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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**COVID-19 EMERGENCY RESPONSE (CHECK IN INFORMATION)
AMENDMENT BILL 2021**

**EXPLANATORY STATEMENT
and
Human Rights Compatibility Statement**
(Human Rights Act 2004, s 37)

Presented by
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**COVID-19 EMERGENCY RESPONSE (CHECK IN INFORMATION)
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COVID-19 EMERGENCY RESPONSE (CHECK IN INFORMATION)
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The Bill is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HRA).

Background – the COVID-19 Public Health Emergency

In December 2019, China reported cases of a viral pneumonia caused by a previously unknown pathogen in Wuhan City, in the Hubei Province of China. The pathogen was identified as a novel coronavirus genetically related to the virus that caused the outbreak of Severe Acute Respiratory Syndrome in 2003. The new strain of coronavirus has come to be known as called SARS-CoV-2 and the disease it causes known as COVID-19. COVID-19 is presently understood to most likely spread from person-to-person contact.

On 30 January 2020, the Director-General of the World Health Organisation (WHO) declared the outbreak of COVID-19 a Public Health Emergency of International Concern. On 11 March 2020, the Director-General of the WHO declared COVID-19 a global pandemic. The WHO requested that every country urgently take necessary measures to ready emergency response systems.

On 16 March 2020, the Minister for Health declared a public health emergency under section 119 of the *Public Health Act 1997* (the PHA) due to the public health risk to the ACT community posed by COVID-19.

On 2 April 2020, the Legislative Assembly passed the *COVID-19 Emergency Response Act 2020* (the Act), which commenced on 8 April 2020.

Since passage of the Act several vaccines have been developed and approved for usage, and an Australia vaccination program implemented. However, during that same time period several variants of concern have also emerged, which have labelled *Alpha*, *Beta*, *Gamma* and *Delta*, with the latter proving to be of greatest concern.

As of 9 July 2021, globally there have been 185,291,530 confirmed cases of COVID-19 and 4,010,834 deaths reported to the World Health Organization (WHO). Also, as of 9 July 2021, there have been a total of 30,905 cases of COVID-19 reported in Australia and 910 deaths.

Comparatively, the Australia Capital Territory has fared extremely well having recorded just 124 cases, although sadly amongst those cases there were three deaths. That is, however, despite in recent months there having been COVID-19 outbreaks impacting NSW, Victoria, South Australia, and Queensland. The COVID-19 situation in NSW is of particular concern to the Australia Capital Territory not just due to the shared border, but due to its size and duration, and because cases which initially been confined to greater Sydney are beginning to be detected in regional NSW.

Background – the Check In CBR app

The ACT Government’s Check In CBR app (the App) was developed by ACT Health to be a fast, easy, and secure mechanism to record the attendance of individuals who have entered a restricted premise in accordance with public health emergency directions. The requirement is currently contained within the Public Health (Check In Requirements) Emergency Direction 2021 (No 2) (the Direction), notified on the ACT Legislation Register as NI2021-437.

Since being first launched on 9 September 2020 the App has proven to be incredibly successful. At the time that this Bill was prepared the App has been downloaded approximately 880,000 times, has had over 25 million check ins and is used in approximately 16,000 businesses/venues/locations in the ACT.

Mandatory ‘checking in’ to businesses and venues was adopted nationally in response to the recommendations of the National Contact Tracing Review – A report for Australia’s National Cabinet (November 2020) which set out the characteristics of optimal contact tracing and COVID-19 outbreak management systems.

The Direction requires retail settings, public transport, taxi and rideshare and businesses and undertakings restricted under Public Health Directions to register to use the App, display an associated QR Code, and take reasonable steps to ensure that persons aged 16 years of age or older who enter the business record their attendance. The name, contact phone number and email is transferred to a secure ACT Health server. The data is stored for 28 days for the purpose of contact tracing (if required) and then deleted, unless the data is required for investigating or prosecuting an offence for failing to comply with a public health direction about contact tracing or giving false or misleading information about contact tracing, in which case it will be held until it is no longer needed.

