

**Review of the  
*Graffiti Control Act (2008) (NSW)***

**Justice Policy Division**

**Department of Attorney General  
and Justice**

**2013**

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## 1. List of findings and recommendations

1. A further review of the *Graffiti Control Act*, including the amendments made by the *Graffiti Legislation Amendment Act 2012*, should be conducted as soon as possible after the period of 3 years from the commencement of the 2012 amendments.

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2. a) The NSW Police Force should consider whether officers would benefit from training on framing charges under the *Graffiti Control Act*.

b) The NSW Graffiti Strategy Management Group should convene a working group, including representatives from NSW Police, BOCSAR, Justice Policy and Court Services, to:

- develop a strategy to improve the accuracy of COPS database entries
  - consider the feasibility of identifying property damage offences involving graffiti in court systems
  - oversee the implementation of any necessary system changes, and
  - report annually to the Attorney General on the total number of graffiti charges laid, the number of graffiti offences charged under any particular offence provision, and the extent of any increase in the use of the provisions in the *Graffiti Control Act*.
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3. Clause 61 of the *Passenger Transport Regulation 2007* should be amended to remove the reference to bill posting.

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4. Part 2 of the *Graffiti Control Act* should be amended to create three offences:

a) Affixing a placard or paper on any premises so as to be visible from a public place, without the consent of the owner or occupier of the premises. Maximum penalty: 4 penalty units

b) Marking graffiti on premises or property, by:

i) intentionally marking premises or property without consent of the owner or occupier of the premises or property. Maximum penalty: 4 penalty units, or

ii) intentionally marking premises or property without consent of the owner or occupier of the premises or property, in circumstances of aggravation, that is, where:

- the mark was made using a graffiti implement, or
- the mark is not readily removable by wiping or by use of water or detergent.

Maximum penalty: 20 penalty units or imprisonment for 12 months (in limited circumstances, as set out in s 4(2) of the *Graffiti Control Act*).

c) Possessing a graffiti implement with the intention that it be used to commit an offence of marking graffiti. Maximum penalty: 10 penalty units or imprisonment

for 6 months (in limited circumstances, as set out in s 5(2) of the *Graffiti Control Act*).

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5. a) Steps should be taken to ensure that data can be collected on the number of community clean up orders made.
  - b) Juvenile Justice and CSNSW should be requested to develop systems to record the number of suitability assessments conducted in relation to community clean up orders, the outcome of each assessment, the reasons for a negative assessment and the number of community clean up orders supervised.
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6. Part 3A of the *Graffiti Control Act* should be amended to provide limits on the number of community clean up hours that may be imposed, in line with section 81 of the *Fines Act 1996*.
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7. Section 9B of the *Graffiti Control Act* should be amended to provide that:

- an order may be made on the court's own motion, or on the offender's application;
  - an offender may apply before, or at the time the fine is imposed, or at any time before the fine has been fully paid or referred to the State Debt Recovery Office;
  - the ability to make an application does not affect section 9N, which states that no appeal lies in respect of a failure to make a community clean up order; and
  - the procedures for applications may be set out in regulations
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8. Further consultation should be carried out in relation to the inclusion of the following council clean up scheme in Part 4 of the *Graffiti Control Act*:

- a) Where graffiti on private property is visible from a public place, a council must notify the owner or occupier of that place that it intends to remove the graffiti.
- b) In the case of residential premises:
  - if the graffiti can be removed without entering the private property, the council may proceed to remove the graffiti if no objection is made following notification
  - if the graffiti cannot be removed without entering the private property, the council may only proceed to remove the graffiti if written consent is provided following notification.
- c) In the case of property other than residential premises, the council may proceed to remove the graffiti if no objection is made following notification.
- d) The liability provisions in s 12 apply where graffiti is removed with implied consent.

## 2. Background

In 2006, the then NSW Government established the Anti-Graffiti Action Team (**AGAT**) to develop new initiatives to respond to graffiti. AGAT was tasked with reviewing all graffiti-related legislation then in force in NSW.<sup>1</sup>

AGAT recommended that relevant legislation be consolidated into a single graffiti Act. In response to the recommendation, Parliament enacted the *Graffiti Control Act 2008* (**the GCA**). The GCA created a single piece of legislation dealing with graffiti offences, the supply of spray paint cans to minors and graffiti removal work by local councils. It commenced on 20 February 2009.

Amendments to the GCA were made by the *Graffiti Control Amendment Act 2009*. These amendments created further offences in relation to the supply and possession of spray paint cans, increased the penalties for certain graffiti offences and introduced a scheme of community clean up orders. The amendments commenced on 30 November 2009, with the exception of the community clean up provisions, which commenced on 3 May 2010.

The NSW Parliament passed the *Graffiti Legislation Amendment Act 2012* on 22 August 2012. That Act commenced on 10 December 2012.

The amendments arising from the *Graffiti Legislation Amendment Act 2012* are substantial. The amendments:

- require a court making a community service order in relation to a graffiti offender to impose a graffiti clean up condition as part of the order
- enable a court to make certain orders with respect to the drivers licence of a person who has committed an offence under that Act
- remove the power for investigating officials and specialist youth officers to deal with young offenders who have committed graffiti offences by way of caution, warning or youth justice conference instead of court proceedings.

## 3. Conduct of the Review

### 3.1 Terms of reference

Section 23 of the GCA provides:

(1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.

(2) The review is to be undertaken as soon as possible after the period of 3 years from the date of assent to this Act.

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<sup>1</sup> J Hatzistergos, 'NSW Government Reviews Graffiti Laws' (Media Release, 16 September 2007).

(3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 3 years

### 3.2 Scope of the Review

This Review considers the provisions of the GCA as at November 2012. It does not review the provisions of the amending Act, which commenced in December 2012.

Reviewing the GCA shortly after it has been significantly amended presents a number of difficulties. The amendments may affect the extent to which the GCA meets its policy objectives, however, this will not be known until sufficient time has passed to evaluate their impact.

The amendments also revise the policy objectives of the GCA. As discussed below, one of the policy objectives of the 2009 amendments was to focus on intervening early with graffiti offenders through options such as youth justice conferences.

The 2012 amendments removed early intervention options for young graffiti offenders, shifting the Act's policy objective to a new one: to make young offenders realise that graffiti is a serious and costly offence.<sup>2</sup>

This Review does not consider the 2012 amendments. However, given their significance and the change in the GCA's policy objectives, it is recommended that a further review, including the 2012 amendments, be undertaken in three years.

#### Recommendation 1

**A further review of the *Graffiti Control Act*, including the amendments made by the *Graffiti Legislation Amendment Act 2012*, should be conducted as soon as possible after the period of 3 years from the commencement of the 2012 amendments.**

### 3.3 Methodology

The Review has been conducted by the Justice Policy Division of the Department of Attorney General and Justice.

Letters seeking input on the operation of the GCA and whether its policy objectives remain valid were sent to key stakeholders in July 2012. Public input was also sought by notices placed in the Daily Telegraph and Sydney Morning Herald newspapers on 1 August 2012. A list of responses is in **Appendix 1**.

In the course of the Review, a number of letters were received from members of the public which, although not sent in response to the call for public submissions, raised issues of relevance to the Review. These letters have also been considered, however, given that they were not intended to be formal submissions, the authors have not been identified in Appendix 1.

