

# Graffiti Vandalism Bill 2015

## EXPLANTORY MEMORANDUM

### Overview of the Bill

- The Graffiti Vandalism Bill (GV Bill) creates stand-alone legislation relating to graffiti and creates a new offence for damaging property by graffiti.
- The Bill replicates and expands on the existing criminal provisions relating to graffiti and graffiti implements and also enables costs of cleaning graffiti on private property to be awarded against the offender.
- Establishes a requirement for graffiti offenders whom are found guilty to be sentenced to a minimum of a community based order or youth community based order involving, where practicable, graffiti clean-up activities.
- Creates an immunity from action in tort against:
  - an individual for damage caused by graffiti removal that is done in good faith and does not constitute negligent behaviour and clarifies that this immunity does not extend to the State; and
  - the owner of a property who has a duty of care to an individual who enters their property for death or injury suffered by an individual involved in graffiti removal unless the breach of duty amounts to gross negligence and clarifies that in such instance action can instead be taken against the State.
- Provides for the forfeiture of anything used in, or in connection with, the offence, including a graffiti implement and anything used to store, record or transmit images of the graffiti caused, upon conviction for a graffiti offence;
- The Bill replicates the general powers and protections of local government in the *Local Government Act 1995* to deal with graffiti; and
- Amends the *Public Transport Authority Act 2003* to:
  - expand the powers of arrest of Public Transport Authority (PTA) security officers to include apprehending persons suspected of committing, on PTA property, the *Criminal Code* offences of disorderly behaviour, trespass and criminal damage and the proposed new GV Bill offence of damaging property by graffiti; and
  - expand the offences for which the Chief Executive Officer of the PTA may prohibit a person from being on or in a PTA conveyance or facility to include the *Criminal Code* offence of damaging property and the proposed new GV Bill offence of damaging property by graffiti.

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### Clause Notes

#### PART 1 – PRELIMINARY

##### Clause 1 Short Title

Cites the short title of the Act as the *Graffiti Vandalism Act 2015* (GV Act).

##### Clause 2 Commencement

This clause will set out when the provisions of the GV Act will commence operation.

Under clause 2(a), Part 1 of the Bill will commence operation on the day the Bill receives Royal Assent and becomes an Act. Part 1 contains the Bill's short title, commencement provisions and definitions of terms used throughout the Bill..

Under clause 2(b), the remaining provisions will commence operation on a date to be fixed by proclamation and allows for different proclamation days to be fixed for different provisions.

##### Clause 3 Terms used

In this Bill:

**graffiti** means any drawing, writing, painting, symbol or mark applied to or marked on property by –

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or
- (b) scratching or etching;

**owner**, of land, means a person who is an owner of the land within the meaning given in the *Local Government Act 1995* section 1.4

#### PART 2 – Graffiti Offences

##### Clause 4 Terms used

In this part –

**adult** means a person who has reached 18 years of age;

**CEO** means the Chief Executive Officer of the Public Sector agency principally assisting the responsible Minister in the administration of Part 8 of the *Sentence Administration Act 2003*;

**child** means a person under 18 years of age;

**community based order** means a community based order made under the *Sentencing Act 1995*;

**community order** means –

- (a) a community based order or intensive supervision order made under the *Sentencing Act 1995*; or
- (b) a youth community based order or intensive youth supervision order made under the *Young Offenders Act 1994*;

**graffiti implement** means any of these –

- (a) a can of spray paint;
- (b) a pen or marker pen, or a similar implement that –
  - (i) has a tip over 6mm wide; and
  - (ii) contains a fluid that is not water soluble and that is capable of marking a surface;

**offender** means a person who has committed an offence under section 5;

**possession** includes having under control in any manner whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing or property in question;

**public property** means property owned by, vested in, or under the control or management of –

- (a) the Crown, or an agent or instrumentality of the Crown; or
- (b) a body corporate established by a law; or
- (c) a local government or regional local government;

**youth community based order** means a youth community based order made under the *Young Offenders Act 1994*.

## **Clause 5 Damaging property by graffiti**

Subclause 1 creates an offence of damaging property by graffiti, without the property owner's consent. The maximum penalty for the offence is a fine of \$24,000 and imprisonment for 2 years, but the minimum penalty for an adult is a community based order and for a child it is a youth community based order.

