



22 March 2011

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The Honourable John Rau MP  
Attorney-General  
DX 336  
ADELAIDE SA

Dear Mr Attorney

### **Graffiti Prevention Discussion Paper**

I refer to your letter of 9 February 2011 inviting the Society to consider the "Graffiti Prevention" Discussion Paper. The Paper has been considered by the Society's Criminal Law Committee and its Children and the Law Committee.

The Society appreciates the opportunity to comment and provides the following comments.

#### **5.1 Increasing Penalties for Graffiti Offences**

*Should penalties for graffiti offences be increased? If so what increase would be appropriate?*

The Society is not opposed to the increase of penalties for the sale of spray-paint, if it will strengthen the responsibility of sellers in requesting identification from their customers.

However, the accepted jurisprudence is that a move to increase penalties has little or no effect on deterrence. Generally, penalties should only be increased if they are not considered to reflect an appropriate tariff for the relevant offending conduct.

There is insufficient information in the Discussion Paper to arrive at a view concerning most of the offences. For example, we refer to the offence by a retailer of not properly storing spray paint: s4(1). We do not have sufficient information about the prevalence of this offence, how often it is prosecuted or expiated or its importance in the graffiti prohibition scheme.

There is not necessarily a direct link between this offence and the graffiti offences (ss9 and 10). Adults, particularly young adults, may lawfully purchase the spray paint and then commit the offences. Similarly, children may falsely represent that they are adults or they may procure an adult to purchase the paint for them.

Notwithstanding the lack of information in the Discussion Paper, we offer some general comments about each of the offences in the Act.

### *Section 4(1)*

The principal object of the s4(1) offence appears to be to minimise the chances of a minor stealing the spray paint, bearing in mind that an adult may lawfully purchase the paint. In other words, the retailer is at jeopardy for not adequately minimising the risk of larceny of an item that may be used to commit an offence. The offence is regulatory. The retailer is not undertaking any criminal behaviour as such. Indeed, the retailers are, as a class, victims when spray paint is stolen because of inadequate storage (in breach of s4). In a sense, therefore, they are liable to a double penalty.

For such offending it seems that the maximum penalty of \$1,250 is adequate. It will not be in retailers' interests for members of the public to steal the retailer's goods. An expiation fee of \$160 (such as it is) or higher penalty by way of fine would be a salutary penalty given the profit margin the retailer stands to make on each spray can.

### *Section 5(1)*

The maximum penalty for the s5(1) offence of selling spray paint to minors appears low. Unlike s4, this conduct can be directly linked to the commission of a very prevalent and costly property damage offence. It may therefore be appropriate for the s5 penalty to be at least double if not treble that of the current s4(1) penalty.

We draw your attention to an error in the Discussion Paper at p14. The s5 offence is not expiable.

### *Section 6(3)*

The s6(3) offence concerns the requirement for the retailer to display a notice informing the public it is unlawful to sell spray cans to minors. It is less serious than the s4(1) offence of failing to properly secure the spray cans. As with s4(1), this offence is regulatory and necessarily has even less of a link to the graffiti offences than s4(1). Provided that all the retailer's staff are aware of the underage sale prohibition, the failure to display the notice could not have any link with the graffiti offences because an underage person could not purchase the product in any event.

The maximum penalty of \$750 fine (expiation \$105) appears adequate and, importantly, proportional to the s4(1) maximum penalty of \$1,250 fine (expiation \$160).

### *Section 7*

The two s7 offences concern hindering and anti-social behaviour between an authorised person and the retailer. They have the same maximum penalty of \$5,000 fine. The offence against the authorised person (s7(6)), who is entrusted with the responsibility of enforcing Part 2 of the Act, appears much more serious than the offence by the authorised person against the retailer (s7(7)). This should be reflected in a difference in penalty between the offences.

The penalty for the authorised person offence (s7(6)), however, appears adequate. We therefore do not necessarily suggest that this penalty be increased. We do consider though that the retailer offence (s7(7)) penalty is too high. Indeed, we have some concern about the existence of this offence. The Act rightly empowers an authorised person to investigate and enforce the provisions of the Act. Hindering and threatening behaviour towards an authorised person should be criminalised and the sanction should be a fine which is significantly greater than the principal offences under Part 2. The Act achieves this.

