



*sentencing*  
ADVISORY  
COUNCIL

# ARSON & DELIBERATELY LIT FIRES

FINAL REPORT NO. 1

*December 2012*

## *About This Final Advice*

This report makes recommendations to the Attorney-General in relation to the serious issue of arson and deliberately lit fires in Tasmania. This report was one of the four initial referrals to the Sentencing Advisory Council at its inception in June 2010. The publication of this report follows the release of a Consultation Paper in December 2011. The purpose of the Consultation Paper was to assist in the discussion about the legislative framework, sentencing options, intervention and community information programs available for adults and juveniles involved in firesetting in Tasmania. The Consultation Paper posed 19 questions, including:

- the introduction of new criminal provisions
- pre-sentence reports to determine the level of risk for juveniles
- the deferral of sentences as a sentencing option
- sentencing options and treatment programs for adult and juvenile firesetters
- community information and education programs in Tasmania.

## *Consultation*

Responses to the Consultation Paper were received from:

- Mr D L Hine, Secretary, Department of Police and Emergency Management, Tasmania
- Mr M Brown, Chief Officer, Tasmania Fire Service
- Mr M Daly, Secretary, Department of Health and Human Services, Tasmania
- Mr T Ellis SC, Director of Public Prosecutions, Tasmania
- Mr R Williams, Deputy Secretary, Corrective Services and Monetary Penalty Enforcement Service, Department of Justice, Tasmania
- Ms A Ashford, Commissioner for Children, Tasmania
- Dr K Fritzon and Dr R Doley, Bond University, Queensland
- Hon M Gaffney, MLC, Member for Mersey
- Ms A Allen, community member, Tasmania
- Mr A Hays, community member, Tasmania (oral submission).

The original Consultation Paper of December 2011 has been incorporated into this Final Advice to provide background information into the 19 questions posed.



## *Information on the Sentencing Advisory Council*

The Sentencing Advisory Council was established in June 2010 by the then Attorney-General and Minister for Justice, the Hon Lara Giddings MP. The Council was established, in part, as an advisory body to the Attorney-General. Its other functions are to bridge the gap between the community, the courts and the Government by informing, educating and advising on sentencing issues in Tasmania. The Council members are Mr Peter Tree SC (Chair), Professor Kate Warner, Dr Jeremy Prichard, Mr Phil Wilkinson, Ms Kim Baumeler, Mr Norman Reaburn, Mr Chris Gunson and Mr Tony Jacobs.

## *Acknowledgments*

This Final Advice was written by Ms Lisa Gregg. Professor Kate Warner and Dr Jeremy Prichard, members of the Sentencing Advisory Council, contributed to the content of this report. The Council would like to thank the Victorian Sentencing Advisory Council, especially Dr Catherine Jeffreys, for assistance with copyediting and typesetting.

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# *Abbreviations*

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ACART	Australian Centre for Arson Research and Treatment
ACF	Arson Control Forum – England
AFAC	Australasian Fire and Emergency Service Authorities Council
AIC	Australian Institute of Criminology
BOCSAR	Bureau of Crime Statistics and Research
Bushfire CRC	Bushfire Cooperative Research Centre
CFMHS	Community Forensic Mental Health Service
CMD	Court Mandated Diversion
DHHS	Department of Health and Human Services
DTO	Drug Treatment Order
DPEM	Department of Police and Emergency Management
DPP	Director of Public Prosecutions
FESA	Fire and Emergency Services Authority
JFLIP	Juvenile Fire Lighting Intervention Program
JAOP	Juvenile Arson Offenders Program
MCCOC	Model Criminal Code Officers Committee
MCLOC	Model Criminal Law Officers Committee
RACV	Royal Automobile Club of Victoria
SCAG	Standing Committee of Attorneys-General
TFS	Tasmania Fire Service
VBRC	Victorian Bushfires Royal Commission

# *Executive Summary*

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One of the inaugural referrals to the Sentencing Advisory Council (the Council) from the Attorney-General was a request to provide advice into arson and deliberately lit fires in Tasmania. The terms of reference for this referral were broad and made it clear that the project was to go beyond sentencing options to include consideration of community information, education and post-sentencing programs. As a result, in this particular advice, the Council has interpreted 'sentencing' very broadly to include:

- the availability of certain offences for which an offender can be sentenced
- diversionary options that could potentially arise before trial
- treatment options available both prior to and after the final decision of the judicial officer in the sentencing process
- crime prevention techniques, including community education.

The request for this report was prompted by both Australia-wide concerns about the catastrophic consequences of bushfire and concerns specific to Tasmania in relation to the number of stolen motor vehicles damaged or destroyed by arson and the continuing increase in damage to Housing Tasmania properties.

The December 2011 Consultation Paper into this advice addressed bushfire and property arson, juvenile firesetting, the existing legislative framework, sentencing options, interventions and community information programs available for adults and juveniles involved in firesetting in Tasmania. The Council invited responses from government and independent agencies, the

judiciary and the community to the 19 questions posed in the Consultation Paper to assist with its Final Advice to the Attorney-General.

As this Final Advice shows, available research into firesetting indicates that there is no 'typical' arsonist and the numerous attempts to classify arsonists' motives have proved problematic. Put simply, some adults are motivated by reasons that are no different from any other anti-social behaviour, for example, to effect a fraud, to conceal a crime, to vandalise or to exact revenge. The remainder either exhibit 'problematic firesetting behaviour' or suffer from a mental illness. In this advice the Council has attempted to address all motivations; it recommends a new offence framework, the establishment of a screening tool for juveniles, an individualised treatment program for adults and juveniles and the inclusion of an additional sentencing option to defer sentences. The advice also outlines the submissions from relevant agencies into the possible service providers available to deliver a program in Tasmania.

This advice recommends amendments to the present offence framework in the Criminal Code. It intends to clarify and simplify the existing offences so that the offence of 'arson' (setting fire to a building) can stand alone as a more serious crime than setting fire to general property. The new framework includes an offence of threatening to damage property that causes a person to fear that the damage will kill or cause serious harm to the person or to another. The Council also recommends the inclusion of a new bushfire offence where a fire is lit and there is a substantial risk that the fire will spread, and an offence where the lighting of a fire results in injury or death.

While research suggests that there are general criminal characteristics that apply to all criminals, arsonists have some characteristics that are not general to all criminals but are arson specific. That is, adult firesetting is strongly predicted by firesetting in adolescence, and adolescent firesetters have had childhood experiences with fire and firesetting. Research into juvenile firesetting makes a clear distinction between 'fireplay' and 'firesetting' behaviour based on the elements of intent and malice. For those juveniles who are only curious about fire, education about the harmful effects of fire, like the course run by the Tasmania Fire Service, is a suitable and cost effective approach. It is the juveniles who use fire as an 'instrument of purposeful action' who have the potential to become pathological adult firesetters. It then follows that early detection is crucial so that this group can be identified and the firesetting behaviour can be addressed and treated.

The Council recommends a simple screening tool be used for juveniles who have admitted to firesetting and a risk assessment for those who are found to be in potential danger of becoming pathological firesetters in the future. An avenue to apply the screening tool and the risk assessment is addressed within this Final Advice.

The limited number of convicted arson offenders together with their wide distribution throughout Tasmania suggests that a specific sentencing option to direct or divert arson offenders to a suitable treatment program is not practical. The existing sentencing framework in both the *Sentencing Act 1997* and the *Youth Justice Act 1997* has sentencing options through which an offender can be directed to a suitable program when available. The Council recommends a further sentencing option: a general power to defer sentences. The deferred sentencing option is a power provided to the court to give the offender the opportunity to rehabilitate prior to final sentencing. The offender's progress can then be taken into account when sentencing. The Council recommends that deferral of sentences be considered as an option to the court for both juvenile and adult offenders.

The Council recommends other minor adjustments to the sentencing regime. These include a cost recovery order requiring a convicted adult offender (with means) to reimburse the costs incurred to the State for responding to a fire. This advice does not suggest that any mandatory requirements should be put in place for juvenile offenders. The Council considers that mandatory requirements do not sit comfortably with the principles of restorative justice and that such requirements fail to recognise the differing circumstances in relation to the offence or the offender.

From the responses to the 19 questions posed within the Consultation Paper, the Council has made 13 recommendations; these are outlined below.

# List of Recommendations

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## Chapter 2: Legislative Offence Framework

### *Recommendation 1* *page 14*

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Section 268 of the *Criminal Code* is amended so that the offence of ‘arson’ is narrowed to only include buildings.

### *Recommendation 2* *page 14*

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Section 268A of the *Criminal Code* is repealed. (This will entail a consequential amendment to section 269 – namely omitting reference to section 268A.)

### *Recommendation 3* *page 14*

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Section 269 of the *Criminal Code* is amended to cover all property not comprised in section 268.

### *Recommendation 4* *page 16*

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Section 276 of the *Criminal Code* is amended to cover the communication, by any means, of a threat to damage property by fire or explosion where the offender is, at the least, reckless that the other person will fear that the damage will kill or cause serious harm to that person or a third person.

### *Recommendation 5* *page 19*

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The *Criminal Code* is amended to include a new offence for ‘Bushfires’ to cover the event where a fire is caused and where there is a substantial risk of the fire spreading.

### *Recommendation 6* *page 22*

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The *Criminal Code* is amended to include a new offence of ‘Causing a fire resulting in injury or death’.

## Chapter 3: Sentencing Framework in Tasmania – Adults

### *Recommendation 7* *page 28*

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The *Sentencing Act 1997* is amended to include an ancillary sentencing option to order an offender convicted of a fire-related offence to reimburse the costs incurred by the State to respond to the fire.

### *Recommendation 8* *page 32*

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The *Sentencing Act 1997* is amended to include a general sentencing option to allow the court to defer the imposition of a sentence to allow an offender the opportunity to participate in a treatment program prior to final sentencing.

## Chapter 4: Sentencing Framework in Tasmania – Juveniles

### *Recommendation 9* *page 39*

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That investigation is made into the development of a screening tool to be used by Tasmania Police to determine if early treatment is necessary for juveniles with a fire-related offence.

### *Recommendation 10* *page 44*

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The *Youth Justice Act 1997* is amended to include a general sentencing option to allow the court to defer the imposition of a sentence to allow an offender the opportunity to participate in a treatment program prior to final sentencing.

## Chapter 5: Treatment Programs – Adults

### *Recommendation 11* *page 48*

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The Australian Centre for Arson Research and Treatment (ACART) program be considered as a treatment program for adult offenders who have exhibited problematic firesetting behaviour. That the risk assessment tool, when finalised by ACART, also be considered for use in Tasmania.

## Chapter 6: Education and Treatment Programs – Juveniles

### *Recommendation 12* *page 60*

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The Australian Centre for Arson Research and Treatment (ACART) program be considered as a treatment program for juvenile (14+) offenders who have exhibited problematic firesetting behaviour. That the risk assessment tool, when finalised by ACART, also be considered for use in Tasmania.

## Chapter 7: Community Information and Education Programs

### *Recommendation 13* *page 64*

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Consideration be given to community crime prevention techniques such as the Fire and Emergency Services Authority (FESA) community arson prevention program.



## Questions Posed in the Consultation Paper

### Question 1

Should the offences of arson (s 268) and setting fire to property (s 269) in the *Criminal Code* be replaced with a new offence of arson defined as unlawfully setting fire to any building, dwelling, airplane, motor vehicle or motorised vessel?

### Question 2

Should s 276 of the *Criminal Code* be replaced by:

- a) A definition of arson that encompasses threats based on s 4.1.7(2) and (3) of the Model Criminal Code?
- b) An offence for threatening to cause property damage based on s 4.1.9 of the Model Criminal Code?
- c) A redrafted offence of s 276 which covers the offences in s 4.1.7(2) and (3) and s 4.1.9 of the Model Criminal Code?

### Question 3

Does Tasmania need a new bushfire offence to cover causing a fire (by lighting a fire, maintaining a fire or failing to contain a fire) where there is a substantial risk of the fire spreading?

### Question 4

- a) Does Tasmania need an arson/bushfire offence to cover the event where a fire has been lit, deliberately or recklessly, or there is a failure to contain a fire that has resulted in injury or death?
- b) If so, what form should it take?

### Question 5

Should a cost recovery order be an ancillary sentencing order available to the court, to order a convicted offender to reimburse the costs incurred by the State for responding to a fire?

### Question 6

Should a specific sentencing option for a treatment program for adult firesetters be considered as an additional order of the court?

### Question 7

- a) Should deferral of sentences be considered as an additional general order of the court prior to final sentencing?
- b) Should deferral of sentences specific to adult firesetters be considered as an additional order of the court prior to final sentencing?

### Question 8

- a) When a juvenile offender has been found guilty of a fire-related offence, should a pre-sentence report to determine the level of risk be a prerequisite to sentencing the offender?
- b) When a juvenile offender has admitted to a fire-related offence, should an assessment to determine the level of risk be a prerequisite to diversion to community conference by Tasmania Police?
- c) When a juvenile offender has admitted to a fire-related offence, should an assessment to determine the level of risk be a prerequisite to diversion to formal caution by Tasmania Police?

### Question 9

- a) When a juvenile offender has been found guilty of a fire-related offence and referred to a community conference by the court, should the outcome plan for the conference contain a mandatory education program or video as to the harmful effects of fire?
- b) When a juvenile offender has admitted to a fire-related offence and is diverted to a community conference by Tasmania Police, should the outcome plan for the conference contain a mandatory education program or video as to the harmful effects of fire?
- c) When a juvenile offender has admitted to a fire-related offence and is diverted to a formal caution by Tasmania Police, should the outcome plan for the caution contain a mandatory education program or video as to the harmful effects of fire?

*Question 10*

- a) When a juvenile offender has been found guilty of a fire-related offence and directed to a community conference by the court, should the outcome plan for the conference have a mandatory requirement for the making of reparation for the offence?
- b) When a juvenile offender has admitted to a fire-related offence and is directed to a community conference by Tasmania Police, should the outcome plan for the conference have a mandatory requirement for the making of reparation for the offence?
- c) When a juvenile offender has admitted to a fire-related offence and is directed to a formal caution by Tasmania Police, should the caution contain a mandatory requirement for the making of reparation for the offence?

*Question 11*

Should a specific sentencing option for a treatment program for juvenile firesetters be considered as an additional order of the court?

*Question 12*

- a) Should deferral of sentences be considered as an option to the court prior to final sentencing?
- b) Should deferral of sentences specific to juvenile firesetters be considered as an option to the court prior to final sentencing?

*Question 13*

Should Tasmania consider making formal links with Monash University to investigate the development of a program for adult firesetters who have a mental illness or are exhibiting problematic behaviour?

*Question 14*

Should Tasmania consider a program similar to Court Mandated Diversion (CMD) to provide treatment to adult firesetters who have a mental illness or are exhibiting problematic behaviour?

*Question 15*

Should Tasmania consider the Community Forensic Mental Health Service (CFMHS) to provide treatment to adult firesetters who have a mental illness or are exhibiting problematic behaviour?

*Question 16*

Should Tasmania consider any of the suggested methods to utilise existing services provided in Victoria?

*Question 17*

- a) Should Tasmania provide a program similar to the Juvenile Arson Offenders Program (JAOP) in Queensland?
- b) Should Tasmania investigate the feasibility of offenders in Tasmania accessing JAOP in Queensland?

*Question 18*

Should Tasmania investigate a suitable treatment program for juvenile firesetters and the appropriate service provider to deliver a program in Tasmania?

*Question 19*

Should Tasmania implement further community information and education programs?

# 1.

## *Introduction*

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### 1.1 TERMS OF REFERENCE

By a letter dated 22 November 2010, the then Attorney-General, Lara Giddings, sought advice from the Sentencing Advisory Council (the Council) on the continued and increasing problem of arson and deliberately lit fires. The terms of reference for this research project were as follows:

I request the Council to conduct an overview of Australian and international approaches to sentencing options and post sentencing programs available to address arson attacks which could result in death or extensive loss to property. I am also interested to hear whether any community information and education programs implemented to deter this type of behaviour have been assessed and, if so, the results of any such assessment.

The terms of reference made it clear that this project went beyond sentencing options to include consideration of community information, education and post-sentencing programs, as well as whether these programs had been assessed and the results of these assessments.

### 1.2 BACKGROUND

As a result of bushfires in Southern Tasmania in February 1967, known as the Black Tuesday Bushfires, over 60 people lost their lives, almost thirteen hundred homes were lost and there was extensive damage to agricultural property. Reports into the causes of the fires state that only 22 of the 110 fires were started accidentally.

In January and February 2009 Victoria experienced its most devastating bushfires with catastrophic loss of life and extreme property damage. Over four hundred thousand hectares were burned, over two thousand homes were lost and over one hundred and fifty people lost their lives. It is suspected that some of these fires were deliberately lit by arsonists whose actions were described as 'mass murder' by the then Australian Prime Minister, Kevin Rudd.<sup>1</sup>

The Victorian Bushfires Royal Commission,<sup>2</sup> which was set up to investigate the causes and responses to the bushfires of 2009, made two recommendations pertaining to arson and deliberately lit fires.

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<sup>1</sup> Emma Rodgers, 'Rudd Angrily Denounces 'Mass Murder' Arsonists', ABC News, (online) 9 February 2009 < <http://www.abc.net.au/news/2009-02-09/rudd-angrily-denounces-mass-murder-arsonists/288018>>.

<sup>2</sup> Victoria, 2009 Victorian Bushfires Royal Commission, *Final Report* (2010) < [www.royalcommission.vic.gov.au/Commission-Reports](http://www.royalcommission.vic.gov.au/Commission-Reports)>.

First, it advocated a coordinated state-wide approach to arson prevention and secondly, it proposed that the Commonwealth, States and Territories continue to pursue the National Action Plan to Reduce Bushfire Arson in Australia.<sup>3</sup> The main objective of the National Action Plan and the resultant National Work Plan to Reduce Bushfire Arson in Australia<sup>4</sup> was to look at bushfire arson prevention initiatives and to identify national priorities for action.

In March 2010, a Symposium held in Melbourne, entitled *Advancing Bushfire Arson Prevention in Australia*<sup>5</sup> (the Symposium), brought together a variety of stakeholders to address bushfire arson. The aim of the Symposium was to advance the information needed for better legal and policy decisions relating to the management of bushfire arson in Australia. This included producing a report summarising the outcome of the Symposium to inform the implementation of the National Action Plan to Reduce Bushfire Arson in Australia. Attendance at the Symposium comprised representatives from fire, police and emergency services, forensic and corrections mental health services, community groups, federal and state government agencies and academic

disciplines such as criminology, sustainability, psychology and law to identify best practice arson prevention models operating in Australia and at an international level.<sup>6</sup> The findings of the Symposium were consistent with international trends, which consistently reiterate the need for a preventative approach to arson and deliberately lit fires.

The Consultation Paper, published by the Council and contained in this Final Advice, reviewed the current Tasmanian position on arson and deliberately lit fires. It considered the legislative structure, the sentencing framework for adults and juveniles, the success or otherwise of intervention programs and community information and education programs both at an interstate and at an international level. The options for reform were in response to the terms of reference and reflected the trend toward the preventative approach to arson and deliberately lit fires. This Final Advice takes into account the submissions made in response to the Consultation Paper and finalises the Council's views to make the final recommendations to the current Attorney-General and Minister for Justice, Mr Brian Wightman.

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<sup>3</sup> Ibid vol 2, 196, 197:

**Recommendation 35**

Victoria Police continue to pursue a coordinated statewide approach to arson prevention and regularly review its approach to ensure that it contains the following elements:

- high-level commitment from senior police
- a research program aimed at refining arson prevention and detection strategies
- centralised coordination that includes comprehensive training, periodic evaluation of arson prevention strategies and programs, and promotion of best-practice prevention approaches
- a requirement that all fire-prone police service areas have arson prevention plans and programs, according to their level of risk.

**Recommendation 36**

The Commonwealth, states and territories continue to pursue the National Action Plan to Reduce Bushfire Arson in Australia, giving priority to producing a nationally consistent framework for data collection and evaluating current and proposed programs in order to identify and share best-practice approaches.

<sup>4</sup> Australian Emergency Management Institute, Commonwealth Attorney-General's Department, 'National Work Plan to Reduce Bushfire Arson in Australia' (2009).

<sup>5</sup> Australian Bushfire Arson Prevention Initiative, Monash Sustainability Institute and Australian Institute of Criminology, Symposium, 'Advancing Bushfire Prevention in Australia' (Melbourne, 25–26 March 2010).

<sup>6</sup> Janet Stanley and Tahl Kestin (eds), *Advancing Bushfire Arson Prevention in Australia: Report from 'Collaborating for Change: Symposium Advancing Bushfire Arson Prevention in Australia', Held in Melbourne, 25–26 March, 2010*, MSI Report 10/3 (Monash Sustainability Institute, 2010) 5.

### 1.3 OUTLINE OF THE PROJECT

Chapter 1 of this report considers arson generally before moving on to discuss the incidence and cost of arson, the increase in frequency of arson and profiles and motives of both juvenile and adult firesetters. Chapters 2, 3 and 4 provide an overview of the offence framework and sentencing options in Tasmania and other jurisdictions and consider possible options for reform. Chapters 5, 6 and 7 look at treatment and intervention programs for both adults and juveniles and community information and education programs.

### 1.4 DEFINITIONS

A useful starting point is a definition of the term 'arson'. The difficulty with terminology relating to arson and firesetting is that there are differences between legal terminology, fire service usage and common understandings of the terms. Historically, the legal definition of arson has involved a person deliberately setting fire to a building. This is reflected in the definition of arson in the *Criminal Code Act 1924* (Tas) (the *Criminal Code*), where there are separate offences for arson (setting fire to a building), setting fire to other property and setting fire to vegetation. This report covers all of these forms of firesetting. Bushfire arson is also a common term in the literature. It covers fires deliberately lit with intent to cause damage and includes situations where a person is reckless in causing the fire and reckless regarding the spread of that fire.

The term 'bushfire' can also cause confusion. Fire managers use the terms bushfire, wildfire and

vegetation fire interchangeably, while many other people restrict the use of bushfire to describe a fire in a forest or similar vegetation, as opposed to other vegetation types such as scrub or grass. The Australasian Fire and Emergency Service Authorities Council defines bushfire as 'a general term to describe a fire in vegetation'. The Tasmania Fire Service also uses the term 'vegetation fire' in its fire reporting processes. 'Wildfire' is the term used in the United States of America and is common in the international literature. Given different agencies, at a national and an international level, all use different terminology, the terms used in this report may vary depending on the source in which a term is mentioned.

Although 'pyromania' is a commonly used term it should be avoided as a synonym for arson as it is an established psychiatric diagnosis. Pyromania has been described as an 'irresistible urge to light fires'.<sup>7</sup> It is accepted that the majority of arsonists are not pyromaniacs as they have an understanding of what they are doing and the consequences, but they still choose to do it anyway.<sup>8</sup> There have been so few arsonists who have been diagnosed as true pyromaniacs that some writers question whether it should be a diagnostic category at all.<sup>9</sup>

'Firesetting' has become a more universally accepted term to describe the intentional setting of fires. For the purposes of this report, the words arson and bushfire arson, and the words arsonist and firesetter, will be used interchangeably to cover all fires that are deliberately lit with intent to cause damage or with recklessness as to the spread of the fire and to cover fires where there is a suspicion of intention or recklessness.

<sup>7</sup> Rebekah Doley, 'Managing Arson Offenders: What Do We Need to Know?' (Paper presented at the Sentencing Conference 2010, National Judicial College of Australia, Canberra, 6 and 7 February 2010) <<http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Sentencing%202010.htm>>.

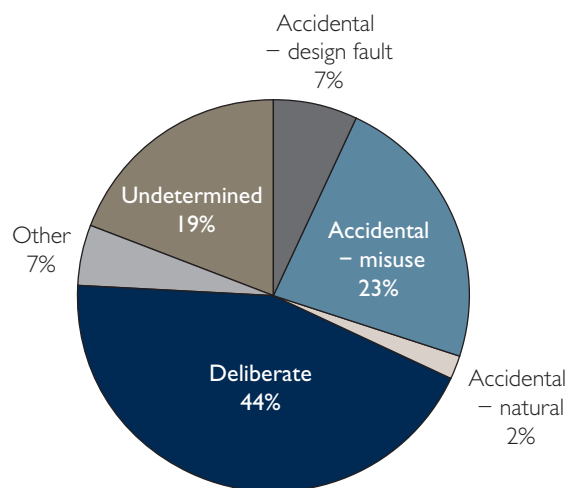
<sup>8</sup> Ibid.

<sup>9</sup> Australian Institute of Criminology, *Motives for Committing Arson: Part 1 – General Arson*, Bushfire Arson Bulletin 4 (Australian Institute of Criminology, 2004) 1.

## 1.5 THE INCIDENCE AND COSTS OF ARSON

Based on previous research undertaken by the Australian Institute of Criminology (AIC), arson in all forms costs the Australian community \$1.6 billion annually.<sup>10</sup> Australian fire services attend between 45,000 and 60,000 bushfires each year, and the Bushfire Cooperative Research Centre (Bushfire CRC) suggests approximately 13,000 to 18,000 of these are deliberately lit.<sup>11</sup> According to the Tasmania Fire Service (TFS) the total value of property loss (bush and structural fires) in the 2010–2011 financial year was approximately \$73.6 million for the State.<sup>12</sup> The TFS attended approximately 3600 fires<sup>13</sup> in the 2010–2011 period; the TFS contends that over 40 per cent of those were deliberately lit (see Figure 1). Data from Tasmania Police shows that there were 1864 burnt out cars in the period from 2005 to 2010.<sup>14</sup> The damage by arson to Housing Tasmania properties for the financial year 2008–2009 alone was reported at \$3,390,000.00.<sup>15</sup>

Figure 1: Cause of fires attended in Tasmania for the financial year 2010–2011



Source: Tasmania Fire Service

## 1.6 IS ARSON INCREASING IN TASMANIA?

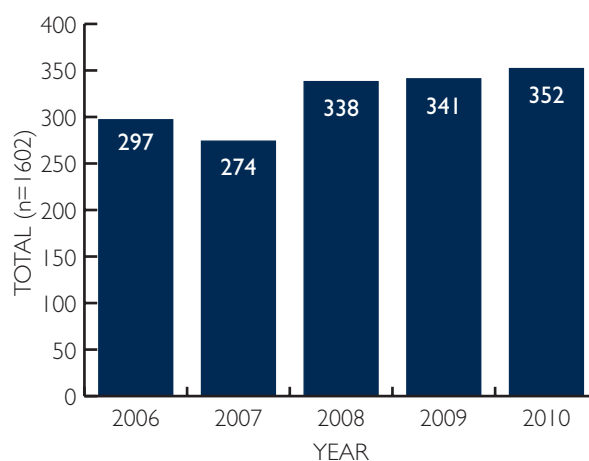
Table 1, Figure 2 and Figure 3 below indicate that damage by arson to Housing Tasmania properties and stolen motor vehicles has increased over the five-year period. The State Fire Commission annual reports indicate a steady rise in the percentage of fires determined by the TFS as deliberately lit.<sup>16</sup>

Table 1: The cost of arson in Housing Tasmania properties for the financial years 2004–2005 to 2008–2009

Financial Year	Cost \$'000 actual	Cost \$'000 in 2011 dollars
2004–2005	1,344	1,778
2005–2006	1,588	2,030
2006–2007	2,102	2,594
2007–2008	2,334	2,717
2008–2009	3,390	3,751

Source: Director of Public Prosecutions

Figure 2: Stolen motor vehicles damaged by arson for 2006–2010



Source: Tasmania Police

<sup>10</sup> Damon A Muller, *Using Crime Prevention to Reduce Deliberate Bushfires in Australia*, Research and Public Policy Series 98 (Australian Institute of Criminology, 2009) iii.

