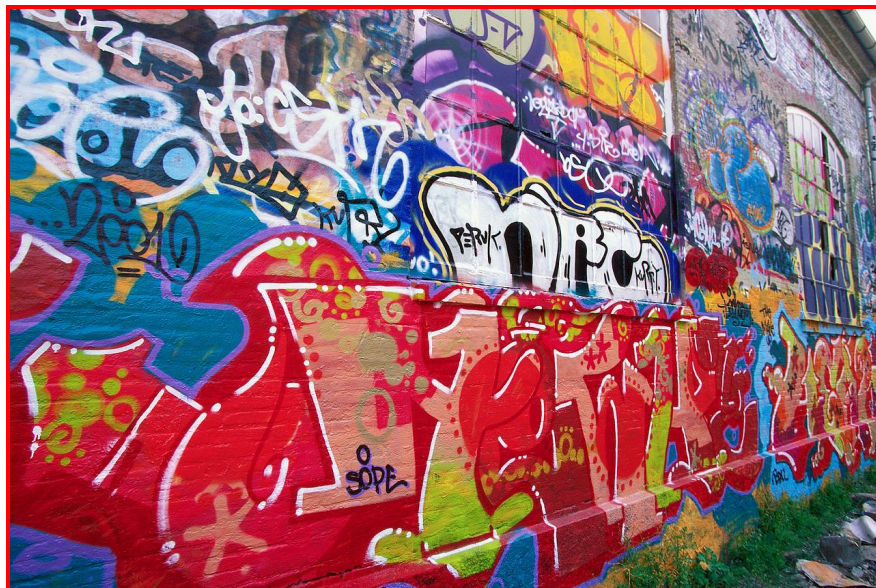


Victorian Graffiti Laws: One Year On April 2009



About Youthlaw

Youthlaw is one of over 50 community legal centres across Victoria, coming under the umbrella of the peak body Federation of Community Legal Centres Victoria. Youthlaw is a state-wide specialist community legal centre for young people under 25 years of age. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, education programs, policy development and law reform work.

Youthlaw has been monitoring the new graffiti laws introduced in Victoria in 2008.

We have been talking to young people, youth workers and most recently held a Graffiti Monitoring Forum in Collingwood on the 8th April 2009. Here is a summary report of the forum.



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1. The introduction of the *Graffiti Prevention Act 2007*

The Victorian Government introduced new graffiti laws in 2007. The *Graffiti Prevention Act (2007) Act* (“the Act”) became law in April 2008.

Youthlaw and other legal and youth services lobbied against the introduction of the new law. Many organisations including the Law Institute of Victoria opposed aspects of it, including:

- ***The law disproportionately targets and unfairly impacts on young people***

Although the law is for all people, young people are most likely to be stopped and searched because they are highly visible in public places and are significant users of public transport, where incidents of graffiti occur. In addition, young people, particularly students, are more likely to be carrying graffiti implements (e.g. textas, pens).

- ***The law is in direct conflict with fundamental principles of the rule of law & undermines human rights***

The law makes it an offence to carry spray paint can regardless of your intention to graffiti or not. This reverses the onus of proof that normally requires police to prove intention to commit an offence. This is in direct conflict with the presumption of innocence principle outlined in s 25(1) of *The Victorian Charter of Rights and Responsibilities*.

- ***Penalties and fines are excessive and disproportionate to the offence, and potentially discriminatory***

Young people have limited capacity to pay financial penalties and excessive financial penalties will be an ineffective penalty for young people. Young people who can't afford to pay the on the spot fine of over \$550 and go to court will end up with a police record. Those who pay will not.

- ***The law is unnecessary – it duplicates existing laws***

Graffiti offences are adequately covered by existing laws including the Summary Offences Act 1966 (Victoria), Crimes Act 1958 (Victoria) and the Transport Act 1983 (Victoria). Young people can be charged with multiple charges under the new and existing laws.

