Legal Aid NEW SOUTH WALES

22 February 2019

Ms Erin Gough
Policy Manager
Law Reform and Sentencing Council Secretariat
NSW Department of Justice

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

Dear Ms Gough,

Review of penalties for bushfires and destroying property by fire

Thank you for the opportunity to provide input into the Council's review of penalties for fire related offences. In summary, Legal Aid NSW submits that existing penalties adequately reflect the criminality of these offences, and should not be changed.

We note that from 2009 to 2013, the standard non-parole period (**SNPP**) scheme in NSW was subject to a lengthy and extensive process of review, involving both the NSW Law Reform Commission and the NSW Sentencing Council. Ultimately, those reviews culminated in a series of recommendations by the NSW Sentencing Council as to how SNPPs should be determined.

In our view, the terms of reference for the current review do not appropriately reflect the Sentencing Council's approach. In particular, they suggest that matters other than those set out in Chapter 4 of the Sentencing Council's 2013 report should be taken into account in determining an SNPP, notably, current drought conditions in NSW. We submit that it would be appropriate for the Council's final report to recommend that future references in relation to the setting of appropriate SNPPs should be in broad terms, so that the Council can apply its established methodology, rather than being bound by additional constraints set out in detailed terms of reference.

Our response to the specific consultation questions are set out below.

What should the SNPP for the offence be, and why?

The Sentencing Council's 2013 report on SNPPs recommends that the SNPP should be set at 37.5% of the maximum sentence for an offence, and then revised up or down as appropriate.

Prior to the 2018 amendment which raised the maximum penalty from 14 to 21 years, the SNPP was set at 35.7% of the maximum penalty, which represents a downward revision from the specified starting point. Currently, the SNPP for an offence under s 203E of the *Crimes Act 1900* sits at 23.8% of the maximum penalty. We suggest that it is appropriate that a lower SNPP be maintained for the following reasons:

1. Although the Sentencing Council recommended that item 15B be retained in the table of SNPP offences, the offence has a number of characteristics that might ordinarily mitigate against an offence being included in the scheme. For example, the offence:
    - is triable summarily – between 2009 and 2017, 85% of finalised charges proceeded in the Local Court[1]
    - does not involve elements of aggravation
    - is not prevalent – less than 50 charges were finalised in the Local Court and higher courts in 2017[2]
    - does not attract inconsistent sentences – most defendants sentenced to a period of imprisonment receive a non-parole period of less than one year[3]
    - encapsulates a wide range of offending behaviour, including relatively low level offences, as evidenced by the large number of defendants who receive a non-parole period of less than one year, and the frequent imposition of sentences other than full-time imprisonment. The offence can be made out by establishing either recklessness or intention, and regardless of whether a bushfire actually eventuates from the lighting of a fire. The prosecution need only establish that the defendant was reckless as to the spread of fire, not that the fire did spread.

2. The vast majority of prosecutions for the offence are against young men aged 18 to 24 years.[4] Establishing a harsher guidepost in the form of a longer SNPP would be an inappropriate response to this group of offenders, who may be engaging in immature and reckless behaviour, without intent to cause damage or harm.

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[1] Source: NSW Bureau of Crime Statistics and Research
[2] As above
[3] As above
[4] As above

3. Sentencing statistics indicate that, notwithstanding an existing SNPP of 5 years, NPPs rarely approach or exceed that duration. Courts do not appear to be hamstrung by the existing sentencing framework. The lower level of penalties does not necessarily reflect a trend of inadequate sentencing for s 203E offences. To the contrary, it may be indicative of courts imposing a NPP that reflects the relatively low level of criminality that is captured by such a broad provision.

While we do not agree that it is a relevant consideration in determining the appropriate SNPP for s 203E offences, we note that the current weather conditions in NSW are not unprecedented. Indeed, it was the ferocity of prior bushfire seasons that led to the enactment of s 203E. There is no reason to assume that community expectations in relation to the sentencing of bushfire offenders have shifted since that time.

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

The arson offences in ss 195 to 198 of the *Crimes Act 1900* were reviewed in detail as part of the Criminal Law Review Division's review of bushfire arson laws, and were found to be appropriate. As noted in that review, 'there are limitations on the ability of criminal laws to [prevent bushfires] by way of increasing penalties … given the already tough penalty regime which exists in NSW'.

The current graduated penalties for property damage by fire provide a wide scope for courts to impose a sentence that is appropriate in the circumstances of the offence, including specified circumstances of aggravation. The increased penalty for s 203E offences has created somewhat of an anomaly, when compared to the Model Criminal Code provision on which it was based. In our view, this increase does not in itself create a sufficient impetus to revise longstanding and settled sentencing practices for other property damage offences.

Further, increasing penalties for offences under ss 195 to 198 in order to achieve parity with s 203E would create undesirable knock-on effects. As just one example, it would create an argument that other offences involving acts done with intent to injure should attract higher penalties so that they remain in line with any revisions to s 196.

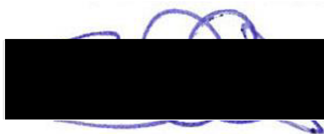
BOCSAR research indicates that a number of offences are rarely prosecuted and, as such, any increase to those penalties is unjustified. Between 2009 and 2017, there were negligible prosecutions for offences under ss 195(2)(b), 196(2)(b) and 197(2)(b), and there were 6 or fewer finalised charges per year under s 196(1)(b).

Over the same time period, for those offences that were prosecuted more regularly,[5] alternatives to full time imprisonment were commonly used. Where sentences of full-time imprisonment were imposed, they did not approach the maximum penalties available for the offences, indicating that existing penalties provide adequate scope for responding to the range of offending captured by these offences.

For these reasons, Legal Aid NSW is of the view that existing penalties for offences of property damage by fire should be maintained.

We look forward to further information regarding the progress of the review. If you have any questions about our submission, the responsible officer within Legal Aid NSW is Bridget O'Keefe, Manager, Strategic Law Reform Unit, [redacted] or [redacted].

Yours sincerely



Brendan Thomas
Chief Executive Officer

[5] That is, ss 195(1)(b), 195(1A)(b), and 197(1)(b).