

## COMMENT

## Burning the law and celebrating violent vigilantism

CRAIG W J MINOGUE analyses public discussion following the recent Victorian bushfires

On 7 February 2009 a number of bushfires caused an unprecedented loss of life and property in Victoria. It is believed that most of the fires resulted from poorly maintained powerlines sparking together and falling. Police indicated that arsonists may also have been involved but stated clearly that 'arson is unlikely to be the cause of most of the bushfires'.<sup>1</sup> In response to loss of life and property caused by the fires many have donated money and goods, and some have commenced a class action against the private power line company.

The popular public discourse found the legal search to allocate blame 'shameful' and lacking in 'morals' bitterly criticizing lawyers who come out of the woodwork when they 'smell the smoke'.<sup>2</sup> Entirely acceptable, however, was the parallel discourse in which it was proposed that people who intentionally light fires should 'rot in hell'.<sup>3</sup> Within days there were also aggressive calls for action against the arsonists in the public media. Arsonists were to be 'doused in a flammable liquid and set alight';<sup>4</sup> 'burnt to death in his own house';<sup>5</sup> 'tortured';<sup>6</sup> and summarily executed by a 'shotgun blast' by the first good citizen who encounters them.<sup>7</sup>

After the arrest of a person suspected of arson in a country area, the local court placed a suppression order on his name for fear of revenge attacks on him and his family.<sup>8</sup> The suppression order on the man's name was lifted by another court a few days later, but an order suppressing the man's image and address from being published remained in place as the magistrate hearing the matter said 'there was a risk of vigilante behaviour towards' the accused such that if the man's image and address were to be published 'it was likely to lead to attacks'.<sup>9</sup> As one social worker observed of the public discourse, 'firebugs have fallen below pedophiles as the most despised individuals in society', reporting on a community meeting in a fire-affected area where it was suggested that arsonists should be sent 'back into the community and they'd sort 'em out'.<sup>10</sup>

Cases involving people convicted of child sex offences illustrate the problem and the associated danger that exists, when an offender is released from prison, even 'people who vaguely resemble [the offender] can be "beaten up"'.<sup>11</sup> Family members of the hated 'other' can be targeted as surrogate victims for vigilante violence. Following the Victorian bushfires, family of the alleged arsonist 'fled their homes ... in fear of vigilantes after the man's court appearance'.<sup>12</sup> Three weeks before the fatal February 2009 fires, 'police had planned to release sketches of men believed to be involved with [earlier] fires ... but had changed their minds because of fears high emotion would spark a

public witch hunt'.<sup>13</sup> The threat of vengeance does not end in the community. Commenting on the reports that the person arrested was being held under tight security because of fears for his safety, Janice Michelsson who lost her house in the fires said that she did not think the accused arsonist would be safe anywhere: 'it doesn't matter where they put him, people everywhere have been affected by this and I think he will be in for a lot of trouble'.<sup>14</sup> The 'trouble' referred to is to be understood by the reader as coming, not from the formal judicial system, but from the mythology of a 'prisoner code of justice' that deals with the likes of 'rock spiders' — those convicted or suspected of child sex offences. 'Trouble' and being 'touched-up', 'beaten-up' or 'sorted-out' are euphemisms for brutal and possibly life-threatening criminal assault in prison, as part of a culture of vigilantism, and of a need for all (prisoners and free persons) to differentiate themselves from a hated other.<sup>15</sup> The lawyer for the accused arsonist told the court that she fears for the safety of her client 'even in protective custody'.<sup>16</sup>

The media reported that residents in fire devastated areas were putting up signs threatening 'you loot, I shoot'. However, up to the time this sign was put up, the police repeatedly denied that there had been any official reports of looting.<sup>17</sup> Australia does not have corporal or capital punishment, but people are confident enough in their understanding of popular sentiment to threaten these extrajudicial punishments for alleged property crime.

