



Solicitor-General of the Commonwealth of Australia

Ms Toni Matulick
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Ms Matulick

RE: Inquiry into the nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016

1. I am writing in response to your email dated 16 September 2016 inviting me to make a submission to the inquiry by the Senate Legal and Constitutional Affairs References Committee (**the Committee**) regarding the nature and scope of the consultations prior to the making of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (**the Direction**).
2. I have served as the Solicitor-General of the Commonwealth since 2013 (after a period as Acting Solicitor-General beginning in October 2012) and am appointed under the *Law Officers Act 1964* (Cth) (**Law Officers Act**). As the Direction seeks to regulate the manner in which I am to perform my statutory functions under the Law Officers Act, I consider it appropriate that I respond to your invitation with a submission limited to certain key factual matters falling within the Terms of Reference of the Committee's Inquiry.

3. This submission does not address in detail the legality or wisdom of the Direction save to identify below certain fundamental background matters concerning the role of the Solicitor-General which are necessary to understand why the Solicitor-General is a person with expertise relevant to the Direction and a person directly affected by the Direction. Nor does this submission describe in detail the consultation I engaged in after the Direction was made to ascertain why I was not consulted about the Direction and to have the Direction withdrawn and a proper consultation process commence.
4. Much has been said publicly, by the Attorney-General and others, about the extent of consultation that occurred with me before the Direction was issued. I do not propose to repeat what has been said. However, to assist the Committee, I consider it important that I clarify a number of matters in light of what has been said. I note, however, that this submission does not reveal the content of legally privileged communications which I am not in a position to waive.

A. The Office of the Solicitor-General

5. Aspects of the role of the Solicitor-General are set out in three key sources: the Law Officers Act, *Guidance Note 11 – Briefing the Solicitor-General (the Guidance Note)* and, since 4 May 2016, the Direction.

The Law Officers Act

6. There are a number of key features of the Law Officers Act.
7. *First*, the Law Officers Act provides that “[t]here shall be a Solicitor-General of the Commonwealth, who shall be the second Law Officer of the Commonwealth” (s 5).

8. *Secondly*, although the Solicitor-General is appointed by the Governor-General (acting on the advice of Cabinet) and works closely with the Government of the day, the Law Officers Act establishes that the Solicitor-General is independent from the Government of the day. For example, the Solicitor-General is appointed for a specified period (s 6), the Remuneration Tribunal sets the Solicitor-General's remuneration and allowances (s 7) and the Solicitor-General cannot be removed from Office unless he or she resigns, becomes incapable of performing the duties of office by reason of temporary illness, is guilty of misbehavior or becomes bankrupt or insolvent (s 10).

9. *Thirdly*, the Solicitor-General's functions are set out in s 12 of the Law Officers Act. They are that the Solicitor-General "act as counsel" for a range of persons and bodies, including the Crown in the right of the Commonwealth, the Commonwealth, a Minister and an officer of the Commonwealth (s 12(a)); that he or she "furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General" (s 12(b)); and that he or she "carry out such other functions ordinarily performed by counsel as the Attorney-General requests" (s 12(c)).

10. Importantly, s 12(b) of the Law Officers Act covers those cases where the Attorney-General seeks the opinion of the Solicitor-General, which may then stand as the opinion of the Attorney-General unless he or she wishes to contradict it. This does not limit s 12(a) of the Law Officers Act where the Solicitor-General may "act as counsel" for a range of persons and bodies. To "act as counsel" includes not just representing such persons in litigation, and advising them in that context, but providing advice on their rights and obligations in law. That is the ordinary meaning of the role of "counsel" in the Anglo-Australian system of law, and the meaning picked up in the statute. Indeed, s 12(c) of the Law Officers Act itself recognises that counsel may have multiple functions. Significantly, Sir Anthony Mason AC KBE CBE QC, the first person appointed

Solicitor-General under the Law Officers Act (and later a Justice, and Chief Justice, of the High Court of Australia) was of the view that:

[i]t is not to be implied from this qualification [in s 12(b)] that the Solicitor-General cannot furnish an opinion to the Commonwealth or its emanations without a request from the Attorney-General. As Solicitor-General I was instructed by the Crown Solicitor and the Attorney-General's Department to advise departments and other Commonwealth agencies without any express approval by the Attorney-General being communicated to me.¹

11. My experience as Solicitor-General is consistent with Sir Anthony's experience. I have been instructed on a number of occasions without any express approval by the Attorney-General being communicated to me. Indeed, there have been times when persons, such as a Prime Minister or a Governor-General, have approached me to provide advice in circumstances where I have been required to keep their very request for advice, as well as the content of advice given, confidential. From reviewing the opinions of Solicitors-General since the Law Officers Act was passed in 1964, it would appear that other Solicitors-General have acted on the same basis I have.

The Guidance Note

12. The Guidance Note is produced by the Office of Legal Services Coordination (OLSC) in the Attorney-General's Department to guide those who perform Commonwealth legal work. It was first produced in 2009 in consultation with the (then) Solicitor-General, Stephen Gageler SC (now a Justice of the High Court). It sets out when the Solicitor-General should be briefed to advise or appear as well as the processes that should be followed when doing so. It does not need to be tabled in Parliament and there are no sanctions for non-compliance.

¹ Sir Anthony Mason AC KBE CBE QC, "The Parliament, the Executive and the Solicitor-General" in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds) *Public Sentinels: A Comparative Study of Australian Solicitors-General* (2014, Ashgate), 50.

The Guidance Note is flexible; it can be amended at any time by OLSC, which it has historically done in close consultation with the Solicitor-General of the day, and it need not be strictly followed if the circumstances require. The latter has occurred on occasions when a Prime Minister or a Governor-General has directly sought my advice, or indeed when the Attorney-General has obtained legal advice in matters of exceptional significance to the Commonwealth from persons other than me.

