

Report

# Fire offences

New South Wales  
**Sentencing Council**

**JUNE 2019**



## **NSW Sentencing Council**

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# Terms of reference

The NSW Attorney General, the Hon Mark Speakman SC MP, issued the following terms of reference:

The Sentencing Council is to review the standard non-parole period for the bushfire offence under section 203E of the *Crimes Act 1900* (NSW) to determine whether it should be increased upon passage of the Community Protection Legislation Amendment Bill in the NSW Parliament to increase to the maximum penalty for the offence from 14 years' imprisonment to 21 years' imprisonment. The Sentencing Council is further to review whether the maximum penalties for the arson offences in Part 4AD Division 2 of the *Crimes Act 1900* (NSW) should be increased.

In undertaking this review, the Sentencing Council should consider:

- The number of convictions that have been made, and the corresponding average length of any custodial sentences imposed, in respect of the bushfire and arson offences since ... 2009 ...;
- Environmental conditions, including current drought conditions across the state, that may exacerbate the potential harm caused by bushfires and other forms of fires;
- The principles that courts apply when sentencing for these offences; and
- Community expectations.

[Received 12 November 2018]

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# Executive summary

## This review

0.1 In 2018, the NSW government increased the maximum penalty for the bushfire offence in s 203E of the *Crimes Act 1900* (NSW) (“*Crimes Act*”) from imprisonment for 14 years to imprisonment for 21 years. In light of this, the Attorney General, by terms of reference we received on 12 November 2018, asked us to review:

- the standard non-parole period (“SNPP”) for the bushfire offence, and
- the maximum penalties for the property damage by fire offences in Part 4AD Division 2 of the *Crimes Act*.

## Fire offences

0.2 The offences under review are some of a range of fire offences under both the *Crimes Act* and the *Rural Fires Act 1997* (NSW), which have maximum penalties ranging from a fine of \$5,500, up to imprisonment for 25 years.

0.3 Other parts of Australia have a wide range of fire offences broadly similar to those in NSW. Significant variations include:

- the offences of causing death by intentionally destroying or damaging property by fire (in Victoria)
- the offence of endangering property by the likely spread of fire (in Queensland), and
- the offence of lighting a fire that is likely to injure or damage a person or property (in Western Australia).

0.4 In some parts of Australia, the maximum penalties for property damage by fire offences are similar to those in NSW. However, Queensland, South Australia and Western Australia each have a maximum penalty of life imprisonment for comparable property damage by fire offences.

## Fire offenders (Chapter 2)

0.5 Fire offenders have a variety of characteristics and motivations for fire offending.

0.6 About half of the fire offenders in NSW are aged 24 years or under. Younger children generally commit fire offences accidentally, while older children have motivations for fire offending that are similar to adults.

0.7 Very few fire offenders have committed a known previous fire offence. A large proportion of fire offenders have a prior offending history that involves offences other than fire offences.

- 0.8 Diversionary options for young people include cautions, warnings and youth justice conferences.
- 0.9 Outside of the criminal law, other ways of preventing fire offending include education, community planning, environmental design, risk analysis, pro-active policing and detection, and therapeutic interventions.
- 0.10 The fire offender literature does not clearly provide reasons for or against increasing the SNPP of the bushfire offence, or increasing maximum penalties of the property damage by fire offences.

### **The bushfire offence (Chapter 3)**

- 0.11 The bushfire offence makes it an offence to cause a fire intentionally, and be reckless as to its spread to vegetation on any public land or on land belonging to another.
- 0.12 The maximum penalty for the offence is 21 years' imprisonment and the SNPP is 5 years. The SNPP was not increased when the maximum penalty was increased from 14 years' to 21 years' imprisonment.
- 0.13 The offence was introduced to emphasise society's condemnation of deliberate bushfire lighting and to reflect the seriousness of the danger that bushfires pose.
- 0.14 Data about charge finalisations for the bushfire offence in various courts show that:
- a relatively low percentage of charges result in a conviction
  - a relatively large proportion of charges are dealt with through provisions that take into account the defendant's mental health, and
  - a relatively large proportion of matters are withdrawn by the prosecution, potentially illustrating the difficulties of proof attached to the bushfire offence.
- 0.15 In dealing with those convicted, NSW courts impose imprisonment in a significant proportion of cases. The sentencing data for the bushfire offence as a principal offence in 2008-2017 shows:
- in the Local Court of NSW, there were 64 offenders, and 42% of them received a sentence of imprisonment, and
  - in the NSW higher courts, there were 7 offenders, and all of them received a sentence of imprisonment.

### **Standard non-parole period for the bushfire offence (Chapter 4)**

- 0.16 The standard non-parole period for the bushfire offence should be set somewhere in the range of 8 to 10 years. (**Recommendation 4.1**)

0.17 This recommended range is more than 37.5% of the maximum penalty for the offence, which is the starting point for setting an SNPP that we recommended in our 2013 report on SNPPs. The range reflects the seriousness with which the community views the offence, and takes into account:

- the need for special deterrence, given the prevalence of deliberately lit fires and the difficulties in detection and prosecution
- the potential for exceptional personal, economic and environmental harm, especially given the increasing risk in light of climate change, and
- the potential vulnerability of victims, particularly for those who live in isolated areas and those who live on the interface between populated urban areas and the bush.

0.18 The courts will apply the SNPP in appropriate cases. Some offenders will nevertheless be subject to relevant sentencing principles that may mitigate their sentences, for example:

- young offenders, for whom the objective of rehabilitation will be more important than usual, and
- those with mental health or cognitive impairments, where the need for deterrence may be less than usual.

### **Property damage by fire offences (Chapter 5)**

0.19 NSW has several property damage offences with various elements. These include the offences of destroying or damaging another's property:

- intentionally or recklessly (and aggravated forms of this offence when committed in company, or during a public disorder)
- with intent to injure a person (and an aggravated form of this offence when committed during a public disorder), and
- dishonestly with a view to gain (and an aggravated form of this offence when committed during a public disorder).

0.20 Each of these offences has escalated penalties where the property damage is caused by fire or explosives. The maximum penalties for the various fire offences range from 10 years' to 16 years' imprisonment.

0.21 The legislative intention for introducing the original offences was to simplify the law, clearly indicate the aggravating circumstances, and rationalise the penalties. Later amendments were part of reforms to criminalise gang activity.

- 0.22 Data about charge finalisations for the offences in various courts show that:
- the proportion of charges resulting in conviction is relatively low, and
  - a relatively large proportion of defendants are dealt with through the relevant mental health provisions.
- 0.23 In dealing with those convicted, NSW courts impose imprisonment in a significant proportion of cases. The sentencing data for a relevant offence as a principal offence in 2008-2017 shows that in the:
- Local Court of NSW, there were 920 offenders, and 36% of them received a sentence of imprisonment
  - NSW Children’s Court, there were 309 offenders, and 25% of them received a juvenile probation order, and
  - NSW higher courts, there were 151 offenders, and 78% received a sentence of imprisonment.

## **Penalties for property damage by fire (Chapter 6)**

- 0.24 Increasing the maximum penalties of the property damage by fire offences to match the new maximum penalty for the bushfire offence presents some difficulties. This is because the property damage by fire offences have very different elements to the bushfire offence.
- 0.25 We considered a number of options for reforming the maximum penalties of the property damage by fire offences, including:
- retaining the current penalty structure
  - increasing the maximum penalties generally
  - increasing the maximum penalties for cases where death results, and
  - increasing the maximum penalties where there was a risk of the fire spreading.
- 0.26 Simply increasing the penalties of the property damage by fire offences, without changing the elements of each offence, risks unbalancing the penalty structure for all of the property damage offences.
- 0.27 Creating fire offences with new elements that reflect more serious outcomes (such as death), or serious risk of spread of fire outside a bushfire situation, would require a substantial review of the existing property damage offences. This is outside the scope of our terms of reference.

0.28 Therefore, we make no recommendation for change to the current maximum penalties for the property damage by fire offences. In doing so, we note that the increase in the maximum penalty for the bushfire offence can be justified on the grounds that lighting a bushfire carries an extremely serious risk to life and property, and deterrence is important. We also note that we have no evidence that the current penalty scheme for the property damage by fire offences has resulted in inadequate sentences.

# Recommendation

## **Recommendation 4.1**

The standard non-parole period for the bushfire offence under s 203E of the *Crimes Act 1900* (NSW) should be set somewhere in the range of 8-10 years.

# 1. Introduction

## In Brief

This report considers penalties for the offence of lighting a bushfire and the offences of property damage by fire. The terms of reference raise two questions: should the standard non parole period (SNPP) for the bushfire offence be changed; and should the maximum penalties for the property damage by fire offences be changed? The offences we are reviewing are some of a number of fire offences of varying degrees of seriousness. Broadly similar fire offences are available elsewhere in Australia, with a few notable exceptions that add elements to the offence such as causing death, or likely injury to people or property. Maximum penalties of life imprisonment are available for property damage by fire offences in some other jurisdictions.

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## Terms of reference

- 1.1 We received the following terms of reference from the Attorney General on 12 November 2018:

The Sentencing Council is to review the standard non-parole period for the bushfire offence under section 203E of the Crimes Act 1900 (NSW) to determine whether it should be increased upon passage of the Community Protection Legislation Amendment Bill in the NSW Parliament to increase to the maximum penalty for the offence from 14 years' imprisonment to 21 years' imprisonment. The Sentencing Council is further to review whether the maximum penalties for the arson offences in Part 4AD Division 2 of the Crimes Act 1900 (NSW) should be increased.

In undertaking this review, the Sentencing Council should consider:

- The number of convictions that have been made, and the corresponding average length of any custodial sentences imposed, in respect of the bushfire and arson offences since ... 2009 ...;
- Environmental conditions, including current drought conditions across the state, that may exacerbate the potential harm caused by bushfires and other forms of fires;
- The principles that courts apply when sentencing for these offences; and
- Community expectations.

- 1.2 The Community Protection Legislation Amendment Bill 2018 (NSW) has now passed. It entered into force on 28 November 2018.<sup>1</sup>

- 1.3 In this report we will refer to the bushfire offence under s 203E of the *Crimes Act 1900* (NSW) ("*Crimes Act*") as the "bushfire offence" and the arson offences in Part 4AD Division 2 of the *Crimes Act* as the "property damage by fire offences".

## Questions posed

- 1.4 We invited submissions on the two questions arising from the terms of reference. In light of changes to the maximum penalty for the bushfire offence from 14 years' to 21 years' imprisonment:

1. Should the standard non parole period (SNPP) for the bushfire offence be changed?

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1. *Community Protection Legislation Amendment Act 2018* (NSW).



2. Should the maximum penalties for the property damage by fire offences be changed?

## This report

- 1.5 This report answers the two questions posed.
- 1.6 The remainder of this chapter briefly sets out the elements of the bushfire offence and the property damage by fire offences, and puts them in the context of other fire offences in NSW. It also outlines past reviews and describes some fire offences in other Australian jurisdictions where these differ significantly from the offences in NSW, in terms of elements or penalty.
- 1.7 The remaining chapters are set out as follows:
  - **Chapter 2: Fire offenders** describes various characteristics of fire offenders.
  - **Chapter 3: The bushfire offence** sets out the elements of the offence, the maximum penalty and applicable SNPP, its origins and purposes and statistics about charge finalisations and sentencing for the offence.
  - **Chapter 4: Standard non-parole period for the bushfire offence** answers the first question, by recommending that the SNPP for the bushfire offence should be set somewhere in the range of 8-10 years. It sets out our reasons for this conclusion.
  - **Chapter 5: Property damage by fire offences** sets out the various property damage by fire offences, the maximum penalties that apply, the legislative intention behind the offences, and statistics about charge finalisations and sentencing for these offences.
  - **Chapter 6: Penalties for property damage by fire** answers the second question, by recommending no change to the current penalties for property damage by fire. It sets out our reasons for this conclusion.

## Fire offences in NSW

- 1.8 Together with the bushfire offence and the property damage by fire offences, there are a variety of offences in NSW that involve fire-lighting. Table 1.1 sets out these offences in descending levels of seriousness.

**Table 1.1 Fire lighting offences in NSW**

Offence	Maximum penalty
<b>Intentionally or recklessly damage/destroy property – intending to endanger life</b> <i>Crimes Act 1900 (NSW) s 198</i>	25 years
<b>Acts against certain property with intent to murder</b> <i>Crimes Act 1900 (NSW) s 28</i>	25 years SNPP 10 years
<b>Set fire to vegetation reckless as to spread (the bushfire offence)</b> <i>Crimes Act 1900 (NSW) s 203E</i>	21 years SNPP 5 years
<b>Damage/destroy property by fire intending to injure during a public disorder</b> <i>Crimes Act 1900 (NSW) s 196(2)</i>	16 years
<b>Damage/destroy property by fire dishonestly with a view to gain during a public disorder</b> <i>Crimes Act 1900 (NSW) s 197(2)</i>	16 years
<b>Damage/destroy property by fire intending to injure</b> <i>Crimes Act 1900 (NSW) s 196(1)</i>	14 years
<b>Damage/destroy property by fire dishonestly with a view to gain</b> <i>Crimes Act 1900 (NSW) s 197(1)</i>	14 years
<b>Damage/destroy property by fire intentionally or recklessly during a public disorder</b> <i>Crimes Act 1900 (NSW) s 195(2)</i>	12 years
<b>Damage/destroy property by fire intentionally or recklessly in company</b> <i>Crimes Act 1900 (NSW) s 195(1A)</i>	11 years
<b>Damage/destroy property by fire intentionally or recklessly</b> <i>Crimes Act 1900 (NSW) s 195(1)</i>	10 years
<b>Setting fire or permitting fire to escape without lawful authority knowing total fire ban in force</b> <i>Rural Fires Act 1997 (NSW) s 100(1B)</i>	7 years and/or fine of 1,200 penalty units (\$132,000)
<b>Setting fire or permitting fire to escape without lawful authority</b> <i>Rural Fires Act 1997 (NSW) s 100(1)</i>	5 years and/or fine of 1,000 penalty units (\$110,000)  Penalty notice: \$2,200
<b>Leaving a fire unextinguished without lawful authority</b> <i>Rural Fires Act 1997 (NSW) s 100(2)</i>	1 year and/or fine of 50 penalty units (\$5,500)  Penalty notice: \$2,200
<b>Fail to comply with total fire ban order</b> <i>Rural Fires Act 1997 (NSW) s 99(11)</i>	1 year and/or fine of 50 penalty units (\$5,500)  Penalty notice: \$2,200

Offence	Maximum penalty
<b>Discarding fire risk objects during a total fire ban</b> <i>Rural Fires Act 1997</i> (NSW) s 99A(1)(b)	Fine of 100 penalty units (\$11,000) Penalty notice: \$1,320
<b>Discarding fire risk objects</b> <i>Rural Fires Act 1997</i> (NSW) s 99A(1)(a)	Fine of 50 penalty units (\$5,500) Penalty notice: \$660

## The offences under review

### The bushfire offence

- 1.9 Under s 203E of the *Crimes Act*, it is an offence to cause a fire intentionally and intend, or be reckless as to, its spread to vegetation on any public or private land (the “bushfire offence”). The maximum penalty was originally 14 years, but was increased to 21 years’ imprisonment, in 2018. The offence carries an SNPP of 5 years.<sup>2</sup> The SNPP was not increased when the maximum penalty was increased.

### Damaging property by fire offences

- 1.10 Under s 195–197 of the *Crimes Act*, it is an offence to destroy or damage property by fire or explosives (a “property damage by fire offence”):
- intentionally or recklessly (in relation to property of another)
  - with intent to cause bodily injury to another, or
  - dishonestly, with a view to gain.
- 1.11 In some cases, increased penalties are available where these offences are committed in company or during a public disorder. As shown in Table 1.1, the maximum penalties for these offences range from 11 years’ to 16 years’ imprisonment.
- 1.12 There is also the offence of destroying or damaging property intending to endanger life.<sup>3</sup> This offence attracts a maximum penalty of 25 years’ imprisonment, whether or not the destruction or damage is caused by fire (or explosives).

### Other fire lighting offences

- 1.13 In addition to the offences under review, NSW has fire lighting offences in the *Crimes Act* and the *Rural Fires Act 1997* (NSW).

2. See [3.4].

3. *Crimes Act 1900* (NSW) s 198.

- 1.14 A number of these are penalty notice offences. A penalty notice amount is fixed by regulation and is imposed administratively. When a person engages in conduct classified as a penalty notice offence, they receive a penalty notice issued by relevant officers, for example the police, or an officer of the local rural fire authority, that requires payment by the due date.<sup>4</sup> If they pay the prescribed penalty amount, a person is not liable for any further proceedings for the alleged offence.<sup>5</sup> The person served with a penalty notice may, instead of paying, choose to have the matter determined by a court.<sup>6</sup>
- 1.15 According to the data set out below, these offences are rarely convicted and sentenced, and penalty notices are seldom imposed.
- 1.16 NSW also has a range of offences relating to lighting fires for land clearance or lighting fire breaks without an appropriate permit.<sup>7</sup> We have not included these in the summaries below.

