

The Senate

Legal and Constitutional Affairs
References Committee

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

November 2016

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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.

Chapter 1

Introduction and background

Referral

1.1 On 15 September 2016 the Senate referred the following matter to the Senate Legal and Constitutional Affairs References Committee (the committee) for inquiry and report by 8 November 2016:

the nature and scope of the consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016, with particular reference to:

- (a) the extent to which any consultation drew on the knowledge or expertise of persons having expertise in the relevant fields;
- (b) whether persons likely to be affected by the proposed instrument had adequate opportunity to comment on its content;
- (c) what was the form of the consultation, including whether any written submissions were sought;
- (d) the timing of when any consultation occurred; and
- (e) any related matter.¹

Conduct of inquiry

1.2 In accordance with usual practice, the committee advertised the inquiry on its webpage, and also wrote to a number of organisations and individuals inviting written submissions by 3 October 2016. The committee received 7 submissions, listed at Appendix 1.

1.3 The committee held a public hearing in Canberra on 5 October 2016, and an additional hearing in Canberra on 14 October 2016. A list of the witnesses who appeared at the public hearing is provided at Appendix 2, and additional information received by the committee at Appendix 3.

Structure of this report

1.4 There are four chapters in this report.

1.5 Chapter 1 describes the context and background to the inquiry.

1.6 Chapter 2 discusses the views of the Attorney-General in relation to the consultations described in the terms of reference, and the relevant views of legal experts.

1.7 Chapter 3 discusses the Solicitor-General's views on the consultations undertaken by the Attorney-General that are described in the terms of reference.

1.8 Chapter 4 outlines the committee's views and recommendations.

¹ *Journals of the Senate* No. 7, 15 September 2016, pp. 214-215.

Relevant legislation

1.9 Section 12 of the *Law Officers Act 1964* (Cth) (the Law Officers Act) provides that:

The functions of the Solicitor General are:

- (a) to act as counsel for:
 - (i) the Crown in right of the Commonwealth;
 - (ii) the Commonwealth;
 - (iii) a person suing or being sued on behalf of the Commonwealth;
 - (iv) a Minister;
 - (v) an officer of the Commonwealth;
 - (vi) a person holding office under an Act or a law of a Territory;
 - (vii) a body established by an Act or a law of a Territory; or
 - (viii) any other person or body for whom the Attorney General requests him or her to act;
- (b) to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General; and
- (c) to carry out such other functions ordinarily performed by counsel as the Attorney General requests.

1.10 Section 55ZF of the *Judiciary Act 1903* (Cth) provides that the Attorney-General may issue directions to apply to Commonwealth legal work, either generally or in relation to a particular matter. The Legal Services Directions 2005 are binding rules that provide obligations with respect to how Commonwealth agencies should conduct themselves during litigation. Guidance Notes are issued to assist Commonwealth agencies comply with their obligations.²

1.11 Section 17 of the *Legislation Act 2003* (Cth) provides that rule-makers should consult before making legislative instruments:

- (1) Before a legislative instrument is made, the rule-maker must be satisfied that there has been undertaken any consultation that is:
 - (a) considered by the rule-maker to be appropriate; and
 - (b) reasonably practicable to undertake.
- (2) In determining whether any consultation that was undertaken is appropriate, the rule-maker may have regard to any relevant matter, including the extent to which the consultation:

2 Attorney-General's Department, *Legal Services Directions and Guidance Notes*, <https://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx> (accessed 1 November 2016).

- (a) drew on the knowledge of persons having expertise in fields relevant to the proposed instrument; and
- (b) ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content.

(3) Without limiting, by implication, the form that consultation referred to in subsection (1) might take, such consultation could involve notification, either directly or by advertisement, of bodies that, or of organisations representative of persons who, are likely to be affected by the proposed instrument. Such notification could invite submissions to be made by a specified date or might invite participation in public hearings to be held concerning the proposed instrument.

Background

1.12 On 4 May 2016 the Attorney-General tabled the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction) in the Senate.³ The Explanatory Statement to the Direction stated that the purpose of the Direction was to 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 and to regularise the process by which referrals to the Solicitor-General for opinions are made.⁴

1.13 The key provision of the Direction, at clause 10B.3 of Schedule 1, states that:

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.

1.14 The Direction further specifies that if such a person or body wishes to refer a question of law to the Solicitor-General, they must seek the Attorney-General's written (signed) consent to do so, with the request copied to the Attorney-General's Department (Department). Should the Solicitor-General receive a reference for advice without the signed consent of the Attorney-General, the Solicitor-General must seek the Attorney-General's consent to (or rejection of) it before proceeding. As noted above, the Direction applies to all persons and bodies referred to in paragraph 12(a) of the Act; while the Legal Services Directions otherwise only apply to 'non-corporate Commonwealth entities'. The Explanatory Statement stated that this was 'not expected to have any practical impact' on the operation of the Direction.⁵

1.15 In the Explanatory Statement, the Attorney-General advised the Senate that before the instrument was made, he 'considered the general obligation to consult'

3 *Journals of the Senate* No. 153, 4 May 2016, p. 4246.

