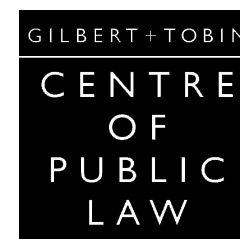

DR GABRIELLE APPLEBY
CO-DIRECTOR
THE JUDICIARY PROJECT

3 October 2016

Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary

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

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs References Committee on this matter. I am writing this submission in my capacity as a member of the Gilbert + Tobin Centre of Public Law at the Faculty of Law, University of New South Wales. I am solely responsible for the views and content in this submission.

In writing this submission, I have drawn substantially on my previous research on and analysis of the role of the Solicitor-General. In case they are of further assistance to the Committee in its deliberations on these matters, could I draw the Committee's attention to the following:

> Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016)
>
> Gabrielle Appleby, 'A Fragile Relationship' *Inside Story* (10 June 2016), available at http://insidestory.org.au/a-fragile-relationship

Gabrielle Appleby, 'The Political Imperative for a Legal War' *Inside Story* (13 July 2016), available at http://insidestory.org.au/the-political-imperative-for-a-legal-war

Gabrielle Appleby 'Reform of the Attorney-General: Comparing Britain and Australia' [2016] *Public Law* 573

This submission is structured as follows. **Part I** provides background on the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 ('the Direction'). **Part II** sets out what is known from the public domain about the consultations that preceded the making of the Direction. **Part III** then discusses the significance of the Direction and process that preceded it with respect to the roles of and relationship between the Solicitor- and Attorney-General, and their obligations to the rule of law.

Part I – The Legal Services Amendment (Solicitor-General Opinions) Direction 2016

In this part, I briefly explain the nature and functions of the Solicitor-General, the previous practice that existing regarding the briefing of the Solicitor-General, the nature of Legal Services Directions, before explaining the amendments to the briefing procedure that were made by the Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction).

(a) Nature and functions of the Solicitor-General

To attempt to understand the Direction and the concerns that have arisen over the process that preceded it, it is first necessary to understand, at least in a general way, the nature and functions of the Solicitor-General's office. The Solicitor-General is a statutory office that is created under the *Law Officers Act 1964* (Cth). Although a vast number of lawyers are involved in providing day-to-day legal advice within government, the Solicitor-General sits at the apex of this system. Unless he or she is overruled by the courts or, in very rare circumstances, the Attorney-General, it is the Solicitor-General who provides the final word on significant legal questions for government. It is in recognition of this important role that the Solicitor-General is given a level of statutory independence in the *Law Officers Act*.[1]

Section 12 of the *Law Officers Act* bestows three functions on the Solicitor-General. Section 12(a) states that the Solicitor-General is 'to act as counsel' for a number of enumerated Commonwealth entities and for 'any other person or body for whom the Attorney-General requests him or her to act'. Section 12(b) states that the Solicitor-General is 'to furnish his or her opinion to the Attorney-General on questions of law referred to him or her by the Attorney-General'. Finally, s 12(c) states the Solicitor-General may 'carry out such other functions ordinarily performed by counsel as the Attorney-General requests.'

Sub-sections 12(a) and (b) draw an explicit distinction between the Solicitor-General's functions of acting as 'counsel' and 'furnishing opinions … on questions of law'. The Solicitor-General may act as counsel for any of the listed entities, but may only furnish opinions on questions of law to the Attorney-General. Further, the statutory distinction in sub-s 12(a) and (b) implies that in acting as counsel in s 12(a), the Solicitor-General is

[1] See statutory guarantees of tenure in s 10 of the *Law Officers Act*.

representing the entity in a contentious matter, whereas s 12(b) is providing advice on questions of law in non-contentious matters only.

Each sub-section of s 12 emphasises the relationship between the Solicitor-General and the Attorney-General in different ways. The Attorney-General is the Minister responsible for the Solicitor-General. When Attorney-General (and Prime Minister) Billy Hughes introduced the bill that created the first statutory federal Solicitor-General position in 1916, he emphasised that there would remain a line of accountability between the Attorney-General and the Solicitor-General:

> The minister [the Attorney-General] will declare the policy of the government in every case, and the Solicitor-General will give effect to it. Thus ministerial discretion will remain, and ministerial responsibility will not be lessened. The government will be as much responsible for every act done by the Solicitor-General as if it had been done by the Attorney-General …

However, this accountability is accompanied by a degree of statutory independence. In 1964 the Commonwealth Solicitor-General was transformed from a public service position with large administrative as well as legal functions to one that had almost exclusively legal functions. Introducing the Law Officers Bill in 1964, Attorney-General Billy Snedden emphasised the importance of appointing a senior barrister to ensure that the Solicitor-General continued to exercise professional independence, which would be reinforced by the guarantees of tenure granted in the statute. William Gummow, then a justice of the High Court, has described the 1964 statute as giving 'independence (and thus added value) [to] the office.' There is a tension that exists between the necessary accountability between the Solicitor-General and the Attorney-General, and the desirability of the Solicitor-General's independence, particularly in the exercise of his or her advisory function.

