

# Chapter 2

## Views of the Attorney-General

### Prior to the Direction

2.1 This chapter describes the perspective of the Attorney-General on the consultation process he conducted with the Solicitor-General prior to issuing the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction).

2.2 On 12 November 2015, the Attorney-General received correspondence from the Solicitor-General requesting a meeting to discuss issues associated with the processes for seeking his advice. The Attorney-General quoted the Solicitor-General as writing: 'the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately'.<sup>1</sup>

2.3 In order to discuss the issues raised in the letter further, a meeting was held on 30 November 2016 at the Attorney-General's office in Canberra. The Attorney-General states in his submission:

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'.<sup>2</sup>

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).<sup>3</sup>

2.4 The Attorney-General invited the Solicitor-General to provide written suggestions for dealing with the issues that he raised, and on 11 March 2016, the Attorney-General's Department (the Department) provided the Attorney-General's Office with a draft copy of written suggestions from the Solicitor-General relating to

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1 Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia (Attorney-General), *Submission 5*, p. 3.

2 *Submission 5*, p. 3.

3 *Submission 5*, p. 4.

the briefing process. On 21 March 2016, the department circulated a finalised copy of the Solicitor-General's suggestions which all related to a redrafting of Guidance Note 11.

2.5 In his submission, the Attorney-General notes that he had thanked the Solicitor-General for his suggestions at a meeting dealing with other matters on 23 March 2016. The Attorney-General indicated to the Solicitor-General at that meeting that the suggestions would be considered.<sup>4</sup>

2.6 An extract of the Solicitor-General's written suggestions was included in the Attorney-General's submission as follows:

[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.<sup>5</sup>

2.7 According to the Attorney-General, he '...took that recommendation [that the Solicitor-General advise the Attorney-General of a request and with a copy of the opinion] into account when formulating the Direction'.<sup>6</sup> Further:

...[a]s 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.<sup>7</sup>

2.8 The Attorney-General sought a meeting with the Solicitor-General in early April 2016, but was advised that the Solicitor-General was overseas and unavailable until 19 May 2016.<sup>8</sup> In late April 2016, the Attorney-General decided that a new Direction, in addition to the Guidance Note, was necessary to address the issues that had been raised by the Solicitor-General.<sup>9</sup> The Secretary of the Department confirmed that:

On 20 April 2016, the Attorney-General advised the department that he wished to make changes to Guidance Note 11 and also that he intended to issue a Direction mirroring the contents of the Guidance Note.<sup>10</sup>

2.9 The Office of Parliamentary Counsel (OPC) clarified that although they were involved in drafting the Direction, but not the Explanatory Statement, they were 'not responsible for undertaking consultation in relation to legislative instruments. That is

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4 *Submission 5*, p. 5.

5 *Submission 5*, p. 5. Emphasis added.

6 *Submission 5*, p. 5.

7 *Submission 5*, p. 5.

8 *Submission 5*, p. 5.

9 *Submission 5*, p. 5.

10 Mr Chris Moraitis PSM, Secretary, Attorney-General's Department, answers to questions on notice, 3 November 2016 (received 7 November 2016), p. 5.

done by the rule-maker or by the relevant instructors on behalf of the rule-maker'.<sup>11</sup> Consultation between the Department and OPC on the content of the Direction occurred on 27 and 28 April 2016, and a final version was provided to the Department on 29 April 2016.<sup>12</sup>

2.10 The Attorney-General states that he took into account the Solicitor-General's proposals when the new Direction and Guidance Note were prepared prior to the dissolution of the 44<sup>th</sup> Parliament, following liaison between the Attorney-General's Office and Department.<sup>13</sup>

2.11 In his submission, the Attorney-General is emphatic that the Solicitor-General was consulted on the '[p]rocess for seeking...Solicitor-General advice in significant matters', both verbally at the meeting on 30 November 2016, and through the subsequent written suggestions the Solicitor-General made, and that input provided during these consultations was taken into account in developing the new Direction and Guidance Note.<sup>14</sup>

2.12 The Attorney-General insists:

...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.<sup>15</sup>

2.13 To support his position, the Attorney-General provided evidence that this interpretation is supported by advice obtained from the Department:

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.*<sup>16</sup>

### **After the Direction**

2.14 On 4 May 2016, the new Direction and Guidance Note were issued. The statement included in the Explanatory Statement also reflects this advice. It states that: 'As the Direction relates to the process for referring a question of law to the Solicitor-

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11 *Committee Hansard*, 5 October 2016, p.11.

