

**ECONOMIC POLICY SCRUTINY COMMITTEE**  
**UPDATED RESPONSE TO WRITTEN QUESTIONS**

On 14 February 2019, the Economic Policy Scrutiny Committee asked the Attorney-General and Minister for Justice a number of questions to which answers were provided on 25 February 2019.

On 6 March 2019, the Committee sought clarification in relation to the response to question 11. The Attorney-General and Minister for Justice provides the following updated response to question 11, and also takes the opportunity to revise the response to question 7.

**Liquor Amendment Bill 2018**

7. **NAAJA expressed concerns that, given reasonable suspicion of the commission of an offence is not required to stop a vehicle, there is potential for the power to be abused to operate as a pretext for unrelated questioning, vehicle checks, or even to conduct searches if during questioning related to a POSI an officer forms a reasonable suspicion based on evidence that would have otherwise been unavailable to them.**
- (a) *What safeguards will be in place to prevent this from happening?*
11. **Is a defence of entrapment available to a person charged as a result of an undercover operation? What safeguards exist against a person being induced to commit a crime in the course of an undercover operation?**

Answers:

7. NAAJA expressed concerns that, given reasonable suspicion of the commission of an offence is not required to stop a vehicle, there is potential for the power to be abused to operate as a pretext for unrelated questioning, vehicle checks, or even to conduct searches if during questioning related to a POSI an officer forms a reasonable suspicion based on evidence that would have otherwise been unavailable to them.

(a) *What safeguards will be in place to prevent this from happening?*

**Answer**

The policy intention for the amendment to insert section 101ZK(7) is that the power to stop and give reasonable directions will only occur in the context of section 101ZK of the Act, and only if as set out in subsections (5) and (6), where 'the officer or inspector suspects on reasonable grounds that an alcohol-related offence is likely to occur', will the officer or inspector seize a container or prevent the customer from entering or remaining in the premises.

The amendment gives police officers and inspectors legislative power to stop vehicles only for the purpose of exercising a power under 'this section', being section 101ZK of the Act. Police officers exercising this power are obliged to exercise it responsibly in the same manner as they exercise a wide range of other policing powers. A significant safeguard is in place in the provision, with the limitation of the words 'reasonable direction'.

If the change proposed by NAAJA was made, police officers and inspectors would be unable to stop or give directions to customers in vehicles unless they suspected that an alcohol related offence was likely to occur. That suspicion is not required in order to exercise the point of sale intervention powers for customers on foot. Without the proposed power, a customer trying to avoid the intervention powers could direct the vehicle to keep moving and it is unclear that police officers or inspectors would have the powers to require that vehicle to stop.

It is accepted there may be situations where a vehicle stopped under the proposed amendment may lead to the police officer receiving further information than may not otherwise be available to them. An example may be that a police officer may become aware of domestic violence or a potential breach of a domestic violence order during a routine vehicle stop. In those situations, police are obliged to act on the information received as required by the relevant legislation. It would be expected that the police officer would be cognisant of those duties to act on information received when stopping a vehicle under section 101ZK of the Act.

11. Is a defence of entrapment available to a person charged as a result of an undercover operation? What safeguards exist against a person being induced to commit a crime in the course of an undercover operation?

**Answer**

No, there is no longer a substantive defence of 'entrapment' in Australia.

In *Ridgeway v The Queen* (1995) 184 CLR 19, the High Court held that evidence obtained by Police acting unlawfully should have been excluded from a prosecution on the grounds of public policy, rendering the conviction improper. The public policy discretion was the subject of the High Court's earlier decision in *Bunning v Cross* (1978) 141 CLR 54.

The public policy discretion to exclude evidence is now enshrined in section 138 of the *Evidence (National Uniform Legislation) Act 2011*, which provides that:

(1) Evidence that was obtained:

- (a) improperly or in contravention of an Australian law; or
- (b) in consequence of an impropriety or of a contravention of an Australian law,

is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Section 138(3) sets out various matters which the Court may take into account in applying section 138(1).

The proposed new provision section 101ZIA is designed to remove, at the least, the condition necessary for the exclusion of the evidence, namely that it was obtained in contravention of law, or in consequence of contravention.

The courts will obviously retain their discretion to determine the other factors relevant to the admission or otherwise of evidence obtained in such undercover operations.

Proposed section 101ZIA uses the words 'acquire', 'supply' and 'possess' in relation to liquor. However, the Act does not use the term 'acquire' in relation to liquor; it uses the term 'purchase' (see, for example, section 116). Further, while the Act uses the term 'supply', it also uses the term 'sell' (see, for example, section 103) and also uses the cognate term 'sell or otherwise supply' (see, for example, section 102). It would be better to ensure that the terms of section 101ZIA are consistent with the language of the Act.

If the Committee is minded to request an amendment to substitute the words 'possess, purchase, sell or otherwise supply' for the words 'acquire, supply and possess', the Department would support the change.