

Dissenting Report from Government Senators

1.1 Government members of the Senate Legal and Constitutional Affairs References Committee (the Committee) Inquiry into the *Nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (the Inquiry) note that Mr Justin Gleeson SC Solicitor General of the Commonwealth of Australia (Solicitor-General), tendered his resignation from the post on Monday October 24, 2016.

1.2 During the course of the Inquiry, Government members came to the conclusion that the position of the Solicitor-General had become untenable. The Solicitor-General's subsequent decision to resign was, in the view of Government members of the Committee, commendable and perhaps an unavoidable consequence of the public Inquiry.

1.3 Government members regret that this Inquiry, set up by the Labor Party to attack Senator the Hon George Brandis, Attorney-General of the Commonwealth of Australia (the Attorney-General), has in the end destroyed the career of the Solicitor-General who was himself appointed by the previous Labor administration.

1.4 Government members of the Committee are concerned that the majority on the Committee have used the Senate committee process, and thereby the taxpayers' indulgence, to pursue a partisan political agenda.

1.5 Government members of the Committee find it unfortunate that the Attorney-General was not in the first instance invited to provide evidence to the Inquiry, which failure highlights the partisan political nature of the Inquiry.

1.6 Government members were strongly opposed on the question of calling both the Solicitor-General and the Attorney-General to give evidence in a public forum. This opposition was based on their belief that the Inquiry would take an administrative matter and make it part of the political process, which would in turn diminish the standing of both positions. Government members warned the Committee about this perilous course of action and voted against calling the Solicitor-General and the Attorney-General.

1.7 When the majority of the Committee decided to proceed with calling the Solicitor-General and the Attorney-General, Government members sought to have the evidence of both taken *in camera*. Government members were again seeking to protect the institution of these offices but were again overruled by the Labor/Greens majority.

1.8 Government members note that it is within the discretion of government—and certainly in the interests of the Australian people—for a broad range of legal advice to

be sought on matters of constitutional importance. Exercising such discretion does not of itself in any way diminish the standing of the office of the Solicitor-General.

1.9 The independence of the Solicitor-General has not in any way been endangered by clarifying the operation of section 12 of the *Law Officers Act 1964* (Cth) (Law Officers Act) through the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction). The terms of section 12 of the Law Officers Act are not prescriptive regarding the form the advice and opinions furnished by the Solicitor-General should take.

1.10 At the Inquiry's public hearing on October 14 the Solicitor-General disclosed onto the public record information regarding 'recent and urgent advice' requested by the Australian Government Solicitor (AGS) on the composition of the Senate.¹ The Attorney-General specified in his evidence to the Inquiry later that day that he did not provide his consent for this disclosure to occur.²

1.11 Further, in his own written submission to the Inquiry, the Solicitor-General revealed details of opinions he had provided to government regarding a citizenship amendment,³ and marriage equality.⁴

1.12 During his appearance before the Committee, the Solicitor-General revealed that the Prime Minister had, in January, personally sought the Solicitor-General's advice on a confidential matter. The Solicitor-General was asked why he felt at liberty to disclose that fact. His response was:

The reason I was at liberty to tell you that...was this, Senator: the Prime Minister in the parliament-I believe it was on Wednesday of this week-said that he had sought advices from me. So, the fact that the Prime Minister has sought advices from me is a matter which has been revealed to this parliament by the Prime Minister.⁵

1.13 It transpired, however, that the Solicitor-General's written submission was published prior to any statement by the Prime Minister in parliament, and the Solicitor-General had already disclosed the following:

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.⁶

¹ *Committee Hansard*, 14 October 2016, p. 5.

² *Committee Hansard*, 14 October 2016, p. 36.

³ *Submission 3*, p. 19.

⁴ *Submission 3*, p. 20.

⁵ *Committee Hansard*, 14 October 2016, p. 7.

⁶ *Submission 3*, p. 4.

1.14 There is nothing to suggest that the Solicitor-General ever sought consent to make that revelation. And it was contained in a written submission that was provided to the Committee *before* the Prime Minister's statement to parliament, to which the Solicitor-General referred.