The Direction

13. On 4 May 2016 the Direction was tabled in the Senate with immediate effect. It is a legislative instrument that has been made under s 55ZF of the *Judiciary Act 1903* (Cth) (**Judiciary Act**) and forms part of the *Legal Services Directions 2005* (Cth) (**Legal Services Directions**). As a Direction, it is binding upon persons who perform Commonwealth legal work and the Attorney-General may impose sanctions for non-compliance.
14. The Direction does not address the process for briefing the Solicitor-General to advise and appear: rather, it imposes a prohibition or restraint that the Solicitor-General may not be asked to furnish, and may not furnish, an opinion on a question of law unless the Attorney-General has referred, or consented to a referral of, the question of law to the Solicitor-General. It then sets out a process for seeking the Attorney-General's consent. It does not set out the matters that the Guidance Note (before its revision) sought to address, such as when the Solicitor-General should be briefed to appear or advise, how the Solicitor-General should be briefed, how the Solicitor-General should be contacted and so on.
15. The Direction provides that it 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 s 12(a) of the Law Officers Act. The difficulty with this is that it assumes that s 12(a) is concerned only with those situations where the

Solicitor-General has been briefed by the Commonwealth, an official or an agency in a “matter”, which appears to connote actual or potential litigation involving the Commonwealth, official or agency. As noted at paragraph [10] above, s 12(a) is not limited to “matters” or actual or potential litigation: it extends to all functions of “counsel” which include advising on rights and obligations irrespective of whether litigation is anticipated or contemplated.

16. As is apparent from the above, the Guidance Note and the Direction differ in purpose, content and enforceability. The differences are significant and mean that consultations about the Guidance Note must be distinguished from consultations about the Direction.

Additional matters about the role of the Solicitor-General

17. There are a number of additional matters about the role of the Solicitor-General that are helpful to set out in this submission.
18. The *first* is that I am not aware of any time since 1964 (or indeed, at all) apart from under the current Direction when the Attorney-General was required by law to give his or her express approval before the Solicitor-General has been able to provide advice.
19. The *second* is that, before the Direction was made, I had instituted a process in which I would inform an Attorney-General of requests for advice that I had received (save for requests from a Prime Minister or a Governor-General that I had been asked to keep confidential). I would write to the Attorney-General to inform him or her of the request and provide the Attorney-General with a copy of my advice once completed. At no stage has an Attorney-General responded that he or she did not wish for me to accept the request to advise.

20. The *third* is that the independence of the Solicitor-General, as established by the Law Officers Act, is of exceptional importance. As independent of the Government of the day, the Solicitor-General is able to give frank and fearless legal advice, unencumbered by political or commercial concerns.

21. The *fourth* is that the Solicitor-General is uniquely positioned to provide whole of government advice. That is because the Solicitor-General is at the apex of Commonwealth lawyers (second only to the Attorney-General), appears in the most important court matters for the Commonwealth and is privy to the most important legal matters concerning the Government. As a frequent counsel in the High Court, the Solicitor-General can draw on his or her experience from engaging directly with the High Court to anticipate how the High Court might respond to novel arguments the Commonwealth might seek to make. The Solicitor-General can also resolve conflicts Commonwealth Ministers, Departments and Agencies may have with each other about the interpretation of legislation in matters of fundamental importance, such as the application of legislation administered by one Department to an area for which another Department is responsible. Such is the respect for the independent advice of the Solicitor-General that the Government or the Governor-General may release the advice of the Solicitor-General or refer to having received that advice as a way of addressing concerns the Parliament, the legal profession or the public may have about a controversial legal issue.

22. The *fifth* is that the advice of a Solicitor-General is treated as a form of binding precedent by other Commonwealth lawyers and subsequent Solicitors-General. This reflects not only respect for the authoritative and independent voice of a Solicitor-General but the importance to the rule of law of the Commonwealth acting consistently and with certainty in respect of its legal position.

23. The *sixth* is that I am assisted in my role by two Counsel-Assisting and an Executive Assistant, who I refer to in the remainder of this submission as my Office.

B. Discussions with the Attorney-General, the Attorney-General's Department and AGS about the Guidance Note

24. In the past year, I have engaged with the Attorney-General, the Attorney-General's Department and AGS about potential revisions to the Guidance Note.
25. *First*, on 12 November 2015 I wrote to the Attorney-General requesting a meeting to discuss a number of concerns I had. One of my concerns was that insufficient procedures were in place to ensure appropriate coordination between Commonwealth bodies and my Office in matters of high legal importance. I considered that these issues were hampering my duty as second Law Officer in providing the Attorney-General and the broader Commonwealth with the best legal advice and advocacy on matters of significance to the Government. In particular, I considered that the processes set out in the Guidance Note (in the form it was then) were not being followed in a manner that best facilitated the performance of my statutory functions under the Law Officers Act.
26. The letter of 12 November 2015 gave three examples of recent matters as evidence of my concerns. It is unnecessary for the purpose of this submission to discuss those examples, although I note all three were matters of exceptional importance to the Government. The letter was copied to the Secretary of the Attorney-General's Department as it raised concerns related to how the Department interacts with the Solicitor-General. A copy of that letter, redacted for legally privileged material, is provided as Attachment A to this submission.

