



New South Wales

Graffiti Control Amendment Act 2009 No 94

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Graffiti Control Amendment Act 2009 No 94

Act No 94, 2009

An Act to amend the *Graffiti Control Act 2008* and related legislation to make further provision with respect to the minimisation and control of graffiti. [Assented to 30 November 2009]

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Graffiti Control Amendment Act 2009*.

2 Commencement

- (1) This Act commences on the date of assent, except as provided by subsection (2).
- (2) Schedule 1 [7] and Schedule 2.1–2.3 commence on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Graffiti Control Act 2008 No 100

[1] Section 3 Definitions

Insert in alphabetical order in section 3 (1):

exercise a function includes perform a duty.

function includes a power, authority or duty.

[2] Section 4 Damaging or defacing property by means of graffiti implement

Omit “6 months” from the maximum penalty for section 4 (1).

Insert instead “12 months”.

[3] Section 5 Possession of graffiti implement

Omit “3 months” from the maximum penalty for section 5 (1).

Insert instead “6 months”.

[4] Part 3, heading

Insert “, **supply, possession**” after “Sale”.

[5] Sections 8A and 8B

Insert after section 8:

8A Supply of spray paint cans to persons under 18

(1) A person who supplies 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 supplying the spray paint can) to a prosecution for an offence under this section that:

(a) the person believed on reasonable grounds that the recipient intended to use the spray paint can for a defined lawful purpose, being the lawful pursuit of an occupation, education or training, or

(b) the supply occurred in a public place and the person believed on reasonable grounds that the recipient intended to use the spray paint can at or in the immediate vicinity of the place where the supply occurred for another defined lawful purpose, or

(c) the supply occurred in a private place and the person believed on reasonable grounds that the recipient intended

to use the spray paint can at or in the immediate vicinity of the place where the supply occurred for an activity that does not constitute an offence against this Act or any other law.

- (3) In this section, a *defined lawful purpose* is:
- (a) the lawful pursuit of an occupation, education or training, or
 - (b) any artistic activity that does not constitute an offence against this Act or any other law, or
 - (c) any construction, renovation, restoration or maintenance activity that does not constitute an offence against this Act or any other law, or
 - (d) any other purpose authorised by the regulations.
- (4) The regulations may provide that this section does not apply to or in relation to any specified class or description of spray paint can.
- (5) In this section:
- private place* means any place that is not a public place.
- 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.

8B Possession of spray paint cans by persons under 18

- (1) A person under the age of 18 years who is in possession of a spray paint can in a public place is guilty of an offence.
Maximum penalty: 10 penalty units or imprisonment for 6 months.
- (2) It is a defence (proof of which lies on the person in possession of the spray paint can) to a prosecution for an offence under this section that the person:
- (a) had the spray paint can in his or her possession for a defined lawful purpose, being the lawful pursuit of an occupation, education or training, or

-
- (b) had the spray paint can in his or her possession for another defined lawful purpose and was at or in the immediate vicinity of the place where the spray paint can was being used or intended to be used for that defined lawful purpose.
- (3) In this section, a ***defined lawful purpose*** is:
- (a) the lawful pursuit of an occupation, education or training, or
 - (b) any artistic activity that does not constitute an offence against this Act or any other law, or
 - (c) any construction, renovation, restoration or maintenance activity that does not constitute an offence against this Act or any other law, or
 - (d) any other purpose authorised by the regulations.
- (4) The regulations may provide that this section does not apply to or in relation to any specified class or description of spray paint can.
- (5) 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 under section 4 or 5 (or under a repealed provision of the *Summary Offences Act 1988* that corresponded to section 4 or 5), 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* to sections 4 and 5, before their repeal by this Act, were sections 10A and 10B.

- (6) 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.

[6] Section 9 Confiscation of spray paint cans from minors

Omit “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” from section 9 (1).

Insert instead “unless the person satisfies the officer that the person’s possession of the spray paint can does not constitute an offence under this Act”.

[7] Part 3A

Insert after Part 3:

Part 3A Community clean up work

9A Definitions

In this Part:

adult offender means an offender who is not a child offender.

assigned officer in respect of a community clean up order means the assigned officer under the *Children (Community Service Orders) Act 1987* or the *Crimes (Administration of Sentences) Act 1999*, as the case requires.

child offender means an offender in relation to a graffiti offence who:

- (a) was under the age of 18 years when the graffiti offence was committed, and
- (b) was under the age of 21 years when charged before a court with the graffiti offence.

community clean up order means an order under this Part requiring a person to perform community clean up work.

community clean up work—see section 9C.

graffiti offence means an offence under this Act.

offender means a person who has pleaded guilty to a graffiti offence in a court or who has been found guilty of or convicted of a graffiti offence by a court.

