

## **Submission on The Graffiti Prevention Bill Exposure Draft 2007**

### **From: Victorian Aboriginal Legal Service Cooperative Limited**

The objectives of the Bill are claimed to be to:

- reduce the significant financial and social costs of graffiti to the Victorian community
- provide a strong deterrent to perpetrators and ensure graffiti-vandals are held accountable
- reduce the incidence of graffiti in Victoria.

There is no evidence provided to suggest that any of these objectives will be achieved by the legislation. There is considerable evidence to the contrary.

The dominant methodology in this bill for “preventing” graffiti is introduction of zero tolerance style criminogenic legislation. The proposed bill will:

- dramatically extend the scope of legal police searches of young people (this will increase the incidence of resist arrest, abusive language, hinder police, shop steal, and theft charges)
- introduce higher penalties as part of the new act with the goal of increasing the severity of sentences for graffiti (This is likely to increase reoffending rates)
- shift the focus from people who do graffiti to people who might do graffiti. and use the presumption of guilt/reverse onus) and infringement notices to ensure a healthy income from fining young people who carry pens, textas or paint. (Being arrested and convicted for something you haven’t done is is likely to encourage some young people to write graffiti.; Other young people will be come further involved in the criminal justice system via failing to pay fines and losing paper work.)
- Undermine the Volatile Substances legislation and redefine all young people who are chroming as offenders.

Greater reliance on criminalizing graffiti is not prevention it is punitiveness. Punishing people who might be thinking about doing graffiti is not prevention it is a preemptive strike. The Draft also provides more power to more rapidly remove graffiti this is not prevention either. It is a part of zero tolerance style criminalization.

The name of the bill is inaccurate and misleading and if the Bill is not withdrawn the word ‘prevention’ should be removed.

### **Assumptions**

The Bill assumes that:

- tougher penalties will reduce the level of graffiti
- that rapid removal of graffiti will prevent graffiti
- that criminalising possession of instruments which may be used for graffiti, increased search and seizure powers and reverse onus rules will prevent graffiti.

No evidence is provided to justify these assumptions.

### **Tough New Penalties...Again**

If evidence was a factor shaping the drafting of this bill then the discussion paper might have considered the criminological evidence that more punitive sentences have no effect or negligible effect on crime rates and recidivism.

“Indeed the weight of expert opinion is that harsher sentencing brings about small if any reductions in the crime rate” (Frieberg, 2001).

The discussion paper chooses not to include any information about the ineffectiveness of more punitive sentencing. It also omits to mention that more punitive sentencing disproportionately effects disadvantaged groups including Kooris. This lack of balance in the discussion paper is likely to increase support for a more punitive approach to graffiti. On top of this failure to acknowledge the counter productiveness of more punitive sentencing governments know and the media play on the public’s superficial attraction to punitive sentencing. “Research into public opinion and sentencing consistently finds that the more information that is provided to respondents the less punitive are their responses...” (Frieberg, Pg 80, 2001) Failure to provide more information about this issue in the discussion paper can be seen as encouragement to adopt a more punitive approach to graffiti.

The Government should be well aware of the link between low information and punitive attitudes to sentencing. The quote above from Frieberg in 2001 was part of a review of sentencing for the Victorian Government. More recently a detailed report in July 2006 from the Sentencing Advisory Council (Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing) makes the issue very clear. Some of the results in the executive summary include:

*Despite this variation in countries, and despite the use of various methodological approaches, the research on public opinion on crime and justice has reached a number of consistent conclusions*

*In the abstract, the public thinks that sentences are too lenient*

- In the abstract, people tend to think about violent and repeat offenders when reporting that sentencing is too lenient*
- People have very little accurate knowledge of crime and the criminal justice system*
- The mass media is the primary source of information on crime and justice issues*
- When people are given more information, their levels of punitiveness drop dramatically*
- People with previous experiences of crime victimisation are no more punitive than the general community*
- People with high levels of fear of crime are more likely to be punitive*
- Despite apparent punitiveness, the public favours increasing the use of alternatives to imprisonment*
- Despite apparent punitiveness, the public believes that the most effective way to control crime is via programs such as education and parental support, rather than via criminal*

*justice interventions*

*– Despite apparent punitiveness, public sentencing preferences are actually very similar to*