27. *Secondly*, on 30 November 2015 I met with the Attorney-General, advisors to the Attorney-General (including the (then) Deputy Chief of Staff, Mr Joshua Faulks), the Secretary of the Attorney-General's Department, Mr Chris Moraitis PSM, and the (then) Australian Government Solicitor, Mr Ian Govey AM, head of AGS, to discuss the concerns I raised in my letter of 12 November 2015. There was a general consensus that my advice should be sought in a timely fashion, and that where amendments have been made to draft legislation on which I have advised I should be given the opportunity to advise on the amendments. It was agreed that the Secretary, the Australian Government Solicitor and I would suggest amendments to the Guidance Note to deal with these points and suggest other desired changes to the Guidance Note for the Attorney-General's consideration.
28. On 8 December 2015, my Office circulated my meeting notes recording four meeting outcomes from the meeting of 30 November 2015 to the Deputy Chief of Staff to the Attorney-General, the Executive Advisor to the Secretary of the Attorney-General's Department and the Australian Government Solicitor. My Office asked that the notes be passed onto the Attorney-General and the Secretary and asked the recipients of the email to respond if they had any comments on the meeting notes. That email is provided as Attachment B to this submission (with the names of junior officers redacted). In response, the Australian Government Solicitor agreed with the notes and sought to add an additional meeting outcome relating to the sharing of information between AGS and the Attorney-General's Department. That email is provided as Attachment C to this submission (with the names of junior officers redacted). The Executive Advisor to the Secretary responded that the Secretary had no concerns with the notes. That email is provided as Attachment D to this submission (with the names of junior officers redacted). The Attorney-General's Deputy Chief of Staff did not respond.

29. The Attorney-General and others have made a number of public statements about what was discussed at the 30 November 2015 meeting. In light of those statements, I wish to make a number of points to clarify matters. *First*, at no time at that meeting did the Attorney-General indicate that he was considering issuing either a legally binding direction concerning the performance of the functions of the Solicitor-General or a requirement that a Commonwealth person or body could only approach the Solicitor-General for advice after receiving the Attorney-General's advance approval. *Second*, at no time at that meeting was there a discussion of restricting access to the Solicitor-General to give legal advice. *Third*, at no time at that meeting was there a discussion that there was a perceived problem that some Government Agencies and Departments were acting other than in compliance with s 12(b) the Law Officers Act because they were approaching the Solicitor-General for advice without going through the Attorney-General. (In fact, had that point been raised with me, I would have made clear that s 12(b) of the Law Officers Act does not require Government Agencies and Departments to go through the Attorney-General before seeking the Solicitor-General's advice for the reasons given in paragraph [10] above.)
30. To the contrary, the meeting had four key purposes which formed the basis of the discussion. *First*, to ensure that my advice, as the Solicitor-General, was sought on matters of importance. *Second*, to ensure that requests for my advice were made in a timely fashion. *Third*, to ensure that I was given an opportunity to provide further advice on draft legislation in circumstances where my advice had been sought on earlier versions of the draft legislation. *Fourth*, to ensure that my advice, once received, was represented accurately, including in statements to the public.
31. I note, for completeness, that I have recently been shown the diary notes kept by two of the Attorney-General's staff who attended the meeting on 30 November 2015. The notes were shown to me in response to my representations to the Attorney-General that I had not been consulted about the

Direction at that meeting, or indeed, at all, despite his statements in the Explanatory Statement and to the media to the contrary. The notes record that the Legal Services Directions were mentioned as one of several general background matters early in the meeting, but at no point thereafter is there any suggestion in the notes of an intent to issue a new Legal Services Direction, let alone a Direction in any way binding or affecting the Solicitor-General or in the terms which emerged five months later on 4 May 2016. The reason for that silence is clear – nothing of that kind was discussed at the meeting. Nothing in those notes caused me to alter my recollection of the meeting as set out above in paragraphs [27], [29] and [30]. If anything, the notes only affirmed my recollection.

32. *Thirdly*, between December 2015 and March 2016 various amendments were suggested to the Guidance Note to address the points discussed at the meeting on 30 November 2015. On 8 December 2015 my Office emailed my proposed amendments to the Australian Government Solicitor and the Executive Advisor to the Secretary of the Attorney-General's Department. Between December 2015 and March 2016, my Office engaged in consultation – both in person and via email – with OLSC and AGS about my proposed changes.
33. To be clear, at no point during the consultations about possible revisions to the Guidance Note did anyone suggest to me or my Office that the Attorney-General should consider, or was considering, either issuing a new and binding Legal Services Direction or introducing a requirement that the Solicitor-General could advise only with the consent of the Attorney-General.
34. *Fourthly*, following the consultations between December 2015 and March 2016, I proposed further revisions to the Guidance Note that reflected the suggestions made by OLSC and AGS. On 21 March 2016 Ms Petra Gartmann, Assistant Secretary of OLSC, circulated the proposed revised Guidance Note to the Attorney-General, as well as the Secretary of the Attorney-General's Department, the Australian Government Solicitor and others.

35. To be clear, the amendments proposed sought to strengthen the ability of the Solicitor-General to provide advice on important matters in the performance of his or her functions under the Law Officers Act. There was no suggestion in the amendments that a legally binding direction might also be issued nor was there a suggestion that a requirement should be introduced that the Solicitor-General could advise only with the pre-approval of the Attorney-General.
36. *Fifthly*, on 23 March 2016 I met with the Attorney-General, the Secretary, the Australian Government Solicitor and others, including Ms Gartmann who attended the meeting as note taker. Although the Guidance Note was on the agenda for the meeting, there was not an opportunity to discuss it. In light of that, at the conclusion of the meeting, the Attorney-General thanked me for the proposed revisions to the Guidance Note and said he would respond to the proposed changes immediately after Easter. (Easter Sunday fell on 27 March 2016.) That was confirmed in an email confirming the action items from the meeting which Ms Gartmann circulated following the meeting. That email is provided as Attachment E to this submission (with the names of junior officers redacted). At no point at the meeting on 23 March 2016, or in the action items circulated after the meeting, was there any mention of the possibility of issuing a new Legal Services Direction binding or affecting the Solicitor-General.
37. *Sixthly*, I did not receive a response to my proposed revisions after Easter and asked my Office to contact OLSC. On 29 April 2016, OLSC informed my Office that the Attorney-General would write to me directly. The emails between my Office and OLSC are provided as Attachment F to this submission (with the names of junior officers redacted).

