

## Submission to the NSW Sentencing Council

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### Review of penalties for fire offences

#### **Question 1. In light of the increase in the maximum penalty for lighting bushfires from 14 to 21 years imprisonment: What should the SNPP for the offence be and why?**

If this question could be answered simply it might be that a 50% increase in the maximum penalty calls for an equivalent 50% increase in the SNPP from 5 years to 7.5 years. This would also retain the SNPP as approximately 35.7% of the maximum penalty. It is, however, more complex than a simple mathematical question and it cannot be answered without considering some of the history of the SNPP scheme and its contemporary utility.

Standard non-parole periods were introduced by the NSW State Government in February 2003,<sup>1</sup> so they have now been in operation for 16 years. A Table of selected offences in the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the SNPP as representing the non-parole period for an offence in the mid-range on the spectrum of objective seriousness for that offence category 'taking into account only the objective factors affecting the relative seriousness of that offence'.<sup>2</sup> This includes a SNPP of 5 years imprisonment for the offence of 'bushfire arson' under s 203E *Crimes Act 1900* (NSW) at item 15B. The legislation provides that when determining an appropriate sentence for an offence in the Table 'the standard non-parole period is a matter to be taken into account by a court ... without limiting the matters that are otherwise required or permitted to be taken into account ...'<sup>3</sup>. The scheme was originally introduced for the stated purposes to promote 'consistency and transparency in sentencing and also promoting public understanding of the sentencing process'.<sup>4</sup> The Attorney-General at the time emphasised that this was 'not mandatory sentencing' but aimed at preserving judicial sentencing discretion at the same time as ensuring 'proper regard is given to the community expectation that punishment is imposed that is commensurate with the gravity of the crime'.<sup>5</sup>

After initially being interpreted as a 'reference point or benchmark, or sounding board, or guidepost'<sup>6</sup> against which the case being decided could be compared after a conviction at trial but not following a plea of guilty<sup>7</sup>, the 'reference point' of the SNPP for various offences

<sup>1</sup> *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW) commenced operation on 1 February 2003.

<sup>2</sup> Section 54A(2) *Crimes (Sentencing Procedure) Act 1999* (NSW).

<sup>3</sup> Section 54B(2) *Crimes (Sentencing Procedure) Act 1999* (NSW). Amended in October 2013 from the original requirement that 'the court is to set the standard non-parole period as the non-parole period for the offence unless the court determines that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period.' By s 54B(3) the court is still required to record reasons for setting a longer or shorter non-parole period and identify each factor taken into account [subject to the limitation on that requirement in s 54B(6)].

<sup>4</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus, Attorney General) 5813.

<sup>5</sup> NSW, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5813 (B Debus, Attorney General) 5813, 5815.

<sup>6</sup> *R v Way* (2004) 60 NSWLR 168, [122], [130].

<sup>7</sup> *R v Way* (2004) 60 NSWLR 168, [68].

came to have a general directive function and the sentencing pattern for some crimes became more severe, including bushfire arson.<sup>8</sup> It was evaluated as a ‘moderately prominent sentencing guide’ and did come to be used as a starting point by judges in considering the appropriate sentence for Table offences.<sup>9</sup> Subsequently, however, in *Muldock v The Queen*, the High Court held that *R v Way* was wrongly decided and the SNPP is not a starting point in the sentencing for a midrange offence after conviction; rather it ‘represents the non-parole period for an hypothetical offence in the middle of the range of objective seriousness without regard to the range of factors, both aggravating and mitigating, that bear relevantly on sentencing in an individual case’.<sup>10</sup> In layman’s terms the overall High Court decision effectively meant that the standard non-parole has no particular prominence in guiding the judicial sentencing discretion. It is simply another guidepost together with the maximum sentence which a judicial officer should take into account as part of his or her instinctive synthesis of all relevant sentencing factors. In light of this decision, the utility of the standard non-parole period scheme was then considered by the NSW Law Reform Commission (NSWLRC), which recommended retaining the scheme but legislating to clarify aspects of the interpretation of the current provisions consistently with the decision in *Muldock* as well as consulting broadly with stakeholders and the community on offences and SNPP levels and monitoring sentencing patterns under the scheme in relation to proportionality and consistency of application.<sup>11</sup> Amendments were subsequently made to these provisions in October 2013 to clarify the role of standard non-parole periods consistently with the decision in *Muldock* and a number of important principles have been established in regard to the role of the SNPP in sentencing from this decision.

I have argued elsewhere<sup>12</sup> and maintain that the best way to promote consistency and transparency in sentencing is to formulate comprehensive sentencing guidelines through the appellate court guideline judgment mechanism or by comprehensive and definitive guidelines from an independent sentencing council, such as is done by the Sentencing Guidelines Council for England and Wales.<sup>13</sup> A representative sentencing council which takes account of informed public opinion as well as other relevant factors and trends in sentencing would be best placed to move forward the original legislative purpose attributed to the standard non-parole period scheme, however, that has not occurred in NSW.

