

Regulatory Impact Statement: Responding to Gang Harms

Coversheet

Purpose of Document	
Decision sought:	This analysis was produced for the purpose of informing Cabinet decisions on responding to gang harms.
Advising agencies:	The Ministry of Justice
Proposing Ministers:	The Minister of Justice
Date finalised:	14 February 2024
Problem Definition	
Public confidence in law and order has been undermined by a number of recent, high-profile instances of serious gang-crime and anti-social behaviour, such as inter-gang conflict and public intimidation during gang runs.	
Executive Summary	
<p>The Government’s coalition agreements commit to introducing legislation within 100 days to respond to gang harm by:</p> <ul style="list-style-type: none"> • (Proposal 1) prohibiting the display of gang patches in public, with a new criminal offence; • (Proposal 2) stopping gang members gathering in public, with a new dispersal power requiring specified people to leave the area and not associate in public for seven days. It will be an offence to not comply; • (Proposal 3) stopping gang offenders from associating for up to three years, with a new consorting prohibition order. It will be an offence to not comply; and • (Proposal 4) making gang membership an aggravating factor at sentencing. <p>In aggregate, these policies seek to shift the government’s response to gang harms closer to that of Australia (which uses the criminal law to suppress the public visibility gangs), and away from jurisdictions like the UK and US (which use the criminal law to respond to specific criminal activities carried out by organised crime groups).</p> <p>For each of the proposals, officials considered the options of:</p> <ul style="list-style-type: none"> • the status-quo, • the proposals referred to in the Government’s 100-Day Plan, and • variations on the proposed 100-Day commitments, agreed to by Cabinet, reflecting modifications recommended by agencies. <p>There is evidence to indicate the proposals can reduce the public visibility of gangs (at least in certain places, for a time), and help Police target high-risk gang members/events. This can be expected to contribute to increased public confidence in law and order.</p> <p>However, the maintenance of increased confidence will depend on how effective the suppression approach ultimately proves to be in reducing crime and victimisation over</p>	

time. There is no evidence to suggest that a suppression approach will work to reduce long-term offending behaviours by gangs, or eliminate gangs altogether.

The shift in the overall approach also risks further entrenching mistrust of state authorities held by gang members and many in their wider whānau. This risks:

- making it more difficult for people to exit gangs (for those able to disengage), or to desist from crime (for those who remain a member or associate);
- undermining relationships between gangs and law enforcement or other agencies, thereby reducing prevention opportunities such as the de-escalation of gang tensions or social service delivery to address needs;
- undercutting efforts to cultivate pro-social activity within gang communities, for those groups that have moved towards adopting such behaviours; and
- making it harder for whānau experiencing violence, particularly domestic violence, to seek help.

For these reasons, the Ministry of Justice's preferred option is the status-quo. This approach recognises that there have already been significant recent changes to legislative and operational efforts to combat the gang harms causing community concern. These changes are in the process of bedding-in and are expected to reduce levels of gang harm and victimisation over time, thereby contributing to increased public confidence in law and order. Recent changes include:

- gang conflict warrants, new powers to seize vehicles driven recklessly, and new asset forfeiture measures targeting leaders and facilitators of organised crime;
- an expansion of the Resilience to Organised Crime in Communities programme to three new districts; and
- the planned increase of 500 new frontline officers.

The Cabinet Paper reflects the options preferred by Ministers, as reflected in the coalition agreements, to enact the new powers with modifications recommended by agencies to address implementation issues.

Limitations and Constraints on Analysis

This analysis has been constrained by:

- **Narrow scope:** Agencies were commissioned to fulfill the Government's commitments on gang policies included in the 100-Day Plan. This commissioning and timeframes limited the options able to be considered that would achieve this objective.
- **Lack of broader public consultation:** The timeframes in which the policy proposals have been prepared did not allow for consultation beyond government agencies affected. As the proposed changes require legislative amendment, the Select Committee process will provide an opportunity for broader scrutiny and input.
- **Data limitations:** Due to the covert nature of criminal activity, and the lack of precedent for these powers in New Zealand, quantitative data with which to estimate the full effects has been difficult to obtain. We have drawn on reports and academic research on overseas experience with comparable legislation.

A longer timeframe could have allowed officials to consult with stakeholders and the public, including groups most affected by these policies, such as Māori and communities with high concentrations of gang activity. This could have provided more fully informed advice on the impact of these proposals, operational challenges, and unintended consequences, as well

as insights on the nature of gang conduct within communities and existing efforts to address them.

The existing knowledge base of government reports, academic research, and international experience provides a solid foundation for assessing the likely overarching impacts of the options. These are summarised in the overview and overall options, referenced where appropriate, as well as select additional references in the relevant sections. Despite the constraints on the analysis, they provide reason to be confident of the likely outcomes and risks for the proposed options.

Responsible Manager(s) (completed by relevant manager)

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14 February 2024

Quality Assurance (completed by QA panel)

Reviewing Agency: Ministry of Justice

Panel Assessment & Comment:

The Ministry of Justice's Regulatory Impact Assessment quality panel has reviewed the RIS: Responding to Gang Harms prepared by the Ministry of Justice and considers that the information and analysis summarised in the Regulatory Impact Statement partially meets the Quality Assurance criteria.

The package of proposals implements an election manifesto commitment. The Government wishes to proceed swiftly, and the time constraints have limited the opportunities for consultation with affected communities. That has constrained the evidence base for analysis. However, the RIS makes good use of available evidence, and the objectives and criteria support good analysis.

The RIS identifies relevant parties and implementation pathways, but these pathways have not been fully developed due to time constraints. The panel considers there is some implementation risk: the regulatory and operational landscape is complicated, with many moving parts, including new regulatory settings that are still bedding in. Additional change to that landscape is likely to carry some implementation risk that has not yet been explored.

Overall, the panel considers that the analysis is robust and can be relied on by Ministers to support their decision-making.

Overview

1. This section describes the overarching context, problem, objectives, and criteria for the policy options. Subsequent sections provide details specific to each option.

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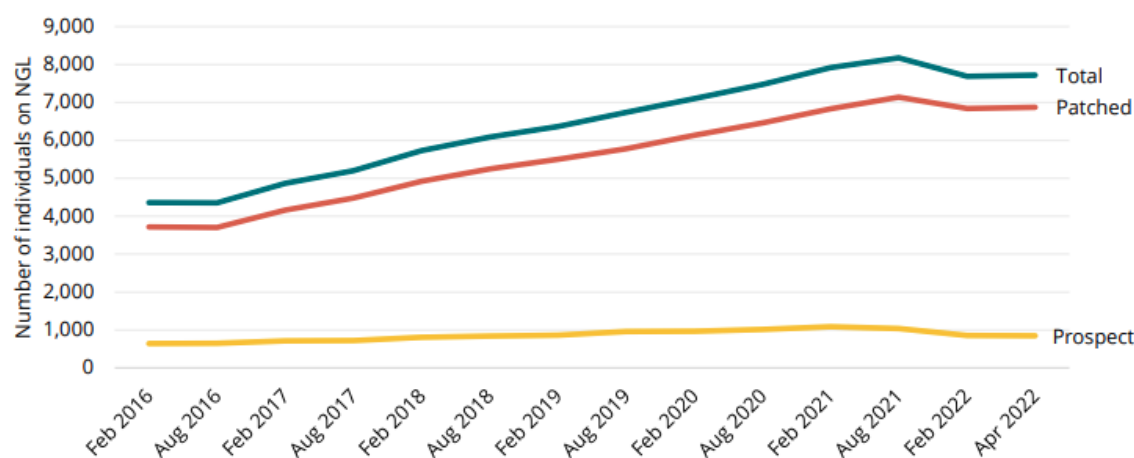
The overarching context on gangs and our response

- Public confidence in law and order has been undermined by a number of recent, high-profile instances of serious gang-crime and anti-social behaviour, such as inter-gang conflict and public intimidation during gang runs. Gang offending can be particularly challenging for communities with a higher ratio of gang presence to Police resources.

