
CRIMINAL LAW AMENDMENT BILL (No.2) 2012

Explanatory Notes

Short title

The short title is the Criminal Law Amendment Act (No. 2) 2012 .

Policy objectives and reasons for them

The primary objectives of the Criminal Law Amendment Bill (No. 2) 2012 (the Bill) are to:

1. amend the *Bail Act 1980* to provide that:
 - the Magistrates Court may impose as a condition of bail that the defendant participate in a rehabilitation, treatment or other intervention program, and that such program is not to be prescribed; and
 - a breach of a condition of bail to participate in such a program is an offence with a maximum penalty of 40 penalty units or two years imprisonment;
2. amend the *Corrective Services Act 2006* to require all drug traffickers sentenced to immediate full-time imprisonment to serve a minimum non-parole period of 80 percent of the sentence imposed;
3. amend the Criminal Code to:
 - increase the maximum penalty for the offence of wilful damage under section 469, punishment in special cases, item 9 (Graffiti), from five to seven years imprisonment; and
 - insert a new graffiti forfeiture provision regarding property used to record, store or transmit images of graffiti, applying to prescribed adult graffiti offenders;
4. amend the *Drug Court Act 2000* to provide for the cessation of the Drug Court by 30 June 2013, and consequential transitional arrangements for offenders currently subject to orders under that Act;
5. amend the *Drugs Misuse Act 1986* to increase the maximum penalty for aggravated supply under section 6 where an adult supplies a dangerous drug to a child under 16 years. An offender will be liable to a maximum penalty of life imprisonment for a schedule 1 drug and 25 years imprisonment for a schedule 2 drug;

6. amend the *Penalties and Sentences Act 1992* to insert a new mandatory community based order called a Graffiti Removal Order, to apply to offenders convicted of a prescribed graffiti offence;
7. amend the *Summary Offences Act 2005* to insert a new graffiti forfeiture provision regarding property used to record, store or transmit images of graffiti, applying to prescribed adult graffiti offenders;
8. amend the *Victims of Crime Assistance Act 2009* to ensure that a victim who so wishes, is permitted to read aloud their victim impact statement before the sentencing court, where it is reasonable to do so in the circumstances; and
9. amend the *Youth Justice Act 1992* to:
 - insert a new mandatory community based order called a Graffiti Removal Order, to apply to any child aged 12 to 16 years convicted of a graffiti offence under the Criminal Code; and
 - insert new and expanded diversionary mechanisms under that Act and the *Police Powers and Responsibilities Act 2000*, which will allow children aged 12 years and over to be made subject to graffiti removal service without court intervention.

The Bill implements the Liberal National Party's pre-election commitment to: ensure that victim impact statements are read out to the sentencing court if the victim wishes; toughen the sentencing laws for drug traffickers who target children; require drug traffickers to serve at least 80 percent of their sentence before parole eligibility; and require all graffiti offenders to remove graffiti and to strengthen the maximum penalty for graffiti crime.

The commitments regarding drug offenders and graffiti crime were reiterated in the *Six Month Action Plan July-December 2012*.

The offence of trafficking in dangerous drugs is the most serious form of drug related offending. It has the potential to cause considerable individual suffering and significant broader social harm. Strong deterrent sanctions are justified.

Further, the amendments to target adults who supply dangerous drugs to children recognise that children, because of their youth, are peculiarly vulnerable to adults who seek to expose them to the dangers of drugs and to the illegal drug culture. The reforms are consistent with the approach in Queensland to specifically protect children under 16 from criminal activity through the creation of offences and higher maximum penalties.

Graffiti crime in Queensland costs the community significant resources annually for it to be cleaned up and demonstrates a complete disregard for property. The increased maximum penalty and the establishment of the new mandatory graffiti removal order regime reinforces graffiti as an act of vandalism and recognises that its removal is an important means by which an offender can give back to their community as part of their sentence order. The reforms go to the heart of the graffiti gang culture and ensure that graffiti offenders remove graffiti, or undertake related work that contributes to graffiti removal or the clean up of public places.

The amendment relating to victim impact statements is an important means by which to empower victims as they traverse the criminal justice system. The Bill ensures that a victim, who so wishes, can read aloud their victim impact statement before the sentencing court unless, having regard to all of the circumstances, the court is satisfied it would be inappropriate to do so. Provisions to support the victim where necessary, in reading aloud their victim impact statement to the court, are included, for example: allowing the victim to read their victim impact statement remotely via closed-circuit television; the use of a screen to obscure the offender from the sight of the victim; the presence of a support person; and permitting the court to be closed for the reading of the victim impact statement.

The Bill includes amendments to end Queensland's Drug Court by 30 June 2013; including consequential transitional arrangements for offenders already subject to orders, such as an intensive drug rehabilitation order under the *Drug Court Act 2000*. These amendments follow the announcement of the State Budget 2012-2013 on 11 September 2012 that funding will cease for the Drug Court; in effect terminating this program.

The Bill also amends the *Bail Act 1980* to provide greater flexibility for magistrates to refer a defendant to any suitable rehabilitative, treatment or other intervention program without the red tape involved to prescribe the program. Further, making a breach of a bail condition to participate in a rehabilitative, treatment or other intervention program an offence will give a clear message to adult defendants that all conditions of bail need to be complied with; or an offence will be committed.

Achievement of policy objectives

The Bill achieves the objectives by way of the proposed amendments to existing legislation described below.

Alternative ways of achieving policy objectives

There are no alternative ways of achieving the criminal law reforms.

Estimated cost for government implementation

Any costs in relation to the amendments will be met from existing agency resources. The future allocation of resources will be determined through the normal budgetary processes.

Consistency with fundamental legislative principles

The Bill amends the *Corrective Services Act 2006* to require all drug traffickers sentenced to immediate full-time imprisonment to serve a minimum non-parole period of 80 percent of the sentence imposed. The amendments impact on the rights and liberties of individuals by requiring offenders to serve longer periods of actual incarceration before being eligible to apply for parole release and therefore arguably punish the offender to a greater extent than was authorised by the former law.

However, the amendments only apply to the most serious form of drug related offending that ordinarily warrants serving a substantial term of imprisonment.

The amendments are justified to ensure that the punishment for these serious offenders fits the severity of the crime and communicates the wrongfulness of their actions; and aims to promote community safety and protection of the community from such offenders. In turn, the new scheme should enhance public confidence in the criminal justice system by promoting consistency and transparency in sentencing. Additionally, the scheme operates prospectively and will only capture offenders who commit a relevant offence after the amendments commence.

The Bill amends the Criminal Code to increase the maximum penalty for the offence of wilful damage by graffiti; and the *Drugs Misuse Act 1986* to increase the maximum penalty for aggravated supply of a dangerous drug to children. The increases mean offenders will face longer periods of imprisonment. The increases are justified to ensure the offences provide adequate protection and sanction.

The Bill amends the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992* to create a new mandatory graffiti removal regime. The amendments impact on the rights and liberties of individuals. However, the effect on the individual must be balanced against the need for community protection. The new mandatory regime is necessary to: denounce graffiti crime; provide adequate deterrence for this cohort of offenders; and enhance community confidence in the criminal justice system.

The graffiti removal order regime operates prospectively and ensures the court retains a limited discretion not to impose the order if reasonably satisfied that the offender is incapable of performing the order due to a physical or mental impairment.

Legislation should ordinarily provide for compulsory acquisition of property only with fair compensation. The new graffiti forfeiture provision which, applies to adult offenders, is justified to stop the dissemination of images of graffiti between offenders. The sharing of acts of graffiti is an important part of the graffiti culture and drives the graffiti-gang mentality. The court has an unfettered discretion as to whether to make such an order.

The amendment to the *Bail Act 1980* to omit section 29(2)(c) means that it is an offence to breach a condition of bail to participate in a rehabilitation, treatment or other intervention program or course, which carries the same penalty as other breaches of bail conditions (that is, a maximum of 40 penalty units or two years imprisonment). The extension of the offence provision to rehabilitation programs negatively impacts on the rights and liberties of adult defendants who voluntarily agree to go on a bail based program as they will be subject to an offence if they breach the condition. This negative impact is justified as it is important that adult defendants be given a clear message that they must comply with all conditions of bail.

