

## Graffiti Prevention Bill: Exposure Draft Youthlaw Submission

### Introduction

Youthlaw is Victoria's state-wide community legal centre for young people under the age of 25. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework. Youthlaw is based at Frontyard Youth Services which is a series of co-located youth services for at risk young people, many of whom are transient and homeless.

We welcome this opportunity to respond to the *Graffiti Prevention Bill: Exposure Draft*. Youthlaw does not support the *Graffiti Prevention Bill* as the Bill contains provisions which undermine principles of natural justice and procedural fairness and are most likely to have a detrimental impact on young people.

Youthlaw acknowledges community concern about incidents of graffiti and vandalism. We support the extension of community based initiatives that aim to prevent unwanted graffiti by engaging graffiti artists in community programs and that address environmental factors such as increased lighting, environmental maintenance and controlled access to some spaces. However, the *Graffiti Prevention Bill* presents a purely punitive response and we urge the Government to consult with the community more widely about a holistic prevention approach.

Youthlaw's key concern regarding the Bill is that it will disproportionately impact on young people. Some provisions also present a significant departure from the fundamental principles of the rule of law and undermine some fundamental human rights.

Given the significance of this Bill, we are disappointed by the timing of the release of the exposure draft, which coincided with the 2006 state election and the Christmas break, as the timing may restrict community discussion and debate about the draft. We urge the state government to consult as widely as possible on the draft and, importantly, to engage young people as part of this consultation process.

Youthlaw's issues and concerns are outlined in two sections in this submission. The first section provides some general comments about the Bill. The second section responds to specific questions on the Exposure Draft as posed in the discussion paper.

### General comments

#### Impact of the Bill on young people

The discussion paper (para 2.3) states that "88% of persons apprehended for property damage on public transport were under 25". Given this statement is unreferenced, it is difficult to determine if police crime statistics support this claim. It is also impossible to determine whether graffiti is the key property offence. However, we do know that young people are highly visible in public places and are significant users of public transport where incidents of graffiti occur. We are concerned that

the proposed offence of possessing a prescribed graffiti implement could capture many young people in and around a public transport infra-structure (s7(1)) or a location with high incidence of graffiti or recently marked with graffiti (s11(2)). In addition, young people, particularly students, are very likely to be carrying graffiti implements (e.g. textas, pens). For these reasons, Youthlaw is concerned that the proposed laws will disproportionately impact on young people and will have a net widening affect by drawing more young people into contact with the criminal justice system and potentially exposing young people to imprisonment for, arguably, a relatively minor property offence.

Youthlaw supports Victoria's current juvenile justice policy framework which emphasises diversion and rehabilitation. The current system aims to prevent low risk young people from entering the criminal justice system and to rehabilitate more serious young offenders. The Bill does not accord with this framework as the proposed legislation is likely to introduce more low risk young people into the criminal justice system and fails to consider more appropriate diversionary strategies.

### **Human rights**

The core international standards for children and young people are explicitly set out in the United Nations *Convention on the Rights of the Child* (CROC). In addition, proposed Victorian legislation must be considered in light of the *Charter of Human Rights and Responsibilities*. Both CROC and the *Charter* provide a rights-based framework for assessing the *Graffiti Prevention Bill*. Youthlaw contends that the Bill contravenes significant human rights principles. Of particular relevance are the following human rights of children and young people:

- Right not to be discriminated against (article 2 CROC and section 8 *Charter*);
- Right to freedom of association (article 15 of CROC and section 16 of *Charter*);
- Right to be diverted from the criminal justice system (article 40 CROC);
- Right to procedural fairness in criminal proceedings, including the right to be presumed innocent, and age appropriate treatment; with detention as a last resort (articles 37 & 40 CROC and section 25(3) of *Charter*);
- Right of a child to have their best interests considered (article 3 CROC and section 17(2) *Charter*)

The draft Bill is arguably in breach of various rights protected in both CROC and the *Charter of Human Rights and Responsibilities*, namely:

- Discrimination - the Bill is likely to result in the targeting and over policing of children and young people.
- Detention of children and young people for the purposes of a police search - the Bill breaches Article 37 (b) of CROC which outlines that the detention of a child must only occur as a last resort.
- Reversing the onus of proof - the Bill breaches the right to be presumed innocent.
- Proposed search powers - conflict with the s 21 of the *Charter* regarding the right to liberty and security and freedom from arbitrary arrest and detention.

