



## **Guidance on the legal risks and duties of care associated with the 'return to play' in light of coronavirus**

### **Addendum**

### **Coronavirus vaccinations**

Published April 2021



# Introduction

This addendum (the **Addendum**) forms part of the “*Legal risks and duties of care when returning to play*” guidance published by Sport England in June 2020 (the **Guidance**).

This Addendum is for the benefit of all sport and physical activity providers (SAPAPs) and focuses on the issue of coronavirus vaccinations in the context of the sector’s return to play (RTP) in spring 2021. As part of the UK Government’s roadmap for easing the coronavirus lockdown restrictions, outdoor sport and physical activity in England is scheduled to return on 29 March 2021 and thereafter adopt a phased return to full activity.

This Addendum is designed to provide high-level guidance on some of the legal issues arising, or that may arise, in respect of vaccines and RTP. In particular, it addresses the issue of SAPAPs making vaccinations a pre-condition of a participant’s RTP. On the face of it, the idea of a vaccine ‘passport’ or ‘certificate’ i.e. a means of proving that a participant’s been vaccinated (either in paper or digital form) might seem like an effective way of minimising the risks of transmission when RTP begins, in doing so preventing a return to further lockdowns, and minimising the risks to personal and public health. However, there are a number of legal risks or ‘barriers’ to making vaccines ‘mandatory’, which SAPAPs should be mindful of and which this Addendum seeks to address.

A SAPAP’s approach to RTP and vaccines is ultimately underpinned by its overriding duty of care towards its participants, as set out further in section B of this Addendum. This duty should be weighed against the range of legal risks, as well as moral and ethical considerations, set out in this Addendum, including in relation to the following:

- Equality and discrimination
- Data protection and privacy laws
- Human rights law issues
- Other ethical considerations.

**This Addendum doesn’t constitute legal advice and isn’t a substitute for such. SAPAPs should seek independent legal advice, including specialist employment law advice if required, and depending on their (or the) relevant circumstances.**

## Terminology

For the purposes of the Guidance Note, the following terms shall have the following meanings:

- “**coronavirus**” refers to the ongoing global pandemic known as the coronavirus disease 2019 (Covid-19).
- ‘**Return to play and activity**’ shall be referred to as “**RTP**”.
- “**SAPAPs**” refers to sports and physical activity providers, including all bodies and organisations which provide sport and/or physical activity opportunities at recreational and/or grassroots level in England. SAPAPs may include:
  - national governing bodies (**NGBs**)
  - sports clubs (**clubs**)
  - other sporting and physical activity providers, including organisations that deliver physical activity as part of a wider suite of functions (such as charities or community groups) <sup>1</sup> (**activity providers**)
  - competitions (**competitions**)
  - other sporting bodies and organisations including county and regional associations.
- “**Participants**” may include:
  - employees
  - staff members
  - volunteers
  - members
  - players
  - match officials
  - parents
  - coaches
  - other participants of sporting or physical activity.

References to “employees”, “volunteers” and “workers” throughout the Addendum should on the most part be self-explanatory for SAPAPs based on the particular context of the relationship between the relevant individual and a SAPAP, and the sport/physical activity itself.

However, SAPAPs should seek independent legal advice from an employment expert should they be unsure of whether a particular participant falls into the category of “employee”, “worker” or “volunteer” etc.

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# Section A:

## Executive summary

**A SAPAP's starting point when assessing its approach to RTP and vaccinations, is its duty to take all reasonable steps necessary to ensure the health and wellbeing of its Participants. When it comes to discharging that duty and implementing a policy for vaccines, SAPAPs should first carry out a suitable risk assessment.**

A SAPAP's duty of care is specific to the nature of the relevant sport or physical activity, and the participants involved, so it should consider the key risks and nuances at play. The nature of the relevant sport or physical activity (e.g. contact vs. non-contact; indoor vs. outdoor), the identity and health status of participants (e.g. vulnerable individuals, individuals with underlying health conditions, pregnant women, disabled individuals etc.) should be considered when assessing the risks of transmission if participants return without having been vaccinated.

