Law Council
OF AUSTRALIA

Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on Foreign Affairs, Defence and Trade
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody,

**REVIEW OF AUSTRALIA'S MILITARY JUSTICE SYSTEM**

I write to outline some ongoing concerns of the Law Council of Australia in relation to the implementation of reforms to Australia's military justice system, arising from the Senate Foreign Affairs, Defence and Trade References Committee's report into the effectiveness of Australia's military justice system.

As you may be aware, the Law Council of Australia has taken a strong interest in the reforms to Australia's Military Justice System since 2005. In September 2007, when reporting to the Senate on the measures contained in the *Defence Legislation Bill 2007*, the Senate Standing Committee recommended that the Law Council be consulted before any new legislative proposals are brought forward for consideration by the Australian Parliament.

The Law Council is advised by a Military Justice Working Group (the Working Group), chaired by Captain Paul Willee RFD, QC, RANR (Rtd). The remaining Working Group members include Ben Salmon RFD, QC, Dr James Renwick, Peter Barr RFD, QC, Colin Strofield, Alexander Ward, the Hon Justice John Logan and Nick Parmeter.

The following comments have been prepared to assist the Senate Standing Committee on Foreign Affairs, Defence and Trade prior to its hearings in Canberra on 20 June 2008, at which the Law Council will appear and respond to any questions the Senators may have.

If you wish to discuss the matters raised in this letter, please don't hesitate to contact either Nick Parmeter on (02) 6246 3733 or the Chair of the Law Council's Military Justice Working Group, Captain Paul Willee RFD, QC.

Yours sincerely

Bill Grant
Secretary-General

17 June 2008

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**LAW COUNCIL OF AUSTRALIA**

**Submission to the Senate Standing Committee on Foreign Affairs, Defence and Trade concerning the Review of Progress in Implementing Reforms to Australia's Military Justice System**

17 June 2008

The Law Council's primary concerns with respect to legislative reforms made since the Report into the Effectiveness of Australia's Military Justice System (the Report) was handed down are as follows:

1. lack of guidance as to 'simplified' evidentiary principles in summary proceedings;
2. no guidance as to what evidentiary principles will apply on appeal from the summary authority;
3. no provisions for interlocutory appeals from the Australian Military Court (AMC);
4. lack of publicly available information as to the activities of the AMC; and
5. Chief of Defence Force Commissions of Inquiry into Military Deaths.

**Evidentiary requirements for summary authorities**

As the Senate Standing Committee will be aware, the Law Council raised specific concerns with respect to the evidentiary requirements for summary proceedings, proposed under the *Defence Legislation Amendment Bill 2007* (DLAB7).

Subsequently, DLAB7 was withdrawn by the former government in order to address fundamental concerns raised by the Senate Standing Committee, following its inquiries into the draft legislation. Although DLAB7 was reintroduced, it was unable to be passed prior to the end of the final sittings of the 41st Parliament.

The *Defence Legislation Amendment Act 2008* (DLAA8) was then introduced in March 2008, which was a slightly amended version of DLAB7. DLAA8 was passed quickly, without significant or adequate comment or debate. In particular, we note the Law Council was not consulted in relation to whether DLAA8 addressed the fundamental concerns raised in its submissions to the Senate Standing Committee in 2007.

The Law Council continues to have significant concerns about the workability and effectiveness of the provisions of DLAA8, in particular with respect to the provisions concerning evidentiary requirements in summary proceedings.

The Law Council notes the following with respect to Schedule 3 of DLAA8, which will amend section 146A of the *Defence Force Discipline Act 1982* (Cth) (DFDA):

- The Senate Standing Committee recommended an amendment to DLAB7, to insert a provision to the effect that "The Summary Authority Rules may be simplified but not depart from the fundamental principles underpinning the rules of evidence".

- In oral and written submissions to the Senate Standing Committee in relation to DLAB7 and the Senate Standing Committee's subsequent bipartisan report in September 2007, the Law Council stated that it will not be sufficient to simply require that "the Summary Authority must not depart from the fundamental principles underlying the rules of evidence." Such a statement is meaningless without some indication of what evidentiary principles are regarded as "fundamental" in this context, and guidance for the lay person as to how those fundamental rules should be applied in practice.