Persons, including staff, entering a premise also have a responsibility to check in using the App, regardless of the length of time they plan to be in the premise. Penalties apply for businesses and individuals who fail to comply with this Direction.

Information about privacy and the use of the App is contained within the Privacy Policy and Terms of Conditions of the App itself, and also reflected in ACT Health’s Privacy Statement published on its website. Territory privacy legislation includes references to mechanisms that allow courts to make orders requiring or authorising the disclosure of personal information. Accordingly, at present ACT Health would be required to disclose personal information collected through the App if compelled to do so by a court or tribunal through processes such as, issuing of a subpoena or warrant.

There have been no such attempts to access personal information collected through the App in this manner to date. Nevertheless, the ACT Human Rights Commissioner has previously expressed concerns about the adequacy of existing privacy protections applying to personal information collected by the App, and has recommended legislative reforms to provide

additional privacy and human rights safeguards by removing the power of a court or tribunal to compel disclosure of personal information obtained through the App.

Western Australia has enacted legislation with a similar effect. The *WA Protection of Information (Entry Registration Information Relating to COVID-19 and Other Infectious Diseases) Act 2021* (the WA Act) ensures its SafeWA app data cannot be used for any purpose other than for health/contact tracing purposes, with or without a subpoena, and must be deleted after 28 days unless investigating or prosecuting an offence in relation to compliance with contact tracing.

Overview and purpose of the Bill

The COVID-19 Emergency Response (Check In Information) Amendment Bill 2021 will have the effect of exclusively reserving personal information collected through the App for contact tracing purposes and compliance with its provisions. This will displace several uses and disclosures of such information which would ordinarily be permitted under the Territory Privacy Principles (TPPs) set out in the ACT's *Information Privacy Act 2014*. In this regard, the effect of the amendments is analogous to those made by the Federal government to the Commonwealth *Privacy Act 1988* when introducing the Federal government's COVIDSafe app. Those amendments, made through the *Privacy Amendment (Public Health Contact Information) Act 2020*, effectively prohibit the use of information obtained directly from the COVIDSafe app for any purpose other than contact tracing.

The policy objective of this Bill is therefore to entrench in primary legislation that personal information collected about individuals by the App:

- a. is provided directly to, and stored by, ACT Health; and
- b. is stored for 28 days and is then deleted, unless the person is subject to an investigation or prosecution for failing to comply with a public health direction about contact tracing or giving false or misleading information about contact tracing; and
- c. can only be used for contact tracing and contact tracing compliance purposes.

The legislative provisions contained in this Bill are only necessary during the COVID-19 public health emergency. For that reason, the *COVID-19 Emergency Response Act 2020* was chosen as the most appropriate location for the amendments because of both its stated purpose of providing emergency measures in response to the COVID-19 emergency, and because it already contains provisions designed to offer community assurance, specifically in relation to parliamentary oversight through section 3 of the Act. Furthermore, the entire Act

is to expire “at the end of a 12-month period during which no COVID-19 declaration has been in force”.

Consultation on the proposed approach

Due to the urgent nature of the Bill, consultation with the community and stakeholders was not possible. However, the amendments contained within the Bill are in response to feedback received from the ACT Human Rights Commissioner about possible privacy concerns associated with the collection, storage and use of personal information by the App for contacting purposes.

The Justice and Community Safety Directorate was also consulted in relation to the amendments, including on the construction and use of offences and consistency with the Territory’s *Human Rights Act 2004* (the HRA).

In addition, the ACT Health Directorate has had regular contact with the Australian Health Protection Principal Committee (AHPPC) and the National Cabinet about the developing COVID-19 situation and a nationally consistent approach to mitigating the risk (for instance through implementation of the recommendations of National Cabinet’s Contact Tracing Review).

