

# Introduction

## Background to the inquiry

In late February 2005, Turkish contractors began work widening parts of the coastal road at ANZAC Cove and constructing two car parks. On 2 March, Turkish authorities halted the work following accounts in the Turkish and Australian media that the site was being damaged. In particular, it was alleged that fragments of human bone had been uncovered by the roadworks. On 4 March, excavation work on the road resumed and was completed on 14 March. The widening of the coastal road and the first layer of asphalt was completed on 22 April 2005, in time for the ANZAC Day commemorations. Further work is planned at the site, including a rock wall along parts of the coastal road to protect against further erosion, and repair of the inland road from Chunuk Bair to Lone Pine.

The inquiry was established following the Senate's approval of an ALP motion inquiring into the role of Australian ministers and officials in the construction work to date, and the heritage protection of ANZAC Cove by way of planning and research. It followed several media releases and questions to government ministers in parliament from Labor Party members and senators. The opposition accused the government of complacency in allowing the construction to proceed without a proper heritage evaluation of the site. It also claimed that the Australian Government was complicit in the damage given the request from the then Veterans' Affairs Minister in August 2004 seeking road upgrades.

## Conduct of the inquiry

### *Submissions and hearing*

The Committee advertised the inquiry on 25 May and 8 June 2005 in *The Australian* and on the Senate website. Interested persons were invited to lodge submissions by 10 June 2005, although the Committee agreed to accept some submissions after that date. The Committee received 15 submissions from various individuals, private and non-government organisations and government departments.

On 17 June 2005, the Committee met in Canberra to hear evidence from Mr William Sellars, the Department of Veterans' Affairs and the Office of Australian War Graves, the Department of Foreign Affairs and Trade, the Department of the Environment and Heritage and the Department of the Prime Minister and Cabinet. Mr Sellars gave his evidence to the Committee via teleconference from his home in Eceabat on the Gallipoli Peninsula. It was Mr Sellars' newspaper articles that gave first publicity in Australia to the alleged damage caused by the roadworks.

## **Procedural issue – non disclosure of government legal advice**

The Committee wishes to draw the Senate's attention to a serious procedural issue it encountered during the course of the inquiry. The matter concerns a refusal to provide the inquiry with legal advice held by the government.

At the inquiry hearing on 17 June, the Department of Foreign Affairs and Trade took on notice two requests for departmental advice on (i) the application of the Treaty of Lausanne and (ii) the definition of 'free access' under the terms of the treaty. (The relevance of the requested information to the inquiry is discussed in Chapter 1.)

To the Committee's surprise, these requests for seemingly innocuous information were refused by the department and minister. In the first instance, the department refused claiming that under standing order 73 it was not in a position to table legal advice to the inquiry. As the Clerk of the Senate advised, standing order 73 applies only to questions put at question time in the Senate and is self-evidently not related to the work of committees. The Clerk clarified the matter further, noting that the order refers to legal *opinion*, not to legal *advice* as the department suggested. He observed that standing order 73 'does not prevent a question which asks for the tabling of a copy of legal advice in the possession of the government'.<sup>1</sup>

Moreover, the Clerk's advice indicated that government legal advice is often provided to parliamentary committees. He stated:

Questions at committee hearings and requests by committees frequently ask for copies of legal advices available to government, and they are frequently provided, unless the responsible minister thinks that there is some public interest ground for a claim that the advice should not be provided, for example, that disclosure of the advice would prejudice legal proceedings or the Commonwealth's position in legal proceedings.<sup>2</sup>

The Committee referred the Clerk's advice to the department, asking it to reconsider the request for the legal advice. It also reminded DFAT that if the department believed there was a public interest ground for a claim that the information should not be disclosed, the matter should be referred to the minister for a ministerial response. This reflects Senate procedures and government guidelines which prescribe that public interest claims should be made by ministers.

On 14 July, the department, writing apparently on the minister's behalf, refused again to provide the legal advices. This second refusal was based, however, on a new ground, as follows:

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- 1 Clerk of the Senate, correspondence to the Committee entitled, 'Gallipoli Peninsula Inquiry – Response by DFAT', 20 June 2005. See Appendix 3.
  - 2 Clerk of the Senate, correspondence to the Committee entitled, 'Gallipoli Peninsula Inquiry – Response by DFAT', 20 June 2005. See Appendix 3.