*those expressed by the judiciary or actually used by the courts*

*– Despite apparent punitiveness, the public favours rehabilitation over punishment as the*

*primary purpose of sentencing for young offenders, first-time offenders and property offenders*

*– Despite apparent punitiveness, public support for imprisonment declines when the offender makes restorative gestures*

*(Gelb, 2006)*

### **Superficial Attraction of Punitive Responses**

Not only is the ineffectiveness of more punitive sentencing ‘overlooked’ but there is no attempt to genuinely engage the public on this issue. The discussion paper relies on proposals and packaging which will be superficially attractive to people who want more punitive sentencing. The discussion paper omits inclusion of any of the information which might lead to alternative approaches to ‘tougher penalties’. This means that the discussion paper is a biased and reprehensible presentation of the issues.

The one thing we can be sure of about more punitive sentencing is that it increases the number of people in jail at any one time and it continues the targeting and over representation of disadvantaged groups.

The provision of unbalanced and biased proposals under the guise of a discussion paper does nothing for the Government’s reputation for integrity, honesty or effectiveness. It sells the community short. It was six years ago that Frieberg’s Sentencing Review suggested that ‘The objective is to sentence smarter rather than longer...’; the Discussion paper makes it clear that the recommendation has not been heard or acted on.

If the State Government want to achieve an outcome other than ‘more tough new penalties’ They will have to let the public know that ‘tough new penalties’ are usually not the answer and speak honestly about the costs and benefits of different crime control strategies.

### **Does Evidence matter to the State Government?**

The failure to include in the discussion paper material of a general nature about sentencing and the effectiveness of various control measures is a serious deficiency in the discussion paper. The discussion of graffiti, the heterogeneity of writers, the social groupings, norms and evolving practices; the problematic issues associated with bracketing ‘graffiti’ with ‘vandalism’ are given the most cursory of nods in the discussion paper and then forgotten. This is another major gap in the discussion paper. The discussion paper tells us that legislative changes have been made interstate and overseas-but fails to mention specific evidence which indicates the zero tolerance approach has already been tried and been a spectacular failure.

The Queensland experience would have been a sensible place to start. "In Queensland, a push to crack down on graffiti resulted, in 1997, in the implementation of the toughest penalties in Australia, if not the western world. Despite this, the incidence of graffiti in Queensland is the same as if not worse than that in comparable jurisdictions." Queensland MP Linda Lavarch MP (2003)

Queensland has had a reverse onus law similar to that proposed in Victoria in relation to possession of a graffiti instrument.

If other states or countries have gone down the same road and failed surely there should be some justification given as to why Victoria should repeat the same strategy.

### **Zero Tolerance....Again**

Lavarch locates the punitive graffiti laws of Queensland as part of the election campaign enthusiasm for punitive sentencing and politicians competing to be 'tough on crime'. Victoria which has hitherto shown some resistance to the idea of zero tolerance now appears to be belatedly embracing it. If that is believed to be the best policy choice we should consider the heartland of zero tolerance, New York City.

New York City has been identified with zero tolerance since the early eighties. Wilson and Kelling put forward the 'broken windows' theory about life style crime and the need to be tough on homeless people and graffiti. "New York has adopted a strenuous zero tolerance policy ever since. There have been reductions in crime but it is argued that factors other than zero tolerance policing are the main causes of the reduction.

### **Seeing through the 'Broken Windows' theory**

New York City in spite of its twenty five years of zero tolerance policies and expanded police force still has a murder rate approximately four times the Australian rate. Kelling and Bratton, passionate advocates of zero tolerance in the early eighties, twenty five years later are still trying to defend their approach against a range of critics. In 2006 they wrote an article entitled 'There Are No Cracks in the Broken Windows: Ideological academics are trying to undermine a perfectly good idea'.

After the 'aggressive' anti graffiti campaign associated with Mayor Ed Koch and Public Transport chief William Bratton in the early 1980's there have been successive new waves of 'tough new penalties'. In 1995 Mayor Giuliani established Anti Graffiti Task Force introduced 'tough new penalties' and banned the sales of aerosols to children under 18. (Wikipedia).