### **Acts against property with intent to murder**

- 1.17 At the more serious end of the spectrum is the offence of committing certain acts against property with intent to murder. Relevant acts include:
- setting fire to “any vessel, or any chattel therein, or any part of her tackle apparel or furniture”, and
  - destroying or damaging any building by “the explosion of gunpowder, or other explosive substance”.<sup>8</sup>
- 1.18 This offence is subject to a maximum penalty of 25 years’ imprisonment and an SNPP of 10 years.
- 1.19 The offence has been compared with the offence of property damage with the intention of endangering life,<sup>9</sup> which is also subject to a maximum penalty of 25 years’ imprisonment but does not have an SNPP. The NSW Court of Criminal Appeal (“CCA”) has observed that it is a more serious offence because it has an SNPP and “in terms of moral culpability, an intention to kill is more serious than an intention to endanger life”.<sup>10</sup>
- 1.20 No convictions have been recorded for this offence in the past 10 years.

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4. *Fines Act 1996* (NSW) s 4(1), s 22(2); *Rural Fires Regulation 2013* (NSW) cl 48.

5. *Rural Fires Act 1997* (NSW) s 131(3); *Fines Act 1996* (NSW) s 22A.

6. *Fines Act 1996* (NSW) s 23A.

7. *Rural Fires Act 1997* (NSW) s 86-88.

8. *Crimes Act 1900* (NSW) s 28.

9. *Crimes Act 1900* (NSW) s 198.

10. *Cassidy v R* [2012] NSWCCA 68 [7], [26].

## Setting fire or permitting fire to escape (without lawful authority)

- 1.21 Of the offences in the category of setting fire or permitting fire to escape without lawful authority, the most serious are the offences of:
- setting fire to another’s land or property without lawful authority, and
  - permitting fire to escape from land that you own or occupy under such circumstances as to cause or be likely to cause injury or damage to a person or to the land or property of another (including the Crown or a public authority) without lawful authority.<sup>11</sup>
- 1.22 These offences are alternatives to the bushfire offence. This means that if a jury is not satisfied that the accused is guilty of the bushfire offence, it may find the accused guilty of one of these offences.<sup>12</sup>
- 1.23 The maximum penalty for setting light to the land or property of another is \$110,000 (1000 penalty units) or 5 years imprisonment or both.<sup>13</sup> The fact that a total fire ban was in force is an aggravating factor.<sup>14</sup> A penalty notice of \$2,200 is available for the non-aggravated offence.<sup>15</sup>
- 1.24 The maximum penalty when the offender *knows* that a total fire ban is in force is \$132,000 (1200 penalty units) or 7 years imprisonment or both.<sup>16</sup>
- 1.25 In the 10 years from January 2008 to March 2018, in the NSW higher courts (in this case, most probably the District Court), only one offender has been sentenced for the non-aggravated offence as the principal offence. They were given a suspended sentence.<sup>17</sup>
- 1.26 In the Local Court, in the four years from July 2014 to June 2018, 22 offenders were sentenced for the basic offence. Six of these offenders were sentenced to imprisonment. Five offenders were sentenced for permitting fire to escape land as their principal offence. One of these offenders received a suspended sentence. The other four offenders received less severe sentences.

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11. *Rural Fires Act 1997* (NSW) s 100(1), s 100(1B).

12. *Crimes Act 1900* (NSW) s 203E(4).

13. *Rural Fires Act 1997* (NSW) s 100(1).

14. *Rural Fires Act 1997* (NSW) s 100(1A).

15. *Rural Fires Regulation 2013* (NSW) cl 48(1), sch 2 pt 1.

16. *Rural Fires Act 1997* (NSW) s 100(1B).

17. Judicial Commission of NSW, *Judicial Information Research System statistics*.

- 1.27 In the four years between 2015 and 2018, 45 penalty notices were issued for the basic offence, 13 of them in 2018.<sup>18</sup>

### **Leaving a fire unextinguished**

- 1.28 There is also an offence of (without lawful authority) leaving any fire lit or used in the open air before the fire is thoroughly extinguished. The maximum penalty is \$5,500 (50 penalty units) or 12 months imprisonment or both.<sup>19</sup>
- 1.29 A penalty notice of \$2,200 is also available for this offence.
- 1.30 The NSW Fire Brigades submitted to the 2009 NSW Attorney General's Department review that the penalty at the time was too light.<sup>20</sup> The review recommended that the penalty notice amount be increased from \$550 to \$1,100.<sup>21</sup>
- 1.31 In the four years between July 2014 and June 2018, only two offenders were sentenced for this offence as the principal offence. One received a fine and the other received a community service order.
- 1.32 In the four years between 2015 and 2018, 30 penalty notices were issued for this offence, 7 of them in 2018.<sup>22</sup>

### **Fail to comply with total fire ban order**

- 1.33 It is an offence to fail to comply with a total fire ban order.<sup>23</sup> A total fire ban order may:
- (a) prohibit the lighting, maintenance or use of any fire or class of fire in the open air for the period or periods specified in the order, and
  - (b) require persons or classes of persons to take action specified in the order for the purposes of preventing the outbreak or the spread of any bush fire or for controlling or suppressing any bush fire.<sup>24</sup>
- 1.34 It is possible for a person to commit this offence without lighting a fire.

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18. Revenue NSW, *Penalty Notice Data Set* (accessed 26 February 2019).

19. *Rural Fires Act 1997* (NSW) s 100(2).

20. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 4.

21. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) Recommendation 1, 5.

22. Revenue NSW, *Penalty Notice Data Set* (accessed 26 February 2019).

23. *Rural Fires Act 1997* (NSW) s 99(11), inserted by *Emergency Services Legislation Amendment Act 2018* (NSW) sch 2[14]. Before 26 October 2018, the offence was contained in s 99(6).

24. *Rural Fires Act 1997* (NSW) s 99(1).

- 1.35 The maximum penalty for the offence is imprisonment for 12 months or 50 penalty units (or both).<sup>25</sup> A penalty notice of \$2,200 is also available.<sup>26</sup> The 2009 review recommended that the penalty notice amount be increased from \$550 to \$1,100.<sup>27</sup>
- 1.36 In the four years from July 2014 to June 2018, 6 offenders were sentenced for this offence. Four received a fine and two received a good behaviour bond.
- 1.37 In the four years from 2015-2018, 39 penalty notices were issued for this offence. 12 of these were issued in 2018.<sup>28</sup>

### **Discarding fire risk objects**

- 1.38 The offence of discarding “a lighted tobacco product or match or any incandescent material (a “fire risk object”) on any land” has a maximum penalty of \$5,500 (50 penalty units), or \$11,000 (100 penalty units) during a total fire ban.<sup>29</sup>
- 1.39 A penalty notice of \$660, or \$1,320 during a total fire ban, is also available.
- 1.40 In the four years from July 2014 to June 2018, 11 offenders were sentenced for this offence as a principal offence. All received a fine.
- 1.41 In the four years between 2015 and 2018, 288 penalty notices were issued for this offence, 67 of them in 2018. Of the 67 in 2018, 12 were issued for committing the offence during a total fire ban.<sup>30</sup>

## **Some fire offences in other jurisdictions**

- 1.42 While the other Australian jurisdictions also have a wide range of broadly similar fire lighting offences, no two jurisdictions take the same approach. Below is a selection of interesting variations on the offences we are reviewing.

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25. *Rural Fires Act 1997* (NSW) s 99(11).

26. *Rural Fires Regulation 2013* (NSW) cl 48, sch 2 pt 1.

27. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) Recommendation 2, 5.

28. Revenue NSW, *Penalty Notice Data Set* (accessed 26 February 2019).

29. *Rural Fires Act 1997* (NSW) s 99A(1).

30. Revenue NSW, *Penalty Notice Data Set* (accessed 26 February 2019).

## Arson causing death (Victoria)

- 1.43 In Victoria, a maximum penalty of 25 years imprisonment applies to the offence of causing death by:
- intentionally destroying or damaging property by fire
  - intentionally destroying or damaging property by fire either intending to endanger the life of another or knowing that the life of another is more likely than not to be endangered by the destruction or damage, and
  - intentionally destroying or damaging property by fire, dishonestly, with a view to gain.<sup>31</sup>
- 1.44 These three arson offences are broadly similar to NSW's property damage by fire offences.<sup>32</sup> The chief difference is that, in NSW, an offender need only be *reckless* as to property damage. NSW, however, does not have a higher maximum penalty when death results from one of these offences.
- 1.45 Victoria increased the maximum penalty to 25 years imprisonment in 1997 in the wake of community outrage about fires in the Dandenongs that resulted in three deaths. It was intended to cover situations where a person dies as the result of arson but the circumstances do not amount to murder.<sup>33</sup> The Victorian government believed that "the act of arson is so intrinsically dangerous that when a death results, the maximum penalty available should reflect that danger".<sup>34</sup>

## Endangering property by likely spread of fire (Queensland)

- 1.46 In Queensland there is an offence of wilfully and unlawfully setting fire to anything situated so that one of the following is likely to catch fire from it:
- a building or structure
  - a motor vehicle, train, aircraft or vessel
  - any stack of cultivated vegetable produce, or of mineral or vegetable fuel, or
  - a mine, or the workings, fittings, or appliances of a mine.<sup>35</sup>

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31. *Crimes Act 1958* (Vic) s 197, s 197A.

32. *Crimes Act 1900* (NSW) s 195, s 197, s 198.

33. Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 1997, 873.

34. Victoria, *Parliamentary Debates*, Legislative Council, 27 May 1997, 1060.

35. *Criminal Code* (Qld) s 462, s 461(1)(a)-(d).



1.47 The maximum penalty for this offence is 14 years' imprisonment. This provision has remained substantially the same since first introduced in 1899.

1.48 There is no offence with equivalent elements in NSW.

### Lighting a fire likely to injure people or property (WA)

1.49 In Western Australia, it is an offence when a person wilfully lights or causes to be lit, or attempts to light a fire, "under such circumstances as to be likely to injure or damage a person or property, whether the fire be caused or not". "Property" includes personal or real property, including Crown land, bush and fauna.<sup>36</sup> The offence attracts a maximum penalty of 20 years' imprisonment. Despite being in the *Bush Fires Act 1954* (WA), it appears to have an application beyond the lighting of bushfires.

1.50 There is no similar offence in NSW. The maximum penalty was increased from 14 years' to 20 years' imprisonment, following the Victorian bushfires in February 2009. The increase was justified "given the serious nature of the offence and the significant danger posed by deliberately lit bushfires".<sup>37</sup>

### Higher penalties for property damage by fire offences

1.51 In some parts of Australia,<sup>38</sup> the maximum penalties for property damage by fire offences are similar to those in NSW. However, Queensland, South Australia and Western Australia have comparable property damage by fire offences that attract a maximum penalty of life imprisonment.<sup>39</sup>

## Past reviews

1.52 The most recent reviews that are relevant to the NSW provisions are the Model Criminal Law Officers Committee report of 2001 and the 2009 review of the Legislation, Policy and Criminal Law Review Division of the NSW Attorney General's Department.

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36. *Bush Fires Act 1954* (WA) s 32.

37. WA, *Parliamentary Debates*, Legislative Assembly, 14 October 2009, 8026.

38. *Crimes Act 1958* (Vic) s 197(1); *Criminal Code* (ACT) s 404(1); *Criminal Code Act 1983* (NT) s 243(1).

39. *Criminal Code* (Qld) s 461(1); *Criminal Law Consolidation Act 1935* (SA) s 85(1); *Criminal Code* (WA) s 444(1)(a).

## Model Criminal Law Officers Committee 2001

- 1.53 The Model Criminal Law Officers Committee, established by the Standing Committee for Attorneys-General, proposed a bushfire offence as part of the Model Criminal Code in 2001. This model provision is the basis for the NSW bushfire offence.<sup>40</sup>
- 1.54 The Committee noted that property damage by fire offences were concerned with harm to individual property interests and did not “adequately reflect the harm to collective or community interests involved in bushfires”.<sup>41</sup>
- 1.55 The Committee concluded that “the essence of the offence is to be found in conduct which creates a risk of an uncontrolled spread of fire to vegetation on land which is not owned or occupied by the offender” and that “the real gravamen of the offence is the creation of a risk, which may or may not eventuate, of catastrophic damage to property, life or environment”.<sup>42</sup> The focus was on the risk of such harm rather than “injury to individual rights of ownership over vegetation”.<sup>43</sup>

## Legislation, Policy and Criminal Law Review Division 2009

- 1.56 The Legislation, Policy and Criminal Law Review Division of the NSW Attorney General’s Department published a review of bushfire arson laws in April 2009.<sup>44</sup> The NSW government commissioned this report in the aftermath of the 2009 Victorian bushfires.

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40. See [3.7]-[3.9].

41. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 47.

42. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 51.

43. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 51.

44. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009).

- 1.57 The NSW report found that “solitary individuals” typically commit bushfire offences in isolated areas, and that the ensuing fire typically destroys any evidence of the means of committing the offence. These characteristics were said to contribute to the relatively small number of prosecutions for bushfire offences. The review therefore addressed difficulties in deterring, investigating and preventing bushfires and focused its recommendations on:
- increasing the penalties for specific minor offences “as a means of fettering and educating the public”, and
  - providing new powers to assist the Rural Fire Service in investigating fires.<sup>45</sup>
- 1.58 The government accepted these recommendations and noted that the existing bushfire offences in NSW were comprehensive in terms of activities covered and penalties available.<sup>46</sup>

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45. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) iii.

46. NSW, *Parliamentary Debates*, Legislative Assembly, Question time: Bushfire Season Preparations, 24 September 2009, 18176.



# 2. Fire offenders

**In Brief**

Fire offenders have a variety of characteristics and motivations for fire offending. About half of the fire offenders in NSW are aged 24 years or under. Younger children generally commit fire offences accidentally, while older children have similar motivations to adults for fire offending. Very few fire offenders have committed a known previous fire offence. A large proportion of fire offenders have a prior offending history that does not involve fire offences. Diversionary options for young people include cautions, warnings and youth justice conferences. Outside of the criminal law, other ways of preventing fire offending include education, community planning, environmental design, risk analysis, pro-active policing and detection, and therapeutic interventions.

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- 2.1 This chapter examines the literature on the characteristics of adults and children who commit fire offences (“fire offenders”), including their motivations for offending, their psychological and social profile, and their past offending. This chapter also examines the ways to prevent fire offending other than through the criminal law. Because a large proportion of fire offenders are children, this chapter concludes by summarising the non-court options used to deal with child fire offenders.
- 2.2 Several authors think that the literature on fire offenders is flawed and may have little instructive value for developing ways to deal with fire offenders because:

- only detected fire offenders are studied and only a small proportion of fire offenders are detected<sup>1</sup>
  - detected fire offenders may not be representative of all fire offenders, for example because they may particularly lack skill or effort in avoiding detection<sup>2</sup>
  - some studies lack a control group or simply assume some psychological abnormality among fire offenders<sup>3</sup>
  - the studies mainly focus on urban fires rather than bushfires, so their conclusions may not apply in the bushfire context,<sup>4</sup> and
  - most of these studies deal with offenders in the UK and the US, which may limit their applicability to Australia.<sup>5</sup>
- 2.3 The literature on fire offenders may have little value for deciding whether the maximum penalties or SNPPs for fire offences should be changed, because the uncertainty and diversity of the causes of, and motivations for, fire offending mean that it is difficult to say whether increasing maximum penalties or SNPPs will be effective in deterring fire offending.
- 2.4 The literature also suggests that a significant proportion of fire offenders are children or have mental illness. Special principles apply when courts sentence these groups. Any changes to those principles are outside of the scope of this review.

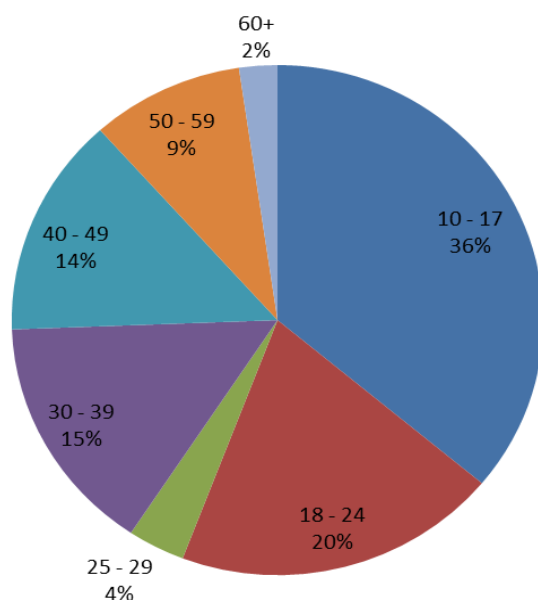
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1. T Drabsch, *Arson*, Briefing Paper 2/2003 (NSW Parliament, 2003) 17; M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 59; D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 5.
  2. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 5; M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) vi-vii, 59-60; T Drabsch, *Arson*, Briefing Paper 2/2003 (NSW Parliament, 2003) 17.
  3. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 59.
  4. J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 509; M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 2.
  5. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 2.

## Age profile of fire offenders

2.5 The literature generally observes that young people commit a large proportion of the total number of fire offences.<sup>6</sup> This is true in NSW. In 2006/2007, 81 out of 104 charges for bushfire related offences were against children.<sup>7</sup> As seen in Figures 2.1 and 2.2 below, in NSW in 2008-2017:

- 56% of bushfire offenders<sup>8</sup> were aged 10-24, and
- 48% of property damage by fire offenders<sup>9</sup> were aged 10-24.

