



**The new night out?
Keys, wallet, Covid 19 status certification.....**

“An insight into Covid status certification”

By Jenny Burgess

On 12 June 2021, the Public Administration and Constitutional Affairs Committee (“the Committee”) published its report into Covid 19 status certification. The report was drafted after the Committee had heard evidence from a wide-range of experts and interested parties, including medical experts, representatives from the sporting, hospitality and performing arts professions and the director of Big Brother Watch. The Government was represented by the Rt Hon Michael Gove MP who is leading the review into Covid passports and other aspects of status certification.

What is Covid status certification?

Covid status certification is a system whereby an individual is able to demonstrate that they have been vaccinated or have recently tested negative for Covid 19 and are therefore “safe”, in that they do not have the virus and cannot pass it on or have a dramatically lower chance of doing so.

There is already a model for this up and running in Israel’s Green Pass system. Also there have been domestic trials in the UK of such a system requiring attendees at certain large

events to show a negative test result or proof of double vaccination before being allowed entry. The FA cup final and the Wimbledon tennis championship are two notable examples.

The primary questions before the Committee were (a) was there a scientific case for Covid Status Certification; (b) if there was, to what aspects of life should it apply; and (c) was it a proportionate response to the risk posed by Covid 19 bearing in mind that it would inevitably be discriminatory against certain individuals.

The report does not begin well for the Government, setting out the conflicting statements delivered by Government officials and ministers on the topic of Covid passports over the previous months. This includes three apparent U-turns by key ministers over the space of no more than a fortnight.

Michael Gove acknowledged that in spite of this apparent conflict of opinion between senior ministers, the Government had in fact pre-empted the conclusion of its review by including a vaccination status function in its general NHS app for the purpose of international travel. As for any domestic introduction of certification, he stated that this would be England-wide rather than regional but that for the rest of the UK the decision would rest with the devolved Governments.

When would Covid status certification apply?

Mr Gove was unable to provide the Committee with any clear detail of what venues, events or locations would be included within the system but he did rule out premises with “essential” use, e.g. Jobcentres, libraries, essential retail, buses or the Underground. He also stated that the Prime Minister had already ruled out smaller venues such as standard bars and restaurants. Two venues which he did identify as being possible candidates for certification were nightclubs and large sporting events such as premier league football matches.

Mr Gove was unable to give any kind of estimate as to the cost of implementing the system, stating only that it was a cost that businesses and individuals would be willing to bear if it meant ensuring that venues were full. Nor was he able to provide the Committee

with the details of any modelling of different scenarios which had been undertaken to assess the benefits of certification.

Is there scientific support for Covid status certification?

The Committee heard evidence as to the effectiveness of the vaccination programme with caveats from experts as to the effectiveness of the vaccine against the new Indian or Delta variant. The Committee was concerned about the reliability of a certification system based to any degree on testing, asking how “safe” any un-vaccinated individual might be 2, 3 or 4 days after a negative test. Professor Peter Openshaw, Professor of Experimental Medicine at Imperial College London, gave an example of getting on a plane with someone who had taken a negative lateral flow test just before boarding, stating that this would “give me some reassurance that at the moment they are probably not going to infect me” but that he would “still wear a mask and wash my hands”.

The conclusion that the Committee reached was that due to the significant areas of scientific uncertainty as regards transmission, effectiveness of the vaccines, implications of new variants and accuracy of testing, the Government had so far failed to make the scientific case for the introduction of a Covid status certification system.

The Committee also concluded that the locations and venues envisaged by the Government as potentially subject to any certification system were a mixture of both “high-risk” venues such as nightclubs (densely-packed, noisy and poorly ventilated) and “lower-risk” venues such as football stadiums, thereby giving the impression that decisions were being made arbitrarily and with little or no reference to the science.

The views of business

The Committee heard evidence from Bill Bush, Director of Policy at the Premier League, Emma McClarkin of the Beer and Pub Association and theatre producer Richard Jordan.

Whilst all three agreed that an end to social distancing was imperative to ensure the recovery and prosperity of their respective industries, their views on Covid status certification varied. In short, whilst Mr Bush and Mr Jordan were tentatively for what was

described as the “lesser of two evils”, Ms McClarkin expressed a clear position against certification. Both Mr Jordan and Ms McClarkin stated that certification would severely impact on the spontaneity which was a big part of both going to the theatre and going to the pub. All three expressed concerns about the additional cost that would be incurred by businesses if certification was imposed on them, Ms McClarkin stated that most pubs cannot afford an additional member of staff to police the entry point.

The conclusion of the Committee on this topic was clear:

“Given the Government’s assessment that the case for certificates is “finely balanced”, the lack of a clear scientific case and the extra burdens and costs that it would place on the businesses and people who it would affect directly, it would be detrimental to the UK’s cultural, social and economic interests for a certificate system to be introduced in any respect domestically”.

