

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.ⁱ

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.ⁱⁱ 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. 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.”

Marina Farnan
Acting First Parliamentary Counsel
30 September 2016

ⁱ 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.

ⁱⁱ 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.