

Review of the Graffiti Control Act 2008 (NSW)

Legal Aid NSW submission to the
Department of Communities and
Justice

10 February 2020

323 CASTLEREAGH ST
HAYMARKET NSW 2000

Legal Aid 
NEW SOUTH WALES

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Children's Legal Service (**CLS**) advises and represents

children and young people involved in criminal cases in the Children's Court, including young people appearing before the Children's Court for parole matters.

CLS lawyers also visit juvenile justice centres and give free advice and assistance to young people in custody.

The Legal Aid NSW Children's Civil Law Service (**CCLS**) provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS works in collaboration with criminal lawyers in the CLS, the Aboriginal Legal Service NSW/ACT and Shopfront Youth Legal Centre to provide joined up legal services to vulnerable young people.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice on the review of the *Graffiti Control Act 2008* (NSW). Should you require any further information, please contact:

Brianna Terry
Senior Law Reform Officer
Strategic Law Reform Unit
Policy, Planning and Programs

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to Department of Communities and Justice (**Department**) on the Review of the *Graffiti Control Act 2008* (NSW) (**Graffiti Control Act**).

Broadly, we reiterate the concerns outlined in our 2012 submission to the previous review of the Graffiti Control Act, published in 2013 (**2013 Statutory Review**). Legal Aid NSW is of the view that having a dedicated 'graffiti' Act, rather than dealing with graffiti offences as a malicious damage offence under the *Crimes Act 1900* (NSW), feeds a community misconception that graffiti offences are amongst the most serious offences committed by children.

The Graffiti Control Act was introduced with the aim of reducing graffiti offending by young people. The discussion paper also notes that the Graffiti Control Act distinguishes graffiti offences from other property offences in order to improve statistics on graffiti, and therefore better inform graffiti policy and decision-making.

However, we note that the Department's website outlines problems obtaining accurate data on graffiti offences:

Exact figures in regard to graffiti vandalism are hard to obtain, both because graffiti vandalism is an under-reported crime, and due to irregular and inconsistent reporting of data by government agencies, businesses, the community and private property owners.¹

The Department's website also states that graffiti offences reported to NSW Police in the five-year period to June 2016 have declined, down an average of 7.5 per cent per year.²

We are not aware of more current data on graffiti offences in NSW. We note that the 2013 Statutory Review recommended that the NSW Graffiti Strategy Management Group convene a working group to develop a strategy to improve data and report annually to the Attorney General on the number of graffiti charges laid.

We would welcome further information from the Department including the rates of graffiti offending and any evidence-based research investigating how provisions such as banning sales of aerosol cans to young people under the age of 18 years has impacted on illegal graffiti offending. We would also welcome any further information from the Department on whether the statistics collected have informed the development of non-legislative responses to reducing graffiti offending, such as through crime prevention strategies.

For the present review, we have confined our comments to question 2, regarding the penalties for offences under the Graffiti Control Act.

¹ NSW Department of Communities and Justice, '*Graffiti Facts and Figures*', (web page, 12 October 2016)

<http://www.crimeprevention.nsw.gov.au/Pages/cpd/protectcommunity/graffitivandalism/facts_and_figures.aspx>

² Ibid.

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

Interaction with the Young Offenders Act 1997 (NSW)

Legal Aid NSW's primary concern regarding the operation of the Graffiti Control Act is its interaction with the *Young Offenders Act 1997 (NSW) (YOA)*. Under the YOA, a police warning or caution may not be given for a graffiti offence, and police cannot refer a child to a youth justice conference for graffiti offences.³ Only courts may give children charged with graffiti offences a caution under the YOA,⁴ or refer the child to a youth justice conference.⁵ In our view this undermines the diversionary philosophy of the YOA, and its principles, including that "*criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.*"⁶

The 2013 Statutory Review stated that amendments to the Graffiti Control Act in 2012 revised its policy objectives:

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.

Legal Aid NSW considers that this policy objective should be balanced with an objective for early intervention and diverting children away from the criminal justice system. In our view, requiring all young people charged with graffiti offences to attend court unnecessarily criminalises young people, impacts on court resources and is not the most effective way to educate children on the seriousness and cost impacts of graffiti.