The size and nature of gangs in New Zealand

- Gangs are typically identified in official statistics as groups with a common symbol, whose members or associates have a record of engaging in criminal activity.¹
- The New Zealand Police (Police) currently use the National Gang List to measure gang membership in New Zealand, but acknowledge the List's limitations; these numbers are inexact and should be understood as indicative only.² For example, indicators that lead someone to be added to the National Gang List (such as wearing a gang patch) are more visible and reliable than those that might lead to removal (such as the difficulty in corroborating that a person has ceased to be involved with a gang).
- As of October 2023, 9,270 patched or prospect members were on the National Gang List. Approximately half of these belong to the largest two gangs, the Mongrel Mob and Black Power.³ It is unclear how much of the increase reflects an actual change in numbers (including from Australian deportations), and how much is accumulated intelligence-gathering (as the National Gang List has existed for less than a decade).

Graph 1: NGL patched and prospect gang members, 2016 to 2022



- Gang membership is associated with criminal offending, imprisonment, and difficulties reintegrating into the community after incarceration.⁴ This is reflected in the disproportionate share of gang members in the prison population.⁵

¹ As reflected in [section 5\(2\)\(a\), Prohibition of Gang Insignia in Government Premises Act 2013](#).

² Paul Bellamy, Parliamentary Library research paper, [New Zealand gang membership: A snapshot of recent trends](#), July 2022, Pgs 4-5.

³ Ibid, Pgs 9-10.

⁴ [Toward an understanding of Aotearoa New Zealand's adult gang environment | Prime Minister's Chief Science Advisor](#) (PMCSA), [full report](#), June 2023, Pgs 37, 47.

⁵ [Using evidence to build a better justice system: The challenge of rising prison costs](#), PMCSA, March 2018, Pg 21.

Table 2. Ethnicity of prisoners, by gang indicator as at 31/10/2017

Ethnicity	Active	Former	Not affiliated	Total	% Active	% Former	% Not affiliated
Māori	2519	367	2432	5318	47%	7%	46%
European	564	90	2663	3317	17%	3%	80%
Pacific	466	41	676	1183	39%	3%	57%
Other/Not rec	48	5	638	691	7%	1%	92%
Total	3597	503	6409	10509	34%	5%	61%

7. Since 2010, New Zealand's gang environment has also been influenced by Australia's deportations policy and the expansion of Outlaw Motorcycle Clubs (such as the Comancheros and the Mongols).⁶ This has fuelled inter-gang competition over drug market control and territorial conflict, including an escalation in firearms offending. Gang conflict naturally varies in intensity as particular disputes emerge or fade.
8. While they are associated with harms from the offending that their members commit, gangs also fulfil a purpose for their members, otherwise they would not exist.⁷ They provide a sense of belonging, community, status, and protection.⁸ For many members, gangs form social and whānau ties.
9. Gangs are deeply entrenched in some communities and can be a multi-generational association. Māori make up a disproportionate share of gang membership, with three-quarters estimated to be Māori. In 2021, Te Puni Kōkiri estimated about 50,000 people overall were related to those members, with Māori whānau of gangs making up around 5% of the Māori population.⁹
10. A significant portion of gang members have also been victims of violence, poverty, and neglect, including family violence, intimate partner violence, and drug or alcohol abuse. While these elements exist in all communities, gangs serve as a concentration zone for individuals with a higher risk of exhibiting anti-social behaviour.¹⁰ These individuals tend to live in the most deprived communities and have high rates of unemployment.
11. Historically, as children and young people, many gang members suffered abuse and neglect in state and faith-based care, creating mistrust and resistance to authority. The disproportionate rate of Māori tamariki placed in state care contributed to the current overrepresentation among gangs. The Waitangi Tribunal has noted that an estimated 80 to 90% of Mongrel Mob and Black Power gang whānau had been a state ward.¹¹

New Zealand's current approach to gang harms

12. The government currently coordinates its work to combat gang harms through two complementary work programmes focused on organised crime.¹²

⁶ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic](#), Pg 40.

⁷ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pgs 8, 57.

⁸ [Using evidence to build a better justice system](#), PMCSA, Pg 21.

⁹ Te Puni Kōkiri, Briefing: *Improving Māori Wellbeing: Whānau with Gang Affiliations*, 2021.

¹⁰ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pgs 8, 21-22, 75.

¹¹ Waitangi Tribunal, [He Pāharakeke, he Rito Whakakīkinga Whāruarua – Waitangi Tribunal inquiry: WAI 2915](#), April 2021, Pg 85, "Moana Jackson, who 20 years ago estimated that 85 per cent of the Mongrel Mob and 88 per cent of Black Power members had been State wards."

¹² Police, Proactive release of: [the Implementation of the Transnational Organised Crime Strategy \(2020-2025\)](#) (December 2022), [Resilience to Organised Crime in Communities papers](#) (September 2020).

- 12.1. the Transnational Organised Crime (TNOC) Strategy – which focuses on disrupting and dismantling organised crime by targeting the enablers of offending and addressing systemic vulnerabilities; in parallel with
- 12.2. the Resilience to Organised Crime in Communities (ROCC) programme – a cross-agency effort that invests in local communities to reduce the drivers and harms of organised crime. For example, this can include addiction treatment, pathways to employment and education, counselling services, etc.
13. The TNOC Strategy focuses on system-level effectiveness, whereas ROCC directly addresses organised crime with a combination of targeted enforcement action and community-led social and economic initiatives. This includes any organised crime perpetrated by gangs, such as gun violence or methamphetamine distribution and use.
14. ROCC involves applying medium to long-term interventions to achieve enduring and intergenerational change for individuals and communities. While interventions are often cost effective, it can take a longer timeframe to realise the benefits.¹³
15. ROCC was launched in 2019 in 4 Police districts: Eastern (Gisborne and the Hawke's Bay), Bay of Plenty, Southern (Southland and Otago), and Counties Manukau. It is currently expanding to 3 additional localities: Northland, West Coast, and Porirua.
16. The TNOC Strategy and ROCC programmes support the operational work of Police and other agencies (such as Customs and Inland Revenue) to disrupt, prevent, and suppress organised crime, violent offending, and unlawful gang behaviour.
17. Police undertake significant work to minimise the risks of organised crime and take enforcement actions where illegal conduct occurs. Recent criminal law initiatives have added to Police's toolkit, focusing on:
 - 17.1. supporting Police to disrupt the most harmful gang activities, such as the Criminal Activity Intervention Legislation Act 2023's new search warrant power enabling weapons to be seized during a gang conflict;
 - 17.2. deterring unsafe fleeing drivers, such as the Land Transport (Road Safety) Amendment Act 2023's new power to seize vehicles identified as having been involved in reckless driving, even where the driver cannot be identified;
 - 17.3. building out law enforcement's tools to better target leaders and facilitators of organised crime, including amendments in the Criminal Proceeds (Recovery) Amendment Act 2023 to enhance asset seizure and forfeiture;¹⁴ and
 - 17.4. the Government's commitment to train at least 500 additional frontline police.
18. Police have so far successfully used the new gang conflict search powers,¹⁵ with Police reporting a reduction in altercations such as shootings in residential areas.¹⁶ This is in the context of Police's broader response to gang harm, Operation Cobalt, focusing on the suppression, disruption, and enforcement of unlawful gang behaviour.