<sup>11</sup> Bushfire Cooperative Research Centre and Australian Fire and Emergency Service Authorities Council, *Bushfire Arson: What Do We Know Now?* Fire Note Issue 63 (2010) <[http://knowledgeweb.afac.com.au/research/community/documents/Bushfire\\_arson\\_what\\_do\\_we\\_know.pdf](http://knowledgeweb.afac.com.au/research/community/documents/Bushfire_arson_what_do_we_know.pdf)>.

<sup>12</sup> State Fire Commission, *State Fire Commission Annual Report 2010–11* (2011) 19.

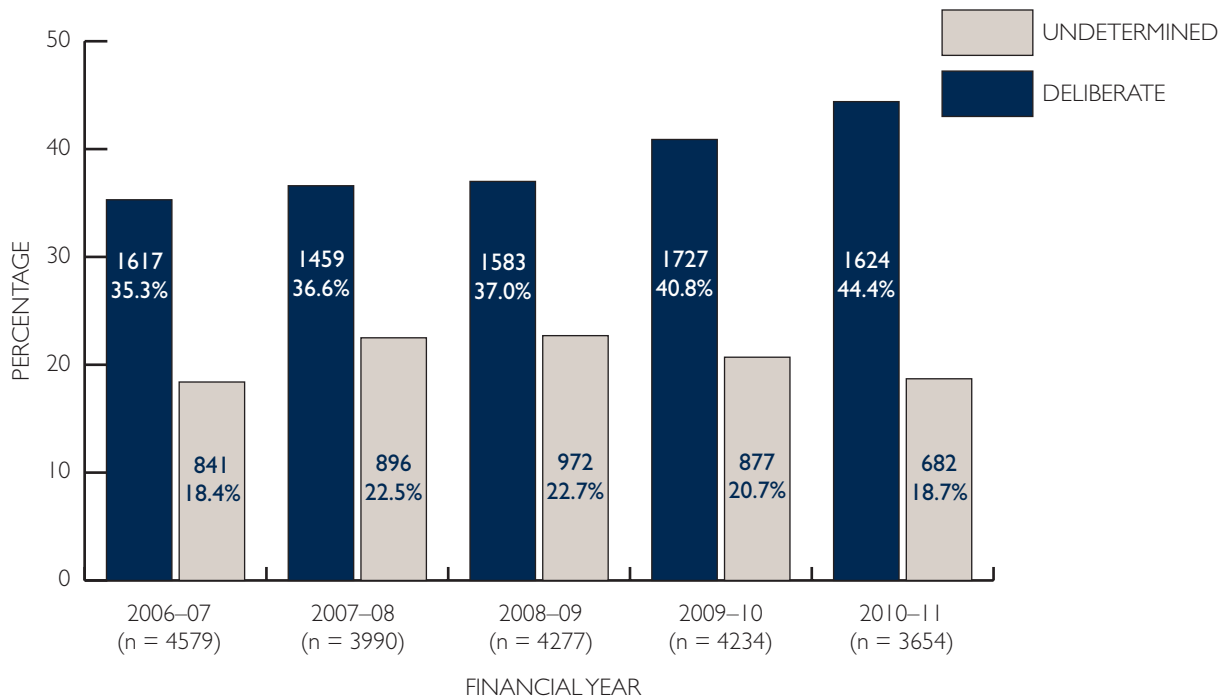
<sup>13</sup> Bushfire, structure, rubbish, vehicle and other.

<sup>14</sup> Tasmania Police, unpublished data.

<sup>15</sup> Director of Public Prosecutions, unpublished data.

<sup>16</sup> This increase is due, in part, to the push by the TFS to decrease the number of fires where the cause is undetermined.

Figure 3: The percentage of fires determined by TFS as deliberate for the financial years 2006–07 to 2010–11



Source: Tasmania Fire Service

## 1.7 INVESTIGATION AND CLEAR UP RATES

A clear up rate for a crime is the percentage of criminals convicted for that crime compared with the total number of crimes reported. Clear up rates differ between the types of arson reported. Bushfire arson has been claimed to have the lowest clear up rate of any crime in Australia. Research into clear up rates for arson shows that for the five-year period from 2001 to 2005 Victoria had, on average, 55 offenders convicted for arson offences per year. For the same period NSW had, on average, 26 offenders convicted for arson per year. In 2004 these two states had more than 27,000 fires between them. Assuming that only half of these 27,000 fires were due to arson, the identification and conviction rate is somewhere around four in every one thousand incidents.<sup>17</sup>

## 1.8 WHY ARSON IS UNIQUE

The reasons people light fires will be explored later in this report, but generally these motivations are no different from any other anti-social behaviour. A person might be dishonestly claiming insurance or a young person might be acting out in an abusive family setting. The problem with using fire to effect a fraud or express frustration or anger is the potential for the fire to spread to more than its intended target, and lead to an outcome more extreme than the effects of most other forms of anti-social behaviour.<sup>18</sup>

Another problem with arson is its potential as an instrument of power:

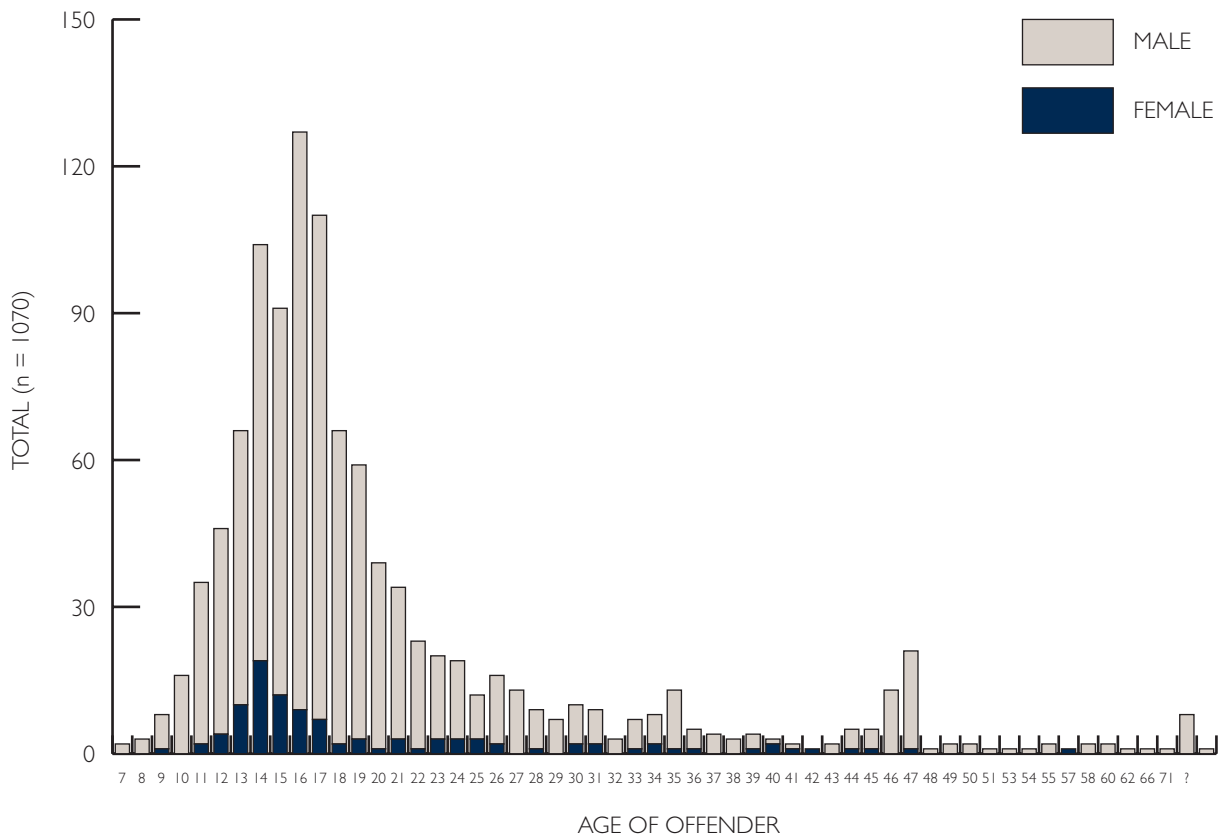
There are few forces more potentially destructive than fire and perhaps none that can be so easily created and released. ...Fire is unique in its ability to put power in the hands of an otherwise disempowered person. ...An otherwise powerless person with a cigarette lighter or a box of matches can achieve destruction, create excitement ... or enact revenge in a uniquely dramatic way.<sup>19</sup>

<sup>17</sup> Adam Tomison, 'Bushfire Arson: Setting the Scene' in Stanley and Kestin (eds), above n 6, 23.

<sup>18</sup> Matthew Willis, *Bushfire Arson: A Review of the Literature*, Research and Public Policy Series 61 (Australian Institute of Criminology, 2004) <<http://www.aic.gov.au/publications/rpp/61/index.html>>.

<sup>19</sup> *Ibid* 12–13.

Figure 4: Age and sex of offenders who have committed fire-related offences



Source: Tasmania Police

## 1.9 THE ARSONIST

It is imperative that we have an understanding of who is committing arson and why they are doing it. It is this knowledge that forms the foundation of an appropriate response. At the outset it should be acknowledged that most of the research available in relation to the profile of the arsonist is based on arsonists who have been convicted. Given the clear up rate is so low, those who are eventually convicted may not necessarily be representative of all firesetters. Research on arson has been varied and has taken different approaches. There have been studies on patterns, motives, classifications, typologies and profiles. What has been consistent in these findings is that the typical profile of an adult arsonist is a young (25–30 year old) male from a lower socioeconomic background who is unemployed or working in an unskilled job.<sup>20</sup>

Tasmanian data indicating the sex and age of offenders for all arson and arson-related offences in Tasmania also indicates that the bulk of offenders are young males. Raw data obtained from Tasmania Police on known offenders for the period 2005–2010 indicates that young male offenders are responsible for the majority of fires that are deliberately lit. The data indicates 90.3 per cent of the total number of offenders charged with arson were male; of those who proceeded to court 38.6 per cent were adults and 50.8 per cent were juveniles (n=1070).<sup>21</sup>

## 1.10 PROFILE AND MOTIVES OF THE ADULT ARSONIST

The various attempts to classify the motives of a 'typical' arsonist have proved problematic. One review concluded 'there is actually no such thing as a typical arsonist, as arson is a complex and multifaceted behaviour'.<sup>22</sup>

<sup>20</sup> Muller, above n 10.

<sup>21</sup> Raw data refers to all those charged with arson offences, not all those charged eventuating in court proceedings, for various reasons. The 50.8 per cent of juveniles became part of the diversion process at that point (refer to Figure 6, page 36).

<sup>22</sup> Muller, above n 10, 13.



The voluminous research on the motives of firesetting has been reviewed and broadly categorised in recent Australian research by Ducat and Ogloff<sup>23</sup> as:

- *Instrumental*: intentional firesetting as a means of achieving a desired goal, e.g. insurance fraud or crime concealment.
- *Expressive*: emotional expression as a means of communicating with the outside world or being empowered, e.g. revenge, stimulation, vandalism.
- *Due to the effects of mental illness*: the most common illnesses are alcohol abuse, personality disorders, depression and schizophrenia.<sup>24</sup>
- *Mixed or motiveless*.

Ducat and Ogloff acknowledge that the categorisations have been based primarily on research on structural arson and suggest that these motives may not be the same as those that underlie bushfire arson. These authors suggest the motive for bushfire arson is 'more tenuous and is likely to be directed at society as a whole, either as displaced anger or due to general anti-social tendencies.'<sup>25</sup> In conclusion, they agree with other commentators stating that bushfire arson should be considered separately in relation to both offence category and intervention programs.<sup>26</sup>

The influence of mental illness as a cause for firesetting is of major concern as a disproportionate number of firesetters are mentally ill or disordered. Past research indicates as many as one-third of firesetters have a major mental illness.<sup>27</sup> Doley's recent research on mental illness and arson<sup>28</sup> has led her to question past research that makes a causative link between the two. She suggests there is a risk in assuming that the mental illness has caused the arson as other causative factors may not have been addressed. Although there may

not be a causal relationship between mental illness and firesetting, it may be a 'factor that prevents them from developing the necessary strategies to do something more socially acceptable, other than firesetting, to regulate their emotions'.<sup>29</sup> Doley concludes that those who have a mental illness often go on to become serial arsonists. As a result, she argues, there is clearly a need to tailor programs for this group.

Firefighter arson is prevalent enough in Australia to warrant consideration. The existing research into the motives of firefighters who commit arson is that it relieves inactivity and generates excitement. Willis has noted that firefighters who engage in arson are found to be relatively new at the job, show difficulties with schooling, family and relationships, and are often found to be under personal stress.<sup>30</sup> Although most research suggests firesetters typically have a lower than average IQ, Doley argues firefighter arsonists are not representative of this group and normally have an above average IQ.

Some commentators have queried the assertion that arsonists have a lower than average IQ. They suggest it is more likely that arsonists are in the 'average' IQ range, some arsonists, like firefighters, have an above average IQ and 'clearly it is the less intelligent ones that are caught'.<sup>31</sup>

## 1.1.1 PROFILE AND MOTIVES OF THE JUVENILE FIRESETTER

Research shows that a large proportion of firesetting is conducted by juveniles. The Australian Institute of Criminology states that juveniles are responsible for nearly three-quarters of deliberately lit fires.<sup>32</sup>

Research into juvenile firesetting makes a clear distinction between 'fireplay' and 'firesetting' behaviour. These two

<sup>23</sup> Lauren Ducat and James R P Ogloff, 'Understanding and Preventing Bushfire-Setting: A Psychological Perspective' (2011) 18(3) *Psychiatry, Psychology and Law* 341.

<sup>24</sup> The Community Forensic Mental Health Service in Tasmania does not generally classify alcohol abuse or personality disorders as standalone mental illnesses.

<sup>25</sup> Ducat and Ogloff, above n 23, 344.

<sup>26</sup> Willis, above n 18, viii, cited in Ducat and Ogloff, above n 23.

<sup>27</sup> Ducat and Ogloff, above n 23.

<sup>28</sup> Doley, above n 7.

<sup>29</sup> Doley, above n 7.

<sup>30</sup> Willis, above n 18, viii.

<sup>31</sup> *Ibid.*

<sup>32</sup> Australian Institute of Criminology, *Preventing Juvenile Firesetting*, AICrime Reduction Matters 39 (Australian Institute of Criminology, 2005).

labels create a distinction based on the element of intent and malice. Fireplay describes the child or juvenile who is normally under the age of 10, lights fires as a result of curiosity or experimentation and is not malicious. Firesetting is decidedly different; the standard intent is higher than in fireplay and the degree of malice can vary. It is the firesetting juveniles who use fire as an 'instrument of purposeful action'.<sup>33</sup> It is this firesetter who has the potential to become a serial arsonist later in life, particularly if the firesetting is not treated.

Australian research into the backgrounds of juvenile firesetters consistently shows that they come from:

backgrounds characterised by parental absence, family breakdown and conflict, parental psychopathy, erratic parenting styles and techniques, and low levels of parental involvement with the children. A number of studies have also shown that many children firesetters have suffered physical and sexual abuse.<sup>34</sup>

Classification schemes or typologies consider the characteristics or traits common in any given behaviour. An overview of the literature on firesetting in the United States of America<sup>35</sup> suggests that the most persuasive typology in use is one by Kolko,<sup>36</sup> who built a classification scheme from clinical assessments of known juvenile firesetters. This classification identifies subtypes of juvenile firesetters and asserts that these categories are not always mutually exclusive. The four subtypes identified are listed below:

- *Curious*: sets fires out of fascination.
- *Pathological*: sets fires out of deep-seated individual dysfunction.
- *Expressive*: sets fires as a cry for help.
- *Delinquent*: sets fires as a means to antisocial or destructive ends.

Doley suggests that there are general criminal characteristics that can be applied to most criminals, but arsonists have some characteristics that are not general to all criminals, but are arson specific. She asserts that adult firesetting is strongly predicted by firesetting in adolescence by those who have, in turn, had childhood experiences with fire and firesetting.<sup>37</sup> Given 14 per cent of juveniles engage in fireplay at some stage in their lives<sup>38</sup> identification of motive is crucial to determining the appropriate intervention.

## 1.12 ARE ARSONISTS DANGEROUS RECIDIVISTS?

A review of the international literature by Brett found that recidivism in firesetting for adult male and female firesetters has been shown to vary between four and 60 per cent. This author concluded that the literature cannot support the hypothesis that all firesetters are inherently dangerous. It was recommended that more research should target different groups of firesetters, examining the individual risk within each group with an aim of researching treatment for some groups.<sup>39</sup> Doley supports this view and suggests that there are subgroups within the arsonist population that are more likely to reoffend. For the subgroups that do go on to become serial arsonists, the firesetting progresses in both magnitude and dangerousness. The subgroups more likely to reoffend are the juvenile firesetter and the adult with mental illness. In Doley's opinion the bushfire arsonists are among the most dangerous of these 'as their fires have no boundaries'.<sup>40</sup>

<sup>33</sup> Charles T Putman and John T Kirkpatrick, *Juvenile Firesetting: A Research Overview*, Juvenile Justice Bulletin (United States Department of Justice, 2005) 2 <[www.ojp.usdoj.gov/ojjdp](http://www.ojp.usdoj.gov/ojjdp)>.

<sup>34</sup> Janet Stanley, 'Preventing Children and Young People Lighting Bushfires in Australia' (2002) 10(2) *Child Abuse Prevention Newsletter* 6, cited in Willis, above n 18.

<sup>35</sup> Putman and Kirkpatrick, above n 33.

<sup>36</sup> David J Kolko and Alan E Kazdin, 'A Conceptualization of Firesetting in Children and Adolescents' (1986) 14 *Journal of Abnormal Child Psychology* 49, cited in Putman and Kirkpatrick, above n 33.

<sup>37</sup> Doley, above n 7.

<sup>38</sup> *Ibid.*

<sup>39</sup> Adam Brett, "'Kindling Theory' in Arson: How Dangerous Are Firesetters?' (2004) 38 *Australian and New Zealand Journal of Psychiatry* 419.

<sup>40</sup> Doley, above n 7.

# 2.

## Legislative Offence Framework

### 2.1 OFFENCE FRAMEWORK IN TASMANIA

Tasmania has a suite of minor and summary fire-related offences punishable by fine rather than imprisonment. However, the analysis in this advice is concerned with the indictable offences set out in the *Criminal Code*.

The indictable arson offences in the *Criminal Code* are in sections 268 (Arson), 268A (Setting fire to vegetation), 269 (Setting fire to property) and 269A (Setting fire with intent to injure person or property). Like all other indictable offences (other than murder and treason), these crimes are punishable by imprisonment of up to 21 years. Arson is setting fire to any building, erection or structure, ship or vessel, heap of timber or vegetable produce, or mine (s 268). The prosecution must prove that the offender intended or foresaw the likelihood of the building etc. catching fire.<sup>41</sup> Section 268A established the crime of unlawfully setting fire to any vegetation, living or dead, including forests, trees, saplings, shrubs, grass, crops, litter, bark, logs, peat etc. Section 269 is a catch all provision covering unlawfully setting fire to any property not covered by section 268 or 268A. A fire set with the intention of injuring a person or property is covered by section 269A. This section makes it a crime to unlawfully place flammable or combustible material, or do any other act, for the purpose of causing a fire with the intent to injure any person or property.

If arson causes death, charges of murder or manslaughter may be laid. Murder is defined in section 157 of the *Criminal Code*. Section 157(1)(c) includes causing death 'by means of an unlawful act or omission which the

offender knew, or ought to have known, to be likely to cause death in the circumstances, although he [or she] had no wish to cause death or bodily harm to any person'. In this instance there is no need to prove that the offender had the intention to kill a person; it is sufficient if he or she committed an unlawful act (such as arson) and knew that the death of someone was likely, or would have known if he or she had stopped to think about it.<sup>42</sup> So if a person set fire to a building and a firefighter died in an effort to suppress that fire, it could be argued that the offender knew or ought to have known that such an act would be likely to cause death because the presence in the building of a person, the firefighter, was predictable. An alternative would be a conviction for manslaughter, which would only require the offender to have committed the unlawful act (the arson) and a reasonable person to have realised that the act was exposing another to an appreciable risk of serious injury.

The most recent case in Tasmania where a person was charged with homicide arising out of a fire was in 2006, when a backpacker hostel manager started a fire at the hostel where he worked to hide thefts of cash. The result was the spread of the fire and the death of one person and injuries to six others. The hostel manager was acquitted of murder but convicted of arson and manslaughter. In passing sentence on the offender, Evans J in the case of *McLennan* 2006 commented:

It was not the prosecution's case that the defendant knew that his conduct was likely to cause death and the jury's verdict bars a finding that the defendant ought to have known of that likely outcome. Nevertheless his conviction for manslaughter

<sup>41</sup> *R v Hodgson* [1985] Tas R 75.

<sup>42</sup> *Simpson* (1998) 194 CLR 228.

involves a finding that his conduct was commonly known to be likely to cause death or bodily harm. For him to have behaved as he did and thereby caused a death of another is a grave crime.<sup>43</sup>

The court found the arson was the unlawful act underpinning the defendant's conviction for manslaughter and recognised that the defendant must only be punished once for the arson. For these crimes the defendant was sentenced to eight years' imprisonment.<sup>44</sup>

## 2.2 OFFENCE FRAMEWORK IN OTHER JURISDICTIONS

### 2.2.1 *International Provisions*

Lansdell<sup>45</sup> reviewed international bushfire arson legislation to determine if any, or any parts thereof, could be used as a model for Australian legislation. The author noted that, while the Mediterranean and California have climatic conditions similar to Australia, the causes of arson across these regions vary significantly.<sup>46</sup> In contrast, American arsonists appear to have similar arson motivations to Australian arsonists. However, some US states have a much tougher legislative approach to preventing wildfire arson with a convicted arsonist in 2009 being sentenced to death.

The application of international legislative approaches was also considered at the Advancing Bushfire Arson Prevention in Australia Symposium. Examples were drawn from Greece, Italy, Spain, California and the United States of America. It was concluded that there were no arson offences in international legislation that were suitable for adoption in Australian legislation. The Symposium also found that fires in Mediterranean jurisdictions were often politically motivated so they could not be compared to Australian jurisdictions.<sup>47</sup>

The only provision that could be appropriate for consideration as a model for Australian legislation is found in the Canadian *Criminal Code*,<sup>48</sup> s 433 (Arson/disregard for human life). This provision is set out as follows:

Every person who intentionally or recklessly causes damage by fire or explosion to property, whether or not that person owns the property, is guilty of an indictable offence and liable to imprisonment for life where:

- a) the person knows that, or is reckless with respect to, whether the property is inhabited or occupied; or
- b) The fire or explosion causes bodily harm to another person.

This provision requires proof that the accused actually knew that damage by fire to the specified property was a probable consequence and the accused proceeded with the conduct in the face of the risk. The additional element that makes the crime more serious than arson is intent or recklessness that the property was inhabited or the fact that bodily harm was caused.

### 2.2.2 *States and Territories of Australia and MCCOC Draft Code Offences*

Each State and Territory in Australia has its own laws covering arson and arson-related offences (see Appendix B). Although all jurisdictions have serious indictable offences that cover the destruction or damage of property by fire, they have quite different approaches to the scope of the offence and the maximum penalties that apply. New South Wales and Western Australia, for example, do not use the term 'arson'. In some jurisdictions arson is limited to certain types of property with a separate offence for other types of property.<sup>49</sup>

The Model Criminal Code Officers Committee<sup>50</sup> (MCCOC) created model offences in 2001 following

<sup>43</sup> *Tasmania v McLennan*, Evans J, 6 September 2006 (Sentence).

<sup>44</sup> This sentence was cumulative upon the sentence for one year for two counts of stealing, making a total sentence of nine years.

<sup>45</sup> Gaye Lansdell et al, "'Terror among the Gum Trees': Is Our Criminal Legal Framework Adequate to Curb the Peril of Bushfire Arson in Australia?' (2011) 18(3) *Psychiatry, Psychology and Law* 357.

<sup>46</sup> Greek law is focused on political and agricultural arson and Italian law is focused on firefighters and seasonal workers seeking extended employment.

<sup>47</sup> John Anderson and Gaye Lansdell, 'The Evolving Legislative Response to Bushfire Arson' in Stanley and Kestin (eds.), above n 6, 45.

<sup>48</sup> The official title is 'An Act Respecting the Criminal Law' (R.S.C. 1985, c. C-46 as amended).

<sup>49</sup> For an overview see Lansdell et al, above n 45.

<sup>50</sup> The Model Criminal Code Officers Committee (MCCOC) is now known as the Model Criminal Law Officers Committee (MCLOC).

detailed consideration of, and consultation with, all jurisdictions in Australia. Arson and fire-related offences are included in Chapter 4 of the MCCOC Model Criminal Code (Model Criminal Code).

The Model Criminal Code offence of 'arson' is established when a person causes damage to a building or conveyance by means of fire or explosive and intends to cause, or is reckless as to causing, damage to that building or conveyance. It was proposed this offence carry a penalty of up to 15 years' imprisonment. The Model Criminal Code also proposed a distinct offence of making a threat to a person to cause damage to any building, property or conveyance by means of fire or explosive with the intention to induce fear that the threat will be carried out, or with recklessness as to causing fear that the threat will be carried out. This offence attracts a penalty of up to 7 years' imprisonment.

The Model Criminal Code 'bushfires' offence is established when a person causes a fire, and intends to cause or is reckless as to causing a fire and is reckless as to the spread of fire to vegetation on property belonging to another. This offence attracts a penalty of up to 15 years. The rationale for this offence was that it should 'adequately reflect the harm to collective or community interests involved in bushfires'.<sup>51</sup> MCCOC concluded that:

The essence of the offence is to be found in conduct which creates a risk of uncontrolled spread of fire to vegetation on land which is not owned or occupied by the offender. Damage to vegetation maybe of great or little moment. For some species of Australian flora, fire is beneficial to procreation of the species. The real gravamen of the offence is creation of a risk, which may or may not eventuate, of catastrophic damage to property, life or environment.<sup>52</sup>

The Model Criminal Code 'bushfires' offence has been enacted in Victoria, South Australia, New South Wales, the Australian Capital Territory and the Northern

Territory with some minor modifications. When New South Wales introduced the Model Criminal Code bushfire offence, the aim was not to address a flaw in the law but to 'seek to emphasise the gravity of the danger that bushfires represent by enacting a special offence of causing a bushfire'.<sup>53</sup> What has essentially happened is that the majority of jurisdictions have legislated to create a distinct offence for deliberately or recklessly starting a bushfire which carries a maximum penalty reflecting the harm to collective or community interests associated with such fires.