The government has yet to publish any specific guidance on COVID-19 vaccinations and the implications of participation in any social activities, including sport. If it does so, of course that will be the starting point for SAPAPs. In the meantime, there are no statutory provisions that exist which give SAPAPs an obvious and clear power to force participants to be vaccinated. To the extent any coronavirus-specific legislation and

guidance is introduced, clearly this will be significant. As part of a SAPAP's risk assessment, however, it should balance its duty to keep its participants safe against the legal and other risks of requiring participants to be vaccinated before RTP.

Making vaccines mandatory would mean handling sensitive health data so could give risk to data protection and privacy risks. There are also equality law considerations at play. Refusing a participant access could leave a SAPAP open to legal challenges on discrimination grounds, for example if the relevant participant refused the vaccine because of a religious belief, pregnancy, or a health condition that could constitute a disability. Then there are other employment law considerations for SAPAPs, and a range of ethical and moral considerations too.

A SAPAP's response should ultimately be proportionate in that it should go far enough to meet the relevant standard of care but should not go so far as to become a disproportionate barrier to participation. In some contexts, making a certain part of a venue or facilities a 'vaccine-only' zone, for example, might be a proportionate means of protecting the health of participants who are vulnerable or have underlying health conditions, provided this has been balanced against the legal risks and a participant's general right to freely refuse any intrusive medical treatment.

On the other hand, making vaccinations mandatory for all participants as a blanket rule would, in most cases, be a disproportionate response, particularly where the government's given a general go-ahead to participation.

In light of the above risks, a sensible and prudent approach to vaccinations for most SAPAPs is likely to be engaging in proactive lines of communication with participants but stopping short of making vaccines mandatory. It's ultimately a question of balance and reasonableness, but key considerations include:

- communicating with participants about the importance of being vaccinated prior to RTP (both on an individual and collective level)
- encouraging and incentivising participants to be vaccinated prior to RTP (including building time into schedules as needed for appointments)
- expressing a strong preference that participants are vaccinated
- looking at alternatives to mitigate risk such as testing, social distancing, ventilation, track and trace etc.
- seeking to understand reasons for refusal, to see if any concerns can be alleviated.

Finally, given this guidance is for SAPAPs right across the sport and physical activity sector, with a range of participants involved, it's sensible and prudent for SAPAPs to take their own independent legal advice on the risks and nuances associates with their particular sporting or activity context.

# Section B:

## Duty of care to protect health and safety of participants

### Duty of care

As was the case with the first phase of RTP in summer 2020, a SAPAP should focus on ensuring that its duty of care has been discharged correctly and proportionately, and to the appropriate standard of care, when transitioning to RTP in spring 2021. That duty is ultimately to take all measures reasonable in the circumstances to ensure the health, safety, wellbeing and welfare of all participants involved in the relevant sport or physical activity.

Clearly that duty will differ based on the nature of the particular sport or activity; and the relevant participants involved (i.e. employees, staff members, volunteers, members, players, match officials, parents, coaches, or other participants of sporting or physical activity). In any event, however, a SAPAP's approach to participants and vaccines is ultimately underpinned by this overriding duty.

### Discharging that duty

When it comes to vaccines and RTP, a SAPAP's starting point in relation to the taking of reasonable steps should firstly focus on carrying out a suitable risk assessment. Whilst a good risk assessment doesn't eradicate the risk of liability should transmission of the virus occur, it'll reduce those risks significantly if it's reasonable, in line with relevant guidance, and delivered properly. In this regard, SAPAPs should familiarise themselves with the key principles around risk assessments set out at section 3 of the Guidance.

As a general point, any SAPAP protocols and guidance should be compliant, and in line, with official coronavirus-specific guidance issued by the government and public health authorities (including the World Health Organisation) as well as (if applicable) the SAPAP above them in the stakeholder chain (e.g. NGB or association). The challenge here is there's been little to no such guidance issued by relevant authorities about participants being vaccinated prior to RTP. The government has yet to publish any specific guidance on coronavirus vaccination, so no protocols or directions have 'trickled down' to relevant authorities for SAPAPs to adopt and follow. Therefore, when carrying out its risk assessment, constructing guidance and protocols, and implementing its response in relation to participants and vaccines, a SAPAP should focus its attention on the following:

- i **relevant UK laws**, including employment, health and safety, human rights, equality, data protection and any coronavirus-specific legislation. [Section C](#) of this Addendum looks at the key legal considerations for SAPAPs to consider under each of these areas.
- ii a **sport or activity-specific** approach: i.e. it should be in line with the sport or activity-specific guidance and protocols in place, but also take into account the risks at play which are specific to the relevant activity. Taking into account the nuances and the risks, it's about deciding on what's

reasonable and objectively justifiable in the interests of enabling RTP but in as secure and safe an environment as possible.

