THE ASCRIPTION OF JURISDICTION TO COURTS-MARTIAL: SOCIAL POLICY IMPLICATIONS FOR A MEDIUM-SIZE, DEMOCRATIC POWER

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INTRODUCTION

Professor Zillman's article "Military Criminal Jurisdiction in the United States"[1] clearly and lucidly describes the issues arising from United States case law relating to United States military courts-martial. Zillman's article traces the developments, over time, in United States legislation and jurisprudence respecting the civil and military jurisdiction of United States courts-martial (including the nature and extent of the jurisdiction exercised by courts-martial as to persons and as to subject-matter). Whilst accomplishing this expertly, it did even more.

Of special interest to us in Australia is the clear presentation in Zillman's article of the policy issues which underlie the United States' legislative and judicial responses. Many of these same policy issues arise, although usually in a rather different social setting, in the Australian context. It is these issues and their implications for the development of Australian military law upon which I propose to focus.

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The following comments were offered extemporaneously on the implications of themes raised in D N Zillman's "Military Criminal Jurisdiction in the United States" infra n 1, lead paper presented at the Military Courts-Martial Symposium, Perth (WA) 1989. This is a transcription of those comments edited by the author.

1. D N Zillman "Military Criminal Jurisdiction in the United States" (1990) 20 UWAL Rev 6.

From Zillman's article can be identified five specific issues of social policy which must arise in this field in Australian military law, as they have arisen in the United States. Whereas these issues have already been squarely faced by the United States courts and by the Congress, most of them still lie below the surface in the Australian context. The nature of the two countries' legal systems is such that one cannot rely upon the same level of judicial activism to resolve these issues in Australia as has occurred in the United States. In part because of the disinclination of Australian judges to involve themselves in what are seen as particularly policy related issues, and in part due to the far lesser volume of court-martial jurisprudence in Australia as compared with the United States, I suggest that we shall have to look to legislation to resolve these issues. I further suggest that it is not satisfactory for the basis of court-martial jurisdiction in Australia to continue, in future, to reside in mere subordinate legislation. In short, I would suggest that the Commonwealth Parliament - either directly, or through the intermediation of a Law Reform Commission - will have to sift through the policy issues to which I have alluded (and upon which I shall expand) as a prelude to its enactment of legislation.

As noted previously, there are five major policy questions which are likely to confront Australian law in this field. I propose to deal with each in turn. However, my treatment must, of necessity, be rather cursory: all I propose to do is to identify these policy issues, and, in the few instances where I feel able, to hint at the directions in which Australian legislation might move.

I. INDEPENDENCE OF THE JUDICIARY

In defining the limits of court-martial jurisdiction, any democratic nation must afford the greatest concern - one is tempted to go so far as to say *paramount* concern - to assuring the independence of the military judiciary. As was the case in the United States experience,[2] one would anticipate that the Australian Parliament and the Australian people also would expect there to be meaningful guarantees that the military judge is, and always will remain, a truly judicial officer, exercising an independent jurisdiction under law; and that such a judge will never be a mere administrative agent of the military command structure.

2. See ibid.

While the same policy concern over judicial independence in the military exists in Australia as existed in the United States,[3] the nature of the military structures of the two countries makes it inherently far more difficult to insulate the Australian military judiciary from what Zillman terms "command control".[4] The mere size differential between the military organizations of the United States on the one hand, and of Australia on the other, makes it inherently far more difficult to insulate the Australian military justice system from "command control". When (as currently is the case) the total number of military personnel in Australia is less than the number of military personnel stationed at certain *individual* military bases in the United States,[5] the officers of the Judge-Advocate-General's Branch within any of the Australian armed services cannot but experience frequent (if not constant) interaction, both professional and social, with their counterparts in many other branches of the military establishment.

Let me put the issue bluntly: How can one assure the independence of the military judge from "command control" in a military environment such as that of Australia in which every general officer is likely to be on first name terms with almost every other general officer, in every branch of each of Australia's armed services?

A. The Necessary Perception of Judicial Independence

A second difference between the military structures of Australia and of the United States further complicates the key problem of assuring the continued independence of the military judiciary in Australia which the legislature must ultimately confront. In comparison with the United States situation, the military justice system of Australia offers far fewer opportunities for advancement. This fact becomes relevant in the present context because, as with the civilian judiciary, it is not enough that the judge be independent; rather, it must be manifestly obvious to all, in the military as in civilian life, that the judge at a court-martial enjoys full independence in exercising that judicial function.