4 Legal Services Amendment (Solicitor-General Opinions) Direction 2016, Explanatory Statement (ES), p. 1.

5 ES, p. 3.

imposed under section 17 of the *Legislation Act 2003* (Cth)⁶ and, '[a]s the Direction relates to the process for referring a question of law to the Solicitor-General, the Attorney-General has consulted the Solicitor-General'.⁷

1.16 The Attorney-General also answered numerous questions in the Senate about this matter between 12 September 2016 and 12 October 2016. These responses included:

[Senator Collins] ...The Solicitor-General has said, 'I wasn't consulted about the direction'. Is the Solicitor-General correct?

[Attorney-General] ...I consulted the Solicitor-General about the matter at meeting in my office on 30 November 2015. I invited the Solicitor-General to put his ideas in writing, which he did, and I considered those as well. When I made the direction, I was advised by my department that the requirements of section 17 of the *Legislation Act* had been satisfied.

[Senator Collins] ...I refer to the Attorney-General's answer in question time on 12 September in which he claimed that the Solicitor-General was consulted on the direction 'during the course of a meeting in my office on 30 November 2015'. Does the Attorney-General stand by this statement?

[Attorney-General] Obviously I do, Senator, and I have just repeated it. That is my position.⁸

Public discussion

1.17 Both the content of the Direction and the background to its tabling became the subject of media attention in June 2016. On 16 June 2016 the Australian Financial Review (AFR) reported that the Solicitor-General had challenged the Attorney-General's claim that the Solicitor-General had been consulted in relation to the Direction. The AFR report stated that the Solicitor-General had written to the Attorney-General on 11 May 2016 'noting that he did not accept that he had been consulted as Senator Brandis had asserted'.⁹

1.18 Citing 'an extensive record of correspondence, meeting minutes and reports about the behind-the-scenes meetings about the [Direction]', the AFR reported that in November 2015 the Attorney-General met with the Solicitor-General, the Secretary of the Attorney-General's Department and the Australian Government Solicitor, at which time the Solicitor-General raised concerns about the management of requests for advice that were submitted to him. Pursuant to an agreement at the meeting, suggested amendments to the guidance notes for such advice were provided to the

6 It is noted that the Act is incorrectly named in the Explanatory Statement as the *Legislative Instruments Act 2003*.

7 ES, pp. 1–2.

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

9 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-gpkvyy> (accessed 1 November 2016).

Attorney-General in late March. No response was received from the Attorney-General before 4 May, when the Direction was tabled and the Solicitor-General advised accordingly. The AFR article also stated that 'a range of officials...were instructed not to consult the Solicitor-General or his office or to notify him [in advance] of the change'.¹⁰

1.19 In response to an enquiry from the AFR, the Attorney-General's office stated that there was 'uncertainty in government about the procedure for briefing the Solicitor General', and that the new arrangement sought to clarify the relevant procedures. The office said that following the November 2015 meeting and subsequent correspondence with the Solicitor-General and other senior officials, the Attorney-General 'considered the suggestions carefully and incorporated some, but not all of them, in the final documents'. The Attorney-General described the Direction as 'inspired by a request by the Solicitor-General himself, to regularise the practice and make it consistent with the statutory requirement that is section 12(b) of the [Law Officers Act]'.¹¹

Disallowance motion in the Senate

1.20 On 13 September 2016, Senator the Hon Penny Wong, Leader of the Opposition in the Senate, gave notice of a motion to disallow the Direction, to be moved on the next sitting day.¹² In accordance with the *Legislation Act 2003* (Cth), unless the motion is resolved or withdrawn by 28 November 2016, the Direction will be disallowed on that date.

Consideration by the Senate Regulations and Ordinances Committee

1.21 On 14 September 2016, the Senate Standing Committee on Regulations and Ordinances (Regulations and Ordinances Committee) advised the Senate of its concern that the Direction contained matters more appropriate for parliamentary enactment (i.e. primary legislation) than a legislative instrument. Noting that subsections 12(a)(i) to (vii) of the Law Officers Act allocated functions to the Solicitor-General that did not involve the Attorney-General, the Regulations and Ordinances Committee stated that:

...in effect, this direction appears to narrow the scope of the Solicitor-General's functions prescribed under subsections 12(a)(i)-(a)(vii)...because, for example, ministers or officers of the Commonwealth can no longer seek the advice of the Solicitor-General on questions of law without the consent of the Attorney-General, unless the question of law arises in the course of a matter in which the Solicitor-General is acting as counsel.

10 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-gpkvyy> (accessed 1 November 2016).

11 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-gpkvyy> (accessed 1 November 2016).

12 *Journals of the Senate* No. 5, 13 September 2016, p. 166.