Consultation

Consultation occurred with: Chief Justice of the Supreme Court; President of the Court of Appeal; Chief Judge of the District Court; Chief Magistrate; the Director of Public Prosecutions; Queensland Law Society; Bar Association of Queensland; Legal Aid Queensland; Protect All Children Today; and Commission for Children and Young People and Child Guardian – regarding victim impact statements; the drug reforms; and increased maximum penalty for graffiti crime.

A letter proposing the approach to the cessation of the Drug Court was sent to: the Chief Magistrate; Queensland Law Society; Bar Association of Queensland; Legal Aid Queensland; and Aboriginal and Torres Strait Islander Legal Service – regarding

Consistency with legislation of other jurisdictions

The Bill does not introduce uniform or complementary legislation.

Notes on Provisions

Part 1 – Preliminary

Clause 1 establishes the short title to the Act as the *Criminal Law Amendment Act (No.2) 2012*.

Clause 2 provides for commencement of the Act. The amendments to ensure that graffiti offenders undertake graffiti removal service and the amendments to the *Bail Act 1980*, commence on a date to be fixed by proclamation. Additionally, certain consequential amendments made as a result of the expiry of the *Drug Court Act 2000*, will commence on 1 July 2013. Otherwise, the Act commences upon assent.

Part 2 – Amendment of *Bail Act 1980*

Clause 3 provides that part 2 amends the *Bail Act 1980*.

Clause 4 amends section 11 (Conditions of release on bail) to provide that a Magistrates Court may impose a condition on the bail that a defendant attend a rehabilitation, treatment or other intervention program or course and sets out the factors the Magistrates Court is to have regard to when imposing such a condition.

Clause 5 amends section 29 (Offence to breach conditions of bail) to omit subsection (2)(c), which currently provides that it is not an offence to break a condition of bail that the defendant participate in a prescribed program provided for under section 11(9) of the *Bail Act 1980*.

Part 3 – Amendment of *Corrective Services Act 2006*

Clause 6 provides that part 3 amends the *Corrective Services Act 2006*.

Clause 7 inserts new section 182A (Parole eligibility date for prisoner serving term of imprisonment for drug trafficking offence) to provide the framework for the new mandatory minimum non-parole period regime for the offence of trafficking in a dangerous drug.

Subsection (1) provides that the new regime applies to a prisoner serving a term of imprisonment for a ‘drug trafficking offence’; that is, an offence under section 5 (Trafficking in dangerous drugs) of the *Drugs Misuse Act 1986* or an offence of counselling or procuring the commission of, or attempting or conspiring to commit, such an offence.

Subsection (2) requires the prisoner to serve a minimum of 80 percent of the term of imprisonment imposed before being eligible to apply for parole release.

Subsection (3) ensures that the court retains the discretion to set a longer non-parole period; that is, a minimum non-parole period beyond 80 percent of the term of imprisonment.

Subsection (4) provides that new section 182A is subject to section 185 of the *Corrective Services Act 2006* (Parole eligibility date for prisoner serving terms of imprisonment in particular circumstances).

Clause 8 amends section 185 (Parole eligibility date for prisoner serving terms of imprisonment in particular circumstances) consequential to the insertion of new section 182A.

Clause 9 amends section 194 (Types of parole orders granted by parole board) to include reference to section 181A (Parole eligibility date for prisoner serving term of imprisonment for life for a repeat serious child sex offence) and new section 182A in the definition of ‘eligible prisoner’.

The recently enacted section 181A sets a minimum non-parole period of 20 years for a prisoner who is serving a term of mandatory life imprisonment for a repeat serious child sex offence under section 161E of the *Penalties and Sentences Act 1992*.

Section 182A sets a minimum non-parole period of 80 percent for a prisoner serving a term of imprisonment for the offence of drug trafficking.

The effect of clause 9 is to ensure that a prisoner, who is eligible for parole under section 181A or new section 182A, will come within the auspices of the parole board.

Clause 10 amends section 209 (Automatic cancellation of order by further imprisonment) to omit section 209(3)(b)(iii). This amendment is a consequence of the expiry of the *Drug Court Act 2000* on 30 June 2013.

Clause 11 inserts new part 7 (Transitional provision for *Criminal Law Amendment Act (No.2) 2012*) into Chapter 7A and new section 490C, to provide for the transitional application of new section 182A. It provides that the new 80 percent minimum non-parole regime operates prospectively; it will only apply to a prisoner serving a term of imprisonment for a drug trafficking offence committed after commencement.

Clause 12 amends Schedule 4 (Dictionary) to insert a new definition of ‘drug trafficking offence’, consequential to the insertion of new section 182A under clause 7. This definition is replicated in section 4 (Definitions) of the *Penalties and Sentences Act 1992* under clause 42.

Part 4 – Amendment of Criminal Code

Clause 13 provides that part 4 amends the Criminal Code.

Clause 14 amends section 227C (Persons who are not criminally responsible for offences against ss 227A and 227B) to omit section 227C(3), definition, *supervision order*, paragraph (d). This amendment is a consequence of the expiry of the *Drug Court Act 2000* on 30 June 2013.

Clause 15 amends section 469 (Wilful damage), punishment in special cases, item 9 (Graffiti).

Subclause (1) increases the maximum penalty under section 469, punishment in special cases, item 9(1) from five years to seven years imprisonment.

Subclause (2) omits section 469, punishment in special cases, item 9(2). The effect is to eliminate the current penalty distinction between the basic graffiti offence and graffiti that involved obscene or indecent representations. Graffiti crime under the Criminal Code will be punishable by a single maximum penalty of seven years imprisonment.

Subclause (3) renumbers section 469, punishment in special cases, item 9, consequential to the omission in subclause (2).

Subclause (4) inserts a ‘*Note*’ into section 469, punishment in special cases, item 9, regarding the new mandatory graffiti removal order regime under the *Penalties and Sentences Act 1992* and the *Youth Justice Act 1992*; and the graffiti forfeiture provision under new section 469AA of the Criminal Code under clause 16.

Clause 16 inserts new section 469AA (Forfeiture of thing used to record, store or transmit image of graffiti).

New section 469AA applies if a person is convicted of the graffiti offence under section 469 of the Criminal Code; the person was an adult at the time of the commission of the offence; and the court is satisfied that property (for example, a mobile phone, a camera or a computer) owned or possessed by the person was used to record, store or transmit an image or images of, or related to, the commission of the offence.

When the court is imposing a sentence on the person for the offence, the court may order the forfeiture of that property to the State. Upon forfeiture the thing becomes the State’s property and may be dealt with as directed by the chief executive.

Clause 17 amends section 552H (Maximum penalty for indictable offences dealt with summarily) to omit the express extension of a Drug Court magistrate’s power to impose a maximum penalty of four years imprisonment on summary conviction under section 552A, 552B or 552BA. This amendment is a consequence of the expiry of the *Drug Court Act 2000* on 30 June 2013.

Part 5 – Amendment of *Drug Court Act 2000*

Clause 18 provides that part 5 amends the *Drug Court Act 2000*.

Clause 19 amends section 12A (Application of pt 3A) to insert a ‘*Note*’ directing attention to new subsection 12B(1A) for the ending of referrals for indicative assessment.

Clause 20 amends section 12B (Referral for indicative assessment) by inserting new subsection (1A) to make it clear that a magistrate must not decide to refer a person for an indicative assessment on or after the relevant day. The term ‘relevant day’ is defined as the day new section 12E of the *Drug Court Act 2000* commences, i.e. upon assent. Indicative assessments are a process to establish whether a person was drug dependent and therefore eligible for referral for assessment by the Drug Court. Given the end of the Drug Court, new section 12B(1A) prevents persons from being referred for indicative assessment.

Section 12B is also amended to insert a ‘*Note*’ directing attention to new section 12E for how a Drug Court magistrate must deal with proceedings after the submission of an indicative assessment report. Further, section 12B(6) is omitted as it is no longer required given the insertion of new section 12E.

Clause 21 inserts new section 12E (Dealing with proceedings after submission of indicative assessment report).

New section 12E provides how the Drug Court magistrate is to deal with proceedings after an indicative assessment is submitted.

