



New South Wales
Council for
Civil Liberties

NSW COUNCIL FOR CIVIL LIBERTIES
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Statement: Expansion of mandatory use of NSW Check in Tool

9 July 2021

The NSW Council for Civil Liberties (NSWCCCL) calls on the NSW government to enact legislation to protect the private information of citizens that is being collected for contact tracing purposes. Substantive policy issues which have a significant impact on human rights and personal liberties should be dealt with in primary legislation.

It is timely to review the effectiveness of the privacy safeguards, of information collected, now that the NSW government has announced the expansion of the Service NSW COVID Safe Check-in tool (Check-in tool). From Monday 12 July 2021, it will be mandatory for all businesses and workplaces to use the Check-in tool.

NSWCCCL is prompted by the revelation that WA police had accessed contact tracing data on two occasions as part of criminal investigations in that State. The Western Australia government has urgently enacted legislation to block WA police who were previously legally able to access data on request, without a warrant.¹

The Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021 (WA) introduces a comprehensive legislative framework to ensure that contact tracing information can only be used and disclosed for contact tracing and related purposes; and is not admissible in evidence in any criminal or civil proceedings.²

The Victorian and Queensland state governments have confirmed the police can access data from their respective COVID-19 QR code check-in apps with a warrant.³

In fact, Queensland police have used data collected by the Qld check in tool in an incident, involving the theft of an officer's gun and Taser.⁴ This incidence was only discovered through internal review processes underlying the need for independent public auditing of information requests. In NSW the IPC could have this role, a role that could be enshrined in primary legislation along with other privacy tools such as Privacy Impact Statements.

¹ Sadler, D (28 June 2021) States urged to protect QR code check-in data

<https://www.innovationaus.com/states-urged-to-protect-qr-code-check-in-data/>

²The Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021 (WA)

[https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43928.pdf/\\$FILE/Protection%20of%20Information%20\(Entry%20Registration%20Information%20Relating%20to%20COVID-19%20and%20Other%20Infectious%20Diseases\)%20Act%202021%20-%20%5B00-a0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_43928.pdf/$FILE/Protection%20of%20Information%20(Entry%20Registration%20Information%20Relating%20to%20COVID-19%20and%20Other%20Infectious%20Diseases)%20Act%202021%20-%20%5B00-a0-00%5D.pdf?OpenElement)

³ Sadler, S (17 June 2021) Victoria and Qld police can also access COVID app data

<https://www.innovationaus.com/victoria-and-qld-police-can-also-access-covid-app-data/>

⁴ Dennien, M (28 June 2021) Queensland police use of check-in data sparks reform calls

<https://www.brisbanetimes.com.au/national/queensland/queensland-police-use-of-check-in-data-sparks-reform-calls-20210628-p584x8.html>



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It has also been revealed that police in Victoria had attempted to take data from that state's app three times but was blocked by the health department.⁵

The NSW Check in tool is currently regulated by the Public Health (COVID-19 Gathering Restrictions) (No 2) 2021 Order (NSW). The order states, in clause 27, "that contact details provided ... are to be used only for the purposes of contact tracing during the COVID-19 pandemic".

NSWCCL acknowledges that the Check-in tool has played a vital role in strengthening NSW contact tracing during the pandemic. However, the operation of effective contract tracing relies on NSW citizens having faith that their personal information will be managed correctly and only used for the specific purpose of contact tracing.

The NSW Parliamentary Secretary for Police and Justice, Mark Taylor, has assured the NSWCCL that "it is the position of the NSW Police Force that there is nothing in the current Orders which creates a power for officers to demand the production of the record of contact details for any other reason than that stated in Clause 42" i.e. the purposes of protecting the health or welfare of members of the public during the COVID-19 pandemic.⁶

It is the view of the NSWCCL, however, that such broad purpose could enable the sharing of health information with police for any other number of additional, loosely linked purposes not anticipated by the public. NSWCCL strongly opposes the use of information gathered solely for health purposes being used for law enforcement or any other additional purpose.

It may be especially convenient to use delegated legislation, in the form of orders, for an emergency such as the COVID-19 health crisis. However, significant and substantive policy issues should be dealt with in primary legislation. As an example, the Commonwealth Legislation Handbook lists matters that should be included in primary legislation, such rules which have a significant impact on human rights and personal liberties. The check-in tool, particularly as expanded, is a form of surveillance which can have a chilling effect on people's behaviour. It significantly impacts personal liberties albeit willingly, for the moment, in exchange for protection of citizens' health.

The NSW Chief Medical Officer, Dr Kerry Chant, amongst others, acknowledges the fatigue being experienced in the community from the current lockdown and continued restrictions on movement.⁷ The NSW government cannot risk further or extended lockdown due to public faith in check-in data security being undermined by a lack of trust. Once trust is lost, contact tracing becomes infinitely more difficult.

A related issue is the unwinding/revocation of the Check-in tool. An order expires at the end of 90 days after it was made, unless revoked, or on such earlier date as may be specified in the order.⁸ However, every change to an existing order resets the limit of the previous order, extending the sunset clause. The

⁵ Sadler 28 June op.cit.

⁶ Now clause 28

⁷ News report ABC 8 July 2021

⁸ *Public Health Act 2010 (NSW)*- SECT 7 (5)



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orders have changed at a seemingly rapid rate, since the pandemic began, creating confusing and inconsistent messaging, amply demonstrated in this current lockdown. In respect of the Check-in tool, at least, instability and the undermining of legal certainty could be avoided.

NSWCCL urges the introduction of laws which address this uncertainty and state that check-in data can only be used expressly for public health purposes.

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