

Discussion Paper

Review of the *Graffiti Control Act 2008*

October 2019

A decorative graphic in the bottom left corner consisting of several overlapping, light blue, rounded shapes that resemble stylized petals or leaves, arranged in a fan-like pattern.

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1. Introduction and context

Review of the Graffiti Control Act

The *Graffiti Control Act 2008* (**the Act**) deals with graffiti offences, the supply of spray paint cans to minors, graffiti removal work by local government and illegal bill posting. The Act was introduced to consolidate all aspects of graffiti law ranging from graffiti offences through to the regulation of the possession and sale of spray paint.

The Act expanded existing offences relating to spray cans to include all graffiti implements, and improved the enforcement of regulations relating to the sale and display of spray paint cans. The Act also distinguishes graffiti offences from other property offences in order to improve statistics on graffiti and therefore better inform graffiti policy and decision-making.

The legislation requires a review to determine whether the Act's policy objectives remain valid and whether its terms remain appropriate for securing these objectives.

Purpose of this statutory review discussion paper

This discussion paper describes key components of the Act and any known issues with its provisions. The discussion paper also asks targeted questions seeking stakeholders' views on these issues. Stakeholders are also welcome to raise any issues outside of these targeted questions.

How to make a submission

The Department of Communities and Justice welcomes input from the public, community organisations, local councils and NSW Government agencies. Submissions can be made:

By email to: policy@justice.nsw.gov.au (with the subject 'Graffiti Control Act Review')

By mail to: Graffiti Control Act Review
Law Enforcement & Crime Policy
Department of Communities and Justice
Locked Bag 5111
Parramatta NSW 2124

Submissions close: 10 February 2020

For more information about the review or making a submission, please email policy@justice.nsw.gov.au.

2. Questions

1. Do the offences under the Act adequately capture graffiti-related behaviour?
2. Are the current penalties for offences under the Act, including the higher maximum penalties for serious and persistent offenders and the alternative penalties, appropriate?
3. Are there any issues with the mandatory clean-up requirements in community service orders?
4. Is the current scope of bill posting regulation sufficient?
5. Should liability for bill posting extend to those that authorise or otherwise benefit from the illegal posting of a bill, as in some other Australian jurisdictions?
6. If so, should liability only be where councils 'opt in'?
7. Should local councils be required to provide more areas for free and lawful posting?
8. Are there any improvements that can be made with the current community clean up order scheme or with the powers provided to local councils for graffiti removal?

3. Offences under the Act

Overview of key offences

The Act intends to capture criminal conduct related to graffiti. Key offences in the Act are:

- marking premises or property (section 4)
- possession of a graffiti implement (section 5)
- posting bills (section 6)
- sale of spray paint cans to people under 18 (section 7)
- supply of spray paint cans to people under 18 (section 8A) and
- possession of spray paint cans by people under 18 (section 8B).

NSW courts finalised a total of **960** charges for offences under the Act from July 2018 to June 2019. The Local Court dealt with 570 of these cases and the Children's Court 390.

The table below shows the number of people charged and convicted for the five most common offences under the Act. These offences are discussed in further detail below.

Provision	Offence	Charged	Convicted
4(1)	Intentionally mark premises without prescribed consent	238	211
4(2)	Intentionally mark premises without prescribed consent where the mark is not readily removable	418	369
5(1)	Possess graffiti implement with intent to commit a s4(2) offence	214	185
6	Bill posting without consent	57	57
8B(1)	Possession of spray paint in public place by a person under 18	33	30

Source: NSW Bureau of Crime Statistics and Research

Offences relating to graffiti marking

The Act has two graffiti marking offences:

1. Section 4(1): a lower level offence for non-permanent markings that can be removed by soap and water.
2. Section 4(2): an aggravated offence for markings that are not readily removable by wiping or by the use of soap and water.

