

SENATE LEGAL AND CONSTITUTIONAL AFFAIRS REFERENCES COMMITTEE

INQUIRY INTO THE NATURE AND SCOPE OF CONSULTATIONS PRIOR TO THE
MAKING OF THE LEGAL SERVICES AMENDMENT (SOLICITOR-GENERAL
OPINIONS) DIRECTION 2016

RESPONSES TO WRITTEN QUESTIONS ON NOTICE

The 30 November 2015 meeting

1. On 30 November 2015 the Attorney-General met with the Solicitor-General, with the Secretary of the Attorney-General's Department and with the Australian Government Solicitor. At this meeting:

- a. Was there consensus that where amendments have been made to draft legislation on which the Solicitor-General has advised, the Solicitor-General should be given the opportunity to advise on the amendments?**
- b. Were changes to the Legal Services Directions discussed?**
- c. Was a legally binding direction concerning the performance of the functions of the Solicitor-General discussed?**
- d. Was the establishment of a requirement that a Commonwealth person or body could only approach the Solicitor-General for advice after receiving the Attorney-General's advance approval discussed?**
- e. Was there any discussion of restricting access to the Solicitor-General or changing access to his giving legal advice in any other way?**
- f. Was there any discussion which suggested that there was a problem with Government Agencies and Departments acting other than in compliance with s 12(b) of the Law Officers Act because they were approaching the Solicitor-General for advice without going through the Attorney-General?**

I do not have a detailed recollection of the 30 November 2015 meeting. I note it was now over 11 months ago.

I do recall there was some discussion around the concerns the Solicitor-General had around the briefing process and the need for revising the Guidance Note 11.

I do not recall any detailed discussion around a direction, although I would not dispute that the Legal Services Directions may have been raised.

The clear outcome of that meeting, as I recall it, was for the Solicitor-General and the department to develop suggested amendments to Guidance Note 11 for the Attorney-General's consideration.

2. Mr Iain Anderson has stated in his evidence to the committee that at this 30 November 2015 meeting 'it was agreed that the Solicitor-General, the Secretary and the Australian Government Solicitor would suggest amendments to 'Guidance note 11' for the Attorney-General's consideration'. Please confirm whether this statement is correct.

See my response to Question 1.

3. The Solicitor-General took notes at this meeting which were circulated by email on 8 December 2015 to your staff.

There is no mention of the Legal Services Directions in these notes.

On 24 December 2015, your Executive Assistant responded to the email stating that you had no concerns with these notes.

Please confirm whether these two statements are correct. Why did your office not seek a correction to the notes so that the Legal Services Directions was included, if it was indeed discussed at the meeting?

My Senior Executive Adviser responded to the Solicitor-General's Office, advising that I had no concerns with the meeting outcomes document, as, in my view, the key outcomes of the meeting were captured by the record. As I understood the document, it did not purport to be a record of everything discussed in the meeting.

Drafting process

- 4. On 11 March 2016 your Department provided the Attorney-General's office with a draft copy of the Solicitor-General's proposals as to how the processes for briefing him could be altered.**
 - a. When did you receive input from the Solicitor-General?**
 - b. Did the Department make any changes to these proposals from the Solicitor-General before they were sent to the Attorney-General?**
 - c. Please outline whether you received a response from the Attorney-General's office to this draft copy of the Solicitor-General's proposals, what that response contained and the date of any response.**

Consistent with Mr Anderson's evidence before the Committee, between 8 December 2015 and 21 March 2016, several versions of Guidance Note 11 were circulated with proposed changes from the Solicitor-General and his Office, the Attorney-General's Department, and the Australian Government Solicitor. The draft copy provided to the Attorney-General's Office on 11 March 2016 reflected the most recent iteration at that time, including the Solicitor-General's proposals, which had been circulated for comment by the Solicitor-General's Office.

- 5. On or before the 21 March 2016, the date on which Mr Gleeson provided his advice regarding the Guidance note 11, had the Department provided any advice on the Legal Services Directions to the Attorney-General's Office?**

No.

- 6. On or before 21 March 2016 had the Department received any information from anyone in the Attorney-General's Office that suggested that there would be a change to the Legal Services Directions?**

No.

- 7. Did the Department discuss the Legal Services Directions or the process for seeking the Solicitor-General's opinions between 21 March 2016 and 20 April 2016? If so, please outline those discussions.**

Brief discussions were held with the Attorney-General's Office during this period as to the status of the Attorney's consideration of the proposed changes to Guidance Note 11.

On 12 April 2016, there was also e-mail correspondence between the Solicitor-General's Office and the department on the status of the same matter. This correspondence was attached to the Solicitor-General's submission to the committee at Attachment F.

In addition, as administration of the Legal Services Directions is a core function of the department, they are generally discussed on a daily basis, including over the period 21 March 2016 to 20 April 2016. Engagement with other Commonwealth entities about the application of particular Directions is a business as usual function.

8. On what date did the Attorney-General advise your Department that he wished to make changes to 'Guidance note 11'?

The Attorney-General advised the department on 20 April 2016.