- iii a **proportionate** response: following its risk assessment, its response should be proportionate (i.e. it should go far enough to meet the relevant standard of care but shouldn't go so far as to become a disproportionate barrier to participation).

It's ultimately a question of balance and reasonableness for SAPAPs. In some contexts, making a certain part of a venue or facilities a 'vaccine-only' zone, for example, might be a proportionate and objectively justifiable means of protecting the health of participants who are vulnerable or have underlying health conditions, provided this has been balanced against the legal risks and a participant's right to not be vaccinated as a basic human right. At the same time, making vaccinations mandatory for all participants as a 'blanket' rule would, probably in most cases, be a disproportionate response.

### Checklist: taking reasonable steps to discharge duty of care in relation to vaccines and RTP

- Carry out a risk assessment
- Follow official guidance and protocols to the extent they're introduced
- Understand and consider legal risks under UK law
- Adopt a sport or activity-specific approach
- Ensure response is proportionate. Implementing a proportionate response

### Checklist: practical steps for engaging with participants

- **Communicating** with participants about the importance of being vaccinated prior to RTP (both on an individual and collective level)
- **Encouraging and incentivising** participants to be vaccinated prior to RTP (including building time into schedules as needed for appointments)
- **Expressing a strong preference** that participants are vaccinated
- **Looking at alternatives** to mitigate risk such as testing, social distancing, ventilation, track and trace etc.
- **Seeking to understand** reasons for refusal to see if any concerns can be alleviated.

**Question 1: when it comes to sporting rules and regulations (e.g. eligibility to enter certain competitions etc.), does the assessment for SAPAPs change now that a vaccination's available?**

The assessment remains the same for SAPAPs: i.e. it's a case of what's reasonable and objectively justifiable in the interests of enabling sport and physical activity, and at the same time providing as safe and secure an environment as possible. I.e. for non-contact or non-physical team sports where competition protocols can be adhered to more easily, it'd seem disproportionate and unjustifiable to introduce mandatory vaccines as a condition for participation.

However, for an inter-club competition in an individual sport involving participants with underlying medical conditions and who are in the vulnerable category, restricting participation to vaccinated participants would seem a much more reasonable and objectively justifiable response. Of course, any decision to make participation conditional on participants being vaccinated on the basis of such a decision being necessary to discharge a duty of care, should be weighed against the legal risks set out in this section C (including an individual's human rights and also risks associated with sharing sensible medical data).

Consideration should also be given to the guidance and directions (if any) given by, if applicable, the SAPAP above them in the stakeholder chain (e.g. NGB or association responsible for regulating the relevant competition or sport).



# Section C:

## Legal risks and considerations

The duty of care outlined at [section B](#) needs to be balanced against a range of legal risks and considerations under UK law. SAPAPs should understand the relevant legal frameworks which apply to the circumstances of their sport or physical activity, and their participants, before implementing any 'vaccination' policy.

Not only has the government yet to publish any specific guidance on coronavirus vaccination, there are no statutory provisions in the UK that give SAPAPs the power to force participants to be vaccinated [2](#). Clearly, to the extent that any primary and secondary legislation comes into force in the UK, SAPAPs should be alive to how this changes things [3](#).

This [section C](#) focuses on the following four areas of UK law:

1. [Equality and discrimination laws](#)
2. [Data protection and privacy laws](#)
3. [Human rights laws](#)
4. [Other ethical and moral standards and considerations](#).