Given this, the [Regulations and Ordinances] committee considers that the changes effected by the direction may be regarded as more appropriate for parliamentary enactment.¹³

Resignation

1.22 On 24 October 2016 the Solicitor-General announced that he was resigning from his position, effective from 7 November 2016. In a letter informing the Attorney-General of his resignation, the Solicitor-General stated that

...the best interests of the Commonwealth can be served only when its first and second Law Officers enjoy each other's complete trust and confidence within a mutually respectful relationship. When such a relationship is irretrievably broken, as is the case here, and each Law Officer holds a term of office established by the Constitution or statute which will not expire in the near future, there must be some resolution to the impasse...My decision does not amount to a withdrawal of any position I have taken in relation to matters of controversy between us, including before the Senate Legal and Constitutional Affairs References Committee.¹⁴

1.23 In response, the Attorney-General thanked the Solicitor-General for his service:

I agree with the view, expressed in your letter, that in the circumstances this is the proper course for you to take. I take this opportunity to thank you for your service as the Solicitor-General of the Commonwealth and wish you well in your future career.¹⁵

A note on terminology

1.24 In the remainder of this report, a reference to the Solicitor-General is to Mr Justin Gleeson SC, Solicitor-General of the Commonwealth of Australia from 14 February 2013 to 7 November 2016, unless otherwise specified.

13 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor* 6 of 2016, 14 September 2016, pp. 24-25.

14 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.

15 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.

Chapter 2

Views of the Attorney-General

Prior to the Direction

2.1 This chapter describes the perspective of the Attorney-General on the consultation process he conducted with the Solicitor-General prior to issuing the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction).

2.2 On 12 November 2015, the Attorney-General received correspondence from the Solicitor-General requesting a meeting to discuss issues associated with the processes for seeking his advice. The Attorney-General quoted the Solicitor-General as writing: 'the processes for coordination of my advice function with my responsibilities to appear, and for coordination of advice across government, are not working adequately'.¹

2.3 In order to discuss the issues raised in the letter further, a meeting was held on 30 November 2016 at the Attorney-General's office in Canberra. The Attorney-General states in his submission:

I met with the Solicitor-General to consult him on, amongst other things, the following issues, which he had raised in his letter of 12 November:

- 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'.²

In other words the Solicitor-General was consulted, at the meeting, about the very issue dealt with by the Direction and Guidance Note. That was the main purpose of the meeting (although other unrelated matters were also discussed).³

2.4 The Attorney-General invited the Solicitor-General to provide written suggestions for dealing with the issues that he raised, and on 11 March 2016, the Attorney-General's Department (the Department) provided the Attorney-General's Office with a draft copy of written suggestions from the Solicitor-General relating to

1 Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia (Attorney-General), *Submission 5*, p. 3.

2 *Submission 5*, p. 3.

3 *Submission 5*, p. 4.

the briefing process. On 21 March 2016, the department circulated a finalised copy of the Solicitor-General's suggestions which all related to a redrafting of Guidance Note 11.

2.5 In his submission, the Attorney-General notes that he had thanked the Solicitor-General for his suggestions at a meeting dealing with other matters on 23 March 2016. The Attorney-General indicated to the Solicitor-General at that meeting that the suggestions would be considered.⁴

2.6 An extract of the Solicitor-General's written suggestions was included in the Attorney-General's submission as follows:

[18] 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.⁵

2.7 According to the Attorney-General, he '...took that recommendation [that the Solicitor-General advise the Attorney-General of a request and with a copy of the opinion] into account when formulating the Direction'.⁶ Further:

...[a]s 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.⁷

2.8 The Attorney-General sought a meeting with the Solicitor-General in early April 2016, but was advised that the Solicitor-General was overseas and unavailable until 19 May 2016.⁸ In late April 2016, the Attorney-General decided that a new Direction, in addition to the Guidance Note, was necessary to address the issues that had been raised by the Solicitor-General.⁹ The Secretary of the Department confirmed that:

On 20 April 2016, the Attorney-General advised the department that he wished to make changes to Guidance Note 11 and also that he intended to issue a Direction mirroring the contents of the Guidance Note.¹⁰

2.9 The Office of Parliamentary Counsel (OPC) clarified that although they were involved in drafting the Direction, but not the Explanatory Statement, they were 'not responsible for undertaking consultation in relation to legislative instruments. That is

4 Submission 5, p. 5.

5 Submission 5, p. 5. Emphasis added.

6 Submission 5, p. 5.

7 Submission 5, p. 5.

8 Submission 5, p. 5.

9 Submission 5, p. 5.

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

done by the rule-maker or by the relevant instructors on behalf of the rule-maker'.¹¹ Consultation between the Department and OPC on the content of the Direction occurred on 27 and 28 April 2016, and a final version was provided to the Department on 29 April 2016.¹²

2.10 The Attorney-General states that he took into account the Solicitor-General's proposals when the new Direction and Guidance Note were prepared prior to the dissolution of the 44th Parliament, following liaison between the Attorney-General's Office and Department.¹³

2.11 In his submission, the Attorney-General is emphatic that the Solicitor-General was consulted on the '[p]rocess for seeking...Solicitor-General advice in significant matters', both verbally at the meeting on 30 November 2016, and through the subsequent written suggestions the Solicitor-General made, and that input provided during these consultations was taken into account in developing the new Direction and Guidance Note.¹⁴

2.12 The Attorney-General insists:

...this consultation was appropriate and sufficient for the purpose of s 17 of the Legislation Act. Given that the Direction (like the Guidance Note) makes no change to the law contained in the Law Officers Act, and given that it is entirely procedural in nature, I did not consider that further consultation was necessary or appropriate.¹⁵

2.13 To support his position, the Attorney-General provided evidence that this interpretation is supported by advice obtained from the Department:

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*.¹⁶

After the Direction

2.14 On 4 May 2016, the new Direction and Guidance Note were issued. The statement included in the Explanatory Statement also reflects this advice. It states that: 'As the Direction relates to the process for referring a question of law to the Solicitor-

11 *Committee Hansard*, 5 October 2016, p.11.

