



ATTORNEY-GENERAL

CANBERRA

Senator Louise Pratt
Chair
Senate Legal and Constitutional Affairs References Committee
Parliament House
Canberra ACT 2600

Dear Senator Pratt

I refer to the Senate Legal and Constitutional Affairs References Committee inquiry into the Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (“the Inquiry”).

Given the Terms of Reference, I was surprised not to have been invited to make a Submission to the Inquiry. Nevertheless, I attach a Submission, which Annexes relevant documents.

I am copying this letter, and a copy of my submission, to the Deputy Chair of the Committee, Senator the Hon Ian Macdonald.

Yours sincerely

(George Brandis QC)

SUBMISSION TO SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

Structure of this submission

1. This submission is divided into four parts. The first explains the requirement, under the *Legislation Act 2003* (Cth), that consultation be undertaken prior to the issuing of a legislative instrument such as the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (**‘the Direction’**). The second part explains the subject matter and effect of the Direction and ‘Guidance Note 11’ (**‘the Guidance Note’**), which is complementary to the Direction and in relevantly identical terms. The third part sets out the consultation that occurred prior to the making of the Direction and Guidance Note, in accordance with the *Legislation Act*. The fourth part addresses some possible misconceptions about the Direction and Guidance Note, and about the consultation that took place prior to their being made.

Consultation required under the *Legislation Act*

2. The source and extent of a rule-maker’s obligation to consult when making an instrument (such as the Direction) are to be found in s 17 of the *Legislation Act*. Under that provision, the rule-maker is required to be satisfied, prior to the making of the instrument, that there has been undertaken any consultation that the rule-maker considers to be appropriate, and which is reasonably practicable to undertake. It is clear from the statute that it is for the rule-maker to decide the degree and form of consultation that are appropriate. Under s 17(2), the rule-maker is permitted to have regard to “any relevant matter” in determining what consultation is appropriate. Subsection 17(3) explicitly provides that the statute does not in any way limit the form that consultation may take.
3. In making the Direction, I complied with the obligation in s 17 by undertaking the consultation set out later in this submission.

The subject matter and effect of the Direction

4. The Direction and Guidance Note, which are, for relevant purposes, in identical terms, establish a whole-of-government procedure that gives effect to paragraph 12(b) of the *Law Officers Act 1964* (Cth) (s 12 of the *Law Officers Act* is at **Annexure 1**).
5. Section 12 of the *Law Officers Act* sets out the statutory functions of the Solicitor-General. Paragraph 12(b) provides that one of the Solicitor-General’s three functions is “to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General”. Except where the Solicitor-General is acting as counsel under paragraph 12(a) (which is irrelevant to the Direction¹), the Act

¹ See para 10B.9 of the Direction.

explicitly provides only one circumstance in which the Solicitor-General may provide an opinion to the Government on a question of law — i.e. where the Attorney-General refers that question to him. The Act does not establish any mechanism whereby another Minister or government entity may refer a question of law to the Solicitor-General.

6. The structure of paragraph 12(b) of the *Law Officers Act* thus reflects the orthodoxy that the Solicitor-General, as the second Law Officer of the Commonwealth,² provides his advice to the Attorney-General, the first Law Officer. Indeed, the office of Solicitor-General was created in 1916 for the very purpose of assisting the performance by the Attorney-General of his duties, including in his role as the principal legal adviser to government.
7. Plainly, however, it is desirable that there be some means by which government officers or entities other than the Attorney-General are able to obtain advice on significant questions of law from the Solicitor-General. To enable this to be done, there are two possibilities. One would be to amend paragraph 12(b) of the *Law Officers Act* so as to eliminate the statutory requirement that questions of law be referred to the Solicitor-General only by the Attorney-General. A second possibility would be to establish a mechanism whereby other Ministers, agencies and bodies within government are able to have the Attorney-General refer questions of law to the Solicitor-General on their behalf, in accordance with the existing paragraph 12(b).
8. The Direction (along with its counterpart Guidance Note) represents the second of these two possibilities. It establishes a procedure that enables other government bodies — not just the Attorney-General — to request Solicitor-General opinions by going through the Attorney-General, in accordance with paragraph 12(b) of the *Law Officers Act*. It does nothing to change the effect of the *Law Officers Act*. It simply establishes a procedure for implementing the requirements of that Act in such a way that allows other government agencies and bodies, rather than just the Attorney-General, to seek the Solicitor-General's opinion on a question of law.
9. In summary, then, the Direction sets out a process for seeking Solicitor-General advice in significant matters, in accordance with paragraph 12(b) of the *Law Officers Act*. Because of the requirements of paragraph 12(b), there is no way under the statute to seek advice from the Solicitor-General other than through the Attorney-General.³ The Direction puts in place a procedure to ensure appropriate coordination within Commonwealth agencies, and between agencies and the Solicitor-General's office, in matters of high legal importance. It is designed to ensure that government bodies act in a manner that best facilitates the Solicitor-General's performance of one of his statutory functions, namely, to provide opinions to the Attorney-General on questions of law referred to him by the Attorney-General. Being a whole-of-

² *Law Officers Act 1964* (Cth) s 5.