### *2.2.3 Provisions Involving Harm or Danger to the Person*

#### ***Damaging Property by Fire with Intent to Injure or Endanger Life***

The Australian Capital Territory, Tasmania, New South Wales and Victoria have offences for damage to property by fire with intent to injure or to endanger life. These provisions vary in scope but generally provide for higher penalties to be imposed.<sup>54</sup>

#### ***Reckless Endangerment of Another Person's Life***

Victoria has an offence (*Crimes Act 1958* (Vic) s 197(2)) whereby a person who destroys or damages property intending to endanger life shall be treated as intending to endanger the life of another if he or she knows or believes that the life of another is more likely than not to be endangered by the destruction or damage.<sup>55</sup>

#### ***Damaging Property Occasioning Death***

Victoria has an additional offence found in section 197A of the *Crimes Act 1958* (Vic). This is the only example of a specific offence for arson causing death in any of the jurisdictions in Australia. To establish this offence the prosecution must prove intentional or reckless destruction of, or damage to, property by fire and a causal connection between the fire and death. There is no requirement that the death be caused intentionally or recklessly.

<sup>51</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Report* (Commonwealth Attorney-General's Department, 2001) ch 4, 47.

<sup>52</sup> *Ibid* ch 4, 51.

<sup>53</sup> New South Wales, *Parliamentary Debates* (Second Reading Speech), Legislative Assembly (12 April 2002).

<sup>54</sup> *Crimes Act 1900* (ACT) s 117(1), *Criminal Code Act 1924* (Tas) s 269A, *Crimes Act 1900* (NSW) s 198, *Crimes Act 1958* (Vic) s 197(2).

<sup>55</sup> *Crimes Act 1958* (Vic) s 197(5)(b).

## 2.3 OPTIONS FOR REFORM

### 2.3.1 Background

The National Work Plan to Reduce Bushfire Arson in Australia, which was endorsed by the 2009 Victorian Bushfires Royal Commission, contained a recommendation for nationally consistent bushfire and arson offences.<sup>56</sup> The objective was for arson and bushfire offences to appropriately reflect the gravity of the offence.<sup>57</sup> As a result the Commonwealth Attorney-General recommended to the then Standing Committee of Attorneys-General (SCAG), now known as the Standing Council on Law and Justice (SCLJ), that Ministers in all States and Territories of Australia agree to implement the Model Criminal Code bushfire and arson offences (see Appendix A). To date, Tasmania has not done so.

The Model Criminal Code does not contain specific offences based on injury or death due to arson or bushfire arson. The arson offence is essentially about damage to structure, and bushfire arson is based on the damage to public property owned by all Australians. MCCOC considered that it was unnecessary and confusing to create special offences in the criminal damage offences penalising conduct that causes or risks injury or death from fire, arguing that such situations would be covered by offences of reckless endangerment.<sup>58</sup> As is clear from the description of the offence framework above, Tasmania does not have a specific offence for injury or death caused by fire and instead relies on wounding, murder or manslaughter to cover these types of injuries.

Chapter 2 of the Model Criminal Code has general principles of criminal responsibility that apply to all offences contained within it. Given this Chapter is fundamentally different from Chapter IV of the Tasmanian *Criminal Code*, which deals with general principles of criminal responsibility, the bushfire and arson offences contained in the Model Criminal Code cannot simply be lifted and inserted into the *Criminal Code*.

<sup>56</sup> Australian Emergency Management Institute, above n 4.

<sup>57</sup> Ibid 5.

<sup>58</sup> Model Criminal Code Officers Committee, above n 51, ch 4, 41.

<sup>59</sup> Ibid ch 4, 39.

<sup>60</sup> Ibid.

This does not mean, however, that consideration cannot be given to modifying the Model Criminal Code offences and/or including new arson offences with injury or death as an element. It appears that, while the Tasmanian Government considered it unnecessary to adopt the model arson and bushfire offences, it is not opposed to having the matter examined further.

### 2.3.2 Item 1 – Adopt the Model Criminal Code Offence of Arson

The current offence of arson in s 268 of the *Criminal Code* covers any building, ship or vessel as well as an assortment of agricultural and forest products, such as hay and timber. In contrast, the Model Criminal Code offence of arson limits its coverage to buildings, motor vehicles, motorised vehicles and aircraft. MCCOC argued that there is no particular reason why, in a post-agricultural society, the law of criminal damage to property should single out fire damage to felled timber or harvested agricultural products for special treatment. Instead the Model Criminal Code treated this as damage to property. Fire damage to standing crops and timber would be caught by MCCOC's proposed bushfire offence.<sup>59</sup> Given arson is the most serious offence in the list of arson-related offences, there is a good argument for a more modern approach, which would be to include vehicles and aircraft in the arson offence and to omit cultivated vegetable produce. This would allow the repeal of the general offence of setting fire to property in s 269 of the *Criminal Code*, an offence wide enough, according to MCCOC, to cover setting fire to another person's cigar without his or her consent!<sup>60</sup>

#### Question 1

Should the offences of arson (s 268) and setting fire to property (s 269) in the *Criminal Code* be replaced with a new offence of arson defined as unlawfully setting fire to any building, dwelling, airplane, motor vehicle or motorised vessel?

## Consultation

Both the DPEM and the TFS are supportive of this legislative change.

The DPP made both a submission into Question 1 of the Consultation Paper and a general comment about summary alternatives to setting fire provisions concerning property in ss 268–269 of the *Criminal Code*. The DPP commented that, prior to the release of the Consultation Paper, he had requested summary alternatives to the setting fire provisions concerning property in ss 268–269 of the *Criminal Code*. The DPP stated that using a summary offence provision, such as unlawfully injuring property contrary to s 37(1) of the *Police Offences Act 1935* (Tas), in order to prosecute for minor firesetting where actual and potential damage was small conflicted with the apparent legislative intent that all unlawful firesetting be dealt with on indictment.

The question of where to set the line if a summary alternative were enacted is not an easy one, as potential harm is such a large consideration in unlawful fire-setting cases that it would not be satisfactory to give an election to the accused based solely on actual dollar-valued damage done.

In relation to Question 1, the DPP indicated support but with reservations as to the subject matter of the proposed offence.

Granted we may be in a post agricultural society and the need to have agricultural and forest products included in the coverage of arson might be questionable, but why replace them with airplanes, motor vehicles and motorised vessels? It does not follow as a matter of drafting or policy that one set of moveable properties should be substituted for another. It would make better sense to confine arson to 'building, erections or structures' as they are most likely to be dwellings or business structures and in either case likely to have people in them or be of very significant value to their owners. All other property could then be confined to s 269.

## Discussion

The Council sees merit in the DPP's request for summary alternatives to ss 268–269 in the *Criminal Code*. The Council did not seek views regarding summary alternatives for fire-related offences in the Consultation Paper; as a result no recommendations are made in the Final Advice. However, the new offence structure proposed by the Council will facilitate consideration of summary alternatives to the indictable offences found in ss 268–269 of the *Criminal Code*.

Concerning the issue of the definition of 'arson', the Council used the Model Criminal Code definition to present a narrower definition of arson than that presently contained in s 268 of the Tasmanian *Criminal Code*. The offence of 'arson' in the *Criminal Code* includes buildings, erections, stack or heap of cultivated vegetable produce etc. The offence of 'arson' in the Model Criminal Code includes 'buildings or conveyances'; a 'conveyance' is defined as a motor vehicle, motorised vessel or aircraft.

The DPP's submission that the Model Criminal Code definition simply replaces one set of moveable products with another is persuasive. In the Tasmanian context this is particularly relevant given the number of motor vehicles that are burnt as a means of destroying evidence. As described by the DPP, buildings and structures are more likely to be of significant value and are more likely to contain people. It makes sense that the more serious crime of 'arson' (s 268) be confined to buildings. Buildings are more likely to be of significant value and contain human life; causing a fire in these areas can result in an offence that is more serious in nature.

Presently, s 268A (Unlawfully setting fire to crops, forest, moorland, peat, etc.) covers various types of vegetation, and s 269 (Unlawfully setting fire to property) is a catch all provision covering any property 'not comprised in s 268 or s 268A'. The Council recommends that the definition of 'arson' in s 268 be narrowed to 'buildings', that s 269 be amended to 'unlawfully setting fire to property not defined in s 268' and s 268A be repealed.<sup>61</sup>

<sup>61</sup> Setting fire to vegetation is taken up in a proposed bushfire offence (see Recommendation 5).

The effect of the new offence framework is that the serious offence of 'arson' is confined to buildings, and all other property damaged by fire is encompassed in the less serious offence of 'unlawfully setting fire to property'. All offences for setting fire to vegetation are taken up in the proposed 'bushfire' offence and are no longer spread throughout section 268, 268A or 269.

### *Recommendation 1*

Section 268 of the *Criminal Code* is amended so that the offence of 'arson' is narrowed to only include buildings.

### *Recommendation 2*

Section 268A of the *Criminal Code* is repealed. (This will entail a consequential amendment to section 269 – namely omitting reference to section 268A.)

### *Recommendation 3*

Section 269 of the *Criminal Code* is amended to cover all property not comprised in section 268.

### *2.3.3 Item 2 – Include Offences for Threats to Damage Property by Fire*

The Model Criminal Code offences include an offence of making a threat to a person to damage a building or conveyance by fire or explosion. Section 4.7.1 (2) and (3) state:

- (2) A person who:
  - a. makes to another person a threat to damage any building or conveyance belonging to that other person or a third person by means of fire or explosives, and property, and
  - b. intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,is guilty of an offence.  
Maximum penalty: Imprisonment of 7 years.
- (3) In the prosecution of an offence against subsection (2) it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

This offence has a parallel in the definition of assault in s 182 of the *Criminal Code* where, as well as an application of force, an assault can be committed by threatening to apply force. A threat requires a threatening gesture, and words alone are insufficient.<sup>62</sup> Currently a person who makes a threat to a person to set fire to property is only guilty of an offence if the threat is made 'in writing'. Section 276 (Sending letters threatening to burn or destroy) of the *Criminal Code* provides:

Any person who, knowing the contents thereof, directly or indirectly causes any person to receive any writing threatening that any property shall be unlawfully burnt, destroyed, or injured, is guilty of a crime.

As well as making a threat to cause damage by fire to a building or conveyance the Model Criminal Code includes an indictable offence of threatening to cause property damage that causes another person to fear that carrying out the threat will cause serious harm to that person or another person.

<sup>62</sup> See sections 182(1) and (2).



Section 4.1.9 (Threat to cause property damage – fear of death or serious harm) provides:

- (2) A person who:
  - a. makes to another a threat to damage property, and
  - b. is reckless as to causing that other person to fear that the carrying out of that threat will kill or cause serious harm to that other person or a third person,is guilty of an offence.  
Maximum penalty: Imprisonment of 7 years.
- (3) In the prosecution of an offence against this section it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

It can be seen that this offence includes the additional fault element (or mental element) of not just foresight that the person to whom the threat is made could fear that the threat will be carried out: the fear must be that the threat will result in death or serious harm to another person.

In support of the enactment of these offences in place of s 276 it can be argued that it is now anachronistic to have an offence of 'sending letters' threatening to burn or destroy. Text messages and email may be in writing, but voicemail messages can be just as frightening as a written message. As MCCOC pointed out, these offences involve serious threats to cause property damage in situations where there is a risk of serious bodily harm or death. There is a strong case for criminalising such conduct.

#### *Question 2*

Should s 276 of the *Criminal Code* be replaced by:

- a) A definition of arson that encompasses threats based on s 4.1.7(2) and (3) of the Model Criminal Code?
- b) An offence for threatening to cause property damage based on s 4.1.9 of the Model Criminal Code?
- c) A redrafted offence of s 276 which covers the offences in s 4.1.7(2) and (3) and s 4.1.9 of the Model Criminal Code?

#### *Consultation*

Both the DPEM and the TFS are supportive of an offence for threatening to cause property damage. While supportive, the DPEM did state that the *Criminal Code*, in its present state, adequately covers arson offences.

Housing Tasmania expressed support for an offence of this nature. Housing Tasmania submitted that making it possible to act when a threat is made provides an opportunity to prevent destruction occurring.

The DPP did not support the inclusion of an offence for threatening to cause property damage. He questioned whether threatening to damage property by fire is more deserving of criminalisation than threats to do personal harm, and suggested that only criminalising the former would be inappropriate.

#### *Discussion*

The Council agrees with the DPP that it would be incongruous to create an offence for making a threat by words alone to burn or destroy property when there is no equivalent offence in relation to threats to do personal harm. For this reason the Council does not recommend an offence along the lines of the summary offence recommended by MCCOC of a threat to cause property damage.<sup>63</sup> The Model Criminal Code offences in relation to threats fit in with the restructure of assaults and offences against the person which completely reconceptualises these offences in a way that does not sit comfortably with Tasmanian *Criminal Code* offences against the person. However, the Council believes that there is a need for the creation of an offence that extends to cases where an offender threatens to harm property, by fire or explosion, which at least implies that the damage to the property will cause serious harm or death to a person. Put simply, the offence is intended for cases where the threat would be likely to cause a person to think his or her life was endangered. At the same time there is a need to modernise s 276.

To that end the Council recommends a redrafting of the existing offence contained in s 276 of the *Criminal Code* (threatening to burn or destroy by means of

<sup>63</sup> Model Criminal Code Officers Committee, above n 51, ch 4, 62.

sending letters). Presently, the existing offence (refer to 2.3.3) is restrictive in that the threat must be made in writing. The definition of writing found in the *Acts Interpretation Act 1931* (Tas) states that expressions referring to writing 'shall be construed as including references to any mode of representing or reproducing words, figures, or symbols in visible form'.<sup>64</sup> The Council believes that this form of threat is anachronistic in the context of contemporary technological advancement. The Council considers that any threat is frightening and 'sending a letter' to burn, destroy or injure property is a less likely medium in today's context. The Council recommends that s 276 should be modernised.

The existing offence contained in s 276 of the *Criminal Code* is primarily concerned with threats to cause property damage. The essence of the proposed offence is not simply the threat that the property in question will be damaged but foresight that the person threatened could fear serious harm or death as a result of the threatened property damage.

The fault elements required by MCCOC for the Model Criminal Code offence are proof of threat to damage property, but it is not necessary to prove an intention to carry out the threat. It is enough that the offender was reckless as to the risk that the person threatened might fear that death or serious harm might result. The Council recommends s 276 be amended to cover this type of offence and be broadened to the communication of a threat by any means.

#### *Recommendation 4*

Section 276 of the *Criminal Code* is amended to cover the communication, by any means, of a threat to damage property by fire or explosion where the offender is, at the least, reckless that the other person will fear that the damage will kill or cause serious harm to that person or a third person.

<sup>64</sup> Section 24(b).

<sup>65</sup> Model Criminal Code Officers Committee, above n 51, ch 4, 47.

#### *2.3.4 Item 3 – Include a Specific Bushfire Offence in Tasmanian Legislation*

The Model Criminal Code section 4.1.8 (Bushfires) provides:

- (1) A person:
- a. who causes a fire, and
  - b. who intends or is reckless as to causing a fire, and
  - c. who is reckless as to the spread of the fire to vegetation on property belonging to another,
- is guilty of an offence.

Maximum penalty: Imprisonment of 15 years.

- (2) In this section:

*Causing a fire* includes:

- a. Lighting a fire
- b. Maintaining a fire
- c. Failing to contain a fire, except where the fire was lit by another person or the fire is beyond the control of the person who lit the fire.

*Spread of a fire* means spread of a fire beyond the capacity of the person who caused the fire to extinguish it.

The rationale for this offence is to create an offence of comparable gravity to arson for persons who start bushfires. MCCOC argued that traditionally the prohibitions against conduct likely to cause bushfires, grass fires or other rural wildfires attract comparatively light penalties that do not adequately reflect the harm to collective or community interests involved in bushfires.<sup>65</sup>

An argument against a further offence is that the suite of arson offences already existing in the *Criminal Code* is adequate. These offences are as follows:

#### **268. Arson**

Any person who unlawfully sets fire to any building, erection, or structure whatever, whether the same is completed or not, or to any stack or heap of cultivated vegetable produce, or of timber, or of mineral or vegetable fuel, or to any mine, or to any ship or vessel, whether completed or not, is guilty of a crime, which is called arson.

**268A. Unlawfully setting fire to crops, forest, moorland, peat, etc.**

(1) Any person who unlawfully sets fire to any vegetation, whether live or dead, is guilty of a crime.

Charge: Unlawfully setting fire to vegetation.

(2) Without limiting the generality of subsection (1), a reference to vegetation in that subsection includes a reference to –

- a. any cultivated vegetable produce, whether standing or cut;
- b. any crop of hay or grass, whether the natural or indigenous product of the soil or not, whether under cultivation or not, and whether standing or cut;
- c. any forest, standing tree, sapling, or shrub, whether indigenous or cultivated;
- d. any moorland, heath, scrub, fern, tussocks, sags, gorse or other weeds; or
- e. any peat, humus, litter, bark, stump, or log.

**269. Unlawfully setting fire to property**

Any person who unlawfully sets fire to any property not comprised in section 268 or 268A is guilty of a crime.

Charge: Unlawfully setting fire to property.

Unlawful setting fire to vegetation (s 268A) is the offence category covering bushfires. This offence requires that the offender set fire to vegetation and did so wilfully and without claim of right. Wilfulness requires that the offender intended, or that he or she foresaw, that the vegetation would catch alight. Claim of right has been held at common law to provide a defence where the accused set fire to furze on a common thinking she had a right to do so.<sup>66</sup> It can be argued that 'unlawfully' in s 268 does not require the act that results in setting fire to the vegetation be in itself an unlawful act. The word 'unlawfully' qualifies the setting fire to the vegetation (e.g. the forest or grass) not the initial fire that spread to the 'vegetation'.<sup>67</sup>

It can be seen that the Model Criminal Code bushfire offence is broader than s 268A of the *Criminal Code* as it also includes maintaining a fire and the failure to contain a fire. It also makes it clear that if a person lights a fire on his or her own property and the fire spreads to private property of another or to publicly owned property, the person will be criminally responsible if it was foreseen. Technically, it is possible that this could be covered by s 268A of the *Criminal Code*. However, the advantage of enacting a bushfire offence with such a label is that this can serve the purpose of highlighting criminal responsibility in such cases and so enhance denunciation and increase the deterrent effect of criminalising this conduct.

An argument against a specific bushfire offence is that the *Criminal Code* penalty structure does not permit the legislature to indicate the gravity of the offence by means of the maximum penalty (as all offences in the *Criminal Code* have a maximum penalty of 21 years, except murder and treason). This diminishes the strength of the argument that an offence of comparable gravity with arson is being created. A counter argument is that the legislative history of the offence can send the same message to the public and to the judiciary as exemplified by the legislative history of culpable driving offences. A further argument against the Model Criminal Code bushfire offence is that it is inappropriate as the fault elements of the Model Criminal Code offences depend on different general principles of criminal responsibility from the general principles of criminal responsibility in the *Criminal Code*. However, other jurisdictions have managed to adapt the Model Criminal Code offence to accommodate different statutory frameworks.

*Question 3*

Does Tasmania need a new bushfire offence to cover causing a fire (by lighting a fire, maintaining a fire or failing to contain a fire) where there is a substantial risk of the fire spreading?

<sup>66</sup> *Smith v Barnham* (1876) 34 LT 774 (Bramwell B), cited in *Walden v Hensler* (1987) 163 CLR 561, 572 (Brennan J).

<sup>67</sup> *Vallance* (1961) 108 CLR 56, 59 (Dixon CJ), 63 (Kitto J), 78 (Windeyer J).

## Consultation

The DPP is not aware of any situation where the existing law has been significantly inadequate to meet a deliberately or recklessly started bushfire. It was noted that failing to contain a fire is not covered by the existing legislation, and this needs a great deal more thought before it should be a crime. For example, what circumstances should create a duty to contain a fire lit by another – property occupation, mere presence or something less or more? By what standard should the omission to contain a fire be judged – criminal negligence, recklessness or less? Should fire service officers be liable or exempt?

Both the DPEM and the TFS are supportive, in principle, of the introduction of this legislation. The DPEM again noted that the *Criminal Code* in its present state adequately covers arson offences.

The TFS also noted that caution will need to be taken if this legislation is introduced, as fire is used for land management purposes and as a way of reducing fuel. As a result, any changes should avoid hampering legitimate fuel reduction burning under 'appropriate conditions with appropriate precautions applied'. The TFS noted that currently there is a draft Fire Offences Bill 2012<sup>68</sup> that may pick this up, in some circumstances.

The Hon M Gaffney, MLC, Member for Mersey, submitted that the draft Fire Offences Bill 2012 is a Private Member's Bill that aims to 'provide a range of measures to prevent individuals from engaging in small-scale fire offences'. The draft Fire Offences Bill 2012 proposes that these offences are dealt with by means of a 'Fire Infringement Notice' similar to the operation of a 'Traffic Infringement Notice' currently used by Tasmania Police.

## Discussion

The offences proposed in the draft Fire Offences Bill 2012 will not overlap with the offence structure for indictable offences recommended by the Sentencing Advisory Council.

The Council has identified a need for the inclusion of a 'bushfire' offence in the *Criminal Code*. The MCCOC rationale for the inclusion of a bushfire offence is persuasive. MCCOC suggests that 'arson' is concerned with harm to individual property interests, which does not adequately reflect the harm to collective or community interests involved in bushfires. MCCOC further state:

The harm which results from bushfire is not limited to damage or destruction of buildings, plant and crops, which are the concern of criminal damage legislation. The destruction of fauna, habitat and flora may be no less deplorable, even though there is no damage of property which belongs to another person.<sup>69</sup>

The Model Criminal Code bushfire offence carries the same penalty as arson and is primarily directed at individuals who start fires on land that they do not own. It also applies to owners who light fires on their own property if there is substantial risk that the fire will spread on that land or adjoining land and the person is reckless with respect to the risk. MCCOC state that this offence is based on the creation of risk rather than the infliction of harm.

The reason for the offence is the risk of catastrophe, unpredictable in extent and consequences, rather than injury to individual rights of ownership over vegetation.<sup>70</sup>

The fault element of this offence is proof of the intentional or reckless causation of the fire and recklessness, at the least, as to the spread of fire on property belonging to another. In this offence it is only necessary to prove that the offender was aware that the fire might spread, and there is no need to prove 'awareness of the substantial risk of catastrophic consequences'.<sup>71</sup>

<sup>68</sup> This Bill is yet to be tabled in Parliament.

<sup>69</sup> Model Criminal Code Officers Committee, above n 51, ch 4, 41.

<sup>70</sup> Ibid 51.

<sup>71</sup> Ibid 53.

The Model Criminal Code includes consent as a general defence by a person 'entitled' to consent to the damage, including the risk that the fire will spread on the property concerned. However, owner A's consent will not protect an offender who realises there is a risk that the fire on A's property will spread over B's property. Consent of an owner or occupier will not displace the liability of working contractors for offences committed against regulatory legislation imposing fire bans or other fire controls.<sup>72</sup>

As mentioned earlier, the Model Criminal Code offences depend on general principles of criminal responsibility, which differ from those in the Tasmanian *Criminal Code*. Other Australian jurisdictions that have had similar problems incorporating Model Criminal Code offences into their criminal law legislation have adapted the offence to fit that legislation.

The Council recommends that an offence of this nature be created, that the offence be broad enough to cover the circumstances where a person lights a fire on his or her own property, or the property of another; and the person is, at the least, reckless as to the spread of fire. As for the Model Criminal Code offence, claim of right or consent should not be a defence to this offence where the fire has spread to another property not covered by the claim of right.

As stated by the DPP, a bushfire offence containing an element of failing to contain a fire will need more consideration before it should become a crime. The Council believes that the advantage of this offence justifies the careful consideration that will need to be taken in the legislative drafting of the offence, prior to its introduction.

### *Recommendation 5*

The *Criminal Code* is amended to include a new offence for 'Bushfires' to cover the event where a fire is caused and where there is a substantial risk of the fire spreading.

### *2.3.5 Item 4 – A Specific Offence to Cover the Situation Where a Fire Has Been Lit That Has Resulted in Injury or Death*

There are some model offences in other jurisdictions in Australia and Canada that could be used as an example or model for incorporation into the *Criminal Code*. The Canadian provision (see 2.2.1) requires proof that the accused knew, or was reckless to the fact, that damage was probable or that harm was actually caused.

The Victorian offences (see 2.2.3) include reckless endangerment where a person can be found guilty of an offence if the person knew that the life of another was more likely to be endangered. There is also the offence of damaging property occasioning death where there must be intentional or reckless damage only; there is no requirement that death was caused intentionally or recklessly, only a causal connection between the fire and the death.

The argument against further offences in the *Criminal Code* is that injury and death as a result of a bushfire are adequately covered by 269A (intent to injure) and other provisions in Part V of the *Criminal Code* – Crimes against the person. If serious injury is caused to a person as a result of a deliberately lit fire, it is possible to charge the firesetter with causing grievous bodily harm or wounding.<sup>73</sup> In the event that the fire causes death, a charge of murder or manslaughter is open. The backpacker hostel case in Launceston demonstrates that offenders can be dealt with in an appropriate manner where setting fire to property causes death. These offences may appear to be adequate especially in light of the successful manslaughter conviction in the backpacker hostel case.

One argument in favour of a new offence, or new offences, is that the Canadian and Victorian provisions cover a number of scenarios that would be difficult to prove or punish under traditional offence categories. For example, the Canadian offence of Arson/disregard for human life allows a person to be punished where arson causes bodily harm to another person without the need to prove that the bodily harm was foreseen or foreseeable.<sup>74</sup> The Victorian offences of damaging

<sup>72</sup> Ibid 43.

<sup>73</sup> A recent indictment filed in *Tasmania v Capell* on 18 July 2011 charged the accused with arson and wounding where it is alleged the arson of a service station resulted in an explosion that caused a wound to another person.

<sup>74</sup> Under existing law, if bodily harm is not a foreseeable consequence of arson it cannot be taken into account as an aggravating factor: *Inkson* (1996) 6 Tas R 1; *Agius* (2000) 77 SASR 469; *Lambie* [2007] TASSC 10.

property occasioning death require no fault element (or mental element) relating to the death.