12 Mr Chris Moraitis PSM, Secretary, Attorney-General's Department, answers to questions on notice, 3 November 2016 (received 7 November 2016), p. 5.

13 *Submission 5*, p. 5.

14 *Submission 5*, p. 6.

15 *Submission 5*, p. 6.

16 *Submission 5*, p. 6. Emphasis added.

General, the Attorney-General has consulted the Solicitor-General'.<sup>17</sup> On the day the Direction was issued, the Attorney-General informed the Solicitor-General via a letter thanking him for his suggestions regarding the Guidance Note.<sup>18</sup>

2.15 In his submission, the Attorney-General notes that '[s]oon after the Direction and Guidance Note were issued, I became aware that the Solicitor-General was dissatisfied with aspects of those instruments'.<sup>19</sup> Further, the Attorney-General invited the Solicitor-General to discuss any concerns with him, but has stated that he did not receive a response.<sup>20</sup>

2.16 In evidence to the committee at a public hearing, the Attorney-General described a breakdown in the relationship between himself and the Solicitor-General since 4 May 2016:

The Solicitor-General also said, on this matter...the Attorney-General has refused to engage with me on this topic...That is not the case. After the election occurred, as you know, several days passed before the outcome of the election was known, and several more days passed before the new government was sworn in. I wrote to the Solicitor-General on 16 August, some two months ago, well before this Senate committee was convened, and invited him to put before me his views. I have heard nothing from the Solicitor-General by way of reply to my letter of 16 August, and I find that curious.<sup>21</sup>

2.17 In his submission, the Attorney-General states that 'it cannot sensibly be suggested that the Solicitor-General was not consulted',<sup>22</sup> and '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'.<sup>23</sup> The Attorney-General's assertion that he consulted the Solicitor-General is founded on the requirements is set out in the *Legislation Act 2003* (Cth). The Attorney-General states that:

...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.

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17 Legal Services Amendment (Solicitor-General Opinions) Direction 2016, Explanatory Statement (ES), p. 2.

18 *Submission 5*, p. 6.

19 *Submission 5*, p. 7.

20 *Submission 5*, p. 7.

21 *Committee Hansard*, 14 October 2016, p. 37.

22 *Submission 5*, p. 6.

23 *Submission 5*, p. 7.

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Given the entirely procedural and routine nature of the Direction, however, I did not consider that this was required here.<sup>24</sup>

2.18 At a public hearing the Attorney-General elaborated on the comments made in his submission both in terms of his interpretation of what it means to consult, and on the legislative requirements he was required to comply with. On the meaning of the word 'consult' he stated that:

To be clear, this consultation, both at the meeting and in the Solicitor-General's subsequent written feedback, occurred prior to my deciding what should be done about the process for referring questions of law to the Solicitor-General. That is how consultation generally works. The person doing the consulting seeks the views of those being consulted and then makes decisions based upon what emerges from that process of consultation. When I use the word 'consult' what I mean is to confer about, deliberate upon, debate, discuss or consider a matter. When one consults someone, one asks their advice, seeks their counsel, has recourse to that person for instruction, guidance or professional advice.<sup>25</sup>

2.19 Regarding the legislative requirements, the Attorney-General stated that:

Some of the submissions to this inquiry, as well as some statements by members of parliament, appear to proceed on the premise that section 17 of the Legislation Act requires something much more than it actually does. It does not require a person who is consulted to be specifically aware of any precise intention or lack of intention that a rule maker may have. Under section 17, it is enough—indeed, it is more than enough—that a rule maker be satisfied that there has been appropriate consultation about the subject matter of a legislative instrument.<sup>26</sup>

2.20 The Attorney-General was presented with an alternative interpretation posited by the Solicitor-General (discussed in the following chapter of this report). In response to questioning at the public hearing about the contradictory views of the Solicitor-General, the Attorney-General replied:

Mr Gleeson, who is a very good lawyer, plainly does consider the directions to be unlawful...Having been a lawyer all of my adult life, I am extremely familiar with the view that lawyers have different views about contestable legal issues...<sup>27</sup>

2.21 At the public hearing, the Attorney-General's view on the consultation was challenged by members of the committee. In response to the direct question: 'Did you consult the Solicitor-General prior to issuing the new legal services direction on 4 May 2016?', the Attorney-General replied:

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24 *Submission 5*, p. 7.