### 1. Equality law and discrimination

#### SAPAPs as employers

Employers in the UK have a legal obligation to ensure the workplace is safe for its workforce. Many SAPAPs which are employers will inevitably view the vaccine as an obvious means of protecting the health and safety of staff, as it could give employees greater

confidence about RTP and mitigating the associated risks. However, there are several legal issues requiring consideration from an employment law perspective.

The government has yet to publish any specific guidance on coronavirus vaccination. Therefore, as a starting point, it's for an employer to decide whether to require vaccination from its employees, as is the case with deciding whether to test employees.

The Public Health (Control of Disease) Act 1984 gives the government a range of powers to prevent and control the spread of infectious diseases, but the legislation specifically excludes the power to require a person to undergo medical treatment. This includes vaccination. Indeed, the Advisory, Conciliation and Arbitration Service (ACAS) [4](#) stated: "Employers should support staff in getting the coronavirus (COVID-19) vaccine, but they cannot force staff to be vaccinated".

The Coronavirus Act 2020 grants the government sweeping powers in many areas, but no power to mandate vaccinations. Given the government itself has no power to require vaccinations, there is likely to be a presumption against an employer being able to do so in most circumstances.

Put simply, it will be difficult for SAPAPs to make RTP conditional on their employees being vaccinated on the basis that the government's not made vaccination mandatory. There are, in addition to this, a number of equality

and discrimination law issues to consider too, as set out below.

#### Discrimination

Equality and discrimination laws in the UK [5](#) apply to a large range of participants, though probably not true volunteers. Any policy which discriminates against a group who shares a protected characteristic must be justified by the organisation as a proportionate means of meeting a legitimate aim. Making vaccinations a condition of RTP potentially impacts a number of protected groups including:

- **Religion or belief:** some religions reject medicines on theological grounds. However, all vaccines currently in widespread use against coronavirus have been welcomed by religious authorities who might have been expected to have concerns (for example, there are in the vaccines no pork products (Islam and Judaism) and no embryonic material (Roman Catholicism)). It's unlikely a simple anti-vaccination opinion on its own would meet the threshold to be a protected belief
- **Disability:** an individual may be unable to take the vaccine due to a medical condition or allergy that could constitute a disability
- **Pregnancy or sex:** pregnant women have been advised not to take the vaccine until more testing has been carried out

- **Age:** younger employees without underlying health conditions may not be eligible for the vaccine for some time. Unfavourable treatment of these employees could be linked to age in a discrimination claim.

In light of the above risks, SAPAP employers should carefully consider whether a policy might disproportionately impact a particular category of employees who haven't taken the vaccine [6](#).

As we note above, even if the policy has a disparate impact, it'll be lawful if the organisation can show it's a proportionate means of meeting a legitimate aim. RTP is likely to be a legitimate aim. However, in our view, it might be difficult in most circumstances to show a blanket policy were proportionate. In particular:

- there are alternatives to reduce risk such as testing and compliance with other coronavirus protocols to which participants are now very used
- the risk itself may be small if, for example the sport is non-contact and/or outdoors
- many individuals may not have been offered a vaccine by the NHS.

#### Key consideration – independent legal advice

Clearly the impact of equality and discrimination law principles may differ considerably based on the circumstances of the particular sport or physical activity. SAPAPs should seek independent legal advice from a specialist employment lawyer should it be unclear of its position and the legal risks.

## Question 2: is it fine for a SAPAP to incentivise and encourage their participants (whether employees, staff, volunteers or other participants) to get the vaccine?

It's clearly in the interests of SAPAPs to encourage their participants to get vaccinated, not least because of their duty of care to protect the health and safety of their participant group as a whole. Clearly the greater levels of vaccination take-up, the better the prospects of a SAPAP ensuring the sporting/physical activity environment or workplace is safe.

The more people who are vaccinated prior to RTP, the less risk of transmission within the sporting or physical activity environment (e.g. club, venue or association) and the less likelihood of RTP being disrupted or halted. Clearly there's a collective desire to avoid a return to further lockdowns and further restrictions on sporting and physical activity. However, going too far, such that an impression of coercion is created, could give rise to risks of direct or indirect discrimination which might come from an express or implied requirement or unfair pressure to be vaccinated, and SAPAPs should bear this in mind. Incentivisation and encouragement should be balanced against conflating opposition to vaccination and the idea of vaccine passports or certificates.