At this point some questions need to be considered. Will any of the estimated 3500 'Facebook vigilantes' who have threatened and incited torture and murder be prosecuted?<sup>18</sup> The Acting Director of Public Prosecutions, Gavin Sibert SC, said on 16 February that the Facebook vigilantes who have defied court suppression orders will be prosecuted.<sup>19</sup> As of the time of writing, 7 March, no charges for contempt had been announced.

During these events a woman named Rosemary Ann Harris was sentenced for lighting two fires in bushland in late 2006. One fire was soon controlled and the other took some weeks to bring under control; no-one was hurt or killed, but some media reports linked Rosemary Harris to the recent fatal fires. In one newspaper report, a double page spread reported both the February 2009 alleged arsonist and the case involving Rosemary Harris, with a headline running across the top of the two pages: 'Separate court appearances spark vigilante fears and anger at mother's "light" sentence'.<sup>20</sup> Firefighters who attended the sentencing in their uniforms, one of whom caught the

## REFERENCES

1. Marika Dobbin, 'Arson unlikely in most of the fires, say police', *The Age* (Melbourne), 12 February 2009, 3.
2. Jenny Herbert, 'Smell of smoke lures the lawyers (Letter)', *The Age* (Melbourne), 16 February 2009, 14; Trevor Beadle, 'Shameful action (Letter)', *The Age* (Melbourne), 1 February 2009, 14.
3. Editorial, 'Dealing with the firebugs', *The Age* (Melbourne) 12 February 2009, 26.
4. Janice Michelsson, 'Open letter to the alleged arsonist behind the Churchill fires', *Herald Sun* (Melbourne), 11 February 2009, 13.
5. Selma Milovanovic, 'Online hate mail threat to arson case', *The Age* (Melbourne) 17 February 2009, 4.
6. John Dorman, Letter (not titled), *The Age* (Melbourne), 10 February 2009, 24; John Spooner, 'The special bunker reserved for an arsonist', *The Age* (Melbourne), 12 February 2009, 25; Kate Hagan, 'Fire accused a target over Facebook photo: lawyer', *The Age* (Melbourne), 18 February 2009, 4.
7. Sean Benedict McKenna, 'No peace in hatred (Letter)', *The Age* (Melbourne), 13 February 2009, 24.
8. Sarah-Jane Collins & Peter Gregory, 'Accused arsonist named despite plea', *The Age* (Melbourne), 17 February 2009, 1; Jane Metlikovec, Mark Buttler & Terry Brown, 'Fire fury as man charged: Accused arsonist appears in court and is branded our most hated Victorian, Nixon call for calm, vigilante warning', *Herald Sun* (special edition) (Melbourne), 14 February 2009, 3.
9. Fiona Hudson, Katie Bice & Michael Wray, 'Secret life of arson accused: day in court', *Herald Sun* (Melbourne), 17 February 2009, 2.
10. Timothy O'Leary, 'Ultimately, arsonists need our help', *The Age* (Melbourne), 11 February 2009, 26.
11. 'Paedophile Ferguson to be moved again', *The Australian* (Sydney), 10 July 2008.
12. David Hastie, Sue Hewitt & Ellen Whinnett, 'A CFA reject: Accused arsonist lit fires monthly', *Sunday Herald Sun* (Melbourne), 15 February 2009, 2.

woman lighting a fire and helped to put it out, said of the sentence, 'It's ridiculous. People like myself are out there putting our lives on the line. A message needs to be sent, she should have got much more'.<sup>21</sup> Perhaps the message will be sent when Rosemary Harris arrives in prison and is the victim of violent vigilante attack resulting in her injury, rape or murder.