C. The Direction: consultation after the Direction was made

38. Since the Direction was made, I have written to the Attorney-General and written to, and met with, the Secretary of the Attorney-General's Department to ascertain why I was not consulted about the Direction. I have also taken steps to have the Direction withdrawn and for a proper consultation process to commence. All those steps to date have proved futile. I do not propose to discuss those steps in detail but note the following four matters to assist the Committee.
39. *First*, on 4 May 2016, the Attorney-General wrote to me to inform me that he had issued a revised version of the Guidance Note and that he had issued the Direction. That letter appeared to me to draw a distinction between the processes that had led to the amendment of the Guidance Note and the issuance of the Direction. That is because the letter noted that I had made "suggestions" in relation to the Guidance Note, but the separate topic of the Direction was introduced by the words "I have also...". The letter of 4 May 2016 is provided as Attachment G to this submission.
40. For completeness, I note that although the letter states that the Guidance Note "has been prepared having regard, *inter alia*, to your suggestions", the revised Guidance Note is in a materially different form to the form I proposed on 21 March 2016. At no stage between 21 March 2016 and 4 May 2016 did anyone either inform me that the Guidance Note would be re-issued in a form significantly different to that I had proposed or seek my views on the revised form of the Guidance Note.
41. *Secondly*, the Direction, as tabled in Parliament, was accompanied by an Explanatory Statement as required by the *Legislation Act 2003* (Cth) in which the Attorney-General stated:

Consultation before making

Before this instrument was made, the Attorney-General considered the general obligation to consult imposed by s 17 of the *Legislative Instruments*

Act 2003.

Section 55ZF of the *Judiciary Act 1903* empowers the Attorney-General to issue Directions, which are to apply generally to Commonwealth legal work, or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter. 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.

42. On 11 May 2016 I wrote to the Attorney-General to inform him that I did not accept that the Direction was the subject of prior consultation with me. At the time I wrote the letter I was concerned that the Attorney-General may have thought that the Attorney-General's Department or his Office consulted me and that there had been miscommunications about whether I was consulted or who was to consult me. I framed my letter in an understated and courteous manner to allow for the possibility of a mistake which could readily have been corrected. That letter is provided as Attachment H to this submission.
43. *Thirdly*, I have received inconsistent accounts from persons in the Attorney-General's Department as to why I was not consulted.
44. *Fourthly*, I spoke with the First Parliamentary Counsel, Mr Peter Quiggin PSM, who informed me that the Office of Parliamentary Counsel (**OPC**) had drafted the Direction on the instructions of the Attorney-General's Department but not the Explanatory Statement. He indicated that he felt he was not at liberty to tell me in advance about the Direction because it is the responsibility of an instructing Department (and not OPC) to consult in relation legislative instruments (save for some exceptions).

D. The terms of reference

45. To assist the Committee, I will now address each of the Terms of Reference in light of what I have set out above.
46. *First*, (in relation to Term of Reference (a)), any consultation that may have occurred in relation to the Direction did not occur with me and did not draw on my knowledge or expertise as the Solicitor-General. I had no advance knowledge that the Direction would be made, no notice of what would be in the Direction and no opportunity to put a submission to the Attorney-General or the Attorney-General's Department as to my views on the legality or merits of the Direction.
47. *Secondly*, (in relation to Term of Reference (b)), although the Solicitor-General is the person most affected by the Direction, I was not given an opportunity to comment on the content of the Direction. As I have indicated above, while there was discussion about the Guidance Note at the meeting on 30 November 2015, the Guidance Note and the Direction are significantly different. Significantly, neither the making of a Direction nor the requirement for pre-approval from the Attorney-General before a Solicitor-General could provide advice was discussed at the meeting of 30 November 2015, at any subsequent meetings, or in any subsequent correspondence. Indeed, the first I learned of the Direction and the requirement for pre-approval was on 4 May 2016 when the Attorney-General wrote to me to inform me that he had made the Direction.
48. *Thirdly*, (in relation to Term of Reference (c)), there was no consultation with me, and no oral or written submissions were sought from me.
49. *Fourthly*, (in relation to Term of Reference (d)), there was no consultation with me at any time.

50. *Fifthly*, (in relation to Term of Reference (e)), as a related matter, had I been consulted about the possible making of the Direction, I would have made a submission to the Attorney-General, in the strongest terms, that the Direction should not be made. Apart from its many other difficulties, there are three significant difficulties with the Direction that had I been consulted I would have raised.
51. The *first* is that the Direction proceeds on the basis that, under the Law Officers Act, the Solicitor-General cannot provide an opinion on a question of law to the Commonwealth, or any agency or official unless it is done under s 12(b) as an opinion on referral from and to the Attorney-General. That basis is wrong in law and represents a radical change in how Solicitors-General have acted since 1964 under the Law Officers Act as I have noted at paragraphs [10] and [15] above.
52. The *second* is that it is critically important that persons such as the Governor-General, Prime Minister and officers of Parliament are able to approach the Solicitor-General for advice in an uninhibited fashion, and in respect to questions framed by them and not by others. They should be able to do so not just where litigation is before a court or anticipated but whenever it is necessary to ensure the law, including the Constitution, is complied with. The Solicitor-General has an important role in assisting the Executive, the Parliament and the Government to uphold the rule of law for the benefit of the whole community. The Direction undermines that role insofar as it permits an Attorney-General to deny access to the Solicitor-General and has the potential to discourage persons and bodies from seeking the Solicitor-General's advice. I am already seeing evidence that requests for advice on matters of very great significance to the Government and the community are going to persons other than the Solicitor-General.
53. The *third* is that it is not apparent that the Direction is supported by s 55ZF of the Judiciary Act. That is because the legislative history and context of s 55ZF

indicate that it was not intended to empower the Attorney-General to make directions with respect to the Solicitor-General.