- ***The law has the potential to undermine existing graffiti prevention strategies***

Community based initiatives that aim to prevent unwanted graffiti by engaging young graffiti artists have been very effective. Local community responses need to be encouraged and developed rather than a zero tolerance, criminalising approach.

2. About the *Graffiti Prevention Act (2007)*

A. *The offences under the Act*

1. ***Marking graffiti*** without consent – up to 2 years imprisonment/ \$27,220.80 fine
Marking can be anything that can't be removed with a dry cloth.
2. ***Marking offensive graffiti*** – even with permission: - up to 2 years and \$27,220.80
3. ***Possession of a prescribed graffiti implement*** while on or adjacent to public transport property – on-the-spot fine - \$567.10 or maximum fine of \$2,835.50
A person can be charged if they have a spray paint can with them. It is not an excuse that there was no intention to graffiti. It is an excuse if you can prove you are using it for employment or trade purposes.
4. ***Possession of a graffiti implement*** – fine up to \$2,835.50
A graffiti implement can be anything used to graffiti
Police must have a reasonable suspicion you intend to graffiti.
5. ***A person must not sell spray paint cans to minors*** unless they produce a letter from their employer.

B. *New search powers under the Act*

Police have expanded search powers to search without warrant anyone 14 or over who is on or near to public transport for an aerosol spray paint can.

Police can search without warrant for other graffiti implements (e.g. markers etc.) if they have a reasonable suspicion that the person has committed or is about to commit a graffiti offence.

Police may inspect bags, ask for removal of a coat, hat and shoes, and conduct a 'pat down' search

People being searched are required to give their name and address

When searching, if police think the suspect is using the spray paint can for CHROMING they are required to stop the search and assist you.

When searching, police must identify themselves. You can ask for this info in writing.

Police who conduct a search MUST make a WRITTEN RECORD of the search details including the member's name, rank and station, date, time and place of search, name and age of the person searched, grounds relied on for conducting the search and a description of any item seized.

A person who is searched may request a copy of the report.

3. Monitoring the new laws

Although there is no provision in the Act for it to be reviewed, Youthlaw has called on government and community stakeholders to monitor the implementation of the legislation, its impact on young people and its effectiveness in reducing graffiti incidence.

Graffiti Laws: One Year On forum was convened to monitor the implementation of the Act one year since its introduction. As police statistical reporting happens in line with the financial year, the forum was operating on strictly 'anecdotal' evidence – meaning that there was no access to police data. The forum promoted a sharing a range of perspectives and anecdotal feedback, stories and experiences from young people, police, local councils, artists, community lawyers and youth workers about how the laws are playing out on the street.

4. Who attended the forum?

While some perspectives were absent, such as traders and operational police officers, contributors to the forum included:

Artists

Zoe Horsfall – Artful Dodgers Studio

Councils

Adrian Doyle – Youth Arts Officer, Youth Services, City of Yarra

Katy Capdevila – Banyule City Council

Denzil Bentley – Nillumbik Shire Council

Lucy Midolo - Wyndham City Council

Lawyers

Chris Ryan – Wyndham Legal Service

Michael Sharkey- Victoria Legal Aid - Youth Services

Greta Clarke – Victoria Aboriginal Legal Service

Louise Hicks - Victoria Aboriginal Legal Service

Lucie O'Brien – Federation of Community Legal Centres

Victoria Police

Morgan Schultz – Local Solutions Crime Prevention, Neighbourhood Justice Centre

Youth advocates

Emma Read – Youth Referral and Independent Person Program (YRIPP)

Joylon Burford – Foundation for Young Australians

Kate Goodrich – YACVic

Shera Angela –Gateway, Jesuit Social Services

Tiffany Overall - Youthlaw

Dave King - Youthlaw

Bridget Harris – Monash University

Prior to the Forum

In the lead up to the forum Youthlaw held a few informal focus groups sessions with young people engaged in street art/graffiti programs in City of Yarra, Banyule City Council and Artful Dodger Studios, Jesuit Social Services to find out how the law was impacting on them.