The Victorian offence of damaging property occasioning death pursuant to s 197A of the *Crimes Act 1958* (Vic) has been criticised due to the lack of requisite culpability for such a serious offence. Lansdell et al argue that a strict liability standard in such a serious offence is not a 'principled use of the criminal law'.<sup>75</sup> The authors argue that criminal responsibility, which is underpinned by the core principles of proportionality and equal treatment, is eroded with a strict liability that essentially does not require proof of fault. They further argue that an 'offence which involves the consequence of causing a death of another should require a subjective intention in relation to death, even if it is expressed in the terms of recklessness'.<sup>76</sup>

One argument in support of a new bushfire offence resulting in injury or death or endangering life is that murder and manslaughter may be more difficult to establish in the context of the bush than in a structural fire. Lansdell et al suggest that murder is difficult to establish when a fire is deliberately lit in the bush as the prosecution is faced with a demanding burden of proof to show beyond reasonable doubt that the firesetter intended to take a human life. If the firesetter had not made an admission that he or she was aware that his or her conduct could kill, the requisite mental element for murder must be by inference from the conduct of the firesetter when the fire was ignited. To make this inference, the factors that may need to be taken into consideration are the firesetter's knowledge of the area, the likelihood of a person being caught in the fire, whether accelerants were used and the weather conditions on the day etc.<sup>77</sup> While s 157(1)(c) of the *Criminal Code* poses a test that has a partly objective element, there is still the need to prove that the particular offender, with his or her knowledge and experience, ought to have known that death was a likely consequence of the unlawful act (such as arson or unlawfully setting fire to vegetation or property). In relation to manslaughter the authors suggest that, although less demanding in terms of burden of proof,

it still needs to be shown that a reasonable person would not have lit a fire in the same circumstances of the firesetter. The court again may have to consider the weather conditions etc. to determine the objective dangerousness of the act.<sup>78</sup>

Further support for an added bushfire offence can be found in the rationale for the creation of the offence of causing death by dangerous driving. This offence was created because of the reluctance of juries to convict drivers of manslaughter where they had caused the death of a person by dangerous driving. Juries were thought to be more likely to convict drivers of causing death by dangerous driving rather than manslaughter despite the fact that the maximum penalty upon conviction was the same. An offence of causing death by fire could ameliorate any reluctance to convict for manslaughter. This argument can be countered by the observation that there is already a dearth of prosecutions for deliberately lit fires that have resulted in death and there is no comparable evidence of a reluctance to acquit arson offenders of manslaughter:

If it were decided that the *Criminal Code* should have an extra new offence to cover lighting a fire/bushfire resulting in injury or death, s 433 of the Canadian *Criminal Code* and s 197A of the *Crimes Act 1958* (Vic) provide possible models. Alternatively, the offence could simply be an aggravated form of the model bushfire offence. The Council draws attention to the view of Lansdell et al, that the Victorian offence was politically motivated rather than a principled use of the criminal law.<sup>79</sup> By inference the same criticism could be levelled at any similar offences with strict liability in relation to the element of death or bodily harm.

#### Question 4

- a) Does Tasmania need an arson/bushfire offence to cover the event where a fire has been lit, deliberately or recklessly, or there is a failure to contain a fire that has resulted in injury or death?
- b) If so, what form should it take?

<sup>75</sup> Lansdell et al, above n 45, 361.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

## Consultation

The DPEM submitted that there is 'a need for a crime to accommodate people who act recklessly and start a bushfire, which spreads and causes damage, injury or death, especially on days of total fire ban'.

The TFS submitted that there is a need for an offence of this nature, and it advised of the need for an appropriate definition of 'deliberate' to ensure fires deliberately lit for land management purposes are not restricted unnecessarily. The TFS further submitted that the Canadian model (referred to in 2.2.1) may be worth exploring.

The reservations the DPP held for a bushfire offence (see Question 3) in relation to the circumstances that create a duty to contain a fire and the standard of omission also applied to this offence where there was failure to contain a fire where the fire resulted in injury or death.

## Discussion

In 1997 Victoria introduced s 197A into the *Crimes Act 1958*. It stipulates that if a person destroys or damages property by fire, knowing or believing that his or her conduct is more likely than not to result in destruction of, or damage to, property, and if the person thereby causes the death of another person, the person is guilty of 'arson causing death'. This provision prompts the question of whether a new offence is required in the Tasmanian setting.

In many circumstances it seems that the current homicide provisions contained in the Tasmanian *Criminal Code* would be sufficient to prosecute a person for causing another's death with fire. These circumstances might include, for example, where death followed shortly after the act of setting fire to a house or vegetation – that is, where there was a clear causal link between the defendant's use of fire and the death of another. Conceivably murder might be made out providing there was sufficient evidence that, for instance, the defendant intended to cause death, or committed an unlawful act that he or she knew or ought to have known (had the defendant stopped to consider the circumstances) was likely to cause death. Likewise, manslaughter might be made out, depending on the charge, if it could be established beyond a reasonable doubt that the death was not unforeseeable.

However, the Council recognises that other circumstances might arise where the Tasmanian community perceives a gap in the homicide provisions contained in the *Criminal Code*. This is essentially because of some of the unique characteristics of fire, which differentiates it from other inherently dangerous things, such as motor vehicles or firearms. The characteristics referred to include (a) the capacity of fire to burn for hours or many days and (b) the influence that other factors, such as weather conditions, can have on the intensity and direction of a fire. By way of example, person A might start a bushfire in northwest Tasmania through an act or omission. The fire burns for several days and, with unexpected high winds and spot-fires, it jumps ahead 150 kilometres to the east. Person B ignores recommendations to evacuate an area threatened by the fire, perhaps intending to save a house, and dies of smoke inhalation. In this type of scenario the causal link between the act or omission and the death becomes very complex – arguably more complex than is typically encountered in deaths caused by motor vehicles or firearms.

Under such circumstances the prosecution might not be able to establish beyond a reasonable doubt that the act or omission of person A directly and immediately caused the death of person B (for the purposes of s 153 of the *Criminal Code*). Section 154(e) would enable the causative chain to remain unbroken despite the actions of person B, but reasonable doubt as to causation might still exist based on the influence of the weather and the time lapse between the act or omission and the death.

Such problems could affect any murder or manslaughter charge in the *Criminal Code*. Supposing that causation could be established, it seems that the broadest provision applicable to the circumstances outlined above would be s 156(2)(b), which covers omissions amounting to culpable negligence where individuals are in control of a dangerous thing (subject to s 150). Other murder and manslaughter charges might be difficult to make out because of the relevant fault elements (including knowledge that an act was likely to cause death) or that the events were not unforeseeable.

Causing death by dangerous driving (s 167A) was introduced into the *Criminal Code* in part because of the difficulties faced with prosecuting individuals for

manslaughter after road fatalities. Section 167A reads as follows:

Any person who causes the death of another person by the driving of a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including in the case of the driving of a motor vehicle on a public street, the nature, condition and use of the street, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the street, is guilty of a crime.

There remains some ambiguity as to whether the principles of causation for this provision come from the *Criminal Code* (ss 153–154) or from the common law.<sup>80</sup> Causation at common law may be broader than that operating under the *Criminal Code*; in essence it needs to be established at common law that the defendant's act or omission was the substantial cause of the death.

Notably, s 167A does not require a fault element for the death; the prosecution is not required to establish, for example, specific intent, subjective knowledge or subjective foresight. Culpability is made out providing the prosecution can establish that the defendant was driving in a manner dangerous to the public (taking relevant circumstances into account) and that the driving caused the death.

The Council suggests that a new fire-related offence could be introduced into the *Criminal Code* that was modelled on s 167A. This offence might be termed 'causing death by dangerous use of fire'. The exact wording of the offence could be determined by the Office of Parliamentary Counsel. However, the offence could have the following features:

- 'Dangerous use of fire' could encompass acts (e.g. fire lighting) or omissions (e.g. failing to contain a fire).
- Dangerousness would need to take into account circumstances of the case – among other things, weather conditions, fire danger rating, proximity to flammable material and proximity to people.
- Dangerous would relate to 'any person', which has a broader meaning at law than 'the public' (as used in s 167A).
- The defence of mistake of fact would be left open as to whether the use of the fire was dangerous.
- Principles of causation would specifically be drawn from the common law.

The application of this offence would arguably be fairer than s 197A of the *Crimes Act* (Vic). With the latter, providing the defendant foresaw the likelihood of setting fire to property, it is irrelevant whether the subsequent death was foreseeable. With the proposed new offence of 'Causing death by dangerous use of a fire', it would be difficult for the prosecution to prove that the use of fire was dangerous if the subsequent death was unforeseeable. In addition, even if the use of fire was objectively dangerous, the defendant could still raise mistake of fact – arguing that he or she made an honest and reasonable mistake about the dangerousness of his or her use of fire.

### *Recommendation 6*

The *Criminal Code* is amended to include a new offence of 'Causing a fire resulting in injury or death'.

<sup>80</sup> John Blackwood and Kate Warner, *Tasmanian Criminal Law: Text and Cases* (University of Tasmania Law Press: 2006).



# 3. Sentencing Framework in Tasmania – Adults

## 3.1 SENTENCING ADULTS IN TASMANIA

### 3.1.1 Overview

In Tasmania the range of applicable sentencing orders are set out in Part 2 of the *Sentencing Act 1997* (Tas) (the Act). These are:

- Imprisonment
- Drug treatment order (magistrates only)
- Suspended term of imprisonment (partially or wholly)
- Community service order
- Probation order (with or without a conviction)
- Rehabilitation program order (for family violence offences only)
- Fine
- Adjournment with undertakings (with or without a conviction)
- Discharge the offender with a conviction recorded
- Dismiss the charge without conviction.

In addition to sentencing orders in Part 2, ancillary orders are set out in Part 9, and assessment, continuing care, supervision and restriction orders are set out in Part 10. Ancillary orders are in addition to sentence and include restitution and compensation orders. Assessment orders are used if a person is found guilty of an offence and the court is of the opinion, or has received advice, that the person is suffering a mental illness. Part 10 allows the person to be detained for an assessment of his or her suitability for a continuing care order, supervision order or restriction order.

When a person has been found guilty of an offence the judicial officer's choice of sentence is informed by the aims or purposes of criminal sentencing. These aims are set out in section 3 of the Act and include punishment, deterrence, prevention, denunciation and rehabilitation. The judge or magistrate is also bound by a range of sentencing principles such as the principle of proportionality, which requires that the punishment imposed be proportionate to the seriousness of the offending behaviour. In addition to the seriousness of the offence, all the circumstances of the individual case, in so far as they are relevant and known to the court, must be taken into account. Sentencing law places limits on the surrounding circumstances that can be taken into account. For example, in a case of arson, only the foreseeable consequences of the crime can be considered by the court.<sup>81</sup>

Before imposing sentence a court may obtain a pre-sentence report. This is a report prepared by a probation officer to assist the court in deciding on the appropriate sentence for an offender found guilty of an offence. By section 82 of the Act the court may, before passing sentence, adjourn proceedings to enable a report to be prepared. By the same section, if the court requires a medical, psychological or psychiatric assessment of the offender it may direct the offender to submit to an assessment for that purpose.

From the sentencing orders listed above, the following have the potential, if the court is minded, to incorporate a rehabilitative component into the sentence. Restitution and compensation orders are also discussed as they have particular relevance in arson cases.

<sup>81</sup> *Lambie* [2007] TASSC 10; *Agius* (2000) 77 SASR 469.

### *3.1.2 Probation Order*

A probation order is a sentence by which the offender is under the supervision of a probation officer and must comply with the directions given by the officer (and any conditions imposed by the court). The conditions of probation orders are set out in section 37 of the Act. A probation order can also include special conditions, including attendance at educational or other programs, as directed by the court or probation officer. A probation officer can direct the offender to submit to a medical, psychological or psychiatric assessment or treatment.

### *3.1.3 Community Service Order*

A community service order is an order made requiring the offender to carry out community service. In addition to requiring an offender to perform community service, an offender is required as a condition of a community service order under section 28(g) of the Act to attend educational or other programs as directed by the probation officer. Such orders therefore have the potential to be used to require attendance at a treatment or educational program designed for arson offenders.

### *3.1.4 Suspended Sentences*

Sentences of imprisonment may be wholly or partially suspended on conditions that include probation and community service. By these means a rehabilitative component can be added to a suspended sentence.

### *3.1.5 Court Mandated Diversion*

Pursuant to section 27B of the Act, if an offender is found guilty of one or more imprisonable offences a magistrate may make a drug treatment order (DTO) and divert an offender to the Court Mandated Diversion (CMD) program for treatment for drug use. The purposes of a DTO are to provide an alternative to imprisonment through an integrated and supervised regime, to facilitate the offender's rehabilitation and reintegration into the community and to reduce offending and reduce risks to the offender's wellbeing.<sup>82</sup> Drug treatment can be ordered through either the bail or the sentencing process. There are three ways diversion into drug treatment can occur: through conditions attached to bail, through conditions attached to a community-based order or a suspended sentence or through a DTO. In practice the DTO is the most commonly used form of diversion to the CMD program. Diversion by means of conditions attached to bail has been problematic in that the program can be too short, although it has been found to be useful to determine the suitability of an offender to the full program. Diversion by means of conditions attached to other sentencing orders has proven impractical as the offender is case managed by both the CMD manager and the probation officer. Diversion by means of a DTO is preferable for two reasons. First a DTO must also have a custodial component – if the offender then defaults from the program the sentence is invoked. This creates a compulsory element to the order with serious ramifications if the program is not completed. Secondly, the DTO is consistent with the philosophy of therapeutic jurisprudence, where the offender goes back to the court and is accountable to the magistrate.<sup>83</sup> Theoretically, if an offender is convicted of arson but illicit drug use contributed to the offence, the court could make a DTO. DTOs are of further interest in the context of arson offences as a model of therapeutic court ordered treatment and review.

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<sup>82</sup> *Sentencing Act 1997* (Tas) s 27C.

<sup>83</sup> A full outline of the philosophy behind therapeutic jurisprudence is outside the scope of this report. A useful source of background reading is provided by the Australasian Institute of Judicial Administration Clearinghouse: <<http://www.aija.org.au/research/australasian-therapeutic-jurisprudence-clearinghouse/the-concept-of-therapeutic-jurisprudence.html>>.

### 3.1.6 Adjourn Proceedings

Section 7(f) of the Act provides the court with the statutory power to adjourn proceedings of a person found guilty of an offence. The court can, with or without recording a conviction, adjourn the proceedings for a period not exceeding 60 months and, on the offender giving an undertaking with conditions attached, order the release of the offender. The imposition of conditions is not intended to provide the court with a supervisory function in relation to the offender; rather it aims to encourage the offender's good behaviour. Additional conditions may relate to participation in educational or rehabilitation programs.

### 3.1.7 Restitution and Compensation Provisions

In Tasmania the restitution and compensation provisions are orders in addition to a sentence and are contained in Part 9 of the Act. These orders were not established for punitive purposes but as a restorative justice measure.<sup>84</sup> Restitution orders pursuant to section 65 are related to restoring stolen goods to the entitled person. Compensation provisions are found in section 68 of the Act and provide for monetary compensation for loss, damage or injury as a result of a criminal offence. By section 68 if the offence is burglary, stealing or unlawfully injuring property (including arson offences) and the court finds that another person has suffered injury, loss, destruction or damage as a result of the offence, the court must order the offender to pay compensation. In the case of any other offence the court may order the offender to pay compensation. If the offender has insufficient funds a compensation order will take priority over a fine.<sup>85</sup>

Independent of sentencing orders are compensation provisions in the *Fire Service Act 1979* (Tas) s 109 allowing the TFS to charge compensation for services at fires in certain circumstances, including when the owner or occupier has been convicted of an offence in relation to the fire.

## 3.2 SENTENCING PRACTICES FOR ARSON AND OTHER FIRE-RELATED OFFENCES

There is limited published information on sentencing practices for arson and other fire-related offences in Australia. Further, most information that is available does not differentiate between sentencing for structural and bushfire arsonists.<sup>86</sup> Lansdell et al considered the case law and literature on sentencing outcomes for arson and fire-related offences. It was noted that sentencing for bushfire arson is not significantly different from sentencing for structural arson cases in that it takes in the fundamental principles of sentencing, such as deterrence, punishment, protection of the community, denunciation and rehabilitation. The authors found that the most serious cases of arson incur immediate incarceration to promote the principles of deterrence and protection of the community. Minor bushfire offences breaching regulatory provisions normally attract a fine, but the deliberate lighting of fires causing considerable damage will frequently incur a term of imprisonment that is rarely suspended. In addition to the general principles of sentencing the authors found that case law identified particular features of arson that the court will consider when determining the seriousness of the offence and the requisite penalty. These were motive, nature of damage or injury, the extent to which human life was endangered, the use of accelerants and the degree of planning.<sup>87</sup> In sentencing arson offenders the courts have also placed substantial weight to the principle of deterrence and less weight to the personal circumstances of the offender than they might otherwise do. However, personal circumstances have been taken into account in some cases; an example is where an offender is young and lacks the requisite intent to do harm. In these instances the court will sometimes not impose an immediate term in prison.<sup>88</sup>

<sup>84</sup> Restorative justice is an approach that concentrates on the needs of the victim, the community and the offender whereby the offender repairs the harm he or she has done by apologising, repaying or providing a community service.

<sup>85</sup> *Sentencing Act 1997* (Tas) s 43.

<sup>86</sup> Mark Woods and Michael King, 'Courts and Bushfire Arson' in Stanley and Kestin (eds), above n 6, 47.

<sup>87</sup> Lansdell et al, above n 45.

<sup>88</sup> *Newton v Western Australia* [2006] WASCA 24.

Muller conducted a survey of available sentencing data from NSW and Victoria and found that offenders who were found guilty and sentenced for arson offences were often not receiving a custodial sentence. Of those offenders who did receive a custodial sentence the maximum sentence available was not being imposed. Muller considered sentencing data from the Victorian Sentencing Advisory Council for the five-year period from 2001 to 2006 for 276 individuals who were sentenced for the principal offence of arson. Data from the NSW Bureau of Crime Statistics and Research (BOCSAR) was examined from 1099 arson and 133 bushfire arson cases for defendants who appeared in New South Wales courts for the same period. Approximately two-thirds of the defendants in New South Wales were found to be guilty, and for the adult arson offenders a period of imprisonment was the most common penalty. The average custodial sentence was 11 months and the average fine was around \$400. The author noted that these sentences did not demonstrate undue leniency by the courts but reflected the fact that many of these appearances were for minor offences, while lengthy sentences were imposed on repeat and serious offenders.<sup>89</sup> Muller suggests that sentencing statistics 'do not do justice to the various considerations that courts factor into sentencing decisions, so it would be overly simplistic to claim that sentences for arson are lenient'.<sup>90</sup> In addition, many arsonists actually appearing in court may be for minor offences while the most serious offenders could be the ones not being caught.<sup>91</sup>

A snapshot of sentencing trends in the higher courts of Victoria produced by the Victorian Sentencing Advisory Council for the five-year period from 2003–2004 to 2007–2008 shows that around one-third of the people sentenced for the principal offence of arson received a period of imprisonment. An evaluation of the types of penalty by age indicates that sentences of imprisonment were most likely to be given to people aged 30–34 years. Conversely, sentences of imprisonment were least common for those aged under 20 years. Community-based orders were most likely to be given to offenders aged under 20 years and community-based orders were least common for those aged 35–39 years.<sup>92</sup>

For this project the Council attempted to retrieve available sentencing data from the Department of Justice database (CRIMES) for arson and fire-related offences in Tasmania for the five-year period from 2005 to 2010 from the Supreme Court, the Magistrates Court and the Youth Court. This data was found to be unreliable and had to be discarded. It indicated that there was a total of 36 adult offenders in the five-year period sentenced by magistrates where the principal proven offence was an arson offence. However, magistrates have no jurisdiction to sentence for the indictable offence of arson committed by adults. The data also revealed only three sentences imposed in the Supreme Court, which is clearly erroneous. Given Tasmania Police statistics show that from 2005 to 2010 there were 1199 persons charged with arson offences, the data from CRIMES cannot be relied on.

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<sup>89</sup> Muller, above n 10, 38.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Sentencing Advisory Council [Victoria], *Sentencing Trends for Arson in the Higher Courts of Victoria, 2003–04 to 2007–08*, Sentencing Snapshot no. 79 (Sentencing Advisory Council, 2009).

Professor Kate Warner from the University of Tasmania allowed access to sentencing data collated for the Tasmania Law Reform Institute Sentencing Project and a later Criminology research project. The data shows that for the period from 2001 to 2008 in the record of single count sentences for arson (s 268), 89 per cent received custodial sentences (n = 56). Of those receiving a custodial sentence, the range was three months to 24 months with a medium sentence of 12 months. Thirty-six per cent of the custodial sentences were wholly suspended. For the same period in the record of single count sentences for unlawfully setting fire to property (s 269), 75 per cent received a custodial sentence (n = 43). Of those receiving a custodial sentence the range was one month to 36 months of imprisonment and the medium sentence was 22 months. Thirty-three per cent of the custodial sentences were wholly suspended.<sup>93</sup>

A further consideration in relation to the sentencing data concerns the situation where the offender has also been charged with a more serious offence. The resultant sentence will not be recorded in the sentencing data for arson offences but for the more serious offence with which the offender has been charged. This will be the case in all jurisdictions where sentencing data is based on the principal offence. The principal offence is the most severe offence of which the offender has been found guilty.<sup>94</sup> Court data in Tasmania (and most jurisdictions in Australia) is recorded by means of principal offence and principal sentence. In Tasmania this can be explained in the terms of *McLennan* (see 2.1). *McLennan* was sentenced for manslaughter, arson and theft: the nine-year sentence imposed would be recorded as a sentence for manslaughter and not as a sentence for arson or theft.

### 3.3 OPTIONS FOR REFORM

#### *3.3.1 Item 5 – Include a Cost Recovery Order as an Ancillary Sentencing Order to Reimburse the Costs Incurred by the State for Responding to a Fire*

One of the outcomes of the National Forum to Reduce Deliberate Bushfires in Australia was that the Commonwealth Attorney-General recommended to the States and Territories that they enable their courts to order a person convicted for arson to pay compensation for the damage caused.

It is unlikely that the provisions of s 68 of the *Sentencing Act 1997* (Tas) dealing with compensation orders are wide enough to cover orders in favour of emergency services, as the section refers to a finding that a 'person has suffered injury, loss, destruction or damage as a result of the offence' (emphasis added). In Victoria, the *Sentencing Act 1991* (Vic) provides a regime for cost recovery orders in relation to offences involving contamination of goods and bomb hoaxes. Section 87D provides that if a court finds a person guilty of such an offence, the court may order the offender to pay to the State such an amount as the court thinks fit for costs reasonably incurred by an emergency service agency (including the fire service) in providing an immediate response to an emergency arising out of the commission of the offence. These provisions could serve as a model for Tasmanian legislation to recover from the offender costs reasonably incurred by a fire fighting agency. The power could be added to Part 9 of the *Sentencing Act 1997* (Tas) – Orders in addition to sentence.

The argument supporting compensation provisions similar to those in Victoria is that they would serve to send a clear message to a potential arsonist that he or she could be forced to reimburse costs incurred by the State for responding to the fire.

One argument against the use of compensation provisions for arson offenders is that they are unlikely to be practically effective. Given the most common offender is typically young and unskilled it is unlikely the offender would have the funds to compensate the State for the cost of the fire fighting operation.

<sup>93</sup> There was no data available for unlawful setting fire to vegetation (s 268A).

<sup>94</sup> Principal proven offences are classified by the Australian Standard Offence Classification (ASOC). ASOC provides a uniform national classificatory framework for classifying offences across Australia. The ASOC classification number for arson is 1211.

The possible introduction of State legislation to enable a court to order an arsonist to reimburse the State for the cost of responding to a fire was put to the TFS by the Council in consultation for the preparation of this report. The TFS drew attention to the existing provision in its own legislation to seek compensation for a fire fighting operation from the owner of a property for a fire that could have been prevented. The TFS has stated it does not follow that course of action, and payment has been made to the commission once in the last 20 years. The TFS does not utilise the existing provisions because it does not want the community to fear being charged for the costs of responding to a fire and, as a result, resist reporting it.<sup>95</sup> However, this concern is not relevant to the issue of cost recovery from a convicted arsonist, as the possibility of cost recovery from such a person is unlikely to have an adverse impact on the reporting of fires.

#### *Question 5*

Should a cost recovery order be an ancillary sentencing order available to the court, to order a convicted offender to reimburse the costs incurred by the State for responding to a fire?

### *Consultation*

The TFS submitted that this may already be covered by the *Fire Service Act 1979*. While recognising that a recovery order may be a good deterrent, the TFS submitted that the high costs of responding are unlikely to be met by a convicted person.

The DPP submitted that:

the practical effect of such a sentencing option is almost nil. Actual recovery is rare and no deterrence of any significance is created; prosecution have to seek, calculate and present, in admissible form, a minutely detailed costing of the claim. Once made it may not be ordered, once ordered it may not be paid.

### *Discussion*

The Council believes that the restorative justice notions of repairing the harm caused by crime could encompass reparation to the State for the cost of responding to a fire. However, the use of cost recovery orders for fire-related offences may prove to have limited utility in most circumstances. As shown, the most common offender is young and unskilled; therefore it is unlikely such an offender would have the funds to compensate the State for the cost of the fire fighting operation. Where a fine is included as part of a sentence the other components of the sentence are lowered to take into account the fine. Therefore, failure to pay the fine will lead to an advantage for the offender of an artificially lowered sentence overall.

Notwithstanding the associated problems, it is not unsound or unreasonable to expect an offender (with means) to pay for the cost incurred by the State for the fire fighting operation for an arson-related offence. The Council recommends that the court be given the *option* to order a convicted offender to reimburse the costs incurred by the State to respond to the fire. This should not be mandatory and it should also be subject to the capacity to pay. If the offender does have the capacity to pay then it could potentially be worth the time for the prosecution to determine the cost of the fire fighting operation.

### *Recommendation 7*

The *Sentencing Act 1997* is amended to include an ancillary sentencing option to order an offender convicted of a fire-related offence to reimburse the costs incurred by the State to respond to the fire.

<sup>95</sup> Meeting with Andrew Comer, AFSM Regional Chief, and Jeff Harper, Deputy Regional Chief, Tasmania Fire Service (12 May 2011).

### 3.3.2 Item 6 – A Specific Sentencing Option for a Treatment Program for Adult Firesetters as an Additional Order of the Court

As noted earlier (see 1.10) past research has indicated that a disproportionate number of firesetters suffer from a mental illness and as many as one-third of firesetters have a major mental illness. Those who have a mental illness have the potential to become serial arsonists; as a result there is clearly a need to tailor programs for this group. McEwan et al suggest that for some firesetters it is the 'psychological function'<sup>96</sup> that is the reason behind their behaviour and there is no intention to harm others. For these individuals the thought of firesetting will not be affected by deterrence methods and the behaviour will increase over time. For this group of arsonists who are not firesetting for rational reasons, treatment may be the only feasible option to reduce firesetting behaviour. McEwan et al have noted that the criminal justice response to bushfire arson should include consideration of the role of rehabilitative treatment in reducing the risks posed by bushfire arson.<sup>97</sup> They argue in support of offence-specific rehabilitation while offenders are incarcerated and community-based psychological interventions for following reasons:

Offence specific social learning and cognitive based psychological interventions have repeatedly been shown to be effective in reducing violence and sexual recidivism, and are routinely recommended by judges and magistrates during sentencing for these crimes. Providing similar validated treatment for fire setters could in the long term offer a cost effective method of reducing the overall risk of arson in the community.<sup>98</sup>

The availability and suitability of treatment/rehabilitation programs for this group of adults and the options in relation to the delivery of these programs are addressed in full in Chapter 5 of this Final Advice. For the moment, the issue for consideration is whether there should be a discrete and specific sentencing option to send an adult arsonist who has a mental illness or exhibiting problematic behaviour to a treatment/rehabilitation program.

By virtue of s 82 of the *Sentencing Act 1997* (Tas), after an offender has been found guilty of an offence the court may order a pre-sentence report and adjourn the proceedings to enable the report to be prepared. If the matters the court wish to have investigated include medical, psychological or psychiatric assessment the court can direct the offender to submit to that assessment. By s 89A in the case of a family violence offence, a pre-sentence report includes a rehabilitation program assessment. Section 7(ea) empowers the court to make a rehabilitation order for a family violence offender. These provisions could be amended to make a treatment order available to adult firesetters.

#### Question 6

Should a specific sentencing option for a treatment program for adult firesetters be considered as an additional order of the court?