³ The exception, not presently relevant, is where the Solicitor-General is acting as counsel under paragraph 12(a) of the Act.

government Direction, it aims to establish an adequate process for coordination of the Solicitor-General's advice function (under paragraph 12(b) of the *Law Officers Act*) and for coordination of advice across government.

Nature and extent of consultation

10. On 12 November 2015, the Solicitor-General wrote me a letter requesting a meeting to discuss the “[p]rocess for seeking ... Solicitor-General advice in significant matters”. In his letter, the Solicitor-General said that “insufficient procedures are in place to ensure ... appropriate coordination within Commonwealth agencies, and between agencies and my office, in matters of high legal importance”. The letter stated that the procedures then in place (in particular, the procedures set out in the pre-existing form of Guidance Note 11) were not “being followed in a manner that best facilitates my performance of my statutory functions”, those being “the functions conferred on [the] office [of Solicitor-General] by s 12 of the *Law Officers Act 1964* (Cth).” Again, the Solicitor-General expressed the view that “the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately.”
11. In short, the Solicitor-General requested a meeting to discuss the very issues addressed by the Direction and Guidance Note.
12. A redacted copy of the letter is at **Annexure 2**. The copy is redacted to preserve legal professional privilege in, and confidentiality of, legal advice referred to in the letter. I do not waive any privilege in, or any other claim to the confidentiality of, the matter in the letter. I consider that, on the ground of public interest immunity, the redacted portions of the document should not be released.
13. On 30 November 2015, I met with the Solicitor-General at my office in Canberra to discuss the concerns he had raised in his letter of 12 November. In other words, I met with the Solicitor-General to consult him on, amongst other things, the following issues, which he had raised in his letter of 12 November:
 - a) the “[p]rocess for seeking ... Solicitor-General advice in significant matters”;
 - b) “procedures ... to ensure ... appropriate coordination within Commonwealth agencies, and between agencies and [the Solicitor-General’s] office, in matters of high legal importance”;
 - c) how processes might be “followed in a manner that best facilitates [the Solicitor-General’s] performance of [his] statutory functions”; and
 - d) “the processes for coordination of [the Solicitor-General’s] advice function with [his] responsibilities to appear, and for coordination of advice across government”.

14. In other words the Solicitor-General was consulted, at the meeting, about the very issue dealt with by the Direction and Guidance Note. That was the main purpose of the meeting (although other unrelated matters were also discussed). The meeting lasted approximately one hour.
15. Two members of my staff, who were present at the meeting on 30 November 2015, Mr Josh Faulks (my then Deputy Chief of Staff) and Mr James Lambie (my then Senior Adviser) took handwritten notes during the meeting. Both Mr Faulks and Mr Lambie are lawyers. Redacted copies of their notes are at **Annexure 3**. The comments made above with respect to privilege in, and confidentiality of, the 12 November letter apply, *mutatis mutandis*, to the notes.
16. While the notes do not purport to be a complete record of what was said, they confirm that the matters raised by the Solicitor-General in his 12 November letter, as well as how they might be addressed, were discussed. On the latter issue, and as the notes record, I specifically stated that two of the instruments “at issue” were the Guidance Note (in its then form) and the *Legal Services Directions*. Specific reference was made to paragraph 12(b) of the *Law Officers Act*. The notes also confirm that the meeting included discussion about the process for referring questions of law to the Solicitor-General, as well as the coordination of requests for such opinions across government. As has been emphasised, those are matters expressly covered by the Direction and Guidance Note.
17. It is important to understand the relationship between the Guidance Notes issued by the Office of Legal Services Coordination (within my Department) and the *Legal Services Directions*. The Guidance Notes give effect to the *Legal Services Directions* or, in the words of the Office of Legal Services Coordination, they “help agencies to comply with their obligations under the directions.”⁴ An amendment to one instrument will therefore necessarily require consideration of whether there should be a complementary amendment to the other (as was the case here). The notes record that I invited the Solicitor-General to “think of improvements to Guidance Note 11”. That necessarily raised the prospect of corresponding amendments to the *Legal Services Directions*, given that the instruments are complementary. The issue (i.e. the process of briefing the Solicitor-General) was identical. Indeed, that is why I expressly referred to both instruments as being “at issue”.
18. It is clear from the notes that at the 30 November meeting I invited the Solicitor-General to provide written suggestions on — to adopt the language of his 12 November letter — the “[p]rocess for seeking ... Solicitor-General advice in significant matters”. That is the subject matter of both the Direction and the Guidance Note.