54. I confirm that I am willing to address questions the Committee might have, whether in person or in writing.

Yours sincerely

Justin Gleeson SC
Solicitor-General of the
Commonwealth of Australia

3 October 2016

ATTACHMENT A



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, and secondly, the accurate public representation of Solicitor-General advice. 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

ATTACHMENT A

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. I identify below three recent examples that indicate the urgency of improved coordination.

Citizenship: In August 2014, I provided an opinion (SG No 23 of 2014) on the first version of a proposal to suspend or revoke a person's Australian citizenship. In March 2015, as I learned much later, the proposal was significantly revised within the Department of Immigration and Border Protection. For the next three months, the proponents of the Bill obtained various advices from the Australian Government Solicitor (AGS) on the revised proposals. Almost by accident, the matter came to my attention again in June 2015. At that point, on request, I advised (SG No 10 of 2015) [REDACTED]

[REDACTED]. The proposal was then further revised, and on 23 June 2015, I provided an urgent advice under acute time constraints on the next version (SG No 14 of 2015).

The Bill which was introduced into Parliament some 24 hours later reflected new changes that were made without seeking my further advice. However, a written statement was later made by you to Mr Dreyfus QC, and ultimately published as an appendix to the Advisory Report of the Parliamentary Joint Committee on Intelligence and Security (Joint Committee), that I had advised that "there is a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the draft Bill". That statement has been repeatedly picked up in the media, including in this morning's *Sydney Morning Herald*.

In September 2015, the Joint Committee published its Advisory Report recommending 26 changes to the Bill. On 11 November 2015, I learned from media reports that the further revised Bill would be amended again, including to implement the Joint Committee's recommendations, and debated in Parliament this week. I have informally learned that urgent advice on the Bill's constitutionality has been sought from AGS. No-one involved in this latest revision process has engaged with my office to seek my further advice.

ATTACHMENT A

In this morning's *Sydney Morning Herald*, the Prime Minister is reported to have made the following statements about the current version of the Bill before Parliament:

The Government's advice is that the [citizenship] laws, if challenged in the High Court, would be upheld. But of course, advice isn't always born out. ...

[The Bill has] gone through a proper process now, and we are confident that it would survive a High Court challenge, but only time will tell.

Those statements, in context, are capable of being understood as statements about the Solicitor-General having advised on the current Bill, and about the content of that advice. If so understood, they are inaccurate.

Marriage equality: I understand that one proposal under active consideration by the Government [REDACTED]

[REDACTED]

[REDACTED] To date, however, I have not been asked to advise on the proposal. Instead, AGS has provided draft advice in the matter. I have raised this concern with your Office and also with your Department. I am told there may be a request for my advice at some unspecified point in the future.

Correspondence between Sir John Kerr and the Queen in 1975: On 9 November 2015, the *Australian* newspaper reported that you and the Prime Minister had decided that this correspondence has been falsely labelled as "private", and that the Governor-General will be advised by his responsible Ministers to request the Palace to release the correspondence. Assuming this reporting to be accurate, you may not have known in advance that, in 2013, I had been asked by the then Governor-General, with the approval of the then Attorney-General under s 12(b) of the *Law Officers Act*, to advise on this very issue. A purpose of Guidance Note 11 is to avoid the risk that one part of government might proceed in ignorance of the Solicitor-General's advice on a matter of high legal importance. Conscious of the

ATTACHMENT A

gravity of these risks in the context of such a sensitive issue, I asked my Counsel Assisting immediately to advise your Chief of Staff of the existence of my opinion (JG No 5 of 2013) and to state that, if you so requested, I would ask the Governor-General to consent to releasing it to you. My office has not received a response.

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. In addition, where public statements are made about the content of advice to the Government on matters of the highest importance, it is critical that they do not convey that advice has come from the Solicitor-General if that is not the fact.

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

ATTACHMENT B

From: [redacted] Counsel Assisting the Solicitor-General
To: Faulks, Joshua, [redacted] Executive Advisor to the Secretary; Govey, Ian (AGS)
Subject: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - meeting notes [DLM=Sensitive:Legal]
Date: Tuesday, 8 December 2015 4:11:30 PM
Attachments: Meeting with A-G, Secretary and Ian Govey on 30 November 2015 - meeting notes.docx

Sensitive: Legal

Dear all,

The Solicitor-General has asked me to circulate his notes of the action items arising out of your meeting on 30 November 2015. Josh and [redacted] Executive Advisor, I'd be grateful if you could pass this on to the Attorney and the Secretary respectively.

Could you please let me know if you have any comments on the notes?

Regarding item 4 of the notes: the Solicitor-General is working on a draft reporting document, which he will circulate to the Secretary and Ian Govey for comment.