Subsection (1) makes it clear that the person does not progress any further in the Drug Court; instead the Drug Court magistrate must exercise the jurisdiction of a Magistrates Court and deal with the person according to law. This means, it allows the magistrate to make the appropriate orders required to deal with the person depending on the circumstances. For example, the magistrate may convict and sentence the person if they have pleaded guilty to the offence; and it is an offence that can be dealt with summarily. Alternatively, the magistrate may adjourn the proceedings for sentencing or for committal proceedings.

Subsection (2) allows an indicative assessment report to be taken into account by a Drug Court magistrate when sentencing the person for the offence.

New section 12E is inserted consistent with the expiry of the *Drug Court Act 2000* on 30 June 2013.

Clause 22 amends section 13 (Application of pt 4) to insert a ‘*Note*’ directing attention to new section 16C for the ending of referrals for assessment.

Clause 23 amends section 15 (Deciding whether to refer for assessment) to insert new subsection (3) to make it clear that a Drug Court magistrate must not make a decision about whether the person appears to be an eligible person, or to refer a person for assessment on or after the relevant day. The term ‘relevant day’ is defined as the day new section 12E of the *Drug Court Act 2000* commences, i.e. upon assent. A referral for assessment establishes a person’s suitability for rehabilitation. Given the end of the Drug Court, new subsection 15(3) prevents persons from being referred for assessment.

Clause 24 amends section 16 (Referral for assessment) to insert a ‘*Note*’ directing attention to section 16C for how a Drug Court magistrate must deal with the

proceeding if an assessment report or a pre-sentence report is submitted on or after the relevant day.

Clause 25 amends section 16A (Assessment report) to insert a ‘*Note*’ directing attention to new section 16C for how a Drug Court magistrate must deal with the proceeding if an assessment report or a pre-sentence report is submitted on or after the relevant day.

Clause 26 inserts new section 16C (Dealing with proceedings after submission of assessment report and pre-sentence report).

New section 16C provides how the Drug Court magistrate is to deal with proceedings after an assessment report or pre-sentence report is submitted on or after the relevant day. The term ‘relevant day’ is defined as the day new section 12E of the *Drug Court Act 2000* commences, i.e. upon assent.

Subsection (1) makes it clear that the person does not progress any further in the Drug Court; instead the Drug Court magistrate must exercise the jurisdiction of a Magistrates Court and deal with the person according to law. This means, it allows the magistrate to make the appropriate orders required to deal with the person depending on the circumstances. For example, the magistrate may convict and sentence the person if they have pleaded guilty to the offence; and it is an offence that can be dealt with summarily. Alternatively, the magistrate may adjourn the proceedings to another day for sentencing or for committal proceedings.

Subsection (2) allows the assessment report and the pre-sentence report to be taken into account by a Drug Court magistrate when sentencing the person for the offence.

New section 16C is inserted consistent with the expiry of the *Drug Court Act 2000* on 30 June 2013.

Clause 27 amends section 17 (Application of pt 5) to insert a new subsection (2) to make it clear that if a person appears before the Drug Court magistrate on or after the relevant day that Division 2 (Making an order), other than section 26(2) (Offender to agree to making or amending of order), does not apply; and the magistrate must exercise the jurisdiction of a Magistrates Court and deal with the person according to law. The term ‘relevant day’ is defined as the day new section 12E of the *Drug Court Act 2000* commences i.e. upon assent.

Division 2 deals with the making of intensive drug rehabilitation orders. An intensive drug rehabilitation order is the special sentencing order made by a Drug Court magistrate when satisfied of certain criteria.

Given the end of the Drug Court, new subsection 17(2) prevents persons from being placed on intensive drug rehabilitation orders. The insertion of new subsection 17(2) is consistent with the expiry of the *Drug Court Act 2000* on 30 June 2013.

The amendment makes clear what is to occur when the Drug Court magistrate does not make an intensive drug rehabilitation order; they must exercise the jurisdiction of

a Magistrates Court and deal with the offender according to law. This allows the magistrate to make the appropriate orders required to deal with the person depending on the circumstances.

Clause 28 amends section 29 (Dealing with offenders if no intensive drug rehabilitation order made) to align with new subsection 17(2) under clause 27, which deals with the ending of the making of intensive drug rehabilitation orders. The amendment makes it clear what is to occur when the Drug Court magistrate does not make an intensive drug rehabilitation order; they must exercise the jurisdiction of a Magistrates Court and deal with the offender according to law. This allows the magistrate to make the appropriate orders required to deal with the person depending on the circumstances. For example, the magistrate may convict and sentence the person if they have pleaded guilty to the offence; and it is an offence that can be dealt with summarily. Alternatively, the magistrate may adjourn the proceedings to another day for sentencing or for committal proceedings.

Clause 29 amends section 33 (Amending intensive drug rehabilitation orders).

New subsection (1A) expressly provides that if a Drug Court magistrate must conduct a court review in relation to an offender; the magistrate must amend the requirements of the offender's intensive drug rehabilitation order or rehabilitation program if the Drug Court magistrate is satisfied, on the balance of probabilities, that the offender can, before 30 June 2013:

- (i) comply with the amended intensive drug rehabilitation order and complete the amended rehabilitation program; and
- (ii) be sentenced under section 36.

The insertion of this new subsection provides an offender with the opportunity to comply with an amended intensive drug rehabilitation order or complete an amended rehabilitation program and be finally sentenced under section 36 before 30 June 2013. New subsection (1A) is in addition to existing section 33(1).

A 'court review', is defined in subsection (4) to mean a review by a Drug Court requiring the attendance of an offender who is subject to an intensive drug rehabilitation order. Under the *Drug Court Regulations 2006*, Schedule 6 (Guidelines for drug courts), section 2, the minimum frequency of a court review is once in any month.

A court review conducted under new subsection (1A) is for a particular purpose, namely amending orders and programs so that they can be completed and sentenced before the 30 June 2013.

New subsection (1A) is also subject to section 26(2), i.e. that the offender agrees to the order being amended and agrees to comply with it. Existing section 34(1)(b) provides a ground for termination of a rehabilitation program if the magistrate proposes to amend the intensive drug rehabilitation order and the offender does not agree to the order being amended or does not agree to comply with the amended order.

Additionally, existing section 34(1)(a) provides a ground for termination of rehabilitation program if the offender asks the magistrate to terminate the rehabilitation program.

New subsection (1A) needs to be applied after consideration of new subsection 33(1B) and in conjunction with new subsection 34(1A) which provides a new ground for the mandatory termination of an offender's rehabilitation program in certain circumstances.

New subsection (1B) clarifies that a Drug Court magistrate does not need to amend the requirements of an intensive drug rehabilitation order or rehabilitation program if satisfied, on the balance of probabilities, that the offender can, before 30 June 2013 –

- (a) comply with the offender's intensive drug rehabilitation order and complete the rehabilitation program; and
- (b) be sentenced under section 36.

Unlike certain sentencing options available under the *Penalties and Sentences Act 1992* an intensive drug rehabilitation order does not contain a time period for its completion. This new subsection acknowledges that some intensive drug rehabilitation orders (and rehabilitation programs) may have been on foot for a period of time and therefore capable of completion and the offender being sentenced before 30 June 2013. This means that if the Drug Court magistrate is so satisfied these intensive drug rehabilitation orders or rehabilitation programs need not be amended as required under new subsection (1A).

Clause 30 amends section 34 (Terminating rehabilitation programs).

Subclause (1) inserts a new ground on which a Drug Court magistrate may terminate a rehabilitation program, namely if a warrant is issued for the offender's arrest under section 40(1)(a) for failure to comply with their rehabilitation program.

Subclause (2) inserts a new mandatory ground of termination via new subsection (1A). A Drug Court magistrate must terminate a rehabilitation program decided for an offender if, the magistrate is satisfied, on the balance of probabilities, there are not reasonable prospects the offender can, before 30 June 2013: comply with the intensive drug rehabilitation order or complete the rehabilitation program; and be sentenced under section 36. New subsection 34(1A) is in addition to existing section 34(1).

Subclause (3) amends subsection 34(3)(c) to make certain that offenders are committed to the District Court. This amendment is a result of the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*, which increased the general criminal jurisdiction of the District Court to offences with a maximum penalty of 20 years or less.

