

15 August 2012



Brendan Thomas
Acting Director General
Department of Attorney General & Justice
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via email: lpclrd@agd.nsw.gov.au

Dear Mr Thomas

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

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit, law and policy organisation that works for a just and democratic society by taking strategic action on public interest issues.

PIAC welcomes the opportunity to provide comment on the statutory review of the *Graffiti Control Act 2008 (NSW)* (the Act), which commenced on 3 December 2008. The Act provides for a number of graffiti offences including:

- intentional damage or defacing of premises or property by means of a graffiti implement;
- possession of a graffiti implement with the intention that it be used to damage or deface premises or property;
- marketing offences relating to affixing a placard or paper on any premises or intentionally marking premises with chalk, paint or other implements; and
- retailer offences relating to selling or supplying spray paint to persons under the age of 18.

Penalties for graffiti control offences

PIAC recognises that minimising graffiti production is a widespread community concern. However, there are difficulties for legislators in this area due to limited criminological research, the fine line between urban art and graffiti vandalism and the varied motivations for graffiti writers.

A Victorian longitudinal study found that the proportion of individuals who engaged in graffiti drawing in public places peaked at about the age of 15 or 16¹. Accordingly, the *Graffiti Control Act* largely affects offenders who are under the age of 18.

PIAC considers the penalties currently available under the Act do not give the courts sufficient scope to address the different types of graffiti and the varied motivations underlying each graffiti incident. Further, we consider that the penalties prescribed are quite severe, do not accurately reflect the nature of the offences committed and do not accord with current restorative approaches to youth criminal justice.

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¹ Smart, Diana et al 2004, 'Patterns of antisocial behaviour from early to late adolescence' *Trends & issues in crime and criminal justice* no. 290, Australian Institute of Criminology, 4.

PIAC supports the safeguard set out in ss 4(2), 5(2) and 8(5) of the Act, which provide that a sentence of imprisonment should only be ordered where the offender has previously been convicted of an offence under the relevant provision, such that the court is satisfied that the person is a *serious and persistent offender* and is likely to commit such an offence again.

However, PIAC considers that, as a general rule, a sentence of imprisonment is not the most appropriate penalty option, especially where offenders are young adults or under the age of 18. The case of 18-year-old Cheyene Back from Daceyville demonstrates that, although imprisonment is said to be reserved for the most serious of cases, the application of the sentencing principles is not always consistent. In that case, Ms Back with no criminal record pleaded guilty to intentionally and recklessly damaging with a black marker a brick wall, the property of Hyde Park Café in Sydney. She was sentenced to a three-month prison term. District Court judge Greg Hosking, in overturning the sentence on appeal, stated, "It is unusual in the extreme for a woman as young as this with no criminal convictions to be sentenced to a term of imprisonment for putting graffiti on a wall, as serious as that matter undoubtedly is"².

Australian law, on the whole, recognises that young people are entitled to special legal protections on account of their developmental maturity. Accordingly, current approaches to youth criminal justice are focused on rehabilitation and reintegration as alternatives to incarceration.³

Imprisonment has been shown to be ineffective in reducing recidivism rates and in acting as a deterrent for crime.⁴ Research shows that young offenders with custodial sentences have a greater risk of reoffending: a 2001 study found those on community based orders had a 23.4% - 28.4% risk of reoffending, compared to a 36.4% - 39.0% likelihood for custodial sentences.⁵

A period of incarceration may also have other undesirable consequences. Offenders may be exposed to greater levels of criminality and more encounters with criminal contacts. From a rehabilitation point of view, detention may not be able to adequately address the complex social and developmental issues that many young offenders suffer from. In particular, imprisonment does not address the reasons for engaging in graffiti production to prevent future re-offending.

PIAC supports a penalty regime that focuses on diversion for young offenders, in order to achieve a balance between preventative and punitive responses to graffiti production. In respect of the issuing of fines to young people, PIAC supports the alternative option of a community clean up order.

Although not strictly within the scope of this review, PIAC echoes these concerns as they apply to the Graffiti Legislation Amendment Bill 2011 currently before the NSW Parliament.

Appeals in respect of community clean up orders

The second issue, which PIAC wishes to comment on, is the availability of appeals in respect of community clean up orders. PIAC supports the availability of community clean up orders as an alternative to the payment of fines where a graffiti control penalty is issued. However, the availability of appeals for a decision on the making of a community clean up order is limited by s 9N of the Act.

² Sydney Morning Herald, 2009, www.smh.com.au/national/graffiti-girl-wins-appeal-against-jail-20090304-8nxd.html.

³ Richards, Kelly, 2011, 'What makes juvenile offenders different from adult offenders?' *Trends & Issues in Crime and Criminal Justice no. 409*, Australian Institute of Criminology, 5.

⁴ Sentencing Advisory Council, 2011, 'Does Imprisonment Deter? A Review of the Evidence', Victoria, 12-13.

⁵ Department of Human Services, 2001, 'Recidivism among Victorian Juvenile Justice Clients 1997-2001', Victoria, 17.

Section 9N of the Act states:

An appeal does not lie in respect of the making of a community clean up order, a failure to make a community clean up order or the revocation or variation of a community clean up order.

PIAC believes that where a community clean up order is not made, an offender should have the opportunity to appeal the decision where economic hardship or other similar and relevant bases are made out, or where the financial or social circumstances of the offender change.

Conclusion

The Graffiti Control Act plays an important part in controlling and minimising the proliferation of graffiti in NSW. However, PIAC believes the penalty regime does not currently provide adequate diversionary options to assist the rehabilitation of offenders. Further, a right of appeal should exist where a community clean up order is not made, particularly in the case of a change in the offender's circumstances.

Yours sincerely

A handwritten signature in black ink that reads "Edward Santow". The signature is written in a cursive style with a large initial 'E'.

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