9B Making of order for community clean up work

- (1) A court that imposes a fine on an offender for a graffiti offence may make an order requiring the offender to perform community clean up work in order to satisfy the amount of the fine.
- (2) A community clean up order may be made by the court at the time that the fine is imposed or at a later time.

(3) A community clean up order may be made even if part of the fine has been paid (in which case it applies to the part of the fine that remains unpaid).

(4) However, a community clean up order is not to be made in respect of a fine if it has been fully paid or the matter has been referred to the State Debt Recovery Office for the making of a court fine enforcement order under the *Fines Act 1996*.

Note. A matter can be referred to the State Debt Recovery Office for the making of a court fine enforcement order if the fine has not been paid by the due date.

9C Community clean up work—meaning

(1) In this Part, **community clean up work** means any community service work under the *Children (Community Service Orders) Act 1987* or the *Crimes (Administration of Sentences) Act 1999* that is approved by the relevant Minister as community clean up work for the purposes of this Act.

(2) The relevant Minister is:

- (a) in the case of a community clean up order made in respect of a child offender, the Minister administering the *Children (Community Service Orders) Act 1987*, or
- (b) in the case of a community clean up order made in respect of an adult offender, the Minister administering the *Crimes (Administration of Sentences) Act 1999*.

9D Order to be made only if offender suitable and community clean up work available

(1) A court must not make a community clean up order unless satisfied, following consultation with an authorised officer, that:

- (a) the offender is a suitable person for community clean up work and, in the case of a child offender, is sufficiently mature to perform community clean up work, and
- (b) arrangements exist for persons who reside in the area in which the offender resides or intends to reside for the offender to perform community clean up work, and
- (c) community clean up work can be provided in accordance with those arrangements.

(2) In deciding whether to make a community clean up order, the court must have regard to whether the offender is willing to participate in community clean up work.

(3) For the purposes of this section, an **authorised officer** means:

- (a) in respect of an adult offender—the Commissioner of Corrective Services, Department of Justice and Attorney General or an officer of the Department authorised by the Commissioner to exercise the functions of an authorised officer under this section, or
- (b) in respect of a child offender—the Director-General of the Department of Human Services or an officer of the Department authorised by the Director-General to exercise the functions of an authorised officer under this section.

9E Notice of order

- (1) As soon as practicable after making a community clean up order, the court is to cause written notice of the order to be given to the following persons:
 - (a) the offender,
 - (b) if the offender is an adult offender—the Commissioner of Corrective Services, Department of Justice and Attorney General,
 - (c) if the offender is a child offender—the Director-General of the Department of Human Services,
 - (d) if the offender is a child offender and the order is made by a court other than the Children’s Court—the registrar of the Children’s Court.
- (2) The notice must include the following information:
 - (a) the place at which, or person to whom, the offender must present himself or herself, in person, for the purpose of enabling the administration of the order to be commenced,
 - (b) the period within which the offender must so present himself or herself.
- (3) A community clean up order is not invalidated by a failure to comply with this section.

9F Explanation of nature and effect of order

- (1) A court that makes a community clean up order in respect of an offender must explain, or cause to be explained, to the offender (in language likely to be readily understood by the offender):
 - (a) the requirements to be complied with by the offender under the order, and
 - (b) the consequences that may follow if the offender fails to comply with those requirements, and

(c) the fact that the order may also be satisfied by payment of the fine.

(2) A community clean up order is not invalidated by a failure to comply with this section.

9G Number of hours of community clean up work

(1) The number of hours of community clean up work, specified in a community clean up order, to be performed by the offender is to be calculated at the rate of 1 hour for each \$30 of the amount of the fine (or that part of the fine that is unpaid).

(2) The number of hours specified in any one 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. Accordingly, 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.

9H Offender must participate in graffiti prevention program

(1) The community clean up work that an offender is directed to do by the assigned officer under the community clean up order must, if practicable, include at least 2 hours participation in a graffiti prevention program.

(2) For the purposes of this section, a *graffiti prevention program* means a personal development, education or other program the object of which is to prevent offenders from engaging in unlawful graffiti activities.