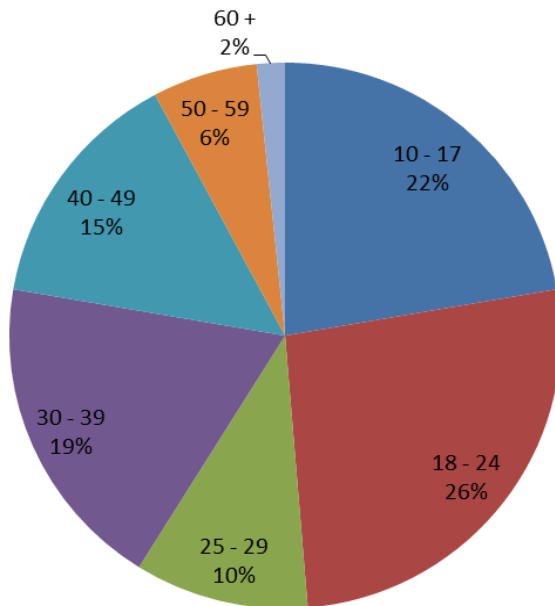
Figure 2.1: Bushfire offence (principal offence): age of offenders – all NSW courts, 2008-2017 (N=86)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031 and jh19-17327)

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6. J Stanley, "Preventing Children and Young People lighting bushfires in Australia" (2002) 10(2) *Child Abuse Prevention Newsletter* 8; T Drabsch, *Arson*, Briefing Paper 2/2003 (NSW Parliament, 2003) 17; L Dalhuisen, F Koenraadt and M Liem, "Subtypes of Firesetters" (2017) *Criminal Behaviour and Mental Health* 59, 60; M R Dadds and J A Fraser "Fire Interest, Fire Setting and Psychopathology in Australian Children: a Normative Study" (2006) 40 *Australian and New Zealand Journal of Psychiatry* 581, 581.
  7. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 16.
  8. *Crimes Act 1900* (NSW) s 203E.
  9. *Crimes Act 1900* (NSW) s 195(1)(b), s 195(1A)(b), s 195(2)(b), s 196(1)(b), s 196(2)(b), s 197(1)(b), s 197(2)(b).

Figure 2.2: Property damage by fire offences: age of offenders – all NSW courts, 2008-2017 (N=1216)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031 and jh19-17327).

## Adult fire offenders

### Motivations

- 2.6 There is an extensive literature aimed at understanding the motivations of people who commit fire offences.<sup>10</sup> The literature suggests that the following motivations are common among fire offenders:

10. For a summary of the literature prior to 2004, see: M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004). For examples of this literature after 2004, see: D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008); J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 507; L Ducat, J R P Ogloff and T McEwan, "Mental Illness and Psychiatric Treatment Amongst Firesetters, Other Offenders and the General Community" (2013) 47 *Australian and New Zealand Journal of Psychiatry* 945; L Ducat, T E McEwan and J R P Ogloff, "An Investigation of Firesetting Recidivism: Factors Related to Repeat Offending" (2015) 20 *Legal and Criminological Psychology* 1; L Dalhuisen, F Koenraadt and M Liem, "Subtypes of Firesetters" (2017) 27 *Criminal Behaviour and Mental Health* 59.



- **excitement, curiosity or boredom** – for example, often seen among children, vandals, fire fighters, and others classified as “pyromaniacs” or “firebugs”
- **revenge or anger** – for example, against an employer, lover, institution or government
- **recognition and attention** – for example, to improve reputation or gain “hero status” as a fire fighter, or as a “cry for help”, and
- **specific purpose or gain** – for example, to conceal a crime, for financial gain such as insurance fraud, or to clear land where it would otherwise be impractical or illegal to do so.<sup>11</sup>

2.7 Some authors think that the literature on fire offender motivations has limited instructive value for dealing with fire offenders because:

- all the studies conclude that fire offenders act on a wide range of motivations, and the identified range of motivations varies between studies<sup>12</sup>
- it is difficult to conclude that a fire offender acts on a single motivation, and arson is a complex behaviour influenced by many factors,<sup>13</sup> and
- fire offender behaviour may be better understood through a multifactorial approach where motivation is only one factor considered, or through approaches that do not consider motivation at all.<sup>14</sup>

## Other subjective factors

2.8 One study suggests that fire offenders are more likely than other offenders to have psychiatric diagnoses or be registered with psychiatric services.<sup>15</sup> The same study

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11. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) iv, vi, viii, 91-95; L Dalhuisen, F Koenraadt and M Liem, “Subtypes of Firesetters” (2017) 27 *Criminal Behaviour and Mental Health* 59, 69, 71; J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology*, 507, 509.
  12. Tasmanian Sentencing Advisory Council *Arson and Deliberately Lit Fires*, Final Report No 1 (2012) v; J A Inciardi, “The Adult Firesetter: A Typology” (1970) 8 *Criminology* 145, 145, 153-154; K J B Rix, “A Psychiatric Study of Adult Arsonists” (1994) 34 *Medicine, Science and the Law*, 21.
  13. L Dalhuisen, F Koenraadt and M Liem, “Subtypes of Firesetters” (2017) 27 *Criminal Behaviour and Mental Health* 59, 60-61; J L Geller, “Firesetting: A Burning Issue” in R N Kocsis (ed) *Serial Murder and the Psychology of Violent Crimes* (Humana Press, 2008) 141, 148-149; J Horley and D Bowlby, “Theory, Research and Intervention with Arsonists” (2011) 16 *Aggression and Violent Behavior* 241; D F Koson and J Dvoskin, “Arson: A Diagnostic Study” (1982) 10 *Bulletin of the AAPL* 38.
  14. L Dalhuisen, F Koenraadt and M Liem, “Subtypes of Firesetters” (2017) 27 *Criminal Behaviour and Mental Health* 59, 60.

notes that some common diagnoses among fire offenders are affective disorders, personality disorders and substance abuse.<sup>16</sup>

- 2.9 The literature suggests that many fire offenders have social problems, including family and relationship issues, poor communication skills and alcohol abuse issues.<sup>17</sup> Several studies show that many fire offenders display below average intelligence, poor academic performance and difficulty gaining employment.<sup>18</sup> The literature suggests that fire fighters who commit fire offences often display difficulties with schooling and employment, have troubled relationships, are new to fire fighting, or are under significant personal stress.<sup>19</sup>

## Past offending

- 2.10 Though conclusions of earlier literature on fire offender recidivism vary widely,<sup>20</sup> recent literature has consistently found that the proportion of fire offenders who are recidivist fire offenders is relatively low. One study found that 2% of people who committed property damage by fire offences were recidivists and that 3% of bushfire lighting offenders were recidivists.<sup>21</sup> Another study found that 5.3% of people who committed fire-related offences were recidivists.<sup>22</sup>
- 2.11 The literature generally observes that a majority of fire offenders have previously committed at least one offence that is not fire-related.<sup>23</sup> It also suggests that fire

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15. L Ducat, J R P Ogloff and T McEwan, "Mental Illness and Psychiatric Treatment Amongst Firesetters, Other Offenders and the General Community" (2013) 47 *Australian and New Zealand Journal of Psychiatry* 945.
16. L Ducat, J R P Ogloff and T McEwan, "Mental Illness and Psychiatric Treatment Amongst Firesetters, Other Offenders and the General Community" (2013) 47 *Australian and New Zealand Journal of Psychiatry* 945.
17. L Dalhuisen, F Koenraadt and M Liem, "Subtypes of Firesetters" (2017) 27 *Criminal Behaviour and Mental Health* 59, 60-61.
18. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) vi-vii.
19. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) viii.
20. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 2; NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 16.
21. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 5.
22. L Ducat, T E McEwan and J R P Ogloff, "An Investigation of Firesetting Recidivism: Factors Related to Repeat Offending" (2015) 20 *Legal and Criminological Psychology* 1.
23. A Brett, "'Kindling Theory' in Arson: How Dangerous are Firesetters?" (2004) 38 *Australian and New Zealand Journal of Psychiatry* 419, 421-422; D A Muller, *Offending and Reoffending Patterns of*

offenders' previous offences are most commonly offences against the person, followed by property offences and drug offences.<sup>24</sup> In NSW criminal courts in 2008–2017, of the 1143 people found guilty of a fire-related offence as their principal offence, 67.8% of them (775 offenders) had a known prior proven court appearance in the previous 5 years.<sup>25</sup>

- 2.12 One study of defendants in NSW courts in 2001–2006 found that a majority of property damage by fire offenders, and about one third of bushfire offenders, had a recorded conviction in the previous seven years. The same study found that 70% of these people with prior convictions had at least one personal offence (which includes homicide, sexual assault, assault, robbery, other acts intended to cause injury, and dangerous or negligent acts endangering people).<sup>26</sup>
- 2.13 However, one author thinks the studies on fire offending recidivism may be limited in their accuracy for the reasons noted above.<sup>27</sup> The same author thinks studies of fire offending recidivism may be distorted because those known to police from previous offending are more likely to be charged with a fire-related offence than those with no previous police contact.<sup>28</sup>

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*Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 1, 3, 5; NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 16; L Ducat, T E McEwan and J R P Ogloff, "An Investigation of Firesetting Recidivism: Factors Related to Repeat Offending" (2015) 20 *Legal and Criminological Psychology* 1.

24. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 1, 3, 5; A Brett, "'Kindling Theory' in Arson: How Dangerous are Firesetters?" (2004) 38 *Australian and New Zealand Journal of Psychiatry* 419, 421-422; NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 16; L Ducat, T E McEwan and J R P Ogloff, "An Investigation of Firesetting Recidivism: Factors Related to Repeat Offending" (2015) 20 *Legal and Criminological Psychology* 1.
25. NSW Bureau of Crime Statistics and Research (sr18-17031).
26. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 5.
27. [2.2].
28. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 5.

## Prevention

- 2.14 Some authors suggest that many fire offenders may not require “specific intervention” because their criminal histories do not involve, or are not limited to, fire offending. Instead, more general crime-prevention measures could prevent their fire offending.<sup>29</sup>
- 2.15 Several authors think that increasing potential punishments for convicted fire offenders is unlikely to deter people from starting fires.<sup>30</sup> Some authors think this is especially true of fire offenders acting from motives that involve little consideration of potential punishment,<sup>31</sup> and of fire offenders with mental illness or intellectual disability.<sup>32</sup>
- 2.16 Given the limited effectiveness of deterrence, some think it is important to focus on developing ways to prevent fire offending other than through the criminal law.<sup>33</sup> The literature suggests several ways to prevent fire offending in adults, including by improvements to:
- **education** – for example, community education programs, mostly aimed at children and often run by fire agencies, that explain the consequences of fire lighting and ways to prevent fires<sup>34</sup>
  - **community planning** – for example, supporting local communities in developing plans to prevent fires (for example, by reducing flammable material in the area),<sup>35</sup>

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29. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 6.

30. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) ix.

31. R N Koscis, *Arson: Exploring Motives and Possible Solutions*, Trends and Issues in Crime and Criminal Justice No 236 (Australian Institute of Criminology, 2002) 5.

32. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 106.

33. D A Muller and A Stebbins, *Juvenile Arson Intervention Programs in Australia*, Trends and Issues in Crime and Criminal Justice No 335 (Australian Institute of Criminology, 2007); NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 16, 29; D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 6.

34. WA Arson Task Force, *Flame Out: Combating Arson in Western Australia* (1999) 21; NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 29-30.

35. WA Arson Task Force, *Flame Out: Combating Arson in Western Australia* (1999) 21.

and undertaking risk assessments that identify those who may be particularly vulnerable<sup>36</sup>

- **environmental design** – for example, improving the design and materials, security and surveillance, and fire protection equipment used in buildings and on properties<sup>37</sup>
- **research and risk analysis** – for example, further research into causes of fire offending behaviour,<sup>38</sup> and deploying prevention measures in areas identified as being at high risk of fire based on factors relating to geography, time and the area’s age and socio-economic profile<sup>39</sup>
- **detection and proactive policing** – for example, installing surveillance cameras in the bush,<sup>40</sup> and using visible police patrols in high-risk locations,<sup>41</sup> especially since an increased chance of apprehension may be more likely to deter fire offenders than an increased potential punishment<sup>42</sup>
- **therapeutic interventions** – for example:
  - early identification of mental illness as the cause of fire offending behaviour,

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36. A Lewis, *The Prevention and Control of Arson*, The Loss Prevention Council Library of Fire Safety Vol 6 (Fire Protection Association, 1999)136.
  37. H Prins, *Fire-Raising: Its Motivation and Management* (Routledge, 1994) 91-93; A Lewis, *The Prevention and Control of Arson*, The Loss Prevention Council Library of Fire Safety Vol 6 (Fire Protection Association, 1999) 84-96; WA Arson Task Force, *Flame Out: Combating Arson in Western Australia* (1999) 21; NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 29-30; D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 6.
  38. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 507, 509; D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 6.
  39. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 509, 511-513; WA Arson Task Force, *Flame Out: Combating Arson in Western Australia* (1999), 21.
  40. H Merkell, “Arsonists on NSW North Coast in Sights of Forestry Corporation” (25 September 2017) *ABC News* <<https://www.abc.net.au/news/2017-09-25/arsonists-on-nsw-north-coast-in-the-sights-of-forestry-corp/8984244>> (retrieved 21 May 2019).
  41. B Teague, *2009 Victorian Bushfires Royal Commission*, Final Report Summary, Parliamentary Paper No 332 (2010) 13.
  42. R Mees, “Is Arson Associated with Severe Fire Weather in Southern California?” (1991) 1 *International Journal of Wildland Fire* 97, 100.

- diversion from the criminal justice system to treat mental illness,<sup>43</sup> and
- increased availability of psychological programs for fire offenders<sup>44</sup>
- **preventing fire offending by fire fighters** – for example:
  - education programs aimed particularly at new and younger fire fighters<sup>45</sup>
  - pre-employment psychological screening, such as comparing applicants to fire offender profiles through interviews and surveys,<sup>46</sup> and
  - pre-employment criminal history checks,<sup>47</sup> such as requiring people applying to become fire fighters to disclose any history of fire offending, including offences committed while a child (which are offences they are not usually required to disclose).<sup>48</sup>

## Child fire offenders

### Motivations

- 2.17 The literature suggests that younger children generally commit fire offences accidentally, non-maliciously and out of curiosity, experimentation or during play.<sup>49</sup> Meanwhile, older children generally commit fire offences deliberately and out of a broader range of motivations similar to those seen in adults.<sup>50</sup> These motivations are commonly expressions of revenge and anger, a need for attention (for example, as a “cry for help” or out of distress, loneliness or unhappiness) and to receive recognition as valuable or heroic.<sup>51</sup>

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43. E Repo and M Virkkunen, “Outcomes in a Sample of Finnish Firesetters” (1997) 8 *Journal of Forensic Psychiatry* 127; H Prins, *Fire-Raising: Its Motivation and Management* (Routledge, 1994) 68-69.
44. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 515; L F Lowenstein, “Recent Research into Arson (1992-2000): Incidence, Causes and Associated Features, Predictions, Comparative Studies and Prevention and Treatment” (2003) 10 *Psychiatry, Psychology and Law* 192, 196.
45. United States Fire Administration, *Special Report: Firefighter Arson* (Maryland, 2003) 29.
46. R Doley, “Smoke Screen” (2003) *Fire Chief* 64; United States Fire Administration, *Special Report: Firefighter Arson* (Maryland, 2003) 30-31.
47. S Howden, “Police Check Volunteer Firefighters” *News.com.au* (1 July 2004).
48. *Young Offenders Act 1997* (NSW) s 68(2)(b).
49. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 62, 124-125.
50. T Drabsch, *Arson*, Briefing Paper 2/2003 (NSW Parliament, 2003) 13.
51. J Stanley, “Preventing Children and Young People Lighting Bushfires in Australia” (2002) 10(2) *Child Abuse Prevention Newsletter* 8-9.

## Other subjective factors

- 2.18 Similar to adults, the literature suggests that many of the children who commit fire offences have psychiatric diagnoses; the more common being personality disorder, post-traumatic stress disorder, and conduct disorder.<sup>52</sup> However, these studies may be distorted by the fact that children exhibiting behavioural problems are more likely to come to the notice of authorities.<sup>53</sup>
- 2.19 Again, similar to adults, the literature suggests that many of the children who commit fire offences have a variety of social problems. These include:
- troubled family relationships, often with absent or distant parents<sup>54</sup>
  - a history of being abused or neglected,<sup>55</sup> and
  - behavioural issues, sometimes including suicidal intentions.<sup>56</sup>

## Past offending

- 2.20 In the NSW Children's Court from 2008-2017, of the 343 people found guilty of a fire offence as their principal offence, 43.7% of them (150 offenders) had a known prior proven court appearance in the previous 5 years. However, these statistics are slightly distorted by the fact that in 14.2% of cases (49 offenders) the offender's court appearance history was unknown.