Subclause 2 provides that property capable of being destroyed, damaged or defaced by graffiti includes vegetation.

Subclause 3 allows the minimum penalty for juvenile graffiti offenders, as provided in subclause 1, to apply despite section 46(5a) of the *Young Offenders Act 1994*. Section 46(5a) provides that a Court is not obliged to impose any mandatory minimum sentence when sentencing a juvenile.

## **Clause 6 Possessing a thing with intent to apply graffiti**

Subclause 1 creates an offence for possessing a thing with intent to damage, destroy or deface property by applying graffiti. This new offence is based on section 557G of the *Criminal Code*, 'Possessing thing for applying graffiti', which will be repealed by this Bill. The new offence carries the same maximum penalty of a fine of \$6,000.

Subclause 2 replicates the 'Presumption as to intent' included at section 557A of the *Criminal Code*. Section 557A currently applies to section 557G 'Possessing thing for applying graffiti' offence. It is therefore appropriate the presumption is replicated in this Bill.

In proceedings relating to the charge of possessing a thing with the intent to apply graffiti, a Court will presume that the person charged had the intention to use the thing to destroy, damage or deface property by applying graffiti, if the circumstances were sufficient for a police officer to form a reasonable suspicion that the person had that intention, and the contrary is not proved.

#### **Clause 7 Selling graffiti implement to child**

Subclause 1 replicates the offence currently at section 216 of the *Criminal Code*, 'Selling graffiti implement to child', and has the same penalties; a fine of \$6 000 for a first offence and a fine of \$12 000 for a subsequent offence.

As with section 216 of the *Criminal Code*, the Bill provides it will be a defence to prove that the person accused of selling a graffiti implement to a child, or someone acting on behalf of the accused, had a reasonable belief that the child was an adult.

#### **Clause 8 Costs of cleaning graffiti**

Clause 8 replaces section 446 of the *Criminal Code*, 'Costs of cleaning graffiti'.

This clause provides that a Court that convicts a person of the offence of destroying, damaging or defacing property by graffiti may order the offender to:

- a) take remedial action to restore the property to the same state as it was in before the offence or to a state specified in the order; or
- b) pay another person to take remedial action to restore the property to the same state as it was in before the offence or to a state specified in the order.

Clause 8 applies irrespective of whether or not the graffiti is visible to the public or is applied to public or private property. This is an extension of section 446 of the *Criminal Code*; section 446 only allowed for costs or remedial action to be ordered where graffiti is visible to the public or applied to public property. This clause will allow the Court to make appropriate remedial work orders against all graffiti offenders.

#### **Clause 9 Application of *Sentencing Act 1995***

Subclause 1 provides that Part 16 Division 1 of the *Sentencing Act 1995* applies to orders made under section 8 of the GV Act (clause 8 above) as if the order were a reparation order.

Subclause 2 provides that an order by the Court of the offender to take remedial action to restore a property is treated as if it were a restitution order made under Part 16 of the *Sentencing Act 1995*, and should the order not be obeyed with, section 122 of the *Sentencing Act 1995* applies.

Section 122 provides that a person who fails to comply commits an offence punishable by the Supreme Court as for a contempt or after summary conviction by the court that imposed the order, a fine of \$10 000 or imprisonment for 12 months.

Subclause 3 provides that an order by the Court of the offender to pay someone to restore a property is treated as if it were a compensation order made under Part 16 of the *Sentencing Act 1995* and enforcement of the order may be undertaken in accordance with 119 and 119A of the *Sentencing Act 1995*.

#### **Clause 10 Conditions to attach to community orders**

Subclause 1 provides that when a graffiti offender has been sentenced to a community order (either a community based order, an intensive supervision order or an equivalent

order contained within the *Young Offenders Act 1994*), the Court must impose a condition that a minimum of 10 hours unpaid work is carried out by the offender.