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

13 *Submission 5*, p. 5.

14 *Submission 5*, p. 6.

15 *Submission 5*, p. 6.

16 *Submission 5*, p. 6. Emphasis added.

General, the Attorney-General has consulted the Solicitor-General'.¹⁷ On the day the Direction was issued, the Attorney-General informed the Solicitor-General via a letter thanking him for his suggestions regarding the Guidance Note.¹⁸

2.15 In his submission, the Attorney-General notes that '[s]oon after the Direction and Guidance Note were issued, I became aware that the Solicitor-General was dissatisfied with aspects of those instruments'.¹⁹ Further, the Attorney-General invited the Solicitor-General to discuss any concerns with him, but has stated that he did not receive a response.²⁰

2.16 In evidence to the committee at a public hearing, the Attorney-General described a breakdown in the relationship between himself and the Solicitor-General since 4 May 2016:

The Solicitor-General also said, on this matter...the Attorney-General has refused to engage with me on this topic...That is not the case. After the election occurred, as you know, several days passed before the outcome of the election was known, and several more days passed before the new government was sworn in. I wrote to the Solicitor-General on 16 August, some two months ago, well before this Senate committee was convened, and invited him to put before me his views. I have heard nothing from the Solicitor-General by way of reply to my letter of 16 August, and I find that curious.²¹

2.17 In his submission, the Attorney-General states that 'it cannot sensibly be suggested that the Solicitor-General was not consulted',²² and 'it should go without saying that while the Legislation Act provides for consultation prior to the making of a legislative instrument, it does not require suggestions made in the course of that consultation to be accepted by the rule-maker'.²³ The Attorney-General's assertion that he consulted the Solicitor-General is founded on the requirements is set out in the *Legislation Act 2003* (Cth). The Attorney-General states that:

...the Legislation Act does not stipulate the form or extent of consultation that should take place prior to the making of a legislative instrument such as the Direction. It does not, for instance, require that an instrument be provided in draft form to any particular stakeholder prior to its being made. Of course, there may be instances where it would be appropriate to do so.

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

18 *Submission 5*, p. 6.

19 *Submission 5*, p. 7.

20 *Submission 5*, p. 7.

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

22 *Submission 5*, p. 6.

23 *Submission 5*, p. 7.

Given the entirely procedural and routine nature of the Direction, however, I did not consider that this was required here.²⁴

2.18 At a public hearing the Attorney-General elaborated on the comments made in his submission both in terms of his interpretation of what it means to consult, and on the legislative requirements he was required to comply with. On the meaning of the word 'consult' he stated that:

To be clear, this consultation, both at the meeting and in the Solicitor-General's subsequent written feedback, occurred prior to my deciding what should be done about the process for referring questions of law to the Solicitor-General. That is how consultation generally works. The person doing the consulting seeks the views of those being consulted and then makes decisions based upon what emerges from that process of consultation. When I use the word 'consult' what I mean is to confer about, deliberate upon, debate, discuss or consider a matter. When one consults someone, one asks their advice, seeks their counsel, has recourse to that person for instruction, guidance or professional advice.²⁵

2.19 Regarding the legislative requirements, the Attorney-General stated that:

Some of the submissions to this inquiry, as well as some statements by members of parliament, appear to proceed on the premise that section 17 of the Legislation Act requires something much more than it actually does. It does not require a person who is consulted to be specifically aware of any precise intention or lack of intention that a rule maker may have. Under section 17, it is enough—indeed, it is more than enough—that a rule maker be satisfied that there has been appropriate consultation about the subject matter of a legislative instrument.²⁶

2.20 The Attorney-General was presented with an alternative interpretation posited by the Solicitor-General (discussed in the following chapter of this report). In response to questioning at the public hearing about the contradictory views of the Solicitor-General, the Attorney-General replied:

Mr Gleeson, who is a very good lawyer, plainly does consider the directions to be unlawful...Having been a lawyer all of my adult life, I am extremely familiar with the view that lawyers have different views about contestable legal issues...²⁷

2.21 At the public hearing, the Attorney-General's view on the consultation was challenged by members of the committee. In response to the direct question: 'Did you consult the Solicitor-General prior to issuing the new legal services direction on 4 May 2016?', the Attorney-General replied:

24 *Submission 5*, p. 7.

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

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

27 *Committee Hansard*, 14 October 2016, pp. 47 and 51.