So is the problem largely solved now? Not really. Between 2002 and 2004 16 million square feet of graffiti has been removed. (Gotham Gazette 16th August 2004). Late in 2005 New York Mayor Bloomberg announced that he would toughen penalties, make it illegal for anyone under 21 to carry spray paint or etching tools on public property and fine large commercial or residential property owners who do not remove graffiti fast enough. (New York Sun 28th December 2005). Another initiative, according to the New York Police Department web site, is a centralized intelligence data base and the provision of rewards of \$500 with a 'dob in a dauber' phone line.



### **Going Below Zero Tolerance**

If rapid removal and zero tolerance were ever going to work we might expect that New York City would be almost graffiti free. Instead of recognising that the policies are not working the New York City legislation in 2006 expands the ‘war against graffiti’ presumably going ‘below zero tolerance’. This involves not just tougher penalties and making graffiti implements illegal but by penalising property owners who are tardy in cleaning off graffiti. This mirrors the United Kingdom Anti-social Behaviour Act 2003 (see Attachment One) which similarly tries to create a whole new class of offender the property owner as accomplice in ‘graffiti vandalism’ if they don’t speedily remove graffiti. This extension of penalties from potentially all young people to potentially all property owners is the logical extension of the illogical premise that rapid removal and zero tolerance will (eventually) work.

This recurring pattern, this vicious cycle of tougher penalties and wider ambit of criminalization is summarized succinctly by Halsey and Young.

“To avoid recidivism, criminalization policies thus tend toward intimidation through increasingly large fines and, ultimately, through the prospect of incarceration. Issues to do with the creation of a criminal record for the writer, the ambiguity of graffiti (as a form of criminal damage which is radically different from vandalism such as seat slashing, which is not creative of an image), or the possible appreciation of graffiti by at least some members of the municipality, are discounted or ignored.(Pg 177,2002)

### **Rapid Removal and the idea of Renewal**

The “Discussion paper’ makes the statement: ‘It is generally accepted that the quick and effective removal of graffiti soon after it occurs lessens the likelihood that graffiti will be applied at the same place. Accordingly, the Exposure Draft Bill contains provisions in which publicly visible graffiti can be removed from private property.’

Considering the first of these two statements; Examination of council and state government web sites suggests the rapid removal of graffiti is an article of faith which is beyond question.

Rapid removal is the most effective strategy - it removes the recognition that 'graffitists' strive for. (**City of Stonington Web site**)

Rapid removal of graffiti prevents the long term recognition graffiti strives for, while reinforcing that an area is monitored and maintained. (**City of Woolongong Web site**)

Prompt graffiti removal is seen as best-practice as it diminishes the level of recognition and reward achieved by graffiti vandals. Prompt graffiti removal also prevents assets from appearing uncared for. (**Western Australian State Government Web site**)

Rapid removal may be “Generally accepted” by some councils and state governments but the evidence is sketchy to non-existent at best. Researchers who have spoken with graffiti writers (Halsey and Young, 2002, 2006) highlight that a clean wall is often seen as ‘negative space’ or a blank canvas by the graffiti writer. The irony of rapid removal is that it produces a constant supply of fresh canvas seen from the graffitist perspective while from the council perspective usually ..removal strategies are founded upon the assumptions that graffiti is a blot on the visual field and that its erasure returns the urban landscape to a pristine condition’. (Halsey and Young, 2002)

### **Casey Local Leader in Zero Tolerance**

The City of Casey claim to have introduced the first graffiti local laws in Australia in 2002. At a conference in 2003 representatives from Casey proudly presented their zero tolerance approach (Smith and Lee, 2003).

*The main offences relate to:*

- *Defacing Property;*
- *Possession of aerosol spray containers;*
- *Prohibiting sale and supply to persons under 18; and*
- *Restricting public access to aerosol spray paint containers.*

In their presentation they predicted that the rate of removal of graffiti required would decline to half the level of the June 2003 level. The Council web site in 2007 indicates that there has been no reduction in the removal rate since June 2003. Prior to the aggressive campaign the Council was removing 17,500 square metres a year and now they are removing 13,200 square metres. The photos below were taken on the 7th of February 2007 five years after the introduction of zero tolerance. The photos are a sample of graffiti in a 1km section of Web street in Narre Warren. It suggests the Casey zero tolerance approach is not a panacea.