Subclause 2 provides that the unpaid community work is to be conducted by the offender (whether adult or child) at the direction of the CEO of the Department of Corrective Services and the work is to comprise of graffiti removal work, if practicable.

Subclause 3 allows the minimum community work commitment imposed by this clause to apply for juveniles despite section 46(5a) of the *Young Offenders Act 1994* which provides that a Court is not obliged to impose any mandatory minimum sentence when sentencing a juvenile.

#### **Clause 11 Immunity when removing graffiti**

Clause 11 provides immunity for offenders undertaking graffiti removal work where the offender has been sentenced to a community based order or similar.

Subclause 1 provides that a person will not be held liable, when engaged in graffiti removal under the GV Act or a community order, for anything that results in damage to property, injury to a person, which has been done in good faith and does not constitute negligence.

Subclause 2 provides that the State is not absolved of any liability that it might have for any individual that is engaged in graffiti removal under this Act and an action in tort may instead be taken against the State.

Subclause 3 provides that in this section, a reference to doing anything also includes a reference to an omission to do anything.

#### **Clause 12 Immunity for owners of property when individuals enter property to remove graffiti**

Subclause 1 provides that this section applies to the owner of a place who owes a duty of care to individuals who enter that place.

Pursuant to subclause 2, the owner of a place is not liable if death or injury is suffered by an individual involved in graffiti removal work under this Act or under a community order, unless they are found to be grossly negligent in their duty of care.

Pursuant to subclause 3, if subclause 2 prevents civil action being brought against the owner of a place, action may instead be taken against the State as if the State owed the duty of care.

Subclause 4 provides that if an owner is found to be grossly negligent in their duty of care, the State may take recover from the owner as a debt any damages, including costs, paid for by the State.

#### **Clause 13 Forfeiture of property**

Clause 13 allows a Court, on application from a prosecutor, to order an offender charged with any offence under the GV Act to forfeit any graffiti implement or anything that was used by the offender to record, store or transmit images of the graffiti caused by that offender.

Subclause 1 provides that section 731 of the *Criminal Code* applies where a Court convicts a person of an offence under the GV Act, as if the conviction were a penalty under the *Criminal Code*.

Section 731 of the *Criminal Code* enables a court that convicts a person of an offence to make an order for the forfeiture to the State, or the destruction or disposal, of any thing that was used in or in connection with the commission of the offence. The Court must not make the order unless the owner, or purported owner, of the property has been afforded the opportunity to show cause as to why the order should not be made.

Subclause 2 provides that, for the purposes of subclause 1, 'any thing that was used in or in connection with the commission of the offence' includes any item that was intended to be used in the commission of a graffiti offence. This includes any graffiti implement and anything that was intended to be used by the offender to record, store or transmit images of the graffiti caused by the offender.

Subclause 3 allows the Court order to include provision for the seizure of a thing or any other action required to enforce that seizure.

Pursuant to subclause 4 a Court must not make an order to seize a thing under subsection 1, unless the property owner has been afforded the opportunity to show cause as to why the order should not be made and an application has been made by the prosecutor.

### **Part 3 – LOCAL GOVERNMENT POWERS**

Part 3 replicates existing local government powers which are relevant to local government's dealing with graffiti. This is necessary as the local government functions relating to graffiti have been removed from the *Local Government Act 1995* (see clauses 41 and 42); local government functions relating to graffiti will instead be contained within the GV Act.

#### **Division 1 – Application**

##### **Clause 14 Terms used**

In this Part –

***approved*** means approved by the relevant local government;

***CEO*** means the Chief Executive Officer of the relevant local government;

***local government property*** means anything, whether land or not, that belongs to, or is vested in, or under the care, control or management of, the local government;

***occupier***, of land, means a person who is an occupier of the land within the meaning given in the *Local Government Act 1995* section 1.4;

***public place*** means –

- (a) any place to which the public, or any section of the public, have or are permitted to have access whether on payment or otherwise; or
- (b) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access; or
- (c) a privately owned place that is unoccupied or is occupied by a person who is not the owner and does not have the authority of the owner.