Best regards

[redacted]

[redacted]
Counsel Assisting the Solicitor-General

T: [redacted]
Attorney-General's Department
3-5 National Circuit, Barton ACT 2600
[redacted]

ATTACHMENT B

Meeting between Attorney-General, Solicitor-General, Secretary and Australian Government Solicitor

30 November 2015, 10.30-11.15am

Solicitor-General's meeting notes

Attendees

Attorney-General; Solicitor-General; Chris Moraitis; Ian Govey; Paul O'Sullivan; Josh Faulks; James Lambie

Meeting outcomes

1. There was a general consensus that:
 - a. where the Solicitor-General's advice is sought, this should occur in a timely fashion; and
 - b. where amendments have been made to draft legislation on which the Solicitor-General has advised, the Solicitor-General should be offered the opportunity to advise on the amendments if possible.
2. The Solicitor-General, the Secretary and Ian Govey will suggest amendments to Guidance Note 11 to deal with these points and suggest other desired changes to paras 6, 7 and 13 for the Attorney-General's consideration.
3. The Solicitor-General will continue his practice of providing quarterly reports to the Attorney-General.
4. The Solicitor-General, the Secretary and Ian Govey will develop a proposal for a new monthly working document, spanning the work of both the Solicitor-General and AGS. The report will be circulated to the Attorney-General, the Solicitor-General, the Secretary and Ian Govey, who will endeavor to meet once a month to discuss the key matters canvassed in the report. The report should set out:
 - a. the most significant opinions recently given or currently underway;
 - b. the most significant cases currently on foot; and
 - c. any other significant legal issues that require the group's attention.

ATTACHMENT C

From: Legal Assistant to Ian Govey
To: Counsel Assisting the Solicitor-General
Subject: FW: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - meeting notes [DLM=Sensitive:Legal]
Date: Friday, 11 December 2015 12:54:03 PM
Attachments: [Meeting with A-G, Secretary and Ian Govey on 30 November 2015 - meeting notes.docx](#)

From: Legal Assistant to Ian Govey **On Behalf Of** Govey, Ian
Sent: Friday, December 11, 2015 11:54 AM
To: Counsel Assisting the Solicitor-General
Subject: FW: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - meeting notes [DLM=Sensitive:Legal]

Counsel Assisting the Solicitor-General

I agree with these notes but would like to add a 5th point:

'5. Consideration will be given to whether a direction to AGS is required to facilitate AGS providing to the rest of AGD material that AGS has not been authorised to provide.'

I'd be happy to elaborate on why I raised this issue at the meeting if that would assist.

Regards
Ian

From: Counsel Assisting the Solicitor-General
Sent: Tuesday, December 08, 2015 4:12 PM
To: Faulks, Joshua; Executive Advisor to the Secretary; Govey, Ian
Subject: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - meeting notes [DLM=Sensitive:Legal]

Sensitive: Legal

Dear all,

The Solicitor-General has asked me to circulate his notes of the action items arising out of your meeting on 30 November 2015. Josh and Executive Advisor to the Secretary, I'd be grateful if you could pass this on to the Attorney and the Secretary respectively.

Could you please let me know if you have any comments on the notes?

Regarding item 4 of the notes: the Solicitor-General is working on a draft reporting document, which he will circulate to the Secretary and Ian Govey for comment.

Best regards



ATTACHMENT C

[REDACTED]
Counsel Assisting the Solicitor-General
[REDACTED]
Attorney-General's Department
3-5 National Circuit, Barton ACT 2600
[REDACTED]

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ATTACHMENT D

From: Executive Advisor to the Secretary
To: Counsel Assisting the Solicitor-General
Subject: RE: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - finalised meeting notes [DLM=Sensitive:Legal]
Date: Thursday, 24 December 2015 11:53:36 AM

Sensitive: Legal

Counsel Assisting the Solicitor-General / Secretary has no concerns with the notes.

From: Counsel Assisting the Solicitor-General
Sent: Tuesday, 22 December 2015 12:18 pm
To: Executive Advisor to the Secretary Govey, Ian (AGS)
Subject: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - finalised meeting notes [DLM=Sensitive:Legal]

Sensitive: Legal

Dear Executive Advisor to the Secretary and Ian

Further to Counsel Assisting the Solicitor-General email below, I attach the finalised version of the Solicitor-General's notes from the meeting with the Secretary, Attorney and Ian on 30 November 2015. Executive Advisor to the Secretary, I'd be grateful if you could pass this version on to the Secretary.

Executive Advisor to the Secretary, regarding item 4, the Solicitor-General has prepared the attached reporting document and I understand Ian is happy with it. Could you pass this on to the Secretary for his comment? Once the Secretary has had an opportunity to comment upon it, I will send the reporting document as well as the Solicitor-General's notes from the meeting on 30 November 2015 to Josh Faulks for the Attorney-General's attention.

Kind regards

[Redacted]

[Redacted]
Counsel Assisting the Solicitor-General


[Redacted]
Attorney-General's Department
3-5 National Circuit, Barton ACT 2600

From: Counsel Assisting the Solicitor-General
Sent: Tuesday, December 08, 2015 4:12 PM
To: Faulks, Joshua, Executive Advisor to the Secretary; Govey, Ian
Subject: Meeting between the A-G, S-G, Secretary and Ian Govey, 30 November 2015 - meeting notes [DLM=Sensitive:Legal]

ATTACHMENT D

Sensitive: Legal

Dear all,




The Solicitor-General has asked me to circulate his notes of the action items arising out of your meeting on 30 November 2015. Josh and  I'd be grateful if you could pass this on to the Attorney and the Secretary respectively.

Could you please let me know if you have any comments on the notes?

Regarding item 4 of the notes: the Solicitor-General is working on a draft reporting document, which he will circulate to the Secretary and Ian Govey for comment.

