

Submission

Statutory Review of the *Graffiti Control Act 2008*

February 2020

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Opening

Thank you for the opportunity to make a submission to the Statutory Review of the *Graffiti Control Act 2008* (the Act).

Local Government NSW (LGNSW) is the peak body for local government in NSW, representing NSW general purpose councils and related entities. LGNSW facilitates the development of an effective community-based system of local government in the State.

This submission was endorsed by the LGNSW Board on 3 April 2020.

Purpose

As noted in the statutory review discussion paper prepared by the Department of Communities and Justice, the Graffiti Control Act deals with graffiti offences, the supply of spray paint cans to minors, graffiti removal work by local government and illegal bill posting.

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

LGNSW greatly welcomes the commencement of this review. Graffiti continues to be a significant issue for councils in terms of damage to property and public amenity and the multimillion dollar graffiti removal bills councils across NSW face every year. Councils report that in community surveys, graffiti always emerges as a key concern for residents and ratepayers.

LGNSW's submission focuses on the eight targeted questions of the discussion paper.

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

Key offences in the Act include:

- marking premises or property
- possession of a graffiti implement (spray can, marker pen or any implement designed or modified to produce a mark that is not readily removable)
- posting bills
- sale of spray paint cans to people under 18
- supply of spray paint cans to people under 18 and
- possession of spray paint cans by people under 18.

Councils view these offences under the Act as generally adequate, and have also reported productive relationships with the NSW Police and local businesses in promoting awareness and compliance of these offences. However, councils have suggested a number of amendments to offences to better capture the range of graffiti-related behaviour, as follows.

Bill posters – authorising offence

Since 2007, LGNSW has been advocating for legislative amendments to the Graffiti Control Act to address issues associated with bill posters. LGNSW's feedback on the adequacy of bill posting offences is provided below at questions 4 and 5.

Heavy duty stickers, including when placed on public footpaths

Feedback suggests that the use of heavy-duty stickers with strong adhesive to mark premises, property and in particular footpaths has grown in recent years, and the Act may not adequately capture this behaviour or consider such stickers to be included within the definition of a graffiti implement.

While the Act contains bill posting offences for affixing placards or paper (which would encompass stickers), this only applies to affixing placards or paper on premises. Public footpaths are not included within the Act's definition of premises and so the bill posting offences do not adequately capture this behaviour.

Councils do have access to alternative offence provisions in other legislation that may capture this behaviour, such as the *Protection of the Environment Operations Act 1997* (Part 5.6A littering and depositing of advertising material offences) as well as the *Local Government Act 1993* (section 632 provides for a general offence of acting contrary to notices to erected by councils). However, it may be more practical and consistent for this behaviour to be captured alongside other graffiti offences in the Graffiti Control Act.

Recommendation 1: The Graffiti Control Act should be amended to better capture unauthorised placement of heavy-duty stickers, including on public footpaths.

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?

Removing graffiti and bill posters presents considerable costs to councils and there is a clear need for effective deterrents. While councils are often responsible for the removal of graffiti, the NSW Police Force is responsible for enforcement and prosecution in relation to graffiti offences. Despite the countless instances of graffiti that take place each year across NSW, the discussion paper makes clear that only a fraction of these are charged and result in conviction. Councils understand the NSW Police Force has limited resources and is often called to deal with more urgent matters.

LGNSW supports a cautious approach where minors are involved. Young people will at times have legitimate and approved reasons for possessing spray paint cans and it is important that the defences for the possession offences in section 8B of the Act are appropriately applied.

In particular, councils have expressed concern that some of the custodial penalties for minors should be approached with extreme caution. For example, subsection 8B(5) of the Act provides for a penalty of up to 6 months imprisonment for a person under the age of 18 who possesses a spray paint in a public place and is a serious and persistent offender.

It is worth noting that there are also penalties of up to five years imprisonment in the *Crimes Act 1900* for the more serious offence of intentionally damaging property (section 195). Given this higher penalty already exists for more serious offences in the Crimes Act, the custodial penalties in the Graffiti Control Act may be unnecessary.

LGNSW supports application of the alternative penalties available under the Graffiti Control Act where appropriate (such as community service and driver licence orders), particularly those that can help an offender understand the impact of their behaviour. At LGNSW's 2019 annual conference, councils resolved to call for social justice committees across all councils, seeking to meet demand for a range of measures including justice reinvestment initiatives. Justice reinvestment initiatives aim to reallocate taxpayer funding from prisons to instead invest in localised early intervention, prevention and diversionary solutions to reduce crime.