##### **Clause 15 Application**

For the purposes of Part 9 Divisions 1 and 2 of the *Local Government Act 1995*, a function under that Part is also a function that a person may be authorised to perform under this Part of the GV Act.

##### **Clause 16 Delegation by local government**

Subclause 1 provides local government with the power to delegate to its CEO any of its powers or the discharge of any of its duties under another provision of this Part of the GV Act.

This replicates the existing delegation powers contained within sections 5.42 and 5.43 of the *Local Government Act 1995*.

### **Clause 17 Delegation by CEO of local government**

Clause 17 provides that a CEO may delegate the CEO's powers or the discharge of the CEO's duties to any local government employee under another the provision of this Part of the GV Act, other than this power of delegation.

This is a replication of the existing powers of delegation contained within section 5.44 of the *Local Government Act 1995*.

## **Division 2 – Notices**

### **Clause 18 Notice requiring removal of graffiti**

Subclause 1 specifies that clause 18 applies to graffiti that:

- a) has been applied to property with the owners or occupiers consent; and
- b) is visible from a public place; and
- c) is considered to be unsightly or offensive by the local government.

Subclause 2 provides that a local government may issue a notice in writing to the property owner or occupier of a place on which graffiti, as described in subclause 1, has been applied. The notice requires the person to obliterate the graffiti in a manner acceptable to the local government, within a set timeframe.

Subclause 3 states that if a notice is given to an occupier of land who does not own that land, the owner must be informed in writing that a notice to remove graffiti has been served.

Subclause 4 states that the terms of occupying the land do not prevent a person from obliterating the graffiti under the terms of the notice.

Subclause 5 determines that a person commits an offence if without reasonable excuse they fail to comply with a notice under subclause 2 and defines the penalties for that offence.

This replicates the existing powers of local government under sections 3.25 of the *Local Government Act 1995*.

### **Clause 19 Additional powers when notice is given**

Subclause 1 provides that this section applies when a notice is served as per clause 18.

Subclause 2 defines that a Court means a Court that would have jurisdiction to hear an action to recover a debt of the amount of the expense, fine or cost sought to be recovered by the notice recipient.

Subclause 3 states that in the event that a person who has been given a notice (the notice recipient) fails to comply with the notice for any reason, a local government may take whatever action it sees fit in order to obliterate the graffiti in a manner acceptable to the local government.

Subclause 4 provides that the local government may recover the reasonable costs for obliterating the graffiti as a debt from the person who failed to comply with the notice.

Subclause 5 allows a notice recipient to apply to a Court for an order under subclause 6 if the notice recipient incurred any costs in complying with the notice requirements, or as a consequence of failing to comply with a notice, incurred a fine or had to pay the costs of a local government doing anything under subclause 3.

Subclause 6 states that on application, a Court may order that, if the notice recipient is the owner – the occupier, or if the notice recipient is the occupier – the owner, pay an amount to the notice recipient, of any expense, fine or cost that the Court deems fair and reasonable.

Subclause 7 describes the factors to be taken into account when a Court makes a decision on what is a fair and reasonable amount.

### **Division 3 – Objection to a notice**

#### **Clause 20 Affected person**

Clause 20 defines who is an ‘affected person’ in relation to when a notice is served. If a person is given a notice to remove graffiti (as per clause 18) by a local government but does not own the property to which the notice relates, then the owner is also an affected person. Therefore, a reference within this Division to the affected person includes the owner and the notice recipient.

#### **Clause 21 Advice of objection and review rights**

Clause 21 provides that when a notice is issued under clause 18, the affected person is to be made aware of their rights of objection to and review of the initial decision which ordered the notice to be given. This is to be carried out as soon as practicable and provided in writing.

#### **Clause 22 Objection may be lodged**

Subclause 1 states that a person may object to a notice if the person has not applied for a review of the decision to give the notice.

Subclause 2 addresses how an objection application should be prepared.

Subclause 3 details how the local government will deal with the objection and that Part 9 and section 9.6 of the *Local Government Act 1995* applies in dealing with the objection.