Yes, I did—on 30 November in my office, and by inviting him to put forward his ideas, which he did in a letter which I received in March. He put his ideas forward in the form of amendments to the guidance note, but the words of the guidance note and the words of the legal services direction are actually identical...I regarded the conversation on 30 November in my office about the issue of the way in which the Solicitor-General was to be briefed, and during the course of which there was a specific reference to the legal services directions as being at issue, as constituting the relevant consultation.²⁸

2.22 The Attorney-General was also asked if the Explanatory Statement made in the Senate on 4 May 2016 was true. The Attorney-General replied:

I believe it to be true. I have been advised by my Department that they believe it to be accurate. The Solicitor-General considers it to be inaccurate, because his understanding of the word 'consult' in section 17 of the Legislation Act is different from my understanding of the word 'consult' and the dictionary's understanding of the word 'consult'.²⁹

2.23 A further issue discussed at the hearing related to meeting notes taken by the Attorney-General's staff during the meeting on 30 November 2016, and whether those notes indicate that the Direction was discussed with the Solicitor-General. The Attorney-General responded:

...on the very first page of the notes this is what they say:

4 x docs at issue

1. Law Officers Act

2. LSD

Which I think is acknowledged as a reference to the legal services directions.

3. Guidance note 11.

4. NPS – 2A

So the issue of the legal services direction, for the purpose of this discussion, was explicitly raised.³⁰

2.24 The Attorney-General attributed conflicting accounts of whether the Direction was discussed at the 30 November 2016 meeting to the fact that the Solicitor-General's notes were a record of meeting outcomes, and the while the Direction was discussed, there was no relevant outcome related to it that warranted inclusion:

CHAIR: Why did the Attorney-General's Department, in responding to Mr Gleeson on that basis, not include in the notes for that meeting explicit reference to a legal services direction, and only a guidance note?

28 *Committee Hansard*, 14 October 2016, pp. 49 and 50.

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

30 *Committee Hansard*, 14 October 2016, p. 59.

Senator Brandis: There are a couple of things. First of all, obviously, you would have to ask them. Secondly, it was a very abbreviated note. Third, it is mis-described as notes of the meeting. It was not. It is described as—the heading of the document is 'Meeting Outcomes', which to me suggests decision points or action points. What I have told you several times now is that no decision was made at that meeting to issue a legal services direction, because we were talking about the substance of the issue, not the form of a legal instrument, if any, which would be promulgated to reflect that of which we had been speaking. Lastly, may I say that there are only two sets of contemporaneous notes of the meeting, and those [are] the ones I have produced.³¹

2.25 The Attorney-General maintained his position throughout the hearing that he consulted the Solicitor-General on the Direction, but conceded that the discussion he had with the Solicitor-General regarding the Direction on 30 November 2016 'focused on the substance, not the form of the rules':

Senator WATT: But you never consulted him, did you?

Senator Brandis: As you know, I did. It was an issue he brought to me.

Senator WATT: He did not bring the issue of the direction to you.

Senator Brandis: It was a problem that Mr Gleeson brought to me and wanted me to fix, and we had a discussion about how to do it. The discussion was focused on the substance, not the form of the rules, and ultimately—and, I thought, uncontroversially—I issued the two instruments, guidance note No. 11 and a legal services direction, which were in identical words.³²

31 *Committee Hansard*, 14 October 2016, p. 59.

32 *Committee Hansard*, 14 October 2016, p. 67.

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 was 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.

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-gpkvyy> (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.

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

Appendix A to Dissenting Report from Government Senators Questions on Notice to the Solicitor-General

- 1. You said in evidence: “I assist in the performance and execution of the executive power of the Commonwealth under chapter II of the Constitution.” In relation to that statement:**
 - a. Are you in any respect empowered to exercise the Commonwealth’s executive power independently of instructions from the Ministry?
 - b. If the answer to the above question is “yes”, please specify how you may exercise the executive power of the Commonwealth independently of ministerial instruction.
- 2. Were you compelled to give evidence or produce any documents to the Committee?**
- 3. Did the Committee or its Secretariat ask you or any member of your staff whether you consented to the publication of your submission on the internet?**
- 4. If the answer to the above question is “yes”, what was the answer given to the Committee or its Secretariat, as the case may be?**
- 5. You said in evidence: “to the extent the Solicitor-General appears in court, ... the Solicitor-General will take instructions from the government of the day but will also owe an ultimate duty to the Commonwealth of Australia and its people.” In relation to that statement:**
 - a. Other than in circumstances where the Commonwealth purported to instruct you to mislead a Court or otherwise to depart from your duties to the Court, are there other circumstances in which you would depart from the Commonwealth’s instructions as to the submissions to be put on its behalf? If so, what are those circumstances?
 - b. What is the precise content and source of your duty to the Commonwealth of Australia?
 - c. What is the precise content and source of your duty to the people of Australia?

