

Response to the Ada Lovelace Institute Call for Public Evidence:

Vaccine Passports and COVID Status Apps

Submitted by

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1. Horizon¹ is a Research Institute centred at The University of Nottingham and a Research Hub within the UKRI Digital Economy programme². Horizon brings together researchers from a broad range of disciplines to investigate the opportunities and challenges arising from the increased use of digital technology in our everyday lives. Prof. McAuley is Director of Horizon, Deputy Director of the UKRI Trustworthy Autonomous Systems (TAS) Hub³, Principal Investigator of the EPSRC-funded DADA⁴ (Defence Against Dark Artefacts) project, addressing smart home IoT network security, and its acceptability and usability issues, the ESRC-funded CaSMa⁵ (Citizen-centric approaches to Social Media analysis) project to promote ways for individuals to control their data and online privacy, and the EPSRC-funded UnBias⁶ (Emancipating Users Against Algorithmic Biases for a Trusted Digital Economy) project for raising user awareness and agency when using algorithmic services. Prof. Hyde is Professor of Law, Regulation and Governance, Deputy Head of the UoN School of Law (Education and Student Experience), Co-Investigator of the TAS Hub, Academic Director of the University's Pathways to Law project, member of the leadership team for the Nottingham's flagship Future Foods Research Beacon,⁷ and a non-practising solicitor. Dr. Chen is Researcher Fellow of Horizon, currently working on the DADA project. We are happy to be contacted for further evidence and for our response to be published in full.
2. We share Ada's recognition of the importance in investigating the risks and benefits of private- and public-sector vaccine passports and COVID status apps, and would like to contribute to the research with our evidence on the potential implications of proposals for vaccine passports (and similar

¹ <http://www.horizon.ac.uk>

² <https://epsrc.ukri.org/research/ourportfolio/themes/digitaleconomy/>

³ <https://www.tas.ac.uk/>

⁴ <https://www.horizon.ac.uk/project/defence-against-dark-artefacts/>

⁵ <http://casma.wp.horizon.ac.uk>

⁶ <http://unbias.wp.horizon.ac.uk>

⁷ <https://www.nottingham.ac.uk/research/beacons-of-excellence/future-food/index.aspx>

COVID status apps designed for the same purpose), especially from a data protection and human rights perspective.

Facts

3. Before explaining the legal considerations around the initiatives of vaccine passports, we would like to set out a few factual grounds based on which our analysis is conducted:
4. **There is no sufficient evidence of the vaccines preventing transmission.** Existing data about the efficacy of the approved vaccines are judged by how much they can stop people from developing symptoms, which is indeed an important aspect of protecting the public. However, there is not yet sufficient data to show that the vaccines can effectively prevent people from getting infected – or from passing the virus further onto others.⁸ Equally, there is no evidence of the vaccines *not* preventing transmission.⁹ In other words, the vaccines’ efficacy in stopping the spread of the virus is scientifically neither proved nor disproved.
5. **Not everyone is advised to take the vaccine.** Some groups of the population may not be able to be vaccinated due to medical reasons, such as history of serious allergic reactions.¹⁰ JCVI also advises against the routine use of the vaccines for pregnant women and children under 16.¹¹
6. **Currently no vaccines offered in the UK are mandatory.** Unlike some other countries, the vaccines rolled out through the national immunisation programme in the UK are not mandatory.¹² There has been a long-standing debate – predating the current pandemic – whether the UK should introduce mandatory vaccination,¹³ but evidence is lacking on how effective this strategy would be.¹⁴
7. **Some foreign governments are considering plans for vaccine passports for international travel.** Estonia, for example, no longer requires travellers from outside the country to quarantine if they can show proof of vaccination.¹⁵ Ada’s international monitor project compiles such updates.¹⁶

Data protection considerations

8. The information about a person’s vaccination status is protected as sensitive data under Article 9 GDPR (“data concerning health”). The collection and further use of such data should therefore be justified with one of the exemptions provided for by Article 9(2). One of the exemptions is the necessity “for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health”. Whether this can be reasonably claimed by the government or a private organisation, however, would depend on the evidence that those who have been

⁸ <https://www.bbc.com/future/article/20210203-why-vaccinated-people-may-still-be-able-to-spread-covid-19>

⁹ <https://www.reuters.com/article/uk-factcheck-transmission-idUSKBN29N1UH>

¹⁰ <https://www.nhs.uk/conditions/coronavirus-covid-19/coronavirus-vaccination/coronavirus-vaccine/>

¹¹ <https://www.gov.uk/government/publications/priority-groups-for-coronavirus-covid-19-vaccination-advice-from-the-jcvi-30-december-2020/joint-committee-on-vaccination-and-immunisation-advice-on-priority-groups-for-covid-19-vaccination-30-december-2020>

¹² <https://commonslibrary.parliament.uk/research-briefings/cbp-9076/>

¹³ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(13\)60907-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(13)60907-1/fulltext)

¹⁴ <https://commonslibrary.parliament.uk/research-briefings/cbp-9076/>

¹⁵ <https://www.gov.uk/foreign-travel-advice/estonia/entry-requirements>

¹⁶ <https://www.adalovelaceinstitute.org/project/international-monitor-vaccine-passports-covid-status-apps/>

vaccinated indeed pose a lower threat to public health, which, as mentioned above, is unclear at the moment.

