

The Shopfront

YOUTH LEGAL CENTRE

Graffiti

1 Is it legal?

If you are tagging or marking someone's property without their consent (including public property, without the consent of the government or Council) – NO.

If you have consent from the owner of the property – mostly, YES, but here are some things to watch out for:

- you could be guilty of offensive conduct if reasonable people would find your graffiti offensive.
 - even if the owner of a building lets you put up a piece on their wall, you might be forced to remove it if it doesn't fit in with local planning laws and doesn't have council approval.
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2 Offences under the *Graffiti Control Act 2008*

2.1 Spray paint and other graffiti implements

- A **graffiti implement** means spray paint, a marker pen, or "any implement designed or modified to produce a mark that is not readily removable by wiping or by use of water or detergent" (*Graffiti Control Act* section 3).
- It is an offence to **possess a graffiti implement with intent to use it to commit a graffiti offence** (*Graffiti Control Act* section 5).

Maximum penalty: \$1,100 fine or 6 months imprisonment.

- It is *not* an offence to possess **spray paint** unless you are intending to use it to damage or deface property.
- However, **if you are under 18 and have a spray paint can in a public place, police may confiscate it from you**, unless you can convince them that you have it for a lawful purpose (*Graffiti Control Act* section 9).
- It is an offence to **sell a spray paint can to a person under 18** (*Graffiti Control Act* section 7).

Maximum penalty: \$1,100 fine.

2.2 Marking or damaging property

- It is an offence to **intentionally mark premises** (which includes buildings, vehicles and even unoccupied land) **or property** (which includes trees) **without the consent of the owner or person in charge**. However, it is *not* an offence to mark a public footpath with chalk (*Graffiti Control Act* section 4(1)).

Maximum penalty: \$440 fine.

- If the mark is not readily removable by wiping or by the use of water or detergent, or if a graffiti implement is used, the offence is committed in "**circumstances of aggravation**" (*Graffiti Control Act* section 4(2)).

Maximum penalty: \$2,200 fine or 12 months imprisonment.

- It is an offence to **intentionally affix a placard or paper on any premises**, without the consent of the owner, so that it is **within view from a public place** (*Graffiti Control Act* section 6).

Maximum penalty: \$440 fine.

3 Offences under other Acts

3.1 Property damage

- **Intentionally or recklessly destroy or damage property (often called “malicious damage”)** (*Crimes Act* 1900 section 195). This can include graffiti (unless it is something that can be easily wiped or washed off).

Maximum penalty: 5 years imprisonment (or 10 years if destruction/damage is caused by fire/explosives).

- **Wilfully damaging or defacing any “protected place”** - eg war memorial, shrine, cemetery (*Summary Offences Act* 1988 section 8).

Maximum penalty: \$4,400 fine.

- **Vandalism or wilful damage on public transport** – (*Passenger Transport Regulation* 2007 clauses 57 and 61).

Maximum penalty: \$5,500 fine (for interfering with or wilfully damaging train or public passenger vehicle) or \$2,200 fine (in other cases). Usually dealt with by a penalty notice (on-the-spot fine) of \$400.

3.2 Offensive implements

- **Having custody of an offensive implement in a public place or school** – this can include something intended to be used to damage property (*Summary Offences Act* 1988 section 11B).

Maximum penalty: \$5,500 fine or 2 years imprisonment.

3.3 Offensive language and conduct

- It is an offence to **use offensive language** or conduct yourself in an **offensive manner** in (or within view/hearing of) a **public place**. This could include graffiti with offensive words or images (*Summary Offences Act* 1988 sections 4, 4A).

Maximum penalty: \$660 fine (language); \$660 fine or 3 months imprisonment (conduct). Over-18s can be given a \$500 penalty notice (on-the-spot fine).

4 Penalties for graffiti offences

4.1 Sentencing options

The fines and prison terms listed above are all *maximum* penalties.

The court can also impose alternatives such as good behaviour bonds, community service orders, cautions, etc.

For offences under the *Graffiti Control Act*, there are extra orders that a court may make, such as graffiti clean-up orders or driver licence orders.

For under-18s, there may also be options under the *Young Offenders Act*.

4.2 Restrictions on imprisonment

Even if imprisonment is an option for an offence under the *Graffiti Control Act* (eg section 4(2), section 5), the court must **not** sentence a person to imprisonment unless the person has previously been convicted of graffiti offences “on so many occasions that the court is satisfied that the person is a serious and persistent offender and is likely to commit such an offence again”.

4.3 Community service orders

A community service order is usually an alternative to imprisonment, which means normally it can't be imposed for a “fine-only” offence.

However, a court may impose a community service order instead of a fine for offences under sections 4(2) and 5 of the *Graffiti Control Act* (*Graffiti Control Act* section 13B), or for damaging or defacing a protected place (*Summary Offences Act* 1988 section 8).

If a court imposes a community service order for an offence under the *Graffiti Control Act*, the order must contain graffiti clean-up conditions unless this is not practicable in the circumstances (*Crimes (Sentencing Procedure) Act* section 90, *Children (Community Service Orders) Act* section 11).

4.4 Community clean-up orders

If a court has imposed a fine for any offence under the *Graffiti Control Act*, the court may make a “community clean-up order”. This means that, instead of paying the fine, the person can work it off at the rate of \$30 per hour. An order can't be made if the fine has already been fully paid or referred to State Debt Recovery for enforcement, but can be made if the fine has been part-paid (*Graffiti Control Act* sections 9A-9R).

4.5 Driver licence orders

In addition to whatever penalty a court imposes for an offence under the *Graffiti Control Act*, the court may make a “driver licence order” (*Graffiti Control Act* sections 13A-13G).

This means that, if you have a learner or provisional licence, the court may make you stay on your Ls or Ps for up to six months longer before progressing to the next level.

The court may also make an order requiring you not to incur 4 demerit points or more for a period of up to 6 months. This would be relevant to people with P2 or full licences (on your Ls or P1s you are not allowed to incur more than 4 demerit points anyway).

These orders can only be made if you are guilty of an offence under the *Graffiti Control Act* (not, for example, destroy/damage property under the *Crimes Act*).

4.6 *Young Offenders Act* options for under-18s

If you are under 18, for some types of offences you may be eligible for a warning, caution or youth justice conference instead of having to go to court.

For most minor summary offences not involving violence, the police can give an informal on-the-spot warning. In many other cases, police can give a formal caution or refer the matter to a youth justice conference without the young person having to go to court.

For offences under the *Graffiti Control Act*, the police *cannot* give a warning or caution or refer a young person to a conference (*Young Offenders Act* 1997 sections 18, 37), but:

- the Children's Court may still give a young person a caution or refer them to a youth justice conference for an offence under the *Graffiti Control Act* (*Young Offenders Act* 1997 sections 31, 40); and
- the police *or* the court may still give a young person a caution or refer them to a conference for other types of graffiti offences (eg destroy/damage property under the *Crimes Act*).

**The Shopfront Youth Legal Centre
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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and the Salvation Army.

This document was last updated in July 2016 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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