5. Key areas of focus at forum

The forum and the focus group work prior to this helped paint a picture of how the laws are being experienced and some key themes and issues that may warrant further exploration.

Key topics:

A. Enforcement of the Act

- As graffiti offences are recorded as property offences it is difficult to ascertain the true extent of graffiti related matters.
- The Victoria Police *Graffiti Management Strategy* focuses on high level, repeat offending and police are not enforcing the lower level summary offences at the same rate.
- Young people involved in graffiti are mainly having contact with police by way of questioning and searches.
- Police are mainly using their search powers in and around public transport and are often issuing cautions rather than on-the-spot fines.
- Searches tend to result in confiscation of graffiti items and cautions.
- Enforcement is focused on possession and marking offences rather than the offence of trading to an under 18 year old.

B. Negative impact on young people

- Many argued that the law discriminates against young people and perpetuates negative stereotypes of young people.
- Conflicting representations of graffiti as art/crime sends confusing messages to young people.
- The laws are marginalising young people and causing some to engage in dangerous behaviour, with negative impacts flowing into their adult lives.

C. Application in local government areas (LGA)

- It is unclear whether the law is reducing the incidence of graffiti, however it is suggested it is resulting in more rushed jobs and tagging.
- Some Councils have adopted a two-pronged response to graffiti management - removal and legal graffiti programs.
- The evidence suggests legal graffiti programs reduce the incidence of unwanted graffiti and tagging.
- Legal graffiti is often difficult for young people to engage in due to complex permit systems for LGAs.
- Young people often get in trouble when they think they are doing the right thing and obtaining the owner's permission to graffiti.

D. Undermining human rights

- The law is in direct conflict with fundamental legal principles and human rights.
- The serious limitations on various human rights is disproportionate to the aim of the legislation to reduce incidence of graffiti

The report will look at each area of focus in turn.

6. Enforcement of the Act

The overwhelming feedback from forum attendees was that the law was not being exercised to its full potential.

The data

Comprehensive data about the number of searches, implements seized and charges laid under the Act etc. will be available from Corporate Statistics, Victoria Police at the end of the 2008-9 financial year. Additionally Section 17 of the *Graffiti Prevention Act (2007)* stipulates that the Chief Commissioner of Police must provide a report at the end of the financial year detailing police statistics on the number of searches without warrant and the number and types of implements found during those searches.

Some generalised comments were made in the absence of this data.

Victoria Police regards graffiti as a form of property damage. Although there has been a 12% decrease in property damage in the City of Yarra last year however this is not necessarily due to the introduction of the *Graffiti Prevention Act (2007)* as a range of activities are categorised as property damage.

Workers at the Youth Referral and Independent Person Program (YRIPP) supported young people in relation to a significant number of property offences (indictable offences) which could be graffiti related, however, as graffiti offences are listed under property offences they are unable to gauge the extent of graffiti related matters.

It was estimated that graffiti matters make up about 10-15% of criminal property damage, and of those only about 10% are reported.

Similarly, lawyers at Victoria Legal Aid and community legal centres did not have many instances of young people being charged under the Act. There have been no reports of jail terms or large fines being issued under the Act. Michael Sharkey from Youth Services, Victoria Legal Aid confirmed that not many matters under the *Graffiti Prevention Act* are coming through the Children's Court. In his view police are using cautions or are open to agreeing to diversion (programs within the Children's Court) for graffiti related offences. Victoria Legal Aid is not seeing many young people presenting with on-the-spot fines. \$550 is a significant sum of money, and in Michael's view it is unlikely that a magistrate would reimpose a fine of that amount if it was challenged in open court.

