be vaccinated, to supply evidence of vaccination or negative tests, and to continue to observe social distancing if that means current restrictions can be relaxed.
12. In principle, Covid status certification could be a proportionate means of safely opening up society. The significant curtailment of other fundamental, hard-won rights and freedoms such as the right to a private and family life, to freedom of assembly, and to an education has in many instances prohibited people from being with their loved ones at the end of their lives, has caused substantial disruption to young people's education, and had significant corollary impacts on people's health, wellbeing and livelihoods.
13. But there are concerns about potential for discrimination or for infringement of civil liberties in the use of certification status to travel, go to work, enjoy social activities and access essential services, and the creation of a two-tier society whereby only certain groups are able to fully enjoy their rights. These equality and human rights considerations must be considered in detail by Government, with clear steps taken to address any anticipated negative impacts.
14. A proportionate approach requires consideration of where the use of such standards may be required, based on the level of risk and impact of not being able to access the service, for example. Decision-making should be transparent, with evidence and risk assessment properly documented, and any decisions clearly time bound and subject to regular review. It should be fully informed by equality and human rights standards.

15. Any proposed scheme must factor in the need for exemptions for particular groups, and be informed by detailed assessments on how effective the vaccine is in terms of reducing transmission rates, reducing the severity of symptoms and risk of severe illness or mortality.
16. Finally, any and all measures for domestic or international schemes require strict parliamentary scrutiny to properly consider the collateral impact on certain groups.

The equality and human rights framework

17. Equality and human rights legislation sets out the government and service providers' obligations to protect people's lives, dignity, and freedoms. It provides a practical framework to navigate decisions about avoiding discrimination and balancing our full range of rights, helping to assess the impact of restrictions and whether they are proportionate and appropriate to individual needs.

The Equality Act 2010

18. The Equality Act 2010 ('the Equality Act') protects individuals from discrimination² and promotes a fairer and more equal society. All duty-bearers with obligations under the Equality Act must therefore continue to act lawfully, taking necessary steps to prevent unlawful discrimination and deliver services with users' needs in mind.

Preventing discrimination

19. The Equality Act prohibits both direct discrimination (where someone is treated differently because of a protected characteristic) and indirect discrimination (where a policy applies 'neutrally' to all groups but puts people with a protected characteristic at a particular disadvantage). Direct discrimination (except age discrimination³) cannot be justified and is always unlawful unless a specific exception applies.⁴ Indirect discrimination may be justified, and therefore lawful, if it is a proportionate means of achieving a legitimate aim.⁵

² The Equality Act protects people from discrimination on the basis of nine protected characteristics: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. Equality and Human Rights Commission (8 January 2019), '[Protected characteristics](#)'

³ Age discrimination can be lawful in some circumstances. There are exemptions in the Equality Act 2010 which permit service providers to use age limits when deciding what services to offer, for example refusing to sell alcohol to under 18s, or offering over 60s concessions to leisure facilities. See Equality and Human Rights Commission pages on [Age discrimination](#) for more information.

⁴ Equality and Human Rights Commission (September 2014), '[Equality Act 2010: summary guidance on services, public functions and associations](#)'.

⁵ Equality and Human Rights Commission (November 2019), '[What is direct and indirect discrimination?](#)'.

20. The Equality Act also prohibits discrimination arising from disability (where a disabled person is treated unfavourably – rather than less favourably than another – or put at a disadvantage because of something that relates to their disability). Again discrimination arising from disability is only lawful if it is a proportionate means of achieving a legitimate aim.⁶
21. Employers, service providers and those carrying out public functions have a duty to make reasonable adjustments, such as changing a policy or the way something is done, so that as far as reasonably practicable disabled people can remain in employment or access services as easily as non-disabled people.⁷
22. In addition, under section 60 of the Equality Act 2010, it is unlawful for an employer to ask a job applicant health related questions before making a job offer, unless where one of a limited number of exceptions applies.

⁶ Equality and Human Rights Commission (February 2020), '[Disability Discrimination](#)'.

⁷ Ibid.

Public Sector Equality Duty

23. The PSED seeks to mainstream equality in public authorities' day-to-day decision-making⁸ by requiring them to have due regard to the need to (a) eliminate unlawful discrimination, (b) advance equality of opportunity and (c) foster good relations between those who share protected characteristics and those who do not.⁹ In the specific context of implementing Covid status certification, the PSED would apply to public authorities (such as Government departments, local authorities and NHS bodies) and those who exercise public functions (for example should the UK Government contract out provision of a Covid status certification service to a private sector company).¹⁰
24. If the UK Government proceeds with some form of Covid status certification, then it must ensure it complies with the PSED at all stages. This includes taking steps to identify and address any negative impact on people with protected characteristics, and ensuring that the approach it takes does not directly or indirectly discriminate. For example, having a digital-only approach may indirectly discriminate against some disabled or older people who don't have or are unable to use digital technology.