(b) Views and practice of Solicitor-General before the Direction

Prior to the making of the Direction, the practice of the current Solicitor-General, Mr Justin Gleeson SC, in relation to the furnishing of opinions on questions of law under s 12(b), was governed by a protocol that was captured in the *Guidance Note 11: Briefing the Solicitor-General* (issued by the Office of Legal Services Coordination). Whenever a request for advice in non-contentious matters came to the Solicitor-General, he wrote to the Attorney-General, informing him of the request and thus giving the Attorney-General an opportunity to intervene in the giving of that advice. A copy of any advice that was given was also provided to the Attorney. More specifically, *Guidance Note 11* provided:

> 13. In addition to cases where the Solicitor-General will appear as counsel, there will also be circumstances in which the Solicitor-General will advise on a question of law and furnish his opinion to the Attorney-General. Requests for such advice should be reserved for the most significant questions of law, falling within the category outlined above. Acceptance of such requests to advise will be confirmed by the Attorney-

> General, following consideration by the Solicitor-General. The opinion will also be provided to the Attorney-General.[2]

(c) Legal Services Directions

Legal Services Directions are issued under s 55ZF of the *Judiciary Act 1903* (Cth). Directions may be issued, relevantly, that are to apply generally to 'Commonwealth legal work'. 'Commonwealth legal work' is defined to mean, relevantly, 'any legal work performed by a person' for a list of Commonwealth entities. Section 55ZF thus appears to provide statutory authority for the Attorney-General to issue a Direction in relation to legal work to be performed by the Solicitor-General on behalf of a Commonwealth entity, although there is an argument that the Solicitor-General is not a 'person' so as to fall within this power.

(d) The Direction

On 4 May 2016, the Attorney-General issued a direction under s 55ZF of the *Judiciary Act 1903* (Cth) that inserted a new clause 10A into the Legal Services Directions 2005 (Cth). The Legal Services Amendment (Solicitor-General Opinions) Direction 2016 (the Direction) had the effect that all persons or bodies seeking an opinion of the Solicitor-General on a question of law must first obtain the written, signed consent of the Attorney-General. All briefs to the Solicitor-General must include a copy of the signed consent of the Attorney-General. The Direction states that it is only to apply to opinions furnished under s 12(b) of the *Law Officers Act*, not to matters that are part of the function performed under s 12(a) of that Act. That is, the Direction purports to apply only to requests for the Solicitor-General's opinions on questions of law in non-contentious matters.

The Direction thus creates a more formalised and rigid framework for Commonwealth entities seeking the Solicitor-General's legal opinion in non-contentious matters. It replaces the protocol adopted by the Solicitor-General that had ensured the Attorney-General was aware of, and could potentially intervene to prevent, requests for the Solicitor-General's opinion.

The purpose of the Direction was stated in the Explanatory Memorandum:

> The new provisions 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 1964* (Cth) and regularise the process by which referrals to the Solicitor-General for opinions are made.

The Explanatory Memorandum does not provide a justification as to why the formalised and rigid process requiring the proactive consent of the Attorney-General was adopted in preference to the Solicitor-General's previous practice, contained in the Guidance Note.

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[2] See further Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 166. See also Guidance Note 11: Briefing the Solicitor-General (Catherine Fitch, 18 February 2014) [13].

Part II – The Nature of the Consultations Prior to the Making of the Direction

The Explanatory Memorandum to the Direction that was issued by the Attorney-General referred to his obligation to consult under s 17 of the *Legislation Act 2003* (Cth). This provision requires the Attorney-General to be satisfied that there was appropriate consultation prior to making the Direction. In determining what consultation was appropriate, the Attorney-General was to consider the extent the consultation 'ensured that persons likely to be affected by the proposed instrument had an adequate opportunity to comment on its proposed content'.

In the Explanatory Memorandum, the Attorney-General stated:

> 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. (emphasis added)

However, documents now released by the Solicitor-General pursuant to a freedom of information request reveal that the Solicitor-General was not consulted about the proposed Direction. Rather, the Solicitor-General had been in discussions with the Attorney-General, the Secretary of the Attorney-General's Department, the Australian Government Solicitor (AGS) and the Office of Legal Services Coordination about amendments to Guidance Note 11. These discussions are detailed below.

