

Passed by both Houses



New South Wales

Graffiti Control Bill 2008

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I certify that this public bill, which originated in the Legislative Assembly, has finally passed the Legislative Council and the Legislative Assembly of New South Wales.

*Clerk of the Legislative Assembly.
Legislative Assembly,
Sydney, , 2008*



New South Wales

Graffiti Control Bill 2008

Act No , 2008

An Act with respect to the minimisation and control of graffiti; to amend the *Summary Offences Act 1988* and certain other legislation; and for other purposes.

I have examined this bill and find it to correspond in all respects with the bill as finally passed by both Houses.

Assistant Speaker of the Legislative Assembly.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Graffiti Control Act 2008*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

graffiti implement means any of the following:

- (a) spray paint,
- (b) a marker pen,
- (c) any implement designed or modified to produce a mark that is not readily removable by wiping or by use of water or detergent.

premises includes the whole or any part of a structure, building, vehicle, vessel or place, whether built on or not.

property includes a tree.

spray can includes anything that is made or adapted for use for emitting a liquid or substance and that operates by means of air, gas or vapour pressure.

spray paint includes any liquid or other substance that is designed to stain, mark or corrode and to be applied from a spray can, and includes the spray can.

spray paint can means a spray can that contains spray paint.

vehicle includes:

- (a) a motor vehicle (whether or not still capable of being driven), and
- (b) a train or other vehicle used on a railway or monorail, and
- (c) a trailer or anything else constructed to be drawn by a vehicle or animal.

(2) Notes included in this Act do not form part of this Act.

Part 2 Graffiti related offences

4 Damaging or defacing property by means of graffiti implement

- (1) A person must not, without reasonable excuse (proof of which lies on the person), intentionally damage or deface any premises or other property by means of any graffiti implement.

Maximum penalty: 20 penalty units or imprisonment for 6 months.

- (2) A court that convicts a person of an offence under this section must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 5 (or under the corresponding provisions of the *Summary Offences Act 1988* as in force before their repeal by this Act) 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.

Note. The corresponding provisions of the *Summary Offences Act 1988*, before their repeal by this Act, were sections 10A and 10B.

5 Possession of graffiti implement

- (1) A person must not have any graffiti implement in the person's possession with the intention that it be used to damage or deface premises or other property.

Maximum penalty: 10 penalty units or imprisonment for 3 months.

- (2) A court that convicts a person of an offence under this section must not sentence the person to imprisonment unless the person has previously been convicted of an offence under this section or section 4 (or under the corresponding provisions of the *Summary Offences Act 1988* as in force before their repeal by this Act) 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.

- (3) If a person is convicted of an offence under this section, the court may, in addition to any other penalty it may impose, make an order that the graffiti implement be forfeited to the Crown, and the graffiti implement is forfeited accordingly.

6 Posting bills and other marking offences

A person must not:

- (a) affix a placard or paper on any premises, or
(b) intentionally mark, by means of chalk, paint or other material, any premises,

so that the placard, paper or marking is within view from a public place, unless the person first obtained the consent, if the premises are

Clause 6 Graffiti Control Bill 2008

Part 2 Graffiti related offences

occupied, of the occupier or person in charge of the premises or if the premises are unoccupied, of the owner or person in charge of the premises.

Maximum penalty: 4 penalty units.

Part 3 Sale and confiscation of spray paint cans

7 Sale of spray paint cans to persons under 18

- (1) A person who sells a spray paint can to a person under the age of 18 years is guilty of an offence.
Maximum penalty: 10 penalty units.
- (2) It is a defence (proof of which lies on the person selling the spray paint can) to a prosecution for an offence under this section that the person selling the spray paint can believed on reasonable grounds that the person to whom the spray paint can was sold was of or above the age of 18 years.
- (3) If an employee contravenes subsection (1), the employer is taken to have contravened that subsection, whether or not the employee contravened the provision without the employer's authority or contrary to the employer's orders or instructions.
- (4) It is a defence to a prosecution against an employer for such a contravention if it is proved:
 - (a) that the employer had no knowledge of the contravention, and
 - (b) that the employer could not, by the exercise of due diligence, have prevented the contravention.
- (5) An employer may be proceeded against and convicted under subsection (1) by virtue of subsection (3) whether or not the employee has been proceeded against or convicted under subsection (1).
- (6) The regulations may provide that this section does not apply to or in relation to any specified class or description of spray paint can.