#### **Clause 23 Review of decision to give notice**

Subclause 1 states that an affected person who wishes to have a notice decision reviewed may:

- a) apply to the State Administrative Tribunal if they haven’t lodged a notice objection; or
- b) after having lodged an objection but, after the expiration of 35 day after lodgement, have not been given notice of how the local government are dealing with the objection.

Subclause 2 allows a person who has received an objection review decision in writing to apply to the State Administrative Tribunal for a review of the decision.

Subclause 3 sets out the timeframes within which a person may make an application for further review.

## **Clause 24 Suspension of effect of notice**

Subclause 1 states that if a notice or decision is subsequently objected to, or a review of a decision under this Division is requested, then the outcome of the previous notice or decision is suspended until the tribunal or deciding person agrees on how to proceed, unless:

- a) the tribunal or person orders the suspension be revoked; or
- b) the local government considers that there are mitigating circumstances that overrule suspending a notice or the decisions effect, or that by suspending the effect of a notice or decision may endanger someone's safety, cause damage to a property or create a public nuisance.

Subclause 2 provides that a person or tribunal cannot, pursuant with subclause 1(a) revoke the suspension of a notice or decision unless it considers that there are urgent reasons why the effect of a notice or decision should not be suspended, or that the suspension of the notice or decision effect is reasonably likely to endanger a person's safety, cause damage to a property or create a public nuisance.

As soon as a local government has made a decision about whether to suspend a notice or decision effect, the affected person is to receive the reasons in writing.

## **Clause 25 Local government graffiti powers on land not local government property**

Clause 25 allows local government to take the necessary steps to remove graffiti which has been applied to a property and which is visible to the public but which was applied without the owner or occupiers consent. A local government may do this even if the land does not belong to the local government or if there is no consent to remove the graffiti.

## **Division 4 – Powers of entry**

### **Clause 26 Application of Division**

Clause 26 provides that the powers conferred by Division 4 may be used for performing any function that local government has within Part 3 of the Bill.

These powers of entry conferred are additional to and in no way limit any other powers of entry conferred by any other law.

When entering land using the powers in Division 4, the local government may use any necessary assistants or equipment needed to effect entry.

### **Clause 27 General procedure for entering property**

Clause 27 provide that, unless entry is authorised by the warrant of a justice, local government has no rights to enter land, premises or thing unless the consent of the owner or occupier is given or notice has been given as per clause 28.

If notice has been given to the owner or occupier in accordance with clause 28, a person authorised by the local government to do so may lawfully enter the land, premises or thing without the consent of the owner, unless the owner or occupier (or a person authorised by them) object to the entry.

### **Clause 28 Notice of entry**

Clause 28 states that notice of intended entry is to be given to the owner or occupier of a property which is to be entered.

The notice must specify the purpose for which the entry is required and the notice continues to have effect for so long as the requirement to enter continues.

The notice of entry must be served at least 24 hours prior to the power of entry being exercised.

Successive entries to a property to carry out the purpose specified in the notice are to be regarded as entries to which the notice relates.

#### **Clause 29 Entry under warrant**

A justice may, by warrant, authorise a local government by its employees, along with such other person named or described in the warrant, or a police officer, to enter any land, premises or thing using such force as is necessary.

The granting of a warrant may only occur where a justice is satisfied that a local government requires entry to a property to perform its functions but entry has either been refused, opposed or prevented, or entry cannot be obtained, or issuing a notice of entry as per clause 28 could not occur without reasonable difficulty or doing so would unreasonably delay entry.

Clause 29 also details the information a granted warrant must contain.

#### **Clause 30 Purpose of entry to be given on request**

A person performing the functions of a local government who has entered or intends to enter a property must give the particulars of the power being used to gain entry.

#### **Division 5 – Protection from liability**

##### **Clause 31 Certain persons protected from liability for wrongdoing**

Subclause 1 states that in this Division the term ‘protected person’ has the meaning given to the term in section 9.56(1) of the *Local Government Act 1995*.

Subclause 2 states that section 9.56 of the *Local Government Act 1995* applies to a protected person who has, in good faith, done, or omitted to do work for a local government under this Part.

