



Western Australia

## **Graffiti Vandalism Act 2016**

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As at 11 Jul 2016

No. 16 of 2016

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# Graffiti Vandalism Act 2016

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**Defined terms**





Western Australia

## **Graffiti Vandalism Act 2016**

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**No. 16 of 2016**

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**An Act to consolidate laws dealing with graffiti vandalism and to amend certain Acts as a consequence.**

*[Assented to 11 July 2016]*

The Parliament of Western Australia enacts as follows:

## **Part 1 — Preliminary**

### **1. Short title**

This is the *Graffiti Vandalism Act 2016*.

### **2. Commencement**

This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent;
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

### **3. Terms used**

In this Act —

**graffiti** means any drawing, writing, painting, symbol or mark applied to or marked on property by —

- (a) spraying, writing, drawing, marking or otherwise applying paint or another marking substance; or
- (b) scratching or etching;

**owner**, of land, means a person who is an owner of the land within the meaning given in the *Local Government Act 1995* section 1.4.



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## Part 2 — Graffiti offences

### 4. Terms used

In this Part —

**adult** means a person who has reached 18 years of age;

**CEO** means the chief executive officer of the Public Sector agency principally assisting the Minister administering the *Sentence Administration Act 2003* Part 8 in its administration;

**child** means a person under 18 years of age;

**community based order** means a community based order made under the *Sentencing Act 1995*;

**community order** means —

- (a) a community based order or intensive supervision order made under the *Sentencing Act 1995*; or
- (b) a youth community based order or intensive youth supervision order made under the *Young Offenders Act 1994*;

**graffiti implement** means any of these —

- (a) a can of spray paint;
- (b) a pen or marker pen, or a similar implement that —
  - (i) has a tip over 6 mm wide; and
  - (ii) contains a fluid that is not water soluble and that is capable of marking a surface;

**offender** means a person who has committed an offence under section 5;

**possession** includes having under control in any manner whatever, whether for the use or benefit of the person of whom the term is used or of another person, and although another person has the actual possession or custody of the thing or property in question;

**public property** means property owned by, vested in, or under the control or management of —

- (a) the Crown, or an agent or instrumentality of the Crown;  
or
- (b) a body corporate established by a law; or
- (c) a local government or regional local government;

**youth community based order** means a youth community based order made under the *Young Offenders Act 1994*.

**5. Damaging property by graffiti**

- (1) A person must not destroy, damage or deface the property of another person by graffiti without that other person's consent.

Penalty: a fine of \$24 000 and imprisonment for 2 years, but the minimum penalty —

- (a) for an adult offender, is a community based order;
- (b) for a child offender, is a youth community based order.

- (2) Property that is capable of being destroyed, damaged or defaced by graffiti includes vegetation.

- (3) This section operates despite the *Young Offenders Act 1994* section 46(5a).

**6. Possessing thing with intent to apply graffiti**

- (1) A person must not be in possession of a thing with the intention of using it to destroy, damage or deface property by applying graffiti.

Penalty: a fine of \$6 000.

- (2) A person is presumed to have an intention referred to in this section in relation to a thing in the person's possession if the person is in possession of the thing in circumstances that give rise to a reasonable suspicion that the person has the intention, unless the contrary is proved.

**7. Selling graffiti implement to child**

- (1) A person must not sell a graffiti implement to a child.

Penalty:

- (a) for a first offence, a fine of \$6 000;
  - (b) for a subsequent offence, a fine of \$12 000.
- (2) It is a defence to a charge of an offence under subsection (1) to prove the accused, or a person acting on behalf of the accused, believed on reasonable grounds that the person to whom the implement was sold was an adult.

**8. Costs of cleaning graffiti**

- (1) This section applies whether the graffiti —
- (a) is visible to the public or not; or
  - (b) is applied to public property or private property.
- (2) A court that convicts a person of an offence under section 5 that involves destroying, damaging or defacing property to which this Act applies may order the offender —
- (a) to take remedial action to restore the property to the same state as it was in before the offence or to a state specified in the order; or
  - (b) to pay another person to take remedial action to restore the property to the same state as it was in before the offence or to a state specified in the order.

