

Chapter 3

Views of the Solicitor-General

Prior to the Direction

3.1 The submission that the committee received from the Solicitor-General outlines a very different perspective and view of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction) and the consultation process that the Attorney-General undertook prior to the Direction being issued.

3.2 The Solicitor-General's account also begins with his letter of 12 November 2015 to the Attorney-General, seeking a meeting to discuss procedural concerns. The Solicitor-General believed that 'insufficient procedures were in place to ensure appropriate coordination between Commonwealth bodies and [the Solicitor-General's] Office in matters of high legal importance', that these were 'hampering' his duty to provide advice to the Attorney-General and the Commonwealth, and finally, 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 [the Solicitor-General's] statutory functions under the Law Officers Act'.¹

3.3 In the letter of 12 November 2015, the Solicitor-General also raised concerns regarding the accuracy of representations made by the Prime Minister and ministers about opinions he had given on proposed government legislation.² The Solicitor-General specifically references the issues of citizenship and marriage equality, and states that '...where public statements are made about the content of advice to the Government on matters of highest importance, it is critical that they do not convey that advice has come from the Solicitor-General if that is not the fact'.³

3.4 The letter of 12 November 2015 also makes it clear that the government had sought advice as to the constitutionality of various iterations of legislation which proposed to suspend or revoke a person's Australian citizenship from the Australian Government Solicitor (AGS) without requesting advice from or notifying the Solicitor-General. The letter also reveals the Solicitor-General's 'concern' that advice on a marriage equality proposal had been provided by the AGS without the Solicitor-General being asked to provide such advice. An extract of this letter is at Appendix 4 of this report.⁴

1 Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia, *Submission 3*, p. 8.

2 Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia to Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia, correspondence sent 12 November 2015.

3 *Submission 3*, p. 21.

4 The letter is attached to the submission of Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia, *Submission 3*, pp. 19–21.

3.5 The Solicitor-General also refers to the meeting held on 30 November 2015 to discuss his concerns, and that it was attended by the Attorney-General, the Secretary of the Attorney-General's Department (the Department), and the Chief Executive Officer of the Australian Government Solicitor. According to the Solicitor-General's account of the meeting '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'.⁵ The Solicitor-General states further that:

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.⁶

3.6 According to the Solicitor-General, the meeting on 30 November 2015 was held to allow him to discuss his view that it was important his advice 'was sought on matters of importance' and 'represented accurately'.⁷

3.7 The Attorney-General's quotations from the letter of 12 November 2015 (provided in Chapter 2) refer to 'processes' and 'procedures'. The Solicitor-General states in his submission that there were four objectives of the letter:

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.⁸

3.8 Following the meeting, the Solicitor-General's office emailed meeting notes to the Attorney-General's Deputy Chief of Staff, and the other attendees mentioned above. This included a statement requesting that the recipients 'respond if they had any comments on the meeting notes'.⁹ The Solicitor-General observes in his submission that:

...[t]he 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...The Executive Advisor to the Secretary responded that the Secretary had no concerns with the notes...The Attorney-General's Deputy Chief of Staff did not respond.¹⁰

5 *Submission 3*, p. 9.

6 *Submission 3*, p. 9.

7 *Submission 3*, p. 10.

8 *Submission 3*, p. 10.

9 *Submission 3*, p. 9.

10 *Submission 3*, p. 9.

3.9 The Secretary of the Department later stated that: 'I do not recall any detailed discussion around a direction, although I would not dispute that the Legal Services Directions may have been raised'.¹¹

3.10 Significantly, the Solicitor-General provides a more detailed description of what was discussed at the meeting in his submission than the Attorney-General does in his account. This is a matter that is central to the question of the extent to which the Attorney-General consulted the Solicitor-General on changes to the Legal Services Directions:

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...)¹²

3.11 On 21 March 2016, the Department forwarded the Solicitor-General's proposed written amendments to the Guidance Note to the Attorney-General, the Secretary of the Department, and the Australian Government Solicitor.¹³ The Solicitor-General made it clear that:

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.¹⁴

3.12 As described in the Attorney-General's account, on 23 March 2016, the Solicitor-General met with the Attorney-General, the Secretary of the Department, and the Australian Government Solicitor, about other matters, and the Attorney-General told the Solicitor-General that he would respond to the Solicitor-General's proposed Guidance Note revisions immediately after Easter. The Solicitor-General did not receive a response from the Attorney-General. The Solicitor-General also made it clear that '[a]t no point at the meeting on 23 March 2016, or in the action items

11 Mr Chris Moraitis PSM, Secretary, Attorney-General's Department, answers to questions on notice, 3 November 2016 (received 7 November 2016), p. 1.