The ACT Health Directorate has also provided regular updates to the community about COVID-19 and the use of the App, and will continue to ensure that the community is informed about confirmed cases in the ACT, measures that are being implemented by the ACT Government, and any other actions that should be taken by the public to limit the spread of COVID-19.

Expiration of provisions

The *COVID-19 Emergency Response Act 2020* already contains an expiry clause, and all amendments in the Bill will be subject to the same time-limited application.

Consistency with Human Rights

Rights Engaged

Broadly, the Bill engages and *promotes* the following HRA rights:

- Section 9 – Right to life
- Section 12 – Right to privacy and reputation

The Bill also engages and *limits* the following HRA rights:

- Section 22 – Rights in criminal proceedings

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic

society. This is further reflected in section 28 of the HRA, with the first subsection of that provision stipulating that human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Subsection (2) then instructs that, in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purposes; and
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

However, the reasonable limits test may not require the adoption of the least restrictive means identified, but rather that when determining the reasonableness of the relevant limitation, it is sufficient that the means adopted falls within a range of reasonable responses to the problem confronted.

The limits that are placed on human rights by the Bill are reasonable and justifiable in a free and democratic society. An assessment of the Bill's impact on relevant provisions of the HRA, against all factors in section 28 (2), is provided below.

Detailed human rights discussion

Permitted uses of check-in information, and check-in information not admissible in court

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

Contact tracing is, in relation to COVID-19, the process of identifying persons who have or may have COVID-19, or persons who have or may have been exposed to COVID-19, and then communicating public health advice and requirements to such persons. Contact tracing is therefore an essential and highly effective means of responding to the public health risks posed by COVID-19 and ultimately alleviating the significant public health risks associated with the COVID-19 public health emergency. In this regard, contact tracing positively engages the right to life as the objective of contact tracing is to protect the lives of members of the ACT community.

The benefits of contact tracing are significantly enhanced if information about the movements of suspected cases and the identification of persons potentially exposed can be reliably and expeditiously obtained. The development and use of the App deliver precisely those benefits through the recording of information about the presence of persons at particular locations.

This however impacts upon the privacy of those persons as information is recorded about them and their movements.

Accordingly, the amendments made by this Bill operate to limit the use of collected personal information to contact tracing and compliance with contact tracing obligations only, and in doing so positively engage the right to privacy through the introduction of additional controls and safeguards about the use of contact tracing information collected.

Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))

Paragraphs 24, 25 and 26 of the United Nation’s ‘Siracusa Principles’ specifically deal with public health. The Siracusa Principles recognise that public health is a legitimate basis for limiting certain rights to deal with a serious public health threat, and due regard is to be given to the advice and instruction on COVID-19 issued by the World Health Organization (the WHO).

Accordingly, the infringement of the right to privacy by contact tracing is a legitimate purpose, in that it is a valuable and effective method of responding to and alleviating the COVID-19 public health emergency. Nevertheless, the additional privacy protections granted by this Bill also have a legitimate purpose in reducing the extent to which the right to privacy is impacted by the Check In CBR app contact tracing system.

Proportionality (s 28(2)(e))

Additional protections on personal information include:

- a requirement that information is only collected via authorised means – that is, the Check In CBR app or another means permitted under the public health directions;
- limiting the permitted uses of information collected via the Check In CBR app to contact tracing and related compliance uses;
- excluding the use of Check In CBR information in court proceedings unless the person is subject to an investigation or prosecution for failing to comply with a public health direction about contact tracing or giving false or misleading information about contact tracing; and
- requirements for the protection and destruction of Check In CBR app information.

In addition, the period during which the provisions for the collection and use of personal information operate is limited. The amendment will operate only during the COVID-19 emergency period as the COVID-19 Emergency Response Act 2020 expires 12 months after the COVID-19 emergency declaration expires.

The Check In app is an effective means to respond to the COVID-19 emergency. Minimal personal information is collected in order to identify a person’s presence at a location in the ACT. It is considered that the provisions for collection, use, protection, and destruction of personal information minimise the potential for infringement of a person’s right to privacy and are therefore proportionate to achieving the legitimate aim.