⁸ Equality and Human Rights Commission (April 2020), '[Public Sector Equality Duty](#)'

⁹ [Equality Act 2010](#), s.149. Having due regard to advancing equality involves: removing or minimising disadvantages suffered by people due to their protected characteristics; taking steps to meet the needs of people from protected groups where these are different from the needs of other people, including taking account of disability; and encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.⁹ Fostering good relations means tackling prejudice and promoting understanding between people from different groups. Compliance with the duty may involve treating some people more favourably than others.

¹⁰ More information is available in our technical guidance on the PSED. Equality and Human Rights Commission (February 2019), '[Equality Act technical guidance](#)'.

Human Rights Act 1998

25. The Human Rights Act 1998 (HRA) sets out the fundamental rights and freedoms to which everyone in Britain is entitled, incorporating the European Convention on Human Rights into UK domestic law. Public bodies and other bodies carrying out public functions¹¹ must not act in a way that is incompatible with the rights set out in the HRA, whether they are involved in designing policies and procedures or directly delivering services.
26. Human rights are universal, and one way of expressing common British values of tolerance, understanding and respect. While some rights are absolute and others are qualified or can be limited, they shouldn't be placed in a hierarchy. They do sometimes overlap, however, or exist in tension with each other, and in some instances certain rights must defer to others.
27. The state is obliged to protect our full range of human rights wherever possible. Below, we set out some of the specific human rights implications for this issue.

Article 2: the right to life

28. The right to life is 'non-derogable', which means it must be maintained even in times of emergency.¹² Public authorities have positive obligations to protect life, including a duty to prevent avoidable deaths.¹³ They should also consider the right to life when making decisions that could put people in danger or affect their life expectancy.¹⁴

¹¹ Public functions are defined as 'functions of a public nature'. Equality and Human Rights Commission (Jan 2011), '[Services, Public functions and Associations: Statutory Code of Practice](#)'.

¹² Council of Europe (April 2020), '[Respecting democracy, rule of law and human rights in the framework of the COVID-19 sanitary crisis: a toolkit for member states](#)', pp. 4-5.

¹³ Equality and Human Rights Commission (15 November 2018), '[Article 2: right to life](#)'.

¹⁴ Ibid.

Article 8: right to a private and family life

29. Article 8 protects the right to respect for a private and family life, home and correspondence.¹⁵ It includes a right to physical and psychological integrity¹⁶ and to create and maintain social relationships.¹⁷ Public authorities can interfere with this right to pursue a legitimate aim, including to protect health, but any interference must be lawful, necessary and proportionate.¹⁸
30. One particular area of challenge is, for example, care home visits. Not seeing family and friends has had potentially serious implications for mental and physical health, particularly over a prolonged period¹⁹, and restrictions on visits and requirements to supervise visits are likely to interfere with people's Article 8 right to family and private life. While these restrictions have been introduced to help protect the lives and health of carehome residents, care providers must apply access policies flexibly and consider the risks and benefits to each individual, taking steps to facilitate safe visits regardless of the vaccination status of family members, including through effective testing for visitors and provision of PPE.

¹⁵ [European Convention on Human Rights](#), Article 8 (1).

¹⁶ See European Court of Human Rights: *Osman v UK* (Application no. 23452/94), paras. 128-130; *Bevacqua and S. v Bulgaria* (Application No. 71127/01), para 65; *Sandra Janković v Croatia* (Application No. 38478/05), para 45; *A v Croatia* (Application No. 55164/08), para 60; *Söderman v Sweden* [GC] (Application No. 5786/08), para 80.

¹⁷ See European Court of Human Rights: *X. v Iceland* (Application No. 6825/74), pp. 86-87; *McFeeley et al. v UK* (Application No. 8317/78) para 82.

¹⁸ [European Convention on Human Rights](#), Article 8 (2). The European Court of Human Rights has held for any interference to be 'necessary' it must correspond to a pressing social need and be proportionate in pursuit of a legitimate aim, See *The Sunday Times v UK* (Application No. 6538/74), para 59.

¹⁹ *Age UK* (22 September 2020), ['Visiting in care homes: where now?'](#).