⁴ See:

<<https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx>>.

19. On 11 March 2016, some 14 weeks after the 30 November meeting, my Department provided to my Office a draft copy of the Solicitor-General's written suggestions as to how the processes for briefing him could be altered. I considered those suggestions. Significantly, the Solicitor-General's proposals included the following paragraph:

[18] Before accepting a brief to advise, the Solicitor-General will notify the Attorney-General of the request *to ensure that the Attorney is content to refer the question of law for the Solicitor-General's opinion under s 12(b) of the Law Officers Act*. The opinion will also be provided to the Attorney-General. [Emphasis added.]

20. I took that recommendation into account when formulating the Direction. It will immediately be apparent that this proposed procedure is very similar to the one ultimately prescribed by the Direction. As required by the *Law Officers Act*, and as is provided for in the Direction, the procedure proposed by the Solicitor-General envisaged the Attorney-General giving his consent prior to the Solicitor-General's provision of an opinion on a question of law.
21. On 21 March 2016, the Office of Legal Services Coordination within my Department circulated a finalised copy of the Solicitor-General's suggestions. There was no relevant difference between this document and the draft that had already been provided to my Office on 11 March.
22. At a meeting with the Solicitor-General (which dealt with other matters) on 23 March 2016, I thanked the Solicitor-General for his suggestions, and indicated that I would consider them, which I did.
23. In early April, my Office contacted the Office of Legal Services Coordination in order to arrange a further meeting with the Solicitor-General in mid-April. My Office was informed that the Solicitor-General's next availability after his return from overseas was more than a month away — not until 19 May 2016.
24. By 20 April 2016, I had concluded that the Guidance Note did require amendment and that a new Direction should also be issued to address the issues raised by the Solicitor-General. Two days previously, of course, it had become clear that both Houses of Parliament would be dissolved in early May, prior to the Solicitor-General's first available appointment time. Taking into account the Solicitor-General's proposals, draft versions of a new Guidance Note and corresponding Direction were prepared. My Office liaised with my Department to ensure that the appropriate amendments were made prior to the dissolution of Parliament.
25. The new Direction and Guidance Note were issued on 4 May, six weeks after the 23 March meeting. On the issue of the procedure to be followed in requesting the Solicitor-General's opinion in accordance with paragraph 12(b) of the *Law Officers Act*, the Guidance Note and the Direction are, as has already been observed, identical. For convenience, copies of the Direction and Guidance Note are at **Annexures 4 and 5**, respectively.

26. In summary, the Solicitor-General was consulted on the “[p]rocess for seeking ... Solicitor-General advice in significant matters”. The Solicitor-General was consulted orally at the meeting of 30 November, and he was also invited to provide written suggestions. Those suggestions were provided and taken into account in the Direction and the Guidance Note.
27. I considered that this consultation was appropriate and sufficient for the purpose of s 17 of the *Legislation Act*. Given that the Direction (like the Guidance Note) makes no change to the law contained in the *Law Officers Act*, and given that it is entirely procedural in nature, I did not consider that further consultation was necessary or appropriate.
28. Along with the Direction, I issued an Explanatory Statement that had been drafted by my Department. It contained the following sentence: “As the Direction relates to the process for referring a question of law to the Solicitor-General, the Attorney-General has consulted the Solicitor-General.” This was a reference to the consultation that I have detailed above. The words, “the process for referring a question of law to the Solicitor-General”, are substantially the same as the very words used by the Solicitor-General in the letter requesting the 30 November meeting: “As the Direction relates to the ‘[p]rocess for seeking ... Solicitor-General advice in significant matters, the Attorney-General has consulted the Solicitor-General.” Whatever the formulation, it cannot sensibly be suggested that the Solicitor-General was not consulted.
29. This is also the view of my Department. The Ministerial Submission recommending that I approve the Direction and Guidance Note included the Explanatory Statement, drafted by the Department. The submission confirmed that the preconditions for the issuing of the Direction and Guidance Note — including the requirements of s 17 of the *Legislation Act* — had been satisfied, subject to my approval. Specifically, the advice stated:
- Section 17 of the *Legislative Instruments Act 2003* [sic] provides that before a rule-maker makes a legislative instrument the rule-maker must be satisfied that any consultation that is considered to be appropriate and is reasonably practicable to undertake, has been undertaken. Due to the nature of the power exercised by you under s 55ZF of the *Judiciary Act 1903* and the subject matter of the instrument, *we consider that your consultation with the Solicitor-General would meet this obligation.*
[Emphasis added.]
30. Accordingly, on 4 May 2016 I issued the Direction, Explanatory Statement and Guidance Note. I wrote to the Solicitor-General to inform him of that fact. In that letter, I thanked the Solicitor-General for his suggestions “regarding amendments to ‘Guidance Note 11’, concerning the process to be followed in briefing the Solicitor-General.” The letter is at **Annexure 6**.