Sentencing data shows that most common outcome for young people charged with graffiti offences is for the Children's Court to dismiss their charges under section 33 (1)(a) *Children (Criminal Proceedings) Act 1987 (NSW)*.⁷ The second most common outcome is dismissal of the charges by a youth justice conference under section 57(2) of the YOA.⁸

³ *Young Offenders Act 1997 (NSW)* ss 13, 14 & 37.

⁴ *Young Offenders Act 1997 (NSW)* s 31.

⁵ *Young Offenders Act 1997 (NSW)* s 40(1A).

⁶ *Young Offenders Act 1997 (NSW)* s 7(c).

⁷ Judicial Commission of New South Wales, *Judicial Information Research Service* (web page, September 2019) <<https://jirs.judcom.nsw.gov.au/penstats/nswlj/nsw2008-100A.html>>. During the period from April 2015 to March 2019, the Children's Court dismissed 44.6 per cent of charges under section 4(1), 38.6 per cent of charges under section s 4(2), 45.4 per cent of charges under s 5(1), 50 per cent of charges under s 6, and 45.5 per cent of charges under s 8B(1) of the *Graffiti Control Act 2008 (NSW)*.

⁸ Judicial Commission of New South Wales, *Judicial Information Research Service* (web page, September 2019) <<https://jirs.judcom.nsw.gov.au/penstats/nswlj/nsw2008-100A.html>>. During the period from April 2015 to March 2019, a Youth Justice Conference dismissed 21.4 per cent of charges under section 4(1), 25.8 per cent of charges under section s 4(2), 18.6 per cent of charges under s 5(1), 50 per cent of charges under s 6, and 24.8 per cent of charges under s 8B(1) of the *Graffiti Control Act 2008 (NSW)*.

We consider that the YOA offers the best opportunity for young people to be sanctioned and educated in relation to graffiti offences. We recommend that both police warnings and cautions be available for graffiti offences under the YOA, and that police should also be able to refer young people to youth justice conferences. As noted above, currently, only the court can divert a young person charged with a graffiti offence to a YOA caution or a youth justice conference.⁹

Case Study: 14-year-old child taken to court for using texta to write name

Our client was 14 years old, and had no criminal record. He was arrested for using a texta to write his name on a traffic box.

Our client could not be cautioned by police for this offence. He attended the Children's Court, which dismissed the charges against him.

At a youth justice conference, a young person comes face-to-face with the person(s) whose property has been damaged by their graffiti. For example, a shop owner affected by a child's graffiti offending can explain the impact of the graffiti including the costs of cleaning and loss of business. In our view, this provides an effective means of achieving the policy objective of making a young person understand the consequences of graffiti.

The YOA also provides for the conditions of a youth justice conference outcome plan to be targeted towards addressing graffiti offending. The *Young Offenders Regulation 2016* (NSW) includes specific requirements for the outcome plan for graffiti offences, which must include graffiti clean-up, participation in a personal development, educational or other program, or fulfilment of an obligation suggested by the victim of the offence that is consistent with the objects of the YOA.¹⁰

Legal Aid NSW considers this is a much more effective rehabilitation process for a young person who has committed a graffiti offence compared to traditional court outcomes such as a fine. As most young people have little or no income, fines can have a disproportionate effect, particularly on young people from disadvantaged backgrounds.¹¹ For example, in the financial years 2016-17 to 2017-18, fines was the second most common legal issue that Legal Aid NSW's Children's Civil Law Service supported children with. Accumulating fine debt can also lead to licence sanctions, which can detrimentally impact on a young person's access to study and work, and has a disproportionate impact on people in rural, regional and remote areas, and those in areas not well serviced by public transport. Fines can also be an ineffective sentencing option for young people, lacking deterrent and rehabilitative effect.¹²

⁹ *Young Offenders Act 1997* (NSW) s 40(1A).

¹⁰ *Young Offenders Regulation 2016* (NSW) r 9 (2).

¹¹ J Quilter and R Hogg, 'The hidden punitiveness of fines' (2018) 7(3), *International Journal for Crime, Justice and Social Democracy*, 9, 15.

¹² NSW Law Reform Commission, *Report 132: Penalty Notices* (February 2012), 330-332.

