THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: EEHrgCrim1643879

22 February 2019

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

By email: sentencingcouncil@justice.nsw.gov.au

Dear Mr Wood,

Review of the standard non-parole period for the bushfire offence and the maximum penalties for destroying property by fire

Thank you for the opportunity to comment on the review of the standard non-parole period ("SNPP") for the bushfire offence under section 203E of the *Crimes Act 1900*, and the maximum penalties for destroying property by fire offences.

For the reasons detailed below, the Law Society considers that the current SNPP for the bushfire offence and the maximum penalties for property damage by fire offences are appropriate and should not be increased.

Setting SNPPs

In its 2013 Report into SNPPs, the NSW Sentencing Council recommended the following approach to setting SNPPs in the future:

> *Recommendation 4.1*
> *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*
> *(e) sentencing statistics and practice, including relevant appellate guidance as to appropriate levels of sentencing for the offence.*[1]

[1] NSW Sentencing Council, 'Standard non-parole periods', December 2013, p40.

We are concerned that this recommended and principled approach appears to have been overlooked in the Terms of Reference for this Review. While (e) is reflected in the current Terms of Reference, there is otherwise no explicit reference to the above criteria. Of particular concern is that the Sentencing Council has been tasked with considering: "*Environmental conditions, including current drought conditions across the state that may exacerbate the potential harm caused by bushfires and other forms of fires.*"[2] This raises two issues:

1. The particular environmental conditions in NSW may be relevant to determining the objective seriousness of an offence on sentence for a specific offence at a particular point in time. However, we do not consider it appropriate criteria for determining the SNPP for all future offending under section 203E. Environmental conditions may change rapidly and unexpectedly. The Law Society supports a consistent approach to the setting or adjustment of SNPPs, as recommended by the Sentencing Council in 2013.

2. There is a risk of double counting. The SNPP is being considered because the State Government recently increased the maximum sentence for the offence under section 203E to "provide a strong deterrent to would-be arsonists while more than 99 per cent of the State is gripped by drought. With low rainfall predicted in coming months and large swathes of bushland looking like a tinderbox, we must do all we can to protect the State from another disaster."[3]

Why the SNPP should be lower than 37.5%

There are strong arguments against increasing the current SNPP of five years and the Law Society is opposed to such an increase.[4]

First, offences under section 203E reflect a wide range of offending behaviour with significant potential differences in the degree of their objective seriousness. This is reflected in the previous maximum penalty of 14 years which was consistent with the Model Code's recommended 15 years.[5] Bureau of Crime Statistics and Research ("BOCSAR") statistics show that between 2008-2017, offenders often received a non-custodial sentence under section 203E.[6] For those who received a custodial sentence the vast majority received a non-parole period of less than one year.[7] This demonstrates that the offence captures conduct of relatively minor objective seriousness.

Second, the offence can be established in the absence of any actual damage: an offender need only be reckless as to the spread of the fire, and no damage need actually occur.

Third, the nature of harm resulting from offending under section 203E is unpredictable and depends on the particular weather patterns of the offence date(s) and the underlying climate condition at the time. Both may alter rapidly and significantly. Such factors (as noted above), may appropriately be considered by the sentencing court in the particular facts of the case, but should not be used as a potentially arbitrary sentencing yardstick to fetter judicial discretion.

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[2] Terms of Reference, Review of the standard non-parole period for the bushfire offence and the maximum penalties for destroying property by fire, November 2018.
[3] NSW Department of Justice, 'Stronger sentences for starting a bushfire', 1 November 2018.
[4] The Law Society opposes an increase to 8 years, being approx. 37.5% of the current maximum of 21 years.
[5] Legislation, Policy and Criminal Law Review Division, Attorney General's Department, 'Review of bushfire arson laws', April 2009, p8.
[6] Source: NSW Bureau of Crime Statistics and Research.
[7] Ibid.

Fourth, leaving the SNPP at five years will provide an appropriate "yardstick" guidance to courts. Increasing the SNPP risks courts being criticised for finding special circumstances to impose a sentence that is just and fair in all the circumstances.

Finally, while general deterrence is an important consideration for arson offences, an important aspect of this is achieved through the increase in the maximum penalty for the bushfire specific offence. Importantly, section 203E is part of a hierarchy of offences. Offenders can be dealt with under this hierarchy, which includes offences with higher penalties than section 203E. For example, if the fire results in serious outcomes involving injury or death, then the offender may be charged under other relevant offences in the hierarchy (some of which are already included in the SNPP scheme). These include:

- section 198 of the *Crimes Act 1900* (25 years imprisonment), where a person lights a fire and damages property with the intention of endangering the life of a person.
- where death results from a bushfire, by the offences of murder and manslaughter.