(3) An offender cannot be required by a community clean up order to participate in any personal development, education or other program that is not a graffiti prevention program.

9I Satisfaction of fine by community clean up work

(1) If an offender who is subject to a community clean up order duly complies with the order, the fine concerned is taken to be satisfied.

(2) If an offender who is subject to a community clean up order duly performs part of the number of hours of community clean up work to be performed under the order, the fine concerned is taken to be satisfied by the amount calculated at the rate of \$30 for each hour of community clean up work actually performed.

9J Satisfaction of orders by payment

- (1) If an offender who is subject to a community clean up order duly pays the fine (or the unsatisfied balance of the fine having regard to the number of hours of community clean up work already performed) the order is taken to be satisfied.
- (2) A community clean up order ceases to be in force when it is satisfied.

9K Revocation of community clean up order

- (1) A court may revoke a community clean up order if it is satisfied, following a report by the assigned officer in respect of the community clean up order, that the offender who is the subject of the order:
 - (a) has failed to report for work under the order within the period of 3 months after being required to do so by the order, or
 - (b) has failed to report for work under the order within any period of 3 months, or
 - (c) has failed to comply with the requirements of the order, or
 - (d) is not capable of performing the work under the order, or
 - (e) is not suitable to be engaged in the work under the order.
- (2) A court may also revoke a community clean up order on the request of the offender subject to the order if satisfied that it would be in the interests of justice to revoke the order.
- (3) A court may revoke a community clean up order in the absence of the offender subject to the order.
- (4) However, a court is not to revoke a community clean up order unless satisfied that the offender has been given notice of the application for revocation and an opportunity to make submissions in respect of the application.
- (5) A court may, when revoking an order, also revoke other community clean up orders that have been made against the offender.
- (6) A community clean up order may be revoked by the court that made it or by a court of like or superior jurisdiction.
- (7) A community clean up order in respect of which the Children's Court is the supervising court may be revoked by the Children's Court even though the Children's Court did not make the order.

9L Effect of appeal against conviction or sentence

- (1) If a finding of guilt, conviction, or sentence in respect of a graffiti offence is quashed, annulled or set aside, any community clean up order made in respect of the fine imposed for the offence is revoked.
- (2) If a fine imposed by a court is varied, the court that varies the fine may revoke or vary any community clean up order made in respect of the fine. In such a case, the court may exercise any functions that could have been exercised by the court that imposed the fine.

9M Notice of revocation or variation of community clean up order

A court that revokes or varies a community clean up order is to cause notice of the revocation or variation to be given to the following persons:

- (a) the offender,
- (b) the offender's assigned officer,
- (c) if the offender is a child offender and the court is not the Children's Court—the registrar of the Children's Court.

9N No appeals against order

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.

9O Registrar of court may exercise functions of court

- (1) The functions of a court under this Part with respect to the making of a community clean up order may be exercised by a registrar of the court, if the offender consents to the making of the order.
- (2) The functions of a court under this Part with respect to the revocation of a community clean up order may be exercised by a registrar of the court.

9P Application of Children (Community Service Orders) Act 1987 to orders made in respect of child offenders

- (1) The *Children (Community Service Orders) Act 1987* applies, subject to this Part, in respect of a community clean up order made in respect of a child offender in the same way as it applies in respect of a children's community service order made in respect of a person to whom that Act applies.

- (2) The following provisions of the *Children (Community Service Orders) Act 1987* do not apply to a community clean up order:
- (a) sections 5, 6, 9, 12, 13 and 14, Part 4, and sections 27 and 28,
 - (b) such other provisions of that Act as may be prescribed by the regulations under this Act.
- Note.** The excluded provisions are generally provisions that duplicate, or are inconsistent with, the provisions of this Part.
- (3) The provisions of any regulation made under the *Children (Community Service Orders) Act 1987* apply in respect of a community clean up order to the extent that those provisions have effect for the purposes of provisions of that Act that apply to a community clean up order.
- (4) The regulations under this Act may modify the operation of the *Children (Community Service Orders) Act 1987* or the regulations under that Act in respect of a community clean up order.