Best regards




Counsel Assisting the Solicitor-General

Attorney-General's Department
3-5 National Circuit, Barton ACT 2600


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ATTACHMENT D

Meeting between Attorney-General, Solicitor-General, Secretary and Australian Government Solicitor

30 November 2015, 10.30-11.15am

Solicitor-General's meeting notes

Attendees

Attorney-General; Solicitor-General; Chris Moraitis; Ian Govey; Paul O'Sullivan; Josh Faulks; James Lambie

Meeting outcomes

1. There was a general consensus that:
 - a. where the Solicitor-General's advice is sought, this should occur in a timely fashion; and
 - b. where amendments have been made to draft legislation on which the Solicitor-General has advised, the Solicitor-General should be offered the opportunity to advise on the amendments if possible.
2. The Solicitor-General, the Secretary and Ian Govey will suggest amendments to Guidance Note 11 to deal with these points and suggest other desired changes to paras 6, 7 and 13 for the Attorney-General's consideration.
3. The Solicitor-General will continue his practice of providing quarterly reports to the Attorney-General.
4. The Solicitor-General, the Secretary and Ian Govey will develop a proposal for a new monthly working document, spanning the work of both the Solicitor-General and AGS. The report will be circulated to the Attorney-General, the Solicitor-General, the Secretary and Ian Govey, who will endeavor to meet once a month to discuss the key matters canvassed in the report. The report should set out:
 - a. the most significant opinions recently given or currently underway;
 - b. the most significant cases currently on foot; and
 - c. any other significant legal issues that require the group's attention..
5. Consideration will be given by Chris Moraitis and Ian Govey to whether a direction to AGS is required to facilitate AGS providing to the rest of AGD material that AGS has not been authorised to provide.

ATTACHMENT E

From: Gartmann, Petra
To: Brandis, George; Gleeson, Justin; Moraitis, Chris; Govey, Ian (AGS); Anderson, Iain
Cc: Manning, Greg; Executive Advisor to the Secretary; Counsel Assisting the Solicitor-General; Lambie, James; Howe, Tom (AGS); DLSO Officer; DLSO Officer; Faulks, Joshua
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]
Date: Thursday, 24 March 2016 3:17:42 PM

PROTECTED Sensitive: Legal

Good Afternoon

I refer to yesterday's Legal Issues Meeting and confirm the following action items:

1. AGD to schedule a meeting with the Attorney-General to discuss the Secretary's Review of Commonwealth Legal Services, and
2. Attorney-General to consider proposed changes to Guidance note 11 and come back with his views in the week commencing 4 April.

Regards

Petra Gartmann
Assistant Secretary
Office of Legal Services Coordination
Attorney-General's Department



From: Gartmann, Petra
Sent: Monday, 21 March 2016 5:00 PM
To: Brandis, George; Gleeson, Justin; Moraitis, Chris; Govey, Ian (AGS); Anderson, Iain
Cc: Manning, Greg; Executive Advisor to the Secretary; Counsel Assisting the Solicitor-General; Lambie, James; Howe, Tom (AGS); DLSO Officer; DLSO Officer
Subject: Legal Issues Meeting - 23 March - Briefing Material [DLM=Sensitive:Legal]

Sensitive: Legal

Good Afternoon

I refer to the **Legal Issues Meeting** scheduled at **10am on Wednesday 23 March** to be attended by:

- Attorney-General, Senator the Hon George Brandis QC
- Solicitor-General, Justin Gleeson SC
- Chris Moraitis, Secretary AGD
- Ian Govey and Tom Howe from AGS
- Iain Anderson, Deputy Secretary Civil Justice and Corporate Group AGD

The following documents are attached:

- agenda

ATTACHMENT E

- monthly report for discussion
- current Guidance Note 11
- revised Guidance Note 11 (both a clean copy and a marked up copy).

The Office of Legal Services Coordination will provide support including preparing minutes and following up any action items.

regards

Petra Gartmann
Assistant Secretary
Office of Legal Services Coordination
Attorney-General's Department



ATTACHMENT F

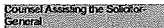


From: Gartmann, Petra
To: Counsel Assisting the Solicitor-General
Cc: DLSO Officer; Counsel Assisting the Solicitor-General
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]
Date: Friday, 29 April 2016 5:26:15 PM

PROTECTED Sensitive: Legal

Hi 

I understand the AG is writing directly to the SG about this.

Regards
Petra

From: 
Sent: Friday, 29 April 2016 2:45 PM
To: Gartmann, Petra
Cc: ; 
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]

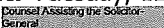


PROTECTED Sensitive: Legal

Hi Petra

I just wanted to follow up to ask if you had any further updates on Guidance Note 11.

Thanks



From: Gartmann, Petra
Sent: Tuesday, 12 April 2016 12:07 PM
To: 
Cc: ; 
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]

PROTECTED Sensitive: Legal

Hi 

I have not yet heard anything but can follow up with the office on Thursday to get a sense of timing (The AG and James Lambie are travelling to Perth at the moment and unlikely to have time to speak with me until after they have returned to Brisbane hence Thursday is the earliest I can seek the update)

ATTACHMENT F

Regards

Petra Gartmann
Assistant Secretary
Office of Legal Services Coordination
Attorney-General's Department

[REDACTED]

From: Counsel Assisting the Solicitor-General
Sent: Tuesday, 12 April 2016 12:01 PM
To: Gartmann, Petra
Cc: DLSC Officer; Counsel Assisting the Solicitor-General
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]

PROTECTED Sensitive: Legal

Hi Petra

The Solicitor-General has asked me to check with you whether you have heard anything from the Office about Guidance Note 11.

Kind regards

[REDACTED]

[REDACTED]
Counsel Assisting the Solicitor-General
[REDACTED]
Attorney-General's Department
3-5 National Circuit, Barton ACT 2600
[REDACTED]

From: Gartmann, Petra
Sent: Thursday, 24 March 2016 3:18 PM
To: Brandis, George; Gleeson, Justin; Moraitis, Chris; Govey, Ian (AGS); Anderson, Iain
Cc: Manning, Greg; Executive Advisor to the Secretary; Counsel Assisting the Solicitor-General; Lambie, James; Howe, Tom (AGS); DLSC Officer; DLSC Officer; Faulks, Joshua
Subject: RE: Legal Issues Meeting - 23 March - Briefing Material [SEC=PROTECTED, DLM=Sensitive:Legal]

PROTECTED Sensitive: Legal

Good Afternoon

I refer to yesterday's Legal Issues Meeting and confirm the following action items:

1. AGD to schedule a meeting with the Attorney-General to discuss the Secretary's Review of Commonwealth Legal Services, and

ATTACHMENT F

2. Attorney-General to consider proposed changes to Guidance note 11 and come back with his views in the week commencing 4 April.