**9. Application of *Sentencing Act 1995***

- (1) The *Sentencing Act 1995* Part 16 Division 1 applies to an order referred to in section 8(2) as if it were a reparation order as defined in that Part.
- (2) The *Sentencing Act 1995* section 122 applies to a person who does not obey an order made under section 8(2)(a) as if the order were a restitution order made under Part 16 of that Act.

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- (3) The *Sentencing Act 1995* sections 119 and 119A apply as if an order made under section 8(2)(b) were a compensation order made under Part 16 of that Act.

**10. Conditions to attach to community orders**

- (1) Where an offender is sentenced to a community order, the court must impose a condition that a minimum of 10 hours unpaid community work be carried out by the offender.
- (2) The unpaid community work is to be performed by the offender (whether adult or child) at the direction of the CEO and the work is to comprise graffiti removal work, where practicable.
- (3) This section operates despite the *Young Offenders Act 1994* section 46(5a).

**11. Immunity when removing graffiti**

- (1) An action in tort does not lie against an individual involved in graffiti removal under this Act or under a community order for anything done that —
- (a) results in damage to property or injury to a person; and
  - (b) is done in good faith and does not constitute negligent behaviour.
- (2) This section does not relieve the State of any liability that it might have for the doing of anything by an individual involved in graffiti removal under this Act.
- (3) In this section, a reference to the doing of anything includes a reference to an omission to do anything.

**12. Immunity for owners of property when individuals enter property to remove graffiti**

- (1) This section applies to the owner of a place who owes a duty of care to an individual who enters that place.

- (2) An action in tort does not lie against the owner of a place for death or injury suffered by an individual resulting from the individual's involvement in graffiti removal under this Act or under a community order, unless a breach of the owner's duty of care amounts to gross negligence.
- (3) An action in tort against the owner that is prevented by subsection (2) may be taken instead against the State as if the State owed the duty of care.
- (4) If a breach of the owner's duty of care is found to have amounted to gross negligence, the State may recover from the owner as a debt any damages, including costs, paid by the State as a result of any action taken under subsection (3).

**13. Forfeiture of property**

- (1) *The Criminal Code* section 731 applies where a court convicts a person of an offence under this Act, as if the conviction were a penalty under *The Criminal Code*.
- (2) For the purposes of subsection (1) "any thing that was used in or in connection with the commission of the offence" includes a thing that was intended to be used, and includes —
  - (a) a graffiti implement; and
  - (b) anything used by the offender to record, store or transmit images of the graffiti caused by the offender.
- (3) The order may include provision for the seizure of a thing or other action required to enforce that forfeiture.
- (4) In addition to *The Criminal Code* section 731(2), a court must not make an order for the forfeiture of any thing under subsection (1) unless the prosecutor applies for the order.

## **Part 3 — Local government powers**

### **Division 1 — Application**

#### **14. Terms used**

In this Part —

***approved*** means approved by the relevant local government;

***CEO*** means the chief executive officer of the relevant local government;

***local government property*** means anything, whether land or not, that belongs to, or is vested in, or under the care, control or management of, the local government;

***occupier***, of land, means a person who is an occupier of the land within the meaning given in the *Local Government Act 1995* section 1.4;

***public place*** means —

- (a) any place to which the public, or any section of the public, have or are permitted to have access whether on payment or otherwise; or
- (b) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access; or
- (c) a privately owned place that is unoccupied or is occupied by a person who is not the owner and does not have the authority of the owner.

#### **15. Application**

For the purposes of the *Local Government Act 1995* Part 9 Divisions 1 and 2, a function under that Part is a function that a person may be authorised to perform under this Part.

**16. Delegation by local government**

- (1) The local government may delegate to its CEO the exercise of any of its powers or the discharge of any of its duties under another provision of this Part.
- (2) A delegation under this section is to be in writing and may be general or as otherwise provided in the instrument of delegation.
- (3) A decision to delegate under this section is to be made by an absolute majority.