¹³ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pg 73-76.

¹⁴ Following the success of the civil forfeiture regime: "the threat of a large bust... risking the forfeiture of their assets, persuaded many groups that had transitioned from 'gangs' to 'criminal gangs' to stop such activities." Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), PhD Thesis, 2010, Pg 673, 683.

¹⁵ Police Media Centre, [Manawatu](#) (8 August), [Tairāwhiti](#) (18 October), [Ōpōtiki and Whakatāne](#) (23 October).

¹⁶ Callum Tasker, ["Police use new search powers in nationwide gang crackdown after fresh legislation,"](#) New Zealand Herald, 10 November 2023.

The Flow of Harm Into Local / Regional Communities

In Aotearoa New Zealand communities, the factors that drive people to join organised crime groups are reinforced by the multiple harms of criminal activity, impacting individuals, families and communities:



Aotearoa New Zealand Context

Organised Crime is expanding and diversifying. Both in Aotearoa New Zealand & Internationally, groups are becoming more sophisticated, strengthened, and expanding their territory.

Gang violence is the most visible face of organised crime in Aotearoa New Zealand. Gangs are key players in the illegal drug trade, being involved in importation, manufacture, distribution and supply.

While violence amongst organised crime groups is not new, the proliferation of firearms is an increasing trend. Firearms are now commonplace in the organised crime environment. Organised crime groups are also involved in the illegal importation and theft of firearms. Corruption of local and central government officials by organised crime groups and private sector is also a very real threat, with corruption via benefit, or through intimidation occurring.



Transnational Organised Crime (TNOC)

Aotearoa New Zealand's relative isolation is no longer a protective factor. Sophisticated TNOC groups are reaching into Aotearoa New Zealand, while local groups such as gangs reach out, establishing international networks.

The scope and scale of TNOC in Aotearoa New Zealand is growing, posing significant risk to our national security, law and order, public safety and wellbeing, and environment.



Resilience to Organised Crime in Communities (ROCC) Work Programme

Addressing the wellbeing harms and drivers of organised crime is a social issue requiring a coordinated response across government, including law enforcement, and with communities.

Organised Crime & Our Operational Response

Working with national operations and investigations groups, and the 12 Police Districts to support and coordinate organised crime operations. The strategy aims to make Aotearoa New Zealand as resilient as possible to national and transnational organised crime, including financial crime.

This work includes a focus on helping to prevent and reduce social harm in our communities, strengthening legislative and policy tools to disrupt organised crime, and coordinating and aligning with enforcement and wellbeing agencies and strategies across Aotearoa New Zealand.

TNOC Strategy and Action Plan

Working with agencies, international partners, and the wider public and private sector to improve coordination, agility and prioritisation of TNOC prevention and enforcement activity.

The strategy aims to pursue the types of TNOC that cause the most harm to Aotearoa New Zealand. It seeks to minimise social, economic and reputational harm; build capability and awareness to prevent and dismantle crimes that underlie TNOC; and stop the supply of illicit commodities and organised crime at the source, coordinating at domestic and international levels.

Recent Australian responses to gang harm

19. The Government's proposals partially draw on the experience of Western Australia, which passed new anti-gang laws in 2021.¹⁷ As these new powers are relatively recent, there is limited data or analysis on their use. Generally, Australia's anti-gang laws have responded to incidents of gang violence across the Commonwealth,¹⁸ and have the aim of disrupting outlaw motorcycle gangs as a way to reduce risks to public safety.¹⁹
20. Police spoke to the Western Australia Police Force, who advised that since coming into force, and up to 2023, there have been 130 cases that recorded charges. Most of these were for the prohibited insignia offence. The vast majority (around 80%) pled guilty or were found guilty by a judge. Many cases involved other associated offending (such as drug or weapon possession, traffic violation, property damage, and trespassing).

The overarching problem and opportunity with gang harms

21. The Government's coalition agreements commit to progress the policies set out in the Government's 100-Day Plan.²⁰ The focus of these is to "make membership of a criminal gang as unappealing as possible."²¹ This includes introducing legislation to:
 - 21.1. prohibit gang patches in public;
 - 21.2. stop gang members gathering in public;
 - 21.3. stop gang offenders from associating; and
 - 21.4. make gang membership an aggravating factor at sentencing.
22. These provide an opportunity to reassess the problem of gang harms, and how we respond. The details of each proposal are covered in their separate sections.

Gangs and organised criminal groups partially overlap

23. While gangs are often the public face of organised crime, they are not synonymous. Gang membership does not inherently entail offending, and an organised criminal group need not be a gang (such as a drug trafficking or money laundering network). Similarly, while gang members are more likely to commit crimes, such offending is not unique to gang members, nor necessarily even mostly committed by them.²²
24. For example, slightly less than 1 in 4 charges for the offence of supplying cannabis²³ involved persons identified by Police as gang members or associates (aka 23.7% on average across 1992-2020 data).²⁴ This suggests gangs do not dominate the market; though they are anecdotally involved in cultivation at higher rates (than street sales).

¹⁷ [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia).

¹⁸ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic: Lessons from the 1990s and Beyond, full report](#), May 2022, Pgs 41-42, "Lessons from Australia"

¹⁹ [Second Reading](#) of the Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021, 18 November 2021, Extract from Hansard for the Western Australia Legislative Assembly.