Given these factors, an SNPP that is significantly lower than 37.5% of the maximum penalty for the offence is justified. A higher SNPP may lead to disproportionately severe penalties.

Increasing penalties for other offences

There is no evidence to justify an increase in the current maximum penalties for property damage by fire offences.

The current maximum penalties for property damage by fire offences are already high and provide adequate scope for the sentencing court. The comprehensive review of bushfire arson laws undertaken by the Attorney General's Department found that the penalties associated with arson type offences were appropriate.[8] The review noted that the *Crimes Act 1900* provides for a significant increase in penalty where a property offence is committed by fire – in most instances it doubles or nearly doubles the maximum available to the court.[9]

The latest BOCSAR crime report shows that for the previous 24-month period, malicious damage to property offences are down by 3.8%,[10] and arson offences are stable.[11]

We are concerned that any increase in penalties would have a disproportionate impact on the relatively high numbers of juveniles who commit fire related offences,[12] and a commensurate increase in arrests for breach of bail and pleas of not guilty by juvenile offenders (and adults).

We oppose, in particular, any increase in the penalties under section 195(1) (intentionally or recklessly destroys or damages property by fire), which carries a current 10-year maximum jail term. In *CB v DPP* [2014] NSWCA 134 the applicant, a 15-year-old boy, had broken into a house and played with a cigarette lighter on a couch. The couch caught fire and ultimately the entire house was destroyed. On appeal, the Court of Appeal concluded that it was sufficient for the Crown to prove that the applicant had foreseen the possibility of some

[8] Legislation, Policy and Criminal Law Review Division, Attorney General's Department, 'Review of bushfire arson laws', April 2009, p6.
[9] Ibid.
[10] NSW Bureau of Crime Statistics and Research, *NSW Recorded Crime Statistics Quarterly Update September 2018*, p3.
[11] Ibid., p18.
[12] Research undertaken by the Australian Institute of Criminology found that of all arson defendants who appeared before NSW courts between 2001 and 2006, almost one quarter were under 18: 'Offending and reoffending patters of arsonists and bushfire arsonists in New South Wales', January 2008, p1.

damage to property – he did not need to have foreseen the extent of the damage. The Court of Appeal observed:

> *In the case of an offence under s 195(1) of the Crimes Act, the result that the accused's acts must produce in order to sustain conviction is harm to property at any point on the scale of seriousness from minor damage to destruction. The foresight that must be proved to establish recklessness is therefore foresight of harm to property to any degree from minor damage to destruction. If the result of the accused's acts is slight or moderate damage, recklessness will be established if the proved foresight was of destruction; and likewise if the result is destruction, recklessness will be established if the proved foresight was of slight or moderate damage.* (at [45])

As observed by Anderson, this definition of recklessness reflects:

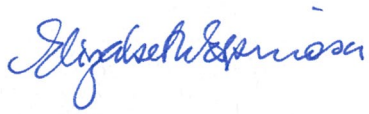
> *… a comparatively low threshold of proof of the fault element for what is often a very serious criminal offence, which can encompass a vast range of harmful consequences and the conviction for which can lead to lengthy periods of detention or imprisonment for the young person or adult perpetrator… This leads to unfair labelling, as substantial moral blameworthiness can attach to what arguably may be inquisitive, ignorant and morally innocent behaviour, particularly in children, youths and those persons with an intellectual impairment. The label of 'reckless' fire-setting can also attach to other behaviour or causes, such as revenge, violence or concealing other crimes, more often by adults. These behaviours are significantly more morally blameworthy but carry the same offence label as fire-setting resulting from the inquisitiveness and immaturity of youth.*[13]

To conclude, we reiterate our support for retaining the current SNPP for the bushfire offence and the current maximum penalties for destroying property by fire offences.

Thank you for considering our submission. We look forward to further consultation with the Sentencing Council as the review progresses.

The contact person for this matter is Ms Rachel Geare, Senior Policy Lawyer, who is available on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,



Elizabeth Espinosa
President

[13] Anderson, John L --- "Playing with fire: contemporary fault issues in the enigmatic crime of arson" [2016] UNSWLawJl 34; (2016) 39(3) UNSW Law Journal 950, p955.