Use of Act by Transit Safety Division, Victoria Police

Victoria Police, Transit Safety Division (TSD), have adopted a targeted response to graffiti with the implementation of a *Graffiti Management Strategy*. TSD is largely an investigative unit who tend to target people who are extensively damaging /and or graffitiing public transport using photographic evidence from trains and elsewhere to profile offenders. The strategy focuses on building cases against high volume, repeat offenders who can be charged with indictable offences of criminal damage rather than summary offences under the *Graffiti Prevention Act (2007)*, although on occasion they are used as an additional charge. Consequently they generally do not use the search powers under the Act.

Case Study – Wyndham City Council

At Wyndham City Council graffiti that is reported to the Graffiti Project Officer is photographed, tagged and added to a database. Police have on occasion requested access to the database as an investigative tool in relation to certain tags.

Use of Act by operational police on the street

Police already possess significant search powers under other laws and are aware of the duplication of these powers under the Act. Police are also aware of the checks on their powers under the Act, i.e. police can't search children less than 14 years of age, rights of young suspects to privacy, respectful treatment, and the requirement that written records of searches are to be submitted. However, YRIPP points out that most pat down searches are conducted without a parent or guardian present, increasing the risk of abuse of these powers.

When searches do take place and graffiti implements are found police usually use their discretion to issue cautions, especially in relation to first offences. Most young people who spoke with Youthlaw reported that they had been searched at least once in and around public transport; all but one reported being cautioned rather than receiving an infringement notice if any graffiti implements were found. This information is congruent with accounts by police. A Sergeant of the Moreland Crime Desk reported that police are more likely to use their discretion to issue warnings rather than infringements, especially for first time offenders under 18 years of age.

Although agreeing most charges laid were for offences under the old laws such as criminal damage, the Sergeant reported that he believed that the new search powers had resulted in a decline of graffiti equipment being carried on public transport.

It was reported that in Nillumbik Shire there is a perception held by local traders that police aren't doing anything to stop graffiti, and a perception by police that they are wasting their time when they do enforce the laws as young people often only get a slap on the wrist and are let off by the magistrate.

Police are sometimes adopting an educative, role consistent with the Victoria Police *Child and Youth Strategy 2009 -2010*.¹

Key Priority Area 5. Improving youth engagement: To work with young people within the community to develop effective partnerships related to the delivery of policing services.

Police in Moreland for example have conducted education campaigns with young people (years 5 and 6) about the impact of graffiti and the costs to the community; money that could be better spent on legitimate art projects run through local councils which police often support.

There also seems to be a heavier focus on enforcing marking and possession offences under the law. While the legislation stipulates that it is an offence to sell spray paint to a minor, there have been no reports of traders being spot-checked for such offences. The responsibility for enforcement of this offence lies with local government officers.

¹ For a copy of the Victorian Child and Youth Strategy Action Plan contact Victorian Police Youth Affairs Office, 9247 6195, steve.soden@police.vic.gov.au

7. Negative Impacts of the Act on Young People

Despite the fact that the Act does not seem to be having a dramatic effect on fines and detention of young people, the group offered a wealth of anecdotal evidence of ways in which the Act was negatively impacting on young people.

Artist or criminal?

There is a contradiction in the way graffiti is represented in the community where young artists are treated as criminals while their work is used in a huge range of advertising and tourist campaigns. Young people and artists have to deal with conflicting messages that represent graffiti as vibrant and cultural versus criminal. Graffiti is entrenched in our culture; it is a signifier for young urban culture and that's largely why young people are drawn to it.

In this way young artists are marginalised through the criminal justice system as the decision for where they sit on the spectrum of vandalism to artistic endeavour rests with law enforcement officials. While graffiti art is a positive influence on many young people, when it is criminalised it turns into a catalyst for negative outcomes. Most young people do not have the capacity to pay a fine of \$550 which would merely contribute to a debt burden that would follow them into adulthood and effect future opportunities, while harsher penalties seriously impact on a young person's future to the point where lives can be ruined for relatively minor property offences.