1.15 These disclosures seem to Government members of the Committee to be at odds with a lawyer's professional duty not to disclose any details of advices to, or conversations with, clients.

1.16 The Solicitor-General subsequently claimed that he made his submission to the Committee, not to the public, and that it was up to the Committee to determine whether his submission was published on the public record or not.⁷ As Second Law Officer of the commonwealth Government members of the Committee think that the Solicitor-General is likely to have been familiar with Senate Committee practice that, in the absence of a request for evidence to be accepted *in camera*, it is usual to publish inquiry submissions.

1.17 From any ordinary legal practitioner, whether a barrister or a solicitor, such behaviour might well constitute professional misconduct. However the Solicitor-General told the Committee: 'Under the Law Officers Act, I do not practise as a barrister'. Further, when asked whether he agreed with the assertion by the former Attorney-General, Mark Dreyfus QC, that the Solicitor-General is 'just a barrister', the Solicitor-General replied: 'No'.⁸

1.18 Under s 13 of the Law Officers Act, the Solicitor-General 'is entitled to all the rights and privileges of a barrister' in all the courts and tribunals of this nation. The post nominal letters 'SC' (Senior Counsel) appear after the Solicitor-General's name in reports of cases in which he appears on behalf of the Commonwealth. And yet it appears that the Solicitor-General did not regard himself as subject to the ordinary duties of a barrister.

1.19 The Solicitor-General released Government documents and information to this Committee without any apparent regard to the wishes of the Government. He revealed the subject-matter of legal advice that had recently been requested by the Attorney-General and he did so without the consent or authority of the Attorney-General.

1.20 According to his own letter to the Committee, the Solicitor-General engaged in 'voluntary co- operation with the Committee'. In other words, he was not compelled to give any evidence, nor was he compelled to produce any documents. Despite this, he appears to have produced documents, answered questions, and neglected to claim 'legal privilege' in respect of certain information without first consulting the Government.

⁷ *Committee Hansard*, 14 October 2016, p. 8.

⁸ *Committee Hansard*, 14 October 2016, p. 10.

1.21 The Government members of the Committee agree that the substance of the Inquiry turns on the construction of the term 'consultation' under section 17 of the *Legislation Act 2003* (Cth) (the Act)⁹ regarding the amendment of the Direction. As the Attorney-General pointed out, however, the issue of the Direction was 'entirely routine'¹⁰ as it 'did not change the law in any way'.¹¹

1.22 Government Senators are satisfied that the Attorney-General flagged with relevant colleagues – including the Solicitor-General and the Secretary of the Attorney-General's Department (the Department) – that the operation of the Direction was under review. Government Senators are equally satisfied that the Attorney-General conducted consultations in accordance with the provisions of the Act. It is clear to members of the Committee that the Department held the same view when it provided advice to the Attorney-General that:

Before this instrument was made, the Attorney-General considered the general obligation to consult imposed by section 17 of the *Legislative Instruments Act 2003*.¹²

1.23 Government Senators note with interest evidence provided to the Committee that the consultation conducted under the former Labor government by former Attorney-General Mr Mark Dreyfus in relation to the *Family Law (Superannuation – Provision of Information: Judges' Pension Scheme) Determination 2013*, consisted only of 'email and telephone exchange between two government departments'.¹³

1.24 On 12 November 2015, the Solicitor-General wrote to the Attorney-General. The letter requested a meeting with the Attorney-General. Its subject heading was: 'Process for seeking and acting on Solicitor-General advice in significant matters'. In his letter, the Solicitor-General said that 'insufficient procedures are in place to ensure ... appropriate coordination within Commonwealth agencies, and between agencies and my office, in matters of high legal importance'. The letter stated that the procedures then in place (in particular, the procedures set out in the pre-existing form of Guidance Note 11) were not 'being followed in a manner that best facilitates my performance of my statutory functions', those being 'the functions conferred on [the] office [of Solicitor-General] by s12 of the *Law Officers Act 1964* (Cth)'. Again, the Solicitor-General expressed the view that:

the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately.