- The Summary Authority Rules will not come into effect until September 2008 when the new Summary Procedure is introduced. It is understood that such rules are currently being drafted but no draft copies have been issued, or if they have, supplied to the Law Council. Rules of evidence have always been a most important part of the military law process as they are to any court. In the circumstances we are unable to ascertain the nature of the evidentiary principles which will be applied, let alone which principles will be fundamental or non-derogable. Accordingly, we are unable to comment on whether a Summary Authority charged with applying the amended provisions will have proper guidance concerning the basic evidentiary principles referred to in the legislation, such as relevance, probative value, weight and reliability; or for that matter guidance about the prejudicial nature of certain evidence or how principles of natural justice must be observed and applied in practice. The Law Council's real concern is that as matters have proceeded thus far, the evidentiary rules in their final form will not be available for comment and criticism until very shortly before they are implemented and insufficiently timeously for appropriate consideration and debate by the Law Council or any other entity which might be able to give the Senate Standing Committee or the Parliament informed assistance concerning the efficacy of those rules.

- In order to ensure the ADF's summary discipline procedure is perceived as fair, independent and not subject to interference by the Defence chain-of-command, the fundamental principles referred to by the Senate Standing Committee should be listed within the provisions of the legislation, not simply referred to in the notes or in subordinate regulations or guidelines because notes of this sort in legislation have no binding effect in the way that legislative words do.

- The legislation also fails to address the fundamental concern notified to the former Parliamentary Secretary for Defence and previous Chair of the Senate Standing Committee (with respect to section 168B of DLAB8) that the application of the ordinary rules of evidence should be restored upon appeal to the Australian Military Court from the decision of the summary authority.

At present, because these matters have not been addressed by the government under the legislation and there is no guidance under the Summary Authority Rules, it is not clear how summary proceedings are presently being conducted. Nevertheless the Chairman of the Working Group has been informed that such summary proceedings will continue to be conducted in accordance with the existing provisions of the DFDA until September. There is also no guidance as to how appeals will be managed by the AMC, which may face similar difficulties in determining which evidentiary principles are intended to apply in respect of their hearings.

The Law Council believes that the failure to address these matters under the proposed DLAB9 may result in a summary discipline procedure under which there is significant

potential for injustice to ADF members. Many of the offences listed under Schedule 1 of the Summary Authority Rules carry serious consequences for those found guilty. It is noted that even if the Summary Authority Rules are written to properly define the evidentiary principles to which the summary authority should have regard, the Law Council's concerns with respect to the ongoing suspension of the rules of evidence on appeal would remain.

**Interlocutory appeals from the AMC**

The Law Council continues to have concerns with respect to the adequacy of the appeal provisions under the *Defence Force Discipline Act 1982.*

In submissions to the Senate Standing Committee in August 2007 concerning DLAB7, the Law Council raised specific concerns with respect to the interlocutory appeals from criminal trials before the AMC. It is noted that those matters have not yet been addressed by the government and may lead to problems in the conduct of criminal trials. Again our information is that this issue has been decided in favour of giving the prosecution the right in appropriate circumstance to appeal in interlocutory matters and legislation to give effect to this proposal will be slated for DLAB9

As advised in previous submissions, two distinct lines of authority have developed with respect to appeal provisions in criminal proceedings relating to matters arising while a trial is underway requiring the judge to make a ruling on a particular issue. Such issues tend to be very important in that they will be of the type which will ultimately affect the result of the trial to the extent that they will determine that result. For example whether or not prosecution evidence should be excluded and in the case where it is so excluded, leaving the prosecution with insufficient evidence to continue with the case. In the broad sense the two lines of authority or approach are as follows:

1. The prosecution should have no rights of appeal which can affect any ruling in favour of the accused at any stage. Under this rule, the most that can be done is that there be a criminal appeal reference which will clarify an issue of law (for future trials in different matters) but will not interfere with a final verdict in the case in which the reference is brought. The policy reflects the position that there should be no unnecessary interference with the course of a criminal proceeding and that the defence is ultimately protected by a right of appeal. Such a policy does not recognize any countervailing remedy for the prosecution where, because an incorrect ruling cannot be appealed, it works unfairness against the prosecution.

2. The prosecution should be permitted to appeal interlocutory points and, indeed, to reverse a verdict of not guilty. The policy involved recognises that a jury verdict is sacrosanct, but that, as an element of the rule of law, judicial rulings during a trial should be subject to appropriate appellate review, albeit sometimes imposing a leave function to avoid undue disruption. This approach is favoured for example in the State of New South Wales for example by the terms of Section 5F of the *Criminal Appeal Act* (NSW).

It is noted that provisions effecting the second approach do not presently exist under the current AMC regime. However, an example of why such provisions are so important can be found in the recent Federal Court decision in *Commonwealth of Australia v Westwood* [2007] FCA 1282. In that case, Sackville J, sitting alone and performing the same function as a judge would in a jury trial outside the military context, ruled inadmissible a record of interview, without which the prosecution would not proceed. There was no right of appeal

under any Act. It is noted that the ruling was of wider significance, particularly for the provisions of the Bill under consideration.