### **Existing laws**

Youthlaw does not support the introduction of new laws to target graffiti. Graffiti offences are adequately covered by existing laws including the *Summary Offences Act 1966 (Vic)*, *Crimes Act 1958 (Vic)* and the *Transport Act 1983 (Vic)*. Youthlaw does not support the reasoning provided in the discussion paper that new legislation is required to ensure policing and prosecution of graffiti is made easier.<sup>1</sup> This is not sufficient reason to introduce legislation which will have a detrimental impact on young people and undermine fundamental rules of law.

Not only do proposed laws duplicate and extend existing laws, we are concerned that a person could be charged under the new legislation plus existing legislation and so face multiple charges given that the Bill 'is in addition to and does not derogate from the Crimes Act 1958 or the Summary Offences Act 1966' (s4 of Bill).

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<sup>1</sup> Department of Justice, Graffiti Prevention Exposure Draft Bill: Discussion Paper p. 17.  
*Graffiti Exposure Bill: Youthlaw submission February 2007*

### **Volatile substance inhalation**

Youthlaw is very concerned that the provisions of the Bill which criminalises the possession of a prescribed graffiti implement (spray-can) will undermine the harm minimisation objectives of the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)*. This Act specifically seeks *not* to criminalise the possession of implements used in substance inhalation (e.g. spray-cans). Young people who 'chrome' may be in possession of a 'prescribed implement' under the graffiti legislation and we are concerned that police may accordingly adopt a more punitive policing response.

Since the implementation of the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)* Youthlaw has worked with the Department of Human Services on the Volatile Substance Abuse Protocols Advisory Committee monitoring the volatile substances legislation. We are concerned that the Graffiti Bill will undermine the good work undertaken to date to educate police about volatile substance inhalation and the importance of a harm minimisation approach. In day to day operations, it will be difficult for police to grapple with two competing pieces of legislation to determine which takes precedence.

If the Graffiti Prevention Bill is to be implemented, Youthlaw recommends that the Bill makes explicit reference to the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)* and states that in cases where a young person is affected by a volatile substance, the volatile substances legislation take precedence. Police should be directed to act according to this legislation and established protocols. We acknowledge this will be difficult operationally and will require ongoing police training to ensure police are aware of and understand the volatile substance legislation and its overlap with the graffiti legislation.

### **Penalties**

The proposed penalties in the Graffiti Prevention Exposure Draft Bill are excessive. The Bill provides for penalties for marking graffiti of a maximum of two years imprisonment or a maximum fine of 240 penalty points (around \$25,000). Graffiti is arguably a relatively minor property offence and yet these penalties match or far exceed more serious offences including:

- Dangerous driving (*Road Safety Act 1986 (Vic)*) – penalty of not more than 240 penalty points or two years imprisonment.
- Careless driving (*Road Safety Act 1986 (Vic)*) - first offence 12 penalty points, subsequent offences up to 25 penalty points.
- Breaching an intervention order - up to 2 years jail or a fine of around \$24,000.

Youthlaw asserts the penalties provided in the Graffiti Prevention Bill are disproportionate to the offence. In addition, in our practice experience, young people have limited capacity to pay financial penalties and we submit that the excessive financial penalties prescribed will be an ineffective penalty for young people.

### **Defining graffiti**

The fact that all types of graffiti (not just tagging) are being considered in the same light by the Bill does not reflect the difference between 'tagging', 'pieces' and 'stencil art' and the different levels of tolerance for these art forms in the community. We need to differentiate between types of graffiti, and understand the motivations for doing different forms of graffiti prior to developing policy and laws about graffiti. There are many positive aspects to young people doing legal graffiti, such as gaining skills towards developing a craft, being part of a peer group and popular culture and enhancing self esteem. Some local government initiatives encourage young people to develop their skills in stencil art and other forms of graffiti as art. In other cases, local businesses commission street artists to decorate the façade of their shop. While Youthlaw does not want the term graffiti to be narrowly defined in legislation, it is important to make these distinctions before developing blanket laws.

### **Monitoring and review**

If new graffiti legislation is to be introduced, Youthlaw recommends that the legislation contains a review clause similar to the one found in the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)* to enable government and community stakeholders to monitor the implementation of the legislation, its impact on young people and its effectiveness in meeting stated objectives.

### **Prevention initiatives**

There is no evidence that the proposals contained in the draft bill would achieve the purpose "...to reduce the incidence of graffiti". Youthlaw submits that the government should support the development of appropriate crime prevention measures which encourage safe and well used public spaces that are less susceptible to unwanted graffiti. Initiatives should also respect the human rights of young people and incorporate their views, needs and ideas in devising solutions to the problems caused by graffiti.