While the print media reports mostly relied on above are a more moderate reflection of the popular public discourse, television, talk-back radio and the internet were much more rabid in their reporting of calls for vigilante violence. For example the main bulletin of the evening news on a commercial television news program, Channel 7, reported that:

One hate group has even set up its own web site and they've been posting comments like this, quote – hope this bastard burns, and this one: cut off his fingers and toes, restitch them, then cut them off again.<sup>22</sup>

The ABC's *Media Watch* program, which critically analyses the news media, found that Channel 7's decision 'to air calls for torture and lynching on the six o'clock news is the nastiest kind of sensationalism'.<sup>23</sup>

Online, Facebook vigilantes 'defied the [suppression order of the court] by publishing [the accused man's] photo and address, accompanied by violent threats' for the accused person to be 'tortured and killed'.<sup>24</sup> AAP reported that one Facebook site vowed the alleged arsonist would 'burn in hell' and published the accused man's street address and photo. Both were still on the site some days later. One contributor asked 'let me hurt him, burn him, put a bullet and knife in every orifice [sic] of his body'.<sup>25</sup>

The mainstream print media started to report on the 'cyber-world equivalent of angry mobs'.<sup>26</sup> The Facebook vigilantes defended their actions as 'free speech'.<sup>27</sup> Blog opinion writers, reprinted in the tabloids, defended violent vigilante sentiment and argued that the 'root cause of vigilantism' could be found in a soft justice system that did not impose long enough sentences for serious criminals like graffiti artists.<sup>28</sup> Yes, graffiti artists were equated with the need for violent action against arsonists who cause multiple deaths.

Exploring the subject of the violent vigilantes in the AAP report, leading forensic psychologist Professor Paul Wilson says:

If you look at the crowds, whether they put it on Facebook or whether they're outside the court, you get a lot of different types of people. You get people who really feel so angry about the crime because they've been personally affected. And there's a group of people who like to show others that they really are good citizens because they're protesting against a horrible act. Then you get a third group who really worry me, who probably have done some pretty awful things in their time but like to think there are people out there worse than them. I think that essentially makes us all a bit like sub human beings, a bit like an animal pack. I think vigilantes are very dangerous. The calls for extreme punishment doesn't actually give that closure that they might want. The bottom line is this guy has not been convicted of anything. Are we now living in a society where we have trial by media and trial by vigilantes? I hope not. Messages of vengeance and hate on Facebook or elsewhere on the web are counter productive to law and order.<sup>29</sup>

Defence lawyers, prosecutors, civil libertarians and others criticised the Facebook vigilantes on the

grounds that they jeopardised a fair trial of any accused person.<sup>30</sup> One criminal lawyer, Greg Barns, was quoted as arguing:

The law says if the publicity is of such a direction and such saturation that it would be almost impossible to find a jury that wasn't tainted by that publicity, then you could get a permanent stay. The outpouring of vigilantism and of some of the media and social networking sites like Facebook ... is really counter productive. Those sort of things will be taken into account when a court decides when a trial takes place. The alternative is that a trial doesn't take place for some years.<sup>31</sup>

The conservative national newspaper, *The Australian*, ridiculed the claim that threats of vigilantes jeopardised any fair trial as 'an argument from another age ... by members of the self-appointed liberty lobby in the blogosphere and ABC'.<sup>32</sup> After all, a fair trial 'is the job of the judge to ensure' and by implication it is something that the media and the Facebook vigilantes should not be concerned with.<sup>33</sup>

A case could be made that these threats and incitements to torture and murder, and the defying of court suppression orders, are themselves most serious criminal offences, as they undermine the right to a fair trial which is at the heart of the modern criminal justice system.<sup>34</sup>

