

10 October 2016

Gavan Griffith QC

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

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

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

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 1903*, section 55ZF. It is *ultra vires* and of no effect as a lawful direction directed to the SG.

5. The *Judiciary Act 1903*, section 55ZF does not authorise any directions to issue concerning the SG, either limited to the *Law Officers Act 1964*, section 12(b), as expressed in para 10B.1 of the Direction or section 12(a), which is expressly excluded by the terms of 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 55ZF. 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 55ZF, who is clearly not an "officer" for the purposes of section 55ZF(3)(b)(iv), 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. Were the SG not an interested party, he is the obvious counsel to give determinative advice as to validity. ON no view, should the Commonwealth come to take proceedings against itself to resolve this controversy as to validity and effect..

Submission 2 The advising power other than that arising by direct request of the AG under section 12(b) of the *Law Officers Act 1964* is conferred by section 12(a). Hence, even if the Direction were 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 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).**

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

10. It is beyond tenable contrary argument that the chapeau to section 12 (a), expressed as to the SG’s functions “*to act as counsel*”, embraces both curial “matters and briefing for advices and opinions”.

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 y reference to 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 to this position 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. During my term of office my briefings for advice and opinions in non- curial matters arose by delivery of briefs for opinion arising under section 12(a). If Commonwealth entities as listed in section 12(a), 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, often the Australian Government Solicitor himself. It was rare to the point of being exceptional that the AG himself sought my opinion by his request issued under section 12(b).

16. As noted by the SG in his submission, para 11, other exceptions to briefings for opinions arising under section 12(a) were direct requests for advice communicated to me by the GG or the PM. In this regard, 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.

- 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 It followed that almost all matters coming to me for advice and opinion were transmitted as counsel for the Commonwealth under section 12(a). Without exception, none were sought to be filtered or controlled through the AG or his political office.
- 18 I note that it is stated by the SG' Submission that administrative procedures are in place for the SG to keep the AG advised as to current matters under advice arising under section 12(a): cf my experience where successive AG's over 14 years never not concerned to be advised or kept abreast of these retainers. Such continuing lines of communication are a matter for agreed arrangements between the continuing Law Officers, but, for the reasons stated are not a matter for statutory direction under section 12 or any other part of the *Law Officers Act*, and for the reasons stated, pursuant to directions rising under the new parts of the *Judiciary Act*, section 52ZF.
- 19 And of course, the Direction itself, para 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 is expressed appears inexplicable only as reflecting the wholly mistaken assumption by the its drafters that the Direction arises under section 12(b). It does not, and this exception merely confirms that the Direction in no way extends to require the prior consent of the AG for the SG to give advice and opinions arising under section 12(a). To this extent also, the Guidelines are predicated upon an incorrect understanding that briefing for opinions arises under section 12() and nor under 12 (b).

Submission 3 In the current circumstances where there is an apparent and undesirable breakdown of an amiable working relationship between the current AG and SG (as to the circumstances of which I express no views) such differences should not be resolved during their continued incumbency by inappropriate and destructive legislative or administrative measures being imposed which have the effect of destroying the independent 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 summarised 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, 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 counsel practicing as a leader at the Australian bars, and in preference for, or at least postponement of, judicial appointments.
26. If maintained, the explicit terms of the Direction, (and as reflected in the Guidelines) signal more than the unfortunate breakdown in personal working relationships between the First and Second Law Officer. Apart from being of uncertain effect and practically unworkable, if remaining implemented in its form or substance (whether valid or not) to establish a gateway through the AG's political office to all opinion work, this Direction will covert this great office (and I use the word "great" advisedly) into one of "closet counsel" within the AG's political office, to be released for non-curial advising on the unreviewable whim of the incumbent AG.
27. Recent issues of controversy expose situations where it may be seen that even at Ministerial level "dodgy advice" may be sought for short-term political advantage. The strength of the Office of SG is to provide the integrity of disinterested advice to the service of the body politic.
28. I entirely agree with Professor Appleby's description of "chilling effect" arising from these developments. The image of a dog on a lead comes to mind. No doubt, that for future appointments "*a*" counsel will be found to accept a shackled office, but at a reduced level of competence and performance, from counsel unlikely and unprepared to say no to those who call for partial rather

than dispassionate impartial advice. It is not so much paying peanuts and getting monkeys, as the salary has never been an inducement. However, the result will be the demeaning of the Office to the equivalent of attracting monkeys.

29. The *Law Officers Act* might be better to be repealed than the Office demeaned to this level of deferential engagement and closet counsel provided for in the Direction.
30. A government of integrity should not shirk from obtaining disinterested peak advice of integrity from its SG. It should not shop around, or even refrain from obtaining the Second Law Officer's advice on matters where it suspects the advice may be contra the Government's preferences.
31. One example of matters erosive of the standing of the office of SG 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. On this issue, as AG Goldsmith was called for his opinion, 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 same issue of the legal justification of Australia for invading a foreign power, advice to the same effect 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. Another is the 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. In each matter it is inexplicable that the SG was not requested by the AG under section 12(b) to advise, on matters as important as waging war or the Constitutional reach of the marriage power. It is the function and duty of the SG to be the source of the Government's advice.

Summary

If they stand, I regard the content and intent of the Directions, and as reflected in the Guidelines, 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, and will be available in Australia from 17 to 26 October 2016.

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11 October 2016