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52. L F Lowenstein, "Recent Research into Arson (1992-2000): Incidence, Causes and Associated Features, Predictions, Comparative Studies and Prevention and Treatment" (2003) 10 *Psychiatry, Psychology and Law* 192, 194-195; J Stanley, "Preventing Children and Young People Lighting Bushfires in Australia" (2002) 10(2) *Child Abuse Prevention Newsletter* 8.
53. J Stanley, "Preventing Children and Young People Lighting Bushfires in Australia" (2002) 10(2) *Child Abuse Prevention Newsletter* 8; M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 69.
54. J Stanley, "Preventing Children and Young People Lighting Bushfires in Australia" (2002) 10(2) *Child Abuse Prevention Newsletter* 8; L F Lowenstein, "Recent Research into Arson (1992-2000): Incidence, Causes and Associated Features, Predictions, Comparative Studies and Prevention and Treatment" (2003) 10 *Psychiatry, Psychology and Law* 192, 193-194.
55. J Stanley, "Preventing Children and Young People Lighting Bushfires in Australia" (2002) 10(2) *Child Abuse Prevention Newsletter* 8; J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 507, 509.
56. L Dalhuisen, F Koenraadt and M Liem, "Subtypes of Firesetters" (2017) 27 *Criminal Behaviour and Mental Health* 59, 60-61; L F Lowenstein, "Recent Research into Arson (1992-2000): Incidence, Causes and Associated Features, Predictions, Comparative Studies and Prevention and Treatment" (2003) 10 *Psychiatry, Psychology and Law* 192, 194-195.

## Prevention

2.21 In addition to the fire prevention methods outlined above in relation to adults,<sup>57</sup> the literature suggests that child fire offending can be prevented by education and therapeutic interventions aimed specifically at children:

- **education** – for example, education programs that explain the consequences of fire lighting and ways to prevent fires,<sup>58</sup> held in schools<sup>59</sup> or at fire stations,<sup>60</sup> often involving parents (for example, encouraging fire preventive behaviour at home).<sup>61</sup> These programs should be individually tailored to:
  - prevent further fascination with fire (especially if underlying psychological or social problems remain unaddressed)<sup>62</sup>
  - prevent traumatising the child (for example, in NSW, visiting burns victims in hospital is no longer part of the youth justice conference program because of its potentially traumatising effect),<sup>63</sup> and
  - prevent exacerbating existing psychological or social problems (for example, low self-esteem, guilt and resentment).<sup>64</sup>
- **therapeutic interventions** – for example:
  - counselling and family therapy<sup>65</sup>
  - behavioural programs that reward children for responding appropriately to their stressors<sup>66</sup>

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57. [2.16]

58. H Prins, *Fire-Raising: Its Motivation and Management* (Routledge, 1994) 83-84; W S Wooden and M L Berkey, *Children and Arson: America's Middle Class Nightmare* (Plenum, 1984) 180-182.

59. D Kafry, "Playing with Matches: Children and Fire" in D Canter (ed) *Fires and Human Behaviour* (David Fulton, 2nd ed, 1990) 57.

60. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 108.

61. W S Wooden and M L Berkey, *Children and Arson: America's Middle Class Nightmare* (Plenum, 1984) 182-183; D Kafry, "Playing with Matches: Children and Fire" in D Canter (ed) *Fires and Human Behaviour* (David Fulton, 2nd ed, 1990).

62. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 114.

63. NSW Attorney General's Department, *Regulatory Impact Statement: Young Offenders Regulation 2010* (2010) 6, 8.

64. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 114.

65. H Prins, *Fire-Raising: Its Motivation and Management* (Routledge, 1994) 83-83; L F Lowenstein, "Recent Research into Arson (1992-2000): Incidence, Causes and Associated Features, Predictions, Comparative Studies and Prevention and Treatment" (2003) 10 *Psychiatry, Psychology and Law* 192, 195-196.



- encouraging children to become interested in activities other than fire lighting,<sup>67</sup> and
- reducing feelings of guilt in children by engaging them in repairing the damage caused by fires.<sup>68</sup>

2.22 There are several programs in Australia that aim to prevent fire offending among children, including Victoria’s Juvenile Fire Awareness and Intervention Program, Queensland’s Fight Fire Fascination Program and Juvenile Arson Offenders Program,<sup>69</sup> and NSW’s Intervention and Fire Awareness Program and FireEd program.<sup>70</sup> The effectiveness of these programs has not been comprehensively evaluated.<sup>71</sup> Similar programs exist in the United Kingdom, such as “Xtinguish”, which one study suggests has reduced the number of average fires per child from 4.4 fires every 6 months to less than 0.5 fires every 6 months.<sup>72</sup>

## Diversiónary options

### Non-court options

2.23 The NSW Police Force has often used non-court options to deal with children who have committed fire offences. In NSW from 2004 to September 2008, of the 1015 people aged 10-17 proceeded against in connection with a fire-related offence, 74.7% of them (758) were proceeded against by police using non-court options.<sup>73</sup> Of those 758 people, the most common non-court option were warnings (331), followed by cautions (285), then youth conferences (98), unclassified options (42) and infringement notices (2).<sup>74</sup>

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66. W S Wooden and M L Berkey, *Children and Arson: America’s Middle Class Nightmare* (Plenum, 1984) 183.

67. D Kafry, “Playing with Matches: Children and Fire” in D Canter (ed) *Fires and Human Behaviour* (David Fulton, 2nd ed, 1990), 59.

68. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 110.

69. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 513.

70. Fire and Rescue NSW, “Prevention and Community Preparedness” (2019) <<https://www.fire.nsw.gov.au/page.php?id=9189>> (retrieved 21 May 2019).

71. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 513-514.

72. J Beale and W Jones, “Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known” (2011) 47 *Fire Technology* 513-514.

73. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 18-19.

74. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 18-19.

However, these numbers do not represent unique offenders, as an offender may be involved in multiple incidents in a year.<sup>75</sup>

- 2.24 The NSW Police Force launched an early intervention initiative in August 2018 called RISEUP Strategy, which aims to prevent youth-related crime and divert child offenders from the criminal justice system. In 2018, two young people charged with fire offences participated in the initiative.

### **Youth justice conferences**

- 2.25 In NSW, a child fire offender may attend a youth justice conference. The purpose of a youth justice conference is to help the child take responsibility for their actions and take steps towards repairing the harm they have caused.<sup>76</sup> Conference participants are issued outcome plans that require them to engage in both education and reparation.<sup>77</sup> The education may involve attending a program, or watching a video or film about the harmful effects of fire.<sup>78</sup> The reparation might include paying compensation, assisting with clean-up operations, and treating injured animals (or if such work is not available, undertaking community service work of a similar kind).<sup>79</sup>
- 2.26 In 2002, NSW introduced legislation that required child fire offenders to attend a burns unit or ward of a hospital.<sup>80</sup> However, there were concerns that these visits could cause burns patients discomfort, embarrassment or distress, and that the visits could traumatise and distress offenders rather than educate them in a constructive manner.<sup>81</sup> As a result, the option of requiring a child fire offender to view a video about the harmful effect of fire was introduced at the end of 2003.<sup>82</sup>
- 2.27 In 2010, the option to visit the burns unit or ward was removed, by which time NSW Health had withdrawn its support for the option, because the visits carried a risk of infection, could infringe upon patient privacy and emotional well-being, and could have an emotional impact on young fire offenders.<sup>83</sup> At the same time, the *Young Offenders Regulation 2010* (NSW) introduced the option of the young offender attending a

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75. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 18-19.

76. NSW, Juvenile Justice, *Guidelines for Youth Justice Conferencing* (2011) 2.

77. *Young Offenders Regulation 2016* (NSW) cl 8(2).

78. *Young Offenders Regulation 2016* (NSW) cl 8(2)(a).

79. *Young Offenders Regulation 2016* (NSW) cl 8(2)(b).

80. *Young Offenders Regulation 2004* (NSW) cl 20(2)(a)(i).

81. NSW, Attorney General's Department, *Regulatory Impact Statement: Young Offenders Regulation 2010* (2010) 6.

82. *Young Offenders Amendment Regulation 2003* (NSW).

83. NSW, Attorney General's Department, *Regulatory Impact Statement: Young Offenders Regulation 2010* (2010) 7.

program that educates about the harmful effects of fire.<sup>84</sup> The regulatory impact statement introducing that regulation noted that the Intervention and Fire Awareness Program for young fire lighting offenders facilitated by the NSW Fire Brigade appeared to be adequate.<sup>85</sup> The remainder of the existing provisions were continued because they recognised “the particular nature of the offence and the potential for widespread damage to life and property if the young person re-offends” and would help ensure that the young person “understands the harm caused by his or her actions and takes responsibility for what they have done”.<sup>86</sup>

- 2.28 A study from the early 2000s suggests that youth justice conferences reduce re-offending in general, showing that young offenders who participated in them reappeared in conferences or court 15-20% less than young offenders who went to court, for each year in the follow-up period.<sup>87</sup>
- 2.29 In NSW from 2001 to 2009, participants were unable to agree on a suitable outcome plan in only one of the 115 youth justice conferences held.<sup>88</sup> In NSW between 2001 and 2008, an average of 89% of outcome plans were completed,<sup>89</sup> and 40% of outcomes included some kind of direct work for the victim, work for the NSW Fire Brigade and/or financial reparation.<sup>90</sup>
- 2.30 From information provided by the NSW Police Force, we understand that of the 53 young people charged for fire-related offences in 2018, 22 of them were scheduled for conferences in 2018. The NSW Police Force also informed us that ten young people reoffended after conferencing, but none of the offences were fire-related.<sup>91</sup>

## Summary

- 2.31 The literature on the characteristics of fire offenders says that:

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84. *Young Offenders Regulation 2010* (NSW) cl 8(2)(a).

85. NSW, Attorney General’s Department, *Regulatory Impact Statement: Young Offenders Regulation 2010* (2010) 7.

86. NSW, Attorney General’s Department, *Regulatory Impact Statement: Young Offenders Regulation 2010* (2010) 8.

87. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 18.

88. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 17.

89. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 17.

90. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 18.

91. Information provided by NSW Police Force (9 April 2019).

- a large proportion of fire offenders are young people
  - adults have diverse motives for deliberate fire offending, while younger children generally commit fire offences accidentally
  - many adult and child fire offenders have psychological and social issues, and
  - only a small proportion of adult fire offenders have committed fire offences in the past, but a majority of adult and child fire offenders have committed non-fire offences in the past.
- 2.32 There are many ways to prevent fire offending other than through the criminal law, including education, community planning, environmental design, risk analysis, proactive policing and detection, and therapeutic interventions.
- 2.33 Around three quarters of child fire offenders are dealt with by non-court options, with the most common non-court options being warnings, then cautions, then youth justice conferences.
- 2.34 Several authors think the literature on fire offenders has flaws that render it of limited instructive value for developing ways to deal with fire offenders.<sup>92</sup> It is difficult to conclude, from the characteristics of fire offenders revealed by the literature, whether increasing maximum penalties or SNPPs will be effective in deterring fire offending. We bear these limitations in mind when framing our recommendations in this report.

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92. [2.2]

## 3. The bushfire offence

### In Brief

The bushfire offence was introduced to emphasise society's condemnation of deliberate bushfire lighting and to reflect the seriousness of the danger bushfires pose. A relatively low percentage of charges for the offence result in a conviction and a relatively large proportion of charges are dealt with through mental health provisions. In dealing with those convicted, NSW courts impose imprisonment in a significant proportion of cases.

<b>The provision</b> .....	<b>31</b>
<b>Origins</b> .....	<b>32</b>
<b>Purpose</b> .....	<b>33</b>
<b>Statistics</b> .....	<b>34</b>
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NSW Children's Court.....	35
NSW higher courts.....	36
Sentencing.....	37
Local Court of NSW.....	37
NSW Children's Court.....	38
NSW higher courts.....	39

### The provision

3.1 The bushfire offence in s 203E of the *Crimes Act 1900* (NSW) provides that it is an offence to:

- cause a fire intentionally, and
- be reckless as to its spread to vegetation on any public land or on land belonging to another.<sup>1</sup>

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1. *Crimes Act 1900* (NSW) s 203E(1).

- 3.2 Recklessness may be established by proof of intention, so it is also an offence to intend the fire to spread to vegetation on any public or private land.<sup>2</sup>
- 3.3 It is a defence if the person is a fire fighter, or is acting under the direction of a fire fighter, and lit the fire during bushfire fighting or hazard reduction operations.<sup>3</sup>
- 3.4 The maximum penalty for the offence is 21 years' imprisonment. The maximum penalty applies when the offence is tried on indictment in the District Court or Supreme Court. When an adult offender is tried on indictment, a standard non-parole period ("SNPP") of 5 years applies.<sup>4</sup> The SNPP was not increased when the maximum penalty was increased from 14 years' to 21 years' imprisonment in 2018.
- 3.5 When the offence is tried summarily in the Local Court (which occurs if the prosecutor or accused has not elected a trial on indictment), the jurisdictional limit of 2 years' imprisonment applies for each offence with a combined limit of 5 years' imprisonment when more than one offence is sentenced in the proceedings.<sup>5</sup> The SNPP does not apply when the offence is tried summarily.<sup>6</sup>
- 3.6 If a jury is not satisfied that the accused is guilty of the offence an alternative verdict is available<sup>7</sup> for an offence under s 100(1) of the *Rural Fires Act 1997* (NSW) ("*Rural Fires Act*").<sup>8</sup>

## Origins

- 3.7 The NSW bushfire offence is based on a provision in the Commonwealth Model Criminal Code.<sup>9</sup>
- 3.8 The 2001 report proposing the model provision, after noting that damage to vegetation "may be of great or little moment" and that fire can be beneficial for the procreation of some species, observed:

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2. *Crimes Act 1900* (NSW) s 203E(2).

3. *Crimes Act 1900* (NSW) s 203E(3).

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) pt 4, div 1A, item 15B.

5. *Criminal Procedure Act 1986* (NSW) s 267(2), s 268(1A); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 58.

6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54D(2).

7. *Crimes Act 1900* (NSW) s 203E(4).

8. See [1.21]-[1.23].

9. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 46.

The real gravamen of the offence is the creation of a risk, which may or may not eventuate, of catastrophic damage to property, life or environment.<sup>10</sup>

- 3.9 The Model Criminal Code proposed a maximum penalty of 15 years' imprisonment.

## Purpose

- 3.10 The second reading speech that introduced the provision in 2002<sup>11</sup> makes clear that it did not seek to fill a gap in the criminal law but rather that it sought to emphasise “society’s abhorrence and condemnation of the deliberate lighting of bushfires” as well as “the gravity of the danger that bushfires represent”.
- 3.11 The offence was not a “catch-all arson offence” but was seen as sitting among the “more than adequate” offences of damage to property by fire. It was also seen as a “direct complement” to the strict liability offence of lighting a fire without lawful authority under s 100(1) of the *Rural Fires Act*. Damage to buildings and other property could be taken into account at sentencing or, where appropriate, could be subject to additional charges.<sup>12</sup>
- 3.12 The maximum penalty at the time of enactment – 14 years' imprisonment – sat in the middle of the range of property damage penalties. This placed the offence on the same level as the offence of causing property damage with the intention of injuring a person, which also had a maximum penalty of 14 years' imprisonment. It was observed:

The danger to life and property that a bushfire represents in a continent as dry as Australia means that the offence should be seen to be a special aggravated form of damage to property.<sup>13</sup>

- 3.13 It was also noted that the offence deals with recklessness as to the spread of a fire to vegetation and does not require any thought about the extent of damage that the fire might cause. The aim was “to prohibit conduct that creates an unacceptable risk of damage” rather than waiting for the damage to occur. It was envisaged that “[i]f a fire is carelessly lit, it may be an offence even if the fire is, by good luck, extinguished before damage occurs”.<sup>14</sup>

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10. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 51.

11. NSW, *Parliamentary Debates*, Legislative Assembly, 12 April 2002, 1468.

12. NSW, *Parliamentary Debates*, Legislative Assembly, 12 April 2002, 1468.

13. NSW, *Parliamentary Debates*, Legislative Assembly, 12 April 2002, 1468.

14. NSW, *Parliamentary Debates*, Legislative Assembly, 12 April 2002, 1468.

- 3.14 The second reading speech introducing the 2018 penalty increase to a maximum term of 21 years' imprisonment noted that it:
- makes one of the lowest penalties for comparable offences across Australia into the equal highest penalty
  - provides enhanced deterrence in the face of a growing risk – particularly in light of the expectation that environmental conditions for summer 2018-19 will be “increasingly conducive to bushfires”
  - better reflects the harm that bushfires can cause – including potentially “catastrophic damage to land and properties, loss of livestock, injury and death to members of the community, and substantial economic costs to individuals and the State”, and
  - better aligns with community expectations.<sup>15</sup>

## Statistics

- 3.15 The following paragraphs set out the statistics about the results of charges and the sentences imposed for the bushfire offence.

### Charge finalisations

- 3.16 The statistics about charge finalisations relate to charges – in some cases there may be more than one charge per offender. This can be seen by comparing the number of charges laid in the various courts with the number of offenders sentenced in 2008-2017.
- 3.17 A relatively low percentage of charges (42-63%) result in a conviction (finding of guilt). By comparison, for example, of the 141,024 charged defendants in finalised court appearances in all NSW courts in 2017, 127,693 (91%) resulted in a conviction.
- 3.18 The statistics also generally illustrate:
- a relatively large proportion of defendants are dealt with through provisions that take into account the defendant's mental health status, and
  - a relatively large proportion of matters are withdrawn by the prosecution, potentially illustrating the difficulties of proof attached to the bushfire offence.