Indeed, even in the absence of potential discrimination, SAPAP employers should be mindful of their implied duty of trust and confidence. Applying undue pressure on employees to take the vaccine without reasonable justification could risk breaching this and result in potential constructive unfair dismissal claims.

SAPAPs should bear in mind the key practical steps to engaging with participants:

- **communicating** with participants about the importance of being vaccinated prior to RTP (both on an individual and collective level)
- **encouraging** and **incentivising** participants to be vaccinated prior to RTP (including building time into schedules as needed for appointments)
- **expressing a strong preference** that participants are vaccinated
- **looking at alternatives** to mitigate risk such as testing, social distancing, ventilation, track and trace etc.
- **seeking to understand** reasons for refusal to see if any concerns can be alleviated.

## Question 3: what would be the implications of an employer SAPAP introducing a clause in an employment contract requiring a participant employee to be vaccinated?

First, as a material variation to an employment contract, such a clause would have to be agreed to by an employee. Even if agreed, an employer seeking to discipline or dismiss an employee for non-compliance with any such 'clause' may amount to unlawful discrimination or unfair dismissal. The lawfulness will depend on whether the employer's action is reasonable, proportionate and objectively justifiable in light of the particular context or circumstances. E.g. if the employee's role can be carried out remotely, then (even if agreed to by the employee) disciplining or dismissing an employee for non-compliance with such a contractual obligation under a participant's employment contract is likely to be unlawful.

If, however, certain participants are particularly vulnerable or at risk, or have underlying health conditions, a SAPAP may decide that being vaccinated is a proportionate requirement for an employee to carry out a certain role (e.g. in a particular area of a venue or facilities). It's ultimately about carrying out an assessment as to whether such a response would be a proportionate means of protecting the health of individuals, weighed against the various legal risks set out in this section C.

This type of an approach would perhaps be more understandable in a sector whereby risks are higher such as where extremely vulnerable individuals are involved (e.g. care home sector). However, one would expect scenarios whereby it's appropriate within the sport and physical activity sector to be more remote.



#### Question 4: Could a SAPAP dismiss a participant employee, or take disciplinary action, for refusing to be vaccinated?

Clearly the SAPAP would need to consider the lawful basis of the dismissal, and whether there are reasonable alternatives. As ever, the circumstances of each case should be considered carefully.

There would be a very clear risk of discrimination under one of the grounds set out in this section B2 (or, for many employees, a risk of unfair dismissal), depending on the context.

A sensible approach for SAPAPs to adopt would be to engage in proactive communications with the relevant participant, as per Question 2 above, by encouraging them to take the vaccine and seeking to understand their reasons for not doing so.

As a general principle, there may be limited circumstances where unreasonable refusal to take the vaccine could possibly justify disciplinary action. For example, one possibility is if an employee's role involves regular international travel and vaccinations become necessary for boarding planes or crossing borders (which might be the case in international sport).

Yet, even in these circumstances, employers would be expected to be flexible and could be expected to consider reallocating the employee to another role where vaccination is not vital, before pursuing disciplinary action. In the context of RTP, it's difficult to foresee a scenario whereby disciplinary action would be objectively justifiable or reasonable..

#### Question 5: can a SAPAP force an employee, staff member or volunteer to get vaccinated?

No. A vaccine is only lawful with an individual's informed and voluntary consent. It's obviously unlawful (and very likely a criminal offence) to force someone to be vaccinated. A SAPAP can, however, encourage and incentivise participants to become vaccinated prior to RTP, and seek to understand why a participant might not be comfortable doing so to see if any concerns can be alleviated (see Question 2 above).

A SAPAP can also ask relevant individuals to discharge their own duties to take reasonable precautions and follow the guidance and protocols in place and remind them of these duties on a regular basis (both verbally and in writing). These include to comply with testing procedures and adhere to venue protocols in relation to social distancing etc.

A SAPAP can also ask individuals to 'opt in' and sign a consent form explaining the risks they would be assuming by RTP amongst participants who've not yet been vaccinated. However, asking participants to 'opt in' is, however, limited, because whilst it highlights to participants their responsibilities to follow guidance and policies etc., it doesn't absolve SAPAP of its legal responsibilities and duties of care. For more information on opt-in please refer to section 6 of the Guidance.

