



**Australian Government**  
**Attorney-General's Department**

## **Parliamentary Inquiry into the nature and scope of consultations prior to the making of the Legal Services Amendment (Solicitor-General Opinions) Direction 2016**

On 15 September 2016, the Senate referred an inquiry into the nature and scope of the consultations prior to the making of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* to the Senate Legal and Constitutional Affairs References Committee for inquiry and report by 8 November 2016. This letter provides the Attorney-General's Department submission to this inquiry. While the Australian Government Solicitor has been separately invited to make a submission to the inquiry, the Australian Government Solicitor has been part of the Attorney-General's Department since 1 July 2015 and the Department's submission incorporates the views of the Australian Government Solicitor.

The terms of reference state that the Committee will inquire and report on 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. 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.

In preparing this submission, and in identifying documents to provide to the inquiry, the Department has had regard to documents created and events that occurred prior to the creation of the Direction. The Department has not had regard to correspondence created after the making of the Direction. The Department believes that correspondence created after the making of the Direction does not fall within the terms of the inquiry because it does not establish the facts of the consultations prior to the making of the Direction.

This submission sets out the consultation that occurred about the process of briefing the Solicitor-General, which is the subject matter of Guidance Note 11 and of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* (the Direction).

### **Background**

The Attorney-General is the First Law Officer of the Commonwealth and in that capacity has a particular role in managing the Commonwealth's legal risk. The Attorney-General is the chief legal adviser to Cabinet and has overall responsibility for the conduct of legal actions brought by the Commonwealth.

The Solicitor-General's responsibilities, as the Second Law Officer, are set out in section 12 of the *Law Officers Act 1964* and include to act as counsel for the Commonwealth, furnish opinions on questions of law on referral by the Attorney-General and to perform such other functions ordinarily performed by counsel as the Attorney-General directs.

Section 12 of the Law Officers Act states 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 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.

Under subsection 55ZF(1) of the *Judiciary Act 1903* the Attorney-General may issue directions (Legal Services Directions) that apply to the performance of commonwealth legal work. Subsection 55ZF(2) provides that the Attorney-General may publish or give notice of Legal Services Directions in any manner the Attorney-General considers appropriate.

Legal Services Directions may be issued to apply generally to Commonwealth legal work or to Commonwealth legal work to be performed in relation to a particular matter (sub-section 55ZF(1)). While Legal Services Directions are issued about the performance of Commonwealth legal work (defined in sub-section 55ZF(3)), they must be complied with by people for whom Commonwealth legal work is performed, by the Australian Government Solicitor and by legal firms acting for the Commonwealth (section 55ZG). Legal Services Directions are legally binding, although non-compliance can only be enforced by the Attorney-General (sub-section 55ZG(2)). Each year there are a small number of instances of non-compliance with the Directions. These are typically dealt with by discussion between the department and the non-compliant party (typically a Commonwealth agency). On occasion remedial action may need to be taken by the non-compliant party. Depending upon the nature of the non-compliance, the remedial action may involve education and training, or might involve taking specific action in handling a legal issue.

The *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* has been consolidated into the *Legal Services Directions 2005*. The Department administers the *Legal Services Directions 2005*, issued by the Attorney-General under section 55ZF of the *Judiciary Act 1903*, and seeks to provide the Attorney-General with visibility of significant legal proceedings involving the Commonwealth and with the ability to ensure that the Commonwealth is taking a consistent and coherent approach to legal issues with whole-of-Commonwealth implications.

While decisions about the handling of significant legal issues are primarily made by the Attorney-General (for example, whether to intervene in certain categories of cases, whether to appeal certain categories of judicial decision, the nature of submissions to be made in certain categories of cases), the Solicitor-General is closely involved in the Commonwealth's management of significant legal

risk. He appears as counsel in the key cases, he advises on the most significant legal issues, and he participates in the meetings of the Significant Legal Issues Committee which discusses the handling of particular matters and issues.

The Attorney-General's Department supports both the Attorney-General and the Solicitor-General in the performance of their roles.

The Department prepares guidance notes to help agencies to comply with their obligations under the *Legal Services Directions 2005*. Guidance notes are not legally binding. Currently there are 12 Guidance notes on the Department's website. Guidance Note 11 is specifically about the process to be followed when briefing the Solicitor-General, including when seeking advice from the Solicitor-General in a matter in which the Solicitor-General is not briefed as counsel. The current content of Guidance Note 11 is almost identical to the content of the *Legal Services Amendment (Solicitor-General Opinions) Direction 2016*.

### ***Consultation prior to the making of the Direction***

On 22 June 2015 the Solicitor-General wrote to the Secretary of the Attorney-General's Department and the Australian Government Solicitor about the process for seeking Solicitor-General's opinions and requested a meeting. The meeting was held on 25 August 2015.

