

The Public Defenders

22 February 2019

NSW Sentencing Council

Dear Chair

Submission to the Sentencing Council on the Review of the standard non-parole period for the bushfire offence and the maximum penalties for destroying property by fire.

1. I refer to the above and, on behalf of the Public Defenders, seek to respond to the issues raised.
2. These submissions are in response to the call for submissions into the following: In light of the increase in the maximum penalty for lighting bushfires from 14 to 21 years' imprisonment:
 - (i) What should the standard non parole period be for lighting bushfires under s 203E of the *Crimes Act 1900 (NSW)* ('the *Crimes Act*'); and
 - (ii) What should the maximum penalties for the offences of destroying or damaging property by fire under ss 195 – 198 of the *Crimes Act*, and why?

Background

3. On 28 November 2018 the maximum penalty for the offence of intentionally causing a bushfire and being reckless as to its spread to vegetation on any public land or land belonging to another increased from 14 to 21 years: s 203E of the *Crimes Act*. The standard non-parole period remained at 5 years. Available as a statutory alternative to the offence is s 100(1) of the *Rural Fires Act 1997* which carries a maximum penalty of 5 years imprisonment and/or 1000 penalty units being an offence that does not require a specific state of mind or any intent or negligence.

4. Various offences concerning destroying or damaging property are set out in ss 195 – 198 of the *Crimes Act* incorporating offences of intentionally or recklessly destroying or damaging another’s property with a range of sentences starting at 5 years maximum penalty, through to 25 years for committing such an act with the intention of endangering life. Penalties are increased within that range where the offence is committed by fire or explosives, in company or during a public disorder offence. In many instances under the *Crimes Act* committing a criminal damage offence by fire doubles or almost doubles the maximum penalty available to a court.

Standard non-parole period for s 203E Crimes Act offence

5. The current standard non-parole period of 5 years is sufficient for the range of circumstances of this offence when considered with the available maximum penalty, applicable case law and current sentencing patterns in light of the typical profile of the offender for this kind of offence.

Sentencing patterns for s 203E offences

6. In the case of *R v Mills* (2005) 154 A Crim R 40 the court noted that the serious nature of this offence was reflected in the maximum penalty (then 14 years). The offence committed by Mr Mills involved the burning of 1,480 hectares of a national park, resulting in over one million dollars in resources, including 443 personnel, but with no losses of private property or human life. At [54] – [57] the court found that the two offences under s 203E(10) fell within the upper range of objectives seriousness, but took into account the offender’s mental condition, which did not result in substantial mitigation. The court outlined factors relevant to the seriousness of the offence (at [55]), including the damage caused, and the offender’s awareness of the potential harm caused by bushfires. Mr Mills following Crown appeal received a sentence of 5 years 2 months, with a non-parole period of 2 years and 8 months. Because of the particular circumstances of the case *Mills*, including his plea of guilty and mental health aspects, the Crown appeal provides limited guidance to the application of and the appropriateness of the level of the standard non-parole period in the present circumstances.

7. The Judicial Commission of NSW indicates that between January 2008 and February 2019 only 4 offences under s 203E have been prosecuted, none of which concerned an offence prosecuted under the increased maximum penalty of 21 years. All four offenders pleaded guilty. Of those, 3 concerned young adults between the ages of 18 and 25 years, two of whom had no prior criminal record. All offenders received gaol terms. Those without records received respectively head sentences of 3 years 6 months and 5 years, and non-parole periods of 3 years 5 months and 2 years. The young adult offender who had a record for a similar offence received a head sentence of 8 years with a non-parole period of 5 years. The fourth offender, a male aged between 41 and 50 years, with priors of a different nature, received a sentence of 2 years 6 months with a non-parole period of 12 months.
8. An analysis of statistics for the s 203E offence, incorporated within an analysis of statistics in 2008 indicated that of the 13 custodial sentences imposed, the mean sentence imposed was 11 months with a maximum of 30 months.¹
9. This cursory analysis of statistics indicates, even prior to the increase in the maximum penalty for this offence, that terms of imprisonment have been imposed, regardless of an offender's age or prior history, and that the terms of imprisonment imposed have markedly increased over time.

Offender profile

10. It is noteworthy that the Australian Institute of Criminology in 2007 reported that male juvenile offenders were more likely to fall into the bushfire arsonist category, and that 63% of those had no prior criminal record, with very few of those with any prior record, or an earlier offence of the same type. This historical picture of offenders appears to be reflected in the current (limited) JIRS statistics which indicate that of those persons sentenced for this offence 75 % were aged between 18 and 25 years of age, and 50% had no criminal record. As stated only one of the four had a prior offence of the same type, and he received a sentence of 8 years, non-parole 5.