8 Unsecured display by retailers of spray paint cans

- (1) The occupier of any shop from which spray paint cans are sold must not display any such can in any part of the shop to which members of the public are permitted access unless the can is properly secured in accordance with subsection (2).
Maximum penalty: 10 penalty units.
- (2) A spray paint can is properly secured if it is displayed:
 - (a) in a locked cabinet, or
 - (b) within or behind a counter in such a manner that members of the public are not able to gain access to the can without the assistance of the occupier or an employee or agent of the occupier, or
 - (c) in any other manner prescribed by the regulations.

- (3) The regulations may provide that this section does not apply to or in relation to any specified class or description of spray paint can.
- (4) The Minister is to review the operation of this section (including the corresponding provision of the *Summary Offences Act 1988* as in force before its repeal by this Act) as soon as possible after the period of 12 months following the date of commencement of this section.
- Note.** The corresponding provision of the *Summary Offences Act 1988*, before its repeal by this Act, was section 10D.
- (5) In this section:
display includes store or keep.
occupier, in relation to a shop, means:
- (a) a person who has the right to occupy the shop to the exclusion of the owner, or
 - (b) the person who is the owner of the shop if there is no person with a right to occupy the shop to the exclusion of the owner.
- sell** includes offer for sale or expose for sale.
shop includes any retail premises.

9 Confiscation of spray paint cans from minors

- (1) A police officer may seize a spray paint can in the possession of a person in a public place if the officer suspects on reasonable grounds that the person is under the age of 18 years, unless the person satisfies the officer that the person has the spray paint can in his or her possession for a purpose that is not unlawful.
- (2) A spray paint can may be seized from a person under this section whether or not the person has been or is to be charged with any offence in connection with the person's possession of the spray paint can.
- (3) A spray paint can seized under this section is forfeited to the Crown.
- (4) The regulations may make provision for or with respect to:
- (a) the procedure to be followed as regards the seizure of spray paint cans under this section and the procedure to be followed after their seizure, and
 - (b) without limiting paragraph (a), prescribing the circumstances in which and the procedure by which spray paint cans seized under this section are to be returned and providing for the jurisdiction of a court to order their return.
- (5) In this section:
public place means:
- (a) a place (whether or not covered by water), or

(b) a part of premises,
that is open to the public, or is used by the public whether or not on
payment of money or other consideration, whether or not the place or
part is ordinarily so open or used and whether or not the public to whom
it is open consists only of a limited class of persons, but does not include
the premises of a school or other educational establishment.

Part 4 Graffiti removal work by local councils

10 Interpretation

In this Part, *occupier*, *owner*, *private land* and *public place* have the same meanings as in the *Local Government Act 1993*.

11 Graffiti removal work—by agreement with owner or occupier

A local council may, by agreement with the owner or occupier of any private land, carry out graffiti removal work on the land.

12 Graffiti removal work—without agreement of owner or occupier

- (1) A local council may, without the agreement of the owner or occupier of any land, carry out graffiti removal work to property on that land if the graffiti concerned is visible from a public place.
- (2) The graffiti removal work referred to in subsection (1) may only be carried out from a public place.
- (3) The local council concerned is to bear the cost of graffiti removal work referred to in subsection (1).
- (4) If a local council carries out graffiti removal work in accordance with this section, the council must, within a reasonable period, give the owner or occupier of the land concerned written notice that the work has occurred.
- (5) A local council must pay compensation for any damage caused by the council in carrying out graffiti removal work in accordance with this section.

Note. Section 730 of the *Local Government Act 1993* provides for the resolution of claims for compensation relating to damage under this section in cases of dispute between the person claiming the compensation and the council.