31. Soon after the Direction and Guidance Note were issued, I became aware that the Solicitor-General was dissatisfied with aspects of those instruments. Accordingly, on 16 August 2016 I invited the Solicitor-General to further discuss any concerns he may have. As at the date of this submission, I have not received a response to that invitation.

32. A table that provides a chronological summary of the consultation that took place is at **Annexure 7**.

Misconceptions

33. It is as well, for the avoidance of any doubt, to address certain misconceptions that members of the Committee may have in relation to the Direction and the nature of the consultation that took place prior to its making.

34. First, it is worth reemphasising that the Direction does nothing to change the substance of the *Law Officers Act*. It simply establishes a procedure for implementing that Act. In particular, the arrangements do not in any way limit the independence of the Solicitor-General; they merely ensure that the procedure for seeking advice from the Solicitor-General is compliant with paragraph 12(b) of the *Law Officers Act*.

35. Second, the Direction does not apply to cases where the Solicitor-General is acting as counsel under paragraph 12(a) of the *Law Officers Act*. That is made abundantly clear by paragraph 10B.9 of the Direction.

36. Third, it should go without saying that while the *Legislation Act* provides for consultation prior to the making of a legislative instrument, it does not require suggestions made in the course of that consultation to be accepted by the rule-maker.

37. Fourth, the *Legislation Act* does not stipulate the form or extent of consultation that should take place prior to the making of a legislative instrument such as the Direction. It does not, for instance, require that an instrument be provided in draft form to any particular stakeholder prior to its being made. Of course, there may be instances where it would be appropriate to do so. Given the entirely procedural and routine nature of the Direction, however, I did not consider that this was required here.

38. Fifth, the procedure established by the Direction appears to be working well. I have received no complaints about how it is operating. In particular, the Solicitor-General has not requested a further meeting, nor has he responded to my invitation of 16 August to discuss any concerns with me.

39. As at the date of this submission, I have considered ten requests for a referral of a question of law to the Solicitor-General in accordance with the Direction. I have referred all ten of them; in the majority of cases, I have done so on the very day that the request was received in my Office. I am advised that my Office has recently received one additional request, which is currently being processed.

40. Sixth, I continue to work with the Solicitor-General on a cordial and professional basis. Most recently, I worked with him, and gave instructions concerning, the Conciliation proceedings brought by Timor Leste against Australia in The Hague, relating to the complex issue of boundary delimitation. I remain willing to engage in further consultation with the Solicitor-General should he seek it, in order to address any concerns he may continue to have about the process for referring questions of law to him in accordance with paragraph 12(b) of the *Law Officers Act*.

George Brandis QC
5 October 2016

LAW OFFICERS ACT 1964 - SECTION 12

Functions of Solicitor-General

The functions of the Solicitor-General are:

(a) to act as counsel for:

(i) the Crown in right of the Commonwealth;

(ii) the Commonwealth;

(iii) a person suing or being sued on behalf of the Commonwealth;

(iv) a Minister;

(v) an officer of the Commonwealth;

(vi) a person holding office under an Act or a law of a Territory;

(vii) a body established by an Act or a law of a Territory; or

(viii) any other person or body for whom the Attorney-General requests him or her to act;

(b) to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General; and

(c) to carry out such other functions ordinarily performed by counsel as the Attorney-General requests.



Solicitor-General of the Commonwealth of Australia

Senator the Hon George Brandis QC
Attorney-General of the Commonwealth
Parliament House
CANBERRA ACT 2600

Dear Attorney

Process for seeking and acting on Solicitor-General advice in significant matters

I write to request a meeting with you. I seek to discuss my concerns that insufficient procedures are in place to ensure, first, appropriate coordination within Commonwealth agencies, and between agencies and my office, in matters of high legal importance,

I consider that my capacity as Second Law Officer to provide you and the broader Commonwealth with the best legal advice and advocacy on matters of significance to the Government is being hampered by these issues.

In order that we may discuss these matters constructively, I consider it best that you have the details of my concerns in writing.

As you know, the Office of Legal Services Coordination within your Department has issued a guidance note (Guidance Note 11) setting out the manner in which the Solicitor-General is to be briefed in order to perform the functions conferred on that office by s 12 of the *Law Officers Act 1964* (Cth). Guidance Note 11 provides a framework directed to ensuring that: (a) the Solicitor-General is requested to advise at an early stage on matters of high legal importance, particularly where it is contemplated that the Solicitor-General will appear in

L17, Law Courts Building
Queens Square
SYDNEY NSW 2000
Tel: (02) 9230 8902
Fax: (02) 9230 8920

Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
Tel: (02) 6141 4139
Fax: (02) 6141 4099

proceedings concerning those matters; and (b) there is appropriate coordination of advice across government on such matters.