Offences related to check-in information – strict liability offences

The nature of the right affected and the limitation (s 28 (2) (a) and (c))

Strict liability offences engage the presumption of innocence under s22(1) of the HRA by removing the fault elements from an offence. This means that it will be sufficient for the prosecution to establish the factual elements of the offence in order to prove the offence, rather than needing to prove that the person acted intentionally or recklessly. However, it is still possible for a person to raise the defence of reasonable and honest mistake.

Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))

The Bill is being introduced to exclusively reserve personal information collected by the App for contact tracing and compliance with contact tracing purposes. This will displace, and even prohibit, several uses and disclosures of such information which would ordinarily be permitted under the Territory Privacy Principles (TPPs) set out in the ACT's Information Privacy Act 2014 (see Background – the Check In CBR app).

The Bill contains strict liability offences that will apply in the case of:

- collection other than via the Check In CBR app or another method permitted under the public health direction; and
- use of check-in information for purposes other than permitted uses.

The imposition of offences to prohibit conduct considered improper is a legitimate purpose. Furthermore, as the imposition of the offences addresses the misuse or improper collection of privacy information collected through contact tracing, there is a rational connection between the creation of the offences and the Act's stated primary purpose of providing "emergency measures in response to the COVID-19 emergency".

The rationale for inclusion of strict liability offences is to ensure that a sufficiently robust and consistent enforcement regime can operate efficiently as part of an escalating enforcement framework, to meet the purpose of ensuring public health and community wellbeing and confidence in the imposed check-in systems and processes.

Proportionality (s 28(2)(e))

The strict liability offences are intended as added safeguards for protecting personal information. The offences support the requirements for the collection of personal information for contact tracing and compliance with contact tracing purposes to be carried out only by those persons authorised to do so, via permitted means, and further for the data to *only* be used for contact tracing and compliance with contact tracing purposes following which that data is to be destroyed after a defined period.

Strict liability offences are appropriate in a regulatory context where a defendant can reasonably be expected to know what the requirements of the law are, and where the need to establish a fault element in each case would make the enforcement regime less effective.

In this case the strict liability offences will primarily apply to persons responsible for collecting or handling check in information and those required to comply with a public health direction in relation to contact tracing who should be aware of the regulatory requirements in relation to the collection and use of this information.

The imposition of strict liability for these offences will ensure that the regulatory intent can be effectively achieved, and the offences enforced while allowing for a defence of reasonable mistake where a person was acting under a genuine misapprehension regarding factual issues.

COVID-19 EMERGENCY RESPONSE (CHECK IN INFORMATION) AMENDMENT
BILL 2021

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **COVID-19 Emergency Response (Check In Information) Amendment Bill 2021**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

Detail

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act will be the *COVID-19 Emergency Response (Check In Information) Amendment Act 2021*.

Clause 2 — Commencement

This clause provides that, except for new sections 2D, 2E (1) to (3) and 2G (1) to (2), the Act will commence on the day after notification.

New sections 2D, 2E (1) to (3) and 2G (1) to (2), which create several new offences, are to commence 30 days after the commencement of the *COVID-19 Emergency Response (Check In Information) Amendment Act 2021*. The delayed commencement is to ensure that there is an appropriate ‘grace’ period applying before the offences commence operation, during which time ACT Health and supporting ACT government agencies will engage with businesses, undertakings, and public transport providers to ensure awareness of the new offences and potential penalties which could be imposed.

Clause 3 — Legislation amended

This is a technical provision identifying the *COVID-19 Emergency Response Act 2020* as the Act that is being amended.

Clause 4 — New part 1 heading

This clause inserts into the *COVID-19 Emergency Response Act 2020* a new heading prior to section 1 of the Act. The heading to be inserted is to read “Part 1 Preliminary”. This amendment is necessary as this Bill will insert several new sections into the *COVID-19 Emergency Response Act 2020* pertaining to Check In Requirements, and as such it is necessary to distinguish preliminary provisions from those concerning check-in information through the creation of specific Parts.