At that time, Guidance Note 11 stated, among other things, that:

#### Functions of the Solicitor-General

3. The Solicitor-General's functions, as Second Law Officer, are found in section 12 of the Law Officers Act 1964 (Cth).

4. These functions include acting as Counsel for the Commonwealth (sub-s. 12(a)) and furnishing opinions on questions of law (sub-s. 12(b)).

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Requests to brief the Solicitor-General for opinions on questions of law: sub-s. 12(b)

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.

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

On 30 November 2015, the Attorney-General met with the Solicitor-General, the Secretary of the Attorney-General's Department and the Australian Government Solicitor. Guidance Note 11 was discussed and 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.

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 23 March 2016 Legal Issues Meeting. The Department also separately provided advice to the Attorney-General on the changes that the Solicitor-General was proposing.

On 23 March 2016 the Legal Issues Meeting was attended by the Attorney-General, the Secretary, the Solicitor-General, and representatives from the Department including the Australian Government Solicitor. It was noted 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 draft revised Guidance Note proposed 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 of 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 was sent from the Attorney-General's Office to the Department. The email also included the content of the revised Guidance Note 11 reflected in a draft legislative amendment to the *Legal Services Directions 2005*.

Also on 27 April 2016, the Attorney-General's Department contacted the Office of Parliamentary Counsel to advise a Legal Services Amendment would be sent through for drafting. Between 27 and 28 April 2016 the Attorney-General's Department and the Office of Parliamentary Counsel liaised on the content of the draft Direction as per usual drafting practice.

On 29 April 2016 the Office of Parliamentary Counsel provided the finalised *Legal Services Amendment (Solicitor-General Opinions) Direction 2016* to the Attorney-General's Department. On 4 May 2016 the Attorney-General formally approved the *Legal Services Direction Amendment (Solicitor-General Opinions) Directions 2016*, the explanatory statement and the revised Guidance Note 11.

The revised Guidance Note 11 contains 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.

Guidance Note 11 now states that, among other things:

Functions of the Solicitor-General

3. The Solicitor-General's functions, as Second Law Officer, are set out in, and limited by, section 12 of the Act.

4. Those functions include acting as Counsel for persons and bodies referred to in paragraph [2].

5. The Solicitor-General's functions also include furnishing opinions on questions of law referred to him or her by, or with the signed consent of, the Attorney-General (paragraph 12 (b)) and carrying out such other functions ordinarily performed by counsel as the Attorney-General requests (paragraph 12(c)).

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Opinions on Questions of Law: Paragraph 12(b)

16. The Solicitor-General will, in accordance with paragraph 12(b) of the Act, furnish his or her opinion to the Attorney-General on questions of law referred to the Solicitor General by the Attorney-General or with the consent of the Attorney-General.

17. The Solicitor-General will furnish an opinion on a question of law only if the Attorney General has referred, or consented to a referral of, the question of law to the Solicitor-General.

18. No person or body referred to in paragraph [2], other than the Attorney-General, may refer a question of law to the Solicitor-General except with the consent of the Attorney General.

19. If a person or body referred to in paragraph [2] forms the view that a question of law should be referred to the Solicitor-General, that person or body must seek, in writing, the Attorney-General's signed consent to the referral of the question to the Solicitor General. The letter must be copied to OLSC.

20. If the Attorney General's Department or AGS:

- (a) has consulted the Solicitor General under paragraph 10A.2 of the Legal Services Directions 2005 (Directions) about whether advice on a question of law should be given by the Solicitor General in relation to a constitutional law issue; and
- (b) forms the view that the Solicitor General's advice should be sought; the Attorney General's Department or AGS must seek, in writing, the Attorney General's signed consent to the referral of the question to the Solicitor General. The letter must be copied to OLSC.

21. If the Attorney-General consents to a referral of a question of law to the Solicitor General, the brief to the Solicitor-General to advise on the question shall include a copy of the signed consent of the Attorney-General.

22. If the Solicitor-General receives a brief to advise on a question of law that does not include a copy of the signed consent of the Attorney-General, then:

- (a) the Solicitor-General shall notify the Attorney-General's Office of the receipt of the brief; and
- (b) the Attorney-General shall either:
  - (i) consent, in writing to the referral of the question of law to the Solicitor-General; or
  - (ii) decline to consent to such referral, in which case the Solicitor General shall return the brief.

23. Occasionally, the Attorney-General considers it appropriate to seek legal advice from persons other than the Solicitor-General. Nothing in this Guidance Note limits the Attorney-General's discretion in this regard.

24. To avoid doubt, the requirement to obtain the Attorney-General's signed consent to refer questions of law to the Solicitor-General 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 paragraph 12(a) of the Act.

The contents of the Direction are almost identical to paragraphs 16-24 of the Guidance Note.

The Department hopes this submission is of assistance to the Committee and would be pleased to provide further information if required.