Recommendation 2: Custodial offences under the Graffiti Control Act should be applied with caution, particularly where minors are involved.

Recommendation 3: The NSW Government should support justice reinvestment initiatives to prevent incidence of graffiti across the State.

Councils have also voiced support for an expansion of penalty notice offences under the Graffiti Control Act. At present, penalty notices can only be issued for offences against sections 7 (sale of spray paint cans to persons under 18) and 8 (unsecured display by retailers of spray paint cans).

The Act does not allow for penalty notices to be issued for any graffiti related offences, including marking premises or property, possession of graffiti implement and posting bills. Administering penalty notice schemes is far more cost effective and faster than seeking court applied penalties. For bill posting offences in particular, issuance of penalty notices should be an option, and council officers should be authorised to issue penalty notices, as well as police.

Recommendation 4: Penalty notice offences should be expanded to include the graffiti related offences set out in Part 2 of the Graffiti Control Act, as well as any future bill posting offences, and council officers should be authorised to issue these penalty notices.

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

Councils have expressed broad support for the mandatory clean up requirements in community service orders and understand that they are well supported by members of the community in dealing with young or first-time offenders.

Many councils across NSW are signed up as community service work partners with the Community Corrections agency of Corrective Services NSW. Councils provide a safe work environment, induction and appropriate tasks, while Community Corrections provides supervision and logistics.

4. Is the current scope of bill posting regulation sufficient?

No. As noted above, bill posting regulation should ensure that heavy-duty stickers are appropriately encompassed in definitions and bill posting offences should be included within the penalty notice scheme.

Since 2007, LGNSW has been advocating for legislative amendments to address issues associated with bill posters on public land and visible from a public space but without the consent of the owner or occupier of the premises. Councils regularly have to deal with illegally advertised bill posters on public land, including on roadside power poles. However, prosecution is difficult.

To obtain a successful prosecution the person fixing the advertising must be caught in the process. A better and more effective option would be to allow councils, and police, to penalise or prosecute commercial venues and event promoters, as they generally bear authorising responsibility for bill posting. LGNSW's recommendations relating to liability for bill posting are outlined further below in response to question 5.

One notable form of bill posting is election campaign signs and corflutes, which often remain long after the date of an election has passed. The placement of these signs may be further regulated by provisions of the *Electricity Supply Act 1995* (where placed on an electricity transmission pole) and the *Electoral Act 2017* in terms of the content of the sign.

Even where a property owner or occupier consents to having these signs erected on their property, the signs are further regulated under State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 which mandates certain development standards for the signs to be considered exempt development, including that the signs be displayed only for a period that is 5 weeks prior to, and one week following an election.

For clarity, the Graffiti Control Act would benefit from a legislative note following bill posting provisions that refers to the relevant provisions that regulate electoral signs in other pieces of legislation.

Recommendation 5: The Graffiti Control Act should include a legislative note following bill posting provisions that draws attention to the additional legislative provisions (beyond the Graffiti Control Act) that regulate electoral signs and corflutes.

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?

Yes. LGNSW and councils support extending liability to those that authorise, commission, arrange or procure bill posting, bringing NSW into line with Victoria, South Australia and Western Australia.

Councils in NSW expend millions of dollars each year and considerable time removing unlawfully posted bills, and face particular challenges in taking action to prevent this –

particularly given the inability to issue penalty notices immediately upon identifying a person affixing a bill.

Recommendation 6: Liability for bill posting ('authorising offences') should extend to those that authorise, commission, arrange or procure bill posting.

6. If so, should liability only be where councils 'opt in'?

Generally, legislation that allows councils to opt in or out of provisions to suit the unique circumstances of their communities is welcome. However, the discussion paper proposes that authorising offences for bill posting might only be made available to councils who 'opt in' by providing designated areas where bill posting is lawful, as:

This option would deter unlawful bill posting without stifling commercial interests.

While councils make considerable efforts to promote and support local economic development, it is not the responsibility of local government to offer advertising opportunities on public land to commercial entities at no cost. While many councils do choose to provide dedicated areas for lawful bill posting – this must remain the decision of each individual council to determine in accordance with the interests of the community.