A more sensible and cost effective approach to reducing the incidence of graffiti would be to address both the motivations of young people to engage in graffiti and the opportunities available to do so. Examples of opportunity reduction include using materials that are resistant to scratching and marking, improved lighting and better design, limiting access to spray paints, prompt removal of graffiti, and designing public spaces to attract more users and to maximise visibility and 'casual surveillance' which also increases a general sense of safety.

The state government should further investigate social programs aimed at alleviating some of the boredom and alienation which lead young people to graffiti. These longer-term solutions include diverting potential offenders through programs and activities which keep them occupied and develop skills, community and school based education programs that promote a sense of responsibility for, and ownership of, community resources and facilities, and providing more legal outlets for young people to practice their art.

Police should work with community members who are affected by graffiti and with young people who engage in graffiti related activities. Young people then become part of the solution, rather than being seen as the problem. Police can play an active role in bringing both groups together to discuss the best ways of addressing graffiti and, in the process, may begin to address the issues of alienation, boredom and hopelessness. Local community responses need to be encouraged and developed rather than a zero tolerance, blanket criminalising approach.

## **3. Discussion paper questions**

### **Section 3 – Defining Graffiti and Graffiti Implements**

#### ***Do you think that the definition of what amounts to the marking of graffiti in the Exposure Draft Bill is clear?***

Yes, however Youthlaw believes the definition is too broad and allows for a wide range of offences to be caught under the definition of "marked graffiti". The discussion paper (paragraph 3.3.3) clearly recognises that the objective behind this definition is to 'limit the possible interpretations or meanings that could be given to the term "graffiti"'. Writing implements such as permanent textas could fit this definition as could marking of drying concrete. Therefore, Youthlaw believes that the definition of what constitutes marked graffiti should be narrowed to ensure that minor acts of graffiti are not caught by these provisions.

#### ***Do you think that the term "graffiti" should be specifically defined in the Exposure Draft Bill?***

No, it should be up to magistrates to interpret the term according to its common law and ordinary meaning.

#### ***Do you think that spray-paint cans should be classified as "prescribed" implements?***

On face value it would appear reasonable to prescribe a limited class of graffiti implements such as spray cans. However some young people could genuinely be carrying spray cans as part of legal graffiti program, or for some other student related purpose.

The bill allows for the class of implement to be prescribed to be widened to include other implements in the future. Youthlaw does not support this extension. This may unnecessarily impact on what a young person could carry on their person e.g. textas, compasses and other arts implements.

#### **Section 4 – Graffiti Offences**

##### ***Do you think that these four proposed graffiti offences are appropriately framed in the Exposure Draft Bill?***

###### *(a) Marking graffiti*

This offence is already covered in alternate pieces of legislation – wilful damage in the *Summary Offences Act 1966 (Vic)*, criminal damage in *Crimes Act 1958 (Vic)* and the *Transport Act 1983 (Vic)*. This additional offence is not necessary as it duplicates existing offences.

###### *(b) Marking harassing or vilifying graffiti*

See response to question below.

###### *(c) Possessing prescribed graffiti implement without lawful excuse*

Youthlaw has significant concerns about the provisions of this offence.

As raised above, this offence conflicts with the objectives of the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)* which seeks not to criminalise the possession of implements involved in the inhalation of volatile substances.

This offence also duplicates an existing offence – s. 223B(3) & (4) of the *Transport Act 1983* with a penalty of 10 penalty units and the legal onus being with the State.

Youthlaw strongly objects to reversal of onus of proof under this proposed offence (see more detailed comments in section 6)

Despite suggestion in paragraph 4.17 of the discussion paper that “those deemed to have a lawful excuse won’t be charged” it is our view that this is unlikely to be the police practice on the ground. It is our opinion based on the experiences of our clients, that the police will confiscate the implement and charge the young person. Any lawful excuse defence will then need to be argued in open court.

Article 40 of CROC stipulates that a child in conflict with the law has the right to treatment which promotes the child’s sense of dignity and worth, which facilitates their reintegration into society which reflects the best interests of the child, and takes the child’s age into account. The particular rights of procedural fairness of child offenders is also found in section 25(3) of the *Charter of Human Rights and Responsibilities 2006 (Vic)* which states that it is relevant for a child charged with a criminal offence to have a procedure that takes into account their age and the desirability of promoting their rehabilitation.

Where young people come into contact with the legal system because of graffiti related charges, they should be treated fairly and wherever possible the young person should be diverted out of the criminal justice system. Instead, police should consider whether the offence is serious enough to warrant a criminal justice response which goes beyond the giving of an informal caution.