Clause 31 omits section 35A (Inclusion of new rehabilitation program), which is no longer required given the expiry of the *Drug Court Act 2000* on 30 June 2013.

Clause 32 amends section 36 (Final sentence to be decided on completion or termination of rehabilitation program) to ensure that where section 36 applies, the Drug Court magistrate must impose a final sentence before 30 June 2013. This reflects the expiry of the *Drug Court Act 2000* on 30 June 2013. Section 36 has also been amended for consistency with other amendments made, namely the omission of section 35A (Inclusion of new rehabilitation program).

Clause 33 amends section 40 (Arrest warrants) to insert new subsections (4) and (4A) which deal with what occurs when an offender is arrested on a warrant issued by a Drug Court magistrate before 30 June 2013.

New subsection (4) provides that if the warrant is issued under section 40(1)(a), the Drug Court magistrate may remand the offender in custody: upon termination of the offender's rehabilitation program under section 34 [Section 36 applies when an offender's rehabilitation program ends]; or if the decision to terminate the offender's rehabilitation program is reserved.

New subsection (4A) provides that if the warrant is issued under section 40(1)(b) and if the offence for which the offender's intensive drug rehabilitation order was made was not a prescribed drug offence, the Drug Court magistrate may remand the offender in custody to appear before a Drug Court magistrate to be sentenced under section 36 before 30 June 2013. A warrant issued under section 40(1)(b) terminates the offender's rehabilitation program. [Section 34(3) provides for what must occur if the magistrate terminates the rehabilitation program and the offence in relation to which the intensive drug rehabilitation order for the offender was made was a prescribed drug offence.]

Clause 34 inserts new section 40A (Dealing with offender after arrest but no final sentence decided before 30 June 2013).

Subclause (1) provides for the application of new section 40A.

Subclause (2) expressly provides for how a Drug Court magistrate must deal with the proceeding to which section 40A applies. The Drug Court magistrate must:

- revoke the conviction recorded for the offence; and
- vacate the intensive drug rehabilitation order; and
- deal with the offender according to law.

Subclause (3) provides that the Drug Court magistrate:

- may remand the offender in custody to appear before a magistrate;
- may release the offender on bail to appear before a magistrate; or
- if the offence in relation to which the intensive drug rehabilitation order made was made is a prescribed drug offence under the *Drug Court Act 2000*, the magistrate must under the *Justices Act 1886*, section 113, commit

the offender to the District Court for sentence. This applies even though the magistrate has not addressed the defendant as required under the Justices Act, section 104(2).

The effect of these provisions means that the Drug Court magistrate must adjourn the proceedings for the offender to appear before a magistrate to be sentenced for the original ('relevant') offence that brought the offender within the jurisdiction of the Drug Court or commit those offences for sentence as required under subclause (3)(c).

The reference that the conviction recorded must be revoked in new section 40A(2)(a) is only a reference to the conviction recorded pursuant to section 18 of the *Drug Court Act 2000*. The conviction is revoked so as not to fetter the sentencing court. The offender's plea of guilty under section 19(c) stands.

Subclause (5) clarifies that the *Bail Act 1986* applies to the offender. Further, it clarifies the application of the *Penalties and Sentences Act 1992*, section 159A.

Clause 35 inserts new section 45 (Expiry of Act), which expressly provides that the *Drug Court Act 2000* expires on 30 June 2013.

Clause 36 amends the schedule (Dictionary) to insert the term 'relevant day', which is defined as meaning the day section 12E commences.

Part 6 – Amendment of *Drugs Misuse Act 1986*

Clause 37 provides that part 6 amends the *Drugs Misuse Act 1986*.

Clause 38 amends section 6 (Supplying dangerous drugs) to insert new maximum penalties for adults who supply dangerous drugs to children under 16 years.

Section 6 already recognises that an adult who supplies a dangerous drug to a minor (that is, a person under 18 years) should be subject to higher penalties than if they supplied the drug to another adult. A new category is inserted into the offence of aggravated supply, namely where an adult supplies a dangerous drug to a child under the age of 16 years. In such circumstances, the maximum penalty is life imprisonment where the drug supplied was a schedule 1 drug; and 25 years imprisonment for a schedule 2 drug.

Subclause (1) recasts the maximum penalties set out under existing section 6(1). New maximum penalties have been inserted at subsections (1)(a) and (1)(d) to apply where the dangerous drug is supplied to a child under 16 years.

Subclause (2) inserts a new category into the offence of aggravated supply under section 6(2), namely where the offender is an adult and the person to whom the dangerous drug is supplied is a minor under the age of 16 years.

Part 7 – Amendment of *Justices Act 1886*

Clause 39 provides that part 7 amends the *Justices Act 1886*.

Clause 40 amends section 154 (Copies of records) to make clear that an exhibit includes certain documents given to a Drug Court under the repealed *Drug Court Act 2000*. Such documents may contain sensitive and confidential personal information, for example medical records relating to a person's drug use or journal writings done as part of a rehabilitation program component of an intensive drug rehabilitation order. This amendment ensures those records are treated in the same manner as exhibits under section 154(2)(d)(ii). This amendment is a consequence of the expiry of the *Drug Court Act 2000* on 30 June 2013.

Part 8 – Amendment of *Penalties and Sentences Act 1992*

Clause 41 provides that part 8 amends the *Penalties and Sentences Act 1992*.

Clause 42 amends section 4 (Definitions) to extend the definition of community based order to include a graffiti removal order; and to insert definitions for the terms: 'corrective services facility'; 'drug trafficking offence'; 'graffiti removal order'; 'graffiti removal service'; 'graffiti offence'; 'remove'; 'unpaid service'; 'unperformed graffiti removal service'; and 'unperformed unpaid service'.

The existing definition for 'corrective services facility' under section 9(10) has been replicated in section 4 (accordingly, clause 43 omits the definition from existing section 9(10)).

'Drug trafficking offence' mirrors the definition inserted in schedule 4 (Dictionary) of the *Corrective Services Act 2006* under clause 12.

'Graffiti removal order' means a graffiti removal order in force under new part 5A (Graffiti Removal Orders).

'Graffiti removal service' carries a broad definition and means the removal of graffiti, or work related to or incidental to the removal of graffiti; or other work related to or incidental to the clean up of public places whether or not it relates to the removal of graffiti.

'Graffiti offence' is an offence either under section 469 of the Criminal Code, punishment in special cases, item 9 (Graffiti); or under section 17(1) (Graffiti Instrument) of the *Summary Offences Act 2005*.

'Unpaid service' refers to community service and/or graffiti removal service.

Clause 43 amends section 9 (Sentencing guidelines) to correct the numbering regarding subsection (8) and to omit the definition of 'corrective service facility' from subsection (10) as clause 42 inserts the same definition into section 4 (Definitions).

Clause 44 amends section 99 (Termination of probation order) consequential to the commencement of the *State Penalties Enforcement and Other Legislation Amendment Act 2007*, which in effect removed the ability for the court to order compensation or restitution as a condition of a community based order. Compensation or restitution

can nevertheless be imposed as a separate sentencing order, with the amounts registered with the State Penalties Enforcement Registry at the earliest opportunity.

Clause 45 amends section 107 (Multiple offences) consequential to the insertion of the new mandatory graffiti removal order regime under new part 5A.

The combined effect of new subsections (4A) and (4B) is that a court may make one or more community service orders for an offender who is subject to an existing graffiti removal order; or who is subject to an existing graffiti removal order and an existing community service order. However, the total number of hours of unperformed unpaid service (that is, the number of hours not yet performed by the offender under the existing orders combined with the fresh order for community service) must not exceed 240 hours.

Clause 46 amends section 108 (Termination of community service) consequential to the commencement of the *State Penalties Enforcement and Other Legislation Amendment Act 2007*, which in effect removed the ability for the court to order compensation or restitution as a condition of a community based order. Compensation or restitution can nevertheless be imposed as a separate sentencing order, with the amounts registered with the State Penalties Enforcement Registry at the earliest opportunity.