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<sup>8</sup> See, for example *R v AJP* (2004) 150 A Crim R 575; *R v Sangalang* [2005] NSWCCA 171; *R v Mills* [2005] 154 A Crim R 40 (bushfire arson case). A study by the Judicial Commission of NSW in May 2010, *The Impact of the Standard Non-parole Period Sentencing Scheme on Sentencing Patterns in New South Wales*, Monograph 33 (2010) found that the scheme had resulted in an increase in severity of sentence for some Table offences and consistency in sentencing had generally increased – see NSW Sentencing Council, *Standard Non-parole Periods*, Background Report, November 2011, 18-20.

<sup>9</sup> See John Anderson, ‘The standard non-parole period as a “reference point” in sentencing’ (2007) 14(1) *Criminal Law News* 15, 16.

<sup>10</sup> *Muldock v The Queen* (2011) 281 ALR 652, [31].

<sup>11</sup> NSWLRC, *Sentencing – Interim report on standard minimum non-parole periods*, Report 134 (May 2012), Recommendations 4.1 and 4.2; and NSWLRC, *Sentencing*, Report 139 (July 2013), [7.12]-[7.14] and Recommendation 7.1.

<sup>12</sup> See John Anderson, ‘Standard minimum sentencing and guideline judgments: An uneasy alliance in the *Way of the future*’ (2006) 30 *Criminal Law Journal* 203.

<sup>13</sup> See <https://www.sentencingcouncil.org.uk/>

Overall, there is still a significant question about the utility of the SNPP scheme in terms of achieving consistency and proportionality in sentencing outcomes. The prescribed SNPPs across the range of offences in the Table remains inconsistent in relation to the maximum sentences for the relevant offences. As the NSWLRC highlighted in their 2012 *Sentencing – Interim report on standard minimum non-parole periods*, Report 134, SNPPs as a percentage of the maximum penalty prescribed for the various offences in the Table range from 21.4% to 80%.<sup>14</sup> Therefore, it is difficult to argue simply that because there has been an increase in the maximum penalty for offences under s 203E *Crimes Act 1900* (NSW) then there should be a corresponding increase in the SNPP. There is no data that I am aware of to show consistent and proportional application of the SNPP for this offence since 2003. As I have observed elsewhere<sup>15</sup>, the perpetrators of arson offences are difficult to detect, reported offences have a low clear up rate and few matters actually proceed to sentencing. Accordingly, it is very difficult to make any informed judgments about the consistency and proportionality of sentencing for bushfire arson offences in terms of the average length of custodial sentences and non-parole periods imposed for the comparatively few convictions that have been recorded in NSW.

The bushfire arson offence was created to reflect the criminality in ‘the potentially catastrophic circumstances of wildfire in the vast tracks of public bush and park lands in Australia, which may destroy valuable shared community assets of flora, fauna and animal habitat’.<sup>16</sup> It is an offence that is predicated on the creation of risk rather than infliction of harm, which is an important difference to structural and other arson-type offences. There is certainly no evidence to show that increasing the SNPP in line with the increase to the maximum penalty would have a significant deterrent and denunciatory effect.

Taking all those matters into account, no increase to the SNPP is recommended. Given the limitations on the utility of the SNPP and considering questions of proportionality in sentencing it should remain at 5 years, which would reduce it to 23.8% of the maximum penalty. This is still not the lowest percentage of SNPPs compared to maximum penalties reflected in the Table. If an increase is considered necessary to align with the increase in the maximum penalty and to reflect perceived community concerns and expectations about bushfire arson and the sentencing of any perpetrators that are convicted of the offence then the increase to the SNPP should be no more than a further 2 years to 7 years, which would make it exactly one-third (33.3%) of the maximum penalty.

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<sup>14</sup> NSWLRC, *Sentencing – Interim report on standard minimum non-parole periods*, Report 134 (May 2012), Appendix D.

<sup>15</sup> See John L Anderson, “‘Playing with fire’: contemporary fault issues in the enigmatic crime of arson’ (2016) 39(3) *University of New South Wales Law Journal* 950-974.

<sup>16</sup> Gaye Lansdell, John Anderson and Michael King, “‘Terror among the Gum Trees’ – Is Our Criminal Legal Framework Adequate to Curb the Peril of Bushfire Arson in Australia?’ (2011) 18 *Psychiatry, Psychology and Law* 357, 358 (citations omitted).

## Question 2. What should the maximum penalties for the offences of destroying or damaging property by fire be, and why?