⁹ *Legislation Act 2003* (Cth), s 17.

¹⁰ *Committee Hansard*, 14 October 2016, p. 38.

¹¹ *Committee Hansard*, 14 October 2016, p. 38.

¹² Legal Services Amendment (Solicitor-General Opinions) Direction 2016, Explanatory Statement.

¹³ *Committee Hansard*, 14 October 2016, p. 39.

1.25 The Direction concerns the process for briefing the Solicitor-General to provide opinions on questions of law. In other words, it deals with one of the very issues raised by the Solicitor-General in his 12 November letter.

1.26 On 30 November 2015, a meeting took place between the Attorney-General, the Solicitor-General, other Commonwealth officials, and members of the Attorney-General's staff. It is apparent from the evidence that a number of matters were discussed during that meeting, which appears to have lasted for around one hour. The meeting was held at the request of the Solicitor-General, in response to his letter of 12 November. The Attorney-General provided to the Committee redacted versions of contemporaneous notes taken by two members of his staff. The notes confirm that among the matters discussed at the meeting were the very matters raised by the Solicitor-General in his 12 November letter:

- a. the '[p]rocess for seeking... Solicitor-General advice in significant matters';
- b. 'procedures ... to ensure ... appropriate coordination within Commonwealth agencies, and between agencies and [the Solicitor-General's] office, in matters of high legal importance';
- c. how processes might be 'followed in a manner that best facilitates [the Solicitor-General's] performance of [his] statutory functions'; and
- d. 'the processes for coordination of [the Solicitor-General's] advice function with [his] responsibilities to appear, and for coordination of advice across government'.

1.27 Those are, of course, the very matters dealt with by the Direction. And the notes record the Attorney-General specifically referring to the *Legal Services Directions* as being 'at issue'. Indeed, that was the Solicitor-General's own evidence:

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.¹⁴

1.28 The notes also reveal that the Attorney-General invited the Solicitor-General to 'think of improvements to Guidance Note 11'. As the Attorney-General submitted, that necessarily raised the prospect of corresponding amendments to the Legal Services Directions, given that the instruments are complementary. Indeed, the Direction and Guidance Note are now, for relevant purposes, identical.

1.29 During his appearance before the Committee, the Solicitor-General characterised the 30 November meeting as follows:

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

The meeting that I came to on 30 November was very much a meeting to say: here are very important matters where the Solicitor-General either is not being brought into the process or is being brought into it in an unsatisfactory fashion, and how can we do better with that issue.¹⁵

1.30 It seems from his extensive evidence to the Committee that the Attorney-General would characterise the meeting somewhat differently. Even accepting the Solicitor-General's characterisation, however, it was plainly open to the Attorney-General to consult the Solicitor-General about the apparently unsatisfactory process that had been followed in relation to the 'very important matters' raised by the Solicitor-General, and then form his own view about how best to solve the problem. It simply cannot be maintained that the Attorney-General did not consult the Solicitor-General. On the Solicitor-General's own evidence, there was consultation at the meeting of 30 November.

1.31 In his evidence to the Committee, the Solicitor-General complained: 'No-one at the meeting said: 'The problem we are talking about here needs a new legal services direction'.¹⁶ Government Senators note that the Attorney-General's Explanatory Statement did not suggest that anything like this *had* been said at the meeting. The Act does not require a specific statement of that kind and the Solicitor-General did not point to anything that would create such a requirement.

1.32 The Attorney-General provided evidence to the Committee that at a meeting held on November 30, 2015 considered the 'substance not form' of the Direction.¹⁷ Government Senators note that this is in-keeping with the consultation provisions of section 17 of the Act.

1.33 The meeting of 30 November would alone have been sufficient to discharge the Attorney-General's consultation duty under the Act. It would also have been a more-than-sufficient basis for the Explanatory Statement to assert that such consultation had occurred.