#### Consultation

The TFS agrees in principle but submits that there is the need to be aware of the resources needed to run a successful program. The TFS stated that it is not funded for this or capable of providing the service.

The DPP doubts that the cost and difficulty of setting up a recognised and effective treatment path would be justified. A treatment program for violent offenders is likely to be more useful than an arson treatment program.

A treatment program for those who have a mental illness or those exhibiting problematic behaviour is supported in principle by the Department of Health and Human Services (DHHS). It was submitted that careful consideration will need to be given to the viability of such a program, given the small number of offenders that the program would service and the need to build local capacity necessary for the delivery of the program. The DHHS submission explains that Forensic Mental Health currently manages four to five individuals whose offending behaviour includes firesetting

<sup>96</sup> Troy McEwan and Ian Freckleton, 'Assessment, Treatment and Sentencing of Arson Offenders: An Overview' (2011) 18(3) *Psychiatry, Psychology and the Law*, 319, 324.

<sup>97</sup> *Ibid* 324.

<sup>98</sup> *Ibid* 325.

(two are inpatients at the Wilfred Lopes Centre and the remainder are on supervision orders). Each of those on the supervision order has an intellectual disability and it is not possible to establish a clear causative link between the person's disability and his or her firesetting behaviour.

Corrective Services agree that intervention in the form of a treatment program has value for the offender who has not committed the crime for instrumental reasons. However, Corrective Services submit that there are insufficient numbers of offenders (either in prisons or in the community) to support a fire-offence-specific group program. The submission notes as at February 2011, there were 32 offenders subject to community-based orders for a principal offence of 'Property damage by fire or explosion'. Twenty of these offenders were in the south, eight in the north and four in the north-west region. This is an insufficient population to support a group program in one region. Likewise, there were 11 prisoners with a principal offence of arson or firesetting, which is insufficient to support a group program.

The Corrective Services Submission states that the Tasmania Prison Service Programs Unit provides 'Making Choices', a medium to high intensity program that targets general offending behaviour. This program is able to provide an effective treatment for instrumental firesetters. Also, existing therapeutic and mental health support services can treat prisoners with a history of firesetting linked to emotional reasons and firesetting linked to mental illness. Likewise, in Community Corrections, a case management model (rather than a specific treatment program) is the best option given the offender numbers and distribution.

## *Discussion*

Presently, the *Sentencing Act 1997* has a specific sentencing option to make a rehabilitation program order in the case of a family violence offence.<sup>99</sup> The advantage of a specific sentencing option for treatment of an offence is the assurance that an appropriate service must provide a program.

The Council reviews the available research and rationale for treatment programs for adult firesetters in Chapter 5. That chapter identifies the necessity of a treatment program for adult fire setters in Tasmania. It also addresses the suitability, availability and appropriate method of delivery for the programs presented. The purpose of this question is to address whether there is a need for a specific sentencing option to direct an adult firesetter to any of the available programs mentioned in Chapter 5. A positive answer, necessitating the provision of a program, must be considered in the context of the number of convicted arson offenders and their distribution throughout Tasmania. The Council agrees that there are insufficient numbers of offenders (either in prisons or in the community) to support a fire-offence-specific group program. It follows that it is premature to recommend a specific sentencing option for deliberate firesetters.

If it is determined that a treatment program should be adopted in Tasmania the court can incorporate a rehabilitative component into the sentence by means of conditions attached to a probation order, a community service order or a suspended sentence. A probation officer can also direct an offender to submit to treatment.

The next question (Question 7) considers additional sentencing options to give the court the power to defer sentences. In the event that the sentencing legislation is amended to accommodate deferral of sentences, this could also be used as a suitable method to give an offender an opportunity to address his or her offending behaviour.

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<sup>99</sup> *Sentencing Act 1997* (Tas) s 7(ea).



### 3.3.3 Item 7 – Deferral of Sentence as an Additional Order of the Court to Allow an Adult Who Has Been Found Guilty of Firesetting the Opportunity to Participate in a Treatment Program Prior to Final Sentencing

Most jurisdictions in Australia have the capacity to defer sentencing for a specified amount of time. A deferred sentencing option is a power provided to the court after a finding of guilt to adjourn the matter to give the offender the opportunity to rehabilitate during that period. The progress of the offender can then be taken into account when sentencing. A legislative power to defer sentencing is found in the Australian Capital Territory, New South Wales, South Australia and Victoria and in Western Australia in the form of a pre-sentence order.

The Tasmanian sentencing legislation does not give the court the capacity to defer sentencing. As noted (see 3.1.6) by s 7(f) of the *Sentencing Act 1997* (Tas) the court can adjourn proceedings and, on the offender giving an undertaking with conditions attached, order the release of the offender. Although it is used from time to time, s 7(f) is unworkable as a therapeutic model with accountability to the court.<sup>100</sup> While it has been proposed that a therapeutic model similar to a drug treatment order (see Chapter 5) should be an option available for treatment for some adult firesetters, the present sentencing framework does not have the capacity to defer sentencing for this purpose. Either s 7(f) and its conditions and breach provisions require amendment or an additional order needs to be inserted into the *Sentencing Act 1997* (Tas) to achieve this purpose.

The *Sentencing Act 1991* (Vic) s 83A allows for deferral of sentencing for up to six months in the Magistrates' Court if the offender is under 25 years of age. The offender's behaviour during the deferral period must be taken into account by the court in sentencing the

offender at the end of the deferral period.<sup>101</sup> In a thorough overview of deferred sentencing in Australia the Victorian Sentencing Advisory Council made similar recommendations in 2008 to those made by Professor Arie Freiberg in the Sentencing Review of 2002.<sup>102</sup> These recommendations were:

- The power to defer sentencing should be extended to the higher courts.
- The power to defer should apply to offenders of any age.
- The maximum period of deferral should be increased to 12 months.

The Victorian Sentencing Advisory Council further suggested that the success of the orders depends on the orders being targeted appropriately; to do this there is a requirement for accurate evaluation and appropriate resources for the preparation of comprehensive reports and assessments.<sup>103</sup>

The Neighbourhood Justice Centre (NJC) established by the *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) is a multi-jurisdictional court including a Magistrates' Court and a Children's Court (Criminal Division). Sentencing in the Magistrates' Court and the Children's Court at the NJC includes all options available to any other magistrate sitting in similar courts with the additional option of deferred sentences for persons over 25 years.<sup>104</sup>

#### Question 7

- a) Should deferral of sentences be considered as an additional general order of the court prior to final sentencing?
- b) Should deferral of sentences specific to adult firesetters be considered as an additional order of the court prior to final sentencing?

<sup>100</sup> The procedure for being called upon to appear in s 60 is defective in that no 'proper officers' appear to have been appointed and there is no-one allocated to supervise the conditions of the order.

<sup>101</sup> *Sentencing Act 1991* (Vic) s 83A(3)(a).

<sup>102</sup> Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (Department of Justice, 2002).

<sup>103</sup> Sentencing Advisory Council [Victoria], *Suspended Sentences: Final Report Part 2 Summary* (Sentencing Advisory Council, 2008).

<sup>104</sup> *Courts Legislation (Neighbourhood Justice Centre) Act 2006* (Vic) s 4Q(3): 'Despite section 83(1)(a) of the Sentencing Act 1991, the Neighbourhood Justice Division may defer sentencing an offender under section 83A of that Act even if the offender is 25 years of age or older'.

## Consultation

The DPP submitted that deferral of sentences is a beneficial option although it is likely to be limited in utility.

Corrective Services indicated that the option of deferral of sentences is supported in principle. They state that providing an offender with the opportunity to rehabilitate prior to sentencing gives the offender a strong incentive to implement change. Deferral of sentence may be a valuable option with respect to a broad range of offences, not just in relation to arson or firesetting. In practical terms, Community Corrections would need a substantial increase in resourcing if it were to supervise offenders during the deferral period, due to increased demands for service. Furthermore, an empirically sound assessment tool (examining history of aggression, age of onset, etc.) would need to be used if deferral of sentences was implemented as a court option for this purpose. No such specialised assessment tool is currently known to Community Corrections.

## Discussion

In considering its response, the Council reviewed the Tasmanian Law Reform Institute's *Sentencing: Final Report No 11* of June 2008. In that report deferral was considered in the context of enabling the offender time to put his or her affairs in order prior to the commencement of a sentence. The Tasmanian Law Reform Institute was not persuaded of the need to defer sentences of imprisonment for that reason. In the context of this advice the Council is only considering deferral of sentence to allow an offender the opportunity to rehabilitate and to address offending behaviour:

Legislative amendments introduced in Victoria in January 2012 allow the Magistrates' Court and the County Court to defer sentencing for up to 12 months for offenders of any age. Previously this option was only available in the Magistrates' Court and for offenders aged 18–25 for up to six months. This amendment was recommended by both the Victorian Sentencing

Advisory Council<sup>105</sup> and Professor Arie Freiberg in the 2002 Sentencing Review,<sup>106</sup> where there was recognition of the utility of deferring sentences in giving the offender the opportunity to rehabilitate. The Victorian Sentencing Advisory Council has emphasised the importance of appropriate resources to ensure accurate evaluation as the success of the orders is dependent on them being targeted appropriately.<sup>107</sup>

This Council recommends, consistent with Victoria's recent legislative changes, that the courts in Tasmania be given the general power to defer sentences to allow a particular offender (that the court sees as appropriate) to undertake programs to demonstrate commitment to rehabilitation. This does not mean simply abstaining from the offending behaviour but addressing alcohol, drug, firesetting and violence issues or taking literacy courses. The resourcing of programs is, of course, an essential part of an effective deferral of sentence disposition. With protection of the community as one of the prime aims in sentencing generally, deferral of sentencing allows the court to have the defendant address as many of the issues relevant to the offending as practicable before the court passes sentence on that defendant.

The Council does not recommend a power to defer sentences specific to adult firesetters. It is clear that deliberate firesetting is a particularly serious crime due to the fact that fire can have such serious consequences. However, if the court were to have the power to defer sentences, the decision as to which offenders should be given the chance for rehabilitation should be left to the discretion of the court.

### *Recommendation 8*

The *Sentencing Act 1997* is amended to include a general sentencing option to allow the court to defer the imposition of a sentence to allow an offender the opportunity to participate in a treatment program prior to final sentencing.

<sup>105</sup> Sentencing Advisory Council, above n 103.

<sup>106</sup> Freiberg, above n 102, 20: 'Recommendation 47: That the purposes of deferring sentence be expended to include obtaining information regarding prospects of rehabilitation, the outcome of medical or other treatment, the outcome of diversion or restorative justice or similar programs.'

<sup>107</sup> Sentencing Advisory Council, above n 103.

# 4. Sentencing Framework in Tasmania – Juveniles

## 4.1 DIVERSION AND SENTENCING JUVENILES IN TASMANIA

This section gives a brief overview of the diversionary and sentencing options for juveniles in Tasmania. This is followed with more detail on the sentencing options available to inform the question of whether there is a need for reform to allow for the treatment of juvenile offenders.

The Magistrates Court Youth Justice Division is the criminal jurisdiction for juveniles charged with committing arson-related offences. In Tasmania the range of sentencing options applicable to juveniles is set out in the *Youth Justice Act 1997* (the Act), which deals with young people who have committed offences from the age of 10 to 17 years inclusive. Children under the age of 10, or below the age of criminal responsibility, cannot be dealt with by the criminal justice system. Prior to sentencing the court can order a pre-sentence report and request that it contain specified information, assessments and reports relating to the youth or the youth's family or other matters.<sup>108</sup>

The range of sentencing options applicable to juveniles is set out in Division 5 of the Act. These are:

- Dismiss the charge (with or without a reprimand or with undertaking of good behaviour)
- Release the offender and adjourn the proceedings on conditions

- Fine, restitution or compensation order
- Probation order
- Community service order
- Rehabilitation program order (for family violence offences)
- Suspended detention order (partially or wholly)
- Detention order.

As an alternative to sentencing a youth, the court can require that a community conference be convened.<sup>109</sup> If the conference is successful and the youth completes undertakings arising from the conference, no further action is taken.

Various influences are evident in the Act, including restorative justice.<sup>110</sup> Clearly, one of the main principles of the legislation is that detention be used as a last resort, as stated in section 5(1)(g). Among other things, the Act seeks to 'enhance and reinforce' the role of families in minimising youth crime and in punishing and managing young offenders.<sup>111</sup> The objectives and principles of the Act state that the community should be protected from crime, that young offenders are to be encouraged to accept personal responsibility for their behaviour and that offenders should learn about the human impact of crime. A number of sections emphasise the importance of proportionality (sections 4(e), 5(1)(b)(i) and (j)) and the avoidance of unnecessary interference in the lives of young offenders (sections 5(2)(c) and (d)).

<sup>108</sup> *Youth Justice Act 1997* (Tas) s 33.

<sup>109</sup> *Ibid* s 37.

<sup>110</sup> Jeremy Prichard, 'Net-Widening and the Diversion of Young People from Court: A Longitudinal Analysis with Implications for Restorative Justice' (2010) 43(1) *Australian and New Zealand Journal of Criminology* 112.

<sup>111</sup> *Youth Justice Act 1997* (Tas) s 4(f).

### 4.1.1 Diversion

The Act provides Tasmanian Police with diversionary options when a young offender has admitted to an offence other than a prescribed offence.<sup>112</sup> Depending on the offence with which they are charged, young arsonists may be eligible for diversion. The diversionary options are informal caution, formal caution or community conference. Tasmania Police are committed to the objects and aims of the Act and are aware of their importance in the diversionary process.

The forms of diversion are as follows:

- *Informal Caution*: when police consider no 'formal' action is required and the young person admits the offence, police can divert the offender to an informal caution. Once given, no further legal action can be taken.
- *Formal Caution*: an authorised police officer may deliver a formal caution in the presence of a responsible adult where a youth admits the offence and agrees to attend. The victim may be invited to attend the caution whereby appropriate discussion takes place to come to an undertaking by the offender and the formal caution is delivered. The undertaking may include, for example, alcohol and anger management courses, cultural awareness programs, up to 35 hours of community service, compensation for victims, restitution for offence-affected property or anything else that may be appropriate in the circumstances.<sup>113</sup> No further action can be taken against the young offender who fails to complete the undertakings agreed to in a formal caution.
- *Community Conference*: a community conference may be established where a young person has admitted the offence and agrees to attend. The conference is facilitated by the Department of Health and Human Services (DHHS) and is attended by a police officer, as well as the victim(s)

and support for the offender. The undertakings may include examples listed above regarding formal cautions and there may be agreement of up to 70 hours community service.<sup>114</sup> If undertakings are not completed, the matter may be referred to the court.

If a youth does not admit to firesetting or Tasmania Police consider diversion inappropriate, then the matter will proceed to court. Upon a finding of guilt the Youth Justice Division of the Magistrates Court still has the option to divert the youth to community conference if it deems that course appropriate.

### 4.1.2 Probation Orders

Subject to section 47(f) of the Act the court may make a probation order. The court has the ability to attach special conditions to a probation order which are reasonable in the circumstances.<sup>115</sup> Orders to attend programs are supervised by Youth Justice Workers in the Youth Justice Division of DHHS. Once a probation order is made the youth is allocated to a case worker who can direct the juvenile to one or more suitable programs. If there is no suitable tailored program, there is the capacity to direct the offender to private psychological consultation. The juvenile can be held accountable if he or she does not comply with the probation order (or related special conditions) or the juvenile commits an offence of a similar nature during the period of probation.

### 4.1.3 Rehabilitation Orders

Section 47(i) of the Act states that in the case of a family violence offence the court can make a rehabilitation program order. Rehabilitation orders are supervised by the Youth Justice Division of DHHS in the same way as probation orders. A rehabilitation order is deemed to be breached in the same way as a probation order.

<sup>112</sup> Tasmania has three categories of prescribed offences, corresponding to three age brackets pursuant to the *Youth Justice Act 1997* (Tas) s 3(1). Offenders aged between 10 and 13 years cannot be diverted away from court for murder, manslaughter or attempted murder. In addition to these crimes, offenders aged 14 to 16 years cannot be diverted for serious sexual offences, aggravated armed robbery, armed robbery, robbery or preparing to commit a property offence armed with a dangerous weapon. The offences ineligible for diversion for 17 year olds include all the offences listed above as well as traffic offences, marine safety offences and specific provisions contained in the *Police Offences Act 1935* (Tas).

<sup>113</sup> *Youth Justice Act 1997* (Tas) s 10(2).

<sup>114</sup> *Ibid* s 16(1).

<sup>115</sup> *Ibid* s 65(2).

#### 4.1.4 Community Service Orders

Provisions relating to community service orders are contained in Part 4 of the Act. A community service order requires a youth to perform community services supervised by Community Youth Justice Workers in the Youth Justice Division of DHHS. The services imposed under the orders are normally required to be undertaken within 12 months unless specified by the court. There is no ability for the court to attach special conditions to this order as can be done with other community-based sentences.

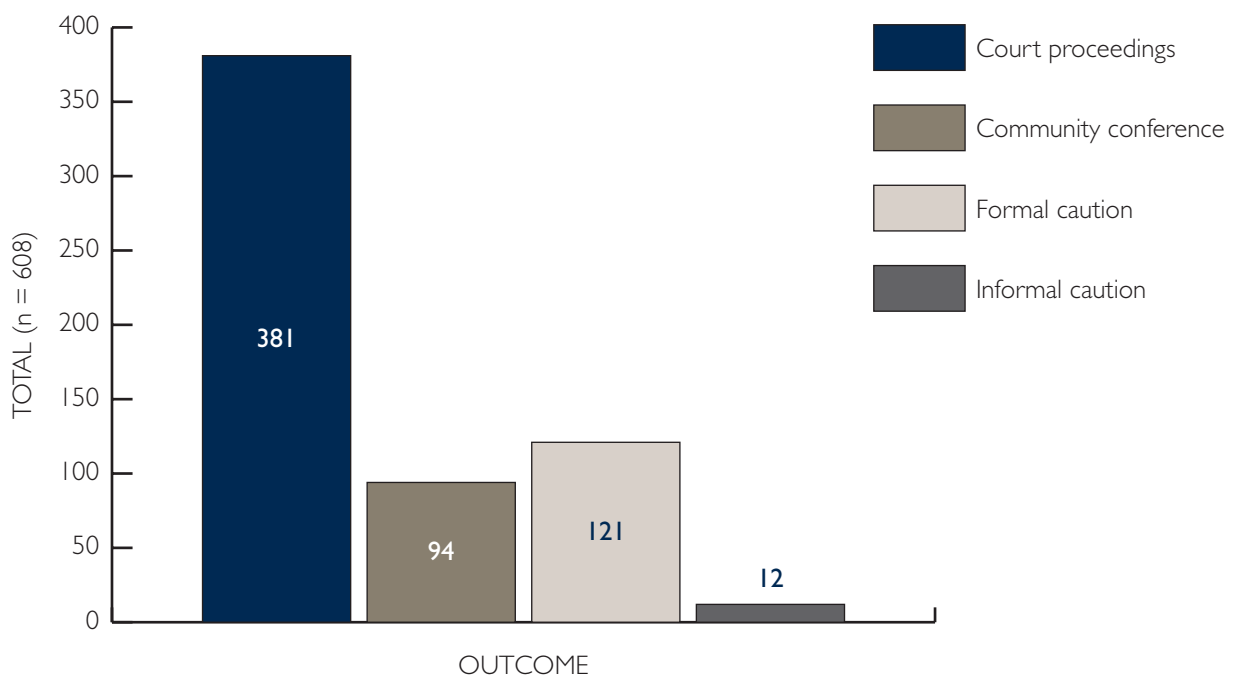
#### 4.1.5 Suspended Detention Orders

Subject to s 47(2) and s 90(1) the court may order that the whole or part of a sentence of a period of detention be suspended. A suspended detention order can be subject to special conditions that the court considers reasonable in the circumstances.<sup>116</sup>

## 4.2 SENTENCING PRACTICES FOR ARSON AND OTHER FIRE-RELATED OFFENCES

Tasmania Police statistics show that, from 2005 to 2010, a total of 1199 persons were charged with arson offences. The offences were the *Criminal Code* offences of arson (s 268), unlawfully setting fire to vegetation (s 268A) and unlawfully setting fire to property (s 269). Given some of these charges did not proceed for various reasons, there were eventually 1070 offenders dealt with by Tasmania Police for this period. Of these 1070 offenders over 60 per cent were under the age of 18 (n = 608). Out of the 608 offenders aged 18 or under, 381 charges ended in court proceedings. The remaining 227 offenders were subject to the diversion process by Tasmania Police in the form of informal caution, formal caution or community conference (see Figure 5).

Figure 5: Outcomes for youths charged with arson offences by Tasmania Police, 2005–2010



Source: Tasmania Police

<sup>116</sup> Ibid s 90(4).

From 2005 to 2010 the Youth Justice Division of the Magistrates Court handed down 127 sentences to juveniles where the principal offence was a fire-related offence (see Figure 6). As can be seen the majority of the sentences are juvenile detention fully suspended, community service, probation orders and good behaviour bonds. The sentencing of arson offenders by the Youth Justice Division of the Magistrates Court appears to operate in accordance with the objectives of the Act.

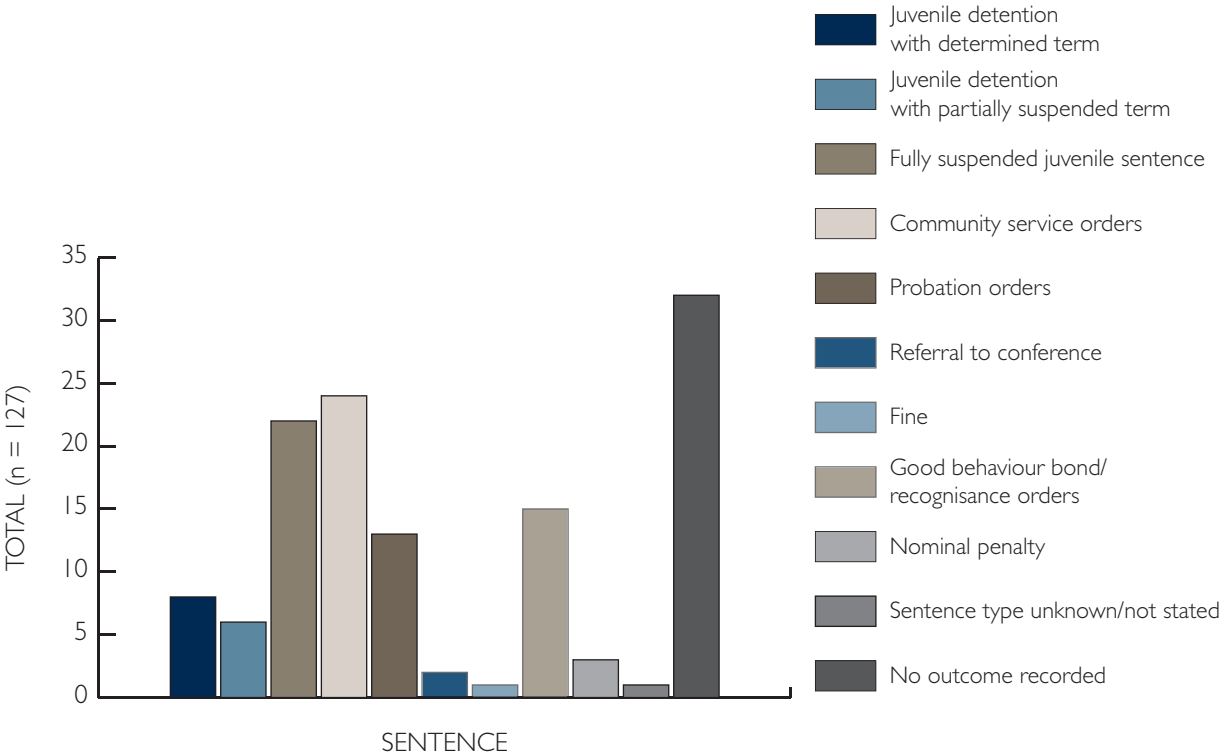
### 4.3 SENTENCING PROVISIONS IN OTHER JURISDICTIONS IN AUSTRALIA

Throughout Australia juveniles charged with arson-related offences are tried in youth justice courts, and like the *Youth Justice Act 1997* (Tas) the governing legislation states that detention should be used as a last resort. Most jurisdictions can divert young offenders from the traditional justice system. Again, similar to the Tasmanian legislation, there are diversionary mechanisms in the form of cautions and family or community conferences.

#### 4.3.1 New South Wales – Youth Justice Conferencing

In New South Wales specific provisions have been made for juveniles who have been found guilty of a fire-related offence and referred to youth justice conferencing by the court. Division 2 of the *Young Offenders Act 1997* (NSW) provides that a young firesetter can be sent to a youth justice conference. Section 52(6)(e) of that Act states that youth justice conferences must comply with any requirements or limitations imposed on outcome plans by the regulations. The *Young Offenders Regulation 2010* (NSW) reg 8 specifies that outcome plans for bushfire/arson juvenile offenders, which are agreed to at youth justice conferences, must provide for the offender's attendance at a program or the screening of a video designed to provide education as to the harmful effects of fire. The outcome plan must also provide for the making of reparation for the offence (such as clean-up operations, treatment of injured animals and the payment of compensation).

Figure 6: Sentencing practices in the Youth Justice Division of the Magistrates Court for fire-related offences, 2005–2010



Source: Department of Justice

The Legislation, Policy and Criminal Law Review Division of the Attorney General's Department in New South Wales reviewed the success of the compulsory education component in conferencing for juveniles charged with arson offences. The Division found that of the 159 youth justice conference referrals for offences involving damage by fire in the period from 2001–2002 to 2007–2008, only one conference was unable to agree on a suitable outcome plan. Of the 158 agreed outcomes, the obligations imposed were completed in 140 cases with an average outcome plan completion rate of 89 per cent.<sup>117</sup>

In relation to conferencing generally, the Department also made reference to the major findings of a 2002 recidivism study by the NSW Bureau of Crime Statistics and Research (BOCSAR). This study found that conferencing has the effect of reducing or delaying reoffending and 'youth justice conferencing has proven to be a successful intervention for young offenders'.<sup>118</sup>

#### 4.4 THE NEED FOR REFORM

As mentioned, research shows that a large proportion of firesetting is conducted by juveniles. The Australian Institute of Criminology asserts that juveniles are responsible for nearly three-quarters of deliberately lit fires.<sup>119</sup> A recent study in New Zealand has also reported that some 43 per cent of juvenile firesetters are displaying extreme antisocial behaviour.<sup>120</sup>

A comprehensive review of the education and treatment programs available for juvenile firesetters and a review of any assessments of these programs can be found in Chapter 6 of this advice. The focus in this chapter is sentencing options.

As stated in Chapter 1 (see 1.11) research has shown that there appear to be two subgroups of juvenile firesetters, those who exhibit fireplay and just have an interest in fire and those who have deeper psychological problems and use fire as an instrument of expression or as an instrument of power. It is those belonging to the latter subgroup who are more likely to reoffend and whose firesetting will increase in both magnitude and dangerousness. The research also indicates the particular need for juvenile firesetters to be assessed and for the appropriate course of action to be taken. For the juvenile who exhibits fireplay there is a need for education as to the harmful effects of fire. For the juvenile who has deeper psychological problems there is a need for a treatment program to be put in place.

