Gavan Griffith

10 October 2016

Submission to Senate Legal and Constitutional Affairs Reference Committee concerning Legal Services Amendment (Solicitor-General Opinions) Direction 2016.

I use the abbreviations GG, PM, AG, AGS, and SG. 'Department" means "Attorney'-General's Department".

This submission is filed in substitution of my submission dated 5 October 2016 written in some haste.

1. I held office as Solicitor-General for the 14 years from 1984 to 1997 as Second Law Officer to AG's Evans, Bowen, Duffy Kerr and Lavarch under the Hawke and Keating Governments and for 3 years to end 1997 to AG Williams under the Howard Government**.**

2 I have read the filed submissions made to the Committee to this date., and, in particular, that of the SG dated 3 October. I entirely agree with and support the content and views authoritatively expressed in paras 5 to 11 and the conclusionary paras 50 to 54 of that submission. I do not address the contested factual issues as to consultation processes.

Submission 1

The Direction is predicated upon a mistaken construction of the Judiciary Act, section 52ZF. It is ultra vires and of no effect as a lawful direction directed to the SG.

5. Judiciary Act 1903, section 55Z does not any authorise any directions to issue concerning the SG, either limited to section 12(b) as expressed in para 10B.1 of the Direction, section 12(b) [which is expressly excluded by the terms od the Direction] or at all.

6. As the SG correctly asserts, this is because the SG is not within the definition and reach of section 52Z. 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 preemptive 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.

7. Hence, on this aspect of power, I go further than the conditional doubt expressed by the SG's submission, para 53. In my opinion, it is untenable

to assert that the reach of the impugned Direction to the SG is authorised under section 52ZF, who is clearly not an "officer" for the purposes of this provision, both as a matter of strict construction and also, as the SG expresses it, because "the legislative history and context indicate that it was not intended to empower the AG" to make such directions directed to the SG. See also the factors noted in the SG's Submission, para 8.

8. If this be correct, the Direction is void and of no legal effect.

Submission 2

The advisings power other than that arising by direct request of the AG under section 12(b) is conferred by section 12(a). Hence, even if it were the Direction not void, as being both beyond power (and as it contended also issued without mandated consultations with the parties affected) in my opinion the Direction -

(a) in no way affects the everyday briefing and exercise of the advising and opinion work of the SG which arises under under section 12 (a); and

(b) is wholly ineffective to control the retainer of the SG to furnish opinions on questions other than in the limited circumstances arising by direct request under section 12(b); and

9. This is the SG's proposition in his Submission para 52, with which I entirely concur.

10. In my view, the construction pressed to the contrary by Professor Appleby, does not reach even the threshold of open for argument. The chapeau to section 12 (a) defining the the SG's functions *"to act as counsel"* embraces both curial "matters and briefing for advices and opinions". Hence, entirely disagree with Professor Appleby's construction advanced in her evidence to the Committee, Hansard p.2 of 5 October 2016 that "the more persuasive view is that the inclusion of section 12(b) meant that the function of section 12 (a) is narrowed. This is to misunderstand that all the briefs for opinions from the originators listed in sub paras (i) to (viii) of section 12(a) arise explicitly under section 12(a) as much as briefs in curial matters.

11. Section 12(b) is a quite separate provision enabling the AG, in practice exceptionally, to refer questions of law to the SG for his opinion. To my experience this is a but rarely exercised power: over 14 years I can recollect only 2 occasions of having the SG of the day referring a matter of law for my opinion under section 12(a). One concerned the meaning of judicial conduct, where my opinion was (as most rarely occurs) tabled in the Parliament.). All other matters for my opinion were briefed without involvement, or so far as I was aware, without reference to, the AG. Section 12(b) in no way attached to this ordinary briefing process under section 12(a).

11. On this aspect, both of construction and practice since the establishment of the Statutory Office in 1964, the SG's submissions are authoritative in their description of the reach and operation of section 12 (a). It suffices to establish this position beyond contrary argument with the extract from Sir Anthony Mason's more recent writings, reflecting his experience ranging back to 1964, cited by the SG's Submission, para 10. My own experience is entirely confirmatory that the primary briefing for opinions are sourced as arising under section 12(a) and only in exceptional circumstances arising as referred directly for opinion under section 12(b).

12. As to process, my briefings for advice and opinions in non- curial matters arose by delivery of briefs for opinion arising under section 12(a) on the request of one or other of 8 categories of entities listed in section 12(a). Where such entities including Ministers, approached my office directly for advice, I responded as would counsel in private practice, and requested the approach be made through briefing by the senior legal officers of the Department, mostly the Australian Government Solicitor himself or, after its separate establishment, by the entity of Australian Government Solicitor. In each such case I reserved the decision whether to accept or refuse the retainer to advise.

16. As noted by the SG in his submission, para 11, other exceptions to briefing under section 12 were direct approaches by the GG or the PM. Requests for advice by the GG are of a special category. I was involved as junior counsel in private practice with the events of 1975 and it was, and remains my view that the GG was entitled directly to seek my legal advice, without the intervention of the AG, alternative to the controversial practice of leaving the GG in the exercise of his or her constitutional functions hawking matters for advice to members of the judiciary or counsel in private practice. IN this regard, my practice was contrary to that referred to by Professor Appleby in her evidence, Hansard p.9, that protocols were in place with my successors for the GG to transmit his requests through the AG. I know nothing of that, and I would have rejected in principle any restriction upon the GG's capacity directly to request my advice. I gather from his evidence that the current SG if of the same view. My practice was to inform the SG I had been requested to advise the GG on a matter, but not transmit the subject matter or content of that advice to the AG.

