

## **Senate Legal & Constitutional Affairs References Committee Inquiry into the nature and scope of consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016**

### ***Submission—Office of Parliamentary Counsel***

#### **Introduction**

1 This submission is made on behalf of the Commonwealth Office of Parliamentary Counsel (*OPC*). OPC is established by the *Parliamentary Counsel Act 1970*. That Act sets out OPC's functions, including the function of legislative drafting.

#### **Legal Services Amendment (Solicitor-General Opinions) Direction 2016**

2 OPC drafted the legislative instrument called the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* on instruction from the Attorney-General's Department.

3 The terms of reference of this Inquiry relate to consultation on the legislative instrument.

4 OPC is not responsible for undertaking consultation in relation to legislative instruments for the purposes of subsection 17(1) of the *Legislation Act 2003*. Subsection 17(1) provides that before making a legislative instrument, the rule-maker must be satisfied that consultation considered by the rule-maker to be appropriate has been undertaken, so far as is reasonably practicable.<sup>i</sup>

5 Under subsection 15J(2) of the *Legislation Act 2003*, an explanatory statement for a legislative instrument must include a description of the nature of any consultation undertaken or, if there was no consultation, an explanation for its absence.<sup>ii</sup> OPC is not involved in the preparation of explanatory statements, and does not read, check or clear them.

6 OPC refers draft legislation to certain Commonwealth agencies in certain circumstances. The cases in which OPC does this are set out in Drafting Direction 4.2, which is publicly available at [http://www.opc.gov.au/about/docs/drafting\\_series/DD4.2.pdf](http://www.opc.gov.au/about/docs/drafting_series/DD4.2.pdf). There is nothing in that Drafting Direction to suggest that the draft instrument should have been referred by OPC to the Solicitor-General. The Drafting Direction states (at paragraph 5): “we do not have any general right or obligation to distribute drafts beyond the agencies mentioned in this Drafting Direction. Apart from these agencies, the decision on how widely a draft is distributed during the drafting process must be one for our clients rather than for us.”

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<sup>i</sup> Subsections 17(1) and (2) of the *Legislation Act* provide:

- (1) Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:
  - (a) considered by the rule-maker to be appropriate; and
  - (b) reasonably practicable to undertake.
- (2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation:
  - (a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and
  - (b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

<sup>ii</sup> Subsection 15J(2) of the *Legislation Act* provides:

- (2) An initial explanatory statement, or a replacement explanatory statement, for a legislative instrument must:
  - (a) be approved by the rule-maker; and
  - (b) explain the purpose and operation of the instrument; and
  - (c) if any documents are incorporated in the instrument by reference—contain a description of the incorporated documents and indicate how they may be obtained; and
  - (d) if consultation was undertaken under section 17 before the instrument was made—contain a description of the nature of that consultation; and
  - (e) if no such consultation was undertaken—explain why no such consultation was undertaken; and
  - (f) if the instrument is a disallowable legislative instrument—contain a statement of compatibility prepared under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*; and
  - (g) contain such other information as is prescribed by regulation.