Obligations under international human rights law

31. The UK Government is signatory to a number of international human rights treaties, which are binding under international law. These treaties are not directly enforceable in the UK courts, but by ratifying them the Government has agreed that their requirements will be reflected in laws, policy and guidance. They can also be used to interpret the rights protected under the HRA.
32. Most pertinent, under Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) the Government is required to recognise everyone's right to 'the highest attainable standard of physical and mental health', including by treating and controlling epidemic diseases.²⁰

²⁰ [International Covenant on Economic, Social and Cultural Rights](#), Article 12.

Vaccinations and protected characteristics

33. In fulfilling the right to health, the UN Committee on Economic, Social and Cultural Rights (CESCR) has emphasised the importance of understanding both freedoms and entitlements – such as the right to be free from non-consensual medical treatment, and the entitlement to a system of health protection that provides equality of opportunity to enjoy the highest attainable level of health.²¹ It has also highlighted the right to timely and appropriate healthcare²² and the need to ensure that healthcare facilities, goods and services are available in sufficient quantity, of good quality, accessible to all without discrimination and sensitive to different cultures.²³
34. Any certification scheme would probably rely on proof of a recent negative Covid-19 test, or evidence that the individual has been vaccinated. While the evidence shows that most people are willing to do both, there are particular challenges for certain groups which may lead to any mandatory vaccination or Covid status certification being discriminatory.

²¹ Ibid., para 8. Para 19 also emphasises ‘equality of access to health care and health services’. [International Covenant on Economic, Social and Cultural Rights](#), Article 2, stipulates that State Parties ‘undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind’.

²² Committee on Economic, Social and Cultural Rights (2000), [CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health \(Art. 12\)](#), para 11.

²³ Ibid. paras. 12 (a), (b), (c) and (d).

35. There are very few people who are genuinely unable to be vaccinated.²⁴ But there are certain groups who have concerns about vaccination, as noted by the UK Government's Scientific Advisory Group for Emergencies (SAGE). These include concerns around the safety of vaccines, and the speed at which they were developed; a reluctance to be vaccinated because of a lack of support available should individuals be required to take time off due to side effects; reservations based on religion or belief; and, for young women, concerns about the impact of the vaccine on future fertility. All this has been compounded by the rapid spread of misinformation on social media. These concerns need to be addressed sensitively.
36. Take-up of the coronavirus vaccine is lower amongst people from certain ethnic minority backgrounds, migrants, and people from lower socio-economic backgrounds. Some of these groups have also been hit hardest by the pandemic.²⁵ While the Government has stated that the vaccine is available to all, if Covid status certification requirements become widespread the Government risks further excluding these groups from access to essential services and employment.

²⁴ Current Government advice is that pregnant women should not routinely be given any of the Covid-19 vaccinations. However it notes that the Joint Council on Vaccination and Immunisation recognises that vaccination may benefit some pregnant women, particularly those who are at a very high risk of contracting the virus, or who have clinical conditions that put them at high risk of serious complications from the virus. UK Government (March 2021) [COVID-19 vaccination: a guide for all women of childbearing age, pregnant or breastfeeding](#).

²⁵ ONS (March 2021) [Vaccine hesitancy by socio-economic characteristics](#)

37. We welcome preliminary approaches to address this through targeted, local outreach and engagement to build confidence and counter misinformation in order to increase take-up rates amongst these communities²⁶. Important steps should also continue to be taken to ensure vaccination centres and information are accessible to all²⁷ in line with public bodies' obligations under the Public Sector Equality Duty.²⁸

²⁶ SAGE (January 2021) [Factors influencing COVID-19 vaccine uptake among minority ethnic groups](#)

²⁷ NHS England (January 2021) [COVID-19 Vaccination Centres: operating framework](#)

²⁸ SAGE (January 2021) [Factors influencing COVID-19 vaccine uptake among minority ethnic groups](#)

‘No Jab No Job’: mandatory coronavirus vaccination in employment

38. Recent reporting has suggested that some employers may be planning to require workers to be vaccinated against Covid-19 in order to work²⁹, including that the UK Government is planning to implement mandatory vaccination of care home workers in England³⁰. This raises questions as to whether it is lawful for such a requirement to be imposed.
39. Employers are right to want to protect their staff and their customers, and more generally to uphold public health. However, Government and employers must ensure that in doing so they continue to meet their obligations under the Equality Act 2010.
40. A blanket policy requiring workers to be vaccinated, applied inflexibly, is likely to be unlawful: there are a small number of people who are simply not able to be vaccinated. So policies need to reflect the latest guidance on who can and cannot receive the vaccine. Currently this guidance says only that those with severe allergies to the vaccine’s ingredients should not have the vaccine, and pregnant women cannot routinely be offered it.
41. Similarly, the implementation of any policy would need to reflect the status of the vaccine roll-out programme and ensure that it does not discriminate against younger people, who are unlikely to be vaccinated until later in the process. Again proportionality and flexibility will be key.