This offence is likely to compound issues between young people and the police. It will also clog up the courts unnecessarily with these types of matters.

***Do you think that Offence 2 – "marking harassing or vilifying graffiti" – should be a separate offence?***

Youthlaw does not believe the offence of "marking harassing or vilifying graffiti" should be a separate offence. This offence would duplicate existing laws contained in the *Racial and Religious Tolerance Act 2001 (Vic)* under s 24 and 25 of the Act as well as existing sedition laws found in s 101 of the *Criminal Code Act 1995 (Cth)*. Additionally Youthlaw foresees significant difficulty in objectively determining and interpreting what constitutes a defence of "reasonable political comment".

**Section 5 – Search and Seizure Powers**

***Do you think that under the proposed Bill the police should have stronger search powers than those outlined?***

Youthlaw opposes expanded police search powers. Existing legislative and common law search powers provides police with sufficient powers to obtain evidence. It is our experience with clients that police often search young people without giving a reason. One of the main complaints we hear from young male clients in particular is that they are currently constantly searched by police. Strengthened powers are likely to result in cases of escalating conflict between police and young people and may result in the young person committing other offences with a net widening result.

Youthlaw is also concerned that 'the fact that a person is present in or near a location with a high incidence of graffiti or one that appears to have been recently marked with graffiti can be taken into account by a police officer in deciding if there are reasonable grounds for suspecting that the person is in possession of a prescribed graffiti implement'.<sup>2</sup> This grants police too much discretion for searching and discriminates against young people for being in a particular area. It also contravenes s21 of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* regarding the right to liberty and security and freedom from arbitrary arrest and detention and article 15 CROC regarding freedom of assembly and movement.

***Are the special procedures for searching young people adequate?***

These protections are appropriate according to state and international human right standards. S17(2) of the *Charter of Human Rights and Responsibilities* states "every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child." Additionally the protection rights in the *UN Convention on the Rights of the Child* safeguarding from all forms of abuse, neglect and exploitation.

However the procedures do not spell out how "best interests of the child" will be defined and used practically? Best interests are usually determined on a case-by-case basis and it requires a rigorous effort to ensure that best interest, not simply adult's perceptions of what those are, are considered. Although adults, including parents, legal guardians, are concerned with or have a claim in decision-making related to children, best interest principle requires the involvement of children where possible because best interests cannot be ascertained unless the child's perspective is taken into account. The weight of the child's view will be assessed according to the child's age and whether the child has sufficient understanding and intelligence to understand fully what is proposed.

While Youthlaw supports the requirement for the presence of a parent or independent person, we question how this will work in practice given that it is well established police practice to conduct searches on the street or wherever a person is first approached by police. In turn, the role of an independent person or parent is usually to support a young person during a police interview. What resources will be made available to endure independent persons are also available for searches? We are concerned that the reality of operational policing will mean that young people are actually searched without this oversight.

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<sup>2</sup> Department of Justice, Graffiti Prevention Exposure Draft Bill: Discussion Paper s. 5.10, p. 15. *Graffiti Exposure Bill: Youthlaw submission February 2007*

In addition, we have concerns about where young people will be detained while waiting to be searched in the presence of an independent person. Whilst the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act 2003 (Vic)* makes provision for a child or young person under the age of 18 to be detained, this is in order to protect the young person from a serious health risk, not in order to prevent a criminal activity. Further the *Drugs, Poisons and controlled Substances (Volatile Substances) Act 2003 (Vic)* states that a young person cannot be detained in a police gaol, police cell or lock-up (See Section 6). The Bill however, makes no such provision, and as such it was presumed that a young person could be detained in a police cell or lock up until a parent or guardian or independent person could be present to supervise a search.

We submit the Bill is in breach of Article 37 (b) of CROC which outlines that the detention of a child must only occur as a last resort, and section 23(3) of the *Charter* that states a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age. Detaining a child or young person on suspicion of possessing a graffiti implement does not warrant a last resort response.

### ***Should police have the power to seize graffiti implements?***

The police already have such seizure powers provided in the *Summary Offences Act 1966 (Vic)* (section 60A) and the *Transport Act 1983 (Vic)* (section 228ZE). The issue for Youthlaw is more about how police will exercise this power.