Early risk assessment of a juvenile who is firesetting will determine the appropriate program, and early intervention will save unnecessary costs on a more tailored program at a later stage. If intervention is necessary, then the assessment is a pivotal step in designing the appropriate individualised intervention program.<sup>121</sup> The Advancing Bushfire Arson Prevention in Australia Symposium also identified the need for a 'far more responsive system and possibly a mandatory treatment program for children with some diagnosis'.<sup>122</sup> The next section canvasses possible improvement to the legislative framework to achieve these ends.

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<sup>117</sup> Legislation, Policy and Criminal Law Review Division, Attorney General's Department, *Review of Bushfire Arson Laws* (NSW Attorney General's Department, 2009) 17.

<sup>118</sup> *Ibid* 18.

<sup>119</sup> Australian Institute of Criminology, above n 32.

<sup>120</sup> Graham Martin et al, 'Correlates of Firesetting in a Community Sample of Young Adolescents' (2004) 38(3) *Australian and New Zealand Journal of Psychiatry* 148, cited in Emma Palmer, Laura S Caulfield and Clive Hollin, *Evaluation of Interventions with Arsonists and Young Firesetters* (Office of the Deputy Prime Minister: London, 2005).

<sup>121</sup> Damon A Muller and Ashley Stebbins, *Juvenile Arson Intervention Programs in Australia*, Trends and Issues in Crime and Criminal Justice no. 335 (Australian Institute of Criminology, 2007).

<sup>122</sup> Mairead Dolan and Janet Stanley, 'Risk Factors for Juvenile Firesetting' in Stanley and Kestin (eds), above n 6, 31.

## 4.5 OPTIONS FOR REFORM

### *4.5.1 Item 8 – Mandatory Assessment to Determine the Level of Risk for a Juvenile Who Has Admitted to a Fire-Related Offence or Mandatory Pre-sentence Reporting for a Juvenile Who Has Been Found Guilty of a Fire-Related Offence*

Subject to s 33 of the *Youth Justice Act 1997*, when a youth has been found guilty of committing an offence the court may order a pre-sentence report. A pre-sentence report is a prerequisite for probation orders, community service orders, detention orders and rehabilitation program orders. Pursuant to s 33A, in relation to a family violence offence, the court may order a rehabilitation program assessment. Given the importance of early diagnosis in the case of juvenile firesetters, a pre-sentence report to determine the level of risk could be a prerequisite for sentencing an offender who has been found guilty of a fire-related offence. It would then follow that a treatment or rehabilitation program assessment could also be considered if the juvenile is found to be at high risk of reoffending.

A report on the risk of reoffending for juveniles who have admitted to fire-related offences could be considered a prerequisite for referral to community conference or formal caution as part of the diversion process for Tasmania Police. If the assessment determines that the juvenile is only curious about fire, then education as to the harmful effects of fire is the appropriate response. In other cases, treatment may be indicated.

#### *Question 8*

- a) When a juvenile offender has been found guilty of a fire-related offence, should a pre-sentence report to determine the level of risk be a prerequisite to sentencing the offender?
- b) When a juvenile offender has admitted to a fire-related offence, should an assessment to determine the level of risk be a prerequisite to diversion to community conference by Tasmania Police?
- c) When a juvenile offender has admitted to a fire-related offence, should an assessment to determine the level of risk be a prerequisite to diversion to formal caution by Tasmania Police?

### *Consultation*

In response to Question 8, DHHS states:

- a) No. Pre-sentence reports should continue to be linked with the type of order being considered, not to the type of offence. If there was a move away from this approach it would be necessary to do this for all offences and define those that warranted a pre-sentence report and associated risk assessment. Sexual offences and violent offences are examples. In addition the costs associated with maintaining such a list poses a high administrative overhead.
- b) No. There appears to be insufficient reason to isolate arson and treat it differently to other offence types, like sexual assault or violent offences. The only pre-requisites to a conference being held for non-prescribed offences are admission of responsibility and agreement to attend. The community conference facilitator in the pre-conference preparation stage is better positioned to gain insight and information into the motivation behind the offence, level of remorse, developmental understanding etc. At this point if the facilitator is concerned that there are significant underlying issues that could result in reoffending they can suggest that Youth Justice Services undertake a risk assessment as part of the conference undertakings. If the assessed risk is high to very high a referral to a forensic psychologist can be made for further assessment.
- c) No. Refer to the first para in b).



The Commissioner for Children expressed concern that mandatory assessment in all cases involving fire-related offences may cause some children or young people to be 'projected more deeply into the criminal justice system than might have warranted for the offence they have committed'.<sup>123</sup> Notwithstanding this, the Commissioner refers to recent research by Dolan et al<sup>124</sup> noting that there is strong evidence to support early assessment. The Commissioner recommends that, in the event that assessment is introduced as a prerequisite in sentencing and/or diversion in fire-related matters, it may be useful to investigate the possible development of a preliminary screening tool. Such a tool may indicate whether a more comprehensive assessment is needed, thereby avoiding delay and intrusion, not to mention the associated costs. The Commissioner again refers to research by Dolan et al and emphasises that 'further research may be necessary to identify robust predictors of recidivism risk specific to fire related offending in order to appropriately direct resources to those children or young people with the greatest need'.

### *Discussion*

The Council agrees that it is costly to administer a risk assessment and it is impractical to expect a mandatory assessment for all arson cases. The Council also notes the submissions stating that those who commit arson offences should not be isolated and treated differently from those who commit other offence types.

However, there are two things about arson that are noteworthy. First, there are few forces more potentially destructive than arson, especially bushfire arson, and there is none that can be so easily created and released. Secondly, the research into arson indicates that there are characteristics of firesetters that are not general to all criminals but are arson specific; adult firesetting is predicted by firesetting in adolescence

and adolescent firesetting is predicted by childhood experiences with firesetting. Given 14 per cent of juveniles engage in fireplay at some stage in their lives, identification of motive is crucial to determining the appropriate intervention.

Given the recognition that adult serial arsonists can potentially be identified in childhood, it follows that it is crucial to attempt to identify these offenders when they first present to the authorities. Without mandatory assessment it is still possible to take all reasonable steps to identify potential arsonists at this time. The Commissioner for Children is mindful that mandatory assessment may cause 'net widening';<sup>125</sup> however, she recognises that there is strong evidence supporting the early assessment of firesetters.<sup>126</sup> Her suggestion to investigate the possible development of a preliminary screening tool, which may indicate the need for comprehensive assessment, has merit as such a tool will overcome avoidable delay, intrusion and associated costs.

The Council agrees that this process will create minimal delay and avoid net widening. It will identify juveniles who will respond well to a simple, low-cost intervention like education. It will expose those who could potentially be at high risk of reoffending, necessitating the need for a more comprehensive risk assessment. It is therefore recommended that investigation is made as to the development and implementation of a structured screening tool to be administered by Tasmania Police.

### *Recommendation 9*

**That investigation is made into the development of a screening tool to be used by Tasmania Police to determine if early treatment is necessary for juveniles with a fire-related offence.**

<sup>123</sup> Prichard, above n 110.

<sup>124</sup> Dolan et al, 'Risk Factors and Risk Assessment in Juvenile Fire-Setting' (2011) 18(3) *Psychiatry, Psychology and Law*, 378.

<sup>125</sup> Net Widening is a phenomenon whereby the sum of court appearances and diversionary procedures for an offence committed can eventuate in an overall increase in the number of offenders having contact with the criminal justice system. This phenomenon runs contradictory to the original purpose of diversionary programs in youth justice systems, which aim to avoid the potential criminogenic effects of formal contact with the criminal justice system. For further reading refer to Prichard, above n 110.

<sup>126</sup> Dolan et al, above n 124.

#### *4.5.2 Item 9 – Outcome Plans for Court and Police Referred Community Conferences and Outcome Plans for Police Formal Cautions to Include a Mandatory Education Program or Video as to the Harmful Effects of Fire*

As mentioned, in New South Wales specific provisions have been made for juveniles who have been found guilty of a fire-related offence and referred to a youth justice conference by the courts. The provisions state that the outcome plan for the conference must provide for the offender's attendance at a program or the screening of a video as to the harmful effects of fire. The questions asked in this advice are whether similar provisions should apply in Tasmania in relation to formal cautions and community conferences.

##### *Question 9*

- a) When a juvenile offender has been found guilty of a fire-related offence and referred to a community conference by the court, should the outcome plan for the conference contain a mandatory education program or video as to the harmful effects of fire?
- b) When a juvenile offender has admitted to a fire-related offence and is diverted to a community conference by Tasmania Police, should the outcome plan for the conference contain a mandatory education program or video as to the harmful effects of fire?
- c) When a juvenile offender has admitted to a fire-related offence and is diverted to a formal caution by Tasmania Police, should the outcome plan for the caution contain a mandatory education program or video as to the harmful effects of fire?

##### *Consultation*

DHHS submits that a mandatory outcome in a community conference does not sit comfortably with the democratic process that a conference represents. Conference outcomes are a reflection of consensus between the victim, the offender and the attending police officer.

##### *Discussion*

The Council recognises that mandatory requirements are contrary to the underlying philosophy of a community conference. The Council also considers that mandatory requirements in community conferencing are inappropriate for practical reasons. There is a need for flexibility to reach a meaningful outcome to meet the requirements of the offender, the victim and any other stakeholders who may be involved. Mandatory requirements do not allow for this flexibility which is based, primarily, on agreement between the parties.

The Council also recognises that firesetting is triggered by multiple motives and it is therefore not logical to assume that an education program is a suitable response to all firesetting behaviour. The literature reviewed by the Council indicates the effectiveness of an education program for offenders whose firesetting is benign and poses a small risk of serious damage (see Chapter 6). If after screening it is believed that the offender will respond to attending an education program, it should be considered, and made available, as part of an outcome plan for community conference by both the court and Tasmania Police. The Council also recommends that the education program be considered, and made available, as part of the undertakings in the formal caution process.

The Juvenile Fire Lighting Intervention Program (JFLIP) run by the Tasmania Fire Service is an appropriate program for firesetters who do not mean to cause damage. JFLIP practitioners are also trained to participate in the diversionary processes of formal cautions and community conferences.

The Council does not recommend that there be a mandatory requirement for juvenile firesetters to be subject to an education program or video as to the harmful effects of fire within the community conference framework. Nor does the Council recommend that there be a mandatory component to the undertakings agreed within the framework of a formal caution.

### 4.5.3 Item 10 – Making of Reparation for the Offence

New South Wales provides for mandatory education in youth justice conferencing for juveniles who have been found guilty of fire-related offences. The same provision also includes a mandatory requirement of the making of reparation for the offence, such as clean-up operations, treatment of injured animals and the payment of compensation. The idea of reparation is that it places the responsibility directly on the young offender for the possible making of amends for the offence.

#### Question 10

- a) When a juvenile offender has been found guilty of a fire-related offence and directed to a community conference by the court, should the outcome plan for the conference have a mandatory requirement for the making of reparation of the offence?
- b) When a juvenile offender has admitted to a fire-related offence and is directed to a community conference by Tasmania Police, should the outcome plan for the conference have a mandatory requirement for the making of reparation for the offence?
- c) When a juvenile offender has admitted to a fire-related offence and is directed to a formal caution by Tasmania Police, should the caution contain a mandatory requirement for the making of reparation for the offence?

#### Consultation

The DPEM stated that formal cautions and community conferences provide reparation strategies including monetary compensation, the development and delivery of talks to specific groups and other actions that may make amends for a youth's actions.

DHHS submitted that a mandatory outcome in a community conference does not sit comfortably with the democratic process that a conference represents. Conference outcomes are a reflection of consensus between the victim, the offender and the attending police officer.

DHHS further added that there are other issues unique to reparation. The examples DHHS used are:

- Risk assessment of the site and occupational health and safety issues including insurance
- Provision of supervision and the physical supervision itself
- Physical ability of the person including fitness and allergies
- Mix of young people (risks associated with putting younger, first-time offenders with older or more experienced offenders as this can strengthen pro-criminal attitudes and can lead to further offending)
- Availability of site/incident clean up.

DHHS also pointed out that where a fine is being considered, the experience of Youth Justice Services is that this frequently sets young people up for failure unless there is a stable, secure income and the quantum is realistic in terms of what young people can actually and reasonably afford. In some cases, parents end up paying the fine, which leads to the question, 'Who is actually making reparation?' There are also implications for insurance claims: where an individual who has suffered property damage has an insurance claim, only the excess can be pursued. DHHS further noted that financial reparation is probably best managed through the civil courts.

#### Discussion

The Council recognises that mandatory requirements are contrary to the underlying philosophy of community conferences whereby the outcome plans are agreed on by both parties. DHHS has drawn reference to issues that are unique to reparation, all of which are worth consideration and have merit. The Council is aware that the objectives of the *Youth Justice Act 1997* include that young offenders are to be encouraged to accept responsibility for their behaviour, and that offenders should learn about the human impact of crime. It does not believe, however, that mandatory requirements for the making of reparation for the offence are a suitable way to achieve these objectives.

#### 4.5.4 Item 11 – A Specific Sentencing Option for a Treatment Program for Juvenile Firesetters

Given the importance of treatment programs for juvenile firesetters with psychological problems, it may be questioned whether there is a need for a specific sentencing option similar to a rehabilitation program order for domestic violence offenders. The making of such an order would be conditional on a recommendation in pre-sentence assessment.

##### Question 11

Should a specific sentencing option for a treatment program for juvenile firesetters be considered as an additional order of the court?

##### Consultation

The TFS has stated that this is a good idea, but questions need to be addressed as to where the resources are coming from and who would manage and deliver this program.

DHHS does not agree to a specific sentencing option for a treatment program for arson offenders as such an order treats arson differently from other offences. Any order that requires Youth Justice Services to provide supervision will see the young person receiving risk assessment and a case plan that addresses identified risks; this may include referrals for treatment and/or counselling. A magistrate may place a special condition on an order, which could include attendance at a specific treatment program if the risk assessment indicated that this would be beneficial.

##### Discussion

Presently, s 47 of the *Youth Justice Act 1997* has a specific sentencing option for a family violence offence (namely a rehabilitation program order). As stated in the advice relating to a specific offence for adult offenders (see Question 6), the advantage of a specific sentencing option for treatment of an offence is the assurance that an appropriate service must always provide the program.

In relation to adult offenders, the Council advised that there was an insufficient number of offenders to support a fire-offence-specific group program or a specific sentencing treatment order.

The Council addresses the necessity and availability of treatment programs for juvenile firesetters in Chapter 6. This chapter draws attention to the importance of early recognition of juvenile firesetters who fire set for psychological reasons. It shows that this type of juvenile firesetting precedes adult firesetting, so early identification and treatment is crucial to avoid a juvenile firesetter progressing to a dangerous arsonist who goes on to light fires that increase in magnitude and dangerousness. For this reason a specific sentencing option for the treatment of juvenile firesetters must be considered.

Recommendation 9 in this Final Advice proposes investigation into the development of a screening tool as an expedient way of identifying juveniles who are at high risk of reoffending. Recommendation 12 proposes investigation into the treatment program developed by the Australian Centre for Arson Research and Treatment (ACART) for firesetters aged 14+ and investigation into the risk assessment presently being developed by ACART.

Given these measures are yet to be introduced in Tasmania, the Council considers it premature to recommend a specific sentencing option for the treatment of juvenile firesetters. If a screening tool and risk assessment are developed and an appropriate treatment program is introduced in Tasmania, there will be other sentencing options that can be used to order a youth to attend treatment.

#### 4.5.5 Item 12 – Deferral of Sentence as an Additional Order of the Court to Allow a Juvenile Who Has Been Found Guilty of Firesetting the Opportunity to Participate in a Treatment Program Prior to Final Sentencing

An explanation of deferred sentencing can be found in Chapter 3 (see 3.3.3). While s 47(d) of the *Youth Justice Act 1997* (Tas) gives the court the power to release a youth and adjourn proceedings on conditions, a court option to defer sentencing is not found in the Act.

By s 414 of the *Children, Youth and Families Act 2005* (Vic) the court can defer sentencing for a period of four months if considered in the best interests of the child and provided the child has agreed to the deferral. By s 415 the court may consider deferral of sentencing for the purpose of the child's participation in a group conference if the court is considering imposing a sentence of probation or a youth supervision order. By s 416 on the hearing date the court must have regard to the child's behaviour during the deferral.

In Tasmania consideration could be given to allowing deferral of sentence as an additional option of the court prior to sentencing. If the court was satisfied after assessment that a juvenile was at risk of reoffending and suitable for a treatment program this would give the juvenile the opportunity to address his or her offending behaviour prior to final sentencing. It is understood that a significant cost must be taken into account for a quality assured rehabilitative service to oversee sentence deferral in juveniles.

##### Question 12

- a) Should deferral of sentences be considered as an option to the court prior to final sentencing?
- b) Should deferral of sentences specific to juvenile firesetters be considered as an option to the court prior to final sentencing?

#### Consultation

DHHS states that a review of the *Youth Justice Act 1997* is currently being undertaken; one of the amendments being considered is the deferral of sentences. Initial consultation with staff at Youth Justice Services and detainees at the Ashley Youth Detention Centre indicates that sentencing should occur as soon as possible after a finding. There is the belief that deferral of sentences leads to various side effects like increased anxiety and an over-familiarity with the judicial system.

The Commissioner for Children supports, in principle, the inclusion of an option of general and specific deferral of sentencing for children and young people pursuant to the *Youth Justice Act 1997*.

It appears to me that deferred sentencing powers would, in appropriate circumstances, provide the Court with a flexible tool to assess a child or young person's prospects of rehabilitation and to provide him or her with an opportunity to address his or her criminal behaviour, and anything that has contributed to their offending behaviour.

The Commissioner drew attention to comments on the utility of deferral of sentence for juvenile offenders made by Chief Magistrate Michael Hill in his speech to the Council of South Pacific Children and Youth Courts in 2011. In this speech his Honour referred to his own jurisdiction in Tasmania by stating:

There is currently a proposal to amend the *Youth Justice Act 1997* to allow for a deferred sentencing option which we also consider will give us more flexibility in dealing with youthful offenders. At the time of writing the future proposal is not known.

The Commissioner noted that, in addition to the Victorian example of deferred sentencing, the Australian Capital Territory also allows for deferred sentencing pursuant to Part 8 of the *Crimes (Sentencing) Act 2005* (ACT). She further stated:

The efficacy of deferred sentencing is of course reliant on there being an appropriately resourced and robust service system. Adequate resourcing is necessary not only to provide appropriate rehabilitative interventions but also to ensure appropriate levels of support and supervision of the child or young person during the period of deferral.

## Discussion

The Council addressed deferral of sentences in relation to adult offenders earlier in this advice (see Question 7). The Council is of the same view for juvenile offenders in that deferral of sentences specific to arson is unnecessary. However, the Council believes in the importance of the court having an additional option that gives it the general power to defer a sentence to allow an offender a chance to rehabilitate prior to final sentencing. If the court were to have the power to defer sentences, the decision as to which offender should be given the chance to rehabilitate prior to final sentencing should be based on comprehensive reports and should be left to the discretion of the court.

The underlying principles of the *Youth Justice Act 1997* are accountability and restorative justice. Given 'diversion and rehabilitation are all strong themes that underpin the philosophy of helping young people in the youth justice system to reach their full potential as citizens',<sup>127</sup> deferral of sentencing to allow a young offender a chance to address his or her offending behaviour appears to be a practical and sensible way to achieve this goal.

The Council understands that sentencing young people as close to the event as possible is desirable but considers that rehabilitation has paramount place in the sentencing approach. The courts have long supported the proposition that in cases of juvenile offenders the goal of rehabilitation is dominant (see for example *Lahey v Sanderson*<sup>128</sup>).

The Council is also mindful that the deferred sentencing proposal has subsequently been removed from the Youth Justice Amendment Bill due to budgetary constraints. The Council is aware that the resourcing of programs is an effective part of the deferral disposition but recommends that there be further consultation to determine whether it can be introduced on a more cost neutral basis.

### *Recommendation 10*

The *Youth Justice Act 1997* is amended to include a general sentencing option to allow the court to defer the imposition of a sentence to allow an offender the opportunity to participate in a treatment program prior to final sentencing.

<sup>127</sup> Department of Health and Human Services, *Changes to the Youth Justice Act 1997* (Retrieved July 2012) <[http://www.dhhs.tas.gov.au/youth/youth\\_justice/review\\_youth\\_justice\\_act](http://www.dhhs.tas.gov.au/youth/youth_justice/review_youth_justice_act)>.

<sup>128</sup> [1959] Tas SR, 22 (Burbury CJ): 'But for the fact that no intermediate disciplinary institution is available in Tasmania does not in most cases afford any sound reason why a youthful offender should be sent to gaol where such institutions exist. If it appears from the pre-sentence report of the probation officer that there is a real possibility of the youth responding to disciplinary supervision under probation the Court would in the ordinary run of crime act upon such a recommendation.'

# 5.

## *Treatment Programs – Adults*

### 5.1 INTERNATIONAL TREATMENT PROGRAMS

A search of the available intervention and treatment programs for adult arsonists internationally showed limited results. While there is an abundance of literature, research, programs and interventions directed at juveniles, adult firesetters appear to be largely ignored. Programs from the United States of America are directed specifically at juveniles, are well established and have been duly assessed; however, the US appears to be devoid of programs for adult arson offenders.

One substantial study from the United Kingdom in 2005 commissioned by the Arson Control Forum (ACF) and conducted by the University of Leicester and the Office of the Deputy Prime Minister<sup>129</sup> entailed a literature review of the best practice in intervening with adult arsonists and young firesetters and included a critical review of these interventions. This study concluded that interventions with adult arsonists is 'sparse and tends to concentrate on psychiatric populations and typically from a cognitive-behavioural approach.'<sup>130</sup> It was found that the available interventions with adults were typically based on case studies and could not be generalised to the wider population.

A later publication by the same authors in 2007 reports on a national survey that included input from fire and rescue services, probation areas, youth offending services, forensic mental health units, several

government departments and the National Association for the Care and Resettlement of Offenders. The results of the survey found that, while some interventions were provided through forensic mental health, neither prison services nor probation services offered any specialist programs for arson offenders.<sup>131</sup>

Recently the UK Government recognised the importance of rehabilitation programs as a vital part of pursuing crime prevention techniques in an effort to prevent arson. As a result the UK Economic and Social Research Council invested over £500,000 with the University of Kent to develop a treatment program for male firesetters.<sup>132</sup>

### 5.2 TREATMENT PROGRAMS IN OTHER JURISDICTIONS IN AUSTRALIA

#### *5.2.1 Forensicare Victoria*

In Australia, the only treatment available for arsonists, although not a specific arson treatment program, can be found at Forensicare in Victoria. The Community Forensic Mental Health Service, the service delivery arm of Forensicare, is responsible for providing outpatient and community-based programs primarily for people who have a serious mental illness and have offended or are at high risk of offending. Specialist assessment and treatment are also provided for people who present with a range of serious problem behaviours.

<sup>129</sup> Palmer, Caulfield and Hollin, above n 120.

<sup>130</sup> Ibid 19.

<sup>131</sup> Emma J Palmer, Laura S Caulfield and Clive R Hollin, 'Interventions with Arsonists and Young Firesetters: A Survey of the National Picture in England and Wales' (2007) 12(1) *Legal and Criminological Psychology* 101.

<sup>132</sup> McEwan and Freckelton, above n 96.

The Problem Behaviour Program provides psychiatric and psychological consultation and treatment for people with a range of behaviours associated with offending. It is specifically directed at people known to have recently engaged in, or are at risk of engaging in, one or more 'problem behaviours'. Some of these behaviours include serious physical violence, sexual offending (including sexual assault and rape), paedophilia, threats to kill and harm others and firesetting. The program provides primary, secondary and tertiary consultations, together with ongoing treatment (following a primary consultation if clients are assessed as having treatment needs that require specialist forensic intervention).<sup>133</sup> Forensicare takes a cognitive behavioural therapy approach to firesetting. Many clients are referred through the criminal justice system although a referral is not actually a requirement for therapy.

### ***5.2.2 Forensic Mental Health Specialist Support Initiative***

As part of the Mental Health Reform Strategy 2009–2019, Victoria has initiated the Forensic Mental Health Specialist Support Initiative. This initiative is essentially a rollout of forensic positions into Area Mental Health Services in Victoria. The thrust of this initiative is to build capacity, confidence and competency in general adult mental health services in respect of forensic patients, or patients in the community with problematic behaviours. Patients enter and leave the system for episodic periods of care as opposed to open ended, life-long treatment. In the intervening periods, these patients are managed in the adult mental health system. Rather than expanding specialist forensic services, it makes sense that capacity in the adult mental health system is bolstered. Under this model, forensic clinicians are employed by the adult mental health services, but they receive supervision, support and skills development from the forensic system.

## **5.3 TREATMENT PROGRAMS IN TASMANIA**

In Tasmania there are no specific treatment programs provided by corrections or mental health services for adult arsonists.

The only treatment available for arson offenders is the general treatment within Tasmania's Forensic Mental Health Services. Forensic Mental Health Services 'provides community and inpatient mental health assessment, treatment and case management for offenders (or people at risk of offending) who have a mental disorder'.<sup>134</sup> This treatment is not specifically targeted at firesetting behaviour but treats the mental illness per se.

### ***Wilfred Lopes Centre***

The Wilfred Lopes Centre is a secure mental health unit that accommodates people with mental illnesses requiring specialist treatment. Patients at the centre include prisoners with a mental illness requiring specialist treatment and those found not guilty for reasons of insanity, those who are unfit to plead or those placed on a forensic order. The centre is situated near the Risdon Prison and is owned and managed by the Department of Health and Human Services (DHHS).<sup>135</sup>

### ***Community Forensic Mental Health Service***

The Community Forensic Mental Health Service (CFMHS) is a state-wide community service for people who are over 18 and have a mental illness. Patients at this service include those who are on a forensic order, on magistrates bail with specific directions to present to CFMHS, on probation or parole or at high risk of becoming involved with the criminal justice system. Treatment aims to reduce the risk of reoffending through compliance with medication, supervision and ongoing risk assessment. In such cases persons are placed on 'supervision orders' by the Supreme Court which requires adherence to conditions.<sup>136</sup>

<sup>133</sup> Forensicare, *Community Services* (Retrieved July 2011) <<http://www.forensicare.vic.gov.au/page.aspx?o=community>>.

<sup>134</sup> Department of Health and Human Services, *Forensic Mental Health Services* (Retrieved September 2012) <[http://www.dhhs.tas.gov.au/service\\_information/services\\_files/mental\\_health\\_services/forensic\\_mental\\_health\\_service](http://www.dhhs.tas.gov.au/service_information/services_files/mental_health_services/forensic_mental_health_service)>.

<sup>135</sup> Statewide and Mental Health Services, Department of Health and Human Services, *Forensic Mental Health Services* (Retrieved July 2011) <[http://www.dhhs.tas.gov.au/mentalhealth/mhs\\_tas/gvt\\_mhs/forensic\\_mental\\_health\\_service](http://www.dhhs.tas.gov.au/mentalhealth/mhs_tas/gvt_mhs/forensic_mental_health_service)>.

<sup>136</sup> *Criminal Justice (Mental Impairment) Act 1999* (Tas) s 31.