<sup>2</sup> NSW, *Parliamentary Debates*, Legislative Council, 10 August 2011, 43.

## 4. Overview of the GCA

### 4.1 Policy objectives of the GCA

The second reading speech for the Graffiti Control Bill 2008 indicates that the legislation was intended to:

- create a single Act to cover every aspect of graffiti law in NSW
- expand existing offences relating to spray cans to include all graffiti implements
- distinguish graffiti offences from other property offences, with the benefit of improving statistics in relation to graffiti, thus informing future graffiti policy
- ensure that laws regulating the sale and display of spray paint are enforced
- control and reduce graffiti in NSW.<sup>3</sup>

The GCA was subsequently amended by the *Graffiti Control Amendment Act 2009*. The objects of the amendments were to:

- increase the severity of penalties for graffiti to deter graffiti offenders;
- focus resources on intervening early with graffiti offenders, particularly through youth justice conferences;
- introduce a scheme of community clean up work to enable offenders to pay off fines by cleaning up graffiti.

### 4.2 Summary of the provisions of the GCA

The substantive provisions of the GCA fall into four categories:

- Offences
- Powers of police and others
- Community clean up work
- Local council removal of graffiti

#### Offences

There are seven offences set out in Parts 2 and 3 of the GCA:

- Damaging or defacing property by means of a graffiti implement (s 4)
- Possession of a graffiti implement (s 5)
- Posting bills and other markings (s 6)
- Sale of spray paint cans to persons under 18 years (s 7)
- Unsecured display of spray paint cans (s 8)
- Supply of spray paint cans to persons under 18 years (s 8A)
- Possession of spray paint cans by persons under 18 years (s 8B)

The GCA provides a general defence to all offences if the act complained of was done with lawful authority.<sup>4</sup>

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<sup>3</sup> NSW, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11759.

<sup>4</sup> *Graffiti Control Act 2008* s 14.

In addition to any penalty imposed for an offence under the GCA, a person convicted of a graffiti offence is liable to pay up to 20 penalty units towards the cost of repairing damage caused by their offence.<sup>5</sup>

Where an offence under the GCA carries a term of imprisonment, a court may only impose a sentence of imprisonment on a 'serious and persistent' offender who is likely to commit a further graffiti offence in the future.

#### Damaging or defacing property by means of a graffiti implement – s 4

A graffiti implement is defined in s 3 to mean spray paint, a marker pen, or any implement designed or modified to produce a mark that is not readily removed by wiping or by use of water or detergent.

Damaging or defacing property using a graffiti implement attracts a maximum penalty of 20 penalty units or imprisonment for 12 months.

Reasonable excuse is a defence to a charge under s 4. The onus of proving reasonable excuse lies on the defendant.

#### Possession of graffiti implement – s 5

Possessing a graffiti implement with intent to damage or deface property carries a maximum penalty of 10 penalty units or imprisonment for 6 months. On conviction, the court may order that the graffiti implement be forfeited to the Crown.

#### Posting bills and other marking offences – s 6

This offence relates to fixing placards or paper on premises, or otherwise marking premises with chalk, paint or other material without consent and in a way that is publicly visible. The offence attracts a maximum penalty of 4 penalty units.

#### Sale of spray paint cans to persons under 18 – s 7

Sale of a spray paint can to a person under 18 years of age carries a maximum penalty of 10 penalty units. A defence is available if the seller believed, on reasonable grounds, that the purchaser was over 18. The offence may be dealt with by issuing a penalty notice carrying a fine of \$550.<sup>6</sup>

#### Unsecured display of spray paint cans – s 8

A failure to secure spray paint cans properly in a shop carries a maximum penalty of 10 penalty units. The offence may be dealt with by issuing a penalty notice carrying a fine of \$550.<sup>7</sup>

#### Supply of spray paint cans to persons under 18 – s 8A

The offence of supplying a spray paint can to a person under 18 was inserted by the 2009 amendments to the GCA, to target adults who purchase cans on behalf of

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<sup>5</sup> Graffiti Control Act 2008 s 18.

<sup>6</sup> Graffiti Control Act 2008 s 16(1), Graffiti Control Regulation 2009 reg 11(1).

<sup>7</sup> Graffiti Control Act 2008 s 16(1), Graffiti Control Regulation 2009 reg 11(1).



children. There are a number of specific defences available for circumstances involving supply for a lawful purpose. The offence carries 10 penalty units.

### Possession of spray paint cans by persons under 18 – s 8B

A person under 18 who is in possession of a spray paint can in a public place is guilty of an offence punishable by a maximum penalty of 10 penalty units or imprisonment for 6 months. Unlike the possession offence in s 5, this offence does not require intention. However, possession for a lawful purpose is a defence.

## **Powers of police and others**

### Confiscation powers

Under s 9, police officers may seize a spray paint can in possession of a person in a public place, if the officer suspects on reasonable grounds that the person is under the age of 18. An officer may not confiscate the can if the carrier satisfies the officer that the possession does not constitute an offence.

### Power to issue penalty notices

Police officers, Fair Trading investigators and certain authorised local council employees can all issue penalty notices for offences under ss 7 and 8 of the GCA.<sup>8</sup>

## **Community clean up work**

Part 3A of the GCA establishes a scheme under which a court imposing a fine for graffiti offences may require an offender to pay off the fine by undertaking community clean up work. One hour of work equates to \$30 of the amount of the fine imposed (s 9G). The scheme is restricted to situations where the court is satisfied that the offender is suitable for community clean up work and such work is available (s 9D).

A community clean up order may be revoked if the offender fails to report for work, or comply with the requirements of the order; or if the offender is no longer capable of or suitable for the work required under the order. An order may also be revoked at the offender's request if the revocation would be in the interests of justice (s 9K).

A court may impose a community service order instead of a fine or a sentence of imprisonment.<sup>9</sup> Following the 2012 amendments, a community service order made in respect of a graffiti offender must include a requirement to clean up graffiti, unless such a requirement is not reasonably practical.<sup>10</sup>

## **Local council removal of graffiti**

Part 4 of the GCA empowers local councils to carry out graffiti removal work and requires councils to keep a register of any graffiti removal work carried out. Under s 11, graffiti removal work may be carried out by agreement with the owner or occupier. Section 12 enables removal without the consent of the owner or occupier if the graffiti is visible from a public place and the graffiti removal is carried out from a public place.

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<sup>8</sup> *Graffiti Control Act 2008* s 16(8), *Graffiti Control Regulation 2009* reg 11(2).

<sup>9</sup> *Graffiti Control Act 2008* s 13B(1). Prior to the 2012 amendments, the power to impose a community service order was provided for in s 15.

<sup>10</sup> *Crimes (Sentencing Procedure) Act 1999* s 90(5); *Children (Community Service Orders) Act 1987* s 11(3).

Section 12 also provides that councils bear the cost of removal work and must pay compensation for any damage caused by carrying out the work.

## **5. Consideration of the GCA's policy objectives**

As discussed above, the purpose of this Review is to consider the validity of the GCA's policy objectives, and whether the terms of the GCA are appropriate for achieving those objectives.