## **Section 6 – Reversing the Legal Burden of Proof**

### ***Do you think a person caught with a can of spray paint while trespassing or on or around public transport property should be required to show he or she has a lawful excuse for carrying it?***

No, Youthlaw does not support any reversal of the legal burden of proof. Any such requirement is designed to make it easier for the police to prosecute suspects. However, the presumption of innocence underpins our justice system. Section 25 (1) of the Victorian *Charter of Human Rights and Responsibilities* states that: ‘a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.’ Reversing the onus of proof is not compatible with this human right and therefore this section of the Bill does not comply with the *Charter* and it should not be made law. It is the job of police to establish why they have reasonable suspicion regarding the intention of the suspect.

### ***In what circumstances do you think it is acceptable for the burden of proof to be reversed?***

Youthlaw does not support the reversal of the legal burden of proof in any circumstances.

### ***How important is it to you that the reversal of burden of proof be limited to the circumstances set out in the Exposure Draft Bill (see paragraph 6.7 in the Discussion Paper)?***

It is critically important that there is no reversal of the burden of proof.

## **Section 7 – Penalties for Graffiti Offenders**

### ***Should a person be jailed for marking graffiti?***

No. Pursuant to various international (Article 37(b) of CROC) and Victorian standards (Section 23(3) of Charter) imprisonment should be a last resort for young offenders. Imprisonment for this offence would also undermine Victoria’s juvenile justice principles which emphasise diversion, rehabilitation and imprisonment as a last resort.

### ***Should the offence of possessing a prescribed graffiti implement be penalised by way of infringement notice or should the offending person be required to go to court?***

Youthlaw has concerns about the potential for young people to incur significant debts as a result of infringement notices received in relation to the offence of possessing a prescribed graffiti implement. Given the proposed reversal of the burden of proof a young person would be required to ‘opt in’ to the legal system to go to open court to challenge an infringement notice and argue a

'lawful excuse'. It is Youthlaw's experience that young people are less likely to take this step, and therefore less likely to enforce their rights.

***Are the penalties for marking graffiti and marking harassing or vilifying graffiti too low, too high, or about right?***

The penalties are excessive. As noted above the proposed penalties match or far exceed more serious offences including:

- Dangerous driving (*Road Safety Act 1986 (Vic)*) – penalty of not more than 240 penalty points or two years imprisonment.
- Careless driving (*Road Safety Act 1986 (Vic)*) - first offence 12 penalty points, subsequent offences up to 25 penalty points.
- Breaching an intervention order up to 2 years jail or a fine of around \$24000.

Youthlaw asserts the penalties provided in the Graffiti Prevention Bill are disproportionate to the offence.

In addition, in our practice experience, young people have limited capacity to pay financial penalties and we submit that the excessive financial penalties prescribed will be an ineffective penalty for young people. For any matters penalised by way of infringement notice, it is important to consider to what extent any infringement costs imposed are likely to establish debts that recipients are unable to meet. This raises a related issue of restitution orders not being paid.

Additionally, and inappropriately, the penalties introduce mandatory sentencing via minimum terms. Rather it is appropriate that offences of *possession* and *intent to mark* do not include minimum terms of imprisonment. It is also appropriate that offences under this Act be summary and tried before a magistrate. In this case it would be reasonable to rely on the penalties under the *Summary Offences Act 1966 (Vic)* for graffiti offenders namely 6 months or 25 penalty units.

*N.B Error in para 7.13 of the discussion paper*

*Children and young Persons Act 1989* applies to young offenders under 18 years (not 17 years), and under 19 year (not 18 years) at the time of appearing before the court.

## **Section 10 – Other Ways of Preventing Graffiti**

***Should physical access to spray paint in retail outlets be restricted?***

Youthlaw does not support mandatory restrictions in retail outlets. There is currently voluntary restricted access at some retail outlets with spray cans not shelved in obvious sections of the store. In July 2002 the state government took action to combat 'chroming' in the community by working with retailers to promote the responsible sale of spray paint cans. Retailers have agreed to a voluntary code not to sell solvents to young people who are likely to abuse them. A number of major retailers such as Mitre-10, PaintRight and Bunnings Warehouse have already developed policies to restrict the sale of these products.

***Should there be an outright ban on the sale of spray paint, or a ban on selling it to people under 18?***

No, young people have the right to buy spray paint like all members of the community. Such a ban would constitute age discrimination, and in this regard not comply with section 8 or the *Charter*.

***Should retailers be required to record the identity of people who buy spray paint?***

No, this would be unfairly onerous on retailers, and likely to breach the right of privacy of the young people involved. Section 13 of the *Charter* gives a person the right not to have his or her privacy unlawfully or arbitrarily interfered with and the right not to have his or her reputation unlawfully attacked.