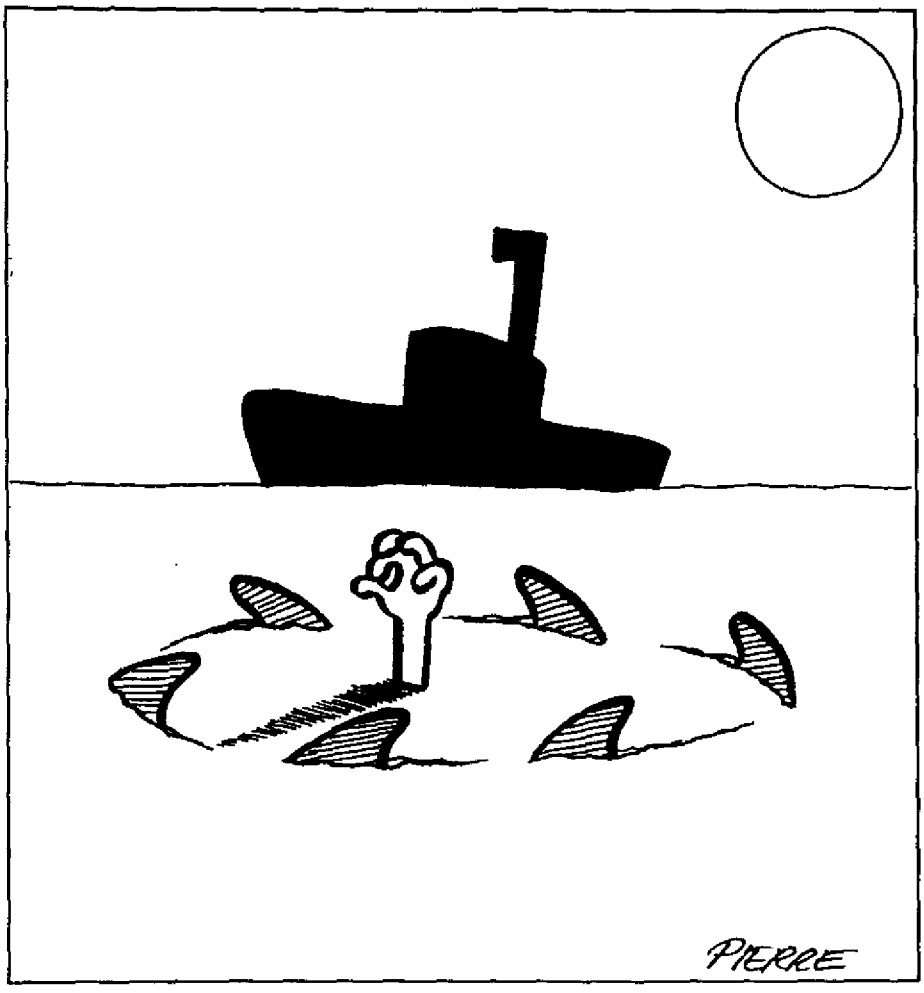
# Time and Prejudice

**Ross Duncan looks at the media reporting of "Dolly" Dunn's discovery and arrest in Honduras and considers when the right to a fair trial begins for the purposes of Australian contempt law**




Recent media coverage of the arrest of alleged pedophile, Robert 'Dolly' Dunn, in Honduras has highlighted yet another uncertainty in the law of contempt. Simply, when a person wanted in relation to serious criminal charges in an Australian jurisdiction is apprehended outside the jurisdiction and faces extradition proceedings, at what point does the matter become sub judice in the Australian jurisdiction? The answer to this question is unclear although the facts of one NSW case suggest media reports after Dunn was apprehended may well have been in contempt.

In November, Australian authorities, with a little help from a 60 Minutes crew, finally caught up with alleged pedophile, Robert 'Dolly' Dunn in Honduras. A total of 91 warrants had been issued since October 1996 for his arrest in relation to alleged sex offences against children. Dunn was deported from Honduras to the United States where, at the time of writing, he was facing an application for his extradition to Australia.