## 5.4 THE NEED FOR A NEW PROGRAM

This review of treatment programs for adult arsonists and any assessments that have been made have shown that programs both within Australia and internationally are virtually non-existent. The very few programs that have been implemented at an international level are dated and not necessarily applicable in an Australian context.

The Advancing Bushfire Arson Prevention in Australia Symposium considered existing models for treatment and risk assessment and noted that there was limited published research in the area of adult arsonists. The Symposium addressed the current limitations in the effective treatment for adult arson offenders. These were a lack of skills/knowledge among practitioners in identifying the appropriate model for working with these individuals, limited resources available for developing that knowledge and a lack of political commitment underpinning these problems. Given this reference demonstrates a political commitment to treatment responses for arsonists and firesetters, it is an appropriate time to consider options for developing new programs.

## 5.5 OPTIONS FOR A NEW PROGRAM

### *5.5.1 Item 13 – Tasmania Investigates the Development of a Program That Could Be Used for Adult Firesetters with a Mental Illness or Exhibiting Problematic Behaviour*

The Australian Bushfire Arson Prevention Initiative<sup>137</sup> has commissioned Monash University to develop a treatment program that could be used to treat adult arsonists with mental illness. It could be proposed that Tasmania initiate a formal link with Monash University to investigate the development of a treatment program that could be used for adult arsonists with mental illness or exhibiting problematic behaviour in Tasmania.

After the Consultation Paper was published the Director of the Australian Centre for Arson Research and Treatment (ACART), Bond University, advised the Council that the Centre had received funding from the Commonwealth Attorney-General for this purpose. The project is funded under the National Emergency Management Projects scheme and is focused on developing an offence-specific targeted treatment program for adult and adolescent arsonists. ACART has developed the program for firesetters aged 14 years and above who have exhibited problematic firesetting behaviour. For the purposes of inclusion into the program, 'problematic' is defined as having set at least one unauthorised fire, i.e. a fire that was not legitimately set for a particular purpose, such as a campfire or property burn off.

#### *Question 13*

Should Tasmania consider making formal links with Monash University to investigate the development of a program for adult firesetters who have a mental illness or are exhibiting problematic behaviour?

<sup>137</sup> The Australian Bushfire Arson Prevention Initiative was established in 2009 with funding from RACV Insurance and is a collaboration of the Monash Sustainability Institute and the Monash Centre for Forensic Behavioural Science in Victoria and Bond University in Queensland. The Initiative 'aims to advance national action on bushfire arson prevention'. Monash Sustainability Institute, Monash University, *The Australian Bushfire Arson Prevention Initiative* <<http://www.monash.edu.au/research/sustainability-institute/bushfire-arson/>>.

## Consultation

The TFS, DHHS and Department of Justice were all supportive of further research and investigation into the development of a program to manage this group of offenders, who are not firesetting for instrumental or criminal reasons.

## Discussion

As mentioned, since the release of the Consultation Paper ACART has developed a specialised treatment program for firesetters. ACART is a research centre developed to aid better understanding and management of deliberate firesetting in the Australian Community. ACART aims to develop fire-specific risk assessment measures and to develop treatment programs for delivery in community and correctional settings. ACART was founded to service the specialised needs of practitioners working with this population and received funding from the Commonwealth Attorney-General's department to investigate the development of a treatment program for adult and juvenile arson offenders.

The ACART program runs for 22 weekly sessions<sup>138</sup> (two hours per session) and is delivered by a registered psychologist with a speciality in either forensic or clinical psychology (or a general registered psychologist with a workplace supervisor who is a registered psychologist with endorsement in either of these two speciality areas). The sessions are conducted on a one-on-one basis allowing the treatment to be flexibly tailored to the individual. ACART will offer a structured training program to appropriately qualified service providers to enable them to become 'approved users' in the delivery of the treatment package. A pilot program is currently running in Queensland, and ethics approval is being sought to expand the project to other locations in Australia. These

activities have been funded by the Commonwealth Attorney-General's Department and Bond University.

The Council has considered, at length, the treatment program proposed by ACART. The program is based on the 'Risk-Need-Responsivity' model.<sup>139</sup> This model is an evidence-based practice in offender rehabilitation derived from the 'what works' literature by Andrews and Bonata.<sup>140</sup> This model also underpins the rehabilitation component of 'Breaking the Cycle',<sup>141</sup> the Strategic Plan for Tasmanian Corrections 2011–2020.<sup>142</sup>

ACART is also focused on developing a risk assessment protocol tailored specifically at deliberate firesetting. The aim is to identify individuals at moderate to high risk of repeat firesetting, who should be provided with appropriate psychological interventions. The protocol is to be developed for use in a community setting as well as for probation and parole.

The Council suggests that the treatment program developed by ACART should be considered for both the treatment of adult and juvenile firesetters over 14 years of age (see Recommendation 12). The Council also suggests that the risk assessment protocol, when established by ACART, also be considered as a risk assessment tool to be used in Tasmania.

### Recommendation 11

The Australian Centre for Arson Research and Treatment (ACART) program be considered as a treatment program for adult offenders who have exhibited problematic firesetting behaviour. That the risk assessment tool, when finalised by ACART, also be considered for use in Tasmania.

<sup>138</sup> Dr Rebekah Doley from ACART has advised the Council that the Centre is reviewing the number of sessions for this program. ACART has not yet determined the number of weekly sessions but has confirmed that it will be fewer than the existing 22 sessions.

<sup>139</sup> The Risk-Need-Responsivity (RNR) framework argues that to be effective, programs need to match the level of treatment to the offender's risk of reoffending. The programs must assess the *criminogenic* needs of the offender and should be matched to the participant's *responsivity*, meaning it tailors the intervention to the abilities and strengths of the offender.

<sup>140</sup> D A Andrews and James Bonata, *Risk-Need-Responsivity Model for Offender Assessment and Rehabilitation* (Her Majesty the Queen in Right of Canada, 2007) <[http://www.publicsafety.gc.ca/res/cor/rep/\\_fl/Risk\\_Need\\_2007-06\\_e.pdf](http://www.publicsafety.gc.ca/res/cor/rep/_fl/Risk_Need_2007-06_e.pdf)>.

<sup>141</sup> For further information on Breaking the Cycle, refer to Corrective Services, Department of Justice, *Breaking the Cycle: A Strategic Plan for Tasmanian Corrections 2011–2020* <[http://www.justice.tas.gov.au/correctiveservices/breaking\\_the\\_cycle](http://www.justice.tas.gov.au/correctiveservices/breaking_the_cycle)>.

<sup>142</sup> See Corrective Services, Department of Justice, *Breaking the Cycle – Tasmanian Corrections Plan (2010–2020): Best Practice in Offender Rehabilitation* (Department of Justice, 2009) <[http://www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0006/129561/Background\\_Paper\\_-\\_Pathways\\_to\\_Offending.pdf](http://www.justice.tas.gov.au/__data/assets/pdf_file/0006/129561/Background_Paper_-_Pathways_to_Offending.pdf)>.

### *5.5.2 Item 14 – A Program Similar to That of the Court Mandated Diversion Program for Adult Firesetters Who Have a Mental Illness or Are Exhibiting Problematic Behaviour*

Once a treatment or rehabilitation program is established for arsonists with a mental illness or exhibiting problematic behaviour; the next consideration is how compliance could be monitored in Tasmania.

The Symposium suggested the therapeutic jurisprudence approach to treatment such as that used by drug courts or other problem solving courts.<sup>143</sup> The replication of a program such as Court Mandated Diversion (CMD), while possible, may not be a practical solution given the small population of Tasmania and the limited number of possible clients for a dedicated program. It may be more appropriate to utilise existing options and services, provided an appropriate treatment provider can be identified.

#### *Question 14*

Should Tasmania consider a program similar to Court Mandated Diversion (CMD) to provide treatment to adult firesetters who have a mental illness or are exhibiting problematic behaviour?

### *Consultation*

The TFS supports a program similar to that of the CMD being considered; it is also supported in principle by DHHS.

DHHS draws reference to considerations that must be given for a program similar the CMD. These predominately relate to the number of clients, resourcing and the provision of a service to which the individual must be referred. DHHS states that there are two to three pre-sentence assessments of offenders charged with firesetting submitted to the court per year. The focus of these reports tends to be whether mental illness (or disability) is a factor in the offence, as opposed to suitability for participation in a diversion program. Additional training would be needed to assess the suitability for participation in a diversion program:

Criteria for participation in the program would need to be carefully determined as well as understood by all stakeholders to avoid a potential avalanche in requests for assessment being made to Court liaison staff.

Corrective Services submit that the population of offenders eligible for such a program would be too small, particularly considering the diversity of the group (repeat versus non-repeat offenders in different locations, with different motivations and treatment-readiness levels).

### *Discussion*

The Council supports the treatment of firesetters; however, it does not consider the specialist CMD treatment as a viable option due the number of convicted arsonists and their distribution throughout Tasmania.

<sup>143</sup> Katarina Fritzon and Troy McEwan, 'Treatment and Intervention with Adult Offenders' in Stanley and Kestin (eds), above n 6, 35.

### *5.5.3 Item 15 – Community Forensic Mental Health Service Provides Treatment to Firesetters Who Have a Mental Illness or Are Exhibiting Problematic Behaviour*

Treatment may be possible for adult firesetters through the Community Forensic Mental Health Service (CFMHS) in Tasmania. Patients for this service must be over 18 and have a mental disorder. Further criteria for eligibility include being on a court order, probation or parole with requirements to seek treatment, being on bail with specific directions to present to CFMHS or being at high risk of becoming involved with the criminal justice system.<sup>144</sup> Given the eligibility for treatment is a diagnosed mental illness, CFMHS would need to agree to expand its core business to include arson offenders. It is anticipated that this would be resource dependent. However, consideration could be given to the possible development of a specialist service within CFMHS to cater for a small number of highly problematic high risk offenders in our community, such as arsonists who may or may not have a mental illness.

#### *Question 15*

Should Tasmania consider the Community Forensic Mental Health Service (CFMHS) to provide treatment to adult firesetters who have a mental illness or are exhibiting problematic behaviour?

### *Consultation*

The TFS supports this in principle.

Corrective Services state that treatment facilitated by CFMHS would be appropriate for some offenders due to the strong link between arson and mental health issues.

DHHS states that CFMHS is well placed to provide treatment to this group. Providing service to those with problematic behaviour unrelated to serious mental illness is contrary to current focus, however. Presently, behaviour is managed or treated to the extent that the person's mental illness or disability drives his or her offending behaviour. CFMHS would need to significantly broaden and reconceptualise its service delivery model to accommodate the delivery of a program such as that suggested. Additional resourcing would be required.

### *Discussion*

Presently the eligibility for an adult to have treatment through CFMHS is a diagnosed mental illness. As mentioned, the Problem Behaviour Program developed by Forensicare in Victoria (see 5.2.1) provides specialist assessment and treatment for people who present with a range of serious problem behaviours, including arson. In December 2011, when the Consultation Paper was published, Forensicare was the only treatment available for arson in Australia. Since then, ACART has developed a specialist treatment program for adult and juvenile firesetters. Recommendation 11 in this report suggests that the ACART program be considered as a treatment program for firesetters in Tasmania. The ACART specialised treatment program for firesetters (see 5.5.1) is designed for those who have developed 'problematic firesetting behaviour'. Neither of these programs requires the offender to have a diagnosed mental illness before treatment for firesetting can be given.

<sup>144</sup> Statewide and Mental Health Services, above n 135.

Therefore, if Tasmania were to consider utilising CFHMS to provide the ACART treatment program or the Problem Behaviour Program developed by Forensicare, CFMHS would need to expand its core business beyond the diagnosed mental illness criteria to include 'problematic firesetting behaviour'.

The motives of the adult arsonist as categorised by Ducat and Ogloff are given in Chapter 1 (see 1.10). The authors categorised an 'instrumental' firesetter as one who is motivated to achieve a desired goal, like insurance fraud or crime concealment. Tasmania has specific issues relating to fire damage to vehicles and properties owned by Housing Tasmania. Offenders who light fires for the purpose of destroying evidence, to secure a different housing property or to effect a fraud are considered instrumental firesetters. Instrumental firesetters are not firesetting for psychological reasons and are not considered to be exhibiting 'problematic behaviours'.

For the group of firesetters who are not firesetting for rational or instrumental reasons, treatment may be the only feasible option to reduce firesetting behaviour. As noted in Chapter 1 (see 1.10) mental illness is a major concern, as a disproportionate number of firesetters are mentally ill or disordered. In relation to the classifications referred to above, the group that is classified as 'expressive' or 'due to the effects of mental illness' is included in the desired group that could respond to a treatment program.

In the context of this question and Question 16, the Council has limited its advice to only describing the category of firesetter considered appropriate for treatment.

The Council has invited responses from the relevant agencies for their views on whether CFMHS in Hobart could potentially provide treatment for adult firesetters in Tasmania. It is not appropriate for the Council to assess the suggestions submitted by the relevant agencies in these areas. However, the submissions from these agencies were solicited in the Consultation Paper and are included in this report because it is anticipated they will be of assistance to those making the policy decisions in this area.

#### *5.5.4 Item 16 – Tasmania Utilises Existing Services Provided by Specialist Forensic Staff or Forensicare in Victoria*

There are several models that could be used to build the capacity to provide treatment in the Tasmanian system without the expense involved in setting up an infrastructure and clinical programs to deal with a relatively small number of patients who generate a disproportionate amount of community risk. Tasmania could utilise existing services provided in Victoria by specialist forensic staff or Forensicare.<sup>145</sup> Options for consideration are:

1. Tasmania could utilise the Forensic Mental Health Specialist Support Initiative (see 5.2.2).
2. Tasmania could set up a satellite clinic with specialist forensic staff attending regular clinics to review patients, provide supervision and provide training and education (in-reach model).
3. Staff from Tasmania could be employed in joint appointments with Forensicare. The staff could do sessional work with Forensicare to be exposed to greater numbers of patients, innovative programs etc. and then bring these skills back to Tasmania.
4. Tasmania could fund a registrar training position at Forensicare.
5. Tasmania could fund a joint academic position/ senior lecturer position in conjunction with Forensicare/Monash University.

#### *Question 16*

Should Tasmania consider any of the suggested methods to utilise existing services provided in Victoria?

<sup>145</sup> Meeting with Mr Peter Kelly, Director of Operations, Melbourne Health (September 2011).

## *Consultation*

The DPEM states that the strategies outlined for adult offenders provide a starting point for discussion and should be balanced against the debate concerning mental illness, resourcing and the need for a whole of government approach to this health issue.

Both the TFS and the DPP support these options being considered. The DPP states that these options are worth exploring in a policy and costing sense, but the capacity to treat must be established before the sentencing option is added.

DHHS submits that geographically and historically strong bonds exist between Tasmania and Victoria. For example, Forensic Mental Health Services clinicians operating in the north west have links with Forensic care clinicians regarding the use of regular locums from Forensic care to cover clinical demand in that part of the State. In relation to the suggestions, comments from DHHS were as follows:

Suggestion 2 is considered the most suitable in the short term. Establishing an in-reach model utilising Victorian clinicians has the potential to lead to the creation of a smaller, liaison type service with the whole of State coverage (in contrast the establishment of a program based in one part of the State has potential to favour the area in which the clinic is based).

Suggestion 3 is also considered to be a viable option with the added benefit in enabling the development of local expertise in this field.

Suggestion 4 is considered to be less suitable given the need for the development of specific psychological, rather than psychiatric, skills in arson management interventions. Within this context the registrar training model is considered to be less than ideal.

As noted above more research is needed into the efficacy of programs for adult firesetter. Given this, suggestion 5 has merit insofar as the establishment of such a position may lead to research and data necessary for the establishment of a program that 'works'.

## *Discussion*

As stated in the discussion for Question 15, in December 2011, when the Consultation Paper was published, the Problem Behaviour Program run by Forensic care in Victoria provided the only treatment available for arsonists in Australia. The Council invited responses from the relevant Tasmanian agencies as to their views on a potential service provider in the Tasmanian context. Melbourne Health suggested several models that could build the capacity of the Tasmanian system without the expense involved in setting up an infrastructure and clinical programs by utilising existing services provided in Victoria by specialist forensic staff or Forensic care.

Again, it is not the role of the Council to assess the utility of any suggestions submitted by the relevant agencies; however, the Council has included the submissions from these agencies in anticipation that these may be of assistance to those making the policy decisions in this area.

In relation to Question 15 and Question 16 the Council has limited its advice to describing the category of firesetter that is considered appropriate for treatment (refer to Question 15).

# 6. *Education and Treatment Programs – Juveniles*

## 6.1 INTERNATIONAL EDUCATION AND TREATMENT PROGRAMS

Treatment programs for juvenile firesetters are well established in the United States of America and the United Kingdom. Programs operate by means of either the educational or the clinical approach. The educational approach focuses on informing individuals of the adverse effects of fire and is useful for the juvenile firesetter who is exhibiting 'fireplay'. The clinical approach is over and above education in that it attempts to change the behaviour of the firesetter – this approach is suitable for the firesetter who has deeper psychological problems. Following is a brief overview of these programs and a review of any assessments that have been made.

### *6.1.1 Assessments of Treatment and Intervention Programs in the United States of America*

In the United States in the 1990s, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) funded the National Juvenile Firesetter/Arson Control and Prevention Program (NJF/ACP Program) in response to a high number of juvenile firesetters. The components identified as successful from that program were program management, screening and

evaluation, intervention services, referral, monitoring and juvenile justice.<sup>146</sup> This program encountered difficulties, however. Drabsch<sup>147</sup> has drawn attention to small departments with limited budgets, a dependency on volunteers, ineffective monitoring of treatment and restricted access to confidential information. Drabsch considered that the 'implementation of such a program in Australia would experience similar problems'.<sup>148</sup>

In 2002 the National Association of State Fire Marshals (NASFM) contracted the University of New Hampshire to offer a distillation of the existing research literature into juvenile firesetting, to convene a conference of researchers and fire, justice and clinical professionals and to deliver a report to NASFM.<sup>149</sup> This comprehensive report makes relevant and useful findings in relation to intervention, control and treatment of juvenile firesetters. Relevant findings are as follows:

- 'Firesetting research literature clearly recognises successful intervention, control, and treatment involves multiple strategies that respond to firesetting's multiple origins'.<sup>150</sup>
- If the risk factors are known with certainty then the juveniles at greatest risk in engaging in firesetting behaviour can be recognised.<sup>151</sup>
- In relation to education programs there appears at times to be confusion as to the target audience.

<sup>146</sup> United States Department of Justice, *Office of Juvenile Justice Delinquency Program* (Retrieved July 2011) <[coy.state.va.us/vcoyl/PDFfiles/Juvenile%20Firesetting\\_0.pdf](http://coy.state.va.us/vcoyl/PDFfiles/Juvenile%20Firesetting_0.pdf)>.

<sup>147</sup> Talina Drabsch, Arson, Briefing Paper 2/2003 (NSW Parliamentary Library Research Service, 2003) 37.

<sup>148</sup> *Ibid* 37.

<sup>149</sup> Putman and Kirkpatrick, above n 33.

<sup>150</sup> *Ibid* 5.

<sup>151</sup> *Ibid* 5.

- There were numerous psychological and clinical treatment programs in the United States.<sup>152</sup> From the clinical literature there were found to be two factors that determined a successful treatment program:
  1. The program was created specifically with the needs of the juvenile in mind.
  2. The program had multi-systemic approaches, involving the firesetter's family, school, ongoing clinical counselling and care, and the participation of local fire and law enforcement officers.
- There is an emphasis on the need to categorise firesetting behaviour and its risks. All stakeholders agreed that some firesetting is benign and poses a small risk of serious damage. This behaviour will respond well to the simple, low-cost interventions like education. Conversely, 'it appears equally clear that other kinds of firesetting behaviour are associated with serious human pathologies and increased risk of tragic outcomes'.<sup>153</sup>
- Many programs have been put in place without the resources to evaluate the program. It is difficult to justify costs without being able to justify the benefits. It may be an expensive proposition to build assessment and evaluation components into the design of a new program as evaluation costs are approximately 10 to 15 per cent of the total program budget. Notwithstanding the cost, evaluation is still considered a sound investment 'because it is more likely that resources will be well spent, results orientated programs will prosper; and ultimately, that juvenile firesetting will be addressed in a cost effective manner'.<sup>154</sup>

### *6.1.2 Assessments of Treatment and Intervention Programs in the United Kingdom*

In March 2005 the Office of the Deputy Prime Minister in London commissioned the University of Leicester to critically assess the interventions run by fire and rescue services and other stakeholders.<sup>155</sup> The interventions were assessed against the accreditation criteria of the Correctional Services Accreditation Panel (CSAP). An outline of the findings is as follows:

- There are clearly two distinct interventions in juvenile firesetting:
  1. Educational approaches to inform individuals of the dangers of fire.
  2. Psycho-social interventions that seek to change some aspect of the firesetter's behaviour.
- The majority of the interventions for children and adolescents are provided by Fire and Rescue services in the form of the educational approach. The educational intervention programs run by Fire and Rescue Service personnel are conducted by firefighters who have had face-to-face contact with firesetters and are considered best placed to deliver these programs to families and children.
- The development of current services needs to give consideration to the development of two distinct interventions, one as an educational package and the other as a treatment program.
- If separate interventions are to be developed for educational and treatment purposes, then clear protocols are necessary for each approach, ensuring that the interventions are matched to participant risk and need.

In summary, the outcome of research in the United Kingdom and the United States clearly indicates there is a need for two distinct interventions with juvenile firesetters, one as an education program and one tailored to suit the individual with the aim of modifying the firesetter's behaviour. There is also the need for risk assessment to determine the appropriate course of action and case management of individuals to ensure a multi-systemic approach to the intervention.

<sup>152</sup> Some programs addressed the broader needs within the firesetter's family and school, some addressed the individual needs of the firesetter and others addressed the juvenile resident within a mental health institution or juvenile detention centre.

<sup>153</sup> Putman and Kirkpatrick, above n 33, 6.

<sup>154</sup> Ibid 6.

<sup>155</sup> Palmer, Caulfield and Hollin, above n 131.



## 6.2 EDUCATION AND TREATMENT PROGRAMS IN OTHER JURISDICTIONS IN AUSTRALIA

Every State and Territory in Australia has an educational program targeting juvenile firesetters who exhibit an unhealthy curiosity about fire; these programs are run by the fire services in all States.

Similarities exist between the programs and many of them have been derived from existing programs in other jurisdictions. Across the jurisdictions, common characteristics include:

- Using firefighters as program facilitators with special training
- Basing programs mostly in the home
- Programs not being specific to bushfires
- Programs being largely educational with some behaviour change elements
- No fire lighting
- Parental involvement being encouraged or required.<sup>156</sup>

The majority of the programs use the home as the program setting. The rationale is that the home allows the facilitator an insight into any family or home problems that might contribute to the fire behaviour.<sup>157</sup> The most significant similarities of all programs are the involvement of parents and care providers. The programs explicitly acknowledge that the parent or carer is integral to the effectiveness of the program.

The Victorian Juvenile Fire Awareness and Intervention Program (JFAIP) was examined by Adler et al.<sup>158</sup> It was found to be 'somewhat effective in reducing arson reoffending'.<sup>159</sup> Within the 12 month follow up period 42.8 per cent did not reoffend.<sup>160</sup> These outcomes were of little difference to the group that received intensive behavioural modification. This may support suggestions that benign firesetting behaviour based on curiosity will respond well to simple low-cost intervention like education.

Muller and Stebbins<sup>161</sup> note that fire education is the most common preventative approach for juveniles. They further note that fire education is a necessary component of any intervention regardless of the young person's motives or firesetting intensity.<sup>162</sup>

The Queensland Juvenile Arson Offenders Program (JAOP) is an initiative that focuses on young people who have come to the attention of the police and the judicial system.<sup>163</sup> JAOP will accept juveniles aged between 13 and 17 years and is specifically designed for those who have been charged with an arson offence. Referrals can be made to JAOP from government agencies including the Department of Communities, the Magistrates Court, the Children's Court and the Queensland Police Service (Child Protection and Investigation Unit). Attendance at JAOP can be made compulsory by court order or community conference agreement. If the course is not completed the child faces further action from the criminal justice system. JAOP's group-based approach incorporates team building to address and develop personal skills that help the juvenile improve his or her self-esteem and return as a functioning member of the community. JAOP also assists by focusing offenders on the consequences of their actions:

<sup>156</sup> Muller and Stebbins, above n 121, 3–4.

<sup>157</sup> Ibid 4.

<sup>158</sup> Robert Adler et al, 'Secondary Prevention of Childhood Firesetting' (1994) 33(8) *Journal of the American Academy of Child and Adolescent Psychiatry* 1191, cited in Ducat and Ogloff, above n 23.

<sup>159</sup> Ducat and Ogloff, above n 23.

<sup>160</sup> To put this percentage in context, the following are examples of comparative effect sizes for other selected interventions: bypass surgery for coronary heart disease has an effect size of 0.15, chemotherapy for breast cancer has an effect size of 0.08–0.11 and psychological therapy for mental health problems has an effect size of 0.32.

<sup>161</sup> Muller and Stebbins, above n 121.

<sup>162</sup> Paul Schwartzman, Hollis Stambaugh and John Kimball, *Arson and Juveniles: Responding to the Violence. A Review of Teen Firesetting and Interventions*, Report 095 of the Major Fires Investigation Project (U.S. Fire Administration, 1998), cited in Muller and Stebbins, n 121.

<sup>163</sup> Queensland Fire and Rescue Service, *Juvenile Arson Offenders Program (JAOP)* (Retrieved June 2011) <<http://www.fire.qld.gov.au/communitysafety/freepograms/jaop.as>>.

The program educates young people about the danger of fire as well as the financial, emotional and community costs of arson. Participants are guided through course activities, which may include:

- A detailed analysis of the participant's offence
- An anatomy of fire
- The effect of arson on individuals, families, businesses and communities
- Fire Aid and resuscitation (without defibrillators)
- General fire safety
- Breathing apparatus
- Fire extinguisher training and
- Experiential learning.<sup>164</sup>

Recent research by Ducat and Ogloff<sup>165</sup> concluded that some psycho-education programs have been encouraging. An evaluation of these programs at an international level shows they have had some impact on recidivism rates when they include elements such as educating juveniles on the social and medical consequences of firesetting, fire skills training and safety awareness, family participation and role play and the use of fire service personnel in the delivery of the program. Kolko<sup>166</sup> has also demonstrated that a cognitive behavioural approach, focusing on self-control, problem solving, coping skills and pro social behaviour, has reduced fire interest. Further, children who receive fire safety skills training from firefighters, including a discussion about motives and reason, show significant increases in their safety awareness.

## 6.3 EDUCATION AND TREATMENT PROGRAMS IN TASMANIA

Presently there is an educational program run by the Tasmania Fire service. No assessments have been made to determine the risk of reoffending in juvenile firesetters; nor are there any intervention or treatment programs available for juveniles who exhibit firesetting behaviour beyond fireplay or curiosity.

The TFS conducts a Juvenile Fire Lighting Intervention Program (JFLIP) as part of the major goal 'to assist the Tasmanian community to manage fire risks and respond safely to fire'.<sup>167</sup> JFLIP is a free, confidential, state-wide behaviour change program designed for children aged between four and 14 who engage in unsafe firesetting. It is a family-based program delivered in the home by trained JFLIP firefighters. Any parent or guardian who considers that his or her child is playing with fire can contact the TFS to enrol the child in the program. The TFS advises that JFLIP is predominately aimed at younger children who do not mean to cause damage and who do not understand how dangerous fires can be.<sup>168</sup> In 2009–2010 JFLIP dealt with 17 cases. Since its inception JFLIP has assisted over 500 children and their families.