**17. Delegation by CEO of local government**

- (1) A CEO may delegate to any employee of the local government the exercise of any of the CEO's powers or the discharge of any of the CEO's duties under another provision of this Part other than this power of delegation.
- (2) A delegation under this section is to be in writing and may be general or as otherwise provided in the instrument of delegation.
- (3) This section extends to a power or duty the exercise or discharge of which has been delegated by a local government to the CEO under section 16, but in the case of such a power or duty —
  - (a) the CEO's power under this section to delegate the exercise of that power or the discharge of that duty; and
  - (b) the exercise of that power or the discharge of that duty by the CEO's delegate,

are subject to any conditions imposed by the local government on its delegation to the CEO.

- (4) Subsection (3)(b) does not limit the CEO's power to impose conditions or further conditions on a delegation under this section.
- (5) In subsections (3) and (4) —  
**conditions** includes qualifications, limitations or exceptions.

**Division 2 — Notices**

**18. Notice requiring removal of graffiti**

- (1) This section applies to graffiti that is —
  - (a) applied to property with the consent of the owner or occupier; and
  - (b) visible from a public place; and
  - (c) considered by the local government to be unsightly or offensive.
- (2) A local government may give a notice in writing to a person who is the owner of property or the occupier of a place on which graffiti described in subsection (1) is applied, requiring the person to ensure that the graffiti is obliterated in a manner acceptable to the local government within a time set out in the notice.
- (3) If the notice is given to an occupier of land who is not the owner of the property, the owner is to be informed in writing that the notice was given.
- (4) A person who is given a notice under subsection (2) is not prevented from complying with it because of the terms on which the land is occupied.
- (5) A person who fails to comply with a notice under subsection (2), without a reasonable excuse, commits an offence.

Penalty:

  - (a) a fine of \$5 000;
  - (b) a further fine of \$500 in respect of each day or part of a day during which the offence continues.

**19. Additional powers when notice is given**

- (1) This section applies when a notice is given under section 18.



- (2) In this section —
- court*** means a court that would have jurisdiction to hear an action to recover a debt of the amount of the expense, fine or cost sought to be recovered by the notice recipient.
- (3) If the person who is given the notice (the ***notice recipient***) fails to comply with it for any reason, the local government may do anything that it considers necessary to obliterate the graffiti in a manner acceptable to the local government.
- (4) The local government may recover the reasonable cost of anything it does under subsection (3) as a debt due from the person who failed to comply with the notice.
- (5) A notice recipient may apply to a court for an order under subsection (6) if the notice recipient —
- (a) incurs expense in complying with any requirement of the notice; or
  - (b) fails to comply with such a requirement and, as a consequence, is fined or has to pay to a local government the cost it incurs in doing anything under subsection (3).
- (6) On an application under subsection (5), the court may order —
- (a) if the notice recipient is the owner — the occupier; or
  - (b) if the notice recipient is the occupier — the owner,
- to pay to the notice recipient so much of that expense, fine or cost as the court considers fair and reasonable in the circumstances.
- (7) In determining what is fair and reasonable, the court is to have regard to —
- (a) the type of land involved; and
  - (b) the terms on which the occupier is occupying the land; and
  - (c) any other matter the court considers to be relevant.

### **Division 3 — Objection to a notice**

**20. Affected person**

If the person to whom a local government gives a notice under section 18 is not the owner of the property to which the notice relates, the owner is also an affected person, and a reference in this Division to the affected person includes both the owner and the person to whom the notice was given.

**21. Advice of objection and review rights**

Whenever a notice is given under section 18, the person giving it is to ensure that, as soon as practicable after the notice is given, the affected person is given written reasons for being given the notice and is informed of the person's rights under this Division to object against, and apply for a review of, the decision to give the notice.

**22. Objection may be lodged**

- (1) An affected person may object to a notice if the person has not applied under this Division for a review of the decision to give the notice.
- (2) The objection is made by preparing it in the approved form and lodging a copy of the completed objection form with the chief executive officer of the local government within 28 days after the notice is given, or within such further time as the local government may allow.
- (3) An objection must be dealt with by the local government as if it were an objection to a decision of the local government under the *Local Government Act 1995* Part 9 and section 9.6 of that Act applies when dealing with that objection.