12 *Submission 3*, p. 10.

13 *Submission 3*, p. 11.

14 *Submission 3*, p. 12.

circulated after the meeting, was there any mention of the possibility of issuing a new Legal Services Direction binding or affecting the Solicitor-General'.¹⁵

After the Direction

3.13 On 4 May 2016, the Direction was tabled in the Senate. The Solicitor-General noted the statement on consultation in the Explanatory Statement:

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.¹⁶

3.14 When the Solicitor-General made representations to the Attorney-General that he 'had not been consulted about the Direction', he was shown the handwritten diary notes described in Chapter 2, that were taken by the Attorney-General's staff at the meeting, indicating that the Legal Services Directions were discussed.¹⁷

3.15 However, according to the Solicitor-General, the Legal Services Directions were only discussed as a background matter, and he was not advised that a new Direction may be issued. The Solicitor-General elaborated on this point at the public hearing:

There was no discussion of the possibility of a new direction. At the commencement of the meeting the Attorney-General identified that there were four documents at issue, and one of those documents was the Legal Services Directions. That was the only point in the meeting at which those directions were discussed.¹⁸

3.16 The Solicitor-General explained at the hearing what his response would have been if the Attorney-General had given him prior notice that he was planning to issue a new Direction:

No-one at the meeting said, 'The problem we are talking about here needs a new legal services direction.' Had I been told at that meeting or later that the Attorney was considering issuing a new legal services direction, what I would have done is examine whether that was lawful, and I would have

15 *Submission 3*, p. 12.

16 Legal Services Amendment (Solicitor-General Opinions) Direction 2016, Explanatory Statement, p. 2.

17 These handwritten notes were provided as an attachment to the A-G's submission to this Inquiry.

18 *Committee Hansard*, 14 October 2016, p. 24.

provided him with an opinion in due course that I considered it not to be lawful.¹⁹

3.17 The Solicitor-General is very clear on the point that he was not given any notice of the new Direction prior to it being tabled. This was discussed in detail at the public hearing:

Senator WATT: When was the first time that you heard about the new legal services direction procedure?

Mr Gleeson: Shortly after lunch on 4 May 2016.

Senator WATT: And 4 May 2016 was the very day that that new direction was issued.

Mr Gleeson: I was sent an email by the Attorney's deputy chief of staff attaching the new direction in its issued form.

Senator WATT: So you first heard about a new legal services direction on the very day that it was issued by the Attorney-General.

Mr Gleeson: After it was issued on that day.²⁰

3.18 The Solicitor-General strongly disagrees with the aspect of the Explanatory Statement which states: 'the Attorney-General has consulted the Solicitor-General'. On 11 May 2016, the Solicitor-General wrote a response to the Attorney-General to inform him that he 'did not accept that the Direction was the subject of prior consultation with me'.²¹ As described in Chapter 2 the Attorney-General firmly holds the alternative view that he *did* consult with the Solicitor-General, as required by section 17 of the *Legislation Act 2003* (Cth).

3.19 At the public hearing, the Solicitor-General clearly expressed his understanding of what an appropriate consultation process would have been in the circumstances:

If one has a duty to consult over the issue of a legislative instrument, the first thing you have to do is tell the person affected or the person with expertise that you are thinking of issuing a legislative instrument. If you do not tell them that they cannot provide you with meaningful comments on either the legality or the wisdom of what you are doing. The second thing you have to do is tell them the substance of what you propose to put in the instrument. Now, if the Attorney had done both those things, the issues that we now have before us would have played out in a very different fashion.²²

19 *Committee Hansard*, 14 October 2016, p. 24.

20 *Committee Hansard*, 14 October 2016, pp. 25–26.

21 *Submission 3*, p. 12.