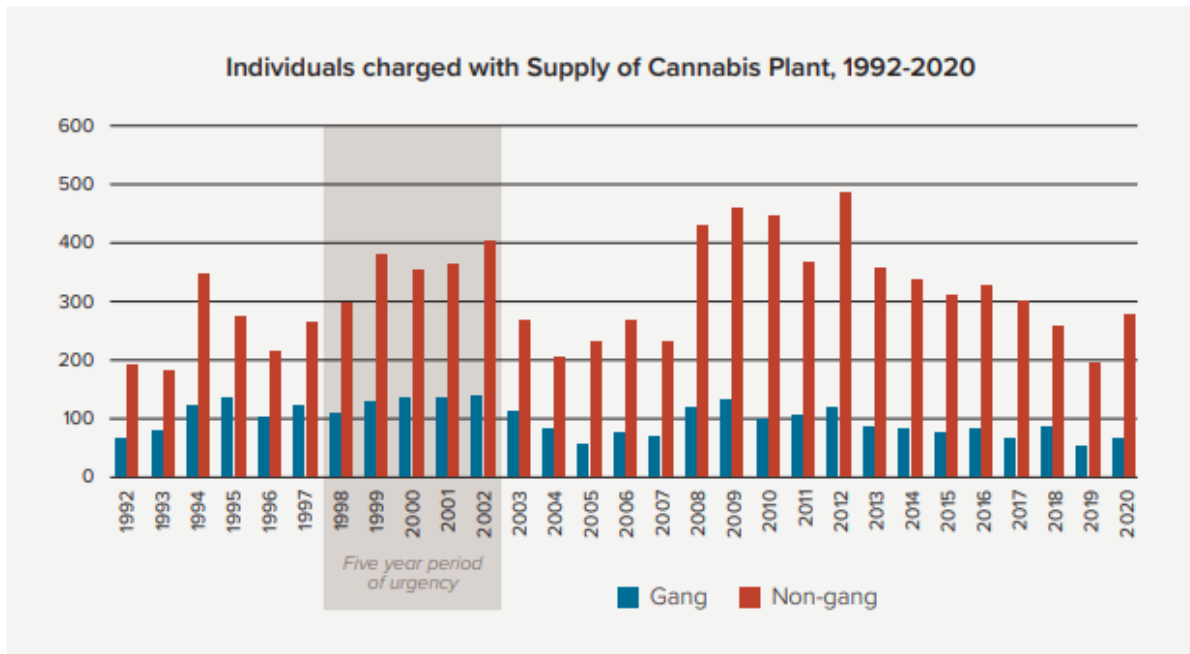
²⁰ [New Zealand National Party & New Zealand First](#) and [New Zealand National Party & ACT New Zealand](#).

²¹ National Party, "[100 Day Action Plan](#)," [full document](#). Quote from "[Real consequences for crime](#)," [full document](#).

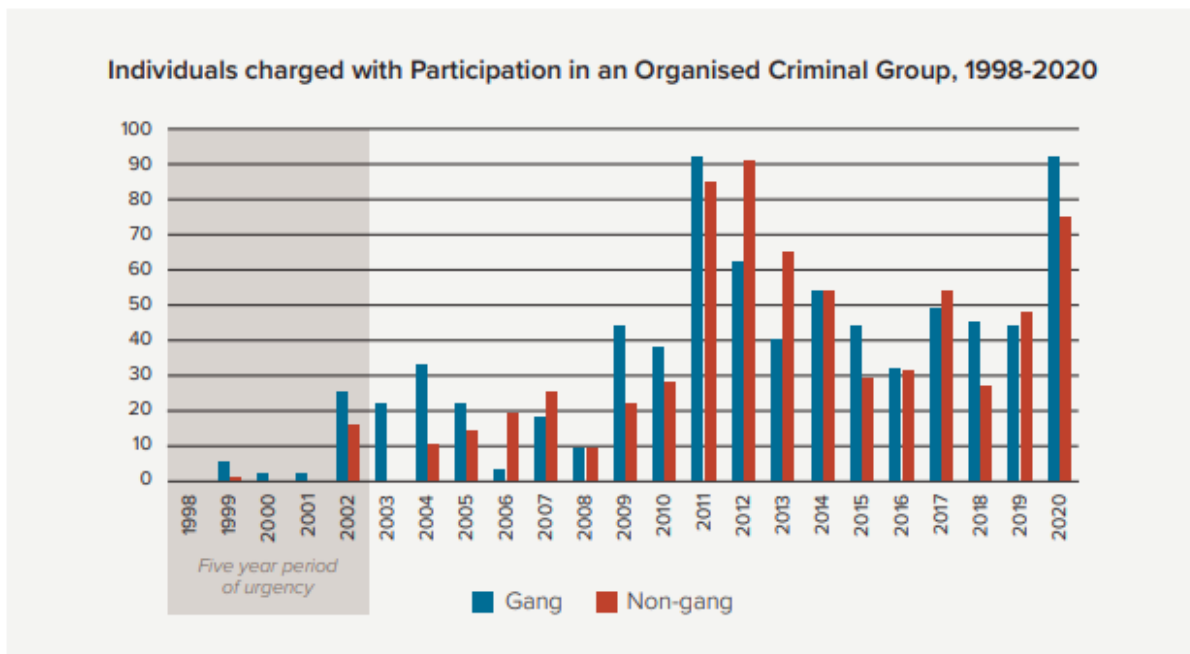
²² [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pg 37, 47.

²³ Misuse of Drugs Act 1975, section 7(b) [Possession and use of controlled drugs](#), in conjunction with [Part 1 of Schedule 3: Class C controlled drugs](#), which lists Cannabis.

²⁴ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic](#), Pgs 32-34.



25. Similarly, the offence of participation in an organised criminal group²⁵ has been charged against gang members or associates in a slight majority of cases (59.8% on average across 1998-2020 data).²⁶ While the number of charges is low, it reaffirms that participation in an organised criminal group is not synonymous with gang membership.



26. These statistics may overstate the involvement of the gangs themselves. The relevant organised offending may reflect a subset of members operating together, without any organisation by the gang structure as a whole. This is the case in Australia, where “most

²⁵ Crimes Act 1961, section 98A [Participation in an organised criminal group](#).

²⁶ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic](#), Pgs 34-35.

outlaw motorcycle gang chapters do not engage in organised crime as a collective unit, but rather as small numbers of members who criminally conspire with other criminals.”²⁷

27. For example, a study of Australian gangs found that offending was concentrated among a relatively small group²⁸ with approximately 5% of gang members responsible for 42% of all offences committed by gang members. And around 4% responsible for 70% of criminal enterprise offending by gang members. This is consistent with other studies from overseas showing that offending is not uniform among gang members and groups.
28. Conversely, whenever gang members do offend, the pre-existing gang network can more easily enable the offending to involve multiple people in an organised manner.²⁹ Certain types of offending that are more likely to fit this include drug offending, firearms offending, and money laundering, relative to their share of offending overall.

There is a spectrum of gang organisations

29. New Zealand’s Gang Harms Insights Centre³⁰ identifies that there are different types of gangs with different capacities of involvement in organised criminal offending.³¹
30. At one end are those groups that are highly focused on organised criminal offending.³² The leaders and facilitators of these gangs tend to be focused on profit-generating offending, such as supply of illicit drugs (from cannabis to methamphetamine) and related activities such as money laundering. These illicit assets are then used for recruitment, which can be especially enticing for young persons living in deprivation.
31. At the other end are gangs that are more focused on the social dimension, as noted at paragraphs 8-9. Some members may engage in offending, but it is not organised or endorsed by the gang itself and often tied in with the same risk factors discussed at paragraph 10. For example, individual drug use, or violence related to untreated mental health disorders.
32. Some gang members and gang organisations have recently moved toward more pro-social behaviours, and are motivated by providing better experiences for themselves and particularly their children and families.³³ For example, organising meals for school children, standing guard at Mosques following the Christchurch terrorist attack, partnering with the Waikato District Health Board to provide the Hearty Hauora event, and encouraging whānau to participate in the COVID-19 vaccine drive.
33. Some gangs are also trying to employ strategies within the gang, such as the Mongrel Mob’s ‘Whānau First’ rule advocating for no violence within gang whānau, and the

²⁷ Australian Crime Commission, per the [Queensland Organised Crime Commission of Inquiry](#), October 2015, Chapter 2.2: Outlaw motorcycle gang criminal activity, Pg 24.