Offences relating to possession of graffiti implements

Section 5 of the Act makes it an offence for a person to possess a graffiti implement with the intention of committing an offence under the Act. A graffiti implement is a spray can, a marker pen or any implement designed or modified to produce a mark that is not readily removable

Offence relating to the posting of bills

Section 6 makes it an offence for a person to intentionally affix a placard or paper, within view from a public place, on any premises without the consent of the owner or occupier of the premises. Bill posting is further discussed in Chapter 5 of this paper.

Offences relating to aerosol spray paint cans

Part 3 of the Act prohibits the sale or supply of aerosol spray paint cans to people under 18. There are additional offences for possession of aerosol spray paint cans by individuals under the age of 18 and unsecured retail storage of spray cans. Police may, in a public place, confiscate spray cans from a person they reasonably believe to be under 18.

Question

- 1. Do the offences under the Act adequately capture graffiti-related behaviour?***

4. Penalties for offences under the Act

Summary of maximum penalties

The table below shows the maximum penalties that are available for offences under the Act. One penalty unit is \$110.

Section	Offence	Max penalty
4(1)	Intentionally mark premises without prescribed consent	4 penalty units
4(2)	Intentionally mark premises without prescribed consent where mark is not readily removable	20 penalty units or a driver license order and/or a community service order
4(4)	Intentionally mark premises without prescribed consent where mark is not readily removable and offender is a serious and persistent offender	20 penalty units or imprisonment for 12 months
5(1)	Possess graffiti implement with intent to contravene section 4	10 penalty units or a driver license order and/or a community service order for community clean up work
5(2)	Possess graffiti implement with intent to contravene section 4 – serious and persistent offender	10 penalty units or imprisonment for 6 months, or a driver license order and/or a community service order for community clean up work
6	Bill posting without consent	4 penalty units
7(1)	Sale of spray paint to person under 18	10 penalty units
8(1)	Unsecured display of spray paint cans by retailers	10 penalty units
8A(1)	Supply of spray paint can to person under 18	10 penalty units
8B(1)	Person under 18 possess spray paint in public place	10 penalty units
8B(5)	Person under 18 possess spray paint in public place – serious and persistent offender	10 penalty units or imprisonment for 6 months

Alternative penalties which may apply

As noted in the table above, a court may impose different penalties on a person for an offence under s.4(2) or s.5. Instead of imposing a fine, a court may make a community service order directing the offender to perform community service work for a specified number of hours. Following amendments in 2012, a court that imposes a community service order for an offence under the Act must include a condition that the offender cleans up the graffiti, unless such a condition is not reasonably practicable. The purpose of these conditions is to ensure that an offender contributes to remediating the damage caused by graffiti offences.

A court may also make a driver licence order, in addition to or instead of imposing a fine or sentencing a person to imprisonment for an offence under s.4(2) or s.5. A driver licence order is either an order extending a person's learner or provisional licence period for a maximum of six months or an order requiring a person not to incur a certain number of demerit points for a maximum period of six

months. Where a person incurs the number of demerit points specified in the driver licence order, the person's licence is suspended for 3 months.

There are also penalties of up to five years imprisonment for the more serious offence of maliciously damaging property under the *Crimes Act 1900* (NSW).

Questions

- 2. *Are the current penalties for offences under the Act, including the higher maximum penalties for serious and persistent offenders and the alternative penalties, appropriate?***

- 3. *Are there any issues with the mandatory clean-up requirements in community service orders?***

5. Bill Posting

Offences relating to bill posters

It is an offence under s.6 of the Act to affix placards or papers on any premises, within view from a public place, without the consent of the owner or occupier of the premises. This includes light and electricity poles, walls, trees, bus shelters and fences.

Generally, the cost of removing illegal commercial bill posters is borne by local councils, and ultimately rate payers. The City of Sydney has indicated that it spent approximately \$900,000 in 2014-15 on the removal of unlawful bills. This does not include costs associated with repairing surfaces that are damaged during the bill removal process or the cost of patrolling areas that have recently been cleaned up. Unlawful bill posting may also increase litter, including blockage of storm water drains, which also incurs costs for local councils.