### Question 6: if a participant hasn't been, or refuses to get, vaccinated can a SAPAP deny him or her access to RTP?

Whilst a SAPAP cannot force a participant to get vaccinated, it can set the requirements for RTP including any conditions which must be met in order for participants (whether volunteers, players, officials, coaches, staff or others) to return the relevant sport or activity.

If a SAPAP, following its risk assessment(s), concludes that it's proportionate and reasonable to (a) require a participant to be vaccinated before RTP; and (b) prevent that participant from RTP if they haven't been, or refuse to get, vaccinated on the basis that they've failed to meet the minimum requirements and are effectively 'opting out', then that's a sensible approach for a SAPAP to adopt.

However, before a SAPAP makes such a decision on these potentially restrictive and onerous minimum requirements, it needs to carry out a full and proper risk assessment, and balance the competing objectives of (i) discharging its duty to make the RTP environment safe and secure; and (b) ensuring its response (and any requirements) are reasonable, proportionate and legally sound (bearing in mind the various legal considerations set out in this Addendum).

### Question 7: if a participant hasn't been vaccinated, can a SAPAP require them to take a lateral flow test instead?

As a starting point, a SAPAP cannot force a participant to take a lateral flow test for the same reasons it cannot force them to get vaccinated. It could, however, theoretically make it a requirement of RTP if the SAPAP concludes that this is a reasonable and proportionate means of discharging its duty to create a safe environment and protect the welfare of its community, and provided any such decision has been weighed against the various relevant legal considerations, including discrimination and privacy.

As a first step, SAPAPs may wish to engage with participants about the individual and collective benefits of taking a lateral flow test and find out whether any participants are uncomfortable with the idea of doing so (or cannot for other reasons). In such scenario it would then be sensible for a SAPAP to understand the reasons for a participant not wanting to, or being unable to, take a lateral flow test, and explore if there are any solutions in order to maximise the return of participants to sport/activity, but minimise the risks of transmission.

SAPAPs should also consider (to the extent applicable) any relevant NGB or other official guidance on lateral flow tests which is in force and which has been signed off or authorised by DCMS. For example, in respect of the first RTP in 2020, lateral flow tests were a requirement for a number of sports seeking to rely on the elite sport exemption. SAPAPs should obviously be mindful of, and ensure to follow, any official guidance which has been put in place by SAPAPs above them in the stakeholder chain (whether NGBs or otherwise).

### Question 8: what if a SAPAP employer makes vaccination an occupational requirement to perform a certain role on health and safety grounds?

If a participant employee refuses to get vaccinated, the relevant SAPAP may wish to argue that it was a contractual obligation for the employee to perform their role safely or, potentially, that they've refused a reasonable management instruction.

However, the starting point is whether it was reasonable in the first place for an employer SAPAP to make vaccinations mandatory on health and safety grounds.

## 2. Data protection and privacy

If a SAPAP decides to make RTP conditional on participants being vaccinated, then it'll be collecting and using sensitive personal information in the form of vaccination records and/or other information from participants relating to their health. Even if SAPAPs decide not to make vaccination mandatory to any extent, they may still choose to ask participants for confirmation of whether they've received the vaccine, or other information relating to their health (such as information about symptoms) which itself would amount to special category health data under data protection laws, as might details of the reasons why vaccination isn't appropriate, such as where religious or philosophical beliefs are relevant.

As with the first phase of RTP in spring 2020, there are a range of considerations for SAPAPs under applicable data protection laws, most notably the EU General Data Protection Regulation ("GDPR") transposed now into

UK law as the UK GDPR, following Brexit, and the UK Data Protection Act 2018. Collecting vaccine-related information will of course be for the purpose of ensuring the health and wellbeing of all participants, in line with the SAPAP's ongoing duty of care. As was the case with asking participants about their underlying health conditions, a SAPAP asking a participant whether he or she's been vaccinated may help inform a SAPAP's ability to create a safe RTP environment.