For the most part, the media considered itself unrestrained in its reporting of this story. Pictures of Dunn were published on the front pages of newspapers and in television news and current affairs programmes. Material which had been presented to the NSW Police Royal Commission concerning Dunn was referred to, and the moment of his apprehension in Honduras was caught on videotape and featured in an episode of 60 Minutes. John Westacott, 60 Minutes executive producer, confidently informed Radio National's Peter Thompson that the programme's legal advice was that there was no sub judice question until Dunn had been formally charged - that is, until he returned to Australia. In contrast, Attorney General Daryl Williams managed to duck some hard questions about the Australian authorities efforts to locate Dunn, claiming that the extradition proceedings were sub judice!

## OPERATION OF SUB JUDICE RULES

The sub judice rules which form part of the general law of contempt operate to restrict the publication of material which is intended or has a tendency to interfere with the administration of justice: *Attorney General for New South Wales -v- TCN Channel Nine P/L* (1992) 20 NSWLR 368 at 379-80 ("**Mason case**").

Material which has been found to be likely to interfere with the administration of justice by prejudicing an accused's right to a fair trial in criminal cases includes:

- a photograph of an accused person if identity may be an issue at the trial.
- material which prejudges the guilt of a person.
- criminal record or bad character of an accused person.

However, the sub judice rules only restrict publication of material in relation to 'pending proceedings'. As the Court of Appeal acknowledged in the Mason case:

> *'In the case of criminal proceedings, the problem is one of identifying the point from which there can be said to be proceedings which are pending'.* (at 375)

## WHEN ARE PROCEEDINGS 'PENDING'?

It is clear that criminal proceedings are pending from the time a person is arrested and charged (*James -v- Robinson* (1963) 109 CLR 593) and, in New South Wales at least, they are pending from the moment a person is arrested. In the Mason case the court explained that arrest was the relevant time because:

> *'That was the time of initiation of criminal proceedings against him [Mason]. That was the time the criminal law was set in motion. From that time there was an obligation to bring him before a court as soon as*

*reasonably practical. From that time he was to use the language of Hall 'under the care and protection of the court' (at 378).*

Given that the Mason case identifies arrest as the starting point, it would seem to follow that any steps in the criminal process prior to that time such as the issuing of a warrant for arrest do not trigger the sub judice period. Certainly, the court showed little interest in the English common law notion of 'imminent' as opposed to 'pending' proceedings. The court did however, note that the *Contempt of Court Act 1981*, which now governs contempt law in the United Kingdom, related liability to the time proceedings are 'active' and that proceedings were active from the time of arrest without warrant, yet no mention was made of the fact that, under that Act, proceedings also become active upon 'the issue...of a warrant for arrest.'

While the effect under Australian contempt law of the issuing of a warrant remains uncertain, an even more complex question arises in circumstances such as those of 'Dolly' Dunn. Not only had the media coverage commenced after warrants for his arrest had been issued, it continued after he was apprehended and then brought before a court to face extradition proceedings.

As mentioned, 60 Minutes took the view that it was open season until Dunn had been charged. While Westacott may not have been explaining his legal advice with precision, certainly the notion that criminal proceedings aren't pending until a person is charged is at odds with the Mason case.

Furthermore, even if it can be argued that Dunn's arrest in Honduras was not an arrest as part of the criminal law process in New South Wales, such an argument would seem to sit uneasily with the outcome of *Attorney General for NSW -v- Mirror Newspapers Limited* (1962) NSWLR 857 ("Bradley case"). In that case, which related to the infamous kidnapping and murder of schoolboy Graeme Thorne, a warrant for the arrest of Stephen Bradley had issued in New South Wales. Police in Ceylon (now Sri Lanka) detained Bradley at the request of New South Wales police. On the day of his arrest, the Daily Mirror published a photograph of Bradley with a caption stating that he had been arrested at Colombo on a warrant charging him with murder. Bradley was remanded in custody pending proceedings for his return to New South Wales. Mirror Newspapers was convicted of contempt on the ground that identity was likely to be an issue in Bradley's trial and the photograph was therefore prejudicial. While the Full Court considered only the likely prejudicial effect of the photograph and seems simply to have assumed that the matter was sub judice at the time, the factual situation appears largely indistinguishable from that surrounding Dunn's apprehension in Honduras.[1]