In *Westwood*, judicial review was tightly circumscribed as:

- the decisions under the *Defence Force Discipline Act* are excluded from the ambit of the *Administrative Decisions (Judicial Review) Act*;

- review under Section 39B of the *Judiciary Act 1903* is in practice limited to the capacity of the Commonwealth[1] to seek a declaration under s 39B(1A)(a) of the Judiciary Act. (The other avenues of jurisdiction in Section 39B were eliminated either because the matter was a criminal matter or related to a criminal matter (see for example sub-section 1A(c)) or because the error did not appear on the face of the record or because the error did not go to the Judge Advocate's jurisdiction.)

The Court accepted it had jurisdiction to grant a declaration under s.39B of the *Judiciary Act*, however, applying the observations of Brennan J in *Sankey v Whitlam* (1978) 142 CLR 1. According to Brennan J, *"most exceptional"* circumstances would need to be shown before the Court would interfere.

As Sackville J outlined in *Westwood* (from which, to date, there has been no appeal and the Law Council understands none will follow), it is almost impossible to conceive of a situation where there would be "most exceptional circumstances", within the meaning of this test.

This is an important issue, but one which the Commonwealth Parliament has rarely had to consider in view of the terms of s 68(1) of the Judiciary Act 1903 (Cth) which provides:

> *Jurisdiction of State and Territory courts in criminal cases*
>
> *The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:*
> ...
> *the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;*
>
> *..., shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.*

The Law Council does not favour any amendment to the Bill which would allow any overturning of a verdict of not guilty. However, the Law Council does favour the introduction of the following provisions similar to these, derived from s.5F of the *Criminal Appeal Act* (NSW):

> *(2) The Attorney General or the Director of Public Prosecutions* [the Bill would refer to the Director of Military Prosecutions ('DMP')] *may appeal to the Court of Criminal Appeal* [The Defence Force Discipline Appeals Tribunal ('DFDAT')] *against an interlocutory judgment or order given or made in proceedings to which this section applies* [any Australian Military Court proceeding].

[1] The court found the Director of Military Prosecutions was *"the Commonwealth"* for this purpose.

*(3) Any other party to proceedings to which this section applies may appeal to the Court of Criminal Appeal* [DFDAT] *against an interlocutory judgment or order given or made in the proceedings:*

*(a) if the Court of Criminal Appeal* [DFADT] *gives leave to appeal, or*
*(b) if the judge or magistrate of the court of trial* [the Military Judge] *certifies that the judgment or order is a proper one for determination on appeal.*

*(3A) The Attorney General or the Director of Public Prosecutions* [DMP] *may appeal to the Court of Criminal Appeal* [DFDAT] *against any decision or ruling on the admissibility of evidence, but only if the decision or ruling eliminates or substantially weakens the prosecution's case.*

The Law Council considers that these provisions derived from the NSW statute have the advantage of having been the subject of much appellate consideration and have a well settled meaning.

The Law Council also respectfully observes that the members of the Australian Military Court will have had very limited experience in relation to the conduct of criminal trials. None of those currently appointed have held civilian judicial office before and some members may have had almost no criminal or litigation experience. It is therefore particularly appropriate that there be the right to bring interlocutory appeals, as we have indicated above, to the Defence Force Discipline Appeal Tribunal, which is composed of experienced judges of superior courts around Australia.

**Activities of the AMC**

The Law Council notes that there is little publicly available information as to the activities of the AMC, which has now been operational for about 6 months or so.

The Law Council's Military Justice Working Group has information that the AMC has been beset by problems, which have been the subject of an enquiry by the Senate Standing Committee and that, as a result, detailed statistics to the end of May have been prepared and sent to the Committee under cover of an explanatory letter from the Chief of the Defence Force. So far the Working Group has been unable to procure a copy of this document. Accordingly, the Working Group is not well equipped to assist the Committee with matters concerning the performance of the AMC, but is prepared to give such advice as it may be able in answer to ad hoc questions during the next Committee hearing.

**Chief of Defence Force Commissions of Inquiry into Military Deaths (COI's)**

Again the Law Council is reliably informed that the progress of such enquiries has been the subject of a separate report to the Committee by CDF to which the working group has not yet had access. The Senate may wish to know that Paul Willee QC has been appointed to CDF's panel of presidential members for the conduct of such COI's and may be able to comment on an *ad hoc* basis.