¹ Muller, D. Offending and reoffending patterns of arsonists and bushfire arsonists in New South Wales, Aust Inst Criminology, Crimes & Trends in Criminal Justice (2008)

11. It is noteworthy that the Review of Bushfire Arson Laws prepared by the Legislation, Policy and Criminal Law Review Division of the Attorney General's Department in April 2009, recognised that the difficulty faced for this type of offending conduct is in the apprehension and prevention of such crimes given offences are typically committed by solitary individuals in isolated locations, as reflected in the small number of prosecutions apparent from the JIRS statistics. The 2009 Review recommended increasing penalties for minor but specific offences as a means of fettering and educating the public together with the provision of new investigative powers to the Rural Fire Service in identifying fires which result in arson. The Review recognised that there were limitations on the ability of criminal laws (in the nature of increased penalties and broadening the scope of offences) to achieve the primary concerns of that review, being the identification of offenders and stopping them before lighting them.

Deterrence value of increasing the standard non-parole period

12. A further increase in the non-parole period in respect of s 203E is likely to result in an increase in the severity of sentence imposed and the duration of sentences of full-time imprisonment, irrespective of the age of the offender or lack of record.² In circumstances where offenders are relatively young and have no history of criminal offending, a gaol sentence of any length is a significant deterrent, both personally and generally. A five year non-parole period is a significant period for a first offender, particularly where they are a young adult.
13. An increase in non-parole sentence would therefore largely impact the young and first time offender, in circumstances where the current range of sentences being imposed serve as a deterrent to these people, punishing the offender, denouncing the conduct, and deterring others. A practicable alternative aimed at protecting the community by enhancing the offender's capacity for rehabilitation might be that offenders following the expiration of the non- parole period, or alternatively as part of their time in custody, are required to attend an educational program concerning the devastation of bushfires.

² Judicial Commission, *The impact of the standard non-parole period sentencing scheme on sentencing patterns in New South Wales*, Monograph 33 (2010).

Conclusion

14. Finally, when comparing the maximum penalties available for bushfire offences under other Australian states and territories, NSW is higher than all states and territories, save as to Tasmania which is the same, and Western Australia (which is life).³
15. In all the circumstances the range of sentences imposed under the current provision is appropriately within range, and the standard non-parole period ought not be increased. Further, it is premature to assess the sentencing patterns at this stage for this offence given the recent increase in the maximum penalty.

What should the maximum penalties for destroying property by fire under ss 195 – 198 of the *Crimes Act*, and why.

16. The Review asserts that the effect of the recently increased maximum penalty for the s 203E offence is that it far exceeds the maximum penalties available under the ss 195 – 198 *Crimes Act* save as to the offence of intentionally endangering life.
17. The range of maximum penalties for the offences encompassed under ss 195 – 198 *Crimes Act* commence at 10 years (s 195 *damage property by fire*), to 14 – 16 years (ss 196-197: *damage property by fire or explosives with intent to cause bodily injury/make dishonest gain*), up to 25 years (s 198 *damage property with intention to endanger life*). When compared to other Australian jurisdictions this range of sentences appears lower than those imposed in some other states and territories. Attached is a chart setting out the sentences imposed in other Australian jurisdictions. However those same states and territories do not differentiate between a broad range of forms of property offending in the way NSW, Victoria, ACT and Tasmania do, allowing for staggered terms of imprisonment dependant on the category of offending. Western Australia for example, has no offence of damaging property by fire or explosive with intent to cause bodily harm or make dishonest gain, rather relying on a single offence of wilfully or unlawfully destroy property by fire (including vegetation), carrying a maximum life sentence, per s 444 *Criminal Code*. South Australia has a single offence of arson, also

³ ACT: s 405 *Criminal Code*: 15 years; NT: s 244 *Criminal Code*: 15 years; Qld: s 463 *Criminal Code* 14 years; South Australia: s 85B *Criminal Law Consolidation Act*: 20 years; Tas: s 268A *Criminal Code*: 21 years; Victoria: s 201A *Crimes Act* 15 years; WA: s 444 *Criminal Code*: Life.

carrying a maximum penalty of life: s 85 *Criminal Law Consolidation Act*. Arguably the graduation of criminality within these offences indicates that higher levels of penalty are unlikely except in the more serious cases.

