

Brandis mishandles a fight he should never have had

Written by Michelle Grattan, Professorial Fellow, University of Canberra

The dramatic break between the Attorney-General and the Solicitor-General – which culminated spectacularly in Justin Gleeson's resignation on Monday – was a saga of misjudgments and mismanagement.

It has cost George Brandis reputation, lost the services to the Commonwealth of a highly respected law officer, and seen Gleeson out of the job he prized.

As Gleeson wrote in his trenchantly-worded resignation letter, there had been an irretrievable breakdown in the relationship between the first and second law officers.

The situation had gone beyond salvaging. Gleeson chose to quit while not retreating one iota from the case he had made against Brandis.

By so doing, he struck another blow against the Attorney, who is also likely to face sharp criticism from the non-government majority on the Senate inquiry into the affair, which is due to report by November 8.

The story started when Gleeson wrote to Brandis last November seeking clarification about the advisory process.

He put forward complaints. Brandis had used his advice on the draft stage of citizenship legislation - for the purpose of political argument – when he hadn't been asked for advice on the final bill.

Also he was clearly unhappy that the government was looking more widely for advice – he instanced not being consulted to that point on marriage legislation.

Brandis convened a meeting, which canvassed a range of matters. Subsequently, Brandis

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decided to issue a formal “direction” that all requests for the Solicitor-General’s advice had to go through the Attorney-General’s office.

This sent Gleeson, obviously already concerned that he might be being sidelined, ballistic.

He hadn’t been warned before the direction was tabled; he believed he hadn’t been consulted as required; he thought the direction illegal.

Brandis, on the other hand, maintained he was simply bringing practice in line with how he read the law, and insisted the earlier discussion amounted to adequate consultation.

Brandis’s fundamental mistake was the direction, which he should have anticipated would be provocative and challenged in legal circles. He didn’t think through the wider consequences.

Brandis also made a serious lapse in not forewarning Gleeson, especially given his obvious sensitivity around his position. It would have been better to have had the argument ahead of the tabling rather than afterwards.

But then, damage done, Brandis failed to find a credible way out.

If, as he said, he thought he was doing nothing radical, Brandis should have negotiated a retreat or compromise when things began to blow up.

For example, if he believed the direction encompassed the process required by the law he could have proposed re-jigging that law. He hinted, when giving evidence to the Senate inquiry, that perhaps the Senate committee should look at the law.

Retreating might have been hard for someone with Brandis’s personality, but the final outcome

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has been worse.

For his part, Gleeson was not faultless.

When Brandis wrote to him in August inviting him to put his complaints, he didn't take up the offer.

More importantly, when Labor's Shadow Attorney-General Mark Dreyfus contacted Gleeson during the election, the Solicitor-General handled this badly.

Dreyfus asked whether Gleeson had been consulted about the direction and whether he agreed with it.

Gleeson answered no to both questions.

He should have either declined to engage with Dreyfus or if he chose to do so, he ought to have informed the government.

Whatever legal rationale Gleeson had, his action didn't pass the common sense test. The caretaker period requires both abundant caution and maximum transparency from Commonwealth officers.

Unless he is a total political innocent, Gleeson must have known that Dreyfus was making a political call.

Some in the government might be glad to see the back of Gleeson – Coalition senators treated him with certain contempt when he appeared before them – but for Malcolm Turnbull the affair is another setback.

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It's a very bad look for the government when the second law officer has resigned on a point of principle with a full-on attack on the Attorney-General. It's also yet another distraction from what the government wants to talk about.

As for Brandis, he ends up losing all round. The political assault on him will go on for some time and the Senate appears certain to quash the direction. The damage has been self-imposed.

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