

RE: *Call for Evidence: COVID-Status
Certification*

Submitted to: *Cabinet Office*

29 March 2021

I. Introduction

1. Christian Legal Centre is a leading legal advocacy group in the United Kingdom dedicated to the protection of religious liberty. We acted as counsel of record for several of the applicants in the seminal case of *Ewedia and Others v. the United Kingdom*, and have taken part in many of the precedent setting cases involving freedom of thought, conscience, and religion in the United Kingdom. Christian Legal Centre's cases are frequently covered by British print and broadcast media.

2. In 2019 alone, the Christian Legal Centre gave advice to 895 Christians who felt that they had suffered some level of detriment because of their Christian faith. The Centre is currently supporting more than 30 court cases involving Christian freedoms, several of those being by way of judicial review. Among those cases have been the judicial review of lockdown regulations relating to churches and collective worship; the most recent being the successful challenge of the Scottish church closures. *Philip v Scottish Ministers* [2021] CSOH 32.

Preliminary Issue

3. The duty to consult as defined in case-law requires, among other things, that adequate time must be given for consideration and response. *R v Brent London Borough Council, ex parte Gunning* (1985) 84 LGR 168 at 169. This particular consultation is of tremendous public importance, as it engages several very real issues involving personal freedoms, government overreach, as well as human and civil rights. Given the existential threat of overly broad Covid-status certification rules, two weeks consultation time is woefully inadequate.

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

4. I am: (f) charity or social enterprise.

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:*

Legal Considerations

5. Currently, section 45E of the Public Health (Control of Disease) Act 1984 prohibits the mandatory use of vaccines: <https://www.legislation.gov.uk/ukpga/1984/22/section/45E>. Section 45E reads: “(1) Regulations under section 45B or 45C may not include provision requiring a person to undergo medical treatment. (2) “Medical treatment” includes vaccination and other prophylactic treatment.” Sections 45B and 45C, as referenced in Section 45E, deal with the power to make regulations in relation to international travel and domestically.
6. While the scope of this consultation does not deal specifically with the issue of mandatory vaccinations, it is nonetheless relevant in that the Government has announced a review into introducing a Covid vaccine certificate system or “vaccine passports.” See e.g.: <https://committees.parliament.uk/call-for-evidence/438/covid-19-vaccine-certification/>. Of note, is that the European Commission has also taken steps towards developing a Europe wide vaccine passport. https://ec.europa.eu/health/sites/health/files/vaccination/docs/2019-2022_roadmap_en.pdf.
7. The move here domestically would be historically unprecedented. In 1853 vaccines were made compulsory for all new-born infants but this was discontinued in 1971. Since then, no other UK government has contemplated such a draconian move. The principle of proportionality is central to UK public law. See e.g.: *Pham v Secretary of State for the Home Department* [2015] UKSC 19, para 60, citing Professor Paul Craig, “*The Nature of Reasonableness*” (2013) 66 CLP 132: “both reasonableness review and proportionality involve considerations of weight and balance, with the intensity of the scrutiny and the weight to be given to any primary decision maker’s view depending on the context.”
8. While primary law cannot be judicially reviewed, proportionality is also a key element in determining legality under the Human Rights Act 1998. In *Jehovah’s Witnesses of Moscow v Russia*, the European Court of Human Rights [ECHR] held that : “free choice and self-determination were themselves fundamental constituents of life and that, absent any indication of the need to protect third parties, the State must abstain from interfering with the individual freedom of choice in the sphere of health care, for such interference can only lessen and not enhance the value of life.” Application no. 302/02, judgment of 10 June 2010, para 136. This would be true both of systems which impose restrictions on freedoms based on Covid-status verification or vaccination-status.
9. With specific regard to vaccination-status, determining whether mandatory vaccination is a proportionate means of serving the legitimate aim of trying to prevent the spread of disease, the ECHR has held that a necessary factor to be weighed is the assessment of whether necessary precautions had been taken to guarantee the suitability of vaccination for the individual case at hand. ECHR, *Solomakhin v Ukraine*, application no. 24429/03, judgment of 15 March 2012, para 36. The *Solomakhin* case was the first to clearly establish the finding in European law that: “[c]ompulsory vaccination – as an involuntary medical treatment – amounts to an interference with the right to respect for one’s private life, which includes a person’s physical and psychological integrity, as guaranteed by Article 8(1).” *Id.*, para 33.