If a SAPAP did decide to require vaccinations it should be mindful that, because vaccine passports contain personal information, they must be compliant with GDPR (Article 5) principles of lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation, integrity, confidentiality and accountability.

SAPAPs should again be aware of the strict requirements relating to health data, which is given the status of '*special category data*' under data protection law. For example, in order to lawfully

process health data, SAPAPs must be able to meet one of the "conditions" under Article 9 GDPR.

Under certain circumstances, processing this kind of data will require a SAPAP to maintain an '*Appropriate Policy Document*' which explains how it'll comply with data protection law in the

context of special category health data. From a practical perspective, SAPAPs should also be mindful of their data collection measures, i.e. who's the data being shared with and who has access to this information? This is equally relevant for both small volunteer-run SAPAPs and larger professional SAPAPs with greater levels of resources.

### Key consideration – independent legal advice

Data protection law imposes strict obligations on the collection, processing, storing and transferring of personal data. If a SAPAP decides to ask participants to disclose whether they've been vaccinated prior to RTP, then it'd be sensible and prudent to seek independent legal advice in order to understand requirements under data protection law and ensure compliance. This is especially the case if SAPAPs decide to disclose details of non-vaccinated individuals to participants.

SAPAPs should consider section 9 of [the Guidance](#) (page 32) on data protection and privacy, including the sections titled: Data protection impact assessments; Privacy notices; Data security; Transparency; Data minimisation; Delete when no longer needed.



### Question 9: can SAPAPs inform participants that certain other participants haven't been vaccinated?

It's difficult to identify any circumstances under which it would be appropriate to inform participants that any other specific participants haven't been vaccinated.

However, SAPAPs may wish to consider whether it's practical or reasonable to inform potential participants, in general, that the SAPAP isn't able to confirm all participants are vaccinated.

For example, certain participants who are more vulnerable may, in the interests of their own health and safety, be better able to make a decision as to whether or not to participate, if they are equipped with the knowledge that other participants may not have been vaccinated, even if no specific information about any individual's vaccination status is shared.

## 3. Human rights laws

There are a range of international [7](#), regional [8](#) and domestic [9](#) human rights law considerations at play in the context of vaccinations and RTP.

One notable risk is that should vaccines be made mandatory, a participant's individual freedom of choice could be limited. Which not only gives rise to potential discrimination or inequality, but also a restriction of human rights.

Any such policy risks undermining the health of individuals since it potentially discriminates against the realisation of social and economic rights of certain individuals who aren't vaccinated or chose not to be vaccinated.

Whilst there's a counter-argument that making vaccines mandatory for attending a competition at a venue is justified on the basis of being in the

public interest, clearly the legal rights and freedom of movement, assembly and the right to manifest one's religion or beliefs and the right to equality and non-discrimination all go to the heart of an individual's rights under ECHR and HRA.

### Personal health data

Confidentiality of personal health data is a relevant principle of the ECHR (article 8) to protect privacy of individuals but also consideration of undesirable or unintended outcomes if vaccine status inadvertently compounded already disadvantaged characteristics (age, ethnicity, gender etc.). The legal data protection and privacy principles set out at [section B](#) above need to be considered carefully, especially in relation to respect to private lives [10 11](#).

## 4. Other ethical and moral considerations

Legal and ethical concerns are intertwined, and a SAPAP should consider its own internal policies, as well as those of the NGB or other body to which it is a member, when assessing its approach to vaccinations and RTP. These include inclusion, diversity and equality policies. These principles tie into the legal considerations around discrimination and equality law.

Clear and consistent communication is key as an overriding consideration, as well as transparency around policies being implemented. This is particularly the case if individuals are reluctant or unwilling to get vaccinated. Rather than a knee-jerk or reactive response and considering making vaccines mandatory, SAPAPs may wish to think proactively by engaging with participants in an open and transparent manner as early as possible.

Part of the role of a SAPAP is to educate participants on not just the individual benefits of more people being vaccinated before RTP, but the collective benefits to the relevant club, sport, activity or community. This is particularly important when a SAPAP has a community of participants made up of individuals more likely to be 'vaccine hesitant' e.g. pregnant women, certain ethnic minority and lower socioeconomic groups, and individuals or groups unable to take time off work, or travel, to vaccination centres.