The policy objectives of the GCA, as set out in Part 4 above, are to:

- create a single Act to cover every aspect of graffiti law in NSW and distinguish graffiti offences from other property offences
- improving statistics in relation to graffiti, thus informing future graffiti policy
- expand existing offences relating to spray cans to include all graffiti implements
- control and reduce graffiti in NSW<sup>11</sup>
- increase the severity of penalties for graffiti in order to deter graffiti offenders
- focus resources on intervening early with graffiti offenders, particularly through youth justice conferences
- introduce a scheme of community clean up work to enable offenders to pay off fines by cleaning up graffiti.

This section of the Review considers the validity of each of these policy objectives, and the GCA's success in achieving them. Issues raised by stakeholders in relation to the operation of the GCA are also discussed.

### **5.1 A single Act for all graffiti law in NSW – distinguishing graffiti offences from other property offences and improving statistics in relation to graffiti**

#### ***Validity of the policy objective***

At the time the GCA was introduced, most graffiti offences in NSW were charged as property damage under s 195(1)(a) of the *Crimes Act 1900*. This made it difficult to distinguish offences involving graffiti from those involving other property damage, and consequently to gather useful data to inform graffiti policy. The GCA was introduced to address this conflation of graffiti damage and other property damage, by ensuring that all graffiti damage is separately charged under the GCA.<sup>12</sup>

Legal Aid NSW submitted that having a dedicated graffiti Act feeds the community misperception that graffiti offences are among the most serious offences committed by young people, while in no way reducing graffiti offending.

Although establishing a new Act to consolidate graffiti offences was not the only way to distinguish graffiti damage from other property damage, the policy objective of establishing a clear set of offences for graffiti damage remains a valid one. It is a

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<sup>11</sup> NSW, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11759.

<sup>12</sup> NSW, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11759

useful step in ensuring that graffiti damage is accurately reported and appropriately dealt with.

In relation to Legal Aid's concerns about feeding community misperceptions, it is noted that an aim of obtaining accurate statistics on graffiti offending is to ensure that graffiti offences are not over-reported, and that community perceptions about graffiti can be addressed with evidence of what is actually occurring.

***Achieving the objective through the existing terms of the GCA***

Although the objective of distinguishing graffiti from other property damage remains valid, the GCA has not to date been successful in achieving it.

A number of stakeholders, including Juvenile Justice, Legal Aid and the Youth Justice Coalition, submitted that the GCA has failed in the objective of distinguishing graffiti from other property damage, as the majority of graffiti offences continue to be charged under the *Crimes Act* as property damage.

The Children's Court noted that the offence of damaging or defacing property under s 4 is used comparatively infrequently, as police prefer to charge graffiti offences under s 195 of the *Crimes Act*.

The Ministry for Police & Emergency Services (**MPES**) agreed that action is rarely taken under the GCA. Charges under the *Crimes Act* are preferred. MPES suggested this may be due to difficulties in framing charges under the GCA. As discussed below, this review makes a number of recommendations to simplify the offence provisions in the GCA.

Statistics from the Bureau of Crime Statistics and Research (**BOCSAR**) confirm that the GCA is used infrequently in comparison to the *Crimes Act 1900*. Between April 2009 and March 2012, police recorded 29,568 incidents of graffiti. Police proceeded against 3,297 people for graffiti damage. Of these, 839 people were charged under s 4 of the GCA and 2,458 were charged under s 195(1)(a) of the *Crimes Act*.

As such, approximately 25% of the property damage incidents categorised as graffiti were dealt with under the GCA. The remaining 75% were dealt with under s 195(1)(a) of the *Crimes Act*.

The percentage of offenders dealt with under the GCA could be even less, depending on how reliably police record that a particular incident of property damage involved graffiti. It is noted that, in addition to the graffiti incidents noted above, 246,213 property damage incidents were recorded in the police database over the same period.

Court databases do not capture whether or not property damage charged under s 195(1)(a) of the *Crimes Act* is caused by graffiti. For this reason, it is not possible to determine the outcomes or penalties for the graffiti offenders who were charged with property damage under the *Crimes Act*.

The existing provisions of the GCA have thus not adequately achieved the objective of having graffiti offences dealt with under a single Act, distinct from other property

offences. Further, the continued use of s 195(1)(a) of the *Crimes Act* for graffiti offences makes it impossible to determine exactly how many graffiti offenders there are in NSW, or how those offenders have been proceeded against.

### ***Proposals for better achieving the policy objective***

The development of appropriate policies in relation to the charging, prosecuting and sentencing of graffiti offenders is dependent on having accurate data on how many people are charged with graffiti, how they are proceeded against, and what the outcome of court proceedings is.

Parliament has shown a clear intention that graffiti incidents should be charged under the GCA. However, this is not currently reflected in police practice.

Discussions with police in the course of preparing the Review showed a positive commitment to promoting the use of the Act, but also reluctance to limit police discretion to charge graffiti under the *Crimes Act* or the *Summary Offences Act*.

The Review proposes a number of changes to simplify the offence provisions of the GCA and facilitate their use (see Recommendation 4). In particular, we recommend broadening the current offence in s 4 to incorporate any graffiti marked on property without the consent of the property owner. These reforms should facilitate increased use of the GCA provisions rather than the *Crimes Act* for graffiti offences.

The proposals in recommendation 2 are intended to increase the proportion of graffiti matters charged under the GCA, and track any change in the respective use of the GCA, the *Crimes Act*, and the *Summary Offences Act*.

These proposals recognise that the GCA's primary objective of creating a single Act covering every aspect of graffiti is not being achieved. Monitoring and reviewing the impact of these recommendations will ensure that the next statutory review has adequate data available to determine whether the Act's objective remains valid and is able to be achieved.

### **Recommendation 2**

**a) The NSW Police Force should consider whether officers would benefit from training on framing charges under the *Graffiti Control Act*.**

**b) The NSW Graffiti Strategy Management Group should convene a working group, including representatives from NSW Police, BOCSAR, Justice Policy and Court Services, to:**

- **develop a strategy to improve the accuracy of COPS database entries**
- **consider the feasibility of identifying property damage offences involving graffiti in court systems**
- **oversee the implementation of any necessary system changes, and**
- **report annually to the Attorney General on the total number of graffiti charges laid, the number of graffiti offences charged under any particular**

**offence provision, and the extent of any increase in the use of the provisions in the *Graffiti Control Act*.**

There is a clear overlap between clause 61 of the *Passenger Transport Regulation 2007 (the Regulation)*<sup>13</sup> and the bill posting offence found in s 6(a) of the GCA. The Regulation provides a maximum penalty of 20 penalty units for affixing a poster to a public passenger vehicle or train, or to any railway infrastructure or property. The overlap is a particular concern given that the penalty for bill posting under the Regulation is five times the penalty in the GCA.

It is noted that the Regulation was amended in 2009 to reflect the fact that graffiti offences were consolidated in the GCA. It appears that the bill posting offence in the Regulation was not migrated into the GCA because it can be dealt with by penalty notice. This was seen as a proportionate response to bill posting, as it typically causes less damage than other graffiti.<sup>14</sup>

Although the intention of retaining the offence in the Regulation was to enable bill posting to be dealt with by imposing a relatively minor financial penalty, the outcome has been the opposite. Where bill posting matters have proceeded to court, the penalties imposed under the Regulation far exceed those imposed under the GCA. Since 2009, four offenders have been convicted of bill posting under the GCA, with penalties ranging from \$100-\$200; while five offenders have been convicted under the Regulation, with penalties ranging from \$250-\$750.<sup>15</sup>

In order to ensure that all graffiti offences are dealt with by a single Act, the Regulation should be amended. It is noted that, unlike the bill posting offence in the GCA, the offence in cl 61 may be dealt with by way of a penalty notice. However, it is considered that Parliament clearly indicated a view on the appropriate penalty for bill posting by introducing s 6 of the GCA.