1.34 The consultation conducted by the Attorney-General in this matter, in accordance with section 17 of the Act, may not have been to the Solicitor-General's liking however that in itself does not mean it was offensive to the Constitution or to the rule of law.

1.35 On 11 March 2016, some 14 weeks after the 30 November meeting, the Attorney-General was provided with a draft copy of the Solicitor-General's written suggestions as to how the processes for briefing him could be altered. Significantly, Mr Gleeson's proposals included the following:

¹⁵ *Committee Hansard*, 14 October 2016, p. 12.

¹⁶ *Committee Hansard*, 14 October 2016, p. 24.

¹⁷ *Committee Hansard*, 14 October 2016, p. 38.

Before accepting a brief to advise, the Solicitor-General will notify the Attorney-General of the request *to ensure that the Attorney is content to refer the question of law for the Solicitor-General's opinion under s 12(b) of the Law Officers Act*. The opinion will also be provided to the Attorney-General. [Emphasis added.]¹⁸

1.36 Plainly, this proposed procedure is very similar to the one ultimately prescribed by the Direction. As required by the *Law Officers Act*, and as is provided for in the Direction, the procedure proposed by the Solicitor-General envisaged the Attorney-General giving his consent prior to the Solicitor-General's provision of an opinion on a question of law.

1.37 It is apparent that in making the Direction, the Attorney-General took into account not only the concerns expressed in the Solicitor-General's 12 November letter, and those discussed at the 30 November meeting, but also the written suggestions that the Solicitor-General provided at the Attorney-General's invitation.

1.38 The Solicitor-General provided evidence to the Committee that he understood the conversation at the November 30 meeting to be about the previous *Legal Services Direction* as it existed prior to the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* coming into effect.¹⁹ Government Senators are of the view that any discussion of the Direction, or its preceding instrument, satisfies the provisions of section 17 of the Act if the purpose of such a meeting was to explore the operable benefits of the instrument.

1.39 The Attorney-General attempted to secure a further meeting with the Solicitor-General, and noted in his evidence that

Doubtless, that meeting would have involved further discussions about the process for referring questions of law to the second law officer.²⁰

The Attorney was informed, however, that the Solicitor-General was unavailable for a period of six weeks.

1.40 The Solicitor-General wrote to the Secretary of the Department on May 24, 2016 outlining a detailed complaint regarding the Direction. The Attorney-General said in evidence that he did not respond personally to this correspondence due to the caretaker provisions having been invoked following the prorogation of the parliament.²¹ The Attorney-General instead referred the correspondence to the

¹⁸ *Submission 5*, p. 5.

¹⁹ *Committee Hansard*, 14 October 2016, p. 25.

²⁰ *Committee Hansard*, 14 October 2016, p. 38.

²¹ *Committee Hansard*, 14 October 2016, p. 36.

Secretary of the Department out of 'an abundance of concern that everything be done properly'.²²

1.41 Government members note that the Solicitor-General provided in his evidence to the Committee that he had accepted a phone call from the Shadow Attorney-General Mr Mark Dreyfus during the caretaker period in June 2016. The Solicitor-General did not inform the Attorney-General (Senator Brandis), or the Secretary of the Department, that this call had occurred. By the Solicitor-General's own admission he and Mr Dreyfus discussed the Direction during this phone call.²³ Government members of the Committee consider this grave error of judgement to have been a clear breach of the Solicitor-General's duty to the Attorney-General.

1.42 The Attorney-General wrote to the Solicitor-General on August 16, 2016, inviting him to provide his views regarding the Direction. To date the Solicitor-General has not replied to this correspondence.²⁴ In light of this, the Solicitor-General's evidence to the Committee that "the Attorney-General has refused to engage with me on this topic" is clearly false and misleading.