18. Further, it is important to take into account that these available provisions co-exist with the other general offences that may be applicable, such as manslaughter (S 24 *Crimes Act* - 25 years), or in some cases murder (s 19A *Crimes Act* - life), acts done involving fire to a vessel or clothing with the intent to commit murder (s28 *Crimes Act* – 25 years), and other offences which are aggravated where the damage involves fire.
19. It is submitted that the variety of provisions available to the prosecution in NSW in determining how to charge, together with the maximum available penalties within this range of offending provides the desirable range, allowing for selection of an offence with a greater maximum penalty depending on the circumstances of the offence.
20. It is submitted that increasing sentences again will not do more to deter would be offenders, given the already lengthy maximum penalties available. The statistics indicate that those caught do already receive appropriately lengthy prison sentences, even when those persons are young adults, enter a plea of guilty and have no criminal record. Sentencing statistics indicate that the sentence range is being imposed in an appropriate way, allowing for longer sentences of imprisonment where a number of aggravating features might apply leaving aside the aggravating features provided by the statute, such as public disorder offences (where offences are committed on conditional liberty, in company, with prior similar offence, little or no remorse, following trial, and where there are poor prospects of rehabilitation).
21. It is submitted that the range of penalties provided under ss 195 – 198 of the *Crimes Act* are both adequate and proximate to the penalties in other jurisdictions for similar offence, particularly in light of the available offences provided by ss 18 and 28 of the *Crimes Act*.


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The Public Defenders

Fire / Arson Offences

ACT

Section	Offence	Max Penalty
s.404(1) <i>Criminal Code</i>	<u>Arson</u> - cause damage to a building or vehicle by fire or explosive	15 years
s.405 <i>Criminal Code</i>	Cause bushfire	15 years
s.117(1) <i>Crimes Act</i>	<u>Arson</u> - Destroy or damage property by means of fire or explosive with intent to endanger life	25 years
s.117(2) <i>Crimes Act</i>	<u>Arson</u> - Destroy or damage property by means of fire or explosive with intent to dishonestly gain	20 years

NSW

Section	Offence	Max Penalty
s.195 <i>Crimes Act</i>	damage or destroy property by fire or explosives	10-12 years
s.196 <i>Crimes Act</i>	damage or destroy property by fire or explosives with intent to cause bodily injury	14-16 years
s.197 <i>Crimes Act</i>	damage or destroy property by fire or explosives with intent to make dishonest gain	14-16 years
s.198 <i>Crimes Act</i>	damage or destroy property (<u>generally – no reference to fire or explosive</u>) with intent to endanger life	25 years
s.203E <i>Crimes Act</i>	bushfire offence	21 years

NT

Section	Offence	Max Penalty
s.243 <i>Criminal Code</i>	<u>arson</u> – cause damage to a building or conveyance by using fire or an explosive substance	life
s.244 <i>Criminal Code</i>	bushfire offence	15 years

QLD

Criminal Code

Section	Offence	Max Penalty
s.461 <i>Criminal Code</i>	<u>arson</u> - wilfully and unlawfully sets fire to: a building or structure, a motor vehicle, train, aircraft or vessel, any stack of cultivated vegetable produce, or of mineral or vegetable fuel, a mine, or the workings, fittings, or appliances of a mine	Life
s.462 <i>Criminal Code</i>	wilfully and unlawfully sets fire to anything situated so that a thing mentioned in s.461 is likely to catch fire	14 years
s.463 <i>Criminal Code</i>	wilfully and unlawfully sets fire to: a crop of cultivated vegetable produce, whether standing or cut, a crop of hay or grass, whether the natural or indigenous product of the soil or not, and whether under cultivation or not, and whether standing or cut, any standing trees, saplings, or shrubs, whether indigenous or cultivated, any heath, gorse, furze, or fern	14 years

South Australia

Section	Offence	Max Penalty
s.85 <i>Criminal Law Consolidation Act</i>	<u>arson</u>	life

s.85B <i>Criminal Law Consolidation Act</i>	cause bushfire	20 years
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TAS

Section	Offence	Max Penalty
s.268 <i>Criminal Code</i>	<u>arson</u>	21 years
s.268A <i>Criminal Code</i>	unlawfully set fire to any vegetation, whether live or dead	21 years
s.269 <i>Criminal Code</i>	unlawfully set fire to any property not comprised in ss.268 or 268A	21 years
s.269A <i>Criminal Code</i>	causing a fire with intent to injure person or property	21 years

21 years is general punishment unless otherwise stated – s.389

Victoria

Section	Offence	Max Penalty
s.197 <i>Crimes Act</i>	offence of destroying or damaging property where caused by fire is charged as <u>arson</u>	15 years
s.197A <i>Crimes Act</i>	<u>arson</u> causing death	25 years
s.201A <i>Crimes Act</i>	intentionally or recklessly cause bushfire	15 years

Western Australia

Section	Offence	Max Penalty
s.444 <i>Criminal Code</i>	wilfully or unlawfully destroys property by fire – property may include vegetation	Life