I do not consider that these processes are being followed in a manner that best facilitates my performance of my statutory functions.

In my view, the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately.

I would be grateful if we could meet to discuss these matters at your earliest convenience.

I have copied the Secretary into this letter, as the concerns I have raised also bear upon the manner in which your Department interacts with the Solicitor-General.

Yours sincerely,

Justin Gleeson SC
Solicitor-General of the
Commonwealth of Australia

12 November 2015

cc: Chris Moraitis PSM, Secretary

SC/AEC/10/CM 30/11/15

(A2)

~~Bill~~

Bill development

- issues of coordination around roles of AEC & SC in policy development process

~~Bill~~

Ax done at time

1/ done less efficient AEC

2/ LSD

3/ Guidance note 11

4/ NPS - 2A

Prepared counters

No limitation on who AEC can take advice from

in AEC call in advice to me

Next advice to differing views

(SC)

Ultimate issue

Western need to come in a timely fashion

(A2) - agrees

Greater built up opinion role of role.

(A2)

Some views no answers needs to go to SC

Just there as a hierarchy of inclination

at early stage it might be better for SC to go

now for judge what should go

(SC)

3/ unilateral - A to Bill

SC should be given an effect to whole opinion

3/ direct reporting

12/ write to AEC before proceed on contract

COPY

No need to revisit 5th provision
discussion

need to
provide
details

AP

5 Number of opinions

- need clearer responsibilities
w/ a se / act / res / de
& officers.
- monthly report

1c

Some significant matters don't
come to SG. => we don't know
about it

1a

agree with / agree need more
coordination
=> need to 'who it'
AGS / SG. => speak to
Chair of coordination

Trustee role of you to think
of improvement of guidance
note of
=> individual in coordination

u
2

Meeting w/ SG 30/1/18
- Chris Meredith

Law Society
At, PDS, ST, JAZ

- Understandable frustration from
SG at process

- Law Officers Act, #

- LSD

- MPS:2A

- Guidance Note No 11 (Pagerler).

SG - Ultimate issue is that a
The most serious matters Govt
gets the best advice in a
timely manner.
∴ Matters need to come in
a timely fashion →

- Graham Griffith had given up writing opinions - confined to appearances

- David Bennett likewise except for some informal opinions. Gogeler & Gleeson have resumed opinion writing.

AG: Some matters self-refer but Rose in a judgment calls our whole matters to SG. Indications is to go to the 1st instance to AG.

Unimpressed by para 6 - think it is vague & wrong.


- "High political sensitivity" is not a judgment for SG, e.g.

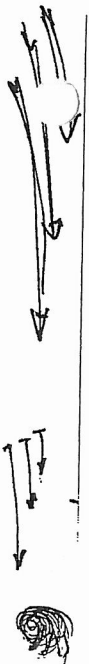
- Substantial change is a "bill"

- for S-G to consider whether to become involved

- Likewise if this involves an interpretation by AGS of those previous S-G advice applies in different circumstances.


para 11


→



15

16: This all rounds give the
about know all significant
legal issues - in-house +
private firms.

17: We have O.L.S.C. They should
have a system.

18: A problem does exist w/
in-house lawyers + co-operation
of separate departments.

19: S.G. + S.G. + A.G.S. to discuss
co-ordination.
Panel of 6 + 13 of GN 11 are

a little obscure.



Legal Services Amendment (Solicitor-General Opinions) Direction 2016

I, George Brandis QC, Attorney-General, make the following direction.

Dated *4th May* 2016

George Brandis QC
Attorney-General

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1 Name

This is the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

| Commencement information | | |
|----------------------------------|--|--------------|
| Column 1 | Column 2 | Column 3 |
| Provisions | Commencement | Date/Details |
| 1. The whole of this instrument. | The day after this instrument is registered. | |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Judiciary Act 1903*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 Amendments

Schedule 1—Amendments

Legal Services Directions 2005

1 After paragraph 10A of the Schedule

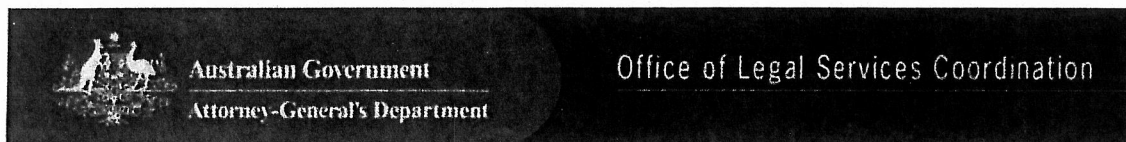
Insert:

10B Opinions on questions of law by the Solicitor-General

- 10B.1 The Solicitor-General will, in accordance with paragraph 12(b) of the *Law Officers Act 1964* (the *Law Officers Act*), furnish his or her opinion to the Attorney-General on questions of law referred to the Solicitor-General by the Attorney-General or with the consent of the Attorney-General.
- 10B.2 The Solicitor-General will furnish an opinion on a question of law only if the Attorney-General has referred, or consented to a referral of, the question of law to the Solicitor-General.
- 10B.3 No person or body referred to in paragraph 12(a) of the *Law Officers Act*, other than the Attorney-General, may refer a question of law to the Solicitor-General except with the consent of the Attorney-General.
- 10B.4 If a person or body referred to in paragraph 12(a) of the *Law Officers Act* forms the view that a question of law should be referred to the Solicitor-General, that person or body must seek, in writing, the Attorney-General's signed consent to the referral of the question to the Solicitor-General. The letter must be copied to OLSC.
- 10B.5 If the Attorney-General's Department or AGS:
- (a) has consulted the Solicitor-General under paragraph 10A.2 of these Directions about whether advice on a question of law should be given by the Solicitor-General in relation to a constitutional law issue; and
 - (b) forms the view that the Solicitor-General's advice should be sought;
- the Attorney-General's Department or AGS must seek, in writing, the Attorney-General's signed consent to the referral of the question to the Solicitor-General. The letter must be copied to OLSC.
- 10B.6 If the Attorney-General consents to a referral of a question of law to the Solicitor-General, the brief to the Solicitor-General to advise on the question shall include a copy of the signed consent of the Attorney-General.
- 10B.7 If the Solicitor-General receives a brief to advise on a question of law that does not include a copy of the signed consent of the Attorney-General, then:
- (a) the Solicitor-General shall notify the Attorney-General's Office of the receipt of the brief; and
 - (b) the Attorney-General shall either:
 - (i) consent, in writing, to the referral of the question of law to the Solicitor-General; or
 - (ii) decline to consent to such referral, in which case the Solicitor-General shall return the brief.
- 10B.8 Nothing in these Directions limits the Attorney-General's discretion to seek legal advice from persons other than the Solicitor-General.

Amendments Schedule 1

10B.9 To avoid doubt, this paragraph does not apply in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel under paragraph 12(a) of the Law Officers Act.



GUIDANCE NOTE 11

Briefing the Solicitor-General

1. This Guidance Note sets out the manner in which the Solicitor-General is to be briefed in order to perform the functions of that office.
2. This Guidance Note applies to those persons and bodies listed in paragraph 12(a) of the *Law Officers Act 1964* (the Act).

Functions of the Solicitor-General

3. The Solicitor-General's functions, as Second Law Officer, are set out in, and limited by, section 12 of the Act.
4. Those functions include acting as Counsel for persons and bodies referred to in paragraph [2].
5. The Solicitor-General's functions also include furnishing opinions on questions of law referred to him or her by, or with the signed consent of, the Attorney-General (paragraph 12 (b)) and carrying out such other functions ordinarily performed by counsel as the Attorney-General requests (paragraph 12(c)).

Briefing the Solicitor-General

6. The Solicitor-General's advocacy services, and the provision of his or her advice, are generally reserved for very important and legally difficult matters that are of exceptional significance to the Commonwealth.

Acting as Counsel in significant legal proceedings: Paragraph 12(a)

Significant legal proceedings

7. The solicitors representing a person or body referred to in paragraph [2] must notify the Solicitor-General of every civil matter in which the person or body is a party or intervener, that:
 - i. raises novel, difficult or important points of legal principle of exceptional importance;
 - ii. relates to the implementation of Government policy or decisions of exceptional importance;
 - iii. raises legal issues resulting in conflict between agencies;
 - iv. has significant financial implications or other exceptionally important whole-of-government implications;
8. For the purposes of the preceding paragraph, "civil matter" means proceedings before a court, tribunal, or commission of inquiry, requiring appearance by counsel.
9. Upon being notified, the Solicitor-General will consider the extent of his or her involvement in the matter and whether, in his or her opinion, it is appropriate that he or she appear on behalf of the relevant person or body referred to in paragraph [2].

High Court proceedings

10. The solicitors representing a person or body referred to in paragraph [1] must provide the Solicitor-General with a request to be briefed to appear in every civil matter where the person or body:
- is a party to, or intervener in, an appeal before the High Court;
 - is a party to, or intervener in, a proceeding within the original jurisdiction of the High Court, other than:
 - proceedings of a kind that are routinely remitted; or
 - proceedings that appear likely to be disposed of by a single Justice (noting that, if circumstances change and the matter is referred to a Full Court, the Solicitor-General must receive a request to be briefed to appear).

