

Chapter 4

Committee views and recommendations

4.1 The dispute between the Attorney-General and the Solicitor-General has raised serious questions about the Attorney-General's compliance with the rule of law in Australia. Having considered the submissions and evidence provided at the public hearings, including from the Attorney-General and the Solicitor-General themselves, it is the committee's view that it was improper for the Attorney-General to have issued the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction) in its current form on 4 May 2016. In addition, there is a serious question over its validity.

Access to documents

4.2 The committee has sought access to any documents and correspondence which would clarify the nature of any consultation that occurred with the Solicitor-General. It has made requests for information from the Attorney-General's Department (the Department) that are relevant to the terms of reference. This includes an order for the Department to produce documents, sent on 18 October 2016. The Department has advised the committee that it has provided relevant documents to the Attorney-General, and that these are still being considered with a view to the Attorney-General making a claim of public interest immunity.

4.3 The committee is concerned that the Attorney-General has only been prepared to provide documents that could in some way be construed to substantiate the assertion that the Direction was substantively discussed at the meeting on 30 November 2016, despite other participants contradicting this claim. The committee has not been provided with any of the documents it has asked for pertaining to the Direction.

4.4 In his submission, the Attorney-General refers to handwritten meeting notes taken by his staff, which merely refer to the process of obtaining advice, as defined by the Direction and Guidance Note. No documents (which the committee understands exist) have been produced to substantiate the actual consultation process and drafting of the Direction.

Legality of the Direction

4.5 The committee notes the view of a previous Solicitor-General that 'the Direction is void and of no legal effect' because the legislation that the Direction is founded on was not intended to apply to the work undertaken by the Solicitor-General.¹ On this view, it is 'untenable' to argue that the reach of section 55ZF of the *Judiciary Act 1903* (Cth) extends to the Solicitor-General and 'in no way empower[s], 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

1 Dr Gavan Griffith QC, *Submission 7*, p. 1.

Act.² Former Queensland Solicitor-General, Walter Sofronoff QC, has also expressed the view that the Direction is 'invalid...misconceived and wrong in law'.³

4.6 These statements draw the changes implemented by the Attorney-General into further disrepute. The committee questions the adequacy of the Attorney-General's legal advice in the absence of any being sought from the Solicitor-General.

4.7 In addition, the committee is concerned at the manner in which the Direction inhibits free and independent access to the Solicitor-General by agencies and ministers other than the Attorney-General. The committee agrees with the Solicitor-General's statements 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;⁴

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;⁵ 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.⁶

4.8 The committee also agrees with the views expressed by:

- (a) Dr Gabrielle Appleby, who described the Attorney-General's issuing of the Direction as raising 'serious concerns for the rule of law';⁷ and
- (b) Former Solicitor-General, Dr Gavan Griffith QC, who stated that he regards the Direction as 'effecting the practical 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'.⁸

2 *Submission 7*, p. 1.

3 Laura Tingle, 'George Brandis in bitter legal fight goes to rule of law', *Australian Financial Review*, 16 June 2016, <http://www.afr.com/news/politics/george-brandis-in-bitter-legal-fight-goes-to-rule-of-law-20160616-gpkvvy> (accessed 1 November 2016).

4 Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia, *Submission 3*, p. 16.

5 *Submission 3*, p. 16.

6 *Submission 3*, pp. 16–17.

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

8 *Submission 7*, pp. 5 and 6.

4.9 It is the committee's view that the Attorney-General has sought to undermine the rule of law in Australia by failing to adequately consult the Solicitor-General and constraining the independence of the Solicitor-General.

Consultation on the Direction

4.10 The Explanatory Statement supporting the Direction clearly states that:

...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.⁹

4.11 During Senate Question Time on 10 October 2016, it was put to the Attorney-General that the Solicitor-General did not consider that he had been consulted about the Direction. The Attorney-General replied: 'I consulted the Solicitor-General about the matter at meeting in my office on 30 November 2015'.¹⁰

4.12 In asserting that he acted properly, the Attorney-General relies on a fanciful definition of 'consultation', when interpreting the requirements of section 17 of the *Legislation Act 2003* (Cth) (Legislation Act). This section requires that before a legislative instrument is made, the rule-maker must be satisfied that there has been consultation undertaken that is considered by the rule-maker to be appropriate and reasonably practicable to undertake.

4.13 The Legislation Act further states that, when determining what consultation was undertaken, the rule-maker may have regard to any relevant matter, including an assessment of the extent to which the rule-maker drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

4.14 The Attorney-General appears to argue that the Legislation Act does not actually require the person who is consulted to be specifically aware of any precise intention or lack of intention of a rule-maker.

4.15 The Attorney-General argues that he undertook appropriate consultation, in the form of a meeting in November 2015 to generally discuss procedures associated with briefing the Solicitor-General, and by considering the Solicitor-General's suggestions on a draft guidance note.¹¹

4.16 However, section 17 of the Legislation Act refers to consultation in relation to a 'proposed instrument'. It is simply not possible for the Attorney-General to have consulted on an instrument that was not yet in existence or even contemplation. By his

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

10 Attorney-General, Senator the Hon George Brandis QC, *Senate Hansard*, 10 October 2016, p. 37.

11 *Committee Hansard*, 14 October 2016, p. 65.

own admission the Attorney-General has confirmed that there was no proposed instrument at the time of the meeting on 30 November 2015. In addition:

- (a) Neither the Australian Government Solicitor and the Secretary of the Attorney-General's Department made any reference to the Direction being discussed at the 30 November 2015 meeting, when asked for feedback on the Solicitor-General's record of matters discussed at that meeting;
- (b) On April 12, the Solicitor-General's office, on behalf of the Solicitor General made an inquiry with the Attorney-General's Department asking for further updates on Guidance Note 11. That same day the Department replied saying they would follow up with the Attorney-General's office, noting the Attorney-General was travelling and they would not be able to respond immediately;¹²
- (c) Evidence from Mr Iain Anderson, the Deputy Secretary of the Department was that the Department was not aware of the Direction until 20 April 2016;¹³
- (d) On April 27 and 28 the Department and the Office of Parliamentary Counsel liaised on the content of the draft direction;¹⁴
- (e) On April 29, the Solicitor-General's office again emailed the Department inquiring about an update on Guidance Note 11. The Department did not advise the Solicitor-General about the work undertaken; instead advising, 'I understand the Attorney-General is writing directly to the Solicitor-General about this'.¹⁵

4.17 The Attorney-General has acknowledged that the first time the Solicitor-General was advised about the Direction was when it was issued on 4 May 2016.¹⁶

4.18 It is clear from the evidence provided by both the Solicitor-General and the Attorney-General, that the Solicitor-General was not consulted on the Direction, was afforded no opportunity to provide comment on the specific content of the proposed Direction, and that he was not informed of its development, or any intent to develop it. This is in spite of the Solicitor-General's explicit inquiries.

4.19 Further, the committee's view is that this part of the Explanatory Statement, and the Attorney-General's subsequent statements during Senate Question Time, are highly misleading, and rely on a fanciful notion of consultation that did not require the Solicitor-General to be informed about the proposed instrument, or provided with an opportunity to comment on its content. For the statement that the 'Attorney-General

12 *Submission 3*, p. 31.

13 *Committee Hansard*, 5 October 2016, p. 16.

14 Mr Chris Moraitis PSM, Secretary, Attorney-General's Department, answers to questions on notice, 3 November 2016 (received 7 November 2016), p. 5.

15 *Submission 3*, p. 31.

16 *Committee Hansard*, 14 October 2016, p. 54.

has consulted the Solicitor-General' to be true, the Attorney-General would have needed, at a minimum, to have advised the Solicitor-General of his intention to introduce a new instrument and provide him an opportunity to comment on its content. The Attorney-General's claim to have 'consulted' the Solicitor-General brings to mind the dissenting judgment of Lord Atkin in the famous administrative law decision of the House of Lords in *Liversidge v Anderson*, where he said:

I know of only one authority which might justify the suggested method of construction. 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less'.¹⁷

Conclusion

4.20 While the Attorney-General has expressed his 'great surprise' that the matter has become an issue of concern,¹⁸ submissions and evidence provided by experts, including a former Solicitor-General, are highly critical of the Attorney-General's actions and suggest that they threaten the rule of law in Australia. It is the committee's view that the Attorney-General's actions, in issuing the Direction, represent a gross infringement on the independence of the Solicitor-General, and call into question the professional integrity and judgement of the Attorney-General.

4.21 The lack of respect that the Attorney-General has displayed towards the Solicitor-General, and the state of their relationship prior to the Solicitor-General's resignation—one of the most critical relationships in his portfolio—demonstrates his lack of competence to hold the office of Attorney-General.

4.22 It is only because the Solicitor-General has been able to raise his concerns through this inquiry that the Parliament became fully aware of these issues. The onus placed on the Solicitor-General to raise the failure of the Attorney-General to engage in proper consultation demonstrates the significance of the Attorney-General's failure to meet the obligations of his office. A consequence of this inadequate consultation was that it inhibited the provision of independent advice that would almost certainly have foreshadowed the significant problems that would likely arise.

4.23 In addition to the lack of consultation, the concerns raised by the Solicitor-General include an assessment that the Direction is 'wrong in law' and 'a radical change in how Solicitors-General have acted since 1964 under the Law Officers Act'.¹⁹ This is affirmed by the report of the Senate Standing Committee on Regulations and Ordinances, which highlights the fact that the Direction does make a substantive change in arrangements regarding the seeking of advice.²⁰

17 [1942] AC 206.

18 *Committee Hansard*, 14 October 2016, p. 51.

19 *Submission 3*, p. 16.

20 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* 6 of 2016, 14 September 2016, p. 24.

4.24 It is important that the committee has had the opportunity to scrutinise this appalling series of events that have culminated in the resignation of the Solicitor-General, citing an 'irretrievably broken' relationship.²¹ It is also important that the committee provide firm recommendations that will contribute to ensuring that the responsibilities of the role of the Attorney-General are undertaken with the requisite professionalism and judgement.

4.25 These events demonstrate that the current Attorney-General has failed to meet these requirements. He undertook no substantive consultation about the specific and significant nature of the change to the Solicitor-General's work prior to amending the Direction. Furthermore, the committee's view is that Attorney-General has misled the Parliament by stating in the Explanatory Statement that consultation with the Solicitor-General had in fact taken place.

4.26 The fact that the Attorney-General continues to assert that he has acted appropriately and has taken no steps to correct the record, or amend the Direction, in spite of the overwhelming contradictory view of experts regarding the impact of the Direction on the rule of law, provides further evidence that he should be discharged from his responsibilities.

4.27 The committee makes the following recommendations:

Recommendation 1

4.28 That the Senate disallow the amendment to the Direction or the Attorney-General withdraw it immediately, and that the Guidance Note be revised accordingly.

Recommendation 2

4.29 That the Attorney-General provide, within three sitting days, an explanation to the Senate responding to the matters raised in this report.

Recommendation 3

4.30 That the Senate censure the Attorney-General for misleading the parliament and failing to discharge his duties as Attorney-General appropriately.

Senator Louise Pratt
Chair

21 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 24 October 2016.