**Recommendation 3**

**Clause 61 of the *Passenger Transport Regulation 2007* should be amended to remove the reference to bill posting.**

## **5.2 Offences that cover the use of all graffiti implements**

### ***Validity of the policy objective***

The GCA was intended to cover graffiti 'done with a variety of different tools ... [including] etching tools'.<sup>16</sup>

As the GCA is intended to deal with all graffiti in NSW, the objective of including all methods of graffiti in the GCA's definitions remains valid.

### ***Achieving the objective through the existing terms of the GCA***

<sup>13</sup> Until February 2013, this offence was found in cl 35(1)(a) of the *Rail Safety (Offences) Regulation 2008*.

<sup>14</sup> Personal Communication, RailCorp, 17 December 2012.

<sup>15</sup> Judicial Information Research System. Note that fines are rounded up to the nearest \$100.

<sup>16</sup> NSW, *Parliamentary Debates*, Legislative Council, 26 November 2008, 11759.

MPES submitted that the existing definition of 'graffiti implement' set out in s 3 of the GCA does not adequately cover all methods of graffiti. They noted the current practice of offenders using acid or similar substances to mark surfaces. A number of other submissions received by Justice Policy outside the scope of the Review also note the growing practice of acid etching.

Currently, etching a surface using a substance may or may not come within the definition of 'graffiti implement' set out in s 3 of the GCA, depending on how the etching is made. If it is made using an 'implement designed or modified to produce a mark that is not readily removed by wiping or by use of water or detergent', the etching would be covered by existing provisions. However, applying etching solution to a surface using some other means, (for example, brushing or rubbing the solution over a stencil), would not be caught by the offence in s 4.

Arguably, acid etching done other than by way of a graffiti implement would come within s 6 of the GCA, which covers markings caused by any 'material'. However, s 6 is intended to capture bill posting and removable markings and, as such, its maximum penalty does not reflect the lasting nature of damage done by acid etching.

The Review agrees that reform is needed to ensure that the GCA adequately covers all methods of graffiti.

### ***Proposals for achieving the objective***

#### **Reform to the definition of 'graffiti implement'**

There are a large number of items that may be used for graffiti but do not come within the meaning of a 'graffiti implement'. For example, graffiti may be done using stationery such as scissors, a compass or correction fluid. The difficulty in attempting to include every item capable of causing graffiti damage within the definition of 'graffiti implement' is that members of the public commonly carry such items for legitimate purposes.

Expanding the definition of 'graffiti implement' to include all items or substances capable of creating graffiti would blur the current distinction between tools that are specifically designed or modified to leave a lasting mark on the one hand, and other objects that might be commonly carried by members of the public on the other. This would result in an excessively broad possession offence in s 5.

Rather than expanding the definition of 'graffiti implement', it is recommended that the offence provisions in the GCA be clarified and simplified.

#### **Alternatives for reform**

Currently, Part 2 of the GCA contains three offences. The Review proposes retaining three offences, but restructuring them, as discussed below.

#### **Offence 1 – Bill posting**

The offence would cover the posting of publicly visible placards and papers on premises, without the consent of the property owner or occupier, equivalent to existing s 6(a) of the GCA.

Currently, s 6 covers both bill posting and low-level marking offences. The proposal separates bill posting and 'marking' type offences, to recognise that the conduct involved in each is inherently different.

It is proposed that the maximum penalty of 4 penalty units be retained.

### **Offence 2 – Marking graffiti**

The current provisions in the GCA recognise a difference between marking graffiti using a specifically designed graffiti implement (s 4), and marking graffiti using some other means (s 6), and provide higher penalties for offences involving a graffiti implement. This distinction acknowledges that the seriousness of a graffiti marking can vary significantly. However, it arguably does not reflect the fact that graffiti markings made other than with a graffiti implement may cause irreparable damage and be equally as serious as graffiti marked with a graffiti implement.

The proposed new offence would draw together and replace the marking offences in ss 4 and 6(b) of the GCA, to form a single offence covering graffiti marking. A simple and an aggravated offence are proposed.

The simple form of the offence would cover intentional marking of premises or property without the consent of the owner/occupier of the premises or property. The maximum penalty would remain at 4 penalty units. This offence would cover the behaviour which previously formed part of s 6(b) and includes marking by way of chalk, paint or other material.

The aggravated form of the offence would cover the same conduct, but would only apply where the marking is made using a graffiti implement, or where the marking is not readily removed by wiping or by the use of water or detergent. The maximum penalty would be 20 penalty units or 12 months imprisonment, as currently provided for in s 4 of the GCA. The limitations on imposing a sentence of imprisonment found in s 4(2) would be retained.

By providing for an aggravated offence where a graffiti implement is used, the proposal recognises the potential seriousness of markings caused by graffiti implements, and retains the existing penalties for such offences. However, the proposal also captures conduct such as acid etching, which does not involve a graffiti implement but which results in a mark that cannot be washed away easily, through a separate circumstance of aggravation.

Currently, s 6(b) applies to markings caused by 'chalk, paint or other material'. Like s 4, the focus of the provision is the method used to cause damage. Provisions framed in this way may not be flexible enough to respond to new methods of marking graffiti that were not anticipated at the time legislation was enacted.

This Review concludes that it would be better to retain this provision without reference to the means by which the mark was made. Further, at present, the offence is only committed if the mark is visible from a public place. This means that a mark made without consent that cannot be seen by the public is not captured. In relation to some railway premises, this creates a more limited offence provision than existed before the consolidation of graffiti offences into the GCA. Previously, any graffiti on

railway property, premises or infrastructure constituted an offence, regardless of whether the graffiti was visible from a public place.<sup>17</sup> This reflected the fact that these sites have historically been the target of graffiti, not all of which can be seen from a public place. The size of these premises, and the difficulty in securing and patrolling them means that they can be significantly damaged by graffiti, both inside and out.

The Review concludes that the real criminality of marking offences is the absence of consent rather than the public (or otherwise) nature of the mark. Therefore, the requirement that the mark be visible from a public place should not be retained in the amended offence provisions.

Removing the requirement that graffiti be visible from a public place may result in graffiti done within private premises (for example, by a tenant) being captured under the GCA. However, this will not render previously legal behaviour, illegal. Rather, this type of offending (as with all types of graffiti) can already be prosecuted as "destroying or damaging property" under s 195 of the *Crimes Act*, an offence which is indictable and carries a maximum penalty of 5 years imprisonment. If, however, the damage warranting a criminal charge is actually graffiti, it is appropriate that it be prosecuted under the GCA, in order to reflect Parliament's intention to have a single Act to deal with all graffiti matters.

### **Offence 3 – Possessing a graffiti implement**

The offence would cover possession of a graffiti implement with the intention to commit the offence of marking graffiti, and would reflect the existing provisions in s 5 of the GCA.