This vigilante discourse cannot be dismissed as idle talk by emotionally wrought hot-heads. There are dozens of cases where people have taken vigilante action, tortured and murdered other people, and then used public vengefulness to explain their actions. In the case of *R v Franklin* (2001) 3 VR 9, Lance Edward Franklin and a mob of others under his control tortured two children, one aged 14 and the other 17, murdering the youngest of them in an act of vigilante violence after a petty property offence was committed against Lance Franklin and his minor drug dealing operation. *R v Piket* [2006] VSC 238 reports that the elderly Eustace Willenberg was murdered because the offender 'thought he was a child molester, maybe' (*R v Piket* [2006] VSC 238, para 8). Willenberg's family described him in their victim impact statements as a loving and respected grandfather and head of an extended family who would be sadly missed (*R v Piket* [2006] VSC 238, para 36). The offender, however, said in his record of interview that he thought by stabbing and slashing Mr Willenberg over two dozen times with a long bladed knife he was 'doing society a favour', that he 'was a bloody vigilante for you police, to be honest', and 'doing a service for the police by killing' (*R v Piket* [2006] VSC 238, paras 24, 8, 29). The court found that the allegation that the victim was a child molester was totally without foundation (*R v Piket* [2006] VSC 238, para 4). Violent vigilantism was at issue also in cases such as *Bowhay* (1999) 111 ACrimR 271; *Hall & Hanslow* (1999) 108 ACrimR 209; *R v Bunting* (No. 3) [2003] SASC 251; *R v Craft* [2003] NSWSC 588; *R v Durant* [2007] NSWSC 428; *R v McGrath* [2000] NSWSC 419; *R v Saad* [2002] NSWSC 146; and *R v Wilshaw & Lowe* [2001] VSCA 35. These few cases report the brutal deaths, some involving torture, of 20 people, justified as punishment for alleged offences or because they were suspected of being a 'paedophile, homosexual and deviant' (*R v Bunting* (No. 3) [2003] SASC 251, para 268). None of the allegations or 'Burning the law ...' continued on page 136

13. Above, n 1.

14. Metlikovec, above n 8.

15. 'Rough justice', *Daily Telegraph* (Sydney), 22 July 2006, 18.

16. Collins, above n 8.

17. Matt Johnson, 'Looters add to pain: low act', *Herald Sun* (Melbourne), 17 February 2009, 11.

18. Milovanovich, above n 5; Hagan, above n 6.

19. Milovanovich, above n 5.

20. Hudson, above n 9; Jane Metlikovec, 'Fire lit while kids wait: firebug mum', *Herald Sun* (Melbourne), 17 February 2009, 3.

21. Metlikovec, above n 20.

22. Chris Reason, 'A hate campaign aimed at Gippsland's accused arsonist', *Seven Nightly News*, 14 February 2009, <http://search.informit.com.au/documentSummary;dn=TEV20090601842;res=TVNEWS> at 4 May 2009.

23. ABC Television, *Media Watch*, 16 February 2009.

24. Hagan, above n 6.

25. Paul Mulvey, 'Vigilantes not wanted, says fire survivor', Australian Associated Press General News, 20 February 2009

26. Milovanovich, above n 5.

27. Alex Dickinson & Matt Sun, 'Bloggers not sorry: "Lynch mob" defence', *MX* (Brisbane), 18 February 2009, 2.

28. David Penberthy, 'Opinion: If courts want to identify the root cause of vigilantism, they should start with themselves', *The Advertiser* (Adelaide), 25 February 2009, 22.

29. Mulvey, above n 25.

30. Peter Black, 'Internet must not be a blight on the legal system', *The Courier-Mail* (Brisbane), 19 February 2009, 33; Melissa Laria, Greg Roberts & Xavier LaCanna, 'Threats against family, ex-girlfriend of accused firebug', Australian Associated Press General News, 17 February 2009.

31. Mulvey, above n 25.

32. 'Putting names up in lights: we have a right to know who is charged with crimes', *The Australian* (Sydney), 19 February 2009, 13.

juvenile repeat offenders was abandoned after it failed 'every criminological criterion by which they can properly be evaluated' (Richard Harding, 'Repeat Juvenile Offenders: The Failure of Selective Incapacitation in Western Australia' (1993) *NCJRS*), and the 'three strikes' burglary law has proved successful only in incarcerating indigenous youths.