10. The question of individual suitability is certainly balanced towards personal autonomy in the case of mandatory vaccination schemes, especially as pertains to Covid. The vaccines have been rushed onto the market in an unprecedented way. Moreover, the government (the Department of Health and Social Care) have given some vaccine producers, like Pfizer, legal indemnity from being sued where patients suffer complications from the vaccine. *See e.g.*: <https://www.independent.co.uk/news/health/coronavirus-pfizer-vaccine-legal-indemnity-safety-ministers-b1765124.html>.
11. What's more, the efficacy and the safety of the vaccines leaves more questions than answers. AstraZeneca has faced serious questions about its efficacy, both during clinical trials and with those over the age of 65. It has also been suspected of leading to blood clots in recipients, with more than a dozen countries in Europe alone suspending its supply pending further investigation. *See*: <https://www.cnbc.com/2021/03/25/astrazeneca-covid-vaccine-all-the-issues-and-problems-the-shot-has-faced.html>. Pfizer and Moderna Covid vaccines have also courted controversy. Newsweek magazine has reported that in the US alone, 970 people have died as a result of taking one of the two vaccines. <https://www.newsweek.com/covid-vaccine-deaths-cause-pfizer-moderna-fact-check-966-died-1574447>.
12. Additionally, pregnant women have been advised not to take the Covid vaccine. What is more, concerns about the vaccine have been raised about possible effects on fertility. *See*: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html>.
13. Precisely stated, Covid vaccines have questionable efficacy, create issues for those who are pregnant, possibly diminish fertility, have led to death and serious harm, and are not subject to tort litigation by those who have been negatively impacted by it. Not only would it be disproportionate to make Covid vaccination mandatory, or at least to create a scheme where those who do not take it suffer detriments such as lessened freedoms, it would be wholly irrational. Where one of the side effects of the Covid vaccination is death, it would strain credulity to suggest that anyone but the individual themselves should be the sole arbiter of whether to take the vaccine or not.
14. While the proportionality threshold for status certification would be lower than for vaccinations, it is far from absolute. Keeping medical data without the explicit consent of the individual involved has been deemed to be an interference with private life as protected by Article 8 of the Convention. ECHR, *L.H. v Latvia*, application no. 52019/07, judgment of 29 April 2014. Mandatory certification schemes essentially remove the possibility of consent and bring them into the purview of Article 8. The Court held in *L.H.* that when determining whether the interference with personal medical data amounts to a violation of privacy within the meaning of the Convention, proportionality and the scope of the powers conferred upon the government are primary considerations. *Id.*

Freedom of Conscience and Religion

15. Any scheme which would unduly punish an individual, either by pecuniary means or by removing freedoms or entitlements would also have a negative impact on religious freedom.

This impact would affect both the *forum externum* and *forum internum* of the individual believer.

(a) In the context of Vaccines and the Forum Internum

16. Christians believe that man was created in the image of God. *Genesis* 1:27. It is also widely held among Christians that the body is a temple and we owe a duty to God to protect it: “*If anyone destroys God’s temple, God will destroy him. For God’s temple is holy, and you are that temple.*” *1 Corinthians* 3:17. Scripture calls on believers to trust in the healing power of God: “*Heal me o Lord, and I shall be healed.*” *Jeremiah* 17:14; “*The Lord sustains him on his sickbed; in his illness you restore him to full health.*” *Psalms* 41:3. The New Testament also speaks to physical healing through faith: “*And the prayer of faith will heal the one who is sick.*” *James* 5:15.
17. While Christians have divergent views on the issue of their faith and vaccines, the fact remains that there are Christians who refuse to get vaccinated because of their faith. Therefore, vaccination schemes which are essentially mandatory (whether strictly speaking or substantively so) can engage Article 9 of the European Convention on Human Rights; freedom of thought, conscience and religion. Like with the issue of physical integrity and private life (Article 8), a proportionality test is required to balance the competing rights. Any limitation of religious belief or exercise must be necessary in a democratic society and is subject to strict scrutiny by the courts. ECHR, 26 September 1996, *Manoussakis and Others v. Greece*, Reports 1996-IV: AFDI, 1996, p. 749, § 44.
18. Moreover, Article 9 is as much an individual right as it is a collective right. Therefore, Christian beliefs against vaccines do not have to be a mandatory faith tenet of a person’s religion to engage Article 9. All that is necessary is for that person to hold the belief seriously and cogently. *Eweida and Others v. the United Kingdom*, 48420/10, 36516/10, 51671/10, 59842/10, HEJUD [2013] ECHR 37 (15 January 2013), para 81.

(b) Status or Vaccine Certification in the Context of the Forum Externum

19. The second Article 9 objection to vaccine passports or Covid-status certification is that it creates a burden on freedom of worship and Christian education. Facility based mandates or individual restrictions facing those who do not have Covid-status or vaccination certification would do violence to the rights of churches, church organisations such as schools, and to individual believers. Any such schemes raise serious constitutional and human rights questions which require both proportionality and rationality. *Philip v Scottish Ministers* [2021] CSOH 32. Paternalism, where laws are imposed on the supposition that they are in the best interests of the common good, but which cannot be evidenced as being necessary in a democratic society and narrowly tailored to safeguard essential freedoms, do not pass legal muster.

(c) Vaccines and Fetal Cell Lines

20. Significant moral and legal questions also arise from the fact that some vaccines have been developed using fetal cell lines harvested from aborted babies. *See e.g.:*

<https://www.sciencemag.org/news/2020/06/abortion-opponents-protest-covid-19-vaccines-use-fetal-cells>. Christian Concern has addressed the issues involved for Christians in a recent video it has published on the subject matter: <https://christianconcern.com/resource/should-christians-accept-vaccines-which-used-fetal-cell-lines/>.