It is unusual, however, to have a mirror offence to protect the retailer from the authorised person (s7(7)). Usually any anti-social conduct by a person in authority is dealt with by the existing criminal law. One can always think of scenarios which might occur that may not be captured by existing laws, but the obvious ones in this case are very unlikely. In short, we do not see the need for the offence and would recommend that it to be repealed. If it is to stay, however, we suggest that penalty be more than halved.

### *Graffiti Offences*

The remaining offences of marking graffiti (s9(1)) and carrying graffiti implement (s10(1)) are important and rightfully carry higher penalties than the other offences. Again, it is difficult to offer an informed opinion however if anything needs to be increased we suggest the fine component of the penalty, not the imprisonment. A maximum six months imprisonment for this type of offending is more than adequate, particularly having regard to the ability to deal with the more serious conduct under s85 of the *Criminal Law Consolidation Act 1935*.

In relation to penalties for young offenders, we regard timeliness between offending and penalty to have a greater deterrent effect than an increase in maximum penalties. Rather than increasing the amount of fines, we recommend the increased use of court diversionary processes as the best way to impress on young offenders the impact their graffiti offending has on victims (from businesses, the community and private property owners). We also advocate for increased anti-graffiti projects that address graffiti vandalism in therapeutic and innovative ways.

## **5.2 Expiable Offences**

*Is it appropriate for graffiti marking offences to be expiable?*

The Society does not regard expiation notices as being an effective means of bringing a young offender to account for their actions. Young people do not tend to have the means to pay the expiation fee. The original fine can easily escalate when payment is not made and late fees are imposed. We reiterate our recommendation for increasing the use of diversionary processes as a more effective way of helping young people understand the consequences of their behaviours and to take responsibility.

On balance we consider it would send the wrong message for the most serious offences in the Act to be expiable. Not only would it be the wrong message, but also a contradictory one given the Government's and the community's expressed concern about the prevalence and damage of graffiti offending. We therefore answer the question "no".

## **5.3 Marking Graffiti - Aggravated Offences**

*Is it appropriate to introduce new aggravated offences for marking graffiti?*

The Society advocates strongly against the proposal to introduce aggravated marking graffiti offences for the following reasons.

There is sufficient scope within current legislation to impose a penalty that reflects more serious instances of graffiti offending and property damage. The offence of marking graffiti without lawful authority (*Graffiti Control Act 2001* s9(1)) currently carries a term of imprisonment, as does the charge of property damage (s85(2) *Criminal Law Consolidation Act 1935*). This latter offence carrying a maximum term of 10 years imprisonment provides police with a very sufficient

alternative to charging an offender with marking property damage. Thus there is currently sufficient scope for a sentencing court to impose a penalty that reflects more serious instances of offending.

The *Criminal Law (Sentencing) Act 1988* s10(ed) already regards offending by an adult in the presence of a minor to be an aggravating factor. The Society is opposed to offending in the presence of a minor being regarded as an aggravating factor due to the discriminate effect it has on youthful offenders. To regard the same offence committed by a 19 year old in the presence of a 17 year old to be more serious than that committed by a 17 year old in the presence of a 16 year old is inappropriate. It criminalises normal adolescent behaviour of socialising with people of similar age, especially so when numerical age is not necessarily a true reflection of maturity.

#### **5.4 - 5.7 Restricting the supply and display of spray-paint and other graffiti implements to minors**

*Is it appropriate to ban the supply of spray-paint cans, and the sale and supply of other graffiti implements, to minors?*

The Society is concerned at the impact this may have on young people accessing materials that may be necessary for their education or employment. Consider for example a student needing to purchase spray-paint or markers necessary for an assignment, and being refused service as the retailer does not trust their legitimate explanation for use.

The suggestion of restricting sale and display of graffiti implements does not adequately consider the potential impact on young people. It is more weighted to the considerations of businesses and suspicions within the community of young people, when it comes to eradicating graffiti vandalism from our streets.

The Discussion Paper refers to interstate jurisdictions introducing legislation to regulate advertisements of implements that may be used to illegally mark graffiti and definitions of "spray-can". In order to best consider these proposed reforms for South Australia, we ask whether such legislation has had the desired effect on the rates of graffiti vandalism.

