



ATTORNEY-GENERAL

CANBERRA

MS16-017799

Senator Louise Pratt
Chair
Senate Legal and Constitutional Affairs References Committee
CANBERRA ACT 2600

Dear Chair

As you are aware, Mr Peter Quiggin PSM, First Parliamentary Counsel, appeared at the hearing on 5 October 2016 of 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.

At that hearing, Mr Quiggin declined to answer a number of questions on the basis that the matters were covered by legal professional privilege and that it was therefore open to me to make a claim for public interest immunity.

One question was whether First Parliamentary Counsel or the Office of Parliamentary Counsel raised concerns that the Solicitor-General was not consulted as the changes were being drafted.

Another question was whether First Parliamentary Counsel or the Office of Parliamentary Counsel had asked the Attorney-General's Department whether they had consulted the Solicitor-General.

The assertion of legal professional privilege was made by Mr Quiggin on the basis that the questions sought information about matters arising during the drafting of a legislative instrument. Mr Quiggin considered that the matters were covered by the decision in *State of NSW v Betfair Pty Ltd* [2009] FCAFC 160, which found that instructions to Parliamentary Counsel to draft legislation are in fact an instruction to provide legal advice and that therefore legal professional privilege attaches to communications between Parliamentary Counsel and their instructors.

I consider that a claim for public interest immunity is appropriate in relation to these questions because, while the mere fact that the matters are covered by legal professional privilege does not of itself mean that public interest immunity is attracted:

- (a) it is in the interests of instructing departments, and members of the government generally, for communications between drafters and instructors that occur during the process of drafting legislation to remain confidential, so that such discussions are frank and not unduly hampered;
- (b) the Office of Parliamentary Counsel owes a duty to its clients not to disclose the content of matters subject to legal professional privilege, and this would be undermined if a claim for public interest immunity were not made;
- (c) further, the Office of Parliamentary Counsel competes with other providers of legal services for an important part of its work, and if the material was released despite it being covered by legal professional privilege, this would be likely to undermine the confidence of clients in the Office of Parliamentary Counsel.

The responsible adviser for this matter in my Office is Daniel Ward who can be contacted

Yours faithfully

(George Brandis)

19 OCT 2016