Clause 5 — New section 2 etc

This clause inserts a new section 2 into the *COVID-19 Emergency Response Act 2020*, followed by new sections 2A through to 2G. As provisions that are preliminary in nature new sections 2, 2A and 2B will be located within Part 1 (to be created by Clause 4 of the Bill). Sections 2C through 2G will form the content of Part 2, the heading for which is “Check-in information”. These sections within new Part 2 contain the core legislative reforms of this Bill.

New section 2 – Dictionary

This new section simply informs the reader that there is a dictionary at the end of the Act which defines certain terms used throughout the legislation, and as such the dictionary is a part of the Act.

New section 2A – Notes

This is a standard provision included in all new Acts which clarifies to the reader that notes included in the Act are not part of the Act. The section is accompanied by a note which references section 127, subsections 1, 4 and 5 of the *Legislation Act 2001*, which address the legal status of notes.

New section 2B – Offences against Act – application of Criminal Code etc

This is also a standard clause included in all new Acts which is intended to draw the reader's attention to the application of other legislation in relation to offences. Note 1 in the section operates to alert the reader to the application of provisions of the Criminal Code to offences in this Act, and in particular Chapter 2 (General Principles of Criminal Responsibility) of the Criminal Code. Through Note 2 in the section the reader is informed that section 133 of the *Legislation Act 2001* should be consulted for guidance on penalty.

New section 2C – Definitions—pt 2

A new Part 2 of the Act dealing with check-in information begins with new section 2C which establishes definitions of several critical words and phrases used in Part 2.

Section 2C as inserted by clause 5 of this Bill includes definitions of the following terms:

- *authorised collector*;
- *Check In CBR app*;
- *check-in information*;
- *contact tracing*;
- *court*;
- *permitted purpose*;
- *public health direction*;
- *statistical or summary information*; and
- *use*.

In addition to those definitions, section 2C operates to direct the reader that the meaning of **authorised person** is that which is contained in section 121 (4) of the *Public Health Act 1997*.

Check In CBR app has been defined to mean the mobile application known as 'Check In CBR', designed to allow people to record their presence at a place using a mobile device. Under section 2D (1) as inserted by this Bill a person may only collect check-in information through using the Check In CBR app or in another way permitted under a public health direction (or under an exemption issued by the Chief Health Officer in accordance with a public health direction).

The combined effect of section 2D (1) and the definition of Check In CBR app is that unless specifically permitted by the Chief Health Officer under a public health direction no other app will be permitted to be used to collect check-in information. Even if that alternative app has been designed to allow people to record their presence at a place using a mobile device, that app will be not be known as ‘Check In CBR’.

Furthermore, a key feature of the ‘Check In CBR’ app is that it was developed by ACT Health to operate in a way in which check-in information collected is provided directly to ACT Health, and thereafter is stored and handled in accordance with ACT Health’s privacy principles, and the operation of these legislative provisions.

Another key phrase defined in section 2C is that of **check-in information**, which means information about the presence of a person at a place in the ACT collect for the purpose of contact tracing. Accordingly, information about the presence of a person at a place collected for some other purpose, such as determining capacity limits for liquor or fire regulations, is not captured by Part 2 of the Act as inserted by this Bill. It should also be noted that the definition of **check-in information** also specifically excludes certain information from the prescribed meaning of **check-in information**. This extends to information relating to the registration of a business, undertaking or public transport providers to use the Check In CBR app, or about **statistical or summary information** derived from the Check In CBR app, such as about the amount of check-ins recorded at a particular venue on a particular day or over time indicating that a venue is complying with the Direction.