6. **You said in evidence as to the role of the Solicitor-General: “it is a full-time commitment to practice as the premier professional lawyer in the nation”. Are you subject to any of the professional duties that apply to lawyers in Australia (or in any jurisdiction within Australia)? If so, what are those professional duties, and what is their source?**
7. **You said in evidence: “However, the Attorney-General is responsible directly to the parliament and the people as a minister of the Crown; the Solicitor-General is not.” Does that fact have any consequences so far as concerns the identity of the person who has the power to claim or to waive legal privilege on behalf of the Commonwealth? If so, what are those consequences? If not, why not?**
8. **At one point in your evidence you described the Attorney-General’s Direction as “a radical change in practice”. Later, you described it as “at least a material change”. Which is it?**
9. **You said in evidence, about the Direction: “It is a radical change in practice whereby a Solicitor-General can do nothing – he cannot even speak to a lawyer – until he has received a brief with a signed consent.” Please identify the precise words in the Direction that prohibit you from “even speak[ing] to a lawyer”.**
10. **In your evidence you stated that the Attorney-General had referred a question of law to you relating to “the composition of this Senate”. In relation to that evidence:**
 - a. Are you able to provide further details about the matter?
 - b. Is it within your power to decide to claim, or to decide not to claim, public interest immunity in respect of information concerning matters upon which the Commonwealth Government seeks legal advice?
 - c. If the answer to the above question is “yes”, please identify the source of that power.
 - d. If the answer to the question is “no”, who *does* have the power to claim public interest immunity on behalf of the Commonwealth? Did you have instructions from that person or those persons in relation to the matter you mentioned concerning the composition of the Senate?

11. Elsewhere in your evidence, you refused to answer questions because to do so would “breach legal privilege”. In relation to that statement:

- a. Precisely what form of “legal privilege” were you referring to?
- b. Is the form of “legal privilege” to which you were referring one that inures to the benefit of the Commonwealth, or to the benefit of the Solicitor-General, or to the benefit of some other party? If the latter, please identify the relevant party.
- c. Is the “legal privilege” to which you referred one that it is your power to claim, or to waive, independently of the instructions of the Commonwealth Government?
- d. If the answer to the above question is “yes”, please identify the precise source of that power.
- e. If the answer is “no”, who *does* have the power to claim the privilege? Did you have instructions from that person or those persons in relation to the matters in respect of which you refused to answer questions on the ground of “legal privilege”? Did you seek the views of that person or of those persons in relation to any matter in respect of which you did not claim “legal privilege” in your evidence or submission to the Committee?

12. You said in evidence: “Under the Law Officers Act, I do not practise as a barrister.” In relation to that statement:

- a. In your capacity as Solicitor-General, are you subject to any standards of professional conduct that apply to practising lawyers? If so, what are those standards, and why are you bound to observe them?
- b. Under s 13 of the Law Officers Act, you have the rights and privileges of a barrister. Do you have any of the duties of a barrister? If so, which ones, and why?
- c. Do you consider yourself to owe any duty of confidentiality to the Commonwealth Government? If so, what is the ambit of that duty, and what is its source?
- d. Is the post-nominal, “SC”, that of a barrister?

- e. If the answer is “yes”, why do you use that post-nominal (and why do the Commonwealth Law Reports place it after your name), even though, as Solicitor-General, you do not practise as a barrister?

13. You said in evidence: “The reason I was at liberty to tell you that it 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.” In relation to that statement:

- a. Please identify the precise statement of the Prime Minister to which you were referring, and the date on which it was made.
- b. Had the statement been made before you provided your written submission to the Committee? Assuming that you or your staff consented to the internet publication of your submission, had the statement of the Prime Minister been made prior to that consent being given?
- c. Why did you consider yourself at liberty, in your written submission, to make the following statement (and, possibly, to consent to its publication): “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”?

14. You said in evidence about the advice you provided to the Prime Minister: “the subject matter of that advice remains confidential to the Prime Minister of Australia. It is his choice whether to waive or not waive the subject matter of that advice, and I sit consistently with his interests in the matter.” In relation to that statement:

- a. Is the Attorney-General ever in an analogous position to the Prime Minister, in which it is his choice whether to waive or not waive the subject matter of your advice? If so, what are the circumstances in which the Attorney-General would be in such an analogous position? If not, why not?

- b. Was it the choice of the Attorney-General to “waive or not waive the subject matter of [the] advice” to which you referred at another point of your evidence, concerning the composition of the Senate? If so, what was his decision on the question of waiver? If not, why not?

15. You said in evidence: “First of all, I provided a submission not to the world; I provided it to a committee – a committee of the parliament. That committee decided whether to release it.” In relation to that statement:

- a. Did the Committee or its Secretariat ask you or any member of your staff whether you consented to the publication of your submission on the internet?
- b. If the answer to the above question is “yes”, what was the answer given to the Committee or its Secretariat, as the case may be?
- c. If you or a member of your staff consented to the publication of your submission, did you consult any member of the Commonwealth Government before that consent was provided? If so, which member of the Government? If not, why not?