Clause 47 inserts new part 5A (Graffiti Removal Orders), which sets the framework for the new mandatory graffiti removal order regime. This new community based order ensures that prescribed graffiti offenders clean up graffiti (or related tasks) and/or public places, as part of the sentence imposed upon them.

New section 110A provides for the making of a graffiti removal order. A graffiti removal order must be imposed upon an offender convicted of a prescribed graffiti offence, irrespective of whether the person was convicted on indictment or summarily; and whether or not a conviction is recorded. A graffiti removal order can be made in addition to any other order the court may impose upon the offender (including, for example, an intensive correction order or imprisonment). The court retains a limited discretion not to impose a graffiti removal order if satisfied that, because of any physical, intellectual or psychiatric disability of the offender, they would be unable to comply with the order.

New section 110B provides that the effect of a graffiti removal order is that the offender must perform unpaid graffiti removal service for the number of hours stated in the order (that is, a total of not more than 40 hours pursuant to new section 110C) under the supervision of an authorised officer.

New section 110C sets out the general requirements of a graffiti removal order.

Subsection (1) sets out the mandatory requirements of a graffiti removal order, which mirror the requirements of a community service order under existing section 103(1).

Subsection (2) caps the total number of hours of graffiti removal service at 40 hours and provides, subject to subsection (3), that the hours must be performed within one year from the making of the order or another time allowed by the court.

Subsection (3) provides that where the offender is detained in custody on remand or serving a term of imprisonment in a corrective services facility during the timeframe within which the offender is to complete the graffiti removal order, the graffiti removal order is suspended while the offender is detained or imprisoned; and the timeframe within which to complete the graffiti removal order is extended by the period of time the offender was detained or imprisoned. Therefore, incarceration is no barrier to the successful performance of a graffiti removal order.

New section 110D requires the court, before making a graffiti removal order, to explain (or cause to be explained) to the offender the purpose and effect of the order; the possible consequences of contravening the order; and that the order may be amended or revoked in the limited circumstances set out in subsection (c).

New section 110E provides for the situation where multiple sentence orders are imposed for a single prescribed graffiti offence.

Where the offender is before the court for sentence after being convicted of a prescribed graffiti offence and the court imposes the mandatory graffiti removal order and also makes a community service order and/or probation order for that single offence, new section 110E provides that:

- the court must make separate orders; and must not impose one order as a condition of another order;
- the total number of hours of unpaid service ordered (that is, graffiti removal service and community service) must not exceed 240; and
- where the offender contravenes a requirement of any of the orders and is dealt with for the original prescribed graffiti offence in relation to that order (for example, under sections 125 or 126 of the *Penalties and Sentences Act 1992*), the other orders are discharged.

New section 110F provides for the situation where multiple sentence orders are imposed for multiple offences, including at least one prescribed graffiti offence.

The combined effect of section 110F(1), (2) and (3) is: where the offender is convicted of two or more prescribed graffiti offences (whether or not the offender is also convicted of one or more other non-graffiti offences), the court must impose at least one graffiti removal order (but may make more than one such order); and may also impose one or more community service orders for the offender. However, if the court makes multiple graffiti removal orders, the combined number of hours of graffiti removal service ordered must not exceed 40 hours.

The combined effect of new section 110F(4) and (5) is: where the offender is convicted of a single prescribed graffiti offence and one or more other non-graffiti offences, the court must impose a graffiti removal order; and may also impose one or more community service orders for the offender.

Subsection (6) ensures that where the court makes one or more graffiti removal orders and one or more community service orders for the offender, the total number of hours of unpaid service ordered (that is, graffiti removal service and/or community service) must not exceed 240 hours.

New section 110G provides for the situation where the offender is subject to successive orders to perform unpaid service.

The intention underpinning new section 110G is to recognise the legislative limits regarding the number of hours of unpaid service that an offender can be subject to at any one time (that is, not more than 240 hours of unpaid service yet to be performed at any one time; and specifically, not more than 40 hours of graffiti removal service yet to be performed); whilst acknowledging the mandatory nature of the new graffiti order regime. The section also ensures that the hours imposed under a graffiti removal order are in fact performed as graffiti removal service.

The combined effect of subsections (1) and (2) is to provide that where an offender is:

- convicted of a prescribed graffiti offence (the new graffiti offence); and
- already subject to one or more existing graffiti removal orders,

in determining the hours for the new graffiti removal order, a graffiti offender can never be subject to more than 40 hours of unperformed graffiti removal service at any one time. Therefore, the total hours of unperformed graffiti removal service under existing orders added with the hours imposed for the new graffiti offence, must not exceed 40 hours.

Subsection (3) further provides that where the offender is already at the legislative cap of 40 hours of unperformed graffiti removal service and is again before the court convicted of a new graffiti offence, the hours to be performed under the newly imposed graffiti removal order must be performed concurrently with the existing hours of unperformed graffiti removal service. This reflects that an offender cannot be subject to more than 40 hours of unperformed graffiti removal service at any one time.

The combined effect of subsections (4) and (5) is to provide that where an offender is:

- convicted of a prescribed graffiti offence (the new graffiti offence); and
- already subject to either:
 - one or more existing community service orders; or
 - one or more existing graffiti removal orders and one or more existing community service orders,

in determining the hours for the new graffiti removal order, an offender can never be subject to more than 240 hours of unperformed unpaid service at any one time. Therefore, the total hours of unperformed community service and unperformed graffiti removal service under existing orders, added with the hours imposed for the new graffiti offence, must not exceed 240 hours.

Subsection (6) further provides that where the offender is already at the legislative cap of 240 hours of unperformed unpaid service and is again before the court convicted of a new graffiti offence, the following happens regarding the hours to be performed under that newly imposed graffiti removal order:

- To the extent that the new graffiti removal order would mean that the total hours of unperformed graffiti removal service exceeds the legislative cap of 40 hours, the additional hours must be performed concurrently with the existing unperformed graffiti removal service.

For example, an offender is subject to an existing community service order and an existing graffiti removal order. Under the existing orders, he has 200 hours of community service yet to perform and 40 hours graffiti removal service yet to perform. The offender is again before the court convicted of a new graffiti offence. The court makes a new graffiti removal order, as mandated under new part 5A, and imposes 10 hours for the order.

Given that the offender is already at the legislative cap of 240 hours of unperformed unpaid service, and in particular is at the legislative cap of 40 hours of unperformed graffiti removal service; the 10 hours imposed for the new graffiti offence must be done concurrently with the existing graffiti removal order.

Therefore, in reality, the offender will perform 200 hours of community service and 40 hours of graffiti removal service.

- Where the newly imposed graffiti removal hours are not required to be performed concurrently with existing graffiti removal service (that is, because although at the legislative cap of 240 hours, the graffiti removal component remains less than 40 hours) – the graffiti removal hours, once performed, must also be taken to be community service performed under one or more of the existing community service orders.

The practical effect of this is that any hours above 240 will in effect be performed along side (or “concurrent with”) the existing hours of unperformed unpaid service and will count toward the community service component of those existing orders.

For example, an offender is subject to an existing community service order and an existing graffiti removal order. Under the existing orders, she has 220 hours of community service yet to perform and 20 hours graffiti removal service yet to perform. The offender is again before the court convicted of a new graffiti offence. The court makes a new graffiti removal order, as mandated under new part 5A, and imposes 10 hours for the order.

Given that the offender is already at the legislative cap of 240 hours of unperformed unpaid service, but is not at the legislative cap of 40 hours of unperformed graffiti removal service; the 10 hours imposed for the new

graffiti offence (once performed) will also be taken to be community service under the existing community service order.

Therefore, in reality, the offender will perform 30 hours of graffiti removal service and 210 hours of community service (instead of 220 hours).

Subsection (7) further provides that the chief executive must, subject to any order of the court, identify the relevant existing community service order or orders in relation to which the graffiti removal service is taken to have been performed; and notify the offender of that in writing.

New section 110H provides that all unpaid service to which the following sections apply: section 110E (subject to subsection (3)); section 110F (subject to subsection (3) and (6)); and section 110G (subject to subsections (2), (3), (5) and (6)), is to be performed cumulatively unless the court orders otherwise.