**23. Review of decision to give notice**

- (1) An affected person may apply to the State Administrative Tribunal for a review of a decision to give a notice if the person —
  - (a) has not lodged an objection to the notice; or
  - (b) has lodged an objection but, at the expiration of 35 days after it was lodged, has not been given notice in writing of how it has been decided to dispose of the objection.
- (2) If the person lodged an objection and has been given notice in writing of how it has been decided to dispose of the objection, the person may apply to the State Administrative Tribunal for a review of the decision on the objection.
- (3) The application is to be made within 42 days after the right to make it arose which is —
  - (a) within 42 days after the notice is given, for an application under subsection (1)(a); or
  - (b) more than 35 days, but within 77 days, after the objection was lodged, for an application under subsection (1)(b); or
  - (c) within 42 days after the objection was decided, for an application under subsection (2).

**24. Suspension of effect of notice**

- (1) If an objection has been lodged against a notice or a decision, or an application has been made under this Division for a review of the decision, the effect of the notice or decision is suspended until the person or tribunal authorised to deal with the objection or application has decided how to dispose of it, unless —
  - (a) the person or tribunal orders that the suspension be revoked; or
  - (b) the local government considers that —
    - (i) there are urgent reasons why the effect of the notice or decision should not be suspended; or

- (ii) suspension of the effect of the notice or decision is reasonably likely to endanger the safety of any person, cause damage to property or to create a serious public nuisance.
- (2) A person or tribunal cannot order, under subsection (1)(a), that the suspension of a decision be revoked unless it considers that —
  - (a) there are urgent reasons why the effect of the notice or decision should not be suspended; or
  - (b) suspension of the effect of the notice or decision is reasonably likely to endanger the safety of any person, cause damage to property or to create a serious public nuisance.
- (3) As soon as a local government makes a decision under subsection (1)(b), it is to give the affected person notice in writing stating its reasons.

**25. Local government graffiti powers on land not local government property**

- (1) A local government may obliterate graffiti that is visible from a public place and that has been applied without the consent of the owner or occupier, even though the land on which it is done is not local government property and the local government does not have consent to do it.
- (2) In subsection (1) —  
*land* includes Crown land the subject of a pastoral lease within the meaning of the *Land Administration Act 1997* section 3(1).

**Division 4 — Powers of entry**

**26. Application of Division**

- (1) The powers of entry conferred by this Division may be used for performing any function that a local government has under this Part, if entry is required for the performance of that function.

- (2) The powers of entry upon land conferred by this Division are in addition to and not in derogation of any power of entry conferred by any other law.
- (3) Entry under this Division may be made with such assistants and equipment as are considered necessary for the purpose for which entry is required.

**27. General procedure for entering property**

- (1) Except if the entry is authorised by the warrant of a justice, entry by or on behalf of a local government on to any land, premises or thing is not lawful unless —
  - (a) the consent of the owner or occupier has been obtained;  
or
  - (b) notice has been given under section 28.
- (2) If notice has been given under section 28, a person authorised by the local government to do so may lawfully enter the land, premises or thing without the consent of the owner or occupier unless the owner or occupier or a person authorised by the owner or occupier objects to the entry.

**28. Notice of entry**

- (1) A notice of an intended entry is to be given to the owner or occupier of the land, premises or thing that is to be entered.
- (2) The notice is to specify the purpose for which the entry is required and continues to have effect for so long as that requirement continues.
- (3) The notice is to be given not less than 24 hours before the power of entry is exercised.
- (4) Successive entries for the purpose specified in the notice are to be regarded as entries to which that notice relates.

**29. Entry under warrant**

- (1) In the circumstances described in subsection (2), a justice may by warrant authorise a local government by its employees, together with such other persons as are named or described in the warrant, or a police officer, to enter any land, premises or thing using such force as is necessary.
- (2) A warrant may be granted under subsection (1) where a justice is satisfied that the entry is reasonably required by a local government for the purpose of performing its functions under this Act, but —
  - (a) entry has been refused or is opposed or prevented; or
  - (b) entry cannot be obtained; or
  - (c) notice cannot be given under section 28 without unreasonable difficulty or without unreasonably delaying entry.
- (3) A warrant granted under subsection (1) —
  - (a) must be in the approved form; and
  - (b) must specify the purpose for which the land, premises or thing may be entered; and
  - (c) continues to have effect until the purpose for which it was granted has been satisfied or one month has elapsed, whichever is the shorter.