²⁸ Morgan et al., [Australian outlaw motorcycle gang involvement in violent and organised crime](#), 5 February 2020, Trends & Issues in Crime and Criminal Justice (Issue 586), Australian Institute of Criminology.

²⁹ Ibid, “Groups with a higher percentage of both members and office bearers with criminal records were assessed as being further along the criminal organisation continuum... [Such groups] attract members with a propensity for committing violent and organised crime, and facilitate further offending among their members.”

³⁰ The [Gang Harm Insights Centre](#) works to understand gang communities, and maintains the National Gang List.

³¹ [Toward an understanding of Aotearoa New Zealand’s adult gang environment](#), PMCSA, Pg 38.

Jarrold Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, Pgs 670-674, “influential elements, usually within the leadership, can distinctively shape different groups... [and gangs may best be] described as ‘grey organisations’, neither fully legitimate or illegitimate...”

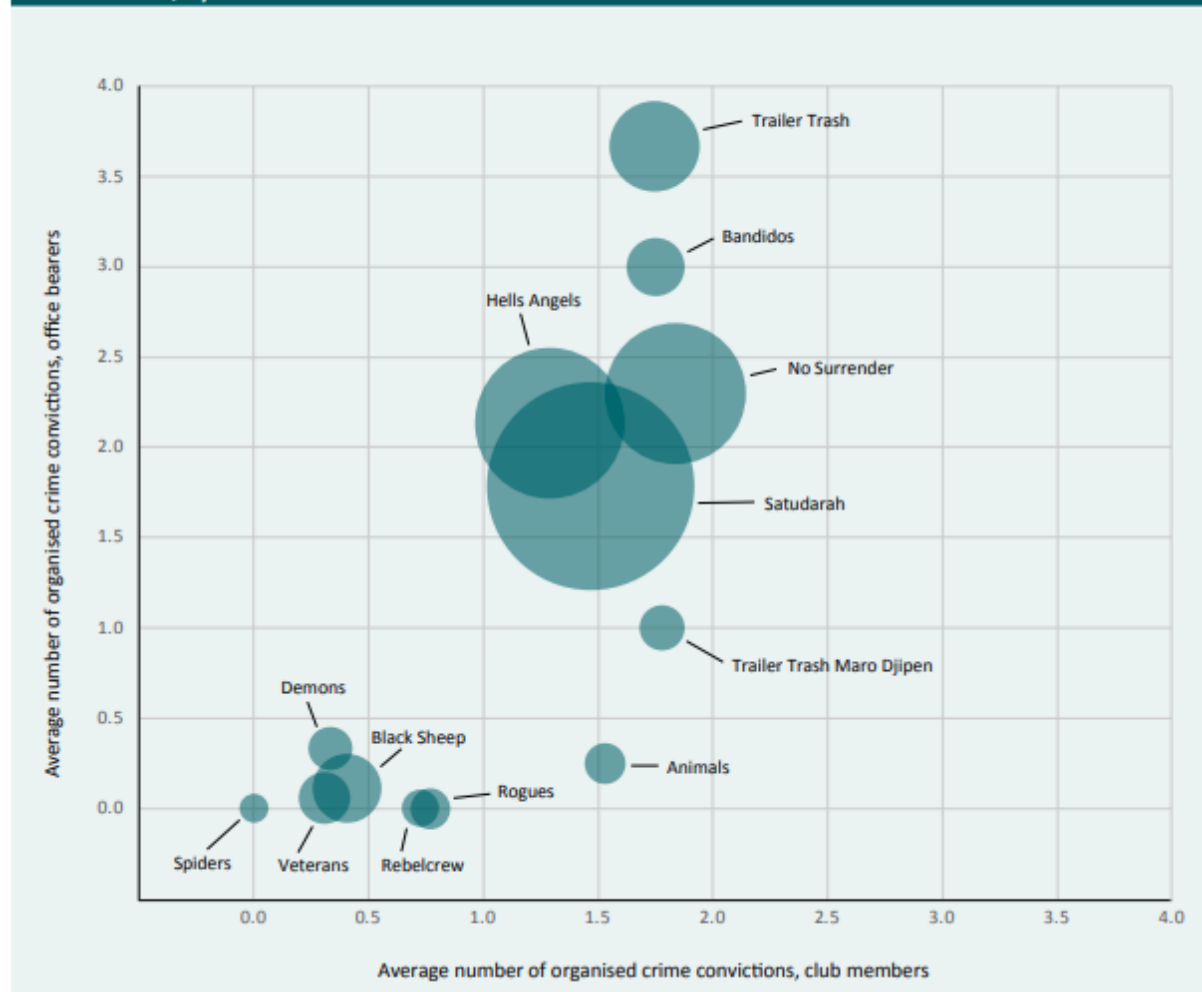
³² [Toward an understanding of Aotearoa New Zealand’s adult gang environment](#), PMCSA, Pgs 48-52.

³³ Ibid, Pgs 57-58.

Black Power Movement Whakatāne aiming to improve the wellbeing of their members and their families through a tikanga-based process.

34. This is a pattern we see internationally. For example, in the Netherlands, organised criminal offending was concentrated among the leadership of a subset of Dutch gangs, and others “whose members are hardly involved in organised crime... As with individual [outlaw motorcycle club] members, there appears to be substantive variation between [outlaw motorcycle club groups] in the criminal involvement of their membership.”³⁴

Figure 1: Average number of organised crime convictions (from age 12 up to 2015) for OMCG members and office bearers, by club



Stakeholders

35. Key stakeholders that the policy problem involves or impacts include victims of gang harm, including communities experiencing gang violence (such as local communities in the districts where ROCC is underway), people who are members of a gang, whānau of gang members, and government agencies tasked with implementing the new proposals. As many gang members in New Zealand also whakapapa Māori, proposals aimed at gangs are likely to disproportionately impact on Māori.
36. Consultation with these communities did not occur due to time constraints in preparing the policy proposals within the 100-day timeframe. Further details on consultation that was undertaken are outlined in the subsection at paragraphs 86-89.

³⁴ Teun van Ruitenburch and Arjan Blokland, “[The Dutch approach to outlaw motorcycle gangs](#),” Australian Institute of Criminology, Trends and issues in crime and criminal justice, No. 655 September 2022, Pg 3-4.