²⁹ Guardian (January 2021) [Pimlico Plumbers to introduce 'no jab, no job' work contracts](#)

³⁰ Politico (March 2021) [UK pushes ahead with mandatory vaccines for care home staff](#)

Enquiries about health

42. As noted above, under the Equality Act 2010 it is unlawful for an employer to ask a job applicant health related questions before making a job offer, unless where one of a limited number of exceptions applies. The EHRC can take enforcement action against an employer who breached this provision.
43. A question in an application form or an interview, for example, as to whether a worker has had the Covid-19 vaccine is likely to be considered a health related question and therefore should only be asked if one of the relevant exceptions applies. The circumstances in which health related questions may be asked include, for example, where it is necessary to determine if a job applicant requires any reasonable adjustments, or to find out whether a job applicant will be able to carry out an intrinsic part of the job.

Prohibition on discriminatory adverts

44. Under the Equality Act 2010 an employer must also ensure that the wording of job adverts does not indirectly discriminate against those with protected characteristics. Therefore stating that job applicants require a Covid-19 vaccination may indirectly discriminate against those with who are not able to be vaccinated, for example pregnant women, as pregnancy and maternity is a protected characteristic under the Equality Act.
45. The Commission has so far not encountered any cases regarding breaches of the Equality Act in relation to mandatory vaccination, but will continue to monitor developments.

Mandating vaccinations for care home workers in England

46. Mandatory vaccination would be a significant departure from current public health policy. The Public Health Act 1984 prohibits the government making any regulations that require medical treatment, including vaccines, and there is limited evidence of mandatory vaccines in the workplace, even in healthcare. Some NHS Trusts do require hepatitis B vaccines for those working in high-risk environments.
47. There are concerns that mandating Covid-19 vaccinations could lead to care home employers placing contractual requirements on workers to have other vaccinations. Seasonal flu, for example, is also responsible for thousands of deaths each year, and while the current immunisation programme is targeted at certain priority groups, including frontline health and social care workers, take up of the flu vaccine is sub-optimal and, as with the Covid-19 vaccines, varies by ethnicity.
48. Any approach employers take around requiring mandatory vaccination as a condition of employment must ensure that it can be objectively justified, and is applied in a proportionate manner – in this case, likely to be based on the greater risk of illness and death faced by care home residents. Employers should ensure that financial support or paid time off is in place for workers requiring time off after vaccination, consider adjusting an individual's duties to minimize risk, and any mandatory approach should also be a temporary measure to support the easing of restrictions.

Mandatory vaccination and access to services

49. Public and private service providers also have obligations under the Equality Act 2010 to prevent unlawful discrimination. Many of the considerations relating to employment are also relevant when accessing services, and the Commission urges caution on applying a blanket rule requiring evidence of vaccination as a condition of entry or to access goods and services, whether as part of a Government-backed scheme or an individual policy requiring evidence of Covid-19 status.
50. The EHRC has produced a range of guidance for service providers to help them understand their obligations under equality law, including in relation to non-discrimination during the pandemic.³¹

³¹ EHRC (September 2020) [Retailers' legal responsibility to disabled customers](#)

Conclusion

51. In principle, we are supportive of schemes that will help get the economy and life back to normal by removing the restrictions on our rights implemented over the past year. However, any proposals need to ensure that they comply with Public Sector Equality Duty, the Human Rights Act and international human rights obligations – including by ensuring that the positive and negative impacts of any programme are measured and, where necessary, mitigated.
52. Our essential position is that:
 - a. Any implementation should be proportionate and measured, and rooted in science and the law. They must have further review and end points, be flexible to specific needs, and remain open to challenge;
 - b. Clear guidance should be provided to employers and service providers, referencing equality and human rights standards to ensure consistency and compliance while limiting the potential for discrimination, and
 - c. Hard to reach groups, or those who evidence suggests are less likely to take the vaccine, should be prioritised for engagement throughout. Particular attention should be given to those groups who are unable to have the vaccine because of a protected characteristic, for example pregnant women, as any mandatory requirement for vaccination or the implementation of Covid status certification may amount to indirect discrimination, unless the requirement can be objectively justified.