1.43 The Attorney pointed out during his evidence that, had the Solicitor-General

*...sought to engage with me in response to my invitation, or even made a phone call to me, which he did not, this issue could have been sorted out in a matter of minutes and at no cost to the taxpayer.*²⁵ [Emphasis added]

1.44 Section 17 of the Act establishes a rule-maker's obligation to consult when making an instrument such as the Direction. Under that provision, the rule-maker is required to be satisfied, prior to the making of the instrument, that there has been undertaken any consultation that the rule-maker considers to be appropriate, and which is reasonably practicable to undertake. Under the statute, it is for the rule-maker to decide the appropriate degree and form of the consultation. Under section 17(2), the rule-maker is permitted to have regard to 'any relevant matter' in determining what consultation is appropriate. Subsection 17(3) explicitly provides that the statute does not in any way limit the form that consultation may take.

1.45 The Solicitor-General said in his evidence:

'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

²² *Committee Hansard*, 14 October 2016, p. 37.

²³ *Committee Hansard*, 14 October 2016, p. 15.

²⁴ *Committee Hansard*, 14 October 2016, p. 37.

²⁵ *Committee Hansard*, 14 October 2016, p. 39.

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.²⁶

1.46 It is clear that the statute leaves the form and extent of consultation entirely at the discretion of the rule-maker. In this case, the rule-maker was the Attorney-General who, unlike the Solicitor-General, is an elected representative and a Cabinet Minister.

1.47 Mr Gleeson is, of course, entitled to his idiosyncratic understanding of what is desirable when it comes to consultation. What he is not entitled to do is to elevate that idiosyncratic understanding to the status of a rule of conduct for the elected government.

1.48 Government members of the Committee are mindful of the Attorney-General's evidence to the effect that it is also important to observe what that Explanatory Statement did *not* say. It did *not* say that the Attorney-General had consulted the Solicitor-General in some specific fashion. It did *not* say, for instance, that he had consulted the Solicitor-General about whether he thought a Direction in some precise form should be issued. It did *not* say that the Attorney-General had consulted the Solicitor-General by providing him with an exposure draft of the instrument. It did *not* say that the Attorney-General had secured the agreement of the Solicitor-General to the form of the Direction. What the Explanatory Statement actually said was:

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.²⁷

1.49 The Attorney-General's Department was of the same view. The Ministerial Submission recommending that the Attorney-General approve the Direction and Guidance Note included the Explanatory Statement, drafted by the Department. The submission confirmed that the preconditions for the issuing of the Direction and Guidance Note—including the requirements of section 17 of the Act—had been satisfied. Specifically, the advice stated:

Section 17 of the *Legislative Instruments Act 2003 [sic]* provides that before a rule-maker makes a legislative instrument the rule-maker must be satisfied that any consultation that is considered to be appropriate and is reasonably practicable to undertake, has been undertaken. Due to the nature of the power exercised by you under s 55ZF of the *Judiciary Act 1903* and the subject matter of the instrument, *we consider that your consultation with the Solicitor-General would meet this obligation.* [Emphasis added]²⁸

²⁶ *Committee Hansard*, 14 October 2016, p. 24.

²⁷ Legal Services Amendment (Solicitor-General Opinions) Directions 2016, Explanatory Statement.

²⁸ *Submission 5*, p. 6.

The Attorney-General was entirely correct to accept the advice of his Department.

1.50 The Attorney-General issued the Direction on 4 May 2016 under section 55ZF of the *Judiciary Act 1903* (Cth). The Direction now constitutes paragraph 10B of the *Legal Services Directions 2005* (Cth). Like the rest of that instrument, the Direction is legally binding, but enforceable only by the Attorney-General.

1.51 On the same day that the Direction was issued, the Attorney also released a new version of what is known as Guidance Note 11 (the Guidance Note), which also concerns the briefing of the Solicitor-General. Paragraphs 16-24 of the Guidance Note are relevantly in identical terms to the Direction. The Guidance Note is one of a series of such Notes maintained by the Office of Legal Services Coordination (within the Attorney-General's Department). Those Notes give effect to the *Legal Services Directions* or, in the words of the Office of Legal Services Coordination, they 'help agencies to comply with their obligations under the directions'.²⁹

1.52 Along with the Direction, the Attorney-General authorised an Explanatory Statement to be issued. That Statement contained the following sentence:

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.³⁰

1.53 Senator Reynolds provided the Solicitor-General with an opportunity to clarify his evidence to the Inquiry by submitting to the Solicitor-General a series of Questions on Notice. Those questions were respectful, and they were carefully formulated. They drew upon the Solicitor-General's own evidence, including his revelation that he had a previously undisclosed conversation with the Shadow Attorney-General, and asked him to expand upon it. The Questions on Notice are appended to this Report.