3. Ibid.
4. Ibid.
5. The total number of military personnel in the Australian Defence Force is 64 908. *Defence Report 1988-89* (Canberra: AGPS, 1989). Compare this figure with total mumber of military personnel at US military installations in Norfolk, Virginia (79 116) and San Diego, California (105 383). See appendix to *Base Closure Military Installations and Facilities Sub-Committee Hearing* HR Doc No 1583, HR Doc No 4481 (1988).

In a large military justice environment, such as that of the United States, even the less-than-fully-informed observer might more willingly conclude that the military judge will look for advancement to the judgment of that judge's many peers within the military justice system. By comparison, and in view of the relatively tiny size of the full-time military justice hierarchy in Australia, this outside observer is far more apt to suspect, incorrectly or otherwise, that in order to guarantee personal advancement, the Australian military judge might (consciously or unconsciously) be inclined to render decisions pleasing to the military hierarchy.

In part, of course, this problem has in the past been overcome in Australia by utilising significant numbers of reserve officers to staff the military justice system. Indeed, many of the military judges sitting in Australia today spend by far the greatest proportion of their working year as legal practitioners, or as judges of the several States' District and Supreme Courts; and, as the occasion requires, they exchange their barristers' or judges' gowns and wigs for their military or naval uniforms. However, notwithstanding the fact that when these reserve officers perform their judicial function in the military they bring to that function the traditions of judicial impartiality with which they have become imbued in civilian life, one must question whether our less-than-fully-informed observer would indeed deem it "manifestly obvious" that this small corps of reserve legal officers can exclude from their minds, when sitting as military judges, all thought of their own advancement within the military hierarchy.

In view of the small number of military law officers in Australia, both full-time and reserve, it is a fact of life that relatively senior persons in the Australian legal profession enjoy but a relatively lowly rank when they serve as reserve military or naval officers. I do not doubt but that when fulfilling their military functions (in the present instance when sitting in judgment at courts-martial) these persons *do* indeed decide every case with scrupulous integrity: on its merits, impartially, and strictly according to law. Nonetheless, I respectfully suggest that the present system does *not* make it manifestly obvious to the lay observer that this is indeed so. What is required of Australian courts-martial, so as to assure the future independence of the military judiciary from "command control" in peace-time and in war-time (and even in "sensitive" cases) and also to assure that this independence is

manifestly obvious to all, is a fundamental change in the structure of the Australian military judiciary.[6]

B. Competence

While the public, as well as the military establishment, expects the military judge to be independent, it also expects that that judge will be highly competent. At such time as Parliament or a law reform body sees fit to review the question of the jurisdiction and constitution of Australian courts-martial, this subsidiary question of the assurance of the highest standards of competency for the military judiciary also will have to be faced.

As I reflect upon the implications for Australia suggested by Zillman's article,[7] I only ask in passing whether the special magistrate within the Australian military is indeed likely to have sufficient ongoing and regular experience in judging criminal cases. In raising this question I once more imply no disrespect for the several persons who today perform this function. Nonetheless, I do have the impression that many of the special magistrates are in fact reserve officers; and that in civilian life a large proportion of them are in legal practices which concentrate upon fields other than criminal law. Even if, as no doubt is the case, an examination of the proceedings which these reserve officers have presided over as military special magistrates would demonstrate their competence, one must nonetheless question whether the lay observer (and more importantly perhaps, the accused in the military court) can properly be expected to have the fullest confidence that all special magistrates, including those coming from a primarily non-criminal law civilian practice, are indeed as fully competent to sit in judgment in military cases as are their legally qualified counterparts[8] in the civilian magistrates' courts.

II. DEFENCE COUNSEL

Zillman's article outlines the stages through which the United States military justice system and United States military law have passed in their quest to assure that the military accused always shall

6. I reiterate that I come to this conclusion without in any way implying the slightest disrespect for the professionalism and impartiality which has been and continues to be manifested by Australia's military law officers.
7. Supra n 1.
8. That is, those magistrates who have attained a university degree in law prior to receiving magisterial appointments.

have the services of competent and independent defence counsel.[9] In the United States this has resulted in the development of an independent career Defense Counsel Service within the military itself. Military lawyers who prove themselves adept at defending service personnel and others charged at the behest of the military authorities before courts-martial, may look to their peers and to their superiors within this Defense Counsel Service for assessment of their abilities. They may thus anticipate promotion and furtherance of their careers.

Once again, given the relatively minute size of the Australian military justice community (when compared with that in the United States), at first impression one would think that it simply is not feasible for a similar defence counsel service to be established within the Australian military justice system.[10]

The consequence of this fact is that so long as military offences in Australia are to be tried in highly distinctive military courts, having their own equally distinctive procedures, it must be significantly more difficult in Australia than it is in the United States to assure that, at all times and in all circumstances, the Australian military accused receives the services of counsel fully conversant with the practices and procedures of the military court.