The above framework is consistent with the objects of the GCA and addresses the issues that have been raised in submissions:

- It retains higher penalties for those offenders who use specifically designed 'graffiti implements', such as spray cans or etching tools;
- It incorporates serious graffiti that is done other than by using a graffiti implement, removing the need for prosecutors to establish that an item is a 'graffiti implement' in every case;
- It does not cast the net for the possession offence in s 5 so wide as to capture items commonly carried by the public;
- It creates an offence that is flexible enough to respond to future methods of marking graffiti.

### **Recommendation 4**

**Part 2 of the *Graffiti Control Act* should be amended to create three offences:**

**1. Affixing a placard or paper on any premises so as to be visible from a public place, without the consent of the owner or occupier of the premises. Maximum penalty: 4 penalty units**

**2. Marking graffiti on premises or property, by:**

<sup>17</sup> *Rail Safety Offences Regulation 2008*, cl 35 (prior to 30 July 2009).



a) intentionally marking premises or property without consent of the owner or occupier of the premises or property. Maximum penalty: 4 penalty units, or

b) intentionally marking premises or property without consent of the owner or occupier of the premises or property, in circumstances of aggravation, that is, where:

- the mark was made using a graffiti implement, or
- the mark is not readily removable by wiping or by use of water or detergent.

Maximum penalty: 20 penalty units or imprisonment for 12 months (in limited circumstances, as set out in s 4(2) of the GCA).

3. Possessing a graffiti implement with the intention that it be used to commit an offence of marking graffiti. Maximum penalty: 10 penalty units or imprisonment for 6 months (in limited circumstances, as set out in s 5(2) of the GCA).

### **5.3 Ensure enforcement of laws regulating the sale and display of spray paint**

The second reading speech to the 2009 amendments to the GCA refers to the Office of Fair Trading's audit of 800 retailers, which found 100% compliance with the sale restrictions in the GCA. However, a total of 10 penalty notices have been issued since October 2009 for failure to properly secure spray paint in a shop, and one penalty notice has been issued for sale of spray paint to a person under 18 years of age. The continued use of penalty notices in relation to these offences indicates that the enforcement of the regulations remains necessary, and that the provisions are facilitating that enforcement.

### **5.4 Control and reduce graffiti offending**

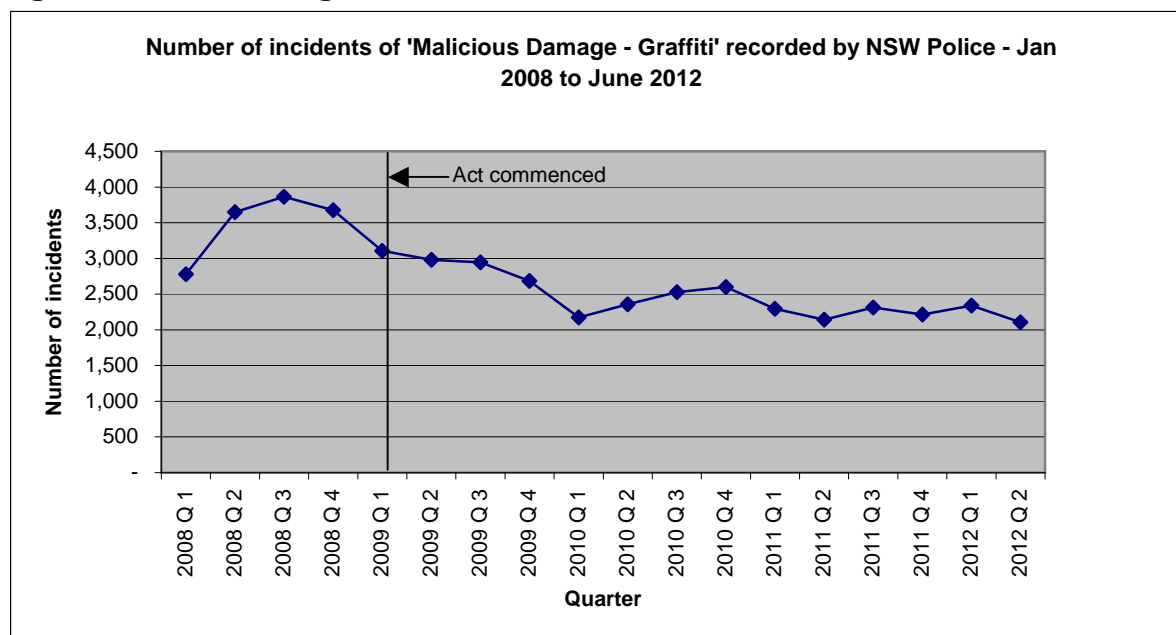
#### ***Validity of the policy objective***

Reducing and controlling graffiti offending is a valid policy objective. Graffiti vandalism is a costly problem. In addition to the substantial costs of clean up, there are significant costs to the community involved in designing surfaces that are resistant to graffiti, and costs to the environment resulting from the chemicals used in graffiti and in removing it.

#### ***Achieving the objective through the existing terms of the GCA***

Figure 1 shows the number of recorded graffiti incidents per quarter since January 2008.

**Figure 1 – Recorded graffiti incidents in NSW since 2008**



The number of incidents per quarter has decreased from 3107 in the first quarter of 2009 (when the GCA commenced), to 2107 in the most recent quarter.

It is not possible to say whether the decrease is attributable to the GCA, or to some other factor. In addition, a long-term analysis of graffiti incidents would be useful in determining how the figures from 2009-2012 compare to previous years.

Although further studies may clarify the extent of, and reasons for, the apparent drop in graffiti incidents, the available information does indicate that graffiti in NSW is declining, in line with the GCA's objectives.

## 5.5 Deter graffiti offenders by increasing penalties

### ***Validity of the policy objective***

The 2009 amendments to the GCA increased custodial penalties in an attempt to deter graffiti offending.

The Australian Institute of Criminology has noted that many policy responses to graffiti, including increased penalties, have not been the subject of adequate research and evaluation and have therefore not been established as effective in reducing graffiti.<sup>18</sup>

Although not specific to graffiti offending, BOCSAR's 2009 report on the deterrent effect of custodial penalties for juveniles found that prison did not exert any specific deterrent effect.<sup>19</sup> On the other hand, BOCSAR noted research that detention does have a significant negative effect on employment prospects, which can increase the likelihood of future arrests, leading to a conclusion that custodial penalties should be used very sparingly with juveniles.

<sup>18</sup> Australian Institute of Criminology, *Key issues in graffiti* (Summary Paper No. 6), 2009.

<sup>19</sup> Bureau of Crime Statistics and Research, *The specific deterrent effect of custodial penalties on juvenile re-offending* (Contemporary Issues in Crime and Justice No. 132), 2009.