Contact tracing is a well established and critical public health process which under section 2C is defined to mean the process of identifying, notifying, communicating with, managing, and directing a person who may be or may have been a source of COVID-19 infection, or alternative, a person who may have been in direct or indirect contact with a person who is or may have been a source of COVID-19 infection. Through this contact tracing process health authorities seek to identify ‘chains of transmission’, and hopefully intervene to prevent further ‘chains of transmission’. The definition also offers examples of direct and indirect contact, however it is important to recognise that direct contact is not referring to or limited to actual physical interaction, but rather also includes close or extended proximity. In contrast, indirect contact can extend to a ‘casual’ contact or even fleeting exposure.

In order to simplify the construction of certain sections to be inserted by this Bill the term **court** is used to encompass not just a court in the ordinary sense (such as the Magistrates Court or Supreme Court) but also a tribunal, or even a person who has the power to require the production of documents or the answering of questions, such as a Commissioner appointed under ACT legislation.

New section 2C establishes that for the purposes of Part 2 of the Act an **authorised collector** is a person who may or must collect check-in information under a public health direction (which is also defined in section 2C), or a person who has registered with the Territory to use the Check In CBR app in relation to a place. This recognises that not all persons using the Check In CBR app are expected or required to use the Check In CBR app, as a great number of persons have voluntarily chosen to register for and use the Check In CBR app for their premises. However, irrespective of whether a person is expected to or required to use the Check In CBR app or does so voluntarily, the check-in information is to be subject to the protections in this Act.

The term **statistical or summary information** is defined in section 2C to mean statistical or summary information that could not reasonably be expected to lead to the identification of an individual. As outlined earlier, statistical or summary information is not **check-in information** for the purposes of the provisions within Part 2 of the Act (as inserted by this Bill). Section 2C as inserted by this Bill also provides relatively straightforward definitions of the term **public health direction**.

Also included is a definition of what amounts to a **permitted use**. The effect of that definition essentially limits the primary permitted use of check-in information to contact tracing (also defined in section 2C). However, purposes relating to undertaking contact tracing is also permitted, which will extend to activities such as assessing, monitoring, and safeguarding the integrity or security of check-in information. This might involve assessing if any data may have been lost or corrupted through an IT failure, or checking to ensure no data has been lost to a malicious cyberattack.

Also permitted is the use of check-in information for the preparation of statistical or summary information by public servants approved by the Chief Health Officer. However, in most instances such information can be produced without accessing aspects of data identifying individuals

Associated with this definition is a further definition of the term **use**, as it applies in relation to information, which essentially includes forms of disclosure, or the making of a record.

New section 2D – Collection of check-in information

A key aspect of the Bill's policy intent is achieved through the imposition of an offence contained within this new section. The offence contained in the first subsection provides that an authorised collector can only collect information for the purpose of contact tracing through one or both of two ways. The primary means is through the direct entry of the information into the Check In CBR app developed and maintained by the ACT Government. Information can be directly entered into the Check In CBR app by using a mobile device to scan a code registered to a place or premises by the ACT Government, or through entry of the information into a Check In CBR app 'business profile' registered to that place or premises. Registered Check In CBR codes are displayed as both a six-digit number or as a quick reference (QR) matrix barcode that is machine-readable.

The only other means an authorised collector can lawfully collect information for the purpose of contact tracing, under subsection (1) (b), is through a way that is permitted under a public health direction, or that has been expressly approved under a specific exemption or approval given by the Chief Health Officer in accordance with a public health direction.

Through the application of the offence in section 2D (1) the permitted methods by which check-in information can be collected is restricted. Put simply, check-in information is only to be collected through the Check In CBR app developed and maintained by the ACT Government, or in a way permitted under a public health direction or a specific exemption or approval given by the Chief Health Officer in accordance with a public health direction.

Such exceptions will be a rarity, and will often only apply or be granted in circumstances in which there is no internet coverage available, or a temporary loss of internet service has occurred, which prevents the Check In CBR app from being able to operate. The overall effect of the provision is that the Check In CBR app is the only approved apps or electronic attendance record system permitted to be used.