### Local Court of NSW

- 3.19 Figure 3.1 sets out the number of finalised charges for the bushfire offence in the Local Court.

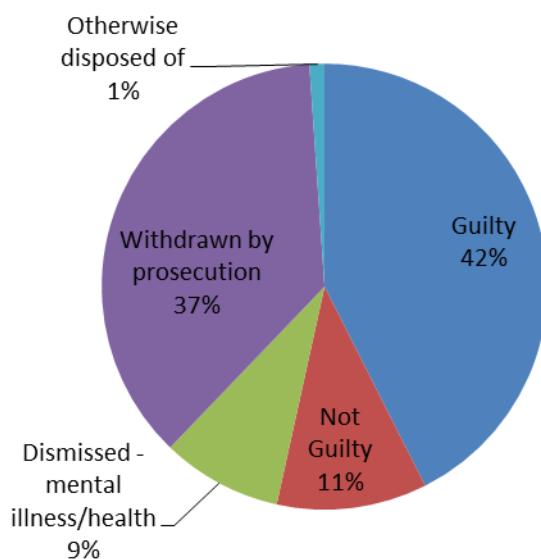
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15. NSW, *Parliamentary Debates*, Legislative Assembly, 13 November 2018, 52-53.



- 3.20 Of the 275 charges laid in the Local Court, 117 (42%) resulted in a finding of guilt. To give a further idea about the group found guilty, of the 64 individuals sentenced for the bushfire offence in 2008-2017, 52 (81%) had entered a guilty plea.<sup>16</sup>
- 3.21 The 9% of charges dismissed due to mental illness/health compares with the 1.6% of all defendants dismissed by the Local Court for the same reason in 2017.<sup>17</sup>
- 3.22 The 37% of charges withdrawn by the prosecution compares with the 4.5% of all defendants in the Local Court in 2017 who had all charges withdrawn by the prosecution.<sup>18</sup>

Figure 3.1: Number of finalised charges for the bushfire offence, Local Court of NSW, 2008-2017 (N=275)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

### NSW Children’s Court

- 3.23 Figure 3.2 sets out the number of finalised charges for the bushfire offence in the NSW Children’s Court.

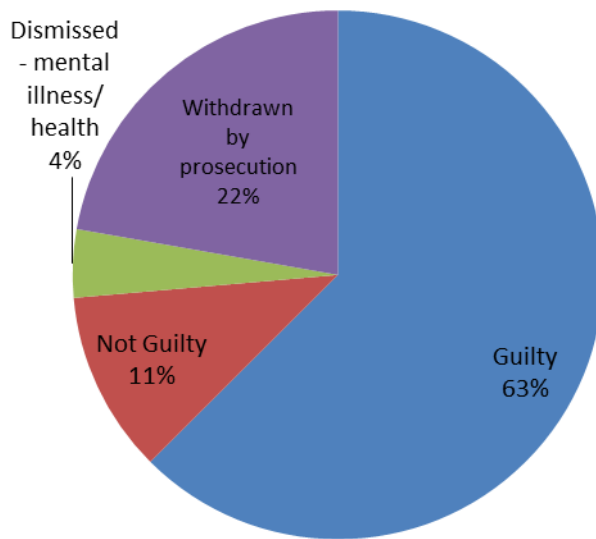
16. NSW Bureau of Crime Statistics and Research (sr18-17031).

17. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.

18. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.

- 3.24 Only 72 charges for the bushfire offence were recorded in the Children’s Court in 2008–2017. It should be noted, however, that one third of them (24 charges) occurred in 2013 and of these, 20 resulted in a finding of guilt.
- 3.25 The 4% of charges dismissed due to mental illness/health compare with the 2.9% of all defendants in the Children’s Court dismissed for the same reason in 2017.

Figure 3.2: Number of finalised charges for the bushfire offence, NSW Children’s Court, 2008-2017 (N=72)



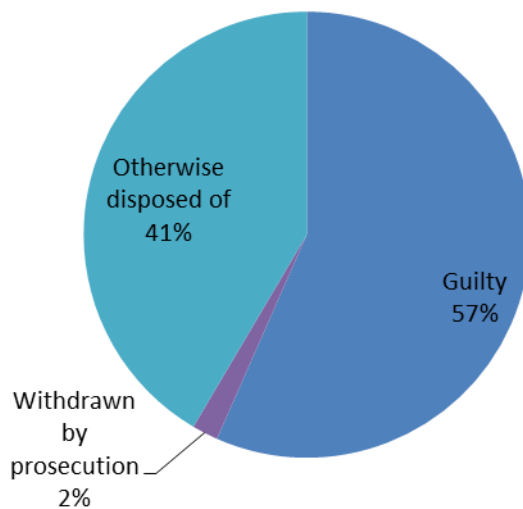
Source: NSW Bureau of Crime Statistics and Research (jh19-17327).

**NSW higher courts**

- 3.26 Figure 3.3 sets out the number of finalised charges for the bushfire offence in the NSW higher courts.
- 3.27 In the 10 years between 2008 and 2017, only 53 charges for the bushfire offence have been laid in the higher courts. Just over half of these charges were disposed of in 2017 – 10 by a finding of guilt and 17 otherwise disposed of. “Otherwise disposed of” includes cases where the court transfers a defendant to the Drug Court or refers them to the Mental Health Review Tribunal.

3.28 The 41% “otherwise disposed of” category is relatively high when compared with the 2.8% of defendants in this category in all matters finalised in the District Court in 2017.<sup>19</sup>

Figure 3.3: Number of finalised charges for the bushfire offence, NSW higher courts, 2008-2017 (N=53)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

## Sentencing

3.29 The statistics set out below relate to the bushfire offence as the principal offence. They show a significant reliance on imprisonment.

### Local Court of NSW

3.30 Figure 3.4 sets out the sentences imposed by the Local Court for the bushfire offence.

3.31 In 2008–2017, the Local Court of NSW sentenced 64 offenders where the bushfire offence was the principal offence. Of these, 27 (42%) were sentenced to imprisonment. The next most frequent sentences were a bond without supervision (11–17%) and a suspended sentence with supervision (9–14%).

3.32 These figures can be compared with those for the penalties that the Local Court imposed for a variety of principal offences in 2017. For all offences, the Local Court imposed imprisonment in 8.7% of cases, in 4.7% of cases for property damage offences not involving fire and in 14.3% of cases for acts intended to cause injury. Of particular

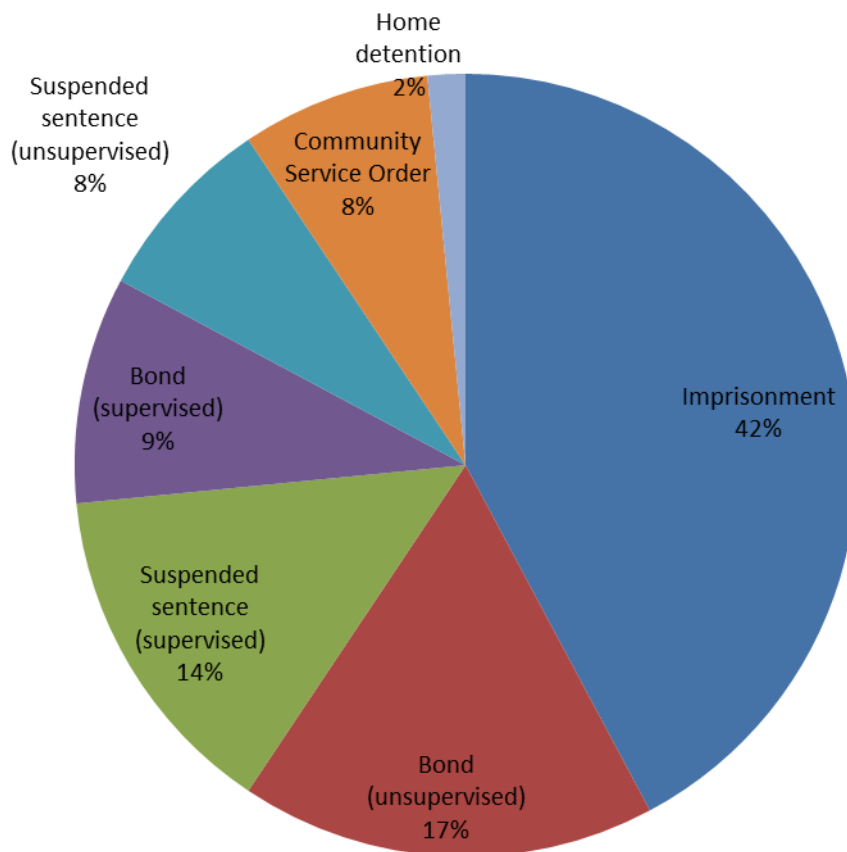
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19. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.

note, no offenders were sentenced to the most common penalty in the Local Court – the fine, which is imposed for all offences in 38.5% of cases, for property damage offences not involving fire in 33.8% of cases, and for acts intended to cause injury in 10.6% of cases.

3.33 We note that suspended sentences were abolished in NSW in September 2018.

Figure 3.4: Type of sentence for the bushfire offence (principal offence), Local Court of NSW, 2008-2017 (N=64)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

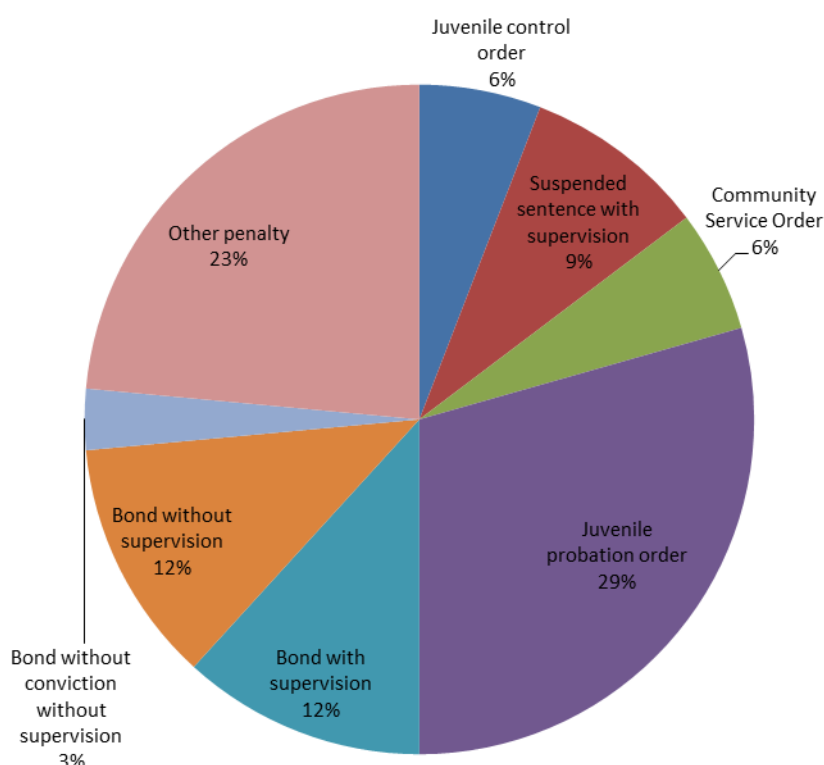
3.34 In 2008-2017, of the 27 offenders sentenced to imprisonment, 25 (93%) received a non-parole period of 12 months or less. Only 2 received a non-parole period of more than 12 months and less than 2 years.

### NSW Children’s Court

3.35 Figure 3.5 sets out the relatively small number of bushfire offenders that are sentenced in the Children’s Court. Of the 34 offenders sentenced for a principal offence in 2008-2017, 14 (41%) were sentenced in 2013.

3.36 Of the 34 offenders, 10 (29%) were sentenced to a juvenile probation order, 8 (23%) were sentenced to an “other penalty”, 4 (12%) were sentenced to bonds with supervision and 4 (12%) to bonds without supervision. A juvenile probation order is an order that releases a young person on probation on such conditions as the Children’s Court may determine, for such time not exceeding two years as it thinks fit.<sup>20</sup> “Other penalty” includes when the matter is dismissed after a youth justice conference,<sup>21</sup> when the juvenile offence is proved but dismissed,<sup>22</sup> and when the court decides to take no action after an offender breaches a bond.

Figure 3.5: Type of sentence for the bushfire offence (principal offence), Children’s Court of NSW, 2008-2017 (N=64)



Source: NSW Bureau of Crime Statistics and Research (jh19-17327).

### NSW higher courts

3.37 In 2008-2017, the higher courts sentenced 7 offenders for the bushfire offence – less than one a year on average.

20. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(e).

21. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c1).

22. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a).

3.38 In the period after the *Muldrock* decision,<sup>23</sup> which established the correct approach to SNPPs, the District Court has handed down four sentences for the bushfire offence as a principal offence. They were all sentences of imprisonment:

- 8 years (5 years NPP)
- 5 years (3 years 5 months NPP)
- 3 years 6 months (2 years NPP)
- 2 years 6 months (12 months NPP).

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23. *Muldrock v R* [2011] HCA 39, 244 CLR 120.

## 4. Standard non-parole period for the bushfire offence

### In Brief

The standard non-parole period for the bushfire offence should be set somewhere in the range of 8 to 10 years. This reflects the seriousness with which the community views the offence and takes into account the need for special deterrence, the potential for exceptional harm and the potential vulnerability of victims.

<b>Increasing the standard non-parole period</b>	<b>42</b>
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<b>Our conclusion</b>	<b>48</b>
4.1	The standard non-parole period (“SNPP”) represents the non-parole period for an offence that, “taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness”. <sup>1</sup> Together with the maximum penalty, it is one of the guideposts for courts when sentencing offenders.
4.2	The terms of reference have asked us to review the 5-year SNPP for the bushfire offence and to determine whether it should be increased in light of the increase to its maximum penalty from 14 years’ imprisonment to 21 years’ imprisonment.
4.3	Two submissions supported an increase. <sup>2</sup>

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 54A(2).

2. Rural Fire Service Association Inc, *Submission FI05*, 1; NSW Police Force and Office for Police, *Submission FI07*, 1.

- 4.4 Some submissions argued against increasing the SNPP for the bushfire offence, including on the basis that:
- the offence has a low prevalence
  - the offence covers a wide range of offending behaviour
  - the offence is one that can be tried summarily and very few offenders are dealt with on indictment (making it difficult to assess the consistency and proportionality of sentencing for the offence)
  - many offenders are children and young people and many have mental health issues, and
  - many offenders plead guilty.<sup>3</sup>
- 4.5 The Office of the Director of Public Prosecutions also took the view that an increase in the SNPP was unnecessary on the basis that the increase in the maximum penalty was sufficient to give further recognition of the serious view that is taken of bushfires.<sup>4</sup> Another submission suggested that there is no evidence to show that increasing the SNPP would have a significant deterrent and denunciatory effect.<sup>5</sup>

## Increasing the standard non-parole period

- 4.6 The fact that an offence has a significant maximum penalty is an indication of the parliament's view of the offence's seriousness, and the expectation that the courts, in appropriate cases, will impose a significant prison term.<sup>6</sup> An increase in the SNPP for the bushfire offence to reflect the increase in the maximum penalty can be similarly said to reflect the community's view of the offence's seriousness.<sup>7</sup>
- 4.7 The bushfire offence is clearly an offence that calls for a specific measure of general and personal deterrence, even though some offenders may be subject to the sentencing principles which are applicable to:
- young offenders – for whom the objective of rehabilitation will be more important, and

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3. Legal Aid NSW, *Submission F102*, 2; The Public Defenders, *Submission F103*, 2-5; J Anderson, *Submission F104*, 3; Law Society of NSW, *Submission F106*, 3; Office of the Director of Public Prosecutions (NSW), *Submission F108*, 2.

4. Office of the Director of Public Prosecutions (NSW), *Submission F108*, 2.

5. J Anderson, *Submission F104*, 3.

6. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) [2.7].

7. *R v Mills* [2005] NSWCCA 175 [53].



- those with mental health or cognitive impairments – where the need for deterrence may be less.
- 4.8 The fact that some offenders may have their sentences mitigated because of these factors does not mean that the parliament should not set an SNPP that is appropriate for an offence in the middle of the range of objective seriousness. The fact that an NPP in that range may not be appropriate for some offenders does not mean that it cannot apply to others.<sup>8</sup>
- 4.9 One paper on preventing and reducing bushfire arson suggested that even though there is a very low probability (around one-third of 1%) that a person who lights a bushfire will be detected and appear in court:

This is, however, not to suggest that generalised deterrence does not exist at all—the legislative reforms and publicity surrounding individual successful prosecutions as well as of the harm caused by bushfire arson, may deter some prospective arsonists and reduce negligent behaviour that can lead to bushfires.<sup>9</sup>

## Guidelines for setting a standard non-parole period

- 4.10 In 2013, we produced a report on SNPP and recommended guidelines for setting a SNPP for an offence:

The process for specifying an SNPP for an SNPP offence should assume as a starting point a non parole period that is 37.5% of the maximum penalty for the offence. The resulting figure can then be reduced or increased (to no more than 50% of the maximum penalty for the offence) as is appropriate, having regard to the following matters:

- (a) the special need for deterrence
- (b) the need to recognise the exceptional harm which the offence may cause
- (c) the potential vulnerability of those who may be victims
- (d) the extent to which the offence may involve a breach of trust or abuse of authority, and

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8. See, eg, *R v Mills* [2005] NSWCCA 175 [61], [63]-[65].