*Webb Street Narre Warren Feb 7th 2007 –Five years after zero tolerance style legislation adopted by Casey Council*





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Anecdotal evidence of rapid removal success often glosses over the sites where the level of writing continues or increases and usually ignores displacement to neighbouring sites.

In relation to claims of success with rapid removal Halsey and Young say, ‘..success is obtained at the cost of either increasing the number of individuals becoming involved (either informally or formally) in the criminal justice system or the further distancing of certain individuals from the community that they live in.’ (Pg 179, 2002)

Not only is the idea of rapid removal problematic it is, in the discussion paper, linked to the idea of councils lacking power to remove graffiti. ‘It is generally accepted that the quick and effective removal of graffiti soon after it occurs lessens the likelihood that graffiti will be applied at the same place. Accordingly, the Exposure Draft Bill contains provisions in which publicly visible graffiti can be removed from private property.’

Many Councils remove graffiti from private property now. No legislation is required. Businesses and residents ask councils to remove the graffiti. The limiting factor is usually

how much Council have in their budget to do this because as we have seen above rapid removal is far from the panacea that Government web sites would have us believe.

### **Is there an alternative to zero tolerance?**

The State Government acknowledges that there is some variation in how local councils respond to graffiti. Rather than consider the costs and benefits of these different approaches the discussion paper ignores this and the draft legislation opts instead for a zero tolerance approach.

Halsey and Young surveyed the approach to graffiti taken by local government. They categorised the approaches as removal; criminalisation; welfarism; acceptance of graffiti culture. 'As will be shown, most (council strategies) are founded on an incomplete and stereotyped model of graffiti production, ensuring their limited effectiveness even prior to implementation.' (Pg 174, 2002)

The researchers observed that councils which adopted strategies of criminalisation also strive to remove graffiti quickly. "Yet the criminalisation aspect of a council's policy usually seems to overtake others, so that adjunct strategies such as removal tend to become simply "assumed" or self-evident. The criminalisation aspect assumes a dominating force in the graffiti strategy of any council which has adopted it.' (Pg 175, Halsey and Young 2002)

The only councils which seemed to secure a reduction in the level of graffiti had an approach that included some mix of welfare, education and removal together with some element of acceptance of graffiti culture.

'We would suggest, therefore, that municipal responses to graffiti should ideally eschew criminalisation or at least opt for a policy that combines acceptance of graffiti culture, welfarism and/ or removal in some way.' (Pg 179, Halsey and Young 2002)

Another interesting characteristic of some of these success stories was a higher level of engagement with other people in the community and reduced fear of graffiti.(See Attachment Two An extract from the Halsey and Young research which provides some more detail of Councils which appear to have had some success in reducing graffiti and reducing community fear)

### **Reversing the Onus of proof: Giving young people a spray**

Paragraph 6.6 in the Exposure Draft discussion paper provides the following justification for the introduction of the reversing the legal burden of proof.

Where is the argument 'that could be made'? 'Costly and difficult' were those words the argument for creating a new offence which could apply to hundreds of thousands of young Victorians and making the offence a revers onus one? The section implies that investigations which are slow and rarely produce successful prosecutions provide a basis for introducing a reverse onus rule. This could apply to a wide range of laws. It overlooks the idea that 'innocent until proven guilty' was not introduced as a result of a chartered accountant or economist telling people it was affordable. It is a way to reduce the chance of convicting

innocent people. Reverse onus starts from an assumption of guilty until proven innocent. The risk of convicting innocent people is no longer on the table as a concern.

Would it be acceptable to make the same argument for traffic offences? Eg Speed Cameras, prosecutions, infringement notices and courts are all expensive and only catch a small percentage of offenders. If we classify all cars as 'prescribed instruments' and we then find people with cars on roads or near roads then an argument can be made that they should be fined and the burden of proof should be on the person with the prescribed instrument to prove that they weren't going to use the car to offend.

The Bill in Part 2 section 7 and in Part 3 (11.2) effectively makes carrying a prescribed graffiti implement illegal if there is some nexus with transport or a graffiti site. This will mean most of Victoria will provide an opportunity for young people to be searched and fined irrespective of whether they have or intended to do graffiti. The proposed Bill will create hundreds of thousands of young suspects, many of whom will be searched. It will create thousands of young people who will be fined as they are carrying 'graffiti implements' and they will be assumed to be intending to use them to do graffiti. The reverse onus means that young people will have to spend considerable time and money if they want to contest the police charge. The fines will be some problem for young people whose parents will pay the fine or the lawyer to fight the charge and a huge problem for young people whose parents won't or can't do either.

