Criminal Law Amendment Bill (No. 2) 2012
Submission 005

SUBMISSION BY

YOUTH ADVOCACY CENTRE INC

TO THE

LEGAL AFFAIRS & COMMUNITY SAFETY COMMITTEE

Criminal Law Amendment Bill (No. 2) 2012

FEBRUARY 2013

The **Youth Advocacy Centre Inc** [YAC] has been operating for over 30 years and offers free legal services, youth support, family support and bail accommodation assistance and services, to young people 10 years and over, particularly those who are in, or are at risk of involvement in, the youth justice system or the child protection system, who live in or around Brisbane. YAC provides support on a limited basis to those under 10 years of age and to young people outside of Brisbane via telephone, website and publications.

All services offered are voluntary and confidential. This means that YAC only works with a young person if they want to work with YAC staff and no contact is made with anyone (families, teachers, police, other adults) without the young person's permission (unless there is a risk of serious, immediate harm to the young person or someone else).

In any dealings with a young person, YAC is guided by the Convention on the Rights of the Child, in particular:

- The right of young people to be treated equally irrespective of "colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status"
- The right of a young person to have an opinion and to be heard in all matters affecting the young person
- Consideration of the best interests of the young person to include consideration of the views of the young person.

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YAC submits the following comments with respect to the *Criminal Law Amendment Bill (No. 2) 2012*.

Re: amendments to: *Criminal Code Act 1899* (Criminal Code)

Clause 15: proposes to amend s 469 Criminal Code which would increase the maximum sentence for wilful damage offences that involve any form of graffiti representations from five to seven years and removes the aggravating aspect of obscenity or indecency.

It is inconceivable that any court would punish anyone by imprisonment for seven years for an offence which does not present any serious risk to life or significant threat to any person. The courts are bound to follow sentencing principles to ensure that the "punishment fits the crime", including its context and the situation of the offender and victim. This therefore questions the appropriateness of such a punishment being included in the Criminal Code.

Drawing a distinction between "graffiti" which may be threatening to individuals or groups in the community or might be categorised as obscene should be considered differently because there may be a potential for some harm to result, but irritating as tagging, or even murals, may be, such activity is hardly commensurate with even a common assault which has a maximum penalty of three years imprisonment. The offence of "assault occasioning bodily harm" has a maximum penalty of seven years – the same as proposed in this situation. It sends an odd message to the community – that putting (some) paint on a wall is considered as serious as actually inflicting injury on another person. YAC notes that the provisions in relation to graffiti fail to draw a distinction between what might be more appropriately considered as "wilful damage" or "public nuisance", namely indiscriminate tagging and those items which could be described as freely donated public murals[1]- albeit without consent. Rather than increase the punishment, it would be preferable to find ways to utilise the artistic skills of those concerned, or make efforts to identify legal spaces where young people can legally use those skills and have them appreciated. There has been a general increase in councils, for example, identifying "street architecture" or walls where painting enhances the local community and this should be utilised to the greatest extent for the benefit of all.

Re: amendments to: *Police Powers and Responsibilities Act 2000* (PPR Act)

Clause 67: proposes to insert a new s 379A into the PPR Act which would enable the police to refer young people aged 12 to 16 years who admit commission of a graffiti offence to a graffiti removal program.

This option for police officers appears analogous to *Youth Justice Act 1992* (YJ Act) s16 which provides for the administration of a caution to a child. Both a police caution and police referral to a graffiti removal program are "a way of diverting a child who commits an offence from the courts' criminal justice system". Research has shown that increased interaction between children and young people and the criminal justice system leads to higher rates of criminality in adult life. It is this research which supports the diversion of young people away from the criminal justice system.

The Act should clarify that should a young person aged between 10 and 11 have been deemed suitable for a graffiti removal program pursuant to s11 of the YJ Act that person should be diverted in accordance with the other options under s11. For example cautioned or referred to a Youth

[1] Rowe, M. and F, Hutton. (2012) 'Is Your City Pretty Anyway? Perspectives on Graffiti and the Urban Landscape.' *Australia and New Zealand Journal of Criminology*. 44:66, 76-84.

Justice Conference. Young people should not be denied an opportunity to be diverted from the court system because of their young age.