13 Register of graffiti removal work

- (1) A local council must keep a register of graffiti removal work carried out in accordance with this Part.
- (2) The register is to specify in respect of each incidence of graffiti removal work carried out:
 - (a) the owner or occupier of the premises on which the graffiti was situated, and
 - (b) the nature of the work carried out, and
 - (c) the actual cost, or an estimate of the cost at current market rates, of carrying out the work, and

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- (d) in the case of graffiti removal work carried out in accordance with section 11—the actual amount charged by the local council for carrying out the work.

Part 5 Miscellaneous

14 General defence

It is a sufficient defence to a prosecution for an offence under this Act if the defendant satisfies the court that the act complained of in the information for the offence was done with lawful authority.

15 Alternative action to imposing penalty for graffiti offences under sections 4 and 5

A court may, instead of imposing a fine on a person or sentencing the person to imprisonment for an offence under section 4 (Damaging or defacing property by means of graffiti implement) or 5 (Possession of graffiti implement):

- (a) make an order under section 8 (1) of the *Crimes (Sentencing Procedure) Act 1999* directing the person to perform community service work, being an order containing a recommendation of the kind referred to in section 91 of that Act, or
- (b) make an order under section 5 of the *Children (Community Service Orders) Act 1987* requiring the person to perform community service work, being an order containing a recommendation of the kind referred to in section 5 (1A) of that Act,

as the case requires.

16 Penalty notices for offences relating to sale or display of spray paint cans

- (1) An authorised officer may serve a penalty notice on a person if it appears to the officer that the person has committed an offence under section 7 (Sale of spray paint cans to persons under 18) or 8 (Unsecured display by retailers of spray paint cans).
- (2) A penalty notice is a notice to the effect that, if the person served does not wish to have the matter determined by a court, the person can pay, within the time and to the person specified in the notice, the amount of the penalty prescribed by the regulations for the offence if dealt with under this section.
- (3) A penalty notice may be served personally or by post.
- (4) If the amount prescribed by the regulations for an alleged offence under section 7 or 8 is paid under this section, no person is liable to any further proceedings for the alleged offence.
- (5) Any such amount prescribed by the regulations for an offence under section 7 or 8 is not to exceed the maximum amount of penalty that could be imposed for the offence by a court.

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- (6) Payment under this section is not to be regarded as an admission of liability for the purpose of, and does not in any way affect or prejudice, any civil claim, action or proceeding arising out of the same occurrence.
- (7) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.
- (8) In this section, *authorised officer* means:
- (a) a police officer, or
 - (b) a person of a class prescribed by the regulations as a class of person who may issue penalty notices under this section.

17 Particulars to be furnished

- (1) If a defendant charged with an offence under this Act:
- (a) has requested the informant to furnish to the defendant reasonable particulars of the behaviour or conduct the subject of the charge, and
 - (b) the informant, or some person on his or her behalf, has not so furnished those particulars,
- the court before which the defendant is charged is to adjourn the charge pending the furnishing of those particulars or may dismiss the charge.
- (2) If, at the hearing of a charge for an offence referred to in subsection (1):
- (a) the evidence discloses behaviour or conduct that constitutes such an offence, and
 - (b) that behaviour or conduct is different from the behaviour or conduct of which particulars have been given to the defendant under subsection (1),
- the court may, on the application of the defendant and if it is of the opinion that the defendant was deceived by those particulars, adjourn the hearing on such terms as it thinks fit.

18 Payment towards cost of repairing damage

A person convicted of an offence under this Act is liable to pay such amount not exceeding an amount equal to 20 penalty units as the court may order as the cost of, or contribution to, the repair or restoration of any damage caused by the action which resulted in the conviction.

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Part 5 Miscellaneous

19 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

20 Proceedings for offences

Proceedings for an offence under this Act may be dealt with summarily before the Local Court.

21 Savings, transitional and other provisions

Schedule 1 has effect.

22 Amendment of other legislation

The Acts and statutory instruments specified in Schedule 2 are amended as set out in that Schedule.

23 Review of Act

- (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.
- (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.