New section 110I provides for the termination of a graffiti removal order. Consistent with the approach taken to community service orders, a graffiti removal order terminates if: the offender satisfactorily performs the total number of hours of graffiti removal service required by the order; the offender is sentenced or further sentenced for the original offence; or the order is revoked under new section 120A.

Clause 48 amends section 119 (Termination of intensive correction order) consequential to the commencement of the *State Penalties Enforcement and Other Legislation Amendment Act 2007*, which in effect removed the ability for the court to order compensation or restitution as a condition of a community based order. Compensation or restitution can nevertheless be imposed as a separate sentencing order, with the amounts registered with the State Penalties Enforcement Registry at the earliest opportunity.

Clause 49 amends the heading of section 120 (Amendment and revocation of community based order) consequential to the insertion of new section 120A under clause 50, by including the words 'other than a graffiti removal order' to the end of the heading.

Clause 50 inserts new section 120A (Amendment and revocation of graffiti removal order).

Subsection (1) provides that the court that made a graffiti removal order may (on application under part 7, Division 1) amend or revoke the order if the court is satisfied that, because of any physical, intellectual or psychiatric disability of the offender, the offender is not capable of complying with the order.

Subsection (2) provides, consistent with the current obligation under existing section 120 (which provides for the amendment and revocation of community based order that is not a graffiti removal order), if a court other than the court that imposed the graffiti removal order amends or revokes the order, the first court must notify the original court of the amendment or revocation.

Clause 51 amends section 121 (Offender may be re-sentenced on revocation of order), in recognition of the mandatory nature of the new graffiti removal order regime. New subsection (3) is inserted to make it clear that where the revoked community based order is a graffiti removal order, the court is not required, upon re-sentencing the offender for the original prescribed graffiti offence, to make another graffiti removal order. The court, however, is not precluded from doing so.

Clause 52 amends section 125 (Powers of Magistrate Court that convicts offender of offence against s123(1)) consequential to the introduction of the graffiti removal order regime under new part 5A.

Subclause (1) inserts new subsection (1)(ba) to provide the Magistrates Court with the power, upon dealing with a contravention of a graffiti removal order, to increase the number of hours of graffiti removal service that the offender must perform. This is consistent with the existing approach, under section 125, to contravention of a community based order that includes a requirement to perform community service.

Subclause (2) inserts a reference to 'graffiti removal service' under existing subsection 2(c). That is, the Magistrates Court has the power, upon dealing with a contravention of a graffiti removal order, to extend the time for completion of the graffiti removal service.

Subclause (3) inserts new subsection (7) which provides, in recognition of the mandatory nature of the new graffiti removal order regime, that if the offence mentioned in subsection (1) relates to a graffiti removal order, the court in taking action under subsection (4)(a) (that is, the re-sentencing the offender for the original prescribed graffiti offence), is not required to make another graffiti removal order. The court, however, is not precluded from doing so.

Clause 53 amends section 126 (Powers of Supreme Court or District Court to deal with offender) consequential to the introduction of the graffiti removal order regime under new part 5A, by inserting new subsection 6(A).

New subsection (6A) provides, in recognition of the mandatory nature of the new graffiti removal order regime, that if the community based order mentioned in subsection (1) is a graffiti removal order, the court in taking action under subsection (4) (that is, the re-sentencing the offender for the original prescribed graffiti offence), is not required to make another graffiti removal order. The court, however, is not precluded from doing so.

Clause 54 amends section 130 (Discharge of multiple community based orders where contravention taken into account) to insert a 'Note' indicating that an offence against section 123(1) is an excluded offence under section 189 if the community based order to which the offence relates is a graffiti removal order.

Clause 55 amends section 134 (Requirements of order have effect despite appeal) consequential to the commencement of the *State Penalties Enforcement and Other Legislation Amendment Act 2007*, which in effect removed the ability for the court to order compensation or restitution as a condition of a community based order.

Clause 56 amends section 135 (Directions under community based order) consequential to the insertion of the mandatory graffiti removal order regime under new part 5A.

Clause 57 amends section 160A (Application of ss160B-160D) consequential to an amendment to the *Corrective Services Act 2006* under clause 7. The effect is that the sentencing court cannot impose a minimum non-parole period that is less than 80 percent of the term of imprisonment imposed for a prisoner serving a term of imprisonment for a 'drug trafficking offence'.

Clause 58 amends the heading of section 160C (Sentence of more than 3 years and not a serious violent offence or sexual offence) to include a reference to 'drug trafficking offence'.

Clause 59 amends section 160D (Sentence for a serious violent offence or sexual offence) to include a reference to 'drug trafficking offence' in the heading of the section and in subsection (1).

Clause 60 amends section 160E (Automatic cancellation of parole release or eligibility dates) to include a reference to 'drug trafficking offence'.

Clause 61 amends section 172D (Court not to have regard to possible order under *Dangerous Prisoners (Sexual Offenders) Act 2003*) consequential to the renumbering of existing section 9(8) under clause 43.

Clause 62 amends section 189 (Outstanding offences may be taken into account in imposing sentence) to provide that an offence against section 123(1), if the community based order to which the offence relates is a graffiti removal order, is excluded from the operation of section 189. The effect is that such an offence is to be dealt with under part 7, Division 2 (Contravention of orders).

Clause 63 amends section 217 (Transitional provision for *Dangerous Prisoners (Sexual Offenders) and Other Legislation Amendment Act 2010*) consequential to the renumbering of existing section 9(8) under clause 43.

Clause 64 inserts a new heading establishing Part 14, Division 6 to address the transitional provisions for the expiry of the *Drug Court Act 2000* with new sections 227, 228, 229, 230 and 231.

New section 227 (definitions for div 6) contains definitions relevant to division 6, namely the terms 'Drug Court Act' and 'intensive drug rehabilitation order'.

New section 228 (Application of div 6) provides that the division applies from 1 July 2013.

New section 229 (Continuation of warrants) expressly provides that a warrant issued under section 40 of the *Drug Court Act 2000* for an offender before the 30 June 2013 but not enforced or enforced but not returned before a Drug Court magistrate before

that day, is taken to be a warrant issued by a magistrate and authorises any police officer to arrest the offender and to bring them before a magistrate.

New section 230 (Dealing with offences after enforcement of warrant) provides for the proceedings that are to occur if an offender is arrested on a warrant mentioned in section 229 and is brought before a magistrate.

Subclause (2) expressly provides that the magistrate must:

- revoke the conviction recorded for the offence; and
- vacate the intensive drug rehabilitation order; and
- deal with the offender according to law.

Subclause (3) however, provides that if the offence in relation to which the intensive drug rehabilitation order for the offender was made is a prescribed drug offence under the *Drug Court Act 2000*, the magistrate must, under the *Justices Act 1886*, section 113, commit the offender to the District Court for sentence. This applies even though the magistrate has not addressed the defendant as required under the *Justices Act*, section 104(2).

The effect of these provisions means that a magistrate must deal with the offender for the original ('relevant') offence that brought the offender within the jurisdiction of the Drug Court or commit those offences for sentence as required under subclause (3). This means, where subclause (3) does not apply, the magistrate may sentence the offender or the magistrate may adjourn the proceedings for sentencing if the magistrate so decides. An example of reason for an adjournment would be to allow the offender an adjournment in order to obtain legal representation.

Subclause (5) clarifies that the *Bail Act 1986* applies to the offender. Further, it clarifies that the reference that the conviction recorded must be revoked in new section 230(2)(a) is only a reference to the conviction recorded pursuant to section 18 of the *Drug Court Act 2000*. The conviction is revoked so as not to fetter the sentencing court. The offender's plea of guilty under section 19(c) stands.

New section 231 (Sentencing an offender after enforcement of warrant) applies if a magistrate sentences an offender to whom section 230 (Dealing with offences after enforcement of warrant) applies or the *Drug Court Act 2000*, section 40A(3)(a) or (b) applies.

Subclause (2) provides that in sentencing an offender, a magistrate must have regard to the initial sentence contained in the offender's intensive drug rehabilitation order.

Subclause (3) clarifies the application of the *Penalties and Sentences Act 1992*, section 159A.

Clause 65 subclause (1) omits section 5 (Trafficking in a dangerous drug) under the *Drugs Misuse Act 1986* from schedule 1 (Serious Violent Offences). Subclause (2) renumbers schedule 1 under the heading '*Drugs Misuse Act 1986*' consequential to the omission made under subclause (1).

