



YOUR REFERENCE

DATE  
13 March 2019

The Hon James Wood AO QC  
Chairperson  
NSW Sentencing Council  
GPO Box 31  
Sydney NSW 2001

By email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au) (Attn: Joseph Waugh)

Dear Mr Wood

### **Sentencing Council Review of penalties for fire offences**

Thank you for the opportunity to make a submission in relation to the Sentencing Council's Review of penalties for fire offences. My comments in relation to the two specific questions posed as part of that Review are as follows:

**In light of the increase in the maximum penalty for lighting bushfires from 14 to 21 years' imprisonment, what should the SNPP for the offence [of lighting bushfires] be, and why?**

This question refers to the specific bushfire offence, section 203E of the *Crimes Act 1900*, which was introduced in 2002. Up until November 2018, the offence carried a maximum penalty of 14 years' imprisonment: this has now been increased to 21 years. A standard non-parole period (SNPP) of five years was introduced in 2002 and remains at that level.

In section 203E, NSW adopted the Model Criminal Code offence but amended it to fit within a hierarchy of property damage by fire offences and less serious offences relating to the lighting of fires. As a result, NSW has both specific and general offences that are applicable to bushfires. These offences cover a wide spectrum of behaviour and are found within a number of different Acts. Murder or manslaughter under the *Crimes Act* are available where the lighting of a bushfire, whether intentionally or recklessly, results in death.

Section 203E was introduced in response to a horrendous bushfire season. The aim was to send a message to the community: "In introducing this bill the Government is seeking not to fill a gap in the criminal law but, rather, to seek to emphasise society's abhorrence and condemnation of the deliberate lighting of bushfires by making specific provisions against it."<sup>1</sup>

The recent penalty increase was introduced via the *Community Protection Legislation Amendment Bill 2018*. The Bill contained "a number of reforms aimed at keeping the community

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<sup>1</sup> Hansard, Legislative Assembly, 12.4.02

safe, including from the risk of terrorism and other high-risk offenders, bushfires, child abuse and the supply of drugs causing death”<sup>2</sup>.

As with the original introduction of section 203E, environmental conditions, in this case a summer season “expected to be increasingly conducive to bushfires”<sup>3</sup> played a part, as did the increasing cost of bushfires to the State, and a reiteration of the catastrophic damage bushfires can cause. The penalty increase would “ensure that the New South Wales penalty is now the equal toughest in the country; will provide an enhanced deterrence for this behaviour in the face of growing risk; will better reflect the harm that bushfires can cause; and will better align with community expectations.”<sup>4</sup>

The increase in penalty was therefore a further recognition of the serious view that is taken of bushfires and of the damage they can cause, which does not, in my opinion, necessitate a corresponding increase in the applicable standard non-parole period.

To be guilty of an offence under section 203E, a person must intentionally cause a fire with recklessness as to the spread of that fire. No specific intent in relation to the spread of the fire is required, just recklessness, and no actual damage need occur (albeit, in the majority of cases some damage, even if minor, will occur). Causing a fire includes lighting a fire, maintaining a fire or failing to control a fire,<sup>5</sup> which represents a wide range of behaviours and indeed, levels of recklessness. Given such disparity, a SNPP of five years is an adequate “guidepost” for a sentencing court.

Section 203E is also a Table 1 offence and can, therefore, be dealt with summarily in the Local Court where the SNPP does not apply. Most matters are, in fact, dealt with summarily; only a very small number are dealt with on indictment. Most matters also involve a guilty plea, which also means the SNPP is not strictly relevant, and the vast majority of offenders are young persons, which again renders the SNPP inapplicable. I note also that many offenders have identified mental health issues which can impact on the applicability of the SNPP. Where, in reality, the SNPP is of limited application, I also see no reason to raise it.

I note also that the SNPP sits appropriately within the tier of SNPPs, where the greater periods are reserved for offences involving death or serious injury.

### **What should the maximum penalties for the offences of destroying or damaging property by fire be, and why?**

The property damage by fire offences, sections 195 to 198 of the *Crimes Act 1900*, sit beneath the bushfire specific section 203E. There is a graded penalty system, from the 10 years available for the basic offence of intentionally or recklessly destroying or damaging another’s property by fire (section 195), to the 25 years available where there is an intent to endanger life (section 198). Increased penalties apply where an offence is committed in company or during a public disorder.

The applicable penalties, in my opinion, are appropriate and “cover the field” in relation to the circumstances in which these property damage offences occur, and the persons who commit the offences. The available maximum penalties are significant, allow sentencing courts appropriate

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<sup>2</sup> Hansard, Legislative Assembly, 13.11.18, AG Speakman,

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> Section 203D *Crimes Act 1900*

scope, act as significant deterrents, and are in line with community expectations in relation to property damage or destruction.

It should also not be forgotten that where death or injury occurs, other offences within the *Crimes Act*, which carry greater penalties, are available.

The increase in penalty for section 203E does not require that penalties for the property damage by fire offences must also increase. Although section 203E sits within the matrix of fire offences, it performs a very specific task in terms of community safety. This task, along with the sheer scale of the damage that can result from a bushfire and their seemingly ever-increasing occurrence, justifies a greater penalty differential.

Yours faithfully



**Lloyd Babb SC**  
**Director of Public Prosecutions**