Being targeted and reinforcing stereotypes

In the views of some attendees the laws create an underclass of young people that are continually targeted by police based purely on their appearance. These searches are a regular part of life for these young people. While older artists are usually working in a legal capacity, most young artists are out on the street practicing their art, making them more susceptible to being targeted by the laws.

Young people felt that they were stopped because of the way they looked, what they were wearing and where they were located. There was an overwhelming sense that this amounted to unfair treatment by the police.

Many young people between the ages of 14 and 18 who spoke to Youthlaw reported being stopped by the police up to 3 or 4 times in the past, sometimes more. These contacts usually took the form of questioning and searches, consistent with the powers appointed to police under the *Graffiti Prevention Act (2007)*. The majority of searches reportedly took place at train stations, on trains or train lines, skate parks and on main streets, although young people claimed that police also target well-know spray paint stores, making it risky to transport spray paint for any use besides official employment. Young people also reported they were more susceptible to being searched at night.

Confiscations of graffiti items

Young people reported that increased number of confiscations of 'graffiti implements' such as spray paint cans (*prescribed graffiti implement*), markers, nips, backpacks and other related articles had been taken from them, some of the articles taken by police (such as sketchpads, artwork, backpacks) were not strictly 'implements' as defined by the Act. One young artist reported having 22 spray cans confiscated at once.

Following confiscation of some articles (such as sketch pads / phones); young people did not always get these items back, being told that they were being used in ongoing investigations. In some instances police have also reportedly confiscated digital cameras and mobile phones which contain images of the artists work around Melbourne.

Case Study – Banyule City Council

A young person involved in the Banyule City Council legal graffiti program reported that police called to his home in response to a separate issue saw graffiti art on his bedroom walls and returned at a later date to take photos of the artwork.

Dangerous behaviours

There is a concern that due to the new laws there are some young people engaging in more dangerous activities such as going into drains, warehouses etc. to avoid getting caught. Since the laws were introduced three graffiti related deaths have been reported stemming from such behaviour.

Confusion about penalties

While many young people seem to be aware that they risk receiving an on-the-spot fine for carrying a spray paint can, many were unclear on other penalties.

Case Study - Youthlaw

Anna had a call from a parent wanting advice for her 16 year old son who had received a \$550 on-the-spot fine from police for carrying a texta pen in his bag on the train. The parent was informed police had power to confiscate and give an on-the-spot infringement notice only for having a *spray paint can* in his possession.

Some young people reported being told they would receive a summons in the mail which is yet to arrive. Young people felt they were living under a shadow as the summons can take 12 months to come through.

Case Study – City of Yarra

One youth involved in the Yarra Youth Services Graffiti Program reported being put on a 5-year good behaviour bond by police (as opposed to a court) after being caught in possession of markers.

Trouble navigating the system

The complex process for getting permission to do legal graffiti is making the landscape for young artists extremely difficult to navigate. Not only do they have to gain permission from the owner of the property where they wish to paint, in most cases they are required to apply for a permit from council as well. In fact, many young artists reported being caught doing what they thought were legal pieces (i.e. having consent from the owner) and there seems to be general confusion over what is allowed and what is not.

Case Study – Banyule CC

Two groups of young people involved in the legal graffiti program at Banyule were caught marking in two separate instances. In both cases they had consent from the owners of the property, but were unaware they needed a permit as well.

In response to this issue, some legal graffiti programs have given participants cards or letters that they can show police if they get caught in possession of graffiti implements.

8. Application in local government areas

Reduction of graffiti

Anecdotally officers from various LGAs reported that young people's concerns about getting caught under the new offences are leading to more rushed jobs, and more tagging which in turn lessens the quality of the graffiti work.