Schedule 1 Savings, transitional and other provisions

(Section 21)

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Graffiti removal work by local councils

- (1) Anything done by a local council under section 67A or 67B of the *Local Government Act 1993* is, to the extent that it had effect immediately before the repeal of those sections by this Act, taken to have been done and to have effect under Part 4 of this Act.
- (2) A register of graffiti removal work kept in accordance with section 67C of the *Local Government Act 1993* (as in force immediately before its repeal by this Act) is taken to be a register of graffiti removal work kept in accordance with section 13 of this Act.

Schedule 2 Amendment of other legislation

(Section 22)

2.1 Crown Lands (General Reserves) By-law 2006

Clause 22 Conduct prohibited in reserve

Omit clause 22 (1) (f).

2.2 Fines Act 1996 No 99

Schedule 1 Statutory provisions under which penalty notices issued

Insert in alphabetical order of Acts:

Graffiti Control Act 2008, section 16

2.3 Local Government Act 1993 No 30

[1] Section 12 What information is publicly available?

Omit the last bullet point paragraph of section 12 (1). Insert instead:

- the register of graffiti removal work kept in accordance with section 13 of the *Graffiti Control Act 2008*.

[2] Section 67 Private works

Omit “section 67A or 67B” from section 67 (6).

Insert instead “Part 4 of the *Graffiti Control Act 2008*”.

[3] Chapter 6, Part 3, Division 4 Graffiti removal work

Omit the Division.

[4] Section 356 Can a council financially assist others?

Omit the note to section 356 (4). Insert instead:

Note. Part 4 of the *Graffiti Control Act 2008* deals with graffiti removal work.

[5] Section 610A Application of Division

Omit “section 67A” from section 610A (1) (e).

Insert instead “section 11 of the *Graffiti Control Act 2008*”.

[6] Section 730 Compensation

Omit “section 67B (5), 128 or 198” from section 730 (1).

Insert instead “section 12 (5) of the *Graffiti Control Act 2008* or section 128 or 198 of this Act”.

2.4 Rail Safety (General) Regulation 2003

[1] Clause 36

Omit the clause. Insert instead:

36 Vandalism and fixing posters

- (1) A person must not:
 - (a) affix any poster to, or
 - (b) destroy or damage,any train, any part of the infrastructure of a railway or any property on railway land or monorail works.
Maximum penalty: 20 penalty units.
Note. Offences relating to graffiti are contained in Part 2 of the *Graffiti Control Act 2008*.
- (2) A person must not, without reasonable excuse, have in his or her possession on any train, any part of a railway, on any railway land or on any part of monorail works any thing intended for use in damaging property.
Maximum penalty: 10 penalty units.
- (3) This clause does not apply to an authorised officer in the execution of his or her duty.

[2] Clause 39 Direction to leave train or premises

Omit clause 39 (1). Insert instead:

- (1) If, in the opinion of an authorised officer, a person is committing:
 - (a) an offence under this Part, or
 - (b) an offence under section 4 of the *Graffiti Control Act 2008* in relation to a train, any part of the infrastructure of a railway or any property on railway land or monorail works,the authorised officer may direct the person to leave the train, railway land or part of the monorail works concerned.

2.5 Summary Offences Act 1988 No 25

[1] Section 3 Definitions

Omit the definitions of *spray can*, *spray paint* and *spray paint can* from section 3 (1).

[2] Section 9 Defacing walls

Omit the section.

[3] Section 10A Damaging and defacing property by means of spray paint

Omit the section.

[4] Section 10B Possession of spray paint

Omit the section.

[5] Section 10C Sale of spray paint cans to persons under 18

Omit the section.

[6] Section 10D Unsecured display by retailers of spray paint cans

Omit the section.

[7] Section 10E Confiscation of spray paint cans from minors

Omit the section.

[8] Section 29A Penalty notices: custody of knives in public place or school

Omit “10C or” from section 29A (1) and (3) wherever occurring.

2.6 Summary Offences Regulation 2005

[1] Part 2A Seized spray paint cans

Omit the Part.

[2] Clause 11

Omit the clause. Insert instead:

11 Penalty notices: custody of knives in public place or school

For the purposes of section 29A (1) of the Act, the amount prescribed in respect of an offence under section 11C of the Act is \$550.

[3] Clause 13A Display by retailers of spray paint cans

Omit the clause.