9Q Application of sentencing legislation to orders made in respect of adult offenders

- (1) The *Crimes (Sentencing Procedure) Act 1999* and the *Crimes (Administration of Sentences) Act 1999* apply, subject to this Part, in respect of a community clean up order made in respect of an adult offender in the same way as they apply in respect of a community service order made in respect of a person under the *Crimes (Sentencing Procedure) Act 1999*.
- (2) The following provisions do not apply to a community clean up order:
- (a) Divisions 2 and 3 of Part 7 and sections 90 (2) (b) and (3), 91, 92 and 93 of the *Crimes (Sentencing Procedure) Act 1999*,
 - (b) sections 113, 114, 115 and 116 of the *Crimes (Administration of Sentences) Act 1999*,
 - (c) such other provisions of the *Crimes (Sentencing Procedure) Act 1999* or the *Crimes (Administration of Sentences) Act 1999* as may be prescribed by the regulations under this Act.
- Note.** The excluded provisions are generally provisions that duplicate, or are inconsistent with, the provisions of this Part.
- (3) The provisions of any regulation made under the *Crimes (Sentencing Procedure) Act 1999* or the *Crimes (Administration of Sentences) Act 1999* apply in respect of a community clean up

order to the extent that those provisions have effect for the purposes of provisions of those Acts that apply to a community clean up order.

- (4) The regulations under this Act may modify the operation of the *Crimes (Sentencing Procedure) Act 1999*, the *Crimes (Administration of Sentences) Act 1999* or the regulations under those Acts in respect of community clean up orders.

9R Regulations

- (1) The regulations may make further provision for or with respect to community clean up work and community clean up orders.
- (2) The regulations may increase the amount of \$30 mentioned in sections 9G and 9I. If the regulations do so, the reference to the amount of \$30 in those sections is to be construed as a reference to that increased amount.

[8] Schedule 1 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Graffiti Control Amendment Act 2009

[9] Schedule 1, Part 3

Insert after Part 2:

Part 3 Provisions consequent on enactment of Graffiti Control Amendment Act 2009

3 Application of amendments

- (1) An amendment made to this Act by the *Graffiti Control Amendment Act 2009* that increases the penalty for an offence against this Act applies in respect of an offence committed on or after the commencement of the amendment.
- (2) A community clean up order may be made under Part 3A, as inserted by the *Graffiti Control Amendment Act 2009*, in respect of a graffiti offence only if it is committed on or after the commencement of that Part.

Schedule 2 Amendment of other legislation

2.1 Children (Community Service Orders) Act 1987 No 56

[1] Section 16 Assignment of officer by Director-General

Omit “On receipt of a copy of a children’s community service order sent to the Director-General in accordance with section 12 (2) of this Act or section 85 (3) of the *Fines Act 1996*” from section 16 (1).

Insert instead “On receiving notice of the making of a children’s community service order”.

[2] Section 19 Duration of children’s community service orders

Omit “or the *Fines Act 1996*” from section 19 (c).

Insert instead “or, in the case of an order made under another Act, under the Act under which it is made”.

2.2 Children (Criminal Proceedings) Act 1987 No 55

Section 33 Penalties

Insert at the end of section 33 (5) (c):

, or

- (d) to make a community clean up order in respect of a fine imposed for an offence under the *Graffiti Control Act 2008*.

2.3 Crimes (Administration of Sentences) Act 1999 No 93

[1] Section 110 Duration of community service order

Omit section 110 (1) (c). Insert instead:

- (c) in the case of a community service order that, under the Act under which it is made, can be satisfied by the payment of a fine, until the order is satisfied in accordance with that Act,

[2] Section 111 Assignment of officer by Commissioner

Omit “On receiving a copy of a community service order sent under section 93 of the *Crimes (Sentencing Procedure) Act 1999* or section 80 of the *Fines Act 1996*”.

Insert instead “On receiving notice of the making of a community service order”.

2.4 Graffiti Control Regulation 2009

Clause 11 Penalty notices for offences relating to sale or display of spray paint cans

Omit clause 11 (2). Insert instead:

- (2) The following classes of persons are prescribed as classes of persons who may issue penalty notices under section 16 of the Act:
 - (a) investigators within the meaning of the *Fair Trading Act 1987*,
 - (b) employees of a local council who are authorised persons for the purposes of section 679 of the *Local Government Act 1993*.

2.5 Rail Safety Act 2008 No 97

Section 104 Power to direct name and address be given

Insert “or the *Graffiti Control Act 2008*” after “rail safety law” wherever occurring in section 104 (1) (a) and (b).

[Second reading speech made in Legislative Council on 12 November 2009
Agreement in principle speech made in Legislative Assembly on 25 November 2009]

BY AUTHORITY