There is no justification for the use of reverse onus in the Draft. The Bill creates a new offence which effectively makes carrying a writing implement in a public place illegal and including a reverse onus rule with it. This will obviously make it easier for the police to get convictions. It will be like shooting fish in a barrel. But it is unclear how these convictions will materially reduce the problem of graffiti.

There is no consideration given to how this will impact on police youth relations more generally and to what extent it will occasion an incentive to some young people to increase their interest in graffiti in response to the challenge.

Will it lead to closer bonds between groups of graffiti writers?

It is unclear how the reverse onus can be justified and how it is consistent with the State's recently proclaimed Charter of Rights.



*South of Webb Street Narre Warren Feb 7th 2007 –Five years after zero tolerance style legislation adopted by Casey Council*

## **Two tiers of offence**

The creation of a two tier system of penalties with higher penalties for racial hatred based comment does not appear to be based on evidence. It is not clear that it will achieve anything. It is not clear why this new proposal is necessary when the Equal Opportunity Commission has powers to deal with these matters. The fact that some councils prioritise removing such graffiti does not seem to provide any basis for saying higher penalties are needed.

The admission that convictions are hard to get suggests that this provision is unlikely to ever be used and it provides further unnecessary complication.

## **Cost Shifting Graffiti removal to the private owner-the next move?**

It is unclear why Government cleaning efforts on private property should be immune from compensation claims. This would appear to be a disincentive for people to seek Council assistance to remove graffiti.

The draft legislation stops short of copying the New York City and UK legislation which enables property owners to be fined for not removing graffiti. Although clearly the zero tolerance philosophy of the legislation lends itself to such an addition later on when it is discovered that graffiti has not been tamed by the new legislation. The fact that the proposed legislation gives more power to Councils and the enthusiasm for rapid removal suggest that it is only a matter of time before property owners will be told (in the interest of public safety) they will be fined if they don't comply with the 'rapid removal revolution'.

Western Australia has mandated removal times of graffiti from public buildings and their web site also extols the virtues of private property owners removing graffiti speedily. When the problem persists this will be the next step below zero tolerance.

It is unclear why Governments require legislative power to remove graffiti from private property when most people would be happy to ask the council to remove graffiti if the council offered such a service. Rather than set up a complicated approval process where you have to object if you don't want it removed why not have an opt in system as presently exists in some municipality.



## **Conflict with existing policy**

The statements in previous years by ministers such as ex Police Minister Haymeyer suggest a more collaborative and heterogeneous approach to the problem as being adopted. Instead it now appears that the Government is adopting a zero tolerance policy. Zero tolerance policies are costly and disproportionately impact on disadvantaged groups.

The criminalising of carrying paint is in direct conflict with the harm minimisation approach adopted by the Volatile substances legislation which was enacted to better deal with chroming. The police appear to be increasingly responding appropriately to this more preventative approach. The exposure draft will encourage police to turn their back on this more effective approach and go back to being focused on getting convictions.

## **Risk of Increasing Graffiti**

The Halsey /Young research highlighted that people who are involved in graffiti were not a homogenous group. However many people involved in graffiti enjoyed the sense of community that the activity contributed to. The research also highlighted that boredom was the most common motivation given for getting involved in graffiti. The zero tolerance approach and the more punitive approach which is being proposed has every chance of making graffiti more attractive, strengthening the bonds between young people involved and creating an environment for more high risk taking behaviour.

## **Conclusion**

The bill sets up a new basis for widespread searching of young people and convicting them on the basis of what they are expected to do, not on the basis of what they have done. This is a domestic version of the preemptive strike. What an unhappy formal introduction to the legal system and police this proposed new legislation will provide for many thousands of young people.

More punitive sentencing disproportionately affects people on low incomes early school leavers, people with mental health problems and Aboriginals. In most cases more punitive sentencing is ineffective and counter productive. The proposed bill omits mention of this.