In JFLIP, practitioners are also trained to participate in diversionary processes for young people who have committed fire-related offences. In the 2009–2010 financial year JFLIP practitioners represented the TFS at eight community conferences and formal cautions.<sup>169</sup>

The TFS JFLIP brochure suggests that fire lighting can also be a sign that a child is worried or upset about something and may need extra help from other services. Clearly, the TFS recognises that firesetting in young people can go well beyond curiosity and can be a symptom of deeper psychological problems, which are beyond the skill of fire service personnel to address.

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<sup>164</sup> Ibid.

<sup>165</sup> Ducat and Ogloff, above n 23.

<sup>166</sup> David J Kolko, 'Efficacy of Cognitive-Behavioural Treatment and Fire Safety Education for Children who Set Fires: Initial and Follow-up Outcomes (2001) 42(3) *Journal of Child Psychology and Psychiatry* 359, cited in Ducat and Ogloff, above n 23.

<sup>167</sup> State Fire Commission, above n 12, 2.

<sup>168</sup> Tasmania Fire Service, *Juvenile Fire Lighter Intervention Program* (Tasmania Fire Service, n.d.) <<http://www.fire.tas.gov.au/Show?pageId=colPublications>>.

<sup>169</sup> State Fire Commission, above n 12, 6.

## 6.4 IS THERE A NEED FOR A NEW PROGRAM?

Research indicates that fire education is effective in reducing firesetting behaviour for juveniles who exhibit fireplay where there is no malice behind their actions. These juveniles set fires out of curiosity and experimentation, have given no thought to the consequences of their actions and will respond well to low-cost intervention like education, which is provided by the TFS's JFLIP program. Tasmania, however, has no arson or fire-specific treatment or intervention beyond the education program provided by JFLIP.

Apart from JAOP in Queensland no other State or Territory in Australia provides treatment or intervention beyond education programs. The only minor exception is the Victorian Juvenile Fire Awareness and Intervention Program which employs a clinical psychologist to consult to the program. To date there are no reported treatment programs of a purely psychological nature in Australia.<sup>170</sup>

The Advancing Bushfire Arson Prevention in Australia Symposium considered the lack of treatment programs for juveniles at high risk and identified that in Australia 'fire services "own" the problem but do not have resources to "manage" the whole problem'.<sup>171</sup> The Symposium recognised that the courts, police and government agencies continue referring cases to fire services that 'don't have the required skills and expertise to treat the complex issues of high risk clients'.<sup>172</sup> The Symposium concluded that there was the need to press for government policies to support prevention with a 'coordinated multi-disciplinary approach'.<sup>173</sup>

## 6.5 OPTIONS FOR A NEW PROGRAM

### 6.5.1 Item 17 – Tasmania Provides Similar Services to That of JAOP in Queensland

The Queensland Juvenile Arson Offenders Program (JAOP) is the only program in Australia that appears to have an educational component and a psychological component. Although research clearly indicates the need for education and psychology to be divided into two distinct programs, an assessment of the JAOP program has been found to be encouraging.

It would be expensive to attempt to recreate the JAOP program in Tasmania. Given the small population in Tasmania it may be more appropriate that a juvenile found to be at high risk of reoffending be case managed on an individual basis. Consideration could also be given to the possibility of accessing JAOP in Queensland.

As no risk assessments have been made on juvenile firesetters in Tasmania it is not possible to estimate how many eligible juveniles there would be per year. Further research into the practicality and feasibility of this idea is outside the scope of this advice.

#### *Question 17*

- a) Should Tasmania provide a program similar to the Juvenile Arson Offenders Program (JAOP) in Queensland?
- b) Should Tasmania investigate the feasibility of offenders in Tasmania accessing JAOP in Queensland?

<sup>170</sup> Fritzson and McEwan, above n 143.

<sup>171</sup> Penny Wolf and Kate McDonald, 'Treatment and Intervention with Juvenile Firesetters' in Stanley and Kestin (eds), above n 6, 33.

<sup>172</sup> Ibid 33.

<sup>173</sup> Ibid 32.

### *Consultation*

The TFS stated that it would be unable to provide this type of service.

In answer to Question 17, DHHS stated that:

- a) This may be an option; however, a significant amount of research, consultation and program development would be required to ensure any program suits the Tasmanian demographic. It is also believed that such a program would require a significant amount of funding.
- b) No. It is believed that this option would be cost prohibitive. It has also been suggested that maintaining strong family support and connections are important factors during the rehabilitative process.

The Commissioner for Children noted that 'current approaches in Australia targeting children and young people who light fires appear to adopt an educational style' and that JAOP is the only Australian program specifically designed for young people convicted of arson offences.

### *Discussion*

As mentioned JAOP is the only program in Australia that appears to have a combined educational and psychological component and an assessment of the JAOP program has been found to be encouraging. However, recent research supports a clear division between education and treatment programs for juvenile firesetters.

The TFS's JFLIP program is an established and successful education program for juvenile firesetters. JFLIP practitioners also successfully represent the TFS in community conferences and formal cautions in Tasmania. Given Tasmania already runs a successful education program and a new treatment program has been developed by ACART, the Council recommends that JFLIP be retained as the education component and a new treatment program be established for juveniles in Tasmania (refer to Recommendation 12). The Council does not recommend that Tasmania provide a service similar to JAOP in Queensland or that Tasmania further investigate the feasibility of accessing JAOP in Queensland.

### *6.5.2 Item 18 – Tasmania Makes Further Investigation as to a Suitable Treatment Program for Juvenile Firesetters and the Appropriate Service Provider to Deliver a Program in Tasmania*

At the time the Consultation Paper was released ACART had not yet established a treatment program for adult and juvenile arson offenders in Australia. The discussion in this section mentioned the lack of the identification, assessment and treatment approaches for juvenile firesetters in Australia despite the evidence from international research that treatment programs offer promise for juvenile offenders. It was noted that the absence of a systematic approach to this problem leaves agencies and legal services that come in contact with this type of firesetter unaware of the 'pathological nature of the behaviour'.<sup>174</sup>

The discussion then referred to the existing process whereby the Youth Justice Division of the Magistrates Court makes an order for a juvenile to attend a treatment program. Such an order is supervised by Youth Justice Workers in the Youth Justice Division of DHHS. Once an order is made the juvenile is then allocated to a case worker who can direct the juvenile to a suitable program. If there is no suitable tailored program there is the capacity to direct the offender to private psychological sessions – this process already exists for other problematic offenders for whom there is no treatment program. The existing options provide a starting point for discussion about the appropriate avenue to deliver the ACART treatment program should it be received in Tasmania.

When the Consultation Paper was published in December 2011, Question 18 was framed as follows:

#### *Question 18*

Should Tasmania investigate a suitable treatment program for juvenile firesetters and the appropriate service provider to deliver a program in Tasmania?

### *Consultation*

The Commissioner for Children drew attention to a suggestion by Dolan et al that what is needed when dealing with young offenders who commit fire-related offences is a 'comprehensive continuum of services and sanctions that take into account community safety, victim reparation, and youth needs'.<sup>175</sup> In the Commissioner's view this type of multi-agency approach is a relevant and an appropriate response to youth offenders generally and not just those who commit fire-related offences. However:

Notwithstanding the various arguments for and against specialised intervention, it appears there is merit in developing a multi-agency approach to respond to this issue which may include the investigation of a suitable treatment programme for juvenile firesetters in Tasmania designed to effectively reduce the likelihood of re-offending.

<sup>174</sup> Katarina Fritzon et al, 'Juvenile Fire Setting: A Review of the Treatment Programs' (2011) 18(3) *Psychiatry, Psychology and Law* 395.

<sup>175</sup> Dolan et al, above n 124.

## *Discussion*

In response to Question 13, the Council drew attention to the ACART treatment program. As mentioned, the specialised treatment program developed by ACART is for adult and juvenile (aged 14+) individuals who have exhibited problematic firesetting behaviour. The Council recommends that the Attorney-General consult with the appropriate ministerial colleagues with a view to implementing this program into their portfolio.

ACART is also focused on developing a risk assessment protocol tailored specifically at the assessment of deliberate firesetting. The aim is to identify individuals at moderate to high risk of repeat firesetting, who should be provided with appropriate psychological interventions, and to develop the protocol for use in a community setting as well as for probation and parole. This risk assessment would prove vital if it was shown that a juvenile could potentially be at risk of reoffending after the recommended screening tool was administered (see Recommendation 9). The Council recommends that when this risk assessment is developed the Attorney-General consult with the appropriate ministerial colleagues with a view to implement the ACART risk assessment into their portfolio.

### *Recommendation 12*

The Australian Centre for Arson Research and Treatment (ACART) program be considered as a treatment program for juvenile (14+) offenders who have exhibited problematic firesetting behaviour. That the risk assessment tool, when finalised by ACART, also be considered for use in Tasmania.

# 7.

# Community Information and Education Programs

## 7.1 THE RECENT TREND TOWARD FIRE PREVENTION

The recent trend in Australia has been to pursue crime prevention strategies to reduce arson and bushfire arson. This is a move away from the past when the bulk of resources and activity was targeted at the recovery stage. The recovery stage is when recovery and repair of the damage takes place if a fire event cannot be stopped. McEwan and Freckelton note, 'the focus of Government attention at present appears to be on improving primary prevention, with enhanced environmental management, policing and fire services practices being central to reducing over incidence of deliberate fire setting'.<sup>176</sup>

The approach in Tasmania aligns with the recommendations of the Victorian Bushfires Royal Commission (VBRC) and the National Work Plan to Reduce Bushfires in Australia. This view is clearly in line with the trend in the rest of Australia in that many deliberately lit fires are preventable using crime prevention techniques.

This trend toward prevention strategies and the subsequent recommendations by the VRBC and the National Workplan to Reduce Bushfires in Australia has resulted in arson and bushfire arson being viewed with the same crime prevention principles as other crimes in Australia. Crime prevention works on the principle that crime is not only in the domain of the criminal justice system; it is a whole of society approach that attempts to stop crime before it happens. Such strategies can focus on situational factors (preventing crime by targeting the environment) or social factors (preventing crime by targeting the community). Although there is now a clearer focus on applying crime prevention

techniques to fire-related offences these practices are not new in Australia. Muller provides an overview of successful strategies. These include:

- Controlling access points and reinforcing guardianship over easily accessed forestry areas
- Fuel reduction and prescribed burning
- Fencing areas, upgrading alarm systems, video surveillance and lighting in schools
- Removal of abandoned cars
- Public education programs to prevent cigarette-related bushfires
- Mapping software to report data to indicate areas that experience high frequencies of deliberate fires
- Australian fire agencies with community safety and education sessions to promote safety and awareness
- Targeting arson prone communities.

## 7.2 COMMUNITY EDUCATION AND INFORMATION PROGRAMS IN AUSTRALIA

All fire services throughout Australia run a school fire education program; however, the Fire and Emergency Services Authority (FESA) in Western Australia has developed an additional program aimed at juveniles. This program is not delivered through the school system (programs generally are when targeting young people) but has been developed specifically for arson prone communities. FESA recognised most of the fires in some areas were being set by juveniles and FESA's response was to raise awareness in the community. The fundamental difference in this program is that it is directed at the arson prone community as a whole as opposed to schools or

<sup>176</sup> McEwan and Freckelton, above n 96, 324.

the individual firesetters. The program has three phases: identification, implementation and evaluation. Areas experiencing elevated levels of fires were identified on a suburb and street level. Local partners then convened to discuss the objectives and strategies.<sup>177</sup> The implementation was a short, intensive awareness campaign particularly focusing on children and families in the area. This included primary school presentations, shopping centre displays, door knocks, information flyers and fridge magnets encouraging the community to report any suspicious activity. Another important consideration in this program was the presence of uniformed police and fire service personnel who reinforced the message that arson is a serious criminal act and it will be treated as such. Monitoring the occurrence of bushfires after the specific area was targeted was a built in component of the evaluation phase. The evaluation phase consistently showed that, in all areas, deliberately lit bushfires declined following intervention.<sup>178</sup>

Muller asserts that, although developed specifically for Western Australia, the program has a number of elements that could easily be used by other communities and agencies in the development of other programs. The key elements would include an awareness of hotspots, high levels of consultation with the community, a coordinated response with fire services and police, blanket coverage of the community, a consistent message and an evaluation framework.<sup>179</sup>

## 7.3 THE CURRENT FOCUS ON CRIME PREVENTION IN TASMANIA

### 7.3.1 TFS School Education Program

The TFS has a School Fire Education Program which in the period 2009–2010 reached 17,149 primary school children in 89 schools. The New School Fire Education resources were introduced into the program at the beginning of the 2010.<sup>180</sup> The purpose of this program is to promote awareness for fire safety and what to do if a fire breaks out in the home or in the bush.

### 7.3.1 TFS and Crime Management Unit, Tasmania Police

The TFS stated that its efforts in relation to arson and deliberately lit fires are predominately focused on the result of the VBRC findings and its recommendations. One of these recommendations was to establish a closer liaison between fire services and police in the identification and prevention of serial arson.<sup>181</sup> As a result a project was instigated to improve relationships and include the Crime Management Unit of Tasmania Police in the investigation process.

This project aims to identify strategies and processes to enable improved analysis of data for the purpose of serial arson identification and the development of intervention programs. The observation of common threads and patterns has resulted in strategies that have proven successful in the identification of offenders. In 2010 the analysis of data from the previous 10 years revealed one person being subject to six major household fires that, in isolation, had previously been attributed to accidental causes. The data interrogation resulted in the identification of arson for the purpose of fraudulent insurance claims. In a separate analysis of different data, a pattern revealed the simultaneous burning of a vehicle and the theft of another vehicle in the same suburb. Further investigation of this pattern exposed drug couriers burning vehicles to destroy evidence after a drug delivery then immediately stealing another vehicle in the same suburb to perform another delivery somewhere else. The TFS and Tasmania Police are continuing to scrutinise available data and pursue other methods to detect and predict both structural and bushfire arson.

The TFS has clearly taken steps in line with VBRC recommendations to improve data collection and analysis. The TFS is utilising this data for a twofold purpose: to detect crime and to predict patterns of behaviour. Indeed, as noted by Lansdell et al, arsonists report they are more likely to be deterred by a greater risk of apprehension than by tougher penalties.<sup>182</sup>

<sup>177</sup> Partners include FESA, the Western Australia Police, the Department of Education and Training, Catholic Education, local government and community volunteers.

<sup>178</sup> R Smith, 'Community Centred Bushfire (Arson) Reduction' (Paper presented at the AFAC conference and Bushfire CRC conference, Perth, 2004), cited in Muller, above n 10, 28.

<sup>179</sup> Muller, above n 10, 29.

<sup>180</sup> State Fire Commission, above n 12, 6.

<sup>181</sup> Victoria, 2009 Victorian Bushfires Royal Commission, above n 2.

<sup>182</sup> Lansdell et al, above n 45.



## 7.4 IS THERE THE NEED FOR FURTHER COMMUNITY EDUCATION PROGRAMS IN TASMANIA?

### 7.4.1 Item 19 – Tasmania Implements Further Community Information and Education Programs

In the course of this project the TFS was asked whether a program similar to that in Western Australia would be suitable in the Tasmanian context. The TFS welcomed a program similar to that run by FESA in Western Australia. The TFS believes specific Tasmanian communities would benefit from arson education and awareness strategies directed toward sectors identified as being at risk. The TFS drew attention to the importance of utilising local knowledge to identify and respond to arson hot spots. They state that 'fires' integrate readily in the community and elicit a level of trust; their knowledge is integral in targeting the 'culture' of the community. However, attention is drawn to the fact that this work cannot be left to the volunteer firefighters living in the community, so these programs are resource dependant.

The TFS made several points relevant to prevention strategies and to this report:

- The importance of the profile of the uniform should not be underestimated.
- It is imperative that young people understand the consequences of their actions when firesetting.
- Education and awareness strategies need to target lower socioeconomic groups in Tasmania.
- For some adults (the ones that set fires for criminal reasons) the only real deterrence is the guarantee they will get caught.<sup>183</sup>

Prevention and deterrence at the primary level have not in the past been confined to community information and education programs. Indeed, the trend is to consider situational factors and social factors as well as data collection and mapping software. Both the TFS and Tasmania Police are committed to the recommendations of the VBRC and arson prevention techniques. They recognise that this crime should not just be left in the hands of the criminal justice system and that there is a range of policy implications as different agencies are concerned with dealing with arsonists and their potential

targets. In this way Tasmania achieves a wholistic community and society approach to arson prevention.

Whether there is a need for further community education programs to be initiated as a part of this response is outside the scope of the Council. The question is better put to those implementing and prioritising policy and direction in this area.

#### Question 19

Should Tasmania implement further community information and education programs?

#### Consultation

The DPEM submitted that there remains a need for continued community information and education programs, which not only inform people concerning their actions when faced by fire, but also targets those areas and communities where arson and fires are particularly prevalent. Hence continuing to apply a focused proactive approach may potentially reduce the need for significant resources to react to bushfires, building fires and vehicle fires.

The TFS stated that this has already been identified as being required through TFS/Tasmania Police working groups. The TFS stated that there is a need for further data analysis work to be progressed to identify the target groups.

DHHS stated that both Children and Youth Services and Housing Tasmania support this proposal. Housing Tasmania states that the deliberate firesetting in Housing Tasmania homes 'erode the community capital and the sense of a functional and vibrant community'.

The Commissioner for Children is supportive of programs targeted to children and young people. The Commissioner encourages further exploration of Western Australia's FESA program, or any other comparable programs targeted at children and young people for delivery in arson prone communities, which might be adapted to the Tasmanian setting. However, these courses need to be appropriately resourced and might include exploration of the capacity of the private sector to assist in this regard.

<sup>183</sup> Meeting with Andrew Comer, AFSM Regional Chief, and Jeff Harper, Deputy Regional Chief, Tasmania Fire Service (12 May 2011).

A submission from a community member, Mr A Hays, suggests an educative response directed at junior school children. It was suggested that local commercial television should be used as the medium to deliver an emotionally charged message to inform this group of the consequences of fire. An example used was that of a video and photograph of a female koala shown drinking from a bottle held by a firefighter. This video was subsequently linked to the Black Saturday bushfires and attracted close to 1,200,000 hits on YouTube. It was also suggested that this message should be delivered without authoritative figures as some children may be averse to messages from those in uniform.

### *Discussion*

The advantage of a program like the arson reduction program run by FESA is that it focuses on the community as a whole to raise awareness and thereby reduce deliberate firesetting. This type of program could be seen as a 'blanket' education program as it is premised on the recognition that many deliberately lit bushfires are lit by children and young people who may have no particular malicious intent but a poor understanding of the consequences of their behaviour.<sup>184</sup> This particular program has a built in evaluation phase that monitors the instances of bushfire arson in the area following intervention. In all instances arson bushfire numbers declined after the intervention.

Crime prevention techniques, like that run by FESA, are seen as a relatively new approach to tackling crime generally. Crime prevention has been subject to much discussion. The main criticism of these types of programs is the lack of research and evaluation processes built into them, which results in a lack of direction. It has also been recognised that these programs suffer from a lack of police involvement.<sup>185</sup> It has been suggested that for this type of program to be successful the program must be based on solid research, it must have an evaluation phase and it should include an approach that considers a whole of government response.

As noted, TFS and Tasmania Police working groups have already recognised the need for community education programs. The TFS states that there is a

need for further data analysis work to be progressed to identify the appropriate target groups. Potentially, data from other agencies, such as police, community service agencies or welfare agencies, could also be used in conjunction with fire service data. Such data may provide information about where other forms of crime or areas of socioeconomic stress intersect with high numbers of deliberate bushfires.

It is obvious that the resourcing of this type of program is an issue. The Arson Control Forum (ACF) has recognised that most of the inhibiting factors in crime prevention programs, unsurprisingly, relate to funding and staffing. Muller<sup>186</sup> believes that if staff are recruited from outside a fire service, a possible outcome is that fire service personnel may not consider the program to be relevant to their work. Such issues may possibly be reduced by building arson reduction programs into the core business of the fire service and using operational personnel so that they feel they have an investment in the success of a program. Building programs into the existing community safety work of the fire service may be easier than obtaining dedicated funding for the programs.

The Commissioner for Children suggested that resourcing might include exploration of the capacity of the private sector to assist in this regard. It is noted that the Australian Bushfire Arson Prevention Initiative was established with seed funding from RACV Insurance.

The Council addressed community education and information programs in this advice as it was part of the initial referral into the topic of arson and deliberately lit fires. The Council addressed this question in the Consultation Paper with the reservation that the question is better put to those implementing and prioritising policy direction in this area.

### *Recommendation 13*

Consideration be given to community crime prevention techniques such as the Fire and Emergency Services Authority (FESA) community arson prevention program.

<sup>184</sup> Muller, above n 10, 28.

<sup>185</sup> Ibid 40.

<sup>186</sup> Ibid 41.

# Appendix A

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## Model Criminal Code Officers Committee – Model Criminal Code

### 4.1.7 Arson

- (1) A person who:
- a. causes damage to a building or conveyance by means of fire or explosive, and
  - b. intends to cause or is reckless as to causing, damage to that or any other building or conveyance,
- is guilty of an offence.

Maximum penalty: Imprisonment of 15 years.

- (2) A person who:
- a. makes to another person a threat to damage any building or conveyance belonging to that other person or a third person by means of fire or explosives, and
  - b. intends that other person to fear that the threat will be carried out or is reckless as to causing that other person to fear that the threat will be carried out,

is guilty of an offence.

Maximum penalty: Imprisonment of 7 years.

- (3) In the prosecution of an offence against subsection (2) it is not necessary to prove that the person threatened actually feared that the threat would be carried out.

- (4) In this section:

*Building* includes:

- a. a part of a building, or
- b. a structure (whether or not moveable) that is used, designed or adapted for residential purposes.

*Conveyance* means motor vehicle, motorised vessel or aircraft.

### 4.1.8 Bushfires

- (1) A person:
- a. who causes a fire, and
  - b. who intends or is reckless as to causing a fire, and
  - c. who is reckless as to the spread of the fire to vegetation on property belonging to another,
- is guilty of an offence.

Maximum penalty: imprisonment of 15 years.

- (2) In this section:

*Causing a fire* includes:

- a. Lighting a fire
- b. Maintaining a fire
- c. Failing to contain a fire, except where the fire was lit by another person or the fire is beyond the control of the person who lit the fire.

*Spread* of a fire means spread of a fire beyond the capacity of the person who caused the fire to extinguish it.

# Appendix B

## Indictable Arson and Fire-Related Offences in Australia

Act	Section	Offence	Maximum Penalty
<b>COMMONWEALTH</b>			
<i>Crimes Act 1914</i>	29 Destroying or damaging Commonwealth property	Intentionally destroying or damaging any Commonwealth property	10 years
<b>ACT</b>			
<i>Criminal Code 2002</i>	404(1) Arson	Causes damage to a building or vehicle by fire or explosive and intends to cause or is reckless about causing damage to that or any other building or vehicle	15 years or 1500 penalty units or both
	404(2)	Makes a threat to damage a building or vehicle by fire or explosive and causes fear to the person receiving the threat	7 years or 700 penalty units or both
	405 Causing bushfires	Intentionally or recklessly causes a fire and is reckless about the spread of the fire to vegetation or property belonging to someone else	15 years or 1500 penalty units or both
<i>Crimes Act 1900</i>	117(1) Arson	Destroys or damages any property by fire or explosive with intent to endanger the life of another	25 years
	117(2)	Dishonestly, with a view to gain, destroys or damages by means of fire or explosive	20 years
<b>NEW SOUTH WALES</b>			
<i>Crimes Act 1900</i>	195 Destroying or damaging property by fire or explosive	Intentionally or recklessly damages property by fire or explosive – in company – during public disorder	10 years 11 years 12 years
	196 Destroying or damaging with intent to injure	Destroying or damaging property intending to cause bodily injury by fire or explosive – during public disorder	14 years 16 years
	197 Dishonestly destroying or damaging property	Dishonestly destroying or damaging property by fire with a view to making gain – during public disorder	14 years 16 years
	198 Destroying or damaging property with intention of endangering life	Destroying or damaging property with the intention of endangering life	25 years
	203E Bushfire offences	Intentionally causes a fire and is reckless as to the spread	14 years
<b>NORTHERN TERRITORY</b>			
<i>Criminal Code Act</i>	239 Arson	Unlawfully setting fire to building, ship, vegetable produce, mine or aircraft	Life
	240 Attempts to commit arson	Attempting to unlawfully set a fire in accordance with section 239	14 years
	241 Setting fire to crops and growing plants	Unlawfully setting fire to crops, vegetables, trees or pasture (indigenous or cultivated)	14 years

QUEENSLAND			
<i>Criminal Code Act 1899</i>	461 Arson	Wilfully and unlawfully setting fire to building or structure, vessel, fuel, cultivated vegetable produce, mine, aircraft or motor vehicle	Life
	462 Attempt to commit arson	Attempting to set a fire contrary to section 461	14 years
	463 Setting fire to crops and growing plants	Wilfully and unlawfully setting fire to crops, indigenous or cultivated hay or grass, indigenous or cultivated trees, saplings or shrubs, or heath, gorse, furze or fern	14 years
SOUTH AUSTRALIA			
<i>Criminal Law Consolidation Act 1935</i>	85 Arson and other property damage	Intending to damage property or being recklessly indifferent as to damage without lawful authority by fire or explosive – threatens	Life  15 years
	85B Special provision for causing a bushfire	Intending to cause or recklessly indifferent as to causing a bushfire	20 years
TASMANIA			
<i>Criminal Code Act 1924</i>	268 Arson	Unlawfully setting fire to any structure or vegetable produce	21 years
	268A Unlawfully setting fire to crops, forest, moorland, peat, etc.	Unlawfully setting fire to any vegetation, living or dead (including forest, tress, saplings, shrubs, grass, litter, bark, logs, etc.)	21 years
	269 Unlawfully setting fire to property	Unlawfully setting fire to any property not covered by section 268 or 268A	21 years
	269A Causing fire with intent to injure person or property	Unlawfully placing flammable or combustible material or doing any other act for the purpose of causing a fire with the intent to injure any person or property	21 years
VICTORIA			
<i>Crimes Act 1958</i>	197 Destroying or damaging property	Intentionally and without lawful excuse destroying or damaging property by fire – intending to endanger the life another – with a view to gain	10 years  15 years 10 years
	197A Arson causing death	Committing arson as defined in section 197 and thereby causing the death of another person	25 years
	198 Threats to destroy or damage property	A threat to destroy or damage any property or damage own property that will endanger life	5 years
	201A Intentionally or recklessly causing a bushfire	Intentionally or recklessly causing a fire, and being reckless as to the spread of fire to vegetation on property belonging to another	15 years
WESTERN AUSTRALIA			
<i>Criminal Code Act Compilation Act 1913</i>	444 Criminal damage	Wilfully and unlawfully destroying or damaging any property by fire	14 years
	554 Attempts and incitement	Attempting to commit an offence or inciting another to commit an offence	7 years

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