Regards

Petra Gartmann
Assistant Secretary
Office of Legal Services Coordination
Attorney-General's Department

[Redacted]

From: Gartmann, Petra
Sent: Monday, 21 March 2016 5:00 PM
To: Brandis, George; Gleeson, Justin; Moraitis, Chris; Govey, Ian (AGS); Anderson, Iain
Cc: Manning, Greg; Executive Advisor to the Secretary; Counsel Assisting the Solicitor General; Lambie, James; Howe, Tom (AGS); DLSO, Officer; DLSO Officer
Subject: Legal Issues Meeting - 23 March - Briefing Material [DLM=Sensitive:Legal]

Sensitive: Legal

Good Afternoon

I refer to the **Legal Issues Meeting** scheduled at **10am on Wednesday 23 March** to be attended by:

- Attorney-General, Senator the Hon George Brandis QC
- Solicitor-General, Justin Gleeson SC
- Chris Moraitis, Secretary AGD
- Ian Govey and Tom Howe from AGS
- Iain Anderson, Deputy Secretary Civil Justice and Corporate Group AGD

The following documents are attached:

- agenda
- monthly report for discussion
- current Guidance Note 11
- revised Guidance Note 11 (both a clean copy and a marked up copy).

The Office of Legal Services Coordination will provide support including preparing minutes and following up any action items.

regards

Petra Gartmann
Assistant Secretary
Office of Legal Services Coordination
Attorney-General's Department

[Redacted]

ATTACHMENT G



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

ATTACHMENT G



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

ATTACHMENT G

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2	Commencement	1
3	Authority.....	1
4	Schedules.....	1
	Schedule 1—Amendments	2
	<i>Legal Services Directions 2005</i>	2

ATTACHMENT G

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.

ATTACHMENT G

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.

ATTACHMENT G

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.

ATTACHMENT G

Legal Services Amendment (Solicitor-General Opinions) Direction 2016

EXPLANATORY STATEMENT

Issued by the Attorney-General
in compliance with section 15G of the *Legislation Act 2003*

INTRODUCTION

Under subsection 55ZF(1)(a) of the *Judiciary Act 1903*, the Attorney-General may issue Legal Services Directions (the Directions) applying generally to Commonwealth legal work (as defined in that section).

The power to issue the Directions was conferred having regard to the Attorney-General's responsibility, as First Law Officer, for matters relating to the performance of Commonwealth legal work by, and on behalf of, the Commonwealth and its agencies.

OUTLINE

Section 55ZF of the *Judiciary Act 1903* empowers the Attorney-General to issue the Directions, which are to apply generally to Commonwealth legal work, or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter.

Paragraph 12(b) of the *Law Officers Act 1964* provides that the functions of the Solicitor-General, in addition to acting as counsel, include furnishing opinions to the Attorney-General on questions of law referred by the Attorney-General.

The purpose of this instrument is to amend the Directions to insert new provisions about seeking opinions on questions of law by the Solicitor-General. The new provisions clarify the circumstances in which an opinion on a question of law may be sought from the Solicitor-General pursuant to paragraph 12(b) of the *Law Officers Act 1964* and regularise the process by which referrals to the Solicitor-General for opinions are made.

PROCESS BEFORE THE INSTRUMENT WAS MADE

Regulatory impact analysis

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required as the Directions are machinery in nature and do not change the regulatory burden placed on businesses or the non-profit sector (OBPR ID 20861).

Statement of compatibility with human rights obligations

Before this instrument was made, its impact on human rights was assessed using tools and guidance published by the Attorney-General's Department. It is fully compatible with human rights as defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Consultation before making

Before this instrument was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislative Instruments Act 2003*.

ATTACHMENT G

Section 55ZF of the *Judiciary Act 1903* empowers the Attorney-General to issue Directions, which are to apply generally to Commonwealth legal work, or that are to apply to Commonwealth legal work being performed, or to be performed, in relation to a particular matter. 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.

Statutory preconditions and Parliamentary undertakings relevant to this instrument

There are no other statutory preconditions or Parliamentary undertakings relevant to the making of this instrument.

Further detail is provided in Attachment A.

ATTACHMENT G

NOTES ON SECTIONS

ATTACHMENT A

Section 1 Name of legislative instrument

This section provides for the legislative instrument to be named as the Legal Services Amendment (Solicitor-General Opinions) Direction 2016. The legislative instrument may be cited by that name.

Section 2 Commencement

This section provides for the legislative instrument to commence on the day after it is registered on the Federal Register of Legislation.

Section 3 Authority

This section identifies the Act that authorises the making of the legislative instrument as the *Judiciary Act 1903*.

Section 4 Schedule

The schedule outlines the process that will apply to how questions of law are referred to the Solicitor-General for an opinion.

The process will apply to people or bodies referred to in paragraph 12(a) of the *Law Officers Act 1964* which is slightly broader in application than the Directions. This difference is not expected to have any practical impact on the approach to referring questions of law to the Solicitor-General.

ATTACHMENT G



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].

ATTACHMENT G

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.

ATTACHMENT G

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;

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- 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).

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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
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Re-issued: April 2016

ATTACHMENT H



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,

I refer to your letter dated 4 May 2016 and the attached *Legislative Services Amendment (Solicitor-General Opinions) Direction 2016*. The attached Explanatory Statement records "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". I do not accept that the Direction was the subject of prior consultation with me.

Yours faithfully,

Justin Gleeson SC
Solicitor General of the Commonwealth

11 May 2016