In coming to this tentative view I advert my mind especially to the circumstance, not of the typical Australian military trial today, often conducted in or near an Australian state capital city, and certainly conducted within the familiar peace-time milieu; rather, I advert my mind to the more unusual situation (at least today) where the trial may occur overseas, possibly at a time when Australian forces are engaged in hostilities of one type or another, and conceivably in a place subject to significant logistical difficulties. If one may assume that a policy imperative exists in Australia[11] to assure professionally competent defence counsel to each and every military accused,[12] then the circumstances of the Australian military establishment in general, and of the Australian military justice establishment in particular (in contradistinc-

9. Supra n 1, 32-33.
10. Perhaps not even if a unified Defence Counsel Service were to be formed from all of the Australian armed services - although this concept may warrant further examination.
11. As Zillman relates that one exists in the US; see supra n 1.
12. Let alone to assure each military accused, in all such circumstances, a right of choice from amongst a significant pool of such professionally competent military defence counsel.

tion to those of the United States), auger in favour of reducing, in so far as is reasonably possible, the distinctions which presently exist between the laws, practices and procedures of Australia's military courts as compared with those of the country's civilian courts.

III. AUSTRALIA'S MILITARY: AN "OCCUPATIONAL" OR AN "INSTITUTIONAL" MODEL?

Zillman expertly canvasses the attempts over time of the United States military justice system to define itself as partaking primarily of what he terms either the occupational or the institutional model. In the end he tells us of the decision reached in the United States experience, and of the effects of that decision upon both the present structure of United States military law and the over-all ethos of the United States military justice system.[13]

When contemplating the structures of which the Australian military justice system of the future might partake, it may be of use to determine into which of these two categories Australia's military may best be placed. Does the Australian military partake of an "institutional" or an "occupational" model? Tentatively, I would suggest that the Australian military at present partakes to some significant extent of each of these two models. Either this process of institutional definition will have to advance to a stage permitting of a firm conclusion, or the future Australian military justice system will have to accommodate itself to such a hybrid "socio-military"[14] structure.

Many attributes of what is termed in Zillman's article the "institutional" model are to be found in the Australian military. For example, it appears that throughout recent decades, if not throughout its entire history, Australia's armed services have had a clear preference, where possible, to retain their highly trained officers and enlisted personnel for relatively long periods of service (in preference to staffing the Australian military with relatively large numbers of personnel on short-term enlistments, or with inductees).[15] Additionally, in the entire dis-

13. Supra n 1.
14. Apologies for this invention of a term. However, its meaning seems readily apparent in the context used, and the author is aware of no term in general usage which expresses the concept intended.
15. One might cite in support of this assertion the public outcry regarding the loss of such key personnel as flight officers to the civilian sector, and the establishment by the Hawke Government of a junior ministry concerned largely with improving the retention rates of the armed services through provision of improved amenities for service personnel and their families.

cussion during recent years of the future of the Australian military establishment it appears to have been accepted by all that conscription is not on the horizon. A third factor which may lead one to see the Australian military partaking of the institutional model is the fact that neither civilian nor military planners foresee the need in the short to medium term future for rapid expansion of the Australian military. Neither in the Dibb report,[16] nor in the debate which followed its publication, was such a need identified as part of any likely scenario which might confront Australia's armed services.

On the other hand, however, Australia's armed services do manifest certain attributes of what is spoken of in Zillman's article as the "occupational" model. Australia's armed services, most especially the Army, presently have a large reserve component; and this reserve component appears likely to play at least as significant a part in future Australian military policy as it does in present-day planning for military contingencies.

Just as significantly, when one compares the Australian military with its United States counterpart, one finds the Australian military community far more integrated with its Australian civilian neighbours than typically is the case in the United States today (or in the recent past). While this matter would no doubt be a fruitful field for extensive sociological inquiry, I will simply note in passing that, in contrast with the practices of the United States Department of Defense, the children of Australian military personnel attend schools in the surrounding civilian community: Australia's military (unlike the United States Department of Defense) does not have, and appears unlikely to establish, separate schools and a separate uniform, national[17] educational curriculum for the children of Australian service personnel. I cite this as but one example of the far greater integration in its day-to-day life of the Australian military community with the surrounding civilian community than is the case when one looks at the facilities provided at major military installations within the United States, and of the lifestyle followed by the military personnel and by their families at such United States bases.