25 *Committee Hansard*, 14 October 2016, p. 38.

26 *Committee Hansard*, 14 October 2016, p. 37.

27 *Committee Hansard*, 14 October 2016, pp. 47 and 51.

Yes, I did—on 30 November in my office, and by inviting him to put forward his ideas, which he did in a letter which I received in March. He put his ideas forward in the form of amendments to the guidance note, but the words of the guidance note and the words of the legal services direction are actually identical...I regarded the conversation on 30 November in my office about the issue of the way in which the Solicitor-General was to be briefed, and during the course of which there was a specific reference to the legal services directions as being at issue, as constituting the relevant consultation.<sup>28</sup>

2.22 The Attorney-General was also asked if the Explanatory Statement made in the Senate on 4 May 2016 was true. The Attorney-General replied:

I believe it to be true. I have been advised by my Department that they believe it to be accurate. The Solicitor-General considers it to be inaccurate, because his understanding of the word 'consult' in section 17 of the Legislation Act is different from my understanding of the word 'consult' and the dictionary's understanding of the word 'consult'.<sup>29</sup>

2.23 A further issue discussed at the hearing related to meeting notes taken by the Attorney-General's staff during the meeting on 30 November 2016, and whether those notes indicate that the Direction was discussed with the Solicitor-General. The Attorney-General responded:

...on the very first page of the notes this is what they say:

4 x docs at issue

1. Law Officers Act

2. LSD

Which I think is acknowledged as a reference to the legal services directions.

3. Guidance note 11.

4. NPS – 2A

So the issue of the legal services direction, for the purpose of this discussion, was explicitly raised.<sup>30</sup>

2.24 The Attorney-General attributed conflicting accounts of whether the Direction was discussed at the 30 November 2016 meeting to the fact that the Solicitor-General's notes were a record of meeting outcomes, and the while the Direction was discussed, there was no relevant outcome related to it that warranted inclusion:

CHAIR: Why did the Attorney-General's Department, in responding to Mr Gleeson on that basis, not include in the notes for that meeting explicit reference to a legal services direction, and only a guidance note?

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28 *Committee Hansard*, 14 October 2016, pp. 49 and 50.

29 *Committee Hansard*, 14 October 2016, p. 51.

30 *Committee Hansard*, 14 October 2016, p. 59.

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Senator Brandis: There are a couple of things. First of all, obviously, you would have to ask them. Secondly, it was a very abbreviated note. Third, it is mis-described as notes of the meeting. It was not. It is described as—the heading of the document is 'Meeting Outcomes', which to me suggests decision points or action points. What I have told you several times now is that no decision was made at that meeting to issue a legal services direction, because we were talking about the substance of the issue, not the form of a legal instrument, if any, which would be promulgated to reflect that of which we had been speaking. Lastly, may I say that there are only two sets of contemporaneous notes of the meeting, and those [are] the ones I have produced.<sup>31</sup>

2.25 The Attorney-General maintained his position throughout the hearing that he consulted the Solicitor-General on the Direction, but conceded that the discussion he had with the Solicitor-General regarding the Direction on 30 November 2016 'focused on the substance, not the form of the rules':

Senator WATT: But you never consulted him, did you?

Senator Brandis: As you know, I did. It was an issue he brought to me.

Senator WATT: He did not bring the issue of the direction to you.

Senator Brandis: It was a problem that Mr Gleeson brought to me and wanted me to fix, and we had a discussion about how to do it. The discussion was focused on the substance, not the form of the rules, and ultimately—and, I thought, uncontroversially—I issued the two instruments, guidance note No. 11 and a legal services direction, which were in identical words.<sup>32</sup>

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31 *Committee Hansard*, 14 October 2016, p. 59.

32 *Committee Hansard*, 14 October 2016, p. 67.