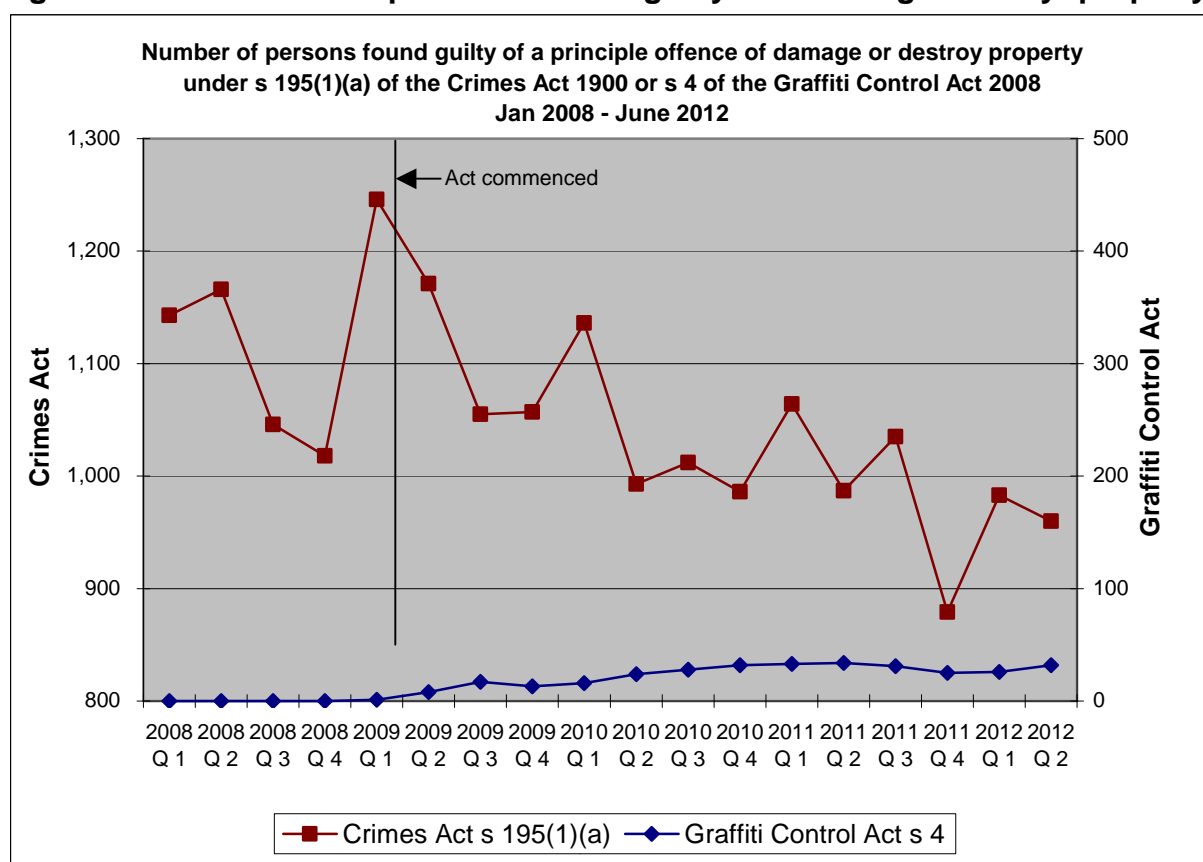
This research raises questions as to whether the policy objective of increasing custodial penalties to deter future offending remains valid.

**Achieving the objective through the existing terms of the GCA**

The Youth Justice Coalition (YJC) submitted that, in relation to young people, custodial penalties are ineffective as a deterrent and are not appropriate for graffiti offences. Legal Aid NSW noted their experience that the GCA has not deterred graffiti offenders, as there has been no change in the number of young people coming before the courts for graffiti offences since the commencement of the GCA.

Figure 2 shows the number of people found guilty of property damage under the *Crimes Act* or graffiti under the GCA between 2008 and June 2012.

**Figure 2 – Number of persons found guilty for damage/destroy property**



Two things are evident from Figure 2. First, as discussed above, the number of people found guilty under s 195(1)(a) the *Crimes Act 1900* far exceeds the number found guilty under the GCA. Second, the number of people found guilty of property damage has fallen overall, but the number found guilty under the GCA has increased. As with the data on recorded graffiti incidents, it is not possible to determine the basis for this change without further research.

As such, the Review is unable to determine whether or not the GCA has succeeded in deterring graffiti offenders.

### ***Detention of young graffiti offenders generally***

PIAC and NSWCCCL expressed concern regarding detention of people under the age of 18 for graffiti offences, especially for up to 12 months. They noted that this exposes young offenders to the influence of more serious offenders, making rehabilitation difficult.

YJC submitted that a control order for graffiti offences is not proportionate to the seriousness of the crime, while Juvenile Justice noted that the penalties in the GCA may contribute to net-widening and suggested that they be reviewed.

The Review notes that one of the policy objectives of the Act was to deter offenders by increasing penalties. Providing terms of imprisonment for particular offences was clearly intended to reflect that goal. However, the GCA contains limitations on the ability of the court to impose a sentence of imprisonment. Imprisonment is only available where an offender has previously been convicted of a graffiti offence 'on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again'.<sup>20</sup> In addition, section 5 of the *Crimes (Sentencing Procedure) Act 1999* states that a court must not impose a sentence of imprisonment unless it is satisfied that no other penalty is appropriate.

Section 6 of the *Children (Criminal Proceedings) Act 1987* also requires a court to have regard to a number of principles when imposing penalties on children, including the fact that children should, wherever possible, be allowed to remain in their home and continue their education and employment without interruption.

Imprisonment or detention therefore serves as a sentencing option to be utilised as a last resort in cases of persistent offending. The use of imprisonment or detention as a sentencing option in circumstances other than these may constitute an appellable error of law.

Statistics from the Judicial Information Research System indicate that only one sentence of imprisonment has been imposed in respect of an offence under the GCA since its commencement. That sentence was for a term of one month.

Given the limited use of imprisonment as a sentencing option for graffiti offences, the Review concludes that the protections in the GCA and other Acts in relation to imposing a sentence of imprisonment are sufficient and that imprisonment should remain available as a sentencing option in relation to certain serious offences under the Act.

## **5.6 Facilitate early intervention with graffiti offenders**

There was strong support among stakeholders for using the provisions of the *Young Offenders Act 1997* to deal with graffiti offenders. Between April 2009 and March 2012, 45% of offenders proceeded against for graffiti were dealt with in court. The majority were dealt with by a police caution or a Youth Justice Conference under the *Young Offenders Act*.

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<sup>20</sup> *Graffiti Control Act 2008* ss 4(2), 5(2).

The most recent amendments to the GCA clearly represent a shift away from this policy objective and focus instead on deterrence and using court proceedings as a method of increasing offender awareness about the impact of their offending.

Given the clear move away from this objective by Parliament, this objective has not been considered in detail here.

## **5.7 Community clean up scheme**

### ***Validity of the policy objective***

Stakeholders raised concerns about the use of fines for young people who are unable to meet fine debt. YJC argued that fining young people may entrench them in poverty, leading to secondary offending. Legal Aid NSW and the NSW Council for Civil Liberties (**NSWCCL**) agreed, stating that the increasing use of fines for young people is ineffective and discriminatory, as they are rarely in a position to pay fines. There are serious ongoing consequences for young people who cannot afford to pay fines.

As such, providing an alternative mechanism for offenders to pay off fine debt in relation to graffiti offences remains a valid policy objective.

### ***Achieving the objective through the existing terms of the GCA***

There was concern among stakeholders that the community clean up scheme has had limited success due to the inability of courts to utilise the provisions. Juvenile Justice and the Children's Court noted that magistrates are frequently unable to make clean up orders, because graffiti offences have not been charged under the GCA.

Stakeholder perception about the limited uptake of community clean up orders is supported by information provided by Juvenile Justice and CSNSW, which indicates the orders are uncommon. Both agencies reported that they supervise few orders. Juvenile Justice estimated that less than five orders have been made in respect of juveniles since the provisions commenced.