This question raises significant issues of proportionality although there is also a spectrum question to consider and whether separate arson offences should be created as I have argued elsewhere.<sup>17</sup> I rely heavily on my published arguments in recommending that the only change that should be made to the current structure of maximum penalties for the offences of destroying or damaging property by fire in Part 4AD, ss 195-198 *Crimes Act 1900* (NSW), is to increase the maximum penalties for offences in s 195 to bring them into line with s 197. This is largely because there is no apparent reason for regarding dishonestly destroying or damaging property as more culpable than intentionally destroying or damaging property. I also consider that there is an argument for restructuring these offences and creating a specific offence of arson as I have argued elsewhere<sup>18</sup> and is the offence label used in most other Australian states.<sup>19</sup>

Looking at the offence in s 195(1)(b) as the standard structural arson offence, it is a broad spectrum offence covering reckless and intentional destruction or damage to any property belonging to another person by fire or explosives. There could be very minor damage to total destruction of property and the fault of the perpetrator ranges from a realisation of the possibility of damage to deliberately setting out to destroy particular property. A maximum penalty of 10 years imprisonment should be sufficient for a sentencing court to reflect the broad range of criminality shown in structural arson offences coming before the courts and this is the same maximum penalty in Victoria. Given, however, the offence of 'dishonestly damaging or destroying property with a view to making a gain' in s 197 *Crimes Act 1900* (NSW) has a maximum penalty of 14 years<sup>20</sup> this creates an inconsistency in relation to the relative culpability of mental states for arson. As a proportional gauge it is not clear why the legislature would consider an arson based on fraud as more culpable than intentional firesetting, or in some circumstances reckless firesetting. Accordingly, there is a case for aligning the ss 195 and 197 offences in terms of maximum penalty and setting them both at 14 years, 15 years (for 'in company' – s 195(1A) only) and 16 years (for during a public disorder). The maximum penalties for the s 196 offence of 'destroying or damaging property with intent to injure a person' should not be altered as arguably the mental state in this offence is no more serious than when the dishonesty or deliberate intention is directed against the property. If adding the intention being directed to injuring a person is regarded as more serious encompassing both a property offence and an offence against the person then consideration might be given to increasing the maximum penalty to 16 years imprisonment. The mental state of intending to endanger life in the destruction of or damage to property is the most culpable state of mind and the maximum penalty of 25 years remains appropriate.

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<sup>17</sup> Anderson, above n 15.

<sup>18</sup> John Anderson, *Smoke gets in your mind: The legal framework for the crime of arson* (2004) 28(1) *Criminal Law Journal* 26-42.

<sup>19</sup> See, for example, *Crimes Act 1958* (Vic) s 197(1) and (6) and *Criminal Law Consolidation Act 1935* (SA) s 85.

<sup>20</sup> Note the maximum penalty for this offence in Victoria is 10 years – see *Crimes Act 1958* (Vic) s 197(3).

The other matters I emphasise relate more to re-designing the elements of arson-type offences in the *Crimes Act 1900* (NSW) as I have argued elsewhere.<sup>21</sup> In that regard, I take two main points from my 2016 article: “‘Playing with fire’: contemporary fault issues in the enigmatic crime of arson”:

- 1. Recognising the need for more specific labelling of arson-type offences in fairly constructing the elements of these offences: ‘The concepts of equal treatment and proportionality in relation to subjective fault elements call attention to the magnitude of the consequences as a material element of an offence and assigning responsibility commensurate with the known or probable harm or injury. Censure of wrongdoing and proportionate sentences must be reflected in the requirements for proof of the defendant’s fault, that is, the mental element threshold must be proportionate to the level of responsibility assigned for the seriousness of the conduct and its ramifications. The comprehensible labelling of fault standards in criminal responsibility will take clear account of the resultant censure, stigma and punishment associated with particular forms of wrongdoing. This employs a moral context to the fault standard that appropriately informs and moderates the assignment of individual criminal responsibility for material conduct within a framework of rational thought and action’.<sup>22</sup>
- 2. This underpins an argument as to reformulation of ‘arson-type’ offences in NSW particularly in relation to the subjective mental elements of the crimes and is grounded in subjectivist orthodox conceptions of fault and rational choice theory. Therefore ‘in ensuring individualised justice, equal treatment and proportionality there must be an approach to subjective mental states that demands proof of clear and unequivocal criminal responsibility when an individual is put at risk of punishment, particularly loss of liberty through incarceration for lengthy periods of time. Accordingly, this culminates in the contention that the prosecution must prove beyond reasonable doubt that the accused either intended to cause the specific harm to nominated property or to the person resulting from their fire-setting behaviour, or that they foresaw that there was a substantial risk of the specific harm in the sense of likelihood that it would occur but went ahead and ignited the fire in spite of the foreseen risks’(recklessness).<sup>23</sup> This should be reflected in statutory arson offences categorised into different grades or ‘subdivisions to reflect the type of property damaged or the magnitude of the damage inflicted’<sup>24</sup> and re-calibrating the maximum sentences accordingly.

Overall, until that complete re-working of the construction of ‘arson-type’ offences is undertaken, it is difficult to answer the question as to what the maximum penalties should be for the offences in ss 195-198 *Crimes Act 1900* (NSW). As such a re-working of the offences seems to be outside the parameters of the review, I have answered this question with my submissions based on the current construction and limitations of ‘arson-type’ offences in NSW as set out above on page 4.

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<sup>21</sup> Anderson, above n 15.

<sup>22</sup> Anderson, above n 15, 971.

<sup>23</sup> Anderson, above n 15, 973.

<sup>24</sup> Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7<sup>th</sup> edition, 2013) 78.