

# 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