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Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Secretary

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

Thank you for the opportunity to provide this submission. I am an Associate Professor at the University of Sydney, Faculty of Law and my research is in the field of administrative law. The Committee's terms of reference make clear that it will assess the consultations carried out for the Legal Services Amendment (Solicitor-General Opinions) Direction 2016. One of my areas of research concerns consultation requirements. Earlier this year I published an [article](#) examining the consultation provisions of the *Legislation Act 2003* (Cth) that are relevant to the subject matter of your inquiry.

My submission draws on my research and is intended to assist the Committee by setting out the principles developed by courts and governments in Australian and the United Kingdom for conducting consultation processes. Such principles are not often referred to in Australia because consultation requirements included in Australian legislation are commonly made to be unenforceable by courts, as is the case for the consultation provisions of the *Legislation Act 2003* (Cth), s 17, 19. That means there is relatively little case law in Australia concerning consultation requirements. Nevertheless, courts and governments in Australia and the United Kingdom have developed principles relating to how consultation processes should be carried out.

The *Legislation Act 2003* s 17 provides generalised guidance. It refers to the rule-maker determining whether the consultation is appropriate and reasonably



practicable by reference to the consulted person's relevant expertise and by giving affected persons an adequate opportunity to comment. The rule-maker is to provide the consulted person with notice and is to provide an explanatory statement for the legislative instrument that is made (*Legislation Act 2003*, s 15J).

The consultation requirements in the *Legislation Act 2003* can usefully be understood by reference to general principles for consultation developed in the United Kingdom. The principles developed by the United Kingdom courts are referred to as the "Gunning principles", and were stated in *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168. They are as follows:

First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ... that adequate time must be given for consideration and response and finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals. (*R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168, 189.)

The United Kingdom government's consultation principles provide additional guidance. Committee members can find them [here](#). The principle most likely to be relevant to the Committee is the following:

C. Consultations should be informative

Give enough information to ensure that those consulted understand the issues and can give informed responses. Include validated assessments of the costs and benefits of the options being considered when possible; this might be required where proposals have an impact on business or the voluntary sector.

...

E. Consultations should last for a proportionate amount of time

Judge the length of the consultation on the basis of legal advice and taking into account the nature and impact of the proposal. Consulting for too long will unnecessarily delay policy development. Consulting too quickly will not give enough time for consideration and will reduce the quality of responses.



F. Consultations should be targeted

Consider the full range of people, business and voluntary bodies affected by the policy, and whether representative groups exist. Consider targeting specific groups if appropriate. Ensure they are aware of the consultation and can access it. Consider how to tailor consultation to the needs and preferences of particular groups, such as older people, younger people or people with disabilities that may not respond to traditional consultation methods.

There are Australian cases in which the courts have reviewed consultation processes when consultation requirements are included in legislation in a mandatory manner.

- The notice provided to the consulted person should provide sufficient detail for the consulted person to provide an informed submission (*Scurr v Brisbane City Council* (1973) 133 CLR 242, 252)
- submissions are to be considered by the decision-maker (*Tickner v Chapman* (1995) 57 FCR 451, 463-4; *Tobacco Institute of Australia v National Health and Medical Research Council* (1996) 71 FCR 265, 281, 284)
- a new round of consultation should be carried out when substantial changes are made to a proposal after the initial consultation process is held. (*Leichhardt Council v Minister for Planning [No 2]* (1995) 87 LGERA 78, 84, 88)

Further analysis of the Australian case law can be found [here](#).

I have limited this submission to consultation principles rather than to how those principles should be applied to the factual circumstances that gave rise to the Committee's inquiry. I hope that reference to these principles will help the Committee with its deliberations.

Yours sincerely

Andrew Edgar