The offence in section 2D is a strict liability offence carrying a maximum penalty of 40 penalty units. An offence is called ‘strict liability’ when there is no requirement to prove a fault element, such as intention or recklessness in relation to some, or all, of the physical elements of an offence. It is sufficient to show that the defendant did the prohibited act. It must also be recognised that the defence of reasonable mistake of fact applies to strict liability offences through the operation of the Criminal Code.

Strict liability offences generally arise in a regulatory context, such as public health protection, where a defendant can reasonably be expected to know what the requirements of the law are, and on that basis fault elements can justifiably be excluded.

New section 2E – Use of check-in information

This new section contributes to key aspects of the Bill’s policy intention that the use of check-in information be essentially constrained to contact tracing, or associated purposes (such as training ACT Government staff in how check-in information is to be appropriately accessed and used).

Under subsection 1 a person will have committed an offence if they use check-in information and the person is not an authorised person under the *Public Health Act 1997*. The maximum penalty for this offence is 40 penalty units.

This is because the main purpose of check-in information is for it to be used for contact tracing purposes, and only persons authorised under the *Public Health Act 1997* should be undertaking contact tracing work in the ACT. However, under subsection 2 (c) an authorised collector is able to disclose check-in information to an authorised person on request.

The third subsection establishes that strict liability applies to the offence in subsection 1. Subsection 4 then instructs that authorised person may use check-in information only for a *permitted purpose*; a term also explained in section 2C.

As previously discussed, an offence is called ‘strict liability’ when there is no requirement to prove a fault element, such as intention or recklessness in relation to some, or all, of the physical elements of an offence. It is sufficient to show that the defendant did the prohibited act. It must also be recognised that the defence of reasonable mistake of fact applies to strict liability offences through the operation of the Criminal Code.

Section 2E (3) places a positive obligation on authorised persons to only use check-in information for a *permitted purpose*. As previously noted in relation to section 2C, what amounts to a *permitted use* is explained in section 2C. The effect of that definition essentially limits the primary permitted use of check-in information to contact tracing (also defined in section 2C). However, purposes relating to undertaking contact tracing is also permitted, which will extend to activities such as assessing, monitoring, and safeguarding the integrity or security of check-in information. This might involve assessing if any data may have been lost or corrupted through an IT failure, or checking to ensure no data has been lost to a malicious cyberattack.

Also permitted is the use of check-in information for the preparation of statistical or summary information by public servants approved by the Chief Health Officer.

New section 2F – Check-in information only admissible in court for limited purposes

This section expressly provides that check-in information, as defined in section 2C, is not admissible in a court proceeding, other than in accordance with subsection 2. The second subsection then operates to establish that check-in information may however still be used for the purpose of investigation or prosecuting an offence relating to compliance with a public health direction, where that public health direction relates to contact tracing. The offending behaviour addressed in subsection 2 includes both failing to comply with such a public health direction and giving false or misleading information when complying (or purporting to comply) with such a direction.

The extended effect of this is that a court – defined in section 2C to also include a tribunal or a person having power to require the production of documents or the answering of questions – will have no legitimate public interest basis for issuing a subpoena or court order to compel the production of check-in information, except for a matter concerned with compliance with a public health direction relating to contact tracing.

When interpreting and applying section 2F it is critical that full regard be given to the application of definitions contained with section 2C; and in particular the definitions of *contact tracing* and *check-information*. Contact tracing is a process used to, amongst other things, identify persons who are potentially sources of COVID-19 infection. Check-in information is generally information about the presence of a person at a place in the ACT, collected for the purpose of contact tracing. Accordingly, a public health direction that sets out requirements about who must make the Check In CBR app available for use, and who must check in, amounts to a public health direction relating to contact tracing.

New section 2G – Protecting and destroying check-in information

Under subsection 1 an authorised collector must take all reasonable steps to protect check-in information that they hold from being misused, interfered with or other lost, as well as to protect check-in information from unauthorised access, modification or disclosure.

The phrasing of the offences, and in particular the use of the words ‘interference’, ‘loss’, and ‘modification’ is consistent with the language used in the TPPs set out in the ACT’s *Information Privacy Act 2014*.