Prosecutions for bill posting offences have risen steeply since the introduction of the current bill posting provision in 2014, from 20 convictions in its first year to 98 convictions in 2017-18¹. This increase in prosecutions has highlighted an opportunity for reform to reduce bill posting and removal costs for local government.

Section 6 currently only applies to individuals who affix posters and not to those who commissioned the poster or who stand to derive a financial benefit from it. The majority of bill posters are commercial advertisements, however there is no mechanism in the Act to enable the prosecution of the promoters or those who seek to benefit from commercial bill posting.

Bill posting offences in other jurisdictions

In addition to people who actually post a bill, anti-graffiti legislation in other jurisdictions captures people who authorise, commission, arrange, incite, cause, counsel or procure the posting of a bill (an 'authorising offence'). Victoria, South Australia and Western Australia have legislated for this type of authorising offence², and it carries equal or greater penalties in those jurisdictions than the offence of bill posting itself.

Consideration of a similar offence in NSW

This review is considering whether the Act should be amended to introduce a new statutory duty on those who promote or otherwise seek to commercially benefit from a commercial event. The duty would require these persons or corporations to take reasonable steps to ensure that the promotion does not involve unlawful bill posting by allowing the prosecution of people (or corporations), even if they did not post the bill themselves. A suggested option for this offence is outlined below.

Suggested option

A new 'authorising offence,' similar to those in Victoria, South Australia and Western Australia, could be introduced in NSW. This would allow prosecutorial action or the issuance of penalty notices against a person or a corporation that authorises the illegal posting of a bill. This offence could apply if the person who authorised the illegal bill posting did so intentionally (as to derive a commercial benefit), recklessly or negligently.

This option would be available for local councils who 'opt in.' Opting in would in turn require local councils to provide designated areas where bill posting is lawful. This option would deter unlawful bill posting without stifling commercial interests.

¹ Bureau of Crime Statistics and Research.

² *Summary Offences Act 1966* (Vic) s10(2) and (3), *Local Nuisance and Litter Control Act 2016* (SA) s23(2), *Litter Act 1979* (WA) s24B(1).

Questions

- 4. *Is the current scope of bill posting regulation sufficient?***
- 5. *Should liability for bill posting extend to those that authorise or otherwise benefit from the illegal posting of a bill, as in some other Australian jurisdictions?***
- 6. *If so, should liability only be where councils 'opt in'?***
- 7. *Should local councils be required to provide more areas for free and lawful posting?***

6. Clean-up powers and orders

Community clean-up orders

Part 3A of the Act allows offenders to pay off fines by undertaking court-ordered community clean-up work and a two hour graffiti education program. Each hour of clean-up work pays off \$30 of their fine, and the clean-up order cannot exceed 300 hours for an adult or 100 hours for a child.

The scheme is restricted to situations where the court is satisfied that the offender is suitable for community clean-up work and that such work is available. 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 where the offender is no longer capable of or suitable for the work. An order may also be revoked at the offender's request if the revocation would be in the interests of justice.

Graffiti removal by local councils

Part 4 of the Act allows local councils to carry out graffiti removal work on private land with or without the consent of the owner or occupier. A local council may only commence graffiti removal work without the consent of the owner or occupier if the graffiti is visible from a public place. If graffiti removal is carried out without consent, the local council is required to:

- bear the cost of the work
- carry out the work from a public place and
- give the owner or occupier written notice (within a reasonable period) that the work has occurred.

Local councils are required to keep a register of graffiti removal work under s.13 of the Act. The register must specify the nature of the work carried out and the actual or estimated costs of carrying out the work. In the case of graffiti removal work done in agreement with the owner or occupier, the local council must record in the register the actual amount charged for carrying out the work.

Question

8. Are there any improvements that can be made with the current community clean up order scheme or with the powers provided to local councils for graffiti removal?