The overarching objectives in relation to gang harms

37. The objectives are to improve public confidence in law and order and reduce gang offending. Instances of serious crime such as inter-gang violence, harassment, and intimidation undermine the public's sense of safety in their communities.
38. We only have indirect measures of how gang harm affects public confidence in the justice system. For example, issue polling from 2023 found that law and order was the second biggest issue for New Zealanders, with 40% rating it as a matter of concern.³⁵
39. These concerns reflect highly-visible confrontations, in part due to the growth in gang membership (including the increase in gangs from overseas); as noted at paragraphs 5 and 7. These include:
 - 39.1. the 2021 Sofitel hotel shooting between the Head Hunters and the Mongols in Auckland;³⁶
 - 39.2. the 2023 school closures in Ōpōtiki during the increased gang presence for a tangi following the death of the president of the Mongrel Mob Barbarians;³⁷
 - 39.3. as well as incidents of citizens unconnected to gangs being caught in the crossfire, such as neighbours scared of being hit by drive-by shootings.³⁸
40. A secondary objective that follows from this is distinguishing between gang conduct that causes harm and that which doesn't. This is because, while only a small share of the general public are likely to be a victim of crime, perceptions of public safety and law and order are influenced by highly-visible cases like those above.³⁹
41. For example, Whanganui District Council attempted to ban gang patches in public in 2009. In an October 2009 telephone survey of Whanganui residents, just under a quarter of participants reported direct contact with gang members. Of those, 56% described their interaction as positive, while 3.7% reported a negative interaction, with the rest reporting the contact was neutral.⁴⁰ However, the small share with a negative interaction can have an outsized influence on public confidence.
42. It is therefore important to focus resources on what is effective at preventing cases of significant crime. The evidence indicates prevention has a more significant impact on public confidence than punishments after the fact.⁴¹ Prevention not only reduces the number of victims but means fewer high-visibility crimes reported in the news.

³⁵ This was "a record high in the Ipsos survey," Jane Patterson, "[Law and order now number two issue for voters, but most still concerned about the cost of living](#)," Radio New Zealand, 9 June 2023

³⁶ Craig Kapitan, "[Luxury hotel shooting trial: Head Hunters trio sentenced to prison for high-profile Auckland shooting](#)," New Zealand Herald, 21 March 2023. .

³⁷ Luke Kirkness, "[Ōpōtiki Mongrel Mob Barbarians death: Police presence at tangi for slain Mongrel Mob Barbarians president Steven Taiatini](#)," New Zealand Herald, 14 June 2023.

³⁸ Nick Truebridge, "[Police scramble to calm tensions after Auckland gang shootings](#)," Radio New Zealand, 25 May 2022.

³⁹ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 2, "Perceptions of Crime and Justice."

⁴⁰ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), PhD Thesis, 2010, Pg 656. "Given the relatively small sample size (109 respondents), the results of the survey can only be viewed as indicative, with an approximate 95 percent confidence level of plus or minus 9.5 percent."

⁴¹ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 11.2, "Increasing punishment does not tend to increase public confidence."

The overarching criteria and scope for options

What criteria will be used to compare options to the status quo?

43. The following criteria have been used to analyse options for each proposal.

Criteria	What this means
Public confidence	The public's sense of safety, ability to go about their communities without disruption, and confidence that law and order is able to be enforced. This is influenced by the visibility of gangs, as well as rates of offending, especially highly-visible instances of significant harm.
Reducing gang membership	The effectiveness of the proposals at facilitating gang members to exit from gangs, meaning to cease affiliation and disengage from participating in activities organised by those groups.
Reducing rates of offending	The effectiveness of the proposals in preventing or disrupting behaviour that is harmful to the public, and/or cultivating desistance from criminal activity by gang members (whether or not a person remains a member or associate of a gang).
Compliance with the New Zealand Bill of Rights Act 1990 (NZBORA)	<p>The degree to which the proposals limit a person's rights under NZBORA, and the extent to which these are justified or mitigated. Those rights most likely to be affected include the:</p> <ul style="list-style-type: none">• freedom of expression,• freedom of peaceful assembly,• freedom of association,• freedom of movement,• freedom from discrimination, and• right to be secure against unreasonable search and seizure.

44. We have given more weight to criterion 3 (reducing rates of offending), as this criterion most directly reflects harm caused to the public. We also give this criterion the most weight because of its relationship to the other criteria:

44.1. Public confidence in law and order would be higher if gang members did not engage in highly-visible and serious offending (per criterion 1);

44.2. If gang members did not offend, we consider there would be significantly less concern about their membership in those groups (per criterion 2); and

44.3. Whether the proposals are necessary to prevent offending is likely to determine whether the proposals are justifiable in their limitation of rights (per criterion 4). Also, if laws are inconsistent with NZBORA, there is a risk they end being ineffective in practice, which risks reducing public confidence in the law.

45. From the evidence below at paragraphs 62-81, there is likely to be a trade-off between focusing on gang membership versus focusing on reducing rates of offending. Both in terms of how law enforcement allocate their resources, and the relationship gang members have with the state (in terms of engaging with social and economic programs that might affect their ability to disengage from a gang or desistance from crime regardless).

What scope will options be considered within?

46. Our scope has been limited by the Government's coalition agreements to introduce legislation progressing the relevant gang policies within a 100-day timeframe. Cabinet considered how the new powers will be enforced, and Police will rely on existing search powers.
47. Officials considered options within those outlines. We have included our analysis of different aspects relevant to each proposal in the respective sections. If more time was available, agencies may have analysed additional options such as those discussed at paragraph 80, and may have been able to provide more detailed advice on reducing gang offending.

Review of the new arrangements

48. The Government has directed agencies to conduct a review in two years of the new legislation that enacts the policy changes. This is reflected in the Regulatory Impact Analysis requirements for proposals that are part of the Government's 100-Day Plan.
49. The Government has agreed that the Ministry of Justice, in consultation with operational agencies, review the performance of the legislation after it has been in force for at least 2 years, as part of the Ministry's ongoing regulatory stewardship responsibilities. This will provide time for the new powers to be implemented, and gather data, as well as flexibility to the Ministry to respond to the Government's other priorities at the time.

Overall options for addressing gang harm

- 50. As noted in the overview: there is substantial variation in the conduct committed both by individual gang members, as well as among different gangs as a whole. And the objectives are to reduce the harm they cause and so improve public confidence.
- 51. Those objectives could take the form of either disengagement from gangs that commit offending (for those willing and able to exit), and/or desistance from crime (even if the person remains a member or associate). Below, we discuss the overall approaches, and how they relate to the evidence on how those objectives might be achieved.

The package of proposals seeks to deter gang membership

- 52. The Government's four proposals are to: prevent the public display of gang insignia, stop disruptive gang gatherings in public, stop known gang offenders from consorting, and increase the severity of punishments for gang members who offend. Cabinet agreed to modified versions of the proposals [100-23-MIN-0004 refers], reflecting agency recommendations, as described in the respective sections.
- 53. This package reflects the intent to "make membership of a criminal gang as unappealing as possible." The cumulative effect may be more than the sum of its parts. This impact may not easily be captured when analysing the proposals in isolation.
- 54. In aggregate, these policies seek to shift the government's response to gang harms closer to that of Australia (which uses the criminal law to suppress the public visibility gangs), and away from jurisdictions like the United Kingdom and United States (which use the criminal law to respond to specific criminal activities of organised crime groups).
- 55. The goal is to increase the disincentives for being a member in a gang. This reflects the idea that if membership is deterred, this will reduce offending by removing individuals from groups that have encouraged engagement in offending.
- 56. As noted in the evidence below, there are examples that indicate such policies can reduce the public visibility of gangs (at least in certain places, for a time), and help Police target high-risk gang members/events. This can be expected to contribute to increased public confidence in law and order.
- 57. However, the maintenance of increased confidence will depend on how effective the suppression approach ultimately proves to be in reducing crime and victimisation over time. There is no strong evidence to suggest that a suppression approach will work to reduce offending behaviours by gang members in the long-term, nor eliminate gangs.