1.54 The Solicitor-General refused to respond to the Questions on Notice. He did so by way of letter dated 24 October 2016. Government Senators were surprised by the Solicitor-General's attitude to the Committee. In his letter the Solicitor-General informed the Committee that he 'did not accept' that there was any deficiency in his evidence, and noted he had 'already provided extensive assistance to the Committee'. The Chair of the Committee subsequently excused the Solicitor-General from answering any of Senator Reynold's Questions on notice in a letter to the Solicitor-General dated October 25, 2016.

²⁹ Attorney-Generals Department, *Legal Services Directions and Guidance Notes*, <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx> (Accessed 8 November 2016).

³⁰ Legal Services Amendment (Solicitor-General Opinions) Directions 2016, Explanatory Statement.

1.55 Government members are concerned that the Chair and the Labor/Greens majority of the Committee decided to excuse the Solicitor-General from answering any of the Questions on Notice that were put by Senator Reynolds.

1.56 Government Senators view the Questions on Notice process as a necessary and tested function of commonwealth transparency and accountability. Allowing a statutory body or officer to be excused from answering Questions On Notice places in jeopardy the ability of all parliamentary committees to forensically pursue matters under inquiry.

1.57 Such practice would allow the majority members of a committee to selectively exclude evidence from any Inquiry, including Senate Estimates, by excusing certain parties from answering Questions on Notice. This runs counter to community expectations regarding parliament's role of ensuring transparency and accountability in all activities of Government and statutory office holders.

1.58 The terms of reference of the Inquiry are as follows:

- the extent to which any consultation drew on the knowledge or expertise of persons having expertise in the relevant fields;
- whether persons likely to be affected by the proposed instrument had adequate opportunity to comment on its content;
- the form of the consultation, including whether any written submissions were sought;
- the timing of when any consultation occurred; and
- any related matter.

1.59 In regards to these terms of reference, Government members of the Committee find that:

- the consultation that occurred did in fact draw on the knowledge and expertise of persons having expertise in the relevant field, to the extent that such consultation was required within the provisions of section 17 of the Act;
- persons likely to be affected by the proposed instrument were given adequate opportunity to comment on its content to the extent that they were required to be provided with such opportunity within the provisions of section 17 of the Act;

- the form that the relevant consultations took was in accordance with usual parliamentary practice and clearly within the provisions of section 17 of the Act;
- the consultation process occurred over a reasonable period of time that allowed for the consultations prescribed under section 17 the Act to take place; and
- all related matters have been satisfactorily addressed.

1.60 All of the evidence presented to the Committee throughout this Inquiry points to the conclusion that the parliament was not at any time misled regarding the consultation process that occurred during the compilation of the Direction.

1.61 The majority report ignores four fundamental propositions:

- a. The Attorney-General clearly consulted the Solicitor-General;
- b. The Attorney-General did not mislead the parliament;
- c. The Attorney-General was independently advised by his Department that he had satisfied the consultation obligations of section 17 of the Act; and
- d. There is no evidence that the Direction has affected, or is affecting, the operation of the office of the Solicitor-General.

1.62 Government Senators observe that the majority report pays no attention to the Solicitor-General's fractious attitude and incomplete evidence. In doing so the majority has abandoned any pretence of balance. Once again Labor and the Greens have wasted the resources of the Senate—resources provided by the taxpayer— on a baseless and partisan Inquiry intended only to score political points.

Senator the Hon Ian Macdonald
Deputy Chair

Senator Linda Reynolds