22 *Committee Hansard*, 14 October 2016, p. 24.

Supporting views of other witnesses

3.20 Dr Gabrielle Appleby, a legal expert on the role of the Solicitor-General in Australia, raised two main concerns about the Direction issued by the Attorney-General. Dr Appleby does not believe the Direction should have been made because it may deter individuals from seeking advice, and may be used to restrict access to the Solicitor-General:

First, the formality and procedure mandated by the Direction might operate to *dissuade* access to the Solicitor-General...Second, it is also unclear how the Attorney-General will exercise his or her discretion to provide consent to access the Solicitor-General. No criteria are set out against which the consent will be granted. There is no review process. Prior to the Direction, the Solicitor-General had implemented a highly formalised process that alerted the Attorney-General to all requests for the Solicitor-General's advice and gave the Attorney-General an effective veto.²³

3.21 It is also the view of Dr Appleby that while the Direction itself is not evidence that the Attorney-General is seeking to 'freeze the Solicitor-General out of important government legal work', it would provide him the capacity to do so if he wished, and provides evidence of a breakdown in the relationship between the country's two most senior law officers.²⁴ At the public hearing, Dr Appleby stated:

The issue of the direction, in my view, demonstrates a serious incursion by the Attorney-General into the Solicitor-General's role, and the process that preceded the issue of the direction demonstrates a lack of trust and a lack of respect by the Attorney-General for the office of the Solicitor-General, particularly in respect of the function, the status and the independence of that office. This raises, in my mind, serious concerns for the rule of law.²⁵

3.22 The first individual to fulfil the role of Solicitor-General in Australia, Sir Anthony Mason AC KBE CBE QC, provided views on the role of the Solicitor-General in a book published in 2014. He notes that he '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'.²⁶ This provides some context regarding the operation of the role as it was originally intended.

3.23 Another former Solicitor-General, Dr Gavan Griffith QC, who served the Hawke, Keating and Howard governments, also criticises the Direction in his submission to the committee, stating that he regards it as 'effecting the practical

23 Dr Gabrielle Appleby, Associate Professor and Co-Director of the Judiciary Project, Gilbert and Tobin Centre of Public Law, UNSW, *Submission 2*, pp. 7–8.

24 *Submission 2*, p. 8.

25 *Committee Hansard*, 5 October 2016, p. 1.

26 Sir Anthony Mason, '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), p. 50.

destruction of [the] independent office of Second Law Officer' and leading to '...perceptions as to the integrity of the continuing office. The uncomfortable image of a dog on a lead comes to mind'.²⁷ Dr Griffith states:

If maintained, the explicit terms of the Direction, signal upon the evidence of the Submissions, not merely the unfortunate breakdown in personal working relationships between the First and Second Law Officer. Apart from being practically unworkable, if it becomes to be implemented in form or substance to establish a gateway through the AG's political office to all the SG's advisory advice, this Direction will covert this great office...into one of 'closet counsel' within the AG's political office, to be released for non-curial advisings on the unreviewable whim of the incumbent AG.²⁸

3.24 While the focus of this inquiry is on the consultation process, the legality of the Direction is a relevant matter. Dr Griffiths' view is that 'the Direction is void and of no legal effect' as the legislation providing the basis for the Direction was not intended to apply to the work undertaken by the Solicitor-General.²⁹ According to Dr Griffith, it is 'untenable' to argue that the reach of section 55ZF of the *Judiciary Act 1903* (Cth) extends to the Solicitor-General:

These parts were introduced into the Judiciary Act following the provision of legal services being opened up to the private sector for competition between the newly established entity of the AGS, established as a separate provider of legal services, and the private sector, to ensure that the Government through the AG would retain ultimate control over the provision of legal services to Governmental entities. They were not directed to, and in no way empower, the AG to issue pre-emptive directions to the SG as to the relationship and exercise of his powers as Second Law Officer as defined and regulated under the Law Officers Act.³⁰

3.25 As repeatedly emphasised by the Attorney-General, under section 17 of the *Legislation Act 2003* (Cth), it is sufficient that a rule-maker be satisfied that there has been 'appropriate consultation' about the subject matter of a legislative instrument.³¹ Associate Professor Andrew Edgar provided a submission that outlined the legal principles associated with consultation processes. Dr Edgar notes that there is little Australian case law on the requirements of these 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, 19.³²

27 Dr Gavan Griffith QC, *Submission 7*, pp. 5 and 6.

28 *Submission 7*, p. 5.