The doubtful effectiveness of removing judicial discretion aside, one might wonder at the rationale behind the proposed amendments, and their relevance to the Butcher case. They make no practical changes to the culpability of perpetrators of violence, and leave a dangerous hole in the legal protection of victims of violence. Crucially, if the same facts that led to the Butcher trial occurred again, the new laws would have no effect whatsoever on the likelihood of a conviction.

The government's 'mandatory knee-jerking' does nothing to address the serious issue at hand: how best to protect those on the front line, who are protecting us. If the government is going to take this issue seriously, then a formal inquiry should be held, data gathered and alternatives with real outcomes assessed. The thousands of police who rallied outside Parliament House deserve protection; a protection not guaranteed by these proposed laws.

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### ***Employment Dispute Resolution Act 2008 (WA)***

The Western Australian Industrial Relations Commission (the 'WAIRC') will now be able to mediate a referred 'employment dispute' between parties who are covered under the Federal workplace relations system. The *Employment Dispute Resolution Act 2008 (WA)* (the 'Act') develops the role of the WAIRC in the provision of dispute resolution and mediation services. The WAIRC provides dispute resolution options to employers, employees and organisations which are aimed to be informal,

easily accessible, expedient and efficient. This primarily targets small businesses.

Both parties (which include an employee, an employee organisation, employer or employer organisation) must consent to the WAIRC as acting as a mediator; the WAIRC does not have powers of compulsion. A mediated settlement agreement is registered with the WAIRC and is binding on the parties, enforceable through the Industrial Magistrates Court. The registration of the agreement prohibits the parties from commencing any other proceedings relating to the employment dispute. There are no costs associated with utilising the WAIRC in this process.

If the WAIRC does not otherwise have jurisdiction to deal with a particular dispute, parties can seek the assistance of the WAIRC pursuant to a referral agreement. A referral agreement can relate to a specific dispute and its resolution, or it can relate to disputes between the parties of a particular class as specified in the agreement. The referral agreement will set out whether the WAIRC is to mediate, conciliate or arbitrate the dispute. The WAIRC may therefore be able to make binding determinations about the industrial dispute. The WAIRC will make consent orders when a dispute is resolved. These orders will be able to vary the operation of an existing state award, order or industrial agreement (only where referral agreement allows it to).

The effect of the Act is to provide another avenue of dispute resolution for employers and employees. This is particularly appealing to small businesses, as the expedient resolution and no cost process of the WAIRC would be an attractive solution to an employment dispute. It may also provide an option for larger employers, seeking to resolve a grievance in a strictly private and confidential setting that can be informal and non-legalistic.

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suspicions in any of these cases was found to have had any veracity, although even if they had this would not be a justification for torture and murder.

To conclude this article, consider an image in the otherwise progressive newspaper, *The Age*. This cartoon by Spooner draws on both calls for fire-proof bunkers for homes in fire-prone areas and the public sentiment for revenge against arsonists discussed here. The caption reads, 'The special bunker reserved for an arsonist'.<sup>35</sup> The image is of a medieval-type cell with a wooden door, wooden bunk suspended from the wall with chains, a pair of manacles fixed to the wall with chains, blood-like colouring on the wall where the previous occupant of the cell/bunker had been chained, an overflowing bucket for human waste with a pool of filth around it, flowing towards a fly-infested food bowl on the floor similar to one that would be used to feed a non-human animal.

Those who are aware of Michel Foucault's historical analysis of discipline and punishment know that the

power to punish has developed from the capricious power of the sovereign to a power regulated in these modern times by the public authorities, the application of reason and the law. However, things are not always as they appear. There is clearly still the potential for a society to justify special unofficial punishments and inhumanities for certain 'others'. Implicitly, and sometimes explicitly, they are singled out in popular public discourse. The threat this represents to individual people and the public order is very obvious. Recent events demonstrate that these dangerous currents can undermine the rule of law and the criminal justice system itself.

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33. Ibid.

34. Milovanovich, above n 5.

35. Spooner, above n 6.