Inner city councils (such as Yarra) are often more accommodating of legal graffiti programs and local businesses often engage graffiti artists to do murals on the side of buildings. A considerable percentage of Yarra residents are ambivalent around graffiti possibly because inner city graffiti is part of the culture, although graffiti has been shown to have a negative impact on community perceptions of safety. A survey conducted showed that 35% of respondents had had graffiti on their property but not many reported it. Most did nothing. People in high graffiti areas only tend to notice graffiti if they have been affected by it, for example if someone tags their fence.

There have been a range of urban planning strategies to combat unwanted graffiti and tagging across a variety of city councils. These strategies usually take a two-pronged response – removal programs and preventative legal graffiti programs.

Councils gave feedback that they have found that legal murals have a positive impact on reducing unwanted graffiti (i.e. tagging) and the community and perceptions of safety.

Case study – Wyndham City Council

While the Wyndham City Council *Graffiti Management Strategy* has had a big emphasis on graffiti removal they have also commissioned seven preventative murals, although not in the graffiti style (no text). The murals were coordinated by contracted artists in known hot spots and have helped reduce tagging in those areas.

In the City of Yarra the Neighbourhood Justice Centre in Collingwood has funded an aerosol art project with Napier Studios and local indigenous artists to improve an unsightly and unsafe location on the Collingwood housing estate. Other graffiti murals, coordinated by Napier Studios, have been funded by City of Yarra. Additionally Doyle, Yarra Youth Arts Officer, has also been working with Council staff responsible for removal to advise them on any culturally significant aerosol art pieces

These initiatives have contributed to decreases in reports of property damage in Yarra.

Case Study – Yarra CC

On average the clean up unit pays \$4000 to clean a wall. The Yarra graffiti program has managed to negotiate that \$4000 to go to Napier studios to do murals which minimise illegal tags and quick jobs - if there is high quality graffiti in the area and people to impress it raises the bar for people to do good graffiti rather than just tagging.

Permits and owner consent

While Councils are in a good position to support legal graffiti programs, most councils still have bureaucratic, cumbersome permit systems which can turn people off the idea.

In Banyule, workers at the legal graffiti program draw up an agreement for owners and other residents on the street when proposing a mural. A similar process is in place at Wyndham who write to people affected and invite them to see the design and then give any objections by a certain date. Yarra has to consider heritage overlay as well as the normal planning processes, including if the mural is facing a road and whether it can be considered advertising.

Recently however there has been a change in planning laws which exempts council members from having to go through the permit process as long as they have permission from the property owner.

9. Undermining human rights

As described earlier, attendees reported on various ways the Act impacts on young people and infringes on a number of their rights protected by the Charter of Human Rights and Responsibilities. (*“the Charter”*). Namely the right to:

- a presumption of innocence (section 25(1))
- freedom from discrimination (section 8)
- freedom of movement (section 12)

Under the *Charter* all public authorities, including government, police and local councils (under section 38), are obliged to act compatibly with rights protected by the *Charter*. In the first instance the *Charter* must be considered when making local laws, and in the second instance they must be considered when council and police implement laws on a day to day basis.²

Young people Youthlaw spoke to expressed frustration at the effect the law has on their ability to practice graffiti legally. The offence of possession of a prescribed graffiti implement in the Act fundamentally reverses the burden of proof in relation. It is up to the individual to prove that they are carrying a ‘prescribed graffiti implement’ for a legal project rather than for police to prove that they have or are using the paint illegally. A number of young people reported to Youthlaw that they were caught in possession of graffiti implements on their way to a range of legitimate activities such as graffiti programs, legal graffiti walls, painting personal canvasses or personal art. This is despite police claims that officers use common sense with possession offences and are able to determine legitimate artists carrying equipment for legitimate use.

Adrian Doyle - Yarra Youth Services Graffiti Program

Young people who try and do the right thing but still get in trouble when doing, for example, legal walls (without permits) get dejected and think everyone is against them; they begin to wonder why should they bother doing the right thing.