Existing responses focus more on reducing harm

- 58. As noted in the overview, the current approach under TNOC and ROCC aim to reduce organised crime, rather than targeting a reduction in gang membership *per se*. The existing frameworks include a range of changes working their way through the system:
 - 58.1. The 2023 law changes to improve Police's tools to prevent firearms offending, deter reckless drivers, and forfeit proceeds of crime, noted at paragraph 17;
 - 58.2. The 2019 launch and implementation of ROCC in 4 Police districts, combining social and economic investments with targeted enforcement, and ongoing expansion to 3 additional localities, noted at paragraph 15; and
 - 58.3. The Government's commitment to train at least 500 new frontline police.

59. These interventions have shown initial success in supporting Police to address the high-profile instances of gang offending. With further time to implement and embed, we would expect to see their positive impact grow, with a corresponding effect on community confidence.
60. The above efforts distinguish between conduct that is harmful versus gang members engaged in pro-social activities, such as the examples at paragraph 32. This gives Police the operational flexibility to work with gangs to improve their conduct. For example, helping make gang runs non-disruptive to communities, while still enforcing the law where they fail to comply. This is consistent with the evidence that punishment alone is less effective at shaping behaviour.⁴² Focusing on deterring membership may close off these opportunities to work with gangs to facilitate lawfulness at a group level.
61. In addition, making the above distinction may be more effective at improving public confidence in the long-term, as noted at paragraphs 40-42. Targeting gangs as groups – including where their conduct is not harmful – is likely to have minimal impact. This is because the majority of the public have little or no contact with gang members,⁴³ and policing non-harmful conduct will not address those high-visibility instances of serious crime that cause people to feel unsafe.

Evidence on how the options achieve the objectives

Australia exhibits trade-offs in focusing on membership over offending

62. While Western Australia's new law was one of the impetuses for the specific proposals addressed in this Regulatory Impact Statement, we noted at paragraph 19 that there is limited data or analysis on their use due to their recency. However, other Australian states have also equipped Police with similar powers with the intent to suppress gang membership and activity, such as anti-consorting laws and insignia restrictions.⁴⁴
63. The Australian experience demonstrates some potential benefits to these kinds of tools. For example, the New South Wales' Ombudsman reviewed their anti-consorting law. They heard from their Police Force that disrupting the ability of outlaw motorcycle gang members to meet freely and regularly reduced "gang runs" (motorcycle convoys), which can improve the public's sense of safety and confidence in law and order.⁴⁵
64. However, the report noted that the powers can capture people who are participating in everyday, otherwise innocent, social interactions in public spaces, or who are involved in only minor or nuisance offending. This is due to the absence of requirements for police officers to prove or suspect that individuals targeted are involved in criminal activity, or that use of the consorting law may assist to prevent crime.⁴⁶

⁴² Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 4.7, "Behavioural science has advanced and there are now more effective tools to shape behaviour than punishment alone."

⁴³ Jarrod Gilbert, [*The rise and development of gangs in New Zealand*](#), PhD Thesis, 2010, Pg 674, "Due in part to a police force unwilling to take bribes, those members of the public who complain of gang harassment are supported by the law. With this knowledge, gangs have tended not to target outsiders for taxing or intimidation, and therefore the wider public is generally deemed untouchable and off limits..."

⁴⁴ Bartels, Henshaw, & Taylor, (2021), [Cross-jurisdictional review of Australian legislation governing outlaw motorcycle gangs](#). *Trends in Organized Crime*, 24(3), 343–360.

⁴⁵ Ombudsman, New South Wales, [The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900](#), April 2016, Chapter 7. Discussion of the use of the new consorting law, Pgs 49-51.

⁴⁶ Ibid, Chapter 11, Is the consorting law operating fairly and reasonably? Pgs 114-118.

65. The New South Wales' Ombudsman recommended narrowing the scope of the anti-consorting laws so that they could only target serious and organised crime. They noted this would be likely to reduce inappropriate or unnecessary use of the laws and ensure law enforcement resources are being used more proportionately and efficiently.
66. Similarly, the Queensland Organised Crime Commission of Inquiry found that its state's focus on gangs had resulted in a loss of visibility of other areas of organised criminal activity.⁴⁷ They noted that gang members accounted for less than 1% of overall offending in Queensland charging data. This included a rate of charges for drug-offending (27%) that is comparable to that in New Zealand, per paragraph 24.
67. There is a risk that various Australian States efforts merely displaced the problem. Queensland's statistics indicated only a 4% reduction in membership in the 2 years following their 2013 law with "no discernible impact on general crime."⁴⁸ The extent to which jurisdictions reduced the visibility of gangs may simply be a product of driving them further underground (maintaining connections more covertly) or relocating to other Australian states with fewer restrictions. New Zealand's unitary nature means there is no alternative jurisdiction to which gang members could relocate.

Gang exit can be beneficial, but is difficult and not required to reduce crime

68. Gang members leaving gangs is correlated with positive outcomes,⁴⁹ such as more pro-social behaviours like less time in prison and higher rates of employment.⁵⁰ Part of this correlation simply reflects the general pattern of people offending less as they age.⁵¹
69. There are various reasons that a person may exit a gang, many related to maturation and significant life events.⁵² For example, parenthood and family responsibilities, new employment, victimisation (including fear of violence from other gang members), physical distance (from moving to a different area), disillusionment (deteriorating intra-gang relationships, or desensitisation to previously-rewarding aspects of gang life).
70. Some government services and supportive relationships may assist with this goal. However, many of these are generally available to gang members only while serving a prison sentence, and not always accessible outside of this context.⁵³ Often, they are tied to conditions for release, rather than the goal of supporting the individuals to live an offence-free lifestyle. For example, more psychologists are employed by Corrections than by Oranga Tamariki.⁵⁴

⁴⁷ [Queensland Organised Crime Commission of Inquiry](#), October 2015, Chapter 2.2: Outlaw motorcycle gang criminal activity, Pgs 24-25.

⁴⁸ Goldsworthy & McGillivray, March 2017, [An examination of outlaw motorcycle gangs and their involvement in the illicit drug market and the effectiveness of anti-association legislative responses](#), *The International Journal of Drug Policy*, Vol 41, 110-117, Pgs 115-116.

⁴⁹ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pgs 61, 67.

⁵⁰ Armon Tamatea, ["I know our people": Exploring community approaches to gang member reintegration II](#), Practice: The New Zealand Corrections Journal, Volume 6 Issue 1, July 2018, at "Acceptable outcomes."

⁵¹ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Figure 18: Future offences expected by riskiest 100 individuals at each age.

⁵² [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pg 65-66.

⁵³ Ibid, Pg 65, 77-81, 83-85.

⁵⁴ Ibid, Pgs 78.