9. J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 507, 516.

- (e) sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.<sup>10</sup>

4.11 We continue to support these guidelines.

## Applying the guidelines

- 4.12 The 5-year SNPP for the bushfire offence is currently around 24% of the maximum penalty of 21 years imprisonment. It was 36% of the former maximum penalty of 14 years imprisonment.
- 4.13 Following the guidelines, the starting point should be 7 years and 10 months. We consider the following matters are of particular relevance to increasing the SNPP from that starting point:
- the need for special deterrence
  - the need to recognise the exceptional harm which the offence may cause, and
  - the potential vulnerability of those who may be victims.

## Need for special deterrence

- 4.14 One study has suggested that of the approximately 54,000 bushfire ignitions every year in Australia, close to half could be classified as deliberately lit or suspicious in origin.<sup>11</sup> Although there needs to be a comprehensive review and analysis of the incidence of deliberate and suspicious bushfire ignitions,<sup>12</sup> even if a smaller number of fires were attributed to deliberate causes, the offence is clearly a prevalent one.
- 4.15 There is a need for special deterrence because, as is generally recognised, the bushfire offence is relatively easy to commit and difficult to detect.<sup>13</sup> Bushfire offences are particularly difficult to detect because the physical evidence that could be used in a prosecution is often destroyed when the offence is committed, and there are seldom witnesses.<sup>14</sup> It may, therefore, not always be obvious that a crime has been committed

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10. NSW Sentencing Council, *Standard Non-Parole Periods*, Report (2013) rec 4.1.

11. J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 507, 508.

12. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 131.

13. J L Anderson, " 'Playing with Fire': Contemporary Fault Issues in the Enigmatic Crime of Arson" (2016) 39 *University of New South Wales Law Journal*, 950, 956, 957, 974.

14. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 21.

and it may require extensive resources to uncover the cause.<sup>15</sup> Some offenders are, therefore, never identified or held responsible.<sup>16</sup>

## Potential for exceptional harm

- 4.16 Not all bushfires are deliberately lit, and not all deliberately lit bushfires spread and become a problem. However, all deliberately lit bushfires carry the potential for exceptional harm.
- 4.17 Notwithstanding the uncertainty about the extent of deliberately lit bushfires, and the relative destructiveness of those that are deliberately lit,<sup>17</sup> deliberately lit bushfires that spread do at least contribute to the harms we outline below.
- 4.18 The Model Criminal Code Officers Committee report identified the “real gravamen” of the bushfire offence as “the creation of a risk, which may or may not eventuate, of catastrophic damage to property, life or environment”.<sup>18</sup> The committee also noted that:
- [o]ffences of criminal damage, which are concerned with harm to individual property interests, do not adequately reflect the harm to collective or community interests involved in bushfires.<sup>19</sup>
- 4.19 Bushfires are unpredictable and depend on weather conditions. They potentially have hugely destructive force when they get out of the control of the firelighter or fire fighters.<sup>20</sup>
- 4.20 A bushfire’s destructive potential can be illustrated by the fact that since 1851, there have been over 800 bushfire deaths in Australia. The Ash Wednesday bushfires in South Australia and Victoria in 1983 took 75 lives and destroyed 2,400 homes. The Black Saturday bushfires in Victoria in 2009 took 173 lives and destroyed over 2,000 homes, and 2,000 other structures. The Black Christmas bushfires in 2001 in NSW

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15. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 18.

16. D A Muller, *Offending and Reoffending Patterns of Arsonists and Bushfire Arsonists in New South Wales*, Trends and Issues in Crime and Criminal Justice No 348 (Australian Institute of Criminology, 2008) 1.

17. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 82-83.

18. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 51.

19. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 47.

20. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 79.

destroyed 121 homes. The Canberra bushfires in 2003 destroyed almost 500 houses. Most recently, the Tathra bushfire in NSW in 2018 destroyed 69 homes and 30 caravans or cabins.

- 4.21 A literature review has observed that “[t]here are few human behaviours, outside terrorist attacks, which achieve this unfettered potential”.<sup>21</sup> Another commentator has observed that “[t]he social and health effects of incendiary fires are best estimated in terms of human disruption and misery”.<sup>22</sup>
- 4.22 Australia has been described as “one of the most fire-prone countries on earth” as a result of its “climate, topography, geography and vegetation”.<sup>23</sup> The potential for serious harm is likely to increase in light of climate change.
- 4.23 In 2010, the NSW Office of Environment and Heritage published a report on observed changes in the NSW climate. It noted that the rising temperatures are having “significant impacts,” including a greater bushfire danger as measured in an increased number of extreme fire danger days each year.<sup>24</sup> It observed that between 1973 and 2007, the annual sum of the forest fire danger index (which measures the risk of fire, taking into account temperature, relative humidity, wind speed, daily rainfall and time elapsed since the last rain) rose by between 10% and 40% at many observation stations across the State.<sup>25</sup>

### **Personal harm**

- 4.24 The bushfire offence carries the potential for exceptional personal harm to all who come within the path of a bushfire, including residents and emergency services personnel. Such personal harm includes:
- death
  - physical injury, and

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21. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 79.

22. R G Vreeland and B M Levin, “Psychological Aspects of Firesetting” in D Canet (ed), *Fires and Human Behaviour* (2nd ed, 1990) 31.

23. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 2.

24. NSW, Office of Environment and Heritage, *Observed Changes in New South Wales Climate 2010* (2010) 2, 6.

25. NSW, Office of Environment and Heritage, *Observed Changes in New South Wales Climate 2010* (2010) 6. See also C Lucas, and others, *Bushfire Weather in Southeast Australia: Recent Trends and Projected Climate Change Impacts*, Consultancy Report, Climate Institute of Australia (Bushfire Cooperative Research Centre, 2007) 48-49.

- psychological injury (such as the development of post-traumatic stress disorder in fire fighters who have an intense exposure to a bushfire disaster).<sup>26</sup>

### **Economic harm**

4.25 Potential economic harm is another broad category and would extend to a number of direct, indirect and intangible costs, such as:

- damage to and destruction of homes, noting that many people live in proximity to at risk bushland, especially at the interface between populated urban areas and the bush<sup>27</sup>
- damage to rural industries, including to crops and stock as well as to forestry<sup>28</sup>
- damage to community infrastructure, including National Parks, and
- costs to the community including the costs of fire services, medical services, and volunteer time,<sup>29</sup> and increases in insurance premiums.

### **Environmental harm**

4.26 Notwithstanding past Indigenous burning practices and the need for some fire to encourage new growth and procreation of bushland, there are a number of potential harms to the environment, such as:

- placing pressures on ecosystems and compromising, for example, the supply of clean water<sup>30</sup>
- increasing pollution, giving rise to health impacts – for example, fine particle health standards in Sydney, which are usually exceeded on 1–3 days per year, were exceeded on 13 days in 2002 because of severe bushfires,<sup>31</sup> and
- harming animals (both wildlife and stock), including injury, death and needless suffering in the aftermath of a fire.

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26. A C McFarlane, "The Aetiology of Post-traumatic Stress Disorders Following a Natural Disaster" (1988) 152 *British Journal of Psychiatry* 116.

27. See [4.29]-[4.30].

28. M Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series No 61 (Australian Institute of Criminology, 2004) 79-80.

29. P Mayhew, *Counting the Costs of Crime in Australia*, Trends and Issues in Crime and Criminal Justice No 247 (Australian Institute of Criminology, 2003) 4-5.

30. J Beale and W Jones, "Preventing and Reducing Bushfire Arson in Australia: A Review of What is Known" (2011) 47 *Fire Technology* 507, 507.

31. Australian Bureau of Statistics, *Measures of Australia's Progress: Summary Indicators*, 1383.0.55.001 (2009) Air Quality.

## Potential vulnerability of victims

- 4.27 Those who live in high-risk areas are particularly vulnerable to fear of loss of property and life during bushfires.
- 4.28 First, people in remote bushland locations are particularly vulnerable because they may be far removed from emergency services and inaccessible to those services. It may also be difficult to escape from bushfires in places where access is limited.
- 4.29 Secondly, there is a particular vulnerability for people who live on the interface between populated urban areas and the bush. The south-eastern portion of Australia is characterised by tall forests with heavy fuel loads and a susceptibility to strong dry winds. The greatest potential for bushfire disaster is at the interface between these forests and populated urban areas.<sup>32</sup>
- 4.30 In 1994, it was observed that in each of the then recent fire disasters in Australia, the major losses had occurred when a single fire burnt into a residential area, either a major town or on one of the city fringes. One example is the Como/Jannali fire in 1994. This was in part due to the:

increasing tendency for people on the outskirts of major cities and towns to purchase larger blocks of from one to 20 hectares and build their homes without substantial clearing of the native vegetation or, where this land had previously been pastoral land, regrowth and regeneration of the native vegetation has been encouraged.<sup>33</sup>

## Our conclusion

- 4.31 In our view, the Government should consider setting an SNPP for the bushfire offence somewhere in the range of 8–10 years.
- 4.32 While two submissions raised the possibility of an SNPP of one-third of the maximum penalty, that is, 7 years,<sup>34</sup> we do not consider that there is adequate reason to set the SNPP below the starting point of 37.5% – that is, 7 years and 10 months.
- 4.33 An SNPP within the range of 8–10 years (38–48% of the maximum penalty of 21 years' imprisonment) reflects the considerations set out above and the seriousness with which parliament and, by extension, the community, views the offence.

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32. N P Cheney, "Bushfires - An Integral Part of Australia's Environment" in I Castles (ed), *Year Book Australia 1995*, No 77 (Australian Bureau of Statistics, 1994) 515, 515.

33. N P Cheney, "Bushfires - An Integral Part of Australia's Environment" in I Castles (ed), *Year Book Australia 1995*, No 77 (Australian Bureau of Statistics, 1994) 515, 520.

34. Rural Fire Service Association Inc, *Submission FI05*, 1; J Anderson, *Submission FI04*, 3.

#### Recommendation 4.1

The standard non-parole period for the bushfire offence under s 203E of the *Crimes Act 1900* (NSW) should be set somewhere in the range of 8–10 years' imprisonment.





# 5. Property damage by fire offences

**In Brief**

NSW has a number of offences of destroying or damaging property with various elements. Each of these has escalated penalties where the damage is caused by fire or explosives. The proportion of charges for these offences that result in conviction is relatively low. A relatively large proportion of those charged for these offences are dealt with under mental health provisions. A relatively large proportion of convicted offenders receive a custodial sentence.

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## The offences

- 5.1 The *Crimes Act 1900* (NSW) (“*Crimes Act*”) includes a number of offences of destroying or damaging property. Each of these has escalated penalties where the destruction or damage is caused by fire or explosives (with a maximum penalty of imprisonment ranging from 10–16 years). The relevant offences are:
  - **Destroying or damaging property intentionally or recklessly.** These offences arise where a person intentionally or recklessly destroys or damages property that belongs to another or to that person and another. In addition to the basic offence, there is an aggravated form of the offence where the person acts in the company of

one or more other people, and where the person acts during a public disorder.<sup>1</sup>  
These are indictable offences that are triable summarily unless:

- the prosecutor or the person charged elects otherwise (if the damage is more than \$5,000),<sup>2</sup> or
  - the prosecutor elects otherwise (if the damage is \$5,000 or less).<sup>3</sup>
- **Destroying or damaging property with intent to injure a person.** These offences arise where a person destroys or damages property, and by doing so intends to cause bodily injury to someone else. There is an aggravated form of the offence where the person acts during a public disorder.<sup>4</sup> These are indictable offences that are triable summarily unless the prosecutor or the person charged elects otherwise.<sup>5</sup>
  - **Dishonestly destroying or damaging property.** These offences arise where a person destroys or damages property dishonestly to make a gain for themselves or for somebody else. There is an aggravated form of the offence where the person acts during a public disorder.<sup>6</sup> These are indictable offences that are triable summarily unless the prosecutor or the person charged elects otherwise.<sup>7</sup>
- 5.2 There is also the offence of destroying or damaging property intending to endanger life.<sup>8</sup> This offence attracts a maximum penalty of 25 years' imprisonment whether or not the destruction or damage is caused by fire (or explosives). It is triable on indictment only.
- 5.3 Table 5.1 sets out the penalties for the property damage offences, including where the offences are committed by fire or explosives.

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1. *Crimes Act 1900* (NSW) s 195.  
2. *Criminal Procedure Act 1986* (NSW) sch 1, table 1, item 3(c).  
3. *Criminal Procedure Act 1986* (NSW) sch 1, table 2, item 3(c).  
4. *Crimes Act 1900* (NSW) s 196.  
5. *Criminal Procedure Act 1986* (NSW) sch 1, table 1, item 9.  
6. *Crimes Act 1900* (NSW) s 197.  
7. *Criminal Procedure Act 1986* (NSW) sch 1, table 1, item 9.  
8. *Crimes Act 1900* (NSW) s 198.

**Table 5.1: Maximum penalties for offences of destroying or damaging property.**

Destroy or damage property...	basic offence		in company		during a public disorder	
	without fire or explosives	by fire or explosives	without fire or explosives	by fire or explosives	without fire or explosives	by fire or explosives
<b>intentionally or recklessly (s 195)</b>	5 years	10 years	6 years	11 years	7 years	12 years
<b>intending to injure a person (s 196)</b>	7 years	14 years			9 years	16 years
<b>dishonestly, with a view to gain (s 197)</b>	7 years	14 years			9 years	16 years
<b>intending to endanger life (s 198)</b>	25 years					

Source: *Crimes Act 1900 (NSW)*.

## Legislative intention

- 5.4 The basic framework of the offences was introduced in 1988 at the same time that the common law felony of arson was abolished.<sup>9</sup> The maximum penalty for the offence of destroying or damaging property with the intention of endangering life was originally life imprisonment, however, this was reduced to 25 years' imprisonment when the life sentence reforms commenced in 1990.<sup>10</sup>
- 5.5 According to the second reading speech, the intention for introducing the offences was to simplify the law, clearly indicate the aggravating circumstances and rationalise the penalties:

The seriousness of these offences does not depend upon the type of property damaged but the means used to damage the property, the intent of the accused, and whether the life of any person was endangered. These offences are part of a scheme for which there is a range of penalties, graded according to these aggravating factors, which are precisely defined. The benefit of this grading of offences is that it will assist in providing sentencing uniformity. The penalties range from five years' imprisonment for the least malicious damage where there are no aggravating factors, to life imprisonment for the most serious where there is an intent to endanger life. The penalties are consistent

9. *Crimes (Criminal Destruction and Damage) Amendment Act 1987 (NSW)* s 3, sch 1(5).

10. *Crimes (Life Sentences) Amendment Act 1989 (NSW)* sch 1(21).

with comparable offences in the *Crimes Act 1900* and comparable legislation in other jurisdictions.<sup>11</sup>

- 5.6 The original enactment did not provide separate penalties for offences committed in company or during public disorder. These aggravating elements were introduced in 2006 as part of reforms intended to “criminalise gang participation and gang-related activity”.<sup>12</sup>

## Judicial consideration of risk of spread of fire

- 5.7 When comparing sentencing for the bushfire offence and sentencing for property damage by fire, a key consideration is the risk of a fire spreading and the consequent danger to life and property. The question is one of some complexity. There is some relevant case law.
- 5.8 Arguably, the property damage offence, which imposes an increased maximum penalty where fire is involved, contains an element of potential risk of physical injury to others.<sup>13</sup>
- 5.9 The fact that an offence is committed without regard to public safety is an aggravating factor under s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW).<sup>14</sup> This can be taken into account at sentencing, subject to the usual care to avoid the risk of double counting.<sup>15</sup>
- 5.10 In the NSW Court of Criminal Appeal (“CCA”), Justice Johnson has observed that in deciding an appropriate sentence for property damage by fire, a court may take into account the circumstances of the possible spread of fire and the potential risk of physical injury to others.<sup>16</sup> In another case, the court simply observed, in relation to a fire in a suburban house:

There was a real risk that the fire would spread to other property causing further damage and putting occupants' lives at risk.<sup>17</sup>

- 5.11 In a recent appeal, the CCA observed:

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11. NSW, *Parliamentary Debates*, Legislative Assembly 28 October 1987, 15344.

12. NSW, *Parliamentary Debates*, Legislative Assembly 30 August 2006, 1142.

13. See *R v Glover* [2002] NSWCCA 376 [56]–[58].

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(i).

15. See, eg, *R v Khan* [2016] NSWSC 1073 [83], [95].

16. *Porter v R* [2008] NSWCCA 145 [80].

17. *Watts v R* [2010] NSWCCA 315 [32].