**30. Purpose of entry to be given on request**

A person who enters or who has entered any land, premises or thing on behalf of a local government is to give particulars of the power by virtue of which the local government claims a right of entry on being requested to do so.

**Division 5 — Protection from liability**

**31. Certain persons protected from liability for wrongdoing**

- (1) In this Division —  
*protected person* has the meaning given in the *Local Government Act 1995* section 9.56(1).
- (2) The *Local Government Act 1995* section 9.56 applies to a protected person for anything that the person has, in good faith, done, or omitted to do, in the performance or purported performance of a function under this Part.
- (3) A local government has the liability for the doing of anything by a protected person as set out in the *Local Government Act 1995* section 9.56(4).

## **Part 4 — Review**

### **32. Review of Act**

- (1) The Minister —
  - (a) must carry out a review of the operation and effectiveness of this Act as soon as is practicable after the end of the period of 5 years beginning on the day on which this section commences; and
  - (b) may carry out a further review of the operation and effectiveness of this Act at any time after the period referred to in paragraph (a).
- (2) The Minister must —
  - (a) prepare a report based on the review; and
  - (b) as soon as is practicable after the preparation of the report, cause it to be laid before each House of Parliament.



**Part 5 — *Public Transport Authority Act 2003* amended**

**33. Act amended**

This Part amends the *Public Transport Authority Act 2003*.

**34. Section 58 amended**

- (1) In section 58(1) delete “it appears to a security officer or a member of the Police Force that the offence referred to in that subsection would be likely to continue or be repeated if the offender is not apprehended,” and insert:

a security officer or a member of the Police Force witnesses an offender committing an offence referred to in that subsection, or reasonably suspects that an offence referred to in that subsection has been committed by an offender,

- (2) In section 58(2):
- (a) in paragraph (c) delete “property.” and insert:  
  
property; or
  - (b) after paragraph (c) insert:  
  
(d) an offence under the *Graffiti Vandalism Act 2016* section 5 committed in relation to Authority property, a conveyance or a facility.

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(3) In section 58(2) after paragraph (a) insert:

or

**35. Section 64A amended**

In section 64A(3):

(a) in paragraph (b) after “section 444” insert:

or 445

(b) after paragraph (c) insert:

(da) an offence under the *Graffiti Vandalism Act 2016* section 5 committed in relation to Authority property, a conveyance or a facility;

## **Part 6 — Consequential amendments**

### **Division 1 — *The Criminal Code* amended**

**36. Act amended**

This Division amends *The Criminal Code*.

**37. Part IV Chapter XXIV deleted**

Delete Part IV Chapter XXIV.

**38. Section 446 deleted**

Delete section 446.

**39. Section 557G deleted**

Delete section 557G.

### **Division 2 — *Local Government Act 1995* amended**

**40. Act amended**

This Division amends the *Local Government Act 1995*.

**41. Schedule 3.1 amended**

In Schedule 3.1 Division 1 delete item 5B.

**42. Schedule 3.2 amended**

In Schedule 3.2 delete item 8.

### **Division 3 — *Young Offenders Act 1994* amended**

**43. Act amended**

This Division amends the *Young Offenders Act 1994*.

***Graffiti Vandalism Act 2016***

**Part 6** Consequential amendments

**Division 3** Young Offenders Act 1994 amended

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**44. Section 46 amended**

In section 46(5a) before “but” insert:

and sections 5 and 10 of the *Graffiti Vandalism Act 2016*

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**Defined terms**

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

<b>Defined term</b>	<b>Provision(s)</b>
adult .....	4
approved .....	14
CEO .....	4, 14
child .....	4
community based order.....	4
community order.....	4
conditions.....	17(5)
court .....	19(2)
graffiti .....	3
graffiti implement .....	4
land .....	25(2)
local government property .....	14
notice recipient.....	19(3)
occupier.....	14
offender.....	4
owner .....	3
possession .....	4
protected person.....	31(1)
public place.....	14
public property.....	4
youth community based order.....	4