The obligation imposed by this offence only extends to check-in information that the person holds. A key feature of the Check In CBR app is that check-in information is sent directly to the ACT Government (ACT Health). Accordingly, check-in information collected by the Check In CBR app is not held by an authorised collector, and as such the authorised collector has no responsibility – or ability – to protect such check-in information. Accordingly, this offence and the obligation it imposes will only have effect if the check-in information collected is by an approved alternative method in accordance with section 2D (2)(b).

A further offence is contained in subsection 2 which requires that an authorised collector take all reasonable steps to destroy check-in information that they hold at a certain time. In most instances destruction is to occur at the end of the contact tracing period. However, if the information is used for a purposes mentioned in section 2F(2) destruction is to occur as soon as reasonably practicable after the authorised collector no longer needs the information. The timeframe in this instance is expressed as being ‘as soon as reasonably practicable’ in recognition that the processes involved in an investigation or prosecution under section 2F(2) may be lengthy, and after such a prolonged period immediate deletion may not be practical or reasonable.

As discussed earlier in this explanatory material, section 2F(2) permits the use of check-in information for the purposes of investigating or prosecuting an offence for failing to comply with a public health direction in relation to contact tracing, or in relation to giving false or misleading information when purporting to comply with a public health direction in relation to contact tracing.

The fourth subsection to the provision instructs that the contact tracing period is a period of 28 days commencing on the day the information is collected, or another period prescribed by regulation.

A maximum penalty of 5 penalty units applies to both offences, however strict liability has not been applied to these offences due to the requirement to ‘take all reasonable steps’.

Section 2G(3) places a positive obligation on the Director-General responsible for administering the *Public Health Act 1997* to take all reasonable steps to destroy check-in information held by the Directorate at the end of the contact tracing period.

Clause 6 — Reports for Legislative Assembly

Section 3(4), definition of *COVID-19 declaration*

At the time that this Bill was prepared section 3(4) of the *COVID-19 Emergency Response Act 2020* provided a definition of the term ‘COVID-19 declaration’. Clause 9 of this Bill creates a dictionary for the *COVID-19 Emergency Response Act 2020* in which definitions of specific terms used through the Act will be located. Due to the establishment of a new dictionary this clause removes section 3(4) and the definition it contained, which will instead now appear in the dictionary.

Clause 7 — New Part 3 heading

This clause inserts into the *COVID-19 Emergency Response Act 2020* another new heading positioned prior to section 5 of the Act. The heading to be inserted is to read “Part 3 Miscellaneous”.

Like clause 4, this amendment is necessary as this Bill will insert several new sections into the *COVID-19 Emergency Response Act 2020* pertaining to check in information. Accordingly, just as it was necessary to insert Parts into the Act to distinguish preliminary provisions from those concerning check in information, it is also necessary to distinguish the new check in information provisions from miscellaneous provisions.

Clause 8 — New section 4A

At the time that this Bill was prepared the *COVID-19 Emergency Response Act 2020* did not contain a regulation-making power. That absence is rectified by this clause with the insertion of new section 4A which simply provides that the Executive may make regulations for this Act.

Clause 9 — Expiry – Act Section 5(2)

At the time that this Bill was prepared section 5(2) of the *COVID-19 Emergency Response Act 2020* operated to guide the reader to the fact that a definition of the term ‘COVID-19 declaration’ was contained in section 3(4). With the creation of a dictionary for the *COVID-19 Emergency Response Act 2020* by clause 9 of this Bill section 5(2) is no longer necessary and is accordingly removed by this clause.

Clause 10 — New Dictionary

A dictionary for the *COVID-19 Emergency Response Act 2020* is inserted by this clause. The definition of *COVID-19 declaration* previously contained in section 3(4) of the Act is contained within the Dictionary, along with a definition of *COVID-19*. For the meaning of all other terms used, such as *check-in information*, *contact tracing* and *CBR check-in app*, the reader is referred back to section 2C of the Act.