

COVID-19 Vaccine Certification Scheme

Briefing for MSPs

8 September 2021

The Scottish Human Rights Commission was established by the Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the National Human Rights Institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

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1. Introduction

This briefing on COVID-19 Vaccine Certification (“vaccine passports”) has been prepared by the Scottish Human Rights Commission for MSPs, in advance of a debate in the Scottish Parliament on Thursday 9 September (motion S6M-01102).

The Commission understands MSPs will debate a Scottish Government proposal to introduce such a scheme for entry to specified venues and large events, including nightclubs, music festivals and some football grounds. In this briefing, the Commission highlights some of the key human rights considerations, which we hope will be of assistance in the debate.

2. The Proposal

The proposal was announced on [1st September](#) and from 3rd September people in Scotland were able to download a copy of their vaccine certificate for use in paper or electronic form.

The Commission welcomes the First Minister’s clear confirmation that proof of vaccine status will [never be used for public services such as transport, hospitals and education](#). In its recent discussions with the Scottish Government, the Commission has emphasised the need for both transparency in the establishment of a vaccine certification scheme, and effective regulation of its subsequent use. We are therefore concerned that the current proposals for vaccine certificates have been launched prior to debate in the Scottish Parliament, and without any corresponding regulation of their use.

3. Human Rights Implications

The Commission’s [full briefing](#), published in April, details the human rights implications of COVID-19 certification. Requiring evidence of vaccine status to secure entry to premises or events engages a number of human rights, such as the rights to private life, free movement, culture and freedom of thought, conscience and religion. Take-up of COVID-19 vaccines is lower among some groups, including people from lower

socio-economic backgrounds, people from certain ethnic minority communities, refugees and people seeking asylum. Use of COVID-19 passports will therefore particularly impact people in these groups. Many of these groups have also been disproportionately impacted by the virus, and the response to it.

The Scottish Government has a duty to take reasonable steps to minimise the risk to life and protect health. However, the measures taken to do so must also comply with the UK's, and in turn Scotland's, human rights obligations. Considering the rights that will be interfered with and the groups particularly impacted, the Commission agrees with the Council of Europe that the possible use of vaccine certification should be considered with the "[utmost caution](#)".

4. Necessity and Proportionality

Ensuring that any use of vaccine passports complies with human rights involves demonstrating that the use in question is: (1) necessary to achieve a pressing social aim, and (2) proportionate, going no further than necessary to achieve that aim. If a measure involving less interference with people's rights could achieve the stated objective, it ought to be used. An essential element of proportionality is that the interference is time-bound, lasting no longer than strictly necessary.

In terms of necessity, the aims of introducing COVID-19 passports in the settings referred to appear to be to: protect people from the virus; encourage vaccine uptake among younger people; and avoid closure of areas of the economy. At the time of writing the Scottish Government had not published a detailed explanation for its conclusion that it is necessary to require evidence of vaccine status in order to enter the specified venues and events. In order that the proposal can be properly tested for compliance with human rights standards, it is important that the Scottish Government set out clearly the aims and the evidence relied upon in concluding that this is a necessary measure to achieve those aims.

In terms of proportionality, the Scottish Government must demonstrate that it has fully considered the potential negative impact on people's

human rights and balanced that against the societal interest. An important element of this will be to explain why the proposed scheme does not include the alternative of a negative COVID-19 test for those who cannot prove they have been vaccinated. At the time of writing the Scottish Government had not set out its assessment of proportionality. In the interests of transparency and accountability, the Scottish Government should publish its full reasoning, including any evidence relied upon.

5. Possible Extension of Use

The Commission notes that the Scottish Government has expressly referred to the possibility of introducing COVID-19 passports in other areas. Given the impact on people's rights, and the particular impact on some groups, it is important that the Scottish Parliament carefully scrutinises any such proposals, requiring a clear demonstration of necessity and proportionality. If considering the introduction of vaccine passports in other areas of hospitality, for example in cafes, bars, restaurants or cinemas, it will be important to hear directly from people who would be excluded from those spaces, in order to properly understand the impact on them before weighing that against the societal interest.

The Scottish Government must ensure that vaccine passports are not used in a way that results in disproportionate interference with people's rights. That requires ensuring that any scheme is temporary, with regular, open and transparent review of its ongoing necessity and proportionality. The Commission welcomes the Scottish Government's commitment to subject the measures to review by the Scottish Parliament [every three weeks](#) and encourages the Scottish Parliament to ensure that any measures are strictly time-bound.

The Commission set out the following recommendations on domestic use of vaccine passports in our April Briefing, [COVID-19 Status Certificates: Human Rights Considerations](#), which remain relevant:

Recommendation 1: The Scottish Government should adopt a human rights based approach to reaching decisions about a potential COVID-19 status certification scheme. The [PANEL principles](#) should be utilised: Participation, Accountability, Non-Discrimination, Equality, Empowerment and Legality. In particular, a clear participatory process should guide any decision that is taken by the Scottish Government and sufficient time for this should be built into the decision-making process, which should be transparent, with reasoning applied and evidence and advice relied upon clearly set out.

Recommendation 2: The Scottish Government should only use, support or permit any use of COVID-19 status certification once there is clear scientific evidence (i) that vaccinations are effective in reducing transmission of the virus, and (ii) of the duration of protection afforded by the vaccines. This must be considered as part of an analysis of the necessity and proportionality of any proposed certification scheme.

Recommendation 3: The Scottish Government should only use, support or permit any use of COVID-19 status certification once there is clear advice regarding the overall effectiveness of the proposed COVID-19 status certification scheme in protecting life and managing the pandemic, and it is assessed as both necessary and proportionate to do so.

Recommendation 4: The Scottish Government should only use, support or permit any use of COVID-19 status certification if alternatives to vaccine certification are included that are viable alternatives for those who have not been vaccinated. If the alternatives involve evidencing test results, ensure that relevant tests are available, accessible and affordable, in general and in relation to the specific contexts in which it is proposed to use certification.

Recommendation 5: The Scottish Government should only use, support or permit any use of COVID-19 status certification if the

system is practicable for all, for example by including suitable and accessible alternatives for those who do not own or use smartphones, and for those who do not wish to use the technology for other reasons.

Recommendation 6: The Scottish Government should carry out a strict necessity and proportionality analysis in relation to the general use of a COVID-19 status certificates and the specific contexts in which it is proposed that certification will be used. The least restrictive measures that achieve the legitimate aim must be used. Consideration should be given to the need for alternatives or exceptions and how these would be provided for through the certification scheme. The decision-making process must be open and transparent, with reasoning applied and evidence and advice relied upon clearly set out.

Recommendation 7: If the Scottish Government decides to use, support or permit COVID-19 status certification in certain settings, any such scheme must be temporary, and there must be regular, open and transparent review of the ongoing necessity and proportionality of the scheme, generally and in each setting in which it is used. This should include regular assessment of the impact of the scheme on people's human rights, as well as the effectiveness of the scheme in achieving its aim. A sunset provision should be enshrined in any certification scheme, ensuring that the measures are to come to an end on a specified date, or as soon as specific conditions are satisfied, for example when a sufficient number of people have been vaccinated or "herd immunity" has been generated, if sooner.

Recommendation 8: The Scottish Government should openly and transparently consider what regulation of private entities' use of certification is necessary to protect people's human rights. The Scottish Government will have to decide whether or not to allow private actors to require certification for entry to premises or events or to access services, such as housing, work, food, clothing, and cultural or leisure activities, and if so on what terms.