15 Similarly, on the rare occasions I was requested by the PM for an opinion, I took the view that the PM was entitled to seek my advice on any matter. Of its nature, the AG would be involved in the issue in any event.

16 In neither case of requests for advice form the GG or the PM would I accept that the AG was empowered under the terms of the Law Officers Act, or otherwise to control or fetter either office holder's access to me. For the reasons stated, I reject any capacity arising under the Judiciary Act, section 52ZF, for the Attorney to make such direction.

16 It followed that without exception, matters coming to me for advice and opinion other than very exceptionally direct requests to advise the SG personally made under section 12(b), were transmitted under section 12(a). Without exception, none of such briefings for advice were sought to be filtered or controlled through the AG or his political office.

18 I note that submissions to the Committee refer to the procedures being in place for the SG to keep the AG informed as to current matters under advice by him under section 12(a): cf my experience where successive AG's over 14 years were not concerned to be within these processes. Such lines of communication a matter for agreed arrangements between the continuing Law Officers, but, for the reasons stated are not a matter for statuary direction under section 12 or any other part of the Law Officers Act, or, for the above reasons stated, under the subsequently enacted parts of the Judiciary Act, section 55ZF, that in no way embrace the possibility of directions issuing concerning the office of the SG,

19 And of course, the Direction 10B.9 explicitly states it does not apply "*in relation to questions of law that arise in the course of a matter in which the Solicitor-General is acting as counsel"* under section 12(a). The fact that this exclusion appears to arise under a wholly mistaken assumption by the drafters of the Direction that the Direction arose under section 12(b) in no ways extends its reach to matters for the SG's advice and opinion briefed and arising under section 12(a). enate exercising its powers to the same result.

Submission 3

In the circumstances that there is an apparent breakdown of an amiable working relationship such a should exist between the current AG and SG (as to the circumstances of which I express no views) such differences as there be should not be resolved during their continued incumbency by legislative measures being imposed which have the effect of destroying the office of SG.

22. In comparison with the England, the office of AG is of a continuing senior political office, AG Bowen was Deputy Prime Minister, and AG Brandis is Government Leader in the Senate. The Law Officers Act 1964 recognised this political fact, and established the statutory office of SG for the appointment of eminent counsel to carry out those non-political functions of counsel *vice* the AG. This position is summarized by the SG's Submission.

23. From inception in 1964, the office was the most engaging and attractive professional position as leader of the Australian bar. First appointed was Sir Anthony Mason over years ago, appointed ahead of the strong contenders of Sir Ninian Stephen and Sir Zelman Cowan. I remember Sir Zelman pressing his job application to Sir Robert Menzies in introducing

him in 1963 as the first Southey Memorial lecturer. Successive holders of the Office have been the Hon Robert Ellicott QC, who went on to become AG, Sir Maurice Byers QC, David Bennett AC QC, the now Justice Gageler (who was once an assistant to me in office) and now Gleeson QC.

24. In my case, the continuing attraction of the Office since I first heard of it in 1964 was so great I jostled some 20 years later with the great jurist the Hon Michael McHugh for the honour of the appointment, and during my 14 years in office I opted for continuing office by thrice refusing appointment as a Chief Justice of Courts other than the High Court, and other appointments. In office, I enjoyed the professional satisfactions of leading counsel for the Commonwealth, both in the Australian Courts and also offshore at the International Court of Justice and at the United Nations. Gleeson, as SG, has enjoyed the same combined practice of leading counsel for the Commonwealth as a body politic within the Federal system and also for Australia offshore.

25. With this background, until the promulgation of this Direction the office of SG undoubtedly maintained its position as the public appointment of choice for the leader of the Australian bars, and in preference for, or at least postponement of, judicial appointments.

Submission 4

The Direction, and its apparent motivations, is destructive of the Office of Solicitor-General

26. 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 (and I use the word "great" advisedly, having regard to prior office holders) 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.

27. A government of integrity should not shirk and avoid obtaining advice of integrity germane to the legality of its actions. It should not shop around and refrain from obtaining the Second Law Officer's advice on matters where is suspects the advice may contra the Government's position. In this regard, recent issues of controversy example situations where it may be seen that even at Ministerial and entire Government level determinative advice may not be sought for reasons of political advantage. The strength of the office of SG is to be retained to provide the integrity of disinterested advice to the service of the body politic. In this regard, I entirely agree with Professor Appleby's description of "chilling effect" of the Direction as to perceptions as to the integrity of the

continuing office. The uncomfortable image of a dog on a lead comes to mind.

28. One example of shopping around for advice other than from the SG, as the Government's counsel, .is Appleby's reference in her written submission to her piece on the role of Lord Goldsmith's advice as to the legality of the invasion of Iraq. At least as AG he was called upon for advice on this issue, albeit advice that universally is regarded as wrong, as Lord Bingham convincingly demonstrated in his 2008 Grotius lecture. In Australia, for reasons I know not, on that issue of the legal justification of Australia for invading a foreign power, advice was not given (and I assume it was not sought) from the then SG but obtained in a short note at the FAS Departmental level.

29. A separate example of this undesirable practice than may only undermine the office of SG is fact disclosed in the material before the Committee that the AG by-passed his SG and sought advice on the definition of marriage issue from his predecessor.

30. The Law Officers Act might be better to be repealed than the office demeaned to this level of deferential or only selective engagement to closet access to the SG within the office of the AG as embraced by the terms of the Direction.

Summary

I regard the content and intent of the Directions as effecting the practical destruction of independent office of Second Law Officer within the Australian constitutional context.

I am happy to reconvene with the Committee were it to re-convene. I am in Australia and available in person 17 to 26 October 2016.

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