

Australian government seeks to gag top legal official

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An acrimonious public conflict has erupted between Australia's two top legal officials over a bid by Prime Minister Malcolm Turnbull's government to bar the release of official legal advice that could potentially expose the illegality of government proposals.

The dispute has worsened since May, when Attorney-General George Brandis, without notice, issued a "Legal Services Direction" barring Solicitor-General Justin Gleeson from giving a formal legal opinion to anyone else without Brandis's written, signed consent.

At stake in this clash are not simply fine legal distinctions, or personal disputes. Essentially, via the attorney-general's decree, the Liberal-National Coalition government is seeking to free itself to act lawlessly, in violation of any constitutional or legal constraint.

During a heated Senate committee hearing yesterday, under hostile questioning from government senators, Gleeson stated his intention to defy the "unlawful" directive. He said that if the July 2 federal election had resulted in a hung parliament, the order would have barred him from giving legal advice to the governor-general, who has the power to decide who should be asked to form a government.

Earlier, Gleeson released a detailed 48-page submission to the Senate legal and constitutional affairs references committee, insisting that the directive be withdrawn and that Brandis did not consult him before issuing it. Gleeson's submission, containing the correspondence between the pair, effectively showed that Brandis misled parliament by falsely declaring that Gleeson was consulted.

Gleeson also quoted a letter he wrote to Brandis last November 12, objecting that he was not consulted on three key moves by the government. These were legislation to allow citizenship to be stripped from

people by executive decree, a proposed plebiscite on same-sex marriage and the release of sensitive correspondence between Governor-General Sir John Kerr and the Queen before Kerr dismissed the Whitlam Labor government in the "Canberra Coup" of 1975.

This lack of consultation clearly violated long-established legal norms. The solicitor-general, who is officially designated "the second Law Officer of the Commonwealth," is meant to be an independent officer, appointed for up to seven years, and who cannot be removed except for incapacitating illness or "misbehaviour."

Under the Legal Officers Act, the solicitor-general must "act as counsel"—give legal advice and representation—to the government and federal agencies. He or she is also required to "furnish opinions" to the attorney-general, but there is no provision saying that the attorney-general could ban advice being given to other officials.

Testifying at the Senate committee hearing yesterday, Gleeson declared: "What is currently contained in the direction issued on 4 May has never previously existed between attorney-general and solicitor-general in Australia since 1916. It is a radical change in the practice, whereby a solicitor-general can do nothing; cannot even speak to a lawyer until he has received a brief with a signed consent."

The far-reaching implications of silencing the solicitor-general can be seen from Britain, where the Blair Labour government in 2003 blocked and then lied about a law officers' opinion casting doubt on the legality of the US-led invasion of Iraq. This year's report of the official Chilcot inquiry confirmed the war's utterly illegal character and the criminal role of those officials, American, British and Australian, who organised and led it.

That such gagging could occur again has been demonstrated by the suppression by Brandis of Gleeson's advice that last year's citizenship bill, which was dressed up as a counter-terrorism measure, was probably unconstitutional.

Fully supported by the Labor Party opposition, this law is a serious attack on the fundamental democratic right of citizenship. A government can now arbitrarily strip citizenship from people, removing core democratic rights, including to vote.

These powers, which can be exercised without any trial or judicial process, go far beyond targeting alleged terrorist suspects. They can be used against a wide range of people deemed to be opponents of the political, corporate and military establishment.

The government and its Labor Party partners defied warnings by legal experts that the bill was most likely unconstitutional, primarily because a government minister could severely punish citizens, by depriving them of their citizenship, without any judicial process, violating the separation of powers in the Australian Constitution.

Labor voted for the bill after complex last-minute amendments were tabled trying to dodge a High Court challenge, even though the government refused to release its legal advice—two letters from the solicitor-general.

At the time, Brandis declared there was “a good prospect that a majority of the High Court would reject a constitutional challenge to the core aspects of the bill.” Prime Minister Turnbull made similar statements.

In his November 12 letter to Brandis, attached to his Senate submission, Gleeson objected to these statements, saying they were “capable of being understood as statements about the solicitor-general having advised on the current bill, and about the content of that advice.”

Gleeson said he had seen a draft of the bill two days before it was introduced to parliament, but was surprised the final bill retained ministerial discretionary powers to revoke citizenships and removed any requirement for natural justice—that is, for citizens to have any opportunity to challenge the loss of their basic rights.

Labor has called on Brandis to resign for misleading parliament, but its main concern, expressed in a Senate motion, is that he undermined “public confidence

within legal administration within the government.”

Appearing before the Senate committee yesterday, Brandis stepped up the government's offensive, accusing Gleeson of instigating a “confected controversy.” Brandis insisted that his directive, “far from being a grab for power, merely gives effect to the existing law.”

Meanwhile, Turnbull backed Brandis, saying he did not believe the solicitor-general's independence had been compromised.

This is an unparalleled rift at the highest echelons of the Australian state. On the *Conversation* web site, a legal expert, Associate Professor Gabrielle Appleby, said the conflict “demonstrates an unprecedented, very public breakdown in the relationship between the two officeholders.”

In a scathing submission to the Senate inquiry, former Solicitor-General Gavin Griffith denounced Brandis for seeking to reduce the solicitor-general's role to a “shackled office” like “a dog on a lead.” He said the “content and intent” of Brandis's directive was “the practical destruction of independent office of second law officers within the Australian constitutional context.”

Labor Senator Penny Wong gave notice of a motion to disallow Brandis's legal directive. Regardless of whether the directive is overturned, the government's actions show a determination to operate without any legal or constitutional restraint on critical issues, which could include going to war and further overturning fundamental democratic rights.



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