Applications for Special Leave

11. The solicitors representing a person or body referred to in paragraph [1] must notify the Solicitor-General of every matter in which the person or body is contemplating seeking special leave to appeal to the High Court.
12. Upon being notified, the Solicitor-General will consider the extent of his or her involvement in the matter, including whether he or she should receive a request to be briefed to appear. The Solicitor-General will inform the solicitors of the outcome of his or her consideration.
13. Noting the short timeframe for lodging an application for special leave to appeal, the solicitors representing the person or body referred to in paragraph [1] must notify the Solicitor-General as early as possible. In each matter, the Solicitor-General should be provided with a copy of the judgment under appeal and the advice of junior or senior counsel briefed in the matter on the prospects of special leave being granted and the prospects on appeal.
14. The Solicitor-General will form an independent view in relation to whether the application should be made (or should proceed in circumstances where an application has already been filed), and will advise orally or in writing as appropriate.
15. In matters in which the person or body referred to in paragraph [1] is the respondent to a special leave application, it will be sufficient for the solicitors representing the person or body to notify the Solicitor-General of any application for special leave which is to receive an oral hearing, and of any grant of special leave.

Opinions on Questions of Law: Paragraph 12(b)

16. The Solicitor-General will, in accordance with paragraph 12(b) of the Act, furnish his or her opinion to the Attorney-General on questions of law referred to the Solicitor-General by the Attorney-General or with the consent of the Attorney-General.
17. The Solicitor-General will furnish an opinion on a question of law only if the Attorney-General has referred, or consented to a referral of, the question of law to the Solicitor-General.
18. No person or body referred to in paragraph [2], other than the Attorney-General, may refer a question of law to the Solicitor-General except with the consent of the Attorney-General.

19. If a person or body referred to in paragraph [2] forms the view that a question of law should be referred to the Solicitor-General, that person or body must seek, in writing, the Attorney-General's signed consent to the referral of the question to the Solicitor-General. The letter must be copied to OLSC.
20. If the Attorney-General's Department or AGS:
 - (a) has consulted the Solicitor-General under paragraph 10A.2 of the *Legal Services Directions 2005* (Directions) about whether advice on a question of law should be given by the Solicitor-General in relation to a constitutional law issue; and
 - (b) forms the view that the Solicitor-General's advice should be sought;the Attorney-General's Department or AGS must seek, in writing, the Attorney-General's signed consent to the referral of the question to the Solicitor-General. The letter must be copied to OLSC.
21. If the Attorney-General consents to a referral of a question of law to the Solicitor-General, the brief to the Solicitor-General to advise on the question shall include a copy of the signed consent of the Attorney-General.
22. If the Solicitor-General receives a brief to advise on a question of law that does not include a copy of the signed consent of the Attorney-General, then:
 - (a) the Solicitor-General shall notify the Attorney-General's Office of the receipt of the brief; and
 - (b) the Attorney-General shall either:
 - (i) consent, in writing to the referral of the question of law to the Solicitor-General; or
 - (ii) decline to consent to such referral, in which case the Solicitor-General shall return the brief.
23. Occasionally, the Attorney-General considers it appropriate to seek legal advice from persons other than the Solicitor-General. Nothing in this Guidance Note limits the Attorney-General's discretion in this regard.
24. To avoid doubt, the requirement to obtain the Attorney-General's signed consent to refer questions of law to the Solicitor-General does not apply in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel under paragraph 12(a) of the Act.

Process for briefing the Solicitor-General

25. All requests to brief the Solicitor-General must be made as soon as possible.
26. All requests must:
 - briefly outline the main issues in the matter;
 - briefly describe the facts and the background to the matter;
 - set out the key dates in the matter;
 - be accompanied by the core supporting documents;
 - in the case of a request for an opinion referred to in paragraphs [16] to [22] above, set out the question(s) of law to be answered in the opinion and the date by which the opinion is required;

- be made to Counsel Assisting the Solicitor-General by email to SG_Briefing@ag.gov.au (or, if necessary, by telephone on 02 6141 4139); and
 - be copied to the Attorney-General's Office.
27. If the Solicitor-General is briefed to advise or appear, the Solicitor-General may request that other counsel assist him or her in the preparation of the advice or appearance.
28. The Solicitor-General must be briefed to the standard that would be required by any senior counsel. Unless the Solicitor-General has otherwise agreed, briefs to the Solicitor-General must be prepared by the Australian Government Solicitor (AGS) or an external legal services provider.
29. The solicitors representing the person or body listed above at paragraph [1] requesting the Solicitor-General's advice (with the Attorney-General's signed consent) or appearance must discuss the form of the brief with Counsel Assisting the Solicitor-General. At a minimum, every brief must:
- outline the main issues in the matter or the legal questions that need to be answered;
 - describe the facts and the background to the matter;
 - include the solicitors' views on the analysis concerning the legal issues or questions
 - summarise and include copies of any previous legal advice (including previous Solicitor-General advice);
 - include copies of relevant legislation, cases or journal articles;
 - provide any other relevant information (such as results of researches to date and any further research); and
 - include an index of documents briefed and tabs for each document.
30. Two copies of the brief should be provided: one to the Solicitor-General in his or her Sydney chambers, and one to Counsel-Assisting the Solicitor-General in the Solicitor-General's Canberra chambers. The solicitors representing the person or body referred to in paragraph [1] must discuss the process for delivering the brief with Counsel Assisting the Solicitor-General.