It can be accepted that the use of fire and explosion carries with it a risk that the fire may spread and may endanger the lives of other people (including fire fighters etc) indirectly. An observation that the offence generically is a serious one for that reason is not objectionable. The question is whether the remarks in the present case were of such a nature or whether they were remarks directed to an assessment of the objective criminality in the present case. That question must be answered by reference to a consideration of the judgment on sentence read as a whole and the impugned comments read in context.<sup>18</sup>

5.12 Another recent appeal also raised some relevant questions on the issue. The case involved the night time destruction by fire of a ground floor supermarket beneath a complex of residential apartments, as part of a plan to defraud an insurer. The fire prevented the residents from leaving the building by the stairs and they escaped by jumping from a balcony. A number of residents were treated for smoke inhalation. The offender, together with two co-offenders (one of whom was a part owner of the supermarket) was convicted of dishonestly damaging property by fire with a view to gain.

5.13 In argument before the CCA, it was submitted that the sentencing judge's emphasis on the offender's awareness of risk to the safety of building residents, and the extent to which the risk actually materialised:

converted the sentencing judge's assessment of the [offender's] state of mind as an aspect of his lack of regard for public safety generally ... into a de facto extension of his criminal liability at the time he committed the offence, when neither recklessness as to endangerment of life and/or actual endangerment to life comprise the mental element of the offence [of destroying or damaging property by fire or explosives dishonestly, with a view to gain].<sup>19</sup>

5.14 The CCA observed that, while there is an offence of destroying or damaging property with the intention of endangering life, "there is no offence under the Crimes Act where, when premises are deliberately damaged or destroyed, reckless endangerment of life is the mental element".<sup>20</sup> However, in the case in hand, the CCA considered that the offender's culpability was of such a high order that it was not persuaded that the sentence being appealed was unreasonable or plainly unjust.<sup>21</sup>

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18. *Ruge v R* [2015] NSWCCA 153 [25].

19. *Nasser v R* [2017] NSWCCA 104 [27].

20. *Nasser v R* [2017] NSWCCA 104 [28].

21. *Nasser v R* [2017] NSWCCA 104 [29].

## Statistics

- 5.15 Apart from the basic offence of damaging property by fire or explosives, most of the other versions of the offence, involving fire or explosives, occur relatively less frequently, if at all.
- 5.16 In the ten years between 2008–2017, only one conviction has been recorded for any of the offences occurring “during a public disorder”.

## Charge finalisations

- 5.17 The statistics about charge finalisations relate to charges – in some cases there may be more than one charge per offender. This can be seen by comparing the number of charges laid in the various courts with the number of offenders sentenced in 2008–2017.
- 5.18 As we also noted in Chapter 3 in relation to the bushfire offence, the proportion of charges resulting in a conviction is relatively low, when compared with the number of all charged defendants who are convicted.<sup>22</sup>
- 5.19 The figures for the Local Court and higher courts likewise show a relatively large proportion of defendants being dealt with through the relevant mental health provisions.

### Local Court of NSW

- 5.20 Figure 5.1 sets out the outcomes for finalised charges for the property damage by fire offences in the Local Court from 2008 to 2017.
- 5.21 Of the 2,051 charges laid in the Local Court, 1,279 (62%) resulted in a finding of guilt. To give a further idea about the group found guilty, of the 920 individuals sentenced for the property damage by fire offence as a principal offence in 2008–2017, 756 (82%) had entered a guilty plea.<sup>23</sup>
- 5.22 The 10% of charges dismissed due to mental illness/health compares with the 1.6% of all defendants dismissed by the Local Court for the same reason in 2017.<sup>24</sup>
- 5.23 The 19% of charges withdrawn by the prosecution compares with the 4.5% of all defendants in the Local Court in 2017 who had all charges withdrawn by the prosecution.<sup>25</sup>

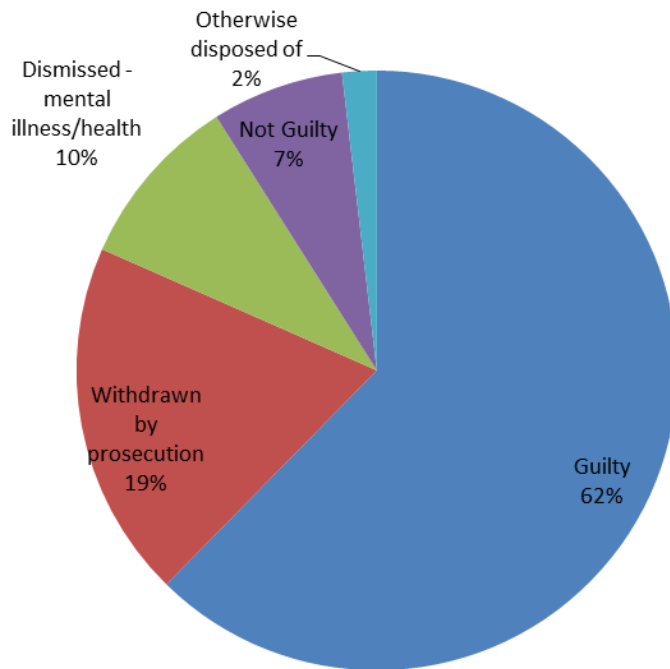
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22. [3.17].

23. NSW Bureau of Crime Statistics and Research (sr18-17031).

24. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.

Figure 5.1: Number of finalised charges by court outcome – property damage by fire, Local Court of NSW, 2008-2017 (N=2051)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

- 5.24 Of the individual offences, the 40 charges relating to destroying or damaging property with intent to injure a person present a different profile – with the prosecution withdrawing 40% of the charges and only 32% of the charges resulting in a finding of guilt. This aligns more closely with the percentages for the number of finalised charges for the bushfire offence.<sup>26</sup>

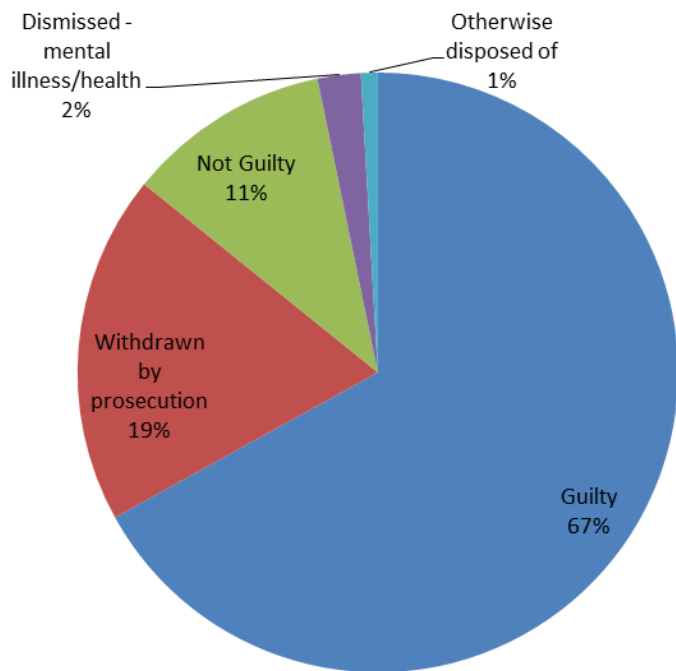
### NSW Children’s Court

- 5.25 Figure 5.2 sets out the number of finalised charges by court outcome for the property damage by fire offences in the Children’s Court in 2008–2017.
- 5.26 775 charges for the property damage by fire offences were recorded in the Children’s Court in 2008–2017.

25. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.

26. See [3.19]-[3.22]; Figure 3.1.

Figure 5.2: Number of finalised charges by court outcome – property damage by fire, NSW Children’s Court, 2008-2017 (N=775)



Source: NSW Bureau of Crime Statistics and Research (jh19-17327).

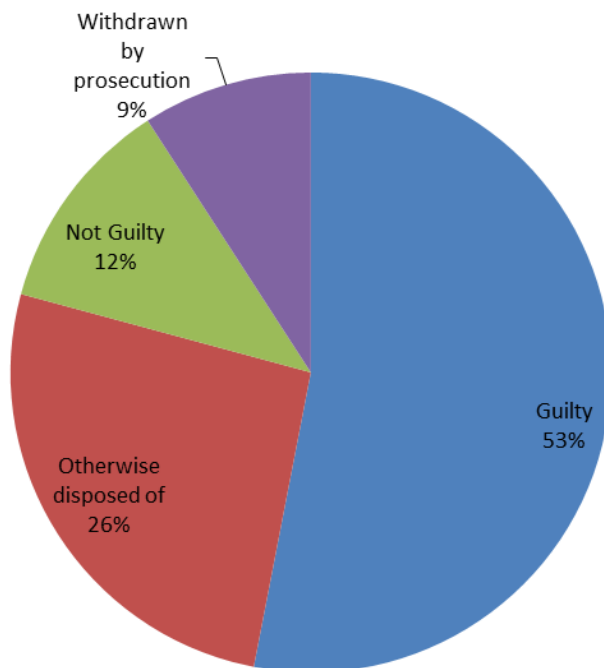
**NSW higher courts**

- 5.27 Figure 5.3 sets out the number of finalised charges by outcome for the property damage by fire offences in the ten years between 2008 and 2017.
- 5.28 The 26% “otherwise disposed of” category is relatively high when compared with the 2.8% of defendants in this category in matters finalised in the District Court in 2017.<sup>27</sup> “Otherwise disposed of” includes cases where the court transfers a defendant to the Drug Court or refers them to the Mental Health Review Tribunal.

27. NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics January 2013 to December 2017*, table 3.



Figure 5.3: Number of finalised charges by court outcome – property damage by fire, NSW higher courts, 2008-2017 (N=558)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

## Sentencing

5.29 The statistics set out below relate to the property damage by fire offences as principal offences.

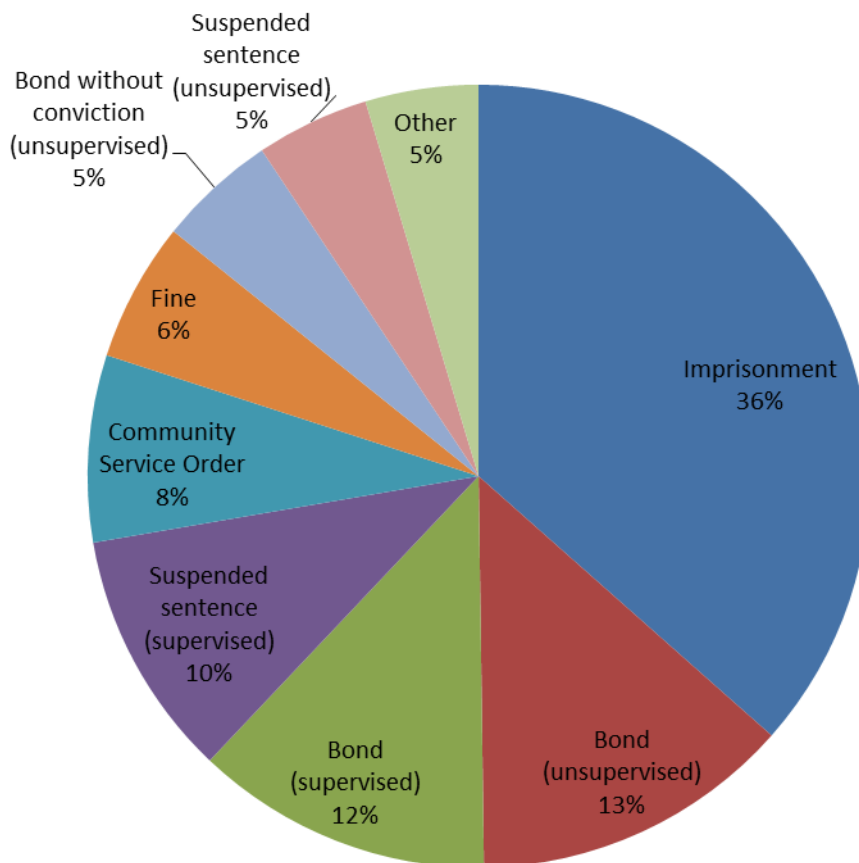
### Local Court of NSW

5.30 In 2008–2017, the Local Court of NSW sentenced 920 offenders where one of the property damage by fire offences was the principal offence. Figure 5.4 sets out the sentences imposed. The three most frequent penalties were:

- imprisonment – 336 offenders (36%)
- bond without supervision – 122 offenders (13%), and
- bond with supervision – 113 offenders (12%).

- 5.31 When compared with the number of penalties the Local Court imposed for all offences in 2017, as set out in Chapter 3,<sup>28</sup> we can see a relatively higher reliance on imprisonment and a substantially lower reliance on the fine as a penalty.
- 5.32 Suspended sentences were imposed in 15% of cases. We note that suspended sentences were abolished in NSW in September 2018.

Figure 5.4: Sentences imposed for a property damage by fire offence (principal offence) – Local Court of NSW, 2008-2017 (N=920)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

Other: Intensive correction order (1.6%); no conviction (0.8%); home detention (0.8%); conviction only (0.7%); periodic detention (0.5%); bond without conviction (unsupervised) (0.2%); other penalty (0.1%).

28. [3.32].

- 5.33 Of the 336 offenders sentenced to imprisonment, 284 (85%) received a non-parole period of 12 months or less. The remaining 52 (15%) received a non-parole period greater than 12 months and less than 2 years.

### **NSW Children’s Court**

- 5.34 Figure 5.5 sets out the sentences imposed by the Children’s Court in 2008–2017 for a property damage by fire offence as a principal offence.
- 5.35 Of the 309 offenders, 76 (25%) received a juvenile probation order, 67 (22%) received an “other penalty”, and 57 (18%) received a juvenile control order. A juvenile probation order is an order that releases a young person on probation on such conditions as the Children’s Court may determine, for such time not exceeding two years as it thinks fit.<sup>29</sup> A juvenile control order generally requires a person to be detained in detention centre established under the *Children (Detention Centres) Act 1987* (NSW).<sup>30</sup> “Other penalty” includes when the matter is dismissed after a youth justice conference,<sup>31</sup> when the juvenile offence is proved but dismissed,<sup>32</sup> and when the court decides to take no action after an offender breaches a bond.

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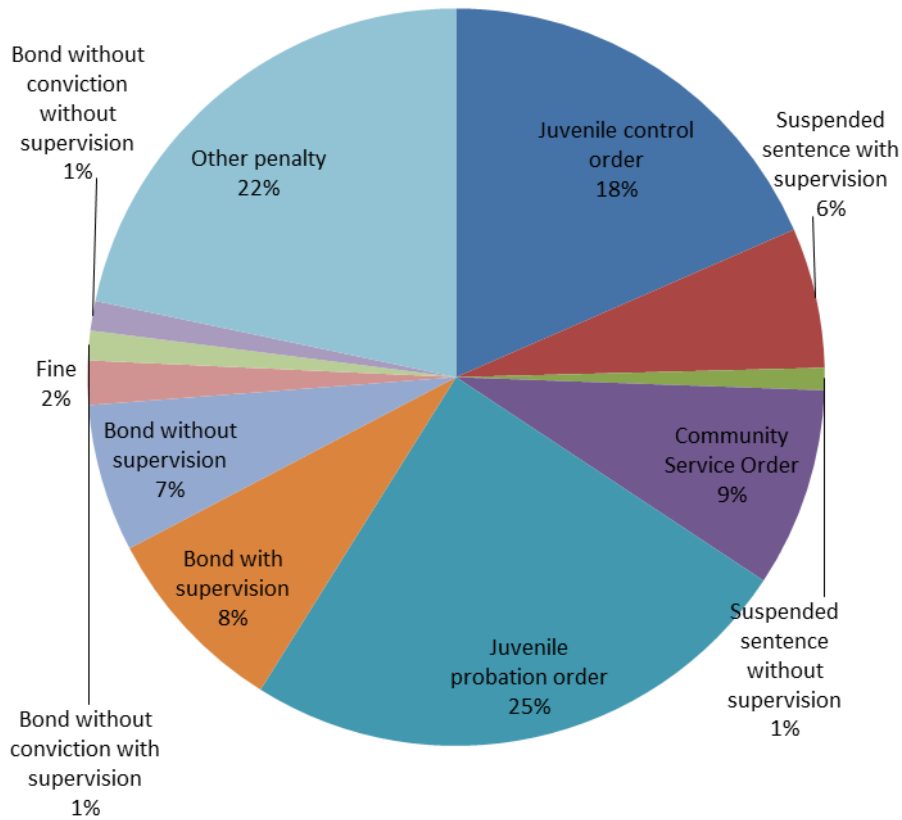
29. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(e).

30. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(g).

31. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c1).

32. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a).