We agree with efforts to clarify legislative definitions of spray-paint to remove confusion for sellers and users, but caution against doing so if it has the effect of frustrating legitimate uses of implements that spray paints, such as tyre blackener.

*What might be an appropriate definition of 'graffiti implement'?*

We suggest that the s10(2) definition is not appropriate. It is too wide. It appears appropriate in the context of s10(1) where there is evidence of an intention to use the graffiti or a deemed intention when a person is trespassing, but not when an otherwise innocent purchase is being made at a retail outlet. The adverse impact on businesses and the public would far outweigh any benefits from having such a law.

*What are the potential impacts on such reform on businesses and the community?*

This question cannot be answered without information about sales of items that could be used as graffiti implements. What can be said though is that businesses are a key stakeholder in this legislation and any laws regulating the sale of otherwise legitimate items must have an adverse impact on businesses and the public.

## 5.5 Restricting the Display of other Graffiti Implements

*Is it appropriate to restrict the display of other graffiti implements?  
What are the potential impacts of such reform on businesses and the community?*

We answer these questions similarly to those under the previous paragraph (5.4). In short, unless the implement can be identified with some certainty as an instrument of crime, we do not support the restriction of display of graffiti implements.

## 5.6 Advertising a Prescribed Graffiti Implement for Sale in a way that is likely to Promote Unlawful Graffiti

*Would an offence regulating how graffiti implements are advertised be effective in reducing incidents of graffiti vandalism in South Australia?*

We do not have sufficient information to make an informed comment as to whether such an offence would be effective to reduce graffiti crime. However, we consider that such an offence would be an appropriate addition to the anti-graffiti legislation provided that it is properly framed to catch advertising which effectively incites or encourages the commission of an offence.

*What are the potential impacts of such reform on businesses and the community?*

An appropriately framed offence against unlawful advertising should have little or no impact on businesses conducting legitimate business practices and on law abiding members of the community.

## 5.7 Defining 'Spray-paint Can'

*Is it appropriate to define 'spray-paint can' in the legislation to capture other items, such as tyre blackener?*

In principle, yes. We caution against extending the definition, however, if the available data suggests that

- these other items are not prevalent in the commission of graffiti offences; and
- storing these items would impose too great a burden/impost on retailers.

A compromise could be to only ban the sale or supply of such items to minors without requiring the items to be specially secured.

## 5.8 Graffiti Removal Orders

*Do you think requiring an offender to participate in a graffiti removal program as part of their sentencing would be an effective strategy?*

Participating in graffiti removal programs could be an effective strategy for young offenders so long as such programs incorporate evidence based therapeutic practices that best assist young people to reflect on and address the reasons for being involved in illegal graffiti marking.

To maximise their effectiveness such programs must be readily available, enabling young people to access them immediately following the imposition of penalty (from court or diversionary processes).

## 5.9 Recovery of Graffiti Clean-up Costs

*Is it appropriate for the court to order that an offender reimburse the council (or other person) for the reasonable costs of graffiti removal?*

It is appropriate for the court to order that a young offender reimburse the council or other person for the reasonable costs of graffiti removal. However the means of a young person to pay such costs must be the overriding factor.

We reiterate our recommendation for the use of diversionary processes and involvement in programs over and above the use of monetary penalties. We also caution against any legislative amendment that may result in a doubling of penalty, by enabling the court to impose a fine as well as an order for the reimbursement of graffiti removal costs.

## 5.10 Confiscation of spray-paint cans

*Do you think police should have the power to confiscate spray-paint cans without having to make an arrest or charge the person?*

Consideration must be given to the often strained relationship between police and young people on the street when contemplating the amendment of police powers to stop, search and arrest young people. If the effect of the legislation is to minimise opportunity for conflict then we support the introduction of police confiscation powers.

*If so, do you think police should be required to have a reasonable suspicion that the person is under the age of 18 and intends to use the object for illegal graffiti?*

Yes.

I trust these comments are of assistance. Please do not hesitate to contact me, should you require any further information. We would welcome the opportunity to review the legislative amendments to the Graffiti Control Act 2001, once drafted.

Yours sincerely



Ralph Bönig  
PRESIDENT