Allowing police to give warnings and cautions for graffiti offences and divert young people to youth justice conferences would also save considerable court time and resources.

We note that the NSW Legislative Assembly Law and Safety Committee (the **Committee**) recommended that the NSW Government review the YOA and determine whether police should be able to issue warnings and cautions and refer young people to youth justice conferences for additional offences, in appropriate matters.¹³ We agree with the Committee's comments regarding the suitability of graffiti offences to be dealt with under the YOA:¹⁴

[T]he Committee notes that certain offences may be excluded or partially excluded from the YOA because of a concern that a YOA outcome or police referral would not be sufficient to hold a young person accountable for these types of offences. However, some types of excluded offences may actually be better dealt with by a YOA outcome or police referral, given an appropriate case. For example, were a young person to attend a youth justice conference for a graffiti offence, face his or her victim, and make reparation for his or her behaviour this may better assist to hold him/her accountable than a fine issued by a court.

Cumulative Community Clean Up Orders

Legal Aid NSW supports discretionary alternatives to satisfying fines, such as community clean up orders (Part 3A Graffiti Control Act). We also support participation in graffiti prevention programs as part of community clean up orders (section 9H), which seek to address the underlying causes of graffiti offending such as boredom, disengagement from school, peer pressure, self-expression or dealing with trauma.

However, Legal Aid NSW is concerned about the impact of unlimited accumulation of hours of community clean up work, particularly on children. Section 9G(2) of the Graffiti Control Act provides that the number of hours specified in any one community clean up work order is additional to any number of hours of community clean up work or community service work required to be performed by the offender under any other order. Although s 9G(4) allows for concurrent orders to be made for child offenders, this appears to be discretionary and does not appear to restrict the operation of s 9G(2), which provides that any limit on the total number of hours of community service work that a person may be required to perform at any one time under another Act, does not apply to any hours required to be performed by an offender under a community clean up order. Section 9P also expressly states that s 13 of the *Children (Community Service Orders) Act 1987*

¹³ Law and Safety Committee, NSW Legislative Assembly, *The Adequacy of Youth Diversion Programs in New South Wales* (Report, September 2018), ix.

¹⁴ Law and Safety Committee, NSW Legislative Assembly, *The Adequacy of Youth Diversion Programs in New South Wales* (Report, September 2018), 22.

(NSW),¹⁵ which provides limits on the total number of hours of community service work that can be imposed on children, does not apply to community clean up orders.

We do not support this approach, and consider that the Graffiti Control Act should be amended to include a total limit on the number of hours of community clean up and community service work that children can accumulate, in line with the *Children (Community Service Orders) Act 1987* (NSW).

Driver licence orders

Legal Aid NSW is concerned about the inclusion of Part 4A Graffiti Control Act concerning driver licence orders. Legal Aid NSW does not support driver licence orders as a consequence for graffiti offending, as there is no nexus between graffiti offences and road safety. Driver licence orders that extend learner or provisional driver licence periods or reduce the number of demerit points can lead to loss of licence, further traffic offending, and can significantly impact on a young person's access to study and work.

Mandatory graffiti clean up

If a community service order is imposed on a child for a graffiti offence, the court must impose a graffiti clean up condition as part of the order.¹⁶ Legal Aid NSW is concerned about the imposition of this mandatory requirement, which removes judicial discretion about the types of work that can be performed as part of a community service order. We reiterate our recommendation above, that the YOA offers the best opportunity for young people to be sanctioned and educated in relation to graffiti offences.

¹⁵ *Children (Community Service Orders) Act 1987* (NSW). Section 13 sets out limits on the number of hours of community service work that can be imposed on children. Sections 13(3) and 13(3A) provides that the court may specify whether a community service work order shall be concurrent or additional to any other such order, but the sum of the number of hours of community service work remaining to be performed at any one time must not exceed 100 hours. If the person is aged 16 or over and one of the orders is made in respect of an offence for which there is a maximum term of imprisonment exceeding 6 months, the total number of hours must not exceed 250 hours, but the number of hours of community service work remaining to be performed for offences that have a maximum penalty of less than 6 months imprisonment cannot exceed 100 hours.

¹⁶ *Children (Community Service Orders) Act 1987* (NSW) s 11(3).