Discrimination and coercion?

The Committee heard evidence from a number of civil liberties groups and others on the moral, ethical and legal concerns around introducing what was described by Liberty as an “immunity passport”. Silkie Carlo, Director of Big Brother Watch, highlighted the issues that would arise around equality and discrimination, stating that many people for legitimate reasons are unable or find it difficult to access or choose not to get the vaccine. Some of those reasons engage protected characteristics under the Equality Act 2010, including age, disability, pregnancy, religion and belief.

The Committee noted that those concerns around discrimination are supported by the data. The Office for National Statistics shows, for example, vaccination rates for people over 50 in England being highest for those describing themselves as White British (93.7%), Indian (90.9%) and Bangladeshi (86.9%), and lowest for Black Caribbean (66.8%), Black African (71.2%) and Pakistani (78.4%). Additionally, while people identifying as Christian, Hindu, Sikh, Jewish and no religion all have vaccination rates above 90%, it is lower for those identifying as Buddhist (83.3%), other religions (81.4%), and Muslim (78.8%). The ONS data also show that vaccination rates were lower according to areas of deprivation, with the vaccination rate in the most deprived areas being 87.8% compared to 94.5% in the least deprived areas.

Coupled with this is a concern that a system of Covid status certification would essentially coerce people into having the vaccine by leaving them with no real choice as to whether to be vaccinated or not.

Mr Gove told the Committee that the concerns around equality and discrimination were something the Government was very much aware of. He said that the lower uptake of vaccination within some communities was why any kind of system would allow for testing as well as vaccination. He stated that anything that the Government put forward would be fair, respect people's rights and would command public confidence and assent. He said that a Equalities Impact Assessment would be produced alongside any legislation introducing such as system.

The Committee, however, concluded that a Covid status certification system was by its very nature discriminatory and that there is no justification for engaging in what is likely to be a significant infringement of individual rights by introducing a Covid-status certification system, particularly in light of the weak scientific case for introduction of the same.

Data protection issues and the danger of ID cards by the back door

A number of Data Protection issues were raised in relation to the proposed system.

Professor Jonathan Wolff, Alfred Landecker Professor of Values and Public Policy at the University of Oxford stated, "I am not worried so much about whether a pub knows whether I have had a vaccine, but what it has to do to authenticate my certificate may mean that a database has to be created, which itself could be liable to hacking or some other intrusion."

Silkie Carlo believed that a Covid status certificates would go further than ID cards in terms of intrusion and invasiveness.

Mr Gove accepted that there has always be scepticism in the UK towards a form of national registration simply for operating as a citizen, moving around and so on. He denied that the Government intended to use Covid-status certification as a Trojan horse for anything like that. He stated that the Government was committed to protecting people's data and to guarding against cyber attacks but went on to say that even with the

strongest data protection requirements, there will still be “hostile actors” who can disrupt the operation of public services.

The Committee was provided with a Data Protection Impact Assessment for the NHS app. This is not a document which is currently published and Mr Gove asked that it not be published. DPIAs for the NHS Covid-19 app, on the other hand, are publicly available.

The Committee concluded that any Covid status certification system would be fraught with data protection and security risks and that whilst it may not be the Government’s intention for the potential introduction of Covid-status certificates to be a route to introducing ID cards into the UK, there are clear similarities and legitimate concerns that this could occur.

So, has the Government made out the case for Covid status certification?

The number of uncertainties that remain around any Covid status certification system, the absence of a convincing scientific case, Mr Gove’s own admission that the case is “finely balanced” and a plethora of other business, ethical and privacy concerns led the Committee to conclude that the Government had failed to make a case for any kind of domestic Covid status certification system.

The Committee considered that the introduction of the Covid-status certificate function on the NHS app for international travel, without notifying and consulting Parliament, could be construed as contempt for Parliament and for the Committee. It urged the Government to ensure that the very minimum of citizens’ personal data is shared with foreign governments through the app.

The Bingham Centre for the Rule of Law argued that it was imperative that any Covid status certification system must be introduced through primary legislation. From a Rule of Law perspective, it was argued, secondary legislation would not provide Parliament with a sufficient opportunity to review, debate or amend the Government’s proposals. Secondary legislation cannot be amended by Parliament except in exceptionally rare circumstances which means that when scrutinising statutory instruments, the usual choice for MPs and Peers is to either approve or reject the instrument in its entirety. As a result, 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. In addition, it was argued, Parliament spends far less time debating secondary legislation than it spends debating primary legislation

The Committee agreed with this view, stating that in light of the impact any Covid status certification would have on businesses and on individuals' rights, secondary legislation would not fit with the constitutional significance of the legislation. It would also deprive Parliament of the opportunity to make amendments.

The Government will issue its response to the report on 12 August 2021. Watch this space.