Part 9 – Amendment of *Police Powers and Responsibilities Act 2000*

Clause 66 provides that part 9 amends the *Police Powers and Responsibilities Act 2000*.

Clause 67 inserts new section 379A (Additional case when arrest for graffiti offence may be discontinued), which provides the police with the option to discontinue with the arrest of a child for a graffiti offence and instead the child undertakes a graffiti removal program.

Subsection (1) clarifies that section 379A applies if a child has been arrested or is being questioned by a police officer about a graffiti offence and the child admits to committing the offence during an electronically recorded interview and the child has attained the age of at least 12 years at the time of the offence.

Subsection (2) provides that a police officer may, at any time before the child appears before a court to answer a charge of the graffiti offence, offer the child the opportunity to attend a graffiti removal program.

Subsections (3) and (4) make it clear what the police officer and child must do, as part of making an offer and entering into an agreement for the child to attend and complete a graffiti removal program.

Subsection (5) provides that the agreement must include a provision authorising the provider of the graffiti removal program to disclose to the commissioner and the chief executive (youth justice services) information about the child's attendance at and completion of the program, or the child's failure to attend or complete the program.

Subsection (6) clarifies that the police officer must give a child a written requirement to attend and complete a graffiti removal program in accordance with the agreement and must inform the child that failure to comply with the requirement is an offence against section 791.

Subsection (7) makes it clear that a police officer must give the chief executive (youth justice services) or a person or organisation nominated by the chief executive for this section, a copy of the agreement.

Subsection (8) allows, following the signing of an agreement, for anything used by a child in the commission of the graffiti offence to be forfeited to the State.

Subsection (9) provides that it is the duty of the police officer to release an arrested child at the earliest reasonable opportunity if the police officer is satisfied subsections (4) and (6) have been complied with.

Subsection (10) provides for the meaning of 'chief executive (youth justice services)' as well as 'graffiti removal program', for the purposes of section 379A.

Clause 68 amends section 381 (Limit on rearrest) and creates a new subsection (2), which serves to clarify that police can rearrest a person responsible for a graffiti offence.

Clause 69 amends Schedule 6 (Dictionary) by inserting a definition of ‘graffiti offence’ for children.

Part 10 – Amendment of *Residential Tenancies and Rooming Accommodation Act 2008*

Clause 70 provides that part 10 amends the *Residential Tenancies and Rooming Accommodation Act 2008*.

Clause 71 omits section 42 (Intensive drug rehabilitation order). This is a consequential amendment as a result of the expiry of the *Drug Court Act 2000* on 30 June 2013.

Part 11 - Amendment of *Summary Offences Act 2005*

Clause 72 provides that part 11 amends the *Summary Offences Act 2005*.

Clause 73 amends the heading of section 47 (Forfeiture) consequential to the insertion of new section 47A in clause 74, to instead read, ‘Forfeiture of thing to which offence relates’.

Clause 74 inserts new section 47A (Forfeiture of thing used to record, store or transmit image of graffiti).

New section 47A applies: if a person is convicted of an offence of possessing a graffiti instrument under section 17 of the *Summary Offences Act 2005*; the person was an adult at the time of the commission of the offence; and the court is satisfied that property (for example, a mobile phone, a camera or a computer) owned or possessed by the person was used to record, store or transmit an image or images of, or related to, the graffiti in relation to which the graffiti instrument was used, reasonably suspected of being used, or reasonably suspected of being about to be used.

When the court is imposing a sentence on the person for the offence, the court may order the forfeiture of that property to the State. Upon forfeiture the thing becomes the State’s property and may be dealt with as directed by the chief executive.

Part 12 – Amendment of *Victims of Crime Assistance Act 2009*

Clause 75 provides that part 12 amends the *Victims of Crime Assistance Act 2009*.

Clause 76 amends section 15 (Giving details of impact of crime on victim during sentencing) consequential to the insertion of new section 15A (Reading aloud of victim impact statement during sentencing) under clause 77. Additionally, the

reference to the *Juvenile Justice Act 1992* under subsection (3) is changed to *Youth Justice Act 1992*, as the Act is now known.

Clause 77 inserts new sections 15A (Reading aloud of victim impact statement during sentencing) and 15B (Special arrangement for reading aloud of victim impact statement during sentencing).

New section 15A provides for the reading aloud of a victim impact statement before the sentencing court.

Section 15A is intended to complement the operation of existing section 15 (Giving details of impact of crime on victim during sentencing), including that a victim impact statement is not required to be made under an oath or affirmation.

Section 15A(3) provides that the court must allow a victim impact statement to be read aloud before the sentencing court unless the court considers that, having regard to all relevant circumstances, it is inappropriate to do so.

While cast in mandatory terms, there remains a limited discretion for the court to refuse a request that the victim impact statement be read aloud. This is intended to accommodate those situations, for example, where a victim may wish to read their victim impact statement but not be available to do so for an unreasonable length of time; or where the content of the victim impact statement is inadmissible.

It is a matter for the victim as to whether they wish to have their victim impact statement read aloud to the sentencing court.

The request to have the victim impact statement read aloud is to be made by the prosecutor for the offence, either in writing or orally; and may be for all or part of the victim impact statement to be read. Further, the victim impact statement is to be read aloud by either the person who prepared the victim impact statement under section 15(5) or the prosecutor on their behalf.

Section 15A(4) makes it clear that the reading aloud of the victim impact statement is for the therapeutic benefit of the person who has prepared it; and accordingly it is not necessary for a person reading aloud the victim impact statement before the court to do so under oath or affirmation.

New section 15B applies where the person reading aloud the victim impact statement under new section 15A is the person who prepared the victim impact statement under section 15(5); and enables the court to make special arrangements to support the victim through this process.

The sentencing court may, on its own initiative or on the application of the prosecutor for the offence, direct that any of the following arrangements be made to assist the person in reading aloud the victim impact statement: allowing the victim to read their victim impact statement remotely via closed-circuit television; the use of a screen to obscure the offender from the sight of the victim; the presence of a support person

who is positioned in close proximity to the reader and within their line of sight; and permitting the court to be closed while the victim impact statement is read.

Clause 78 amends Schedule 3 (Dictionary) to insert a new definition of ‘prosecutor for an offence’, consequential to the insertion of new sections 15A (Reading aloud of victim impact statement during sentencing) and 15B (Special arrangement for reading aloud of victim impact statement during sentencing).

Part 13 – Amendment of *Youth Justice Act 1992*

Clause 79 provides that part 13 amends the *Youth Justice Act 1992*.

Clause 80 amends section 11 (Police officer to consider alternatives to proceeding against child) to align with the new provisions created under section 379A of the *Police Powers and Responsibilities Act 2000* under clause 67 by providing the police with an alternative to a court proceeding against a child for a graffiti offence.

Subclause (1) amends section 11 to add the new subsection (1)(e).

Subclauses (2) and (3) amend sections 11(4) and (5) and (6), respectively, to insert a reference to new subsection 11(1)(e).

Clause 81 amends section 37 (Form and content of conference agreement) to clarify the form and content that a youth justice conference agreement must take in relation to a matter involving a graffiti offence.

Subclause (1) renumbers former subsections 37(7) to (11) as new subsections (9) to (13).

Subclause (2) creates new subsection 37(7) to clarify that if the offence committed by the child is a graffiti offence, then any youth justice conference agreement signed by the chief executive must provide for the child to be subject to a program similar to one a child is subject to under a graffiti removal order.

Further, subclause (2) creates the new subsection 37(8) that clarifies that subsection (7) does not apply if a victim of the offence, participating in the conference, requests that the agreement deal with the offence in another way mentioned in subsection 37(4).

Subclause (3) amends the renumbered subsection 37(13) by omitting the former reference to subsection (10) and replacing it with subsection (12).

Clause 82 amends section 41 (If chief executive signs agreement for program) to include a graffiti removal order under subsection (1)

Subclause (2) amends section 41(2) to create subsections (a) and (b); with (a) making it clear that if a youth justice conference agreement is signed by the chief executive and provides for a program similar to one a child is subject to under a graffiti removal

order, the chief executive must arrange the program and must monitor the child's participation in the program.