Communication around the data being collected (and by whom) when asking participants for information about their health status and whether or not they've received both their vaccine jabs is relevant here too.

Flexibility and dialogue will be key to addressing any issues as they arise.

## Section D: Disabled participants

As part of the consultation with employees about vaccination, it's possible that employers will learn about an employee's disability that they weren't previously aware of. They'll then be on notice of the employee's disability and should consider whether reasonable adjustments should be made.

Strictly speaking, true volunteers wouldn't be covered by discrimination legislation as employees/workers but there's an argument that they would be covered as service users. It's therefore sensible and prudent for a SAPAP to always seek to make reasonable adjustments for any individuals connected to it.

### **Question 10: should a SAPAP's approach to vaccinations change, or be more 'strict', in order to protect participants who are particularly at risk, whether those who've been shielding from coronavirus, are in a high-risk category, or have underlying health conditions that make them particularly vulnerable?**

Clearly there's an obligation and duty on SAPAPs to adapt and adjust their guidance and protocols to ensure they're meeting specific requirements relating to individuals who are at particular risk in light of coronavirus and RTP. This applies to the issue of asking and indeed requiring participants to get vaccinated to protect other, more vulnerable, or at-risk, individuals.

However, as covered elsewhere, any measures must be proportionate, and not go too far such that they unreasonably restrict or delay RTP. They should also factor in the various legal risks and considerations.

Ultimately, there's an important balance to strike. For SAPAPs it's about carrying out a suitably context-specific risk assessment which identifies the level of risk associated with certain categories of participants, and then putting in place measures that are reasonable and proportionate based on those risks. And as an overarching theme, communication with participants around the individual and collective benefits of getting vaccinated prior to RTP is key, so that the whole SAPAP community can work together in making the RTP as safe and efficient as possible.

It's worth also noting that in certain disability sport categories where the participants include clinically vulnerable individuals, there may exist a stronger argument to be more prescriptive on vaccines (and of course other coronavirus-related safety measures), analogous to the position in, for example, care homes or hospitals.

<sup>1</sup> This is an important stakeholder group and includes more 'informal' physical activity providers outside of the more 'traditional' sport setting (e.g. charities, community groups and providers of physical activity sessions in care homes or as part of walking groups or as part of a wider suite of functions).

<sup>2</sup> The Public Health (Control of Disease) Act 1984 gives the government a range of powers to prevent and control the spread of infectious diseases, but the legislation specifically excludes the power to require a person to undergo medical treatment. This includes vaccination.

<sup>3</sup> This would also be relevant for SAPAPs in England that involve participants (or clubs) from Scotland, Wales and Northern Ireland.

<sup>4</sup> ACAS is an independent public body that receives funding from the government. It provides free and impartial advice to employers, employees and their representatives on employment rights, and best practice and policies.

<sup>5</sup> Equality and discrimination laws in the UK are now principally to be found in the 2010 Equality Act.

<sup>6</sup> Note that even if a SAPAP, after a risk assessment, did introduce mandatory vaccines as a 'policy', it would need to make reasonable adjustments for individuals unable to get a vaccine (e.g. pregnant or disabled staff).

<sup>7</sup> These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic and Social and Cultural Rights (ICESCR), as well as many other international agreements on rights to which the UK is a party.

<sup>8</sup> In particular the European Convention on Human Rights and Fundamental Freedoms, to which the UK is a signatory and the rulings of whose court (the European Court of Human Rights) it's under an international law duty to implement.

<sup>9</sup> In particular the Human Rights Act 1998, enacted to bring into domestic law the rights to be found in the European Convention on Human Rights.

<sup>10</sup> This includes the protection of personal health information and biometric data.

<sup>11</sup> Whilst not a direct consideration for SAPAPs, it's worth noting that the idea of electronic vaccine passports being used to monitor individuals' movement, or their health status is part of a broader ethical discussion in the context of vaccines and human rights. Clearly there's a need to prevent marginalised groups being subject to more scrutiny, and mandatory vaccines shouldn't be used to determine the degree of freedom or rights of individuals.

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