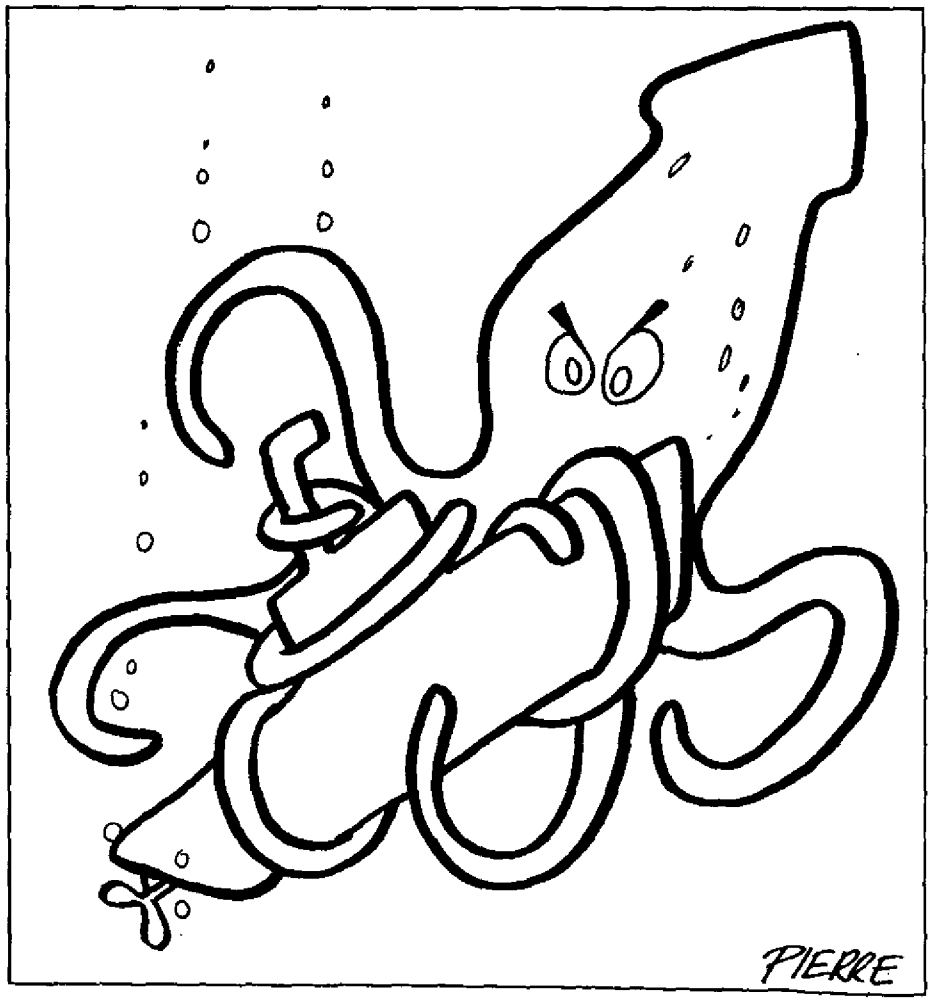
## POSSIBLE OUTCOMES

In the absence of clear authority it is only possible to speculate about the point at which the sub judice period commences where a person wanted in an Australian jurisdiction to face criminal charges is apprehended outside the jurisdiction and subsequently becomes the subject of extradition proceedings. It seems at least arguable that the matter becomes sub judice at any one of the following points in time:

- when the person is apprehended by authorities in the foreign jurisdiction and a request for extradition is made.
- when extradition proceedings commence in the foreign jurisdiction.
- when extradition is ordered and the person is surrendered to the Australian authorities.
- when the person physically returns to the Australian jurisdiction.
- when the person is formally charged in the Australian jurisdiction upon his return.

Arrest in the foreign jurisdiction accords with the circumstances in the Bradley case and is arguably consistent with the 'time of arrest' nominated in the Mason case. Query, however, whether that event can reasonably be considered the moment when, as the court put it in Mason's case, 'the criminal law is set in motion'. On one view, extradition is simply the extraterritorial dimension of the local criminal law. On the other hand, it can be argued that the relevant criminal law process is that of the Australian jurisdiction and that is not set in motion at least until an order for extradition has been made and possibly not until the person is returned to Australia.