### ***Proposals for achieving the objective***

It is anticipated that the above recommendations aimed at ensuring graffiti charges are laid under the GCA will facilitate increased use of the clean up scheme, as community-clean up orders will be available to magistrates sentencing graffiti offenders.

In order to ensure that any change in uptake of the orders can be measured, steps should be taken to ensure that orders are accurately reflected in the systems of the courts, Juvenile Justice and CSNSW. The Review has been advised that CSNSW is already taking steps towards recording the orders.

## **Recommendation 5**

**a) Steps should be taken to ensure that data can be collected on the number of community clean up orders made.**

**b) Juvenile Justice and CSNSW should be requested to develop systems to record the number of suitability assessments conducted in relation to community clean up orders, the outcome of each assessment, the reasons for a negative assessment and the number of community clean up orders supervised.**

Juvenile Justice raised a concern about the absence of a limit on the total number of community clean up hours that can be ordered, stating that this creates an inconsistency between the GCA and the *Children (Community Service Order) Act 1987*.

Section 13 of the *Children (Community Service Order) Act 1987* sets out a method of calculating the maximum number of hours of community service work to be performed by offenders under 18 years of age. The *Crimes (Sentencing Procedure) Regulation 2010* contains a similar provision with respect to adults.<sup>21</sup>

However, sections 9P and 9G of the GCA provide that these limits do not apply in respect of community clean up orders.

This means there is no upper limit on the number of work hours to be performed by defendants who have their fines converted to community clean up hours by the court under the GCA.

Conversely, there *is* an upper limit on the number of work hours to be performed by defendants who do not have their fine converted to community clean up hours, but who then default on payment of their fine.

Section 81 of the *Fines Act 1996* specifies the maximum number of hours of community service work to be completed by fine defaulters (300 hours for an adult and 100 hours for a child), and provides that children may conduct community service work for fine default concurrently with work under another community service order.

The provisions therefore apply more harshly in relation to offenders who have not defaulted on their fines than they do to offenders the State has had to pursue for fine default.

Increasing the number of fines paid by way of community clean-up supports the Government's new policy objective of making offenders aware of the impact and cost of graffiti. As noted by Legal Aid, young offenders who are forced to clean up graffiti damage come face-to-face with the consequences of their actions. For young offenders with no disposable income, undertaking community clean up ensures that they are held directly responsible for their offending, rather than having fines paid by a parent or guardian.

MPES, NSWCCCL and the Public Interest Advocacy Centre (**PIAC**) raised concerns about the imposition of fines on offenders who have no capacity to pay them. These

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<sup>21</sup> *Crimes (Sentencing Procedure) Regulation 2010* r 23.

stakeholders all suggested amendments to increase the number of community clean up orders made by the court.

The Review agrees that it is desirable that community clean up orders be used more regularly. Converting a fine to a community clean up order at the time a sentence is imposed, rather than following default, would reduce the need for enforcement attempts and ensure offenders are required to commence clean up work at an earlier stage.

However, the absence of a limit on the number of community clean up hours that can be imposed means that the current system creates a disincentive for defendants to seek community clean up orders and does not promote early engagement of offenders in clean up work.

It is therefore recommended that amendments be made to the GCA to promote the use of community clean up orders, including an amendment to align the maximum number of work hours under such an order with the limits in the *Fines Act 1996*.

#### **Recommendation 6**

**Part 3A of the *Graffiti Control Act* should be amended to provide limits on the number of community clean up hours that may be imposed, in line with section 81 of the *Fines Act 1996*.**

A number of proposals for increasing the uptake of community clean up orders were suggested by stakeholders.

NSWCCL and PIAC suggested that s 9N of the GCA be amended to allow an appeal on limited grounds where a clean up order is not made by the court. MPES submitted that the court should be required to make a community clean up order where it considers that an offender does not have capacity to pay a fine.

At this stage, amendments to guide judicial discretion, or to enable appeal on the grounds that a community clean up order was not made, are not considered necessary. There is no evidence that the infrequency of community clean up orders is due to the misapplication of judicial discretion. The Children's Court notes that community clean up orders are a useful penalty that Magistrates are commonly unable to utilise, due to the fact that graffiti charges are usually laid under the *Crimes Act*, rather than the GCA.

This Review makes a number of recommendations to increase the frequency with which charges are laid under the GCA, as opposed to the *Crimes Act*. It is anticipated that an increase in the percentage of matters charged under the GCA will have the result of increasing the uptake of community clean up orders, since they will be available to Magistrates in more matters.

The following recommendation proposes amendments designed to ensure that Magistrates turn their mind to the community clean up order provisions, without removing or limiting the discretion of the court not to make an order where it is not suitable.

Section 9B(2) of the GCA provides that a community clean up order may be made by the court at the time the fine is imposed, or at any later time. Recommendation 7 proposes that if a court imposes a fine but no assessment of suitability/work availability has occurred, an offender may request that such an assessment take place. A community clean up order could then be made on a subsequent date. This amendment is intended to clarify the operation of the existing provisions. In particular how the existing power to make a community clean up order 'at a later time' can be exercised. The Local Court raised a concern regarding the procedural mechanism by which a matter would be listed after it has been recorded as finalised. It may be desirable to include a regulation making power in s 9B to provide for regulations to be made that set out the application process.

#### **Recommendation 7**

**Section 9B(2) of the *Graffiti Control Act* should be amended to provide that:**

- **an order may be made on the court's own motion, or on application by the offender;**
- **an offender may make an application before, or at the time the fine is imposed, or at any time before the fine has been fully paid or referred to the State Debt Recovery Office;**
- **the ability to make an application does not affect section 9N, which states that no appeal lies in respect of a failure to make a community clean up order; and**
- **the procedures for applications may be set out in regulations**

## **5.8 Other issues**

### ***Council removal of graffiti***

Justice Policy has been provided with a number of submissions from local councils, separately from this Review, requesting extended powers to remove graffiti from private property without the consent of property owners.

Currently, councils can remove graffiti from property with the consent of the owner or occupier. Councils may remove graffiti without consent if the graffiti is visible from a public place and the removal work is carried out from a public place. Councils have proposed that, in addition to existing powers, they should either:

- be permitted to carry out graffiti removal work from private property without the permission of the property owner or occupier, or
- be permitted to require owners to remove graffiti from their property.

Other submissions to this Review did not propose increased council powers. On the contrary, NSWCCCL submitted that the existing powers of councils to remove graffiti without consent are already too broad and should be restricted. They argued that if existing powers are retained, provision should be made for an owner to obtain permission to create and keep graffiti on their property.



MPES also recognised in its submission that people may view certain graffiti as art, and that there should be a distinction between this type of graffiti and unwanted, unauthorised graffiti vandalism.

These submissions encapsulate the tension between the rights of property owners, the desire to protect appreciated works of street art and community expectations that unsightly examples of vandalism will be removed as quickly as possible.

Mistaken removal of significant street art during graffiti removal operations has, in the past, caused embarrassment and led to significant media coverage and criticism. For example, Melbourne City Council issued an apology after accidentally removing a known artwork by street artist Banksy during graffiti clean up works.

Expansion of council powers to remove graffiti without consent, or to require property owners to remove it would raise a number of concerns in practice. Councils may face liability claims for damage to property or injuries sustained while attempting to gain access to private property, or during removal work. Large compensation claims may arise from the accidental removal of commissioned work. Further, owners who are asked to remove graffiti or to pay for council to remove it may dispute the matter in the Land and Environment Court, leading to increased caseloads for the Court and legal costs for councils, which will be required to resolve disputes about what constitutes 'graffiti'.