Further, all local government areas across NSW already have opportunities for venues and events to advertise and promote their offerings in accordance with the law and it is reasonable to expect that commercial enterprises should factor this into their cost of doing business (rather than having ratepayers bear these costs).

Recommendation 7: The availability of authorising offences for bill posters must not be contingent on council being made to offer free commercial advertising on public land.

7. Should local councils be required to provide more areas for free and lawful posting?

No. Councils supports regulation that allows them to determine what is right for their own communities to whom they are democratically accountable. As noted above, while many councils do choose to provide designated places for free and lawful bill posting, this comes at a cost to councils and ratepayers. As such, it is important that each council determines what is appropriate for its own circumstances.

Recommendation 8: There should be no mandatory requirement for councils to provide additional 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?

Local council graffiti removal powers

As noted in the discussion paper, Part 4 of the Act allows 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.*

Councils have raised concerns that there are at times challenges with removing graffiti from commercial properties or derelict blocks of land awaiting development. This is particularly the case where councils cannot clean graffiti from a public place and are required to seek agreement from the owner or occupier to access private land in order to carry out graffiti removal work.

Many councils successfully enter into arrangements with owners or occupiers of commercial premises to access their private land to remove graffiti free of charge, and the owners are generally very pleased to have this service available. However, there are times when this is not possible. At LGNSW's 2017 Annual Conference, councils resolved to seek amendments to Part 4 of the Graffiti Control Act to provide councils with a mechanism to enforce the removal of graffiti from private commercial property. Such an amendment could require a period of notice to be issued to the property owner, for example 14 days' notice of the intention to remove graffiti from the property.

Recommendation 9: The Graffiti Control Act should be amended to provide councils with a mechanism to enforce the removal of graffiti from private commercial property.

Register of graffiti removal work

Section 13 of the Graffiti Control Act also requires councils to keep a register of graffiti removal work, specifying the nature of the work carried out and the actual or estimated costs of carrying out the work. Councils have advised that while maintaining the register is not overly burdensome, it nonetheless draws upon limited council resources. Further, other than the requirement to maintain the register, the Graffiti Control Act makes no further reference to the register and councils have advised the reasons it is required are unclear.

Recommendation 10: The NSW Government should consider the usefulness of the graffiti removal work register and whether maintaining the register should no longer be required.

Additional comments

Finally, councils across NSW are increasingly embracing street art and commissioned public artworks painted on walls as a vibrant and welcome addition to public amenity. Any amendments to the Graffiti Control Act should not inhibit street art that is non-commercial, has development approval if necessary and is undertaken with consent of the property owner.

Recommendation 11: Amendments to the Graffiti Control Act should not inhibit appropriately approved street art.

Recommendation summary

In summary, LGNSW makes the following recommendations:

Recommendation 1: The Graffiti Control Act should be amended to better capture unauthorised placement of heavy-duty stickers, including on public footpaths.

Recommendation 2: Custodial offences under the Graffiti Control Act should be applied with caution, particularly where minors are involved.

Recommendation 3: The NSW Government should support justice reinvestment initiatives to prevent incidence of graffiti across NSW.

Recommendation 4: Penalty notice offences should be expanded to include the graffiti related offence set out in Part 2 of the Graffiti Control Act, as well as any future bill posting offences, and council officers should be authorised to issue these penalty notices.

Recommendation 5: The Graffiti Control Act should include a legislative note following bill positing provisions that draws attention to the additional legislative provisions (beyond the Graffiti Control Act) that regulate electoral signs and corflutes.

Recommendation 6: Liability for bill posting ('authorising offences') should extend to those that authorise, commission, arrange or procure bill posting.

Recommendation 7: The availability of authorising offences for bill posters must not be contingent on council being made to offer free commercial advertising on public land.

Recommendation 8: There should be no mandatory requirement for councils to provide additional areas for free and lawful posting.

Recommendation 9: The Graffiti Control Act should be amended to provide councils with a mechanism to enforce the removal of graffiti from private commercial property.

Recommendation 10: The NSW Government should consider the usefulness of the graffiti removal work register and whether maintaining the register should no longer be required.

Recommendation 11: Amendments to the Graffiti Control Act should not inhibit appropriately approved street art.

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LGNSW would welcome the opportunity to assist with further information during this review to ensure the views of local government are considered.

To discuss this submission further, please contact LGNSW Senior Policy Officer at elizabeth.robertson@lgnsw.org.au or on 02 9242 4028.