On 30 November 2015, the Solicitor-General met with the Attorney-General and others including the Secretary of the Attorney-General's Department and Ian Govey, (Chief Executive Officer, Australian Government Solicitor (AGS)), at which meeting it was decided (by 'general consensus'):

> a. where the Solicitor-General's advice is sought, this should occur in a timely fashion; and
>
> b. where amendments have been made to draft legislation on which the Solicitor-General has advised, the Solicitor-General should be offered the opportunity to advise on the amendments if possible.[3]

Based on this consensus, the meeting minutes circulated by the counsel assisting the Solicitor-General record that the Solicitor-General, the Secretary and Ian Govey would suggest amendments to Guidance Note 11 for the Attorney-General's consideration.

Following that meeting, on 8 December 2015, counsel assisting the Solicitor-General circulated a number of proposed amendments to the Guidance Note to the Secretary and the AGS.[4] A number of pieces of correspondence followed between the AGS, and the Attorney-General's Department (predominantly from the Office of Legal Services Coordination), and counsel assisting the Solicitor-General in relation to the proposed amendments. This correspondence could be described as a process of consultation and comment between

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[3] See email dated 8 December 2015, FOI doc 1.

[4] See email dated 8 December 2015, FOI doc 5 and subsequent email correspondence; see also email correspondence in FOI doc 7.

individuals in these offices, resulting in the some revisions to the proposed amendments to Guidance Note 11.[5]

On 23 March 2016, a meeting was held between the Attorney-General, the Solicitor-General and others, for which the agenda included the proposed amendments as agreed between the Attorney-General's Department, the AGS and the Solicitor-General.[6] The proposed amended Guidance Note has not been released. Following the meeting of the 23 March, the following action item was noted:

> Attorney-General to consider proposed changes to Guidance note 11 and come back with this views in the week commencing 4 April.[7]

The Solicitor-General's office followed this up on two occasions in April. On 29 April, an email was sent from the Attorney-General's Department to counsel-assisting the Solicitor-General with the single line:

> I understand the AG is writing directly to the SG about this.[8]

On 4 May, the Attorney-General wrote to the Solicitor-General. The letter stated:

> Thank you for your suggested amendments to 'Guidance Note 11', concerning the process to be followed in briefing the Solicitor-General.
>
> Please find enclosed a final copy of the revised Guidance Note, which has been prepared having regard, *inter alia*, to your suggestions.
>
> I have also issued an amendment to the *Legal Services Directions 2005*. The amendment will insert a new paragraph 10B, and will take the form of the enclosed document.
>
> Both the revised Guidance Note and the amended Legal Services Direction take effect immediately.[9]

This letter implies that the Solicitor-General was, at the date the Direction was issued and took effect, unaware that the Attorney-General was considering the issuing of a Direction, rather than making an amendment to the Guidance Note. While the FOI documents reveal that the Solicitor-General had been consulted, and indeed had proposed amendments in consultation with the AGS and AGD, on possible changes to the Guidance Note, the first time he was aware of a possible amendment to the Directions was apparently on 4 May, the date it came into effect.

This version of events is supported by the reporting of Laura Tingle in the *Australian Financial Review* in June (although I cannot confirm these details through publicly available sources).[10] Tingle reported that when the Direction was drafted, officials in the Office of

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5 See, eg, email correspondence in FOI docs 7, 8, 10.

6 See agenda for this meeting and attachments, contained in email dated 21 March 2016, FOI doc 2.

7 Email dated 24 March, in FOI doc 21.

8 Email dated 29 April in FOI doc 21.

9 Letter 4 May 2016, FOI doc 3.

10 Laura Tingle, George Brandis in Bitter Legal Fight Goes to Rule of Law' Australian Financial Review, 16 June 2016, available at http://www.afr.com/news/politics/george-brandis-in-bitter-legal-fight-goes-to-rule-of-law-20160616-gpkvyv

Legal Services Coordination and the Office of Parliamentary counsel were instructed not to notify the Solicitor-General of the changes or to consult with the Solicitor-General regarding them. The story also alleges that the AGS was not consulted regarding the changes. Further, it alleges there is a letter dated 11 May 2016 in which the Solicitor-General wrote to the Attorney-General explicitly disputing that he was consulted in relation to the Direction.

Part III – Analysis and conclusions

If it is functioning well, Australia's combination of a non-political, statutorily accountable yet independent Solicitor-General and a highly politicised Attorney-General can bring independent, impartial legal advice and legal representation for government via the Solicitor-General, while maintaining the framework of accountability and the other benefits of a politically engaged Attorney-General. However, to function well, the model relies heavily on the integrity and restraint of individual officeholders.