Figure 5.5: Sentences imposed for a property damage by fire offence (principal offence) – NSW Children’s Court, 2008-2017 (N=309)

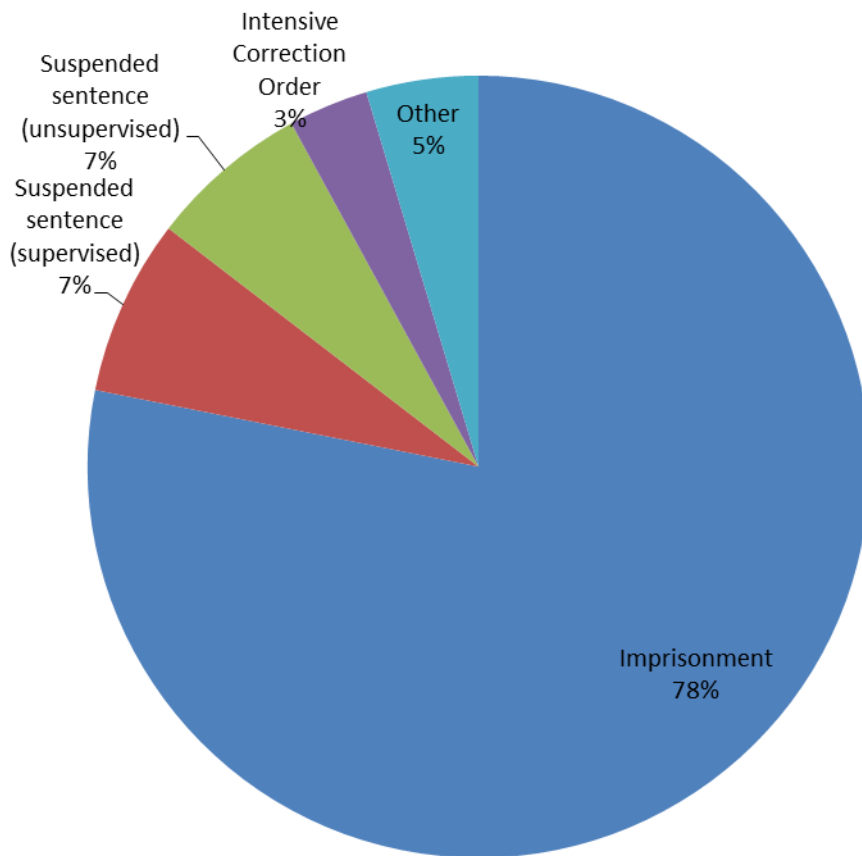


Source: NSW Bureau of Crime Statistics and Research (jh19-17327).

### NSW higher courts

- 5.36 Figure 5.6 sets out the sentences imposed by the higher courts in 2008–2017 for a property damage by fire offence as a principal offence.
- 5.37 Of the 151 offenders sentenced, 118 (78%) were sentenced to imprisonment, and 21 (14%) were sentenced to a suspended sentence.
- 5.38 Suspended sentences are now no longer available in NSW, having been abolished in September 2018.

Figure 5.6: Sentences imposed for a property damage by fire offence (principal offence) – NSW higher courts, 2008-2017 (N=151)

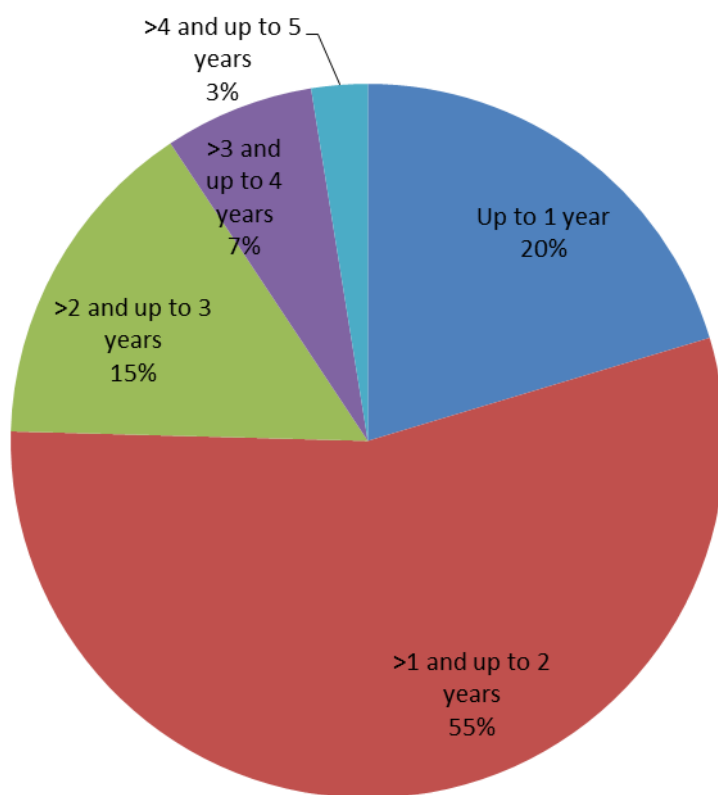


Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

Other: Bond (supervised) (1.3%); juvenile control order (0.7%); periodic detention (0.7%); home detention (0.7%); community service order (0.7%); bond (unsupervised) (0.7%).

5.39 Figure 5.7 sets out the non-parole periods imposed on 118 offenders sentenced to imprisonment. 65 (55%) received a non-parole period of more than 1 year but no more than 2 years. One quarter received a non-parole period of more than 2 years. The non-parole periods of more than 2 years were spread across all of the different property damage by fire offences.

Figure 5.7: Non-parole periods for a property damage by fire offence (principal offence)  
– NSW higher courts, 2008-2017 (N=118)



Source: NSW Bureau of Crime Statistics and Research (sr18-17031).

## 6. Penalties for property damage by fire

### In Brief

Increasing the maximum penalties for the existing property damage by fire offences is not desirable. This is because they have very different elements to the bushfire offence, and increasing the penalty, without changing the elements of the offences, risks unbalancing the penalty structure for all of the property damage offences. Options of creating fire offences with new elements that reflect more serious outcomes (such as death), or serious risk of spread of fire outside a bushfire situation would require a substantial review of the existing property damage offences. This is beyond our terms of reference.

<b>The question</b> .....	<b>65</b>
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### The question

- 6.1 The second question arising from our terms of reference is whether the maximum penalties for property damage by fire<sup>1</sup> should be changed in light of the increased penalty for the bushfire offence.
- 6.2 Some submissions did not support a general increase in the penalties for property damage by fire.<sup>2</sup> Others supported a general increase in these penalties.<sup>3</sup>
- 6.3 Part of the problem with answering this question is that we are comparing two very different groups of offences.

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1. *Crimes Act 1900* (NSW) s 195(1)(b), s 195(1A)(b), s 195(2)(b), s 196(1)(b), s 196(2)(b), s 197(1)(b), s 197(2)(b).

2. Legal Aid NSW, *Submission FI02*, 3-4; The Public Defenders, *Submission FI03*, 5-6; Law Society of NSW, *Submission FI06*, 3-4; Office of the Director of Public Prosecutions (NSW), *Submission FI08*, 2-3.

3. Rural Fire Service Association Inc, *Submission FI05*, 1; NSW Police Force and Office for Police, *Submission FI07*, 1-2.

- 6.4 In the case of the bushfire offence, the main elements are intentionally lighting a fire and being reckless about its spread to vegetation. The offence is potentially complete if a person lights a fire with the requisite recklessness. No harm need result. This offence is very much like the old offence of arson, which required simply the lighting of a fire.
- 6.5 On the other hand, the offences of intentional or reckless property damage by fire require some form of damage, although the intention or recklessness need only be in relation to some form of harm or destruction, not the harm or destruction that actually results.<sup>4</sup>
- 6.6 To an extent, the element of the risk of fire is reflected in the greater penalty for destruction or damage to property when fire is used.<sup>5</sup> For example, the basic offence of intentionally or recklessly destroying or damaging property attracts a maximum penalty of 5 years' imprisonment, but 10 years when the destruction or damage is by fire or explosives.
- 6.7 The following hypothetical scenarios of a person seeking to destroy a motor vehicle by fire raise the question whether there is a gap in the existing offence provisions:
- If they drive a car to the middle of deserted open-air car park one night and set light to it, the maximum penalty is 10 years' imprisonment for the basic offence of property damage by fire. However, if the fire goes out and they fail to destroy or damage the car, they have not committed that offence, although they may have committed the inchoate offence of attempt.
  - If they drive a car to the middle of the bush one night and set light to it, the maximum penalty is 21 years for lighting a fire and being reckless as to its spread to vegetation, etc. However, if the fire goes out and they fail to destroy or damage it, the offence is still complete.
  - If they drive a car to a car park under a block of apartments one night and set light to it, the maximum penalty is 10 years even though they may be reckless as to its spread to other properties and present a serious risk to the lives of people sleeping in the apartments above.
- 6.8 Particular questions are whether there should be different, or harsher, penalties for fire offences where death results, or where the offender is reckless as to spread of fire to other than vegetation, or where there is a high chance of spread of fire to other property. We address these options below.<sup>6</sup>

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4. See *CB v DPP* [2014] NSWCA 134.

5. See *R v Glover* [2002] NSWCCA 376 [56]-[58].

6. [6.19]-[6.30].



- 6.9 It may not be possible to deal with penalties for property damage by fire without restructuring the existing offences entirely. One submission draws attention to the problems with the existing hierarchy of offences. While this submission acknowledges a need to recognise the magnitude of the material consequences of lighting fires and the need to assign responsibility commensurate with known or probable harm or injury, it does not consider that this could be proposed as a response to our terms of reference.<sup>7</sup>

## Options for reform

- 6.10 We have considered a number of possible approaches to the problem that leave the basic framework of the fire offences intact.

### Retain the current penalty structure

- 6.11 One option is to make no change to the current penalty structure. The significantly disproportionate maximum penalty for lighting bushfires can be justified on the basis of the particular fears of the community in relation to bushfires and their destructive/uncontrollable power.<sup>8</sup> We illustrate the potential for exceptional harm in chapter 4.<sup>9</sup>
- 6.12 Some submissions also conclude that the variety of provisions available, together with their maximum penalties, provides an adequate range of possible penalties depending on the circumstances of the case.<sup>10</sup>

### Increase the maximum penalties for fire offences generally

- 6.13 Another option would be simply to increase the penalty for offences involving fire/explosives.
- 6.14 Some jurisdictions, such as Western Australia and South Australia, provide for a maximum penalty of life imprisonment for property damage by fire.<sup>11</sup>
- 6.15 Increasing the maximum penalty for property damage by fire to something like 25 years' imprisonment would give the courts the discretion to sentence for a range of criminal activity and resulting harms. However, this could be seen as unbalancing the current penalty structure for the various offences of destroying or damaging property. One submission suggests that increasing the penalty for property damage by fire with an

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7. J Anderson, *Submission FI04*, 5.

8. See, eg, Office of the Director of Public Prosecutions (NSW), *Submission FI08*, 3.

9. [4.16]-[4.26].

10. The Public Defenders, *Submission FI03*, 6; Legal Aid NSW, *Submission FI02*, 3; Office of the Director of Public Prosecutions (NSW), *Submission FI08*, 2.

11. *Criminal Law Consolidation Act 1935* (SA) s 85(1); *Criminal Code* (WA) s 444(1)(a).

intent to injure could lead to arguments for proportional increases in other offences that involve an intent to injure.<sup>12</sup>

- 6.16 There are problems with taking an approach that gives the courts a wide discretion as to penalty. In 2009, the Criminal Law Review Division (“CLRD”) suggested that there could be a problem with the current penalty structure incorporating both intentional and reckless activity:

A person who recklessly lights a fire that does damage is of lesser criminality than a person who intentionally lights a fire. Dealing with both under an offence with a single, high maximum penalty potentially leads to a sentence that is disproportionate to the criminality of the offender or one that the general public will view as disproportionate to the maximum penalty.<sup>13</sup>

- 6.17 The CLRD concluded:

As a result of the consistent and close scrutiny of arson related offences in NSW, there are now a set of complementary provisions, which cover the range of behaviours which are of concern. These offences carry penalties between 10 and 25 years imprisonment. NSW has implemented two approaches.

First, bushfires can be dealt with under a tiered scheme of general property damage offences which are aggravated by fire. Second, in addition to the general offences, NSW has emphasised its concern with bushfire by enacting the specific Model Code offence. This underlines the level of concern about this type of behaviour and also allows charging patterns to be monitored in relation to bushfires.<sup>14</sup>

- 6.18 As already noted, a number of submissions do not support a general increase in the penalties for property damage by fire.<sup>15</sup>

### **Increase the maximum penalties for cases where death results**

- 6.19 There is currently no provision in NSW for an increased penalty where property damage by fire unintentionally results in death. The 2009 CLRD review identified a similar gap in the bushfire offence.<sup>16</sup>

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12. Legal Aid NSW, *Submission F102*, 3.

13. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 9.

14. NSW Attorney General’s Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 13.

15. [6.2].

- 6.20 In 2009, the Commonwealth Government proposed to the Standing Council of Attorneys General an extension of the bushfire offence to provide higher penalties where a bushfire causes death or serious bodily harm. All states agreed that they would consider implementing the new model offence.<sup>17</sup> As already noted,<sup>18</sup> Victoria applies a maximum penalty of 25 years imprisonment to various arson offences where death results.<sup>19</sup> No other states or territories have such provisions for bushfire offences or fire offences more generally.
- 6.21 It should be noted that, when death results from a fire offence, the offences charged may, depending on the facts of the case, be:
- murder, for example, where there is reckless indifference to human life or a high level of foresight, or
  - manslaughter, for example, where the offending amounts to an unlawful or dangerous act or criminal negligence.
- 6.22 NSW also has the offence of property damage with an intention to endanger life, which attracts a maximum penalty of 25 years' imprisonment.<sup>20</sup>
- 6.23 The 2009 CLRD review considered the existing NSW arrangements were adequate<sup>21</sup> and, given the current coverage, did not recommend additional offences. However, it suggested that further reviews could be undertaken to simplify the existing types of general property damage.<sup>22</sup>
- 6.24 In 2001, the Model Criminal Code Officers Committee also concluded that it was "both unnecessary and confusing to enact special provisions in criminal damage legislation which would penalise conduct which causes ... death or personal injury from fire".<sup>23</sup>

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16. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 9.

17. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 9. See WA, *Parliamentary Debates*, Legislative Assembly, 14 October 2009, 8026.

18. [1.43]-[1.45].

19. *Crimes Act 1958* (Vic) s 197, s 197A.

20. *Crimes Act 1900* (NSW) s 198.

21. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 6.

22. NSW Attorney General's Department, Legislation, Policy and Criminal Law Review Division, *Review of Bushfire Arson Laws* (2009) 13.

23. Australia, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Chapter 4: Damage and Computer Offences and Amendments to Chapter 2: Jurisdiction*, Report (2001) 41.

## Increase the maximum penalties where there was a risk of the fire spreading

- 6.25 While the current framework reflects specific concerns about bushfires and targets recklessness as to spread of bushfires, it does not, in the same terms, target recklessness as to spread in other contexts, particularly in urban contexts.
- 6.26 One option would be to create an aggravated offence for serious cases involving recklessness as to the spread of fire to other property or recklessness as to harm to others. This would be similar to the bushfire offence requiring recklessness as to spread to vegetation on other land.<sup>24</sup>
- 6.27 Another option would be to add an element based on provisions in, for example, Western Australia, which deal with lighting a fire that is likely to injure people or property,<sup>25</sup> or Queensland which deal with endangering property by likely spread of fire.<sup>26</sup>
- 6.28 Elements such as recklessness as to spread of fire to another property could be engaged in cases where, for example, a business owner sets fire to their shop and risks the lives of people sleeping in apartments above. For example, the maximum penalty of 14 years' imprisonment for property damage by fire dishonestly with a view to gain<sup>27</sup> could be increased to 21 years where the fire is also lit recklessly as to its spread.
- 6.29 However, care would be needed in framing such new provisions so that any additional element of recklessness as to spread or harm did not prevent courts, when sentencing for a basic fire offence, from taking into account the inherent risk in lighting any fire. That is, any new provisions would need to be careful to avoid the operation of the *De Simoni* principle<sup>28</sup> – which prohibits judges taking into account aggravating circumstances that would have warranted a conviction for a more serious offence.<sup>29</sup> At present, it would appear to be possible to take into account potential physical injury to others without warranting a conviction for a more serious offence because none currently exists.<sup>30</sup>

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24. *Crimes Act 1900* (NSW) s 203E(1).

25. *Bush Fires Act 1954* (WA) s 32.

26. *Criminal Code* (Qld) s 462.

27. *Crimes Act 1900* (NSW) s 197.

28. *R v De Simoni* (1981) 147 CLR 383, 395-396.

29. *R v Glover* [2002] NSWCCA 376 [53]-[57].

30. *R v Glover* [2002] NSWCCA 376 [54].

6.30 We are not aware of any cases where the penalty imposed has been inadequate in the circumstances, due to the lack of an appropriate offence or escalated penalty option. One submission supports this view.<sup>31</sup>

## Our conclusion

6.31 We make no recommendation for change to the current penalties for property damage by fire.

6.32 We see no pressing reason to increase these penalties within the current structure of offences, including the recently increased penalty for lighting bushfires. In particular, we note that:

- bushfire offences carry an extremely serious risk to life and property
- general deterrence of bushfire offences is very important given this risk, and
- we are not aware that the current penalty scheme has resulted in inadequate sentences for property damage by fire offences.

6.33 There are difficulties in comparing the bushfire offence with the general fire offences, particularly in relation to matters such as seriousness of outcome and risk. Such a comparison would require a substantial review of the existing property damage offences, which we consider is beyond our terms of reference.

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31. The Public Defenders, *Submission FI03*, 6.



## A. Submissions

- FI1** Helen Connell, 19 December 2018
- FI2** Legal Aid NSW, 20 February 2019
- FI3** Public Defenders, 22 February 2019
- FI4** John Anderson, 23 February 2019
- FI5** Rural Fire Service Association Inc, 25 February 2019
- FI6** Law Society of NSW, 27 February 2019
- FI7** NSW Police Force and Office for Police, 1 March 2019
- FI8** Office of the Director of Public Prosecutions, 14 March 2019