29 *Submission 7*, p. 1.

30 *Submission 7*, p. 1.

31 *Committee Hansard*, 14 October 2016, p. 38.

32 Dr Andrew Edgar, Associate Professor, Faculty of Law, University of Sydney, *Submission 6*, p. 1.

3.26 Dr Edgar concurs that section 17 the *Legislation Act 2003* (Cth) provides only general guidance and 'refers to the rule-maker determining whether the consultation is appropriate and reasonably practicable' and that this should be done with regard to the 'consulted person's relevant expertise and by giving affected persons an adequate opportunity to comment', and the consulted person should be provided with notice.³³

3.27 In Australia, there is some case law on mandatory consultation requirements of legislation.³⁴ Dr Edgar's submission observes that the principles developed by the United Kingdom courts, referred to as the *Gunning Principles*, can provide guidance, in the context of a lack of Australian case law:

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.³⁵

3.28 This guidance summarises what may be considered reasonable steps to undertake in conducting a consultation process.

The terms of reference

The extent to which any consultation drew on the knowledge or expertise of persons having expertise in the relevant fields

3.29 The view of the Solicitor-General at the time is that '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'.³⁶ A number of past Solicitors-General support the interpretation of the Solicitor-General, as do other eminent senior barristers that practice in the field of Australian public law.

Whether persons likely to be affected by the proposed instrument had adequate opportunity to comment on its content

3.30 It is apparent that the Solicitor-General is the person most affected by the Direction. The Solicitor-General submitted the view:

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

33 *Submission 6*, pp. 1–2.

34 For example, it was held that 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; and that 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.

35 *R v Brent London Borough Council; Ex parte Gunning* (1985) 84 LGR 168, 189.

36 *Submission 3*, p. 15.

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.³⁷

What was the form of the consultation, including whether any written submissions were sought

3.31 The Solicitor-General is emphatic that 'there was no consultation with me, and no oral or written submissions were sought from me...at any time'.³⁸

The timing of when any consultation occurred

3.32 The Solicitor-General states that:

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.³⁹

Any related matter

3.33 In his submission, the Solicitor-General informed the committee what his views would have been if he were consulted by the Attorney-General about the Direction. The Solicitor-General would have 'made a submission to the Attorney-General, in the strongest terms, that the Direction should not be made',⁴⁰ including the following points:

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...;⁴¹

...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;⁴²

37 *Submission 3*, p. 15.

38 *Submission 3*, p. 15.

39 *Submission 3*, p. 15.

40 *Submission 3*, p. 16.

41 *Submission 3*, p. 16.

42 *Submission 3*, p. 16.

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;⁴³ and

...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.⁴⁴

3.34 At the public hearing, the Solicitor-General elaborated on the views expressed in his written submission on the consultation process undertaken by the Attorney-General prior to the Direction being issued. The Solicitor-General's initial response after lunch on 4 May 2016 was that he was 'shocked by the change because the Attorney-General and I had otherwise been working very cooperatively...to deal with these very issues.'⁴⁵ It is apparent that the Attorney-General received advice and drafting assistance prior to the Direction being tabled on 4 May 2016 and that others in government had a far greater understanding than the Solicitor-General of the precise form of the Direction. At the hearing, the Solicitor-General was asked whether any officers in the Attorney-General's Department had discussed the Direction with him:

I said to them, 'In the period leading up to 4 May, you must have known about this direction. You were helping draft it. The Parliamentary Counsel knew about it. The Attorney knew about it. His staff knew about it. How on earth could it have been that the one person who needed to know was not told?' That is the question I asked, and the best answer I could get...they certainly did not suggest to me I had been consulted; they said, 'We think that was something which the Attorney was going to deal with'.⁴⁶

43 *Submission 3*, p. 16.

44 *Submission 3*, pp. 16–17.

45 *Committee Hansard*, 14 October 2016, p. 6.

46 *Committee Hansard*, 14 October 2016, p. 27.