16. P Dibb *Review of Australia's Defence Capabilities: A Report to the Minister for Defence* (Canberra: AGPS, 1986).
17. Indeed, international.

Clearly, an assessment of the Australian armed services must lead to the conclusion that they are significantly different in what I term their socio-military character from those of the United States. However, the extensive discussion by Zillman of the competing influences of the occupational and of the institutional model in the American experience, examined over time, offers guidance when seeking to assess the sort of socio-military model which one might seek to perpetuate in Australia; a model to perpetuate and to buttress through the establishment by legislation of a military justice system for the Australian forces in the 21st century which is commensurate with the values and needs of that socio-military model.

IV. EXTRA-TERRITORIAL JURISDICTION

A fourth policy issue canvassed in Zillman's article also has a counterpart in the Australian experience. It therefore needs to be assessed when seeking to chart the future directions for the Australian military justice establishment and for Australian military law. In any such planning exercise special consideration must be afforded to the issue of the trial of offences allegedly committed by Australian military personnel when stationed outside of Australia.[18]

Again, in contrast with the United States situation, it may safely be anticipated that Australia will conduct far fewer courts-martial in such situations than does the United States. Quite simply, in comparison with the United States (and most especially in peace-time)[19] Australia stations only a relatively infinitesimal number of military personnel and their families overseas, and they are stationed in a far smaller number of foreign countries. If, as we learn from Zillman's article, the need to assure a trial consistent with the expectations of the United States community and consistent with the general traditions of the United States legal system has led to the creation of a highly differentiated military justice system in the United States possessing a relatively extensive jurisdiction over the dependants of military personnel and over offences not intimately related to military service, then a significant motivation for this has been the need to meet the require-

18. And dependants who accompany them to their overseas postings.
19. Additionally, it would seem that for purposes of planning the directions to be taken by Australian military law and its military justice system, one must assume that Australian forces will be engaged in hostilities far less frequently than has been and will likely be the case with the armed forces of the United States.

ments of the relatively far greater number of United States military personnel and military dependants regularly stationed overseas in peace-time. By contrast, this certainly is a far less pressing concern in the Australian situation. In shaping Australia's future military justice system, law reformers and legislators may therefore afford somewhat lesser weight to this policy consideration.

With respect to the trial of offences overseas, a second factor differentiates the Australian and the United States situations. This factor also must be of relevance to law reformers and to other planners who may be called upon to shape the future of Australia's military justice system. Unlike the United States situation, there is no clear constitutional impediment in Australia to vesting in a predominantly civilian Australian criminal court sufficient jurisdiction to try such offences.

Subject to detailed analysis, I would hazard the view that, constitutionally, there would seem to be no impediment to vesting jurisdiction in an Australian court to try Australian citizens under the ordinary civilian laws of an Australian State or Territory for acts committed in places over which Australia does not enjoy sovereignty under international law. Thus, should legislators or law reformers be desirous of significantly demilitarising the military justice system,[20] it would appear feasible, for example, to make the ordinary criminal laws of the Australian Capital Territory applicable to Australian military personnel and their dependants in respect of acts they may commit at Australian military installations overseas.

There already is a close precedent (albeit one which apparently has not yet been subjected to judicial scrutiny). Under international law the area known in Australian municipal law as the Australian Antarctic Territory would appear not to be the sovereign territory of the Commonwealth of Australia. However, legislation of the Parliament of the Commonwealth of Australia purports to make the legal system of the Australian Capital Territory applicable to Australians when they are present in the Australian Antarctic Territory;[21] and this Act provides

20. In comparison with the United States policy choice to quite clearly differentiate the military from the civilian justice systems of that country.

21. The most current reprint of the relevant legislation is not available to the author at the University of Western Australia. See however the (Cth) Australian Antarctic Territory Act 1954 s 6(1).

for the submission of matters arising in the Australian Antarctic Territory to the jurisdiction of a domestic Australian civilian judge.[22]

V. MILITARY DISCIPLINE

Finally, a fifth policy consideration very clearly emerges from the review of the United States experience provided for us in Zillman's article. Constantly over time, United States military law has been influenced significantly by the requirement for courts exercising jurisdiction over service-related offences to be appreciative of the special requirements of military discipline. It would appear that this factor is equally as applicable when one assesses the form which Australia's military justice system might best take in the coming decades.