9. On what date did the Attorney-General advise your Department that he intended to issue new Legal Services Directions mirroring the contents of the guidance note?

The Attorney-General advised the department on 20 April 2016.

10. Between 20 April 2016 and 4 May 2016 did the Attorney-General's Department discuss the Legal Services Directions or Guidance note with the Solicitor-General?

On 29 April 2016, there was e-mail correspondence between the Solicitor-General's Office and the department on the status of the Attorney-General's consideration of the proposed changes to Guidance Note 11.

This correspondence was attached to the Solicitor-General's submission to the committee at Attachment F.

11. Did you, at any point, request an explanation of the need for the new Directions from the Attorney-General's office?

No.

12. Were you directed by anyone in the Attorney-General's office, or by anyone external to the Department, not to discuss the new Directions with the Solicitor-General?

No.

13. Did you realise the new Directions had not been discussed with the Solicitor-General?

I was not directly involved in the process of implementing the Attorney-General's decision of 20 April 2016 to issue a new direction. This was being handled in the department by Deputy Secretary Anderson and officers from his Group.

14. If so, did you not raise concerns, if so why/ if not why not?

See my response to Question 13.

15. Did you express any concerns about the impact of the change on the Solicitor-General's role of the new Directions to anyone? Did you express concerns to the Attorney-General's Department?

See my response to Question 13. I note Mr Anderson's evidence on 5 October 2016 that a concern was raised with the Attorney-General's Office that the process for seeking the Attorney-General's

consent would need to flow smoothly, to ensure it did not impede the ability of persons to seek timely advice from the Solicitor-General.

Response to the Direction

16. Can you confirm receipt of a letter from the Solicitor-General dated May 24, which stated that he believed he had not been consulted, and included a chronology of events to back up that claim?

Yes.

17. What action did you take on receipt of that letter? Have you taken the Solicitor-General's concerns to the Attorney-General?

I wrote to the Attorney-General on 27 May 2016, enclosing a copy of the Solicitor-General's letter of 24 May 2016. I also wrote to the Solicitor-General on the same day, advising that I had drawn his letter to the Attorney-General's attention.

18. The Explanatory Memorandum attached to the Legal Services Amendment tabled in Parliament, states that consultation took place in accordance with the Law Officers Act 1964. To what does this refer and with whom did consultation take place and when?

The department's view was, and remains, that there was a process of consultation.

On 22 June 2015, the Solicitor-General wrote to the Australian Government Solicitor and myself about the process for seeking Solicitor-General's opinions and requested a meeting. That meeting was then held on 25 August 2015. At that time, Guidance Note 11 stated, amongst other things, in respect of seeking an opinion from the Solicitor-General that acceptance of such a request to advise will be confirmed by the Attorney-General following consideration by the Solicitor-General.

On 12 November 2015, the Solicitor-General wrote to the Attorney-General requesting a meeting to discuss the process for seeking and acting on the Solicitor-General advice in significant matters and setting out a number of concerns about how the process was operating.

On 30 November 2015, I attended a meeting with the Attorney-General, Solicitor-General, and the Australian Government Solicitor, and it was agreed that amendments to Guidance Note 11 would be developed by the department and the Solicitor-General for the Attorney-General's consideration.

Between 8 December 2015 and 21 March 2016, several draft versions of Guidance Note 11 were circulated with proposed changes from the Solicitor-General and his office, the Attorney-General's Department and the Australian Government Solicitor.

On 21 March 2016, a copy of proposed changes to Guidance Note 11 was emailed to the Attorney-General's office together with the agenda for the Significant Legal Issues meeting to be held on 23 March 2016.

On 23 March 2016, the Significant Legal Issues meeting was held, and was attended by the Attorney-General, the Solicitor-General, and various representatives from the department, including the Australian Government Solicitor and myself. It was noted in the course of the meeting that the Attorney-General had been provided with a copy of the draft revised Guidance Note 11 in the meeting papers and the Attorney-General advised that he would consider the draft. The actual draft revised guidance note did propose extensive changes throughout the guidance note, including in the section covering briefing the Solicitor-General for opinions.

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.

On 27 April 2016, a revised Guidance Note and draft legislative amendment to the Legal Services Directions 2005 was sent from the Attorney-General's Office to the department. That day, the department contacted the Office of Parliamentary Counsel (OPC) to seek their assistance with preparing a legal services amendment direction.

Between 27 and 28 April 2016, the department and OPC liaised on the content of draft direction. On 29 April 2016, OPC provided the finalised Legal Services Amendment (Solicitor-General Opinions) Direction 2016 to the department.

On 4 May 2016, the Attorney-General formally approved that Direction, as well as the explanatory statement and the revised Guidance Note 11. Revised Guidance Note 11 does contain most of the changes that were in the draft provided to the Attorney-General on 23 March 2016, other than in the section covering requests to brief the Solicitor-General for opinions. The contents of the Direction are almost identical to the current form of the Guidance Note.