There must be an appropriate understanding around reporting and accountability between the two Attorney- and Solicitor-General. The Attorney-General must be adequately briefed of the work of the Solicitor-General, but such accountability must not inappropriately impinge on the work of the Solicitor-General. Each relationship between Attorney-General and Solicitor-General will be different. As current Commonwealth Solicitor-General, Justin Gleeson SC explained, 'Each Solicitor-General and Attorney-General must come to their own practical accommodation as to how much consultation and briefing is necessary to ensure that the Attorney is sufficiently informed to report to parliament.'

While accepting the need and importance of accountability, this must be balanced against the need to respect the independence of the Solicitor-General and the importance of the office's rule of law function of providing final legal advice on the most important and sensitive legal issues across government. One of the most fundamental preconditions for this to occur is for individuals and entities within the Commonwealth to have early and unhindered access to the Solicitor-General. That is, when Australian ministers and government officials need the Solicitor-General's advice, conditions of access and timing should not be manipulated by anyone – including the Attorney-General. In itself, the Direction does not necessarily herald an attempt to manipulate access to the Solicitor-General. But it does place greater control in the hands of the current Attorney-General, and his successors.

Given the previous practice, as captured in [13] of the *Guidance Note*, justification for the stricter, more rigid requirements of the Directions in requiring *written consent* has not been adequately provided to date. I am concerned that the new requirements in the Direction may act as deterrence or to Commonwealth entities who wish to, and should, seek the advice of the Solicitor-General, or that the Attorney-General may, in the future, use the new process to inappropriately deny access to the Solicitor-General.

First, the formality and procedure mandated by the Direction might operate to *dissuade* access to the Solicitor-General. Commonwealth entities requiring urgent high-level advice may decide not to seek it from the Solicitor-General because of the new, more demanding briefing process. The arrangements that now govern access to the Solicitor-General in

Australia mean that no one in government, even the Prime Minister, can ask the office for legal advice without the Attorney-General's written, signed consent. Former Tasmanian Solicitor-General Leigh Sealy SC identified the dangers of over-formalisation in his 2011–12 report to the Tasmanian parliament:

> There is some anecdotal evidence to suggest that some people may regard compliance with the guidelines as being onerous and, for that reason, decide not to obtain advice when they might otherwise do so. That is plainly undesirable. On the other hand ill-considered and incomplete requests for advice can be both frustrating and unnecessarily time-consuming for those who are required to deal with them. As with so many things, it will be necessary to try to find a suitable point of balance.[11]

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. Given this background, the Direction appears to be an assertion of control by the Attorney-General over the Solicitor-General for no immediately perceptible reason. If it is intended that the Attorney-General will use his greater powers to restrict access to the Solicitor-General's office, this raises serious rule-of-law concerns. While the Direction does not in and of itself indicate that the Attorney-General intends to freeze the Solicitor-General out of important government legal work, it provides a ready means should the Attorney seek to do so.

Finally, the ability of the Attorney-General to sideline the Solicitor-General through the new process in the Direction also raises the possibility that an individual may endorse a certain course of action to remain within the government's trusted circle. That is, to avoid the prospect of being frozen out, to ensure the Solicitor-General receives high-level government work, a Solicitor-General might act in a manner that ingratiates himself or herself to the Attorney. Even if no such course of action is adopted, the Direction may create the perception that this is the case. Either position is plainly undesirable from a rule of law perspective.

The manner by which the Direction was issued is also indicative of a breakdown in the relationship between the Solicitor-General and the Attorney-General. The failure to consult the Solicitor-General regarding the proposed issue of a Direction, and the allegation that the matter was intentionally kept from the Solicitor-General, is extremely concerning.

To fulfil its potential for the fostering the rule of law in government, the Solicitor-General relies on the respect and understanding of the office by others in government. This respect and understanding ought to be exemplified and encouraged by the Attorney-General. Indeed, during my research, which involved interviews with almost fifty current and former Solicitors- and Attorneys-General and others who worked closely with them, I was often told that the role of the Solicitor-General is largely dependent on three things: the individual who

[11] Solicitor-General, Parliament of Tasmania, *Solicitor-General Report for 2011-2012* (2012).

holds the office, the attitude of the Attorney-General towards that individual and the office, and the wider political circumstances.

The process that preceded the issue of the Direction and the issue of the Direction itself demonstrates that there is loss of openness and trust between the two Law Officers. This gives rise to serious concerns that the Solicitor-General's capacity to fulfil his function may be in danger of being undermined, a situation with potentially serious repercussions for the rule of law.

Yours sincerely

Associate Professor Gabrielle Appleby