Law Council
OF AUSTRALIA

Dr Kathleen Dermody
Committee Secretary
Senate Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Dermody,

Re: Law Council submission – *Defence Legislation Amendment Bill 2006*

As discussed this morning, I provide the following by way of further information for the Senate Foreign Affairs, Defence and Trade Committee concerning the *Defence Legislation Amendment Bill 2006* (DLAB6). This builds further upon the Law Council's oral submissions to the Senate Committee on 9 October 2006.

Protections in relation to majority verdicts

There is a very important, long-standing protection afforded to service members in relation to majority verdicts, which I forgot to bring to the committee's attention last evening and which I have some doubts will survive DLAB6.

The provisions of the Defence Force Discipline Rules provide the 'interstitial tissue' between the provisions of the Act and procedural and substantive processes of the court martial hearing. Rule 33 provides for the order of voting of the members of the court martial from the most junior ranking officer to the most senior. It is designed to prevent the junior members of the court being overborne or otherwise influenced by the most senior member voting in a particular way on the issue of guilt of the accused in relation to offence(s) charged. Rule 33 provides as follows:

> "Manner of voting of court martial
>
> > 33. On any question to be determined by the court martial, the members of the court martial shall vote orally, in order of seniority commencing with the junior in rank."

The rule was last considered in *Hembury v Chief of the General Staff* [1998] 193 CLR 641, where it was conceded that the Judge-Advocate's charge to the court martial could have been taken as suggesting that it might vote in order of seniority rather than juniority. The High Court unanimously upheld the importance of rule even in modern times, while unanimously rejecting the contention that the departure from the rules did not constitute a substantial miscarriage of justice. This contention was based on the arguments of the respondent that, prior to the vote being taken, each of the three officers was well aware of the views of the others and if, contrary to their oath, any of them was willing to mould his or her decision to conform with that of the president, he or she must have had every opportunity to do so irrespective of the order of voting.

Rule 33 was made by the JAG pursuant to the rule making power of s.149 of the *Defence Force Discipline Act 1982* (Cth) (repealed and replaced for summary authorities by DLAB6). Under DLAB6, proposed s.149A confers power on the Chief Military Judge (CMJ) of the Australian Military Court (AMC), who is not the judge of a superior civil court, as all former JAGs have been, but rather a creature of a tribunal.

This creates the incongruous situation that the JAG, who is a superior court judge, will be able to make the rules for summary proceedings but the CMJ will have the power to make them for the AMC. This bestowal of the rule making power on the chief of a tribunal detracts from the perceived authority of the AMC. It is likely to be perceived either as a lowering of the status of the AMC, or undermining the protections afforded to accused service men and women by particular rules made for that purpose (including Rule 33). This heightens the need for parliamentary vigilance in respect of the contents of such rules. As it is, there is no guarantee that the CMJ designate will be of the same view as the High Court in *Hembury* and he or she may alter the rules to remove that protection.

Thank you very much for permission to address this matter so belatedly.

Yours sincerely

Paul Willee QC RFD
Chairman
LCA Military Justice Working Group

10 October 2006