The ability of councils to remove graffiti without consent is at odds with other provisions in the GCA. Section 14 of the GCA provides that it is a defence to any charge under the GCA that the defendant acted with lawful authority. As such, there is a distinction between graffiti carried out with lawful permission and that carried out without permission. However, this distinction is not carried through to the graffiti removal provisions, which allow councils to remove lawful graffiti, provided the removal work is carried out from a public place.

The difficulties in providing clarity about what constitutes graffiti vandalism, as opposed to graffiti art, leave property owners who have commissioned or permitted graffiti art on their premises vulnerable to having the work removed without their consent.

For these reasons, the Review concludes that an appropriate response to Councils' concerns would be the introduction of an implied consent model.

The Review recognises that, in some instances, unsightly or offensive graffiti on private property cannot be easily removed by councils. For example, graffiti on upper levels of commercial buildings may be highly visible from a public place, but may not be accessible from the ground for council removal.

At present, under section 11 of the GCA, such graffiti could only be removed if the property owner gives express permission. Obtaining express consent from a corporation or other large organisation may be difficult in practice and, as such, may significantly hamper council attempts to remove offensive or unsightly graffiti.

'Implied consent' models exist in Queensland and Victoria. Those models operate as follows:

Summary Offences Act 2005 (Qld)

Part 3 of the Act deals with the removal of graffiti.

Under the provisions, a graffiti removal officer may remove 'public graffiti', that is, graffiti in, or readily seen from, a public place. In order to remove graffiti, an officer may enter:

- a public place
- vacant land, or premises other than a dwelling (with the express or implied consent of the owner)
- a dwelling or land around a dwelling (with the express consent of the owner).

Consent by an owner is unnecessary if graffiti can be removed by leaning or reaching into the place, or if the graffiti is on property bordering a public place (for example, on a front fence), provided that the removal creates minimal intrusion.

Where consent to enter a place is given by the owner, that consent may be subject to conditions. The officer may only exercise powers subject to those conditions.

In the case of vacant land or premises other than a dwelling, a council must provide the owner with a graffiti removal notice. The Act sets out the ways in which a notice can be given. If, within 14 days of the notice being given, the owner has not objected to the graffiti removal, the owner is taken to have consented to the removal and the officer may enter the premises or land.

Graffiti removal officers are protected from liability for acts or omissions made honestly and without negligence. However, liability for such actions attach to the State, or to the local government that appointed the officer.

A person may claim compensation if they incur a loss because of the exercise of power by a graffiti removal officer.

The Act prohibits any attempt to require an owner to pay for the costs of removing graffiti. However, the Act does allow owners and councils to reach agreement as to who will be responsible for the costs of removal.

Graffiti Prevention Act 2007 (Vic)

Part 4 of the Act deals with removal of graffiti.

A council may remove graffiti that is visible from a public place in the following circumstances:

- where entry to private property is required: if, following 28 days notice of the intended removal, the owner or occupier of the property has provided written consent to the removal and to the entry to the property for that purpose.

- where entry to private property is not required: if, following 10 days notice of the intended removal, no objection to the removal has been made by the owner or occupier of the property.

The Act sets out the methods for giving notification of intended removal.

No compensation is available in respect of any loss, damage or injury resulting from any act or omission done in good faith under the Act.

The Act clarifies that there is no duty on a council to remove graffiti from private property.

### Proposed model for council removal of graffiti in NSW

Both Victoria and Queensland models balance the rights of property owners with the need for expediency where council removal of graffiti is required. They require owners or occupiers to be given notice of impending removal, thus minimising the risk of accidental removal of commissioned works. In the case of non-dwellings, they also enable councils to take action to remove graffiti on the basis of implied consent.

Noting the potential difficulties involved in obtaining consent from corporate owners and owners of vacant land, the Review recommends the introduction of similar implied consent provisions in NSW, with the following features:

- where graffiti on private property is visible from a public place, a council must notify the owner or occupier of that place that it intends to remove the graffiti
- in the case of residential premises:
  - if the graffiti can be removed without entering the private property, the council may proceed to remove the graffiti if no objection is made within 14 days following notification
  - if the graffiti cannot be removed without entering the private property, the council may only proceed to remove the graffiti if written consent is provided following notification
- in the case of property other than residential premises, the council may proceed to remove the graffiti if no objection is made within 14 days following notification.

The provisions should set out the procedures for giving notification of intended removal and the appropriate period for consent. A period of 14 days has been recommended for the implied consent provisions, following the Queensland model. It is noted that the Victorian Act provides a notification period of 28 days where entry to private property is required. That timeframe provides an extended opportunity for owners to provide written consent to the removal of graffiti, however, if written consent is not provided, the council cannot proceed, even after 28 days have elapsed. While a separate notification period has not been recommended here, there would be nothing preventing a council from proceeding with removal works if express consent were to be provided more than 14 days after notification.

The GCA provides, in section 12, that councils bear the cost of graffiti removal work where the removal is carried out without the agreement of the owner. Section

13(2)(d), however, envisages the possibility of some costs of removal being borne by the owner or occupier, where removal work is carried out with consent.

It is proposed that councils continue to bear the cost of removal in cases where they proceed without express consent, consistently with section 12. However, where owners provide written consent for removal, it should be open for owners and councils to reach an agreement as to who should bear the costs of removal, as envisaged by s 13(2)(d) of the GCA, and in line with the Queensland provisions.

Similarly, s 12(5) provides that councils must pay compensation for any damage caused by carrying out graffiti removal work without the agreement of an owner or occupier. The Queensland Act also provides for compensation, but notes that the mere removal of graffiti of itself does not give rise to a compensable loss. The Victorian provisions do not allow compensation, but they do not provide for entry to premises without express consent.

The proposed model retains s 12(5) of the GCA, so councils may be liable for damage caused by carrying out graffiti removal work in the absence of express consent.

It is recognised that there are a large number of councils who would be affected by the proposed changes. As such, we have recommended that our proposed model should be the subject of further consultation.

#### **Recommendation 8**

**The Department of Attorney General and Justice should conduct further consultation in relation to the inclusion of the following council clean up scheme in Part 4 of the *Graffiti Control Act*:**

**a) where graffiti on private property is visible from a public place, a council must notify the owner or occupier of that place that it intends to remove the graffiti**

**b) in the case of a residential premises:**

- if the graffiti can be removed without entering the private property, the council may proceed to remove the graffiti if no objection is made following notification**
- if the graffiti cannot be removed without entering the private property, the council may only proceed to remove the graffiti if written consent is provided following notification**

**c) in the case of property other than a residential premises, the council may proceed to remove the graffiti if no objection is made following notification.**

**d) the liability provisions in s 12 apply where graffiti is removed with implied consent.**

## **Appendix 1 – List of submissions**

Submissions to the Review were received from the following individuals and organisations:

- Youth Justice Coalition
- Ministry for Police & Emergency Services
- Legal Aid NSW
- Public Interest Advocacy Centre
- NSW Council for Civil Liberties
- Department of Family & Community Services
- Juvenile Justice Division of the Department of the Attorney General & Justice
- Children’s Court NSW
- Corrective Services NSW