The proper exercise of the discretion of diversion is a fundamental requirement of the effective administration of the principles of the Youth Justice Act. Section 21 of the YJA provides an opportunity for judicial review of the discretion to caution. The YJA also allows judicial discretion to divert young people to drug diversion after proceedings have been commenced. Prior to the December 2012 amendments to the YJ Act, courts were able to refer young people to youth justice conferencing even if the police had not exercised the discretion. YAC has observed since the December amendments that matters that would have been referred to youth justice conferencing have been referred to court. Since that time Magistrates and Judges have commented that some of the offences before them may have been better dealt with by youth justice conference, however there is no ability for the Magistrate or Judge to review that decision at the time of sentence. YAC continues to observe many instances where courts use the powers under s21 of the YJ Act or to divert young people to drug diversion. It is vital to maintain transparency and fairness in the discretion able to be exercised by police pursuant to s11 that the option to review that discretion is available to the sentencing court.

Re: amendments to: *Youth Justice Act 1992* (YJ Act)

Clause 83: proposes the insertion of new s176A which would require that a court finding a child who is at least 12 years of age guilty of a graffiti offence **must** make a graffiti removal order.

The comments in relation to 10 and 11 year olds are reiterated here. It would not be appropriate for the court to impose a higher order sentence because the child cannot be placed on a graffiti removal program. The court should have the power to make this order (with fewer hours) or be directed not to impose a higher level order.

The new provision would also impose a community based order without consent. All other such orders must have the consent of the young person and it is submitted that this new provision should remain consistent with the other orders. If the young person should refuse to consent to such an order, the court would be able to take that into account in deciding the appropriate penalty.

Clause 87: proposes to insert a new s 180A which would provide that a graffiti removal order be suspended while a young person serves time in detention. It is submitted that any young person who appears before the Childrens Court and is sentenced to a period of detention should not then be required to complete hours of graffiti removal during their conditional release. Detention is the last resort for young people who are sentenced under the YJ Act. To deprive a young person of their liberty is the ultimate punishment our State of Queensland allows.

A graffiti removal order is akin to a specialised form of community service order (CSO). CSOs are at the lower end of the sentencing scale followed by probation and conditional release orders and then detention. Time under a conditional release order would be more productively spent integrating the young person back into the community, including addressing education, training or employment options and developing the requisite life skills with the aim preventing their re-offending.

Clause 89: proposes to insert a new division 7A – Graffiti Removal Orders

New s 194B(e) would require the child abstain form a violation of the law during the period of the order. It is submitted that this should be amended to require abstinence from **graffiti crime**. Unlike

a community service order, for example, which is a generic sentence and contains a requirement to not violate the law during a community service order, a graffiti order relates to a specific type of offence.

New s 194C would require that *if reasonably practicable* a graffiti removal order is to avoid conflicts with the child's attendance at school or their place of training or employment

Avoiding conflicts with the child's attendance at school or place of training or employment is of paramount importance and the provision should state that it **must not** conflict. The evidence is clear that maintaining contact with educational institutions or employment is key to reducing the risk of involvement in youth offending or recidivism. Further, there is a direct correlation between young people in detention and low literacy skills and academic achievement, which also directly affects their prospects for future employment.

It is therefore imperative that nothing impedes a young person's education or employment, particularly where a young person needs all the encouragement possible to maintain this because they may be at risk of disengaging. By requiring young people to attend a graffiti removal program which conflicts with school or work attendance would be counter-productive to the overall purpose of the amendments which is to reduce the amount of graffiti crime committed in Queensland.

Graffiti Removal Service is **defined** in Schedule 4 (Dictionary) of the YJ Act to mean:

(a) the removal of graffiti; or

(b) work related or incidental to the work mentioned in paragraph (a); or(c) other work related to or incidental to the clean up of public places whether or not it relates to the removal of graffiti.

It is submitted that subsection (c) should be excluded from the definition. The stated purpose of the mandatory graffiti removal order is to require all offenders convicted of graffiti related offences to give back to the community by contributing to the removal of graffiti from public places. Subsection (c) as it currently stands is contrary to the policy objectives of this bill, as work incidental to the clean-up of public places, whether or not it relates to the removal of graffiti, is analogous to community service orders that are already available as a sentencing option. Again, this order relates to a specific type of offence and therefore the response should be directly related to that.