Fee on brief

31. The Solicitor-General's services are budget-funded. Entities and persons are not billed for the Solicitor-General's work. Should counsel from the private bar or the Australian Government Solicitor be briefed jointly with the Solicitor-General, the engagement will be subject to the usual arrangements for engagement of counsel as set out in Appendix D of the Directions.
32. In the event that a costs order is made in favour of the Commonwealth (including a Minister) or person, the solicitors for the Commonwealth, entity or person must consult Counsel Assisting the Solicitor-General about the amount of time the Solicitor-General has spent on the matter. For the purpose of calculating costs in favour of the Commonwealth, entity or person, the daily rate for the Solicitor-General is \$5,000 (including GST) and the hourly rate is \$833.33 (including GST).

Urgent matters

33. If a person or body referred to in paragraph [1] regards as urgent any brief to the Solicitor-General to act as counsel under paragraph 12(a), then that person or body will notify the Solicitor-General of its reasons for regarding the matter as urgent, and of its preferred timeline for the provision of the Solicitor-General's services.
34. In cases where a person or body is required to seek the Attorney-General's consent to a referral of a question of law to the Solicitor-General in accordance with the procedure set out at paragraphs [19] to [21], and where that person or body regards the matter as urgent, the person or body shall notify the Attorney-General's Office of its reasons for regarding the matter as urgent, and of its preferred timeline for the provision of the Solicitor-General's opinion.

Confidentiality of Solicitor-General Opinions

35. Opinions of a Solicitor-General are confidential to Government. Opinions of a Solicitor-General shall be neither publicly released nor communicated to any person outside the Australian Government, except by the Attorney-General, or with the Attorney-General's consent.

Significant Issues Reports

36. The requirement in paragraph 3 of the Directions to report on significant issues is not satisfied by a request to brief the Solicitor-General. In all matters in which the Solicitor-General has accepted a brief, the person or body must report to OLSC if the matters raise a significant issue for the purpose of paragraph 3. Guidance on significant issues is contained in Guidance Note 7—Reporting on Significant Issues.

Office of Legal Services Coordination
Telephone: 02 6141 3642
E-mail: olsc@ag.gov.au
Re-issued: May 2016

DOCUMENT 3



ATTORNEY-GENERAL

CANBERRA

4 May 2016

Mr Justin Gleeson SC
Solicitor-General of the Commonwealth of Australia
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Solicitor-General

A handwritten signature in black ink that reads "Justin".

Thank you for your suggestions regarding amendments to 'Guidance Note 11', concerning the process to be followed in briefing the Solicitor-General.

Please find enclosed a final copy of the revised Guidance Note, which has been prepared having regard, *inter alia*, to your suggestions.

I have also issued an amendment to the *Legal Services Directions 2005*. The amendment will insert a new paragraph 10B, and will take the form of the enclosed document.

Both the revised Guidance Note and the amended Legal Services Directions take effect immediately.

Yours faithfully,

(George Brandis)

Encl: Revised Guidance Note
Amended Legal Services Directions 2005

CONSULTATION WITH THE SOLICITOR-GENERAL: CHRONOLOGY OF EVENTS

| Date | Event |
|------------------|---|
| 12 November 2015 | The Solicitor-General wrote to the Attorney-General requesting a meeting to discuss the process for seeking his advice (see Annexure [*]) |
| 30 November 2015 | The Attorney-General met with the Solicitor-General to discuss the matters raised in the Solicitor-General's letter of 12 November |
| 11 March 2016 | The Attorney-General's Department provided his office with a draft copy of the Solicitor-General's proposals as to how the processes for briefing him could be altered |
| 21 March 2016 | Office of Legal Services Coordination circulated a finalised copy of the Solicitor-General's proposed changes to the process for briefing him (see Annexure [*] and [*]) |
| 23 March 2016 | The Attorney-General met with the Solicitor-General. At that meeting, the Attorney indicated that the Solicitor's 21 March proposals would be taken into account |
| Early April 2016 | The Attorney-General's office contacted the Office of Legal Services Coordination to arrange a further meeting with the Solicitor-General. The AGO was advised that the Solicitor-General was not available until 19 May 2016 |
| 4 May 2016 | The Direction and Guidance Note were issued |
| 16 August 2016 | The Attorney-General invited the Solicitor-General to discuss any concerns the latter had with the briefing process |