16. You said in evidence: “My client was the Commonwealth of Australia, it was the rule of law and it was the Constitution.” In relation to that statement:

- a. What, precisely, are the duties that you owe to the Commonwealth of Australia, and what is the source of each of those duties?
- b. Please define “rule of law”, and please specify in what way the rule of law is or was your client.
- c. Please explain how the Constitution is or was your client, and please identify which of its provisions imposed upon you a duty to tell any member of parliament “what I considered the truth to be” in relation to a statement “made to that parliament that I consider conscientiously to be inaccurate”.

17. You said in evidence: “If I was asked by any member of the 44th Parliament, which was dissolved on 6 May, the day that a statement was made to that parliament that I consider conscientiously to be inaccurate as to what the true facts were, it was my duty to tell that member of

parliament, which would have included you and any person here, what I considered the truth to be.” In relation to that statement:

- a. What, precisely, was the source of that duty?
- b. What other duties do you owe to members of parliament?

18. You said in evidence: “The conversation [with Mr Dreyfus] was on the telephone in early to mid-June. The conversation I think took about two minutes or so and what we discussed were the two matters I told you.” In relation to that statement:

- a. Where were you when you took the phone call?
- b. Was anybody else in your presence when you took the phone call? If so, who?
- c. Other than the Committee, who else have you (or any member of your staff) told about the phone call?
- d. Did you or any member of your staff have any other contact or communication with any member of parliament (other than the Attorney-General or another member of the Government) or with any person on the staff of such a member of parliament, from the time at which you were notified that the Direction had been made, until the time at which you appeared before the Committee? If so, please provide full details of that contact or communication.
- e. Is it your practice to make file notes of important conversations?
- f. Did you make a file note of the phone conversation with Mr Dreyfus? If so, please provide it to the Committee.
- g. If you did not make a file note, why did you not do so?

19. You said in evidence: “Secondly, [Mr Dreyfus] asked me: did I support the direction? I said, no, I did not.”

- a. Did you have a duty to provide that second response? If so, please identify the precise source of that duty. If not, why did you provide it?
- b. Have you ever told another parliamentarian (including any member of the Government) whether you support a measure taken by the

Government or by any member of it? Please provide full details of any such instances.

- c. What is the precise scope and source of any duty upon you to provide information to parliamentarians as to whether or not you support a measure taken by the Government or by any member of it?

20. You said in evidence: “By this stage, early June, I had written two letters to the Attorney-General. The first you have seen; the second letter was a longer letter.” What were the dates of those two letters addressed to the Attorney-General?

21. You said in evidence: “my primary authority to do what I did comes from the Law Officers Act as a second law officer.” Precisely which provision(s) of that Act provided the authority to do what you did? Please specify how that provision or those provisions provided the relevant authority.

22. You said in evidence: “The people I am responsible to include, firstly, the Crown in right of the Commonwealth – that is the Governor-General. Secondly, it includes the Commonwealth. It includes, in relevant senses, the parliament.” What are those “relevant senses”, and what is the precise provision of the Law Officers Act under which you are responsible to the parliament?

23. You said in evidence: “During that caretaker period – I think you will find it is paragraph 2.4 of the caretaker rules – there was a major policy decision which was required to be made by the Attorney-General.” In relation to that statement:

- a. Irrespective of whether you were in all respects bound by the Caretaker Conventions, was your behaviour at all times consistent with those Conventions? If the answer is “no”, in what respects was it inconsistent?
- b. Did you at any point ask the Attorney-General whether he had informed the Shadow Attorney-General of the “major policy decision” that had to be made? If so, please provide details of the circumstances in which you asked that question.
- c. Are you bound by the Caretaker Conventions? If not, please specify the respects in which you are not bound.

24. You said in evidence: “I have a duty to the Commonwealth of Australia under my statute.” Please specify the precise content and the precise provision(s) that is or are the source of that duty.

25. To your knowledge or belief, have you or any member of your staff (whether current or former) ever communicated with a person in any of the following categories about the subject matter, content, or fact of legal advice you were to provide, had provided, or might provide to the Government? The categories are:

- a. Journalists, publishers or commentators;
- b. Members of the legal profession who work outside government; and
- c. Members of parliament or their staff (other than members of the Government and their staff).

26. You said in evidence: “He asked me, secondly, did I support the direction. And I gave him my opinion: I did not support the direction.” At another point you said: “I was asked by Mr Dreyfus two factual questions. ... Number two: he asked me if I supported the direction and I said I did not support the direction.” In relation to those statements:

- a. Was the second question asked by Mr Dreyfus one of fact or opinion?
- b. In your answer to Mr Dreyfus’s second question, did you provide an opinion or did you provide a fact?

27. You said in evidence: “My primary duty is to the Law Officers Act, which is a binding statute. It binds me.” Please identify the precise provisions of the Law Officers Act that bound you to do the following:

- a. To provide answers to the two questions asked by Mr Dreyfus; and
- b. To refrain from informing the Attorney-General of the telephone conversation with Mr Dreyfus.