As pointed out in Borrie and Lowe, 'The difficulty, as always, is to balance the protection of trials from prejudice with upholding freedom of speech. Too early a starting point unduly restricts freedom



of speech but uncertainty too long has an inhibiting effect.' (Law of Contempt, 3rd ed. 236). It is submitted that the appropriate trigger point should be the moment when extradition is ordered and the person is surrendered to the Australian authorities. It is that moment which seems most closely to approximate the arrest of a person in the Australian jurisdiction. It is only at that time that the wheels of the criminal process in the Australian jurisdiction inevitably begin to roll, that the person is certain to be brought before the courts in the place where the charges must be answered. The issuing of a warrant seems too early and would, as in the case of Christopher Skase, result in public comment being unduly stifled when there is next to no chance of the person ever returning to Australia.

Courts, of course, will generally be more concerned to protect the criminal justice process than free speech and, if asked the question in relation to circumstances such as Dunn's, are likely to settle upon an earlier rather than later time. Whatever the correct legal position may be, it seems unlikely that the authorities in New South Wales will be going out of their way to ensure the fair trial of an alleged pedophile, - at least, that is, until he sets foot back on Australian soil.

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[1]see also *R -v- Clarke, ex parte Crippen* [1908-1910] All ER 915 at 921 per Coleridge J for obiter statement that the English common law considers proceedings pending from the issue of a warrant.

# Moral Rights - Beware the Waiver Mongers

**Simon Lake of the Australian Writers' Guild examines the current proposed amendments to the Copyright Act to introduce moral rights in Australia and argues that the inclusion of waiver provisions is theoretically and operationally flawed**

At the end of each episode of *the Simpsons*, the production company logo emerges with an invisible child's voice saying "I made that".

Innocent as it sounds, the claim of authorship has been one of the most contentious copyright and creative issues in the audio visual world. In Australia, the stage on which this battle has been fought is the legislation on moral rights[1] which is currently before the Senate.

The Senate Committee in its report on the Bill which was released in October, said that writers should be included along with directors and (unfortunately in our view) producers as an "author" or "maker" of a film.

We understand that the Bill is due to be debated in March 1998.

The Australian Writers' Guild ("AWG") has received overwhelming support for its view that the writer should be considered along with the director as being an author of the film. Space does not permit me to explore the authorship debate to the degree that it deserves.

Those that make films know the reality and centrality of the writers role and they have supported our position. Needless to say we are grateful to the Senators, particularly the Coalition Senators, who also supported our view.

In this article I want to concentrate however, on a debate which has not attracted the same degree of publicity as authorship. That is, the objection of writers and directors to the waiver provisions in the bill and recent developments in forging an industry consent clause to replace the application of blanket waivers.

Some members of the legal profession have warned that moral rights will stop production and investment. Not since the introduction of the Mabo legislation, when suburban free-hold backyards were supposedly being threatened, has there been such self serving rhetoric from sectors of the legal profession.

I hope to put those fears in context and put forward an argument that Australia should embrace moral rights as an important step in confirming our respect for artists and their contribution to society.

These goals of respect and investment certainty can co-exist. The production industry has made considerable positive progress in creating a better solution with an industry consent clause and will continue to do so. That is, unless the "waiver-mongers" get their way.

## WHY THE AUSTRALIAN WRITERS' GUILD OBJECTS TO WAIVER

Waiver treats moral rights as an economic right subject to contractual negotiation, as opposed to an inalienable personal right, such as the right to vote or the integrity of the body.

Although the legislation recognises moral rights as a personal right to the extent that moral rights cannot be assigned, it does in its present form, allow an artist to waive their moral rights in works already in existence.

In our submission to the Senate Committee we argued that a waiver is effectively a relinquishment of one's rights.

What a waiver is saying in effect is that there are no circumstances, in the present or in the future, under which you can protect your work from gross distortion or mutilation. And there is no aspect of consultation or negotiation implicit in a waiver.

Moreover, the reality for writers and directors is that they are in a weak bargaining position and will be forced to waive their rights. This is the experience in all countries with waiver provisions. In England the Writers' Guild and the Directors' Guild have confirmed that the waiver is uniformly enforced.

In Australia many production companies are insisting on waiver as a condition of signing the contract. Australian writers and directors are already losing work if they refuse to sign waiver clauses.

Our French counterparts find the insistence on a waiver very baffling, driven more by ideology than actual experience. Given that they have a 50 year