

**HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS**

PARLIAMENTARY INQUIRY WRITTEN QUESTION ON NOTICE

Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the
Crimes Legislation Amendment (Economic Disruption) Bill 2020 .

QoN Number: 04

Subject: Law Council of Australia Recommendations

Asked by: Amanda Stoker

Question:

The Law Council of Australia (LCA) raised the following concerns in relation to the bill:

1. The LCA recommended preserving the existing obligation on law enforcement officials in subsection 23V(3) to provide or make available records made of an admission or confession, which is elicited by a law enforcement official who is acting covertly, based on the rationale detailed at pp. 29-33.
2. The LCA also recommended that the committee seek further explanation from the Government regarding the inclusion of measures in schedule 2. The LCA recommended the committee specifically enquire as to whether the inclusion of schedule 2 measures reflects an intention to make greater use of covert investigations, and/or may facilitate greater use of such techniques in the investigation of Commonwealth offences (see p. 34.)

Can the department please respond to recommendations and concerns raised by the LCA?

Answer:

Recommendation 7—preservation of the requirements in subsection 23V(3)

The Law Council has recommended that Item 6 of Schedule 2 to the Bill should be omitted and substituted with amendments to section 23V of the *Crimes Act 1914* that preserve the existing obligation on law enforcement officials in subsection 23V(3) to provide or make available records made of an admission or confession, which is elicited by a law enforcement official who is acting covertly. It is recommended that the obligation to provide these records to a suspect or their lawyer should apply as soon as it is possible to do so without causing prejudice to the covert investigation in relation to the suspect.

The Department is considering this recommendation.

Recommendation 8—improved safeguards for ‘scenario evidence’ techniques

The Law Council has also recommended that the Committee seek further explanation from the Government regarding the inclusion of measures in Schedule 2 to the Bill. The Law Council recommended that the Committee specifically enquire as to whether the inclusion of Schedule 2 measures reflects an intention to make greater use of covert investigations, and/or may facilitate greater use of such techniques in the investigation of Commonwealth offences.

These amendments do not reflect an intention to make greater use of covert investigations.

The amendments made by Schedule 2 strengthen undercover operations by clarifying that the obligations imposed on investigating officials under Part IC of the Crimes Act do not apply to undercover operatives. These amendments are critical to achieve the legitimate objective of maintaining public order by ensuring that any evidence gained by undercover operatives is not considered to have been obtained unlawfully by reason of the fact that an undercover officer did not comply with the Part IC procedures. This will improve the Commonwealth’s capacity to prosecute serious criminal offences. Requiring compliance with those obligations would directly undermine any undercover activity undertaken by law enforcement officers.

Undercover operative programs provide law enforcement agencies with a professional undercover capability to meet the challenges of multi-jurisdictional domestic and international crime. It is a vital component in investigating serious crime. The amendments made by Schedule 2 support this capability and ensure that evidence gained by operatives is admissible (subject to the court’s ultimate discretion). Undercover officers are trained to engage with alleged offenders in a fair, safe and non-threatening way at all times and provide every opportunity for targets to not engage in criminal activity. All undercover operations go through a stringent internal vetting and approval process.

Further, the Commonwealth Ombudsman provides independent oversight of the use of powers by law enforcement agencies in investigations into serious Commonwealth offences.