21. Pro-life beliefs, whether based on religious grounds or separate from them, are protected by Article 9 of the Convention. The taking of a vaccine which was developed with the use of fetal cells, the harvesting of which necessitated the destruction of human life, would be a serious issue of conscience for many people who identify as pro-life. The dissenting opinions of Judges Vučinić and De Gaetano in the *Eweida and Others* case, argued that instances of conscientious objection are not so much a matter of freedom of religion as they are of freedom of conscience. Freedom of conscience is mentioned in Article 9.1, but is not subject to any of the limitations in Article 9.2, meaning that once a genuine and serious case of conscientious objection is established, the state is obliged to respect it both positively and negatively. *Eweida and Others v. the United Kingdom*, 48420/10, 36516/10, 51671/10, 59842/10, HEJUD [2013] ECHR 37 (15 January 2013). Whatever the case, it is clear that the imposition of a vaccination certification scheme would cause a crisis of conscience for many and undoubtedly lead to much litigation.

Employment Law

22. There are also significant employment law implications in making status-certification or vaccines mandatory. Employers have a legal duty to ensure the health and safety of their workforce as far as reasonably possible. However a mandatory status certification scheme or vaccine policy, could expose an employer to claims, including for discrimination and/or constructive dismissal if an employer were to take detrimental or disciplinary action because an employee refuses to be vaccinated or tested for status certification and such refusal is related to a characteristic that is protected under U.K. discrimination law (namely, age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex or sexual orientation).

23. For example, there is a risk of maternity or disability discrimination where employees who are pregnant or suffering from a medical condition that amounts to a disability are not able to have the vaccine and are consequently treated less favourably by their employer than employees who have had the vaccine. The same would be true of those who suffer from medical issues which would make status certification painful or otherwise undesirable.

24. Likewise, and again the context of vaccination, such a requirement could also amount to age discrimination if younger employees, who are likely to be the last category of people being offered the vaccine as part of the NHS rollout, are treated less favourably than older employees who have had the vaccine.

25. A policy of mandatory vaccination or status certification could also infringe employees' right to privacy under Article 8 of the Human Rights Act 1998, under the same legal principles discussed above. Technically an employer may be able to justify such a breach, but this is likely to be difficult where less personally invasive measures are available to employers to maintain the health and safety of their workforce, such as social distancing and the wearing of face coverings.

26. Employers must also consider the data protection implications of mandating vaccinations or status certification since holding data on whether an employee has had the vaccine or recently been tested for Covid is likely to be considered a special category of data under applicable data protection law (meaning that it needs more protection because it is sensitive). To lawfully process such data, there must be a lawful basis for the processing, and additional conditions and supporting documentation must be put in place, including conducting an impact assessment to identify and minimise any risks. The result is that such government schemes would put an extra bureaucratic burden on employers during a time when many businesses are already struggling due to prolonged lockdown.
27. Additionally, employers should not rely on vaccination or status certification to replace other protective measures in the workplace, such as social distancing and the wearing of face coverings and should continue to assess their workplace risks as the pandemic unfolds. In this sense, any such certification scheme might be counter-productive in employers then feel that they have done enough to protect their workforce.
28. The bottom line is that enforcing status certification or vaccine policies in the sphere of employment may well be met by a plethora of legal challenges. With specific reference to vaccines, *see e.g.*: <https://www.cipd.co.uk/knowledge/fundamentals/emp-law/health-safety/preparing-for-covid-19-vaccination#gref>.

Conclusion

29. Medical and ethical opinion is divided on the introduction of immunisation or status certification policies that involve some degree of coercion (such as fines). *See*: <https://commonslibrary.parliament.uk/research-briefings/cbp-9076/>. With the government also discussing vaccine passports, it is also important to reflect on the fact that there is no guarantee that even if the vaccine is made mandatory everyone will take it. Figures suggest that up to 20 % of the population may not. *See*: <https://www.theguardian.com/world/2020/sep/24/a-fifth-of-people-likely-to-refuse-covid-vaccine-uk-survey-finds>.
30. Whatever the case, whether the government pursue Covid-status certification rules or vaccine certificates, serious issues surround implications in many spheres of private and public life; including in the sphere of privacy and personal physical autonomy, data collection, conscience, religious exercise and employment.
31. The government would do well to remember the controversy surrounding national identity cards shortly after world war II, which were finally removed in 1952 because of the tension they created between ordinary citizens and government agents. The last attempt to reintroduce national id cards was the repeal of the Identity Cards Act 2006 by the Identity Documents Act 2010. One of the glories of the United Kingdom, and the reason so many have fled their own countries to the safe shores of Britain, is freedom from government coercion. Any proposed certification scheme, particularly one which includes mandatory vaccinations, would do violence to this freedom which cannot be justified on proportionality or rationality grounds.