Unreasonable limitation on Charter rights

These impacts on young people raise the question about whether aspects of the law amount to an unreasonable limitation of these *Charter* rights. Under section 7 of the *Charter*, rights may be subject to limitations that:

- Have a legitimate and compelling aim;

² Please note: Victoria Local Governance Association (VLGA) has a pilot project called ‘Human Rights Matters Locally’. In partnership with a number of local councils, VLGA are developing tools to assist local government to implement the Charter.

- Are proportionate to that aim; and
- Restrict the right as little as reasonably possible.

The law needs to strike a balance between people's individual rights and a need for public authorities to protect the broader public interest, such as public safety, health and order.

As police seem to be more interested in prosecuting high-level graffiti offences it is more difficult to argue that the laws are necessary. There is a strong counter argument that the breach of the right to a presumption of innocence for example is a disproportionate response to the issue of graffiti.

It could be argued that this law amounts to an unreasonable limitation on human rights because they are disproportionate to the aim of reducing incidents of graffiti and improving social amenity, and there are less restrictive and more effective means reasonably available to achieve this i.e. supporting more legal graffiti programs.

At the end of the forum time there was discussion about the danger of the Act having been successfully passed and fairly lightly implemented, in that it could lie 'dormant' until its more draconian elements were needed. Participants gave the example of how the Act might be used in the run up to key sporting / state events such as the Commonwealth Games / The Olympics etc. where it could be used to 'crackdown' on graffiti art across state and cities.

10. Conclusion and Next Steps

The feedback from the forum highlighted several areas that warrant further exploration and action.

A. Source and analyse data regarding the implementation of Act

From Victoria Police

As the information in this report is largely anecdotal, we await the Chief Commissioner's report under section 17 of the Act in relation to:

- a) the number of searches without warrant under section 13 conducted during financial year; &
- b) the number and type of graffiti implements found during the course of those searches; and
- c) any other information requested by the Minister.

From Children's Court of Victoria

Consider criminal division data made available for the Court's Annual Operational & Statistical report prepared by the Court Services section of Department of Justice and by the Court.

However it may be difficult to obtain specific data about offences under *Graffiti Prevention Act* rather than more general data about matters and outcomes.

This information will provide an opportunity to draw concrete conclusions on the extent of enforcement which can be compared with the experiences and issues outlined in this report.

B. Further awareness raising and education regarding the Act

The laws have complicated the landscape and young people have a fair bit of confusion surrounding some aspects of the laws, especially:

- rights and responsibilities in relation to searches
- penalties
- confiscation of items
- legal walls and obtaining permits.

Stakeholders are encouraged to conduct further education campaigns to inform young people of their rights and responsibilities under the Graffiti Prevention Act.

C. Promotion of legal graffiti programs

Most accounts by youth and council workers involved in legal graffiti programs were positive about the impact of these programs on young people and their effectiveness in reducing unwanted graffiti. Legal murals are less likely to be tagged on and they 'raise the bar' for other local artists.

Youthlaw to promote the establishment of legal graffiti programs in various municipalities as a part of local graffiti strategies, and distribute information to Councils regarding changes to laws relating to council officer and applications for permits.

D. Police and Young People

There is a perception that policing strategies are invasive and are contributing to friction between young people and police. Stereotypes may be perpetuated through uniform policing strategies that view all young people as the same.

Youthlaw will advocate for better relationships and engagement between young people and police consistent with Victoria Police Child and Youth Strategy 2009-2013.

This may be by way of closer involvement by police in legal graffiti programs and further educative programs to make young people aware of what they can and can't do.

E. Advocate for an Act which is consistent with Human Rights

Forum participants expressed a keenness to continue to monitor the Act and continue campaign against elements of the Act that they felt infringe on young people's human rights.

Youthlaw will continue to advocate for fair and proportionate laws that are consistent with the principles of the Charter.

This report will be made available to all key stakeholders and interested parties.