Clause 83 inserts new section 176A (Sentence orders – graffiti offences).

New section 176A(1) provides that section 176A applies if a child is found guilty of a graffiti offence and the child had attained at least the age of 12 years at the time of the offence.

Section 176A(2) clarifies that without limiting section 175, the court must make a graffiti removal order for the child.

Section 176A(3) clarifies that, subject to sections 194A and 249(3), the graffiti removal order must order the child to perform graffiti removal service for a period no longer than is allowed with regard to the child's age.

Clause 84 amends section 177 (More than 1 type of order may be made for a single offence) by inserting a reference to the new section 180A (Combination of detention order and graffiti removal order), as provided for under clause 87, which allows a court to make more than one type of sentence order, including a graffiti removal order for a single offence.

Clause 85 inserts the new section 178A (Combination of graffiti removal order and probation and community service orders), which applies if a court orders, for a single offence, a combination of a graffiti removal order with, one or both, a probation order and a community service order.

Subclause (3) allows the court, upon contravention of one of the orders other than the graffiti removal order, and after the orders are made and the child is re-sentenced for the original offence, to discharge the orders other than graffiti removal order. Further, if considered appropriate, the court may also discharge the graffiti removal order.

Subclause (4) allows the court, when the child contravenes the graffiti removal order after the orders are made and is resentenced for the original offence, to discharge all of the orders.

Clause 86 amends section 180 (Combination of detention order and other orders) to provide for the new heading 'combination of detention order and probation order'.

Clause 87 inserts new section 180A (Combination of detention order and graffiti removal order) which allows a court to order for a single prescribed graffiti offence, or where there are multiple offences of which one is a prescribed graffiti offence, a combination of a detention order and graffiti removal order.

Subsection (1)(a) applies if a court makes a detention order and a graffiti removal order for a single graffiti offence or for multiple offences of which one is a graffiti offence.

Subsection (1)(b) applies if the court makes a detention order for a child who is already subject to one or more existing graffiti removal orders.

Subsection (2)(a) clarifies that if subsection (1)(a) applies, the graffiti removal order starts when the child is released from detention under the detention order.

Subsection (2)(b) provides that if subsection (1)(b) applies, then the graffiti removal order is suspended until the child is released from detention under the detention order.

Subsection (3) clarifies any period, under sections 194B(3) or 194D, which apply to a graffiti removal order, starts: if subsection (1)(a) applies - when the child is released from detention; or if subsection (1)(b) applies - is extended by the period the child is detained under the detention order.

Clause 88 amends section 183 (Recording of conviction), subsection (3) to allow courts to consider whether a conviction be recorded or not be recorded for an order provided for under section 176(A).

Clause 89 inserts new Division 7A (Graffiti Removal Orders) under Part 7.

New section 194A outlines the preconditions that the court must consider when deciding to impose a graffiti removal order and in determining the number of graffiti removal service hours to order.

New section 194B clarifies the requirements that must be contained in the graffiti removal order.

New section 194C sets out the obligations of the chief executive in relation to the child's performance of graffiti removal service, which includes taking all necessary steps to ensure that the child, if practicable, is kept apart from any adult under sentence for an offence.

New section 194D outlines the time limits within which a child must perform their graffiti removal service hours. This includes options for the court, or the proper officer of the court, to extend the period of time as allowed under section 245, 247 or 252, respectively.

New section 194E provides under subsection (a) that the court, when a child is found guilty of two or more graffiti offences in the same proceeding, must make at least one graffiti removal order against the child and may make more than one graffiti removal order. Further, subsection 1(b) provides that if a child is found guilty of two or more offences in the same proceeding, one of which is a graffiti offence, the court must make a graffiti removal order. Subsection (2) provides that this section does not limit section 176A.

New section 194F clarifies the number of hours of graffiti removal service that can be ordered by a court if it makes one or more graffiti removal orders against a child and the child is not already subject to an existing graffiti removal order. This section applies whether or not the child is also found guilty of any other offence.

New section 194G clarifies the number of hours of unpaid service that can be ordered by a court if making one or more graffiti removal orders and one or more community

service orders against a child found guilty of one or more graffiti offences and the child is not subject to an existing graffiti removal order or an existing community service order. This section applies whether or not the child is also found guilty of any other offence.

New section 194H clarifies the number of hours that can be imposed on a child when a court makes one or more graffiti removal orders and the child is subject to one or more existing graffiti removal orders. This section applies whether or not the child is also found guilty of any other offence. Further, provisions under section 194H (3) oblige the court when making an order under this section, and where the number of hours of graffiti removal service ordered and the number of unperformed graffiti removal service hours, when added together, equals the maximum number of hours allowed by section 176A, to order the graffiti removal service to be performed concurrently with the unperformed graffiti removal service.

New section 194I applies if a court makes, as provided for under subsection (1)(a), one or more graffiti removal orders against a child and the child is subject to either one or more existing community service orders, or one or more existing graffiti removal orders and one or more existing community service orders.

Subsection (2) provides that subject to subsection (3) the number of hours of unperformed unpaid service and the number of hours of graffiti removal service ordered to be served for the prescribed graffiti offence, added together, must not total more than the maximum number of hours of community service allowed under section 175(1)(e).

Subsection (3)(a) applies if the number of hours of unperformed unpaid service for a child equals the maximum allowed under section 175(1)(e), and the child is then ordered to serve further graffiti removal service hours as per subsection (1)(a). These additional hours must be performed concurrently with any unperformed graffiti removal service to the extent that the number of hours of graffiti removal service ordered to be served, when added to the number of hours of unperformed graffiti removal service, is more than the maximum number of hours of graffiti removal service allowed by section 176A(3).

Subsection 194I(3)(b) provides, that if subsection (3)(a) does not apply, then the graffiti removal service must, when it is performed, be taken to be both community service performed under one or more of the existing community service orders as well as graffiti removal service under the graffiti removal order made by the court.

Subsection 194I (4) clarifies that for subsection 3(b), the chief executive must decide under which of the existing community service order or orders, the graffiti removal service is taken to be performed as community service. Further, the chief executive must notify the child in writing of their decision under this section.

New section 194J clarifies when unpaid service is to be performed cumulatively unless the court orders otherwise.

New section 194K clarifies the cumulative effect of child and adult orders. This section applies if a court makes one or more child graffiti removal orders, child

community service orders, adult graffiti removal orders or adult community service orders.

Subsection (2) provides that to the extent the total number of hours of service that a person is subject to, that is the number of unperformed hours, under all of the orders is more than the maximum number of hours applicable under the *Youth Justice Act 1992* or the *Penalties and Sentences Act 1992*, the order or orders made by the court is or are of no effect. In effect this means if a person is subject to both adult and child orders, and if the total number of hours of unperformed service is more than the maximum allowed under the *Penalties and Sentencing Act 1992*, part 5, division 2 or part 5A, the orders or orders made by the court is or are of no effect to the extent that the hours exceed the legislative limits.

Subsection (3) provides that the hours of service in each order a person is subject to are cumulative on the hours in each other order, unless the court that makes the order directs otherwise.

New section 194L makes it clear when a graffiti removal order ends.

Clause 90 amends section 245 (Court's power on breach of a community based order other than a conditional release order or boot camp order) by inserting new subsection (1)(aa) which allows a court, for a breach of a graffiti removal order, to increase the number of graffiti removal hours but not more than the maximum appropriate to the child allowed by section 176A or sections 194F to 194I, or to extend the period within which the graffiti removal service must be performed but not so that the extended period ends more than 1 year after the court acts under this section.

Subclause (2) amends section 245(3) to include reference to subsection (1)(aa).

Clause 91 amends section 249 (Matters relevant to making further order) to insert subsection (3) which provides that a court need not, when re-sentencing the child for the prescribed graffiti offence for which the order was made, make another graffiti removal order.

Clause 92 amends section 252 (Variations by consent) by inserting subsection (5)(ca) to clarify the options for a court to vary a graffiti removal order by consent.

Clause 93 amends Schedule 4 (Dictionary) to include definitions to give effect to Division 7A including definitions for a graffiti offence and graffiti removal service.