Subclause 3 provides that the local government has the liability for the doing of anything by a protected person, as set out in section 9.56(4).

#### **Part 4 – Review**

##### **Clause 32 Review of Act**

Clause 32 details when the Minister must carry out reviews of the operation and effectiveness of this Act.

A report is to be prepared based on the review and is to be tabled before each House of Parliament as soon as practicable after being prepared.

#### **Part 5 – *Public Transport Authority Act 2003* amended**

##### **Clause 33 Act amended**

This Part amends the *Public Transport Authority Act 2003*.

##### **Clause 34 Section 58 amended**

Subclause 1 amends section 58(1) *Public Transport Authority Act 2003* by expanding the existing arrest powers of Public Transport Authority (PTA) security officers by allowing the apprehension of people reasonably suspected of committing certain offences.

Currently, a PTA security officer may only apprehend a person committing an offence on PTA property if it appears to the officer that the offence is likely to continue or be repeated. The amendment will allow a security officer to apprehend a person reasonably suspected of committing the offence, without the need for the offence to continue or be repeated.

Subclause 2 amends section 58(2) of the *Public Transport Authority Act 2003* to include the new stand-alone graffiti offence as an offence for which a PTA security officer may apprehend an offender who has committed the offence on PTA property.

Subclause 3 makes a minor consequential amendment to section 58(2).

#### **Clause 35 Section 64A amended**

Section 64A(3) of the *Public Transport Authority Act 2003* prescribes the circumstances in which the Chief Executive Officer of the PTA may prohibit offenders, convicted of committing certain offences on PTA property, from using PTA vehicles or conveyances for a period of time.

Clause 35 amends section 64A(3) of the *Public Transport Authority Act 2003* to prescribe section 445 of the *Criminal Code* (Damaging Property) and the new stand-alone graffiti offence as offences which may result in a prohibition order being issued.

### **Part 6 – Consequential amendments**

#### **Division 1 – The *Criminal Code* amended**

##### **Clause 36 Act amended**

Clause 36 provides that this Division amends the *Criminal Code*.

##### **Clause 37 Part IV Chapter XXIV deleted**

Clause 37 deletes Part IV of Chapter XXIV from the *Criminal Code*. This Part contains the offence of selling graffiti implements to children. The provisions in Part IV have been replicated within this Bill.

##### **Clause 38 Section 446 deleted**

Clause 38 deletes section 446 of the *Criminal Code*. Section 446 relates to the costs of cleaning graffiti, which have been replicated within this Bill.

##### **Clause 39 Section 557G deleted**

Clause 37 deletes section 557G of the *Criminal Code*. Section 557G provides the offence of possessing things for graffiti, which has been replicated within this Bill.

#### **Division 2 – *Local Government Act 1995* amended**

##### **Clause 40 Act amended**

Clause 40 states that this Division amends the *Local Government Act 1995*.

##### **Clause 41 Schedule 3.1 amended**

Clause 41 deletes item 5B from Division 1 of Schedule 3.1 of the *Local Government Act 1995*.

Item 5B provides local government with the power to obliterate graffiti in certain circumstances. This item is removed as all local government powers for removal of graffiti have been included within this Bill.

#### **Clause 42 Schedule 3.2 amended**

Clause 42 deleted item 8 from Schedule 3.2 of the *Local Government Act 1995*. Schedule 2 details the Particular things local governments can do on land even though it is not local government property, one of which is item 8 - 'Obliterate graffiti that is visible from a public place and that has been applied without the consent of the owner or occupier'. As the local government powers for dealing with graffiti have been included within this bill, item 8 can be deleted.

#### **Division 3 – *Young Offenders Act 1994* amended**

##### **Clause 43 Act amended**

Clause 43 states that Division 3 amends the *Young Offenders Act 1994*.

##### **Clause 44 Section 46 amended**

Clause 44 amends section 46(5a) of the *Young Offenders Act 1994* to include a references to the offences provided by clauses 5 and 10 of this Bill. This will make it clear that minimum sentences prescribed in the GV Act take precedence over section 46(5a) of the *Young Offenders Act 1994*.