This requirement may militate in favour of restricting jurisdiction over military personnel in respect of service-related offences to a relatively limited number of judges, so as to assure that the judges exercising such jurisdiction develop a sufficient appreciation of those requirements which follow from the disciplined structure of a military force. Thus it would appear reasonable at first glance, if full heed is to be given in the Australian context to this final policy consideration, to suggest that Australia's military judges probably ought to remain at least *significantly*[23] differentiated from their civilian counterparts. Hence, it is suggested that Australia must retain a special corps of uniquely *military* judges.

However, Australia may well find it desirable, if not indeed necessary, to meet this policy requirement by shaping its future system in a uniquely Australian socio-military mould. In balancing this policy requirement for judges exercising jurisdiction over service-related offences to be fully conversant with the requirements of military discipline, in conjunction with the other policy considerations canvassed in Zillman's article and outlined above in the Australian context, military planners, law reformers and parliamentarians may choose to steer a middle course.

22. Ibid, s 10(1). Once more, the author has been obliged to rely upon his recollection formed from a perusal of this subordinate legislation at law libraries elsewhere in Australia and overseas.
23. Such a *significant* differentiation need not, as is suggested below, require the *absolute* differentiation between the military and the civilian judiciary which has evolved in United States law. Indeed, a quite different means of achieving the level of differentiation appropriate to the Australian context is proposed, at least tentatively, in the following paragraphs.

An adequate and sufficient response to this policy consideration[24] might be to vest jurisdiction over military offences (howsoever defined in future military law reform enactments) in a relatively small number of judges selected from the ranks of the various State and Territorial courts, both inferior and superior. In addition to their present commissions as judges or warrants of appointment as magistrates, these individuals might be appointed as well to serve on a newly established Australian Court of Military Justice.

Appointments to this Court of Military Justice, which might contain branches corresponding generally to the inferior and superior civilian courts, might be restricted to individuals who, by virtue of their security of tenure on the various State and Territorial benches, will manifest obvious impartiality when called upon to adjudicate in military cases. Either prior to or immediately following their secondary appointment to such a newly constituted Australian Court of Military Justice, these judges and magistrates could be afforded an extensive programme of orientation designed, amongst other things, to familiarise them with the current structure and operational exigencies of Australia's several military services, and with the nature and purposes of present-day Australian military discipline.

Once again, precedents exist for vesting jurisdiction as judges of special federal courts in serving judges of Australia's State Supreme Courts and of the Federal Court of Australia. Historically, the judges of Norfolk Island (an external territory of the Commonwealth of Australia) have been drawn from the ranks of the judges of other Australian superior courts.[25] Currently, the Supreme Courts of the external territories of Christmas Island and of the Cocos (Keeling) Islands are presided over (on the relatively rare occasions when these courts are required to sit) by one of the two or three judges of the Federal Court of Australia who hold additional commissions as judges of one or another of these two territorial Supreme Courts.[26]

24. Tentatively, indeed, I would venture a preferable response as well.
25. See (Cth) Norfolk Island Act 1979 s 55:

> A person may be a Judge of the Supreme Court [of Norfolk Island] notwithstanding that he is also a Judge of another court created by the Parliament, or is also the holder of a judicial office in relation to a Territory other than Norfolk Island, by virtue of an appointment made either before or after his appointment as a Judge of the Supreme Court.

26. I thank my learned colleague Peter Johnston for allowing me to buttress my recollection of the pertinent legislation by perusing the enabling provision, being

CONCLUDING REMARKS

In this brief commentary on Zillman's article I have been decidedly limited in my objectives. I would suggest though that in the not too distant future many of the same types of policy issues which have been confronted by the United States military justice system well may arise, albeit in a different form, within the distinctive Australian milieu. An apparently quite satisfactory response to these socio-military policy issues has been found in the United States context in large part through the series of far-reaching judicial decisions in that country. By comparison, the less interventionist tradition of the Australian judiciary makes it relatively unlikely that necessary accommodations to Australia's emerging socio-military policy requirements can or will be fashioned in the Australian military justice system through the medium of case law. Rather, I would suggest that any such reforms will have to be the result of legislation.

Hopefully, such legislation will occur not in an environment of crisis, but, rather, in the wake of a careful and mature consideration of the future requirements of Australia's military justice system. Such consideration may occur quite profitably both within the military justice establishment, as well as through the activities of other persons (including the studies of academics within both schools of law and departments of strategic studies, and those of law reform agencies). Although the United States experience is far different from that which Australia faces or is likely to face,[27] such planners - civilian and military - can, with great profit, study the socio-military policy problems which are common generally to military justice systems in democratic nations of the common law tradition, and which emerge vividly from Zillman's article.

s 5B, in his personal copy of the Supreme Court Ordinance 1963 of the Territory of the Cocos (Keeling) Islands.

27. See supra n 1.