The Sentencing Advisory Council report (2006) reconfirmed that most people's knowledge about sentencing is limited and comes from the media and that if people have more information about issues they have less punitive opinions. Conversely the omission in the discussion paper of any attempt to provide information which might support a less punitive approach or a non zero tolerance approach can be viewed as an attempt to avoid scrutiny of a policy option which has already been decided.

VALS believe the exposure draft proposal is poorly thought through and relies on false assumptions. The proposed exposure draft is not supported by VALS.

## References

Frieberg, A Sentencing Review, Victorian Government, 2001

Gelb, Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing, Sentencing Advisory Council, 2006

Halsey, M. & Young, A. (2002) 'The Meanings of Graffiti and Municipal Administration', *Australian and New Zealand Journal of Criminology*, Vol. 35, No. 2, pp. 165-86.

Linda Lavarch MP Law and water : An holistic response to graffiti reduction and prevention Presented at: Graffiti and Disorder : Local Government, Law Enforcement and Community Responses 2003

Lee, K and Smith, W Graffiti and Disorder : Local Government, Law Enforcement and Community Responses, City of Casey, Victoria. Presented at: Graffiti and Disorder : Local Government, Law Enforcement and Community Responses 2003

## Attachment One

### United Kingdom Anti-social Behaviour Act 2003

#### 48 Graffiti removal notices

(1) This section applies where a local authority is satisfied-

- (a) that a relevant surface in an area has been defaced by graffiti, and
- (b) that the defacement is detrimental to the amenity of the area or is offensive.

(2) The authority may serve a notice (a "graffiti removal notice") upon any person who is responsible for the surface imposing the requirement mentioned in subsection (3).

(3) That requirement is a requirement that the defacement be removed, cleared or otherwise remedied within a period specified in the notice being not less than 28 days beginning with the day on which the notice is served.

(4) If the requirement mentioned in subsection (3) is not complied with, the authority or any person authorised by the authority may remove, clear or otherwise remedy the defacement.

#### 49 Recovery of expenditure

(1) A local authority may recover from the person on whom a graffiti removal notice was served expenditure reasonably incurred in exercise of the power under section 48(4).

## Attachment Two

Extract from *The Meanings of Graffiti and Municipal Administration* (Halsey, M and Young, A 2002) *Australian and New Zealand Journal of Criminology*, Vol. 35, No. 2, pp. 165-86.

Thus, acceptance of the culture of graffiti also requires appreciation of graffiti culture: councils need advice on and understanding of matters such as the innate competitiveness of graffiti writers (whereby writers paint over older pieces to prove their own style or to outdo another's style), and writers' acceptance of graffiti's inherent ephemerality (whereby writers know from the outset that each work is temporary and will be painted over, by other writers if not by regulatory agents). Exemplary of the strategy of accepting graffiti culture is Geelong City Council (Victoria), who spent 8 years developing a non-punitive response to graffiti. They commissioned a graffiti mural in the city centre (which met with positive responses from all sections of the population). Three graffiti writers were employed to paint murals at the public swimming pool, again to popular acclaim. Paint and other materials for this project were donated by the Police Community Consultative Committee. One writer was employed at a school to teach art classes. The results included a noticeable decline in illegal graffiti in the city, and a wider sense of public appreciation for graffiti art (with related benefits of reduced fear of crime and reduced sense of spoiling of the urban landscape). Pg 179.

Other councils promoting aspects of graffiti culture include Mitcham (South Australia) who have contracted and permitted several legal pieces, and Gosnells (Western Australia) whose "Urban Art" program is said to have substantially reduced the incidence of illegal graffiti. Writers have been commissioned to paint murals on bus shelters and water tanks, often incorporating road safety and social justice issues. Four councils in New South Wales follow similar lines: Hurstville provides a legal wall (and reported lowered rates of illegal graffiti, a reduction in local fear of crime, and more positive attitudes towards young people in the community); Woolloomooloo commissioned murals for one of its housing estates and for its Police Station (with positive effects on the sense of amenity and community); and Parramatta and Warringah councils run workshops to improve the techniques of those interested in legal graffiti. Classes are taught by a former writer of illegal graffiti, and include "History of Graffiti Art", "Lettering Design and Layout", "Spraycan and Nozzle Techniques" and "Character Development".