9. It should also be pointed out that the introduction of a vaccine passport programme would almost certainly trigger a data protection impact assessment (DPIA), since it falls within the scenario specified in Article 35(3)(b): “processing on a large scale of special categories of data referred to in Article 9(1) [i.e. sensitive data]”.

Right to life (Article 2 ECHR) and right to respect for private and family life (Article 8 ECHR)

10. If further evidence reveals that the vaccine passport’s role in controlling the spread of the virus is limited, those who as a result have become infected, and then developed serious or even fatal illness may have their Article 2 or Article 8 right violated. They might have taken decisions that have put them at risk, based on the unverified promise of the state-run vaccine passport that they themselves or those they are in contact with are immune from the virus. In *Brincat and Others v. Malta*, the Court ruled that if a government knowingly failed to take measures to protect workers from workplace hazards, there would be a violation of the right to life (if the worker died from the hazard) or the right to respect for private and family life (if the worker developed a serious disease). The health risks associated with the vaccine passport, in particular for workers in the hospitality, public service or education sectors, should be carefully considered as a matter of human rights.

Prohibition of discrimination (Article 14 ECHR)

11. A vaccine passport may also cause discriminatory effects, especially for individuals who are medically unable to take the vaccine or who have legitimate concerns over the side effects. Denial of access to public or private services or the workplace based on the fact that someone has not been vaccinated can have disastrous ramifications for the person. Some businesses are already planning to exclude applicants or discipline staff who have not been vaccinated.¹⁷ Setting aside the specific considerations under employment law, such practices may also raise human rights concerns. Unjustified differentiated treatment, especially to vulnerable groups who suffer from prejudice and stigmatisation, is a violation of Article 14 in conjunction of Article 8, as the Court held in *I.B. v. Greece*. This applies not just to discrimination directly imposed by the state, but also its failure to protect individuals from such discrimination performed by private entities.¹⁸
12. There are also pending cases regarding the legitimacy of compulsory vaccination schemes with regard to, among others, the right to education (Article 2, Protocol No. 1).¹⁹
13. The long-term socio-economic effects of the discrimination caused by the vaccine passport scheme may come as another serious concern. Research conducted prior to the current pandemic has pointed out that penalising those who fail to take up immunisations could widen inequalities, because compulsory vaccination does not help those who have genuine difficulties accessing health

¹⁷ <https://www.itv.com/news/2021-02-17/businesses-are-seeking-no-jab-no-job-contracts-to-force-employees-to-get-vaccines-what-the-law-says>

¹⁸ Paras 82-83, *I.B. v. Greece*

¹⁹ *Vavříčka v. Czech Republic* (no. 47621/13), *Novotná v. Czech Republic* (no. 3867/14), *Horných v. Czech Republic* (no. 73094/14), *Brožík v. Czech Republic* (no. 19306/15), *Dubský v. Czech Republic* (no. 19298/15) and *Roleček v. the Czech Republic* (no. 43883/15)

services, and would further entrench their distrust in the vaccines.²⁰ Marginalised groups, such as those who are homeless, digitally left behind, with limited proficiency or refugee status, may suffer from the inability to use a digital vaccine passport.

Freedom of movement (Article 2, Protocol No. 4, Article 12 ICCPR)

14. Although the UK has not yet ratified Protocol No. 4 of the ECHR, it has an international obligation to ensure a similar freedom under ICCPR, which covers the right to leave a country. The ECtHR jurisprudence on this right (in particular, see *Battista v. Italy*) considers a state's unjustified refusal to issue a passport as a violation of the freedom of movement. While a vaccine passport is not entirely comparable to a passport, they serve a similar purpose of facilitating citizens to travel across border if these travel documents are required by foreign authorities. On this basis, if certain foreign countries have indeed implemented the plan to require travellers from the UK to present a proof of vaccination, the government may have a legitimate ground to introduce a standardised document *solely for this purpose* and only on request by the traveller. However, the government should also take all necessary steps to make sure those who are unable to take the vaccine for medical reasons are not discriminated against at the border. In addition, the government should carefully consider how to avoid the document being abused to restrict domestic travels or create horizontal discriminatory effects (e.g. employers requiring staff to present one). The UK government should also work with foreign governments and international organisations to with a view to adopting alternative coordinated measures that prove more effective, and less discriminatory.

²⁰ [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(13\)60907-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(13)60907-1/fulltext)