28. You said in evidence: “What happened during June of this year, as one got closer to the election date of 2 July, was that it became apparent that there was a possibility that there would be a hung parliament or some other situation where the Governor-General, consistent with practice, would be seeking the advice of the Solicitor-General.” In relation to that statement:

- a. When did it become apparent to you that there was a possibility of a hung parliament or some other situation of the kind to which you referred? Was this apparent to you when you took Mr Dreyfus's phone call?
- b. Please identify all of the instances of a Governor-General seeking advice from the Solicitor-General that you regard as constituting "practice". In which of these instances has the Governor-General sought the advice of the Solicitor-General without the approval of the Attorney-General or the Government?

29. You said in evidence: "If I had simply said, 'Mr Dreyfus, I cannot say a word to you,' I think I would have compromised the independence of my office and I would have compromised the ability to advise the Governor-General." In what way(s) would the independence of your office have been compromised, and in what way(s) would you have compromised the ability to advise the Governor-General?

30. You said in evidence: "To the extent that the Prime Minister or the Governor-General may wish to come to me tomorrow for an advice, if the direction were read literally I would not be able to comply with that." In relation to that statement:

- a. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the Direction is to be "read literally"?
- b. If the answer is "yes", please provide details of the Attorney-General's response.

31. You said in evidence: "So the problem is that the drafting of the carve-out renders the direction inconsistent with section 12(a)." In relation to that statement:

- a. Are there any other arguable interpretations of the carve-out, or is your construction of it the only possible such construction?
- b. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the carve-out is to be construed as you construe it? If so, please provide details of the Attorney-General's response.

- c. Have you ever asked the Attorney-General whether it was his intention that the carve-out be construed in the manner you construe it? If so, please provide details of the Attorney-General's response.

32. You said in evidence: "The effect of that is that to get within the carve-out I have to already be lawfully acting as counsel under 12(a)". In relation to that statement:

- a. Are there any other arguable interpretations of the carve-out, or is your construction of it the only one possible?
- b. Have you ever asked the Attorney-General, who made the Direction and who would enforce it, whether the carve-out is to be construed as you construe it? If so, please provide details of the Attorney-General's response.
- c. Have you ever asked the Attorney-General whether it was his intention that the carve-out be construed in the manner you construe it? If so, please provide details of the Attorney-General's response.

33. In answer to a question from Senator McKim, asking whether you were aware of any other instances where constitutional advice was sought by the Attorney from any source other than you, you replied: "Senator, I cannot answer that question without breaching privilege, I am afraid." In relation to that response:

- a. What "privilege" were you referring to?
- b. Why were you unable to answer the question without breaching that privilege?

34. You said in evidence: "If I had not answered that question honestly, whoever asked it, in my conscience I would have been lending myself to an inaccurate statement to the parliament, and that is something I am not prepared to do as a matter of my duty." In relation to that statement:

- a. What "duty" were you referring to?
- b. To whom is that "duty" owed?
- c. What is the precise content of that "duty"?
- d. What is the precise source of that "duty"?

Appendix 1

Public submissions

- 1 Office of Parliamentary Counsel
- 2 Associate Professor Gabrielle Appleby
- 3 Solicitor-General
- 4 Attorney-General's Department
- 5 Attorney-General
- 6 Associate Professor Andrew Edgar
- 7 Dr Gavan Griffith QC

Appendix 2

Public hearings and witnesses

Wednesday, 5 October 2016 —Canberra

ANDERSON, Mr Iain, Deputy Secretary, Civil Justice and Corporate Group, Attorney-General's Department

APPLEBY, Dr Gabrielle Jody, Associate Professor, Gilbert + Tobin Centre of Public Law, Faculty of Law, University of New South Wales

BENNETT, Dr David Michael John, AC, QC, Private capacity

GRIFFITH, Dr Gavan, Private capacity

LAMBIE, Mr James, Principle Adviser, Office of the Attorney-General

QUIGGIN, Mr Peter, First Parliamentary Counsel, Office of Parliamentary Counsel

Friday, 14 October 2016 —Canberra

BRANDIS, Senator the Hon. George, QC, Attorney-General, Commonwealth of Australia

GLEESON, Mr Justin Thomas, SC, Solicitor-General of the Commonwealth of Australia

Appendix 3

Tabled documents, answers to questions on notice and additional information

Additional information

- 1 Office of Parliamentary Counsel response to questions on notice
- 2 Attorney-General's claim for public interest immunity - OPC documents
- 3 Written questions on notice to the Solicitor-General
- 4 Solicitor-General response to written questions on notice
- 5 Response to Solicitor-General from Committee Chair
- 6 Mr Chris Moraitis, Secretary, Attorney-General's Department - Answers to questions on Notice (received 7 November 2016)
- 7 Attorney-General's Department - Answers to questions on Notice (received 7 November 2016)

Tabled Documents

- 1 Document tabled by Attorney-General, Senator Brandis, at public hearing on 14 October 2016 - opening statement
- 2 Document tabled by Attorney-General, Senator Brandis, at public hearing on 14 October 2016 - Section 12 of the Law Officers Act 1964 (Cth)
- 3 Document tabled by Attorney-General, Senator Brandis, at public hearing on 14 October 2016

Appendix 4

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

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.

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