The Minister for Foreign Affairs has decided that this department should decline the committee's request to provide the advice, on the grounds that it has been a longstanding practice accepted by successive Australian governments not to disclose legal advice which has been provided to government, unless there are compelling reasons to do so in a particular case.<sup>3</sup>

The Committee has a number of concerns about the unusual features of the argument advanced above by the minister and department. First, it is a principle of open government that the government must point to 'compelling reasons' *not* to disclose information, rather than the other way around. Second, in refusing to provide the information the minister did not make a claim on the usual ground of public interest immunity but referred instead to 'longstanding practice'. There are, however, numerous precedents for governments disclosing legal advice in a manner contrary to that claimed above. As advice from the Clerk states:

As for the alleged “longstanding practice”, it is surprising that there has been such a practice but that it has not been heard of hitherto. I know of no previous occasion of any government stating that legal advice would not be disclosed “unless there are compelling reasons to do so in a particular case”. There have been many instances of governments disclosing legal advice without any indication that there were any “compelling reasons to do so”, and when the only reason for doing so appeared to be that the advice supported a case being made out by government at the time. The statement in the letter therefore appears to be a completely new declaration in relation to the disclosure of legal advice.<sup>4</sup>

As a case in point, on 18 March 2003 the government tabled legal advice in the Senate relating to the use of force against Iraq.<sup>5</sup> Senior legal officers in the Attorney-General's Department and the Department of Foreign Affairs and Trade had prepared the advice. No compelling reasons for tabling it were provided. Indeed, the fact that the government waited for a request before tabling the advice suggests the absence of compelling reasons to do so in this case.

The Committee is particularly troubled by the implications that this refusal has for the transparency and scrutiny of government. If, as the Clerk suggests, this matter heralds a 'new declaration' in relation to the disclosure of legal advice, then it amounts to throwing a veil of secrecy over a major category of information held by the

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3 Mr J Newman, DFAT, correspondence to the Committee, 14 July 2005. See Appendix 3.

4 Clerk of the Senate, correspondence to the Committee entitled, 'Gallipoli Peninsula Inquiry – Request for legal advice from DFAT', 21 July 2005. See Appendix 3.

5 'Use of force against Iraq – Memorandum of advice prepared by First Assistant Secretary (Bill Campbell QC), Office of International Law, Attorney-General's Department and Senior Legal Adviser (Chris Moraitis), Department of Foreign Affairs and Trade, dated 12 March 2003', *Journal of the Senate*, No. 68-18 March 2003, 1577.

government. It would constitute a retrograde step for open government. It would also represent a major barrier to the parliament's ability to scrutinise the operation of the executive and importantly the legal advice behind government decisions and policy.

Due to the gravity of this development, the committee wrote to the minister asking whether this declaration represented government policy on the disclosure of advice. After a considerable delay, the minister's response simply reiterated his position.<sup>6</sup> It completely ignored the many precedents of committees successfully requesting legal advice provided to government in the absence of 'compelling reasons to do so in a particular case'.

The Committee believes this development warrants airing in the chamber to allow debate on the justification to withhold a major category of government information. Such a unilateral measure should be subject to debate by the Senate itself, not signalled indirectly by way of a letter to a committee of that house.

The department's and the minister's responses and the Clerk's advice to the Committee can be found in Appendix 3.

## **Structure of the report**

This report has four chapters. **Chapter 1** reviews the historical significance of the 1915 conflict and the Gallipoli Peninsula for both the Australian and Turkish people. **Chapter 2** looks at the need for an upgrade of the coastal road, and Australian officials' knowledge of the construction work. **Chapter 3** examines the allegations that the roadworks disturbed human remains and permanently damaged the military heritage of the landscape. **Chapter 4** reviews this evidence and looks at some of the current initiatives by Turkish and Australian authorities to preserve the ANZAC site.

## **Acknowledgements**

The Committee wishes to thank all those who assisted with the inquiry. They include those who lodged written submissions and the Australian Government officials who gave evidence at the June hearing. The Committee is particularly grateful to Mr Sellars for his willingness to give evidence at the hearing at such a late hour in Turkey.

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6 The Hon. Alexander Downer, Minister for Foreign Affairs, response to the Committee, 9 September 2005, See Appendix 3.