

Crime and literary profits

The Australian Law Reform Commission is currently undertaking an inquiry into whether the Commonwealth Act should be amended to include literary proceeds of crime

The Son-of-Sam case in the U.S. in 1977 produced the first literary proceeds of crime legislation which came to be known as the Son-of-Sam law.

David Berkowitz, the self-titled "Son-of-Sam", claimed that the dog of his neighbour Sam had told him to commit the murders. He gave the rights to his story, and then a book concerning his crimes, to the *New York Post*. The Son-of-Sam law was passed in response to a furious American public which believed Berkowitz would grow rich from the deals he was making. By 1997, Congress and 36 states in the U.S. had passed similar laws. Equivalent legislation has been used in the U.K. and Canada to confiscate literary proceeds of crime.

These laws have not gone without challenge. In 1991, the U.S. Supreme Court held in *Simon & Schuster v. New York Crime Victims Board* that the New York legislation was unconstitutional. The Supreme Court noted the laudable intentions of the legislation in seeking to prevent criminals from profiting from their crimes and to allow victim compensation from the offenders, but it found that the legislation was too broad. The effect of the Son-of-Sam law was to regulate protected speech and the court found it was too wide to avoid violation of the First Amendment. Under the legislation even mentioning a crime that did not result in a conviction would merit confiscation of the proceeds and the court stated that the proceeds from books such as *The Autobiography of Malcolm X* and Thoreau's *Civil Disobedience* would be open to forfeiture.

In a recent U.S. case concerning Florida's Son-of-Sam law, journalist Sondra London working with convicted murderer and former fiancé Danny Rolling has had her profits seized on the basis that a felon or someone acting on their behalf is prohibited from profiting from their work. Florida amended its legislation in response to the *Simon & Schuster* case to try to distinguish it from the New York legislation found unconstitutional by the Supreme Court. London's case is the first occasion in which such a law has been used against an author working with a felon. The former relationship with Rolling which the judge described as a "unique and special relationship" was a relevant consideration in the decision. London vows to appeal against what she and First Amendment scholars argue is unconstitutional legislation which breaches free speech.

Due to such constitutional problems, courts in the U.S. have used sentencing guidelines to restrict literary proceeds before they have been gained by offenders. Heavy fines and orders for restitution specifically relating to media related profits have been imposed on offenders to ensure there are no profits from literary pursuits. Conditions of probation stipulating no public comment concerning crimes have been made. Such sentencing has been criticised as damaging freedom of speech.

The Australian Parliament passed a Proceeds of Crime Act in 1987. Similar legislation has been passed in Victoria (1986), Tasmania

(1993), Queensland (1989) and South Australia (1996). The Commonwealth Act allows for the forfeiture of items such as drugs or laundered money and allows the Commonwealth to trace, freeze and forfeit proceeds of crime pursuant to international obligations under a number of Criminal Matters Treaties.

The prevailing view is that at present literary proceeds would not be viewed as "proceeds" under the Commonwealth Act. (The Australian Law Reform Commission is currently undertaking an inquiry into whether the Act should be amended to include literary proceeds of crime).

The Australian state legislation differs in the discretion it gives to the courts when ordering the confiscation of literary proceeds. The Victorian Act expressly, and the Queensland Act implicitly, provide for social utility or public benefit criteria to be taken into consideration. In these states, the courts may choose not to order confiscation, or to order partial confiscation, in appropriate circumstances. The South Australian and Tasmanian Acts provide no such flexibility.

Forfeiture applications can be brought by state or federal police under the direction of the relevant Director of Public Prosecutions in the jurisdiction where the infringement has taken place. These are civil proceedings arising out of the civil remedies function of the DPP.

A recent Australian example concerns Heather Parker, a former Victorian prison warden who assisted her inmate lover and another prisoner to escape from custody. Parker contracted with *Woman's Day* magazine to tell the story of the escape and ultimate shoot-out for the sum of \$42,000. The proceeds of the deal were successfully confiscated under the Victorian Crimes (Confiscation of Profits) Act 1986. <

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