71. At the same time, it can be challenging for a person to want to exit a gang.⁵⁵ For many, this would be synonymous with cutting their social and whānau ties and support networks, as well as discarding a part of their self-identity with which they have positive associations. This is compounded by their gang (and possibly criminal) history creating a barrier to employment. This helps explain why some gang members remain in the gang environment their whole life.
72. It is therefore not realistic to expect many gang members to exit, regardless of external incentives. And there is no strong evidence that suppression by law enforcement is effective at doing so.⁵⁶ Conversely, if a person in a gang desists from offending, their gang membership is not inherently a concern.
73. Evidence indicates that criminal offending by gangs can be reduced even if their membership is unaffected. For example:
 - 73.1. the effectiveness of intensive policing using existing law enforcement powers (focused on offending),⁵⁷ which successfully quelled previous spikes in gang violence such as the 1996 gang wars in Christchurch and Invercargill.⁵⁸ This is consistent with criminological studies that increasing the certainty of punishment modestly deters crime, whereas severity of punishment has a minimal effect.⁵⁹
 - 73.2. similarly, more recently, Police have operationally increased monitoring of gang runs and made use of the new powers described at paragraph 17. Police report gang members are increasingly aware that they are likely to be held accountable for their actions, including traffic or firearms offending and outstanding breaches, so are more compliant when they attend gang runs and have had fewer reported inter-gang altercations.⁶⁰
 - 73.3. the efforts by some gang communities to adopt pro-social behaviours (as discussed at paragraphs 32-33), encouraging desistance from crime even for those who remain a member or associate.

Imprisonment for non-harmful conduct can entrench gang membership

74. Powers that seek to discourage gang membership with the threat of punishment risk criminalising behaviour that is not harmful and would be lawful if committed by someone who is not a gang member. For example, targeting displays, gatherings, or associations based on the class of people they involve.
75. Where imprisonment for non-harmful conduct occurs, it could counterproductively entrench gang membership and presence for affected individuals, whānau, and communities. Incarceration is correlated with a range of negative health, behavioural,

⁵⁵ Ibid, Pgs 57, 64-65.

⁵⁶ Ibid, Pg 70.

⁵⁷ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), Thesis, 2010, Pgs 683, "legislation [that] attacked criminal behaviour and not the gangs themselves (unless they committed crime)... avoided any possibility of the gangs drawing strength or cohesion from specifically targeted 'gang' legislation."

⁵⁸ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic](#), Pgs 14-15.

⁵⁹ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 4, "Punishment and deterrence;" citing Pratt, Cullen, Blevins, Daigle, & Madensen, (2006). The empirical status of deterrence theory. In F. Cullen, J. Wright & K. Blevins (eds). *Taking Stock: The Status of Criminological Theory*. New Brunswick, NJ: Transaction Books.

⁶⁰ New Zealand Police, Aide Memoire for the Minister of Police: *Gangs and Organised Crime: responding to make a lasting difference*, paragraphs 21-23, 8 December 2023

and psychological outcomes, including increased involvement in criminal activity.⁶¹ And a parent's involvement in the criminal justice system is a key predictor of children's later involvement with the Corrections system.⁶²

76. As incarceration is expensive, this has flow-on consequences of requiring resources that could otherwise be spent on victim support, crime prevention, or behavioural rehabilitation.⁶³ Incarceration can be cost-effective at keeping the public safe from the highest-risk offenders. However, as those already in prison are those most likely to offend, the marginal return on investment from imprisoning lower-risk offenders tends to produce less benefit than cost.⁶⁴
77. It is worth noting that, while prisons have been thought of as a recruitment ground for gangs, this is not borne out by the data. Most gang members in prisons were identified as such when they arrived, and very few people that arrived without a gang affiliation were recorded as having left with one.⁶⁵

There is a risk of crowding out opportunities to foster pro-social behaviour

78. New Zealand's current approach to gang harms focuses on preventing and responding to offending, as well as building resilience in our communities, as described in paragraphs 12-16. A shift to focusing on gang membership would change the relationship between the state and gangs. Under the status quo, it is possible for gang members to have positive interactions, if they are not engaging in criminal activity.
79. In contrast, a strategy of policing membership could reinforce anti-social attitudes and mistrust among gang members, making it harder for ROCC to reach this population with social and economic interventions that help prevent (re)offending.⁶⁶ This risks:
 - 79.1. making it more difficult for people to exit gangs (for those willing to disengage), or to desist from crime (for those who remain a member or associate);
 - 79.2. undermining relationships between gangs and law enforcement or other agencies, thereby reducing prevention opportunities such as the de-escalation of gang tensions or social service delivery to address needs;
 - 79.3. undercutting efforts to cultivate pro-social activity within gang communities, for those groups that have moved towards adopting such behaviours; and
 - 79.4. making it harder for whānau experiencing violence, particularly domestic violence, to seek help.

⁶¹ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pg 53.

⁶² Ibid, Pgs 74-75; and

Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 1.7, "Crime within families harms children and continues the cycle of abuse and neglect" and Chapter 8.7, "Prevention and rehabilitation are linked because of intergenerational risk transfer."

⁶³ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 4, "Punishment and deterrence," "An evidence-based approach to punishment would limit its use to the minimum necessary to maintain public confidence."

⁶⁴ Ibid, Chapter 5.4, "The more that incapacitation is used, the less effective it becomes," "Return on Investment... in terms of crimes prevented is less than \$1 for more than 90% of those sentenced to imprisonment."

⁶⁵ [Toward an understanding of Aotearoa New Zealand's adult gang environment](#), PMCSA, Pg 51.

⁶⁶ Ibid, Pgs 73-81, 86-89.

80. The existing interventions in part recognise it is possible for gangs to have pro-social motivations. Public safety can be improved by tapping into these motivations by:⁶⁷
 - 80.1. Improving the relationship with the state: leaving the groups intact while rendering them non-violent by effectively reinforcing the positive aspects of their behaviour (as noted at paragraphs 8-9 and 31-33); and
 - 80.2. Changing the dynamics at an organisational level: by assisting gangs in resolving disputes peacefully, reducing violent spill-over to the community.
81. For example, the Scottish Violence Reduction Unit took a prevention approach to address the conditions that allow violence to develop before they get worse (some of which, such as the Community Planning Partnership, has similarities to ROCC interventions). This reduced homicides by 35% between 2010 and 2020.⁶⁸

Targeting gangs will affect Māori and their whānau the most

82. As is reflected in the research, gang members are disproportionately young, male, live in more deprived communities, and as noted in the overview three-quarters of those on the National Gang List are Māori. Any policies that impact gangs will therefore disproportionately impact Māori. The primary, direct impact of punitive measures will be to increase rates of convictions and potentially imprisonment.
83. By the same token, gang members and their whānau are also more likely to be victims of crime, so any reduction in gang harms will also disproportionately benefit these groups.⁶⁹ For example, women and children related to gang members have a heightened risk of experiencing abuse, and fear of violence may be a barrier to leaving such a relationship.⁷⁰
84. Given the significant adverse impacts of imprisonment, as described at paragraphs 74-76, on-balance the net-impact is likely to be negative. The downstream effects may also require additional social assistance as result of the disruption to whānau, particularly where a parent is on remand or incarcerated.
85. In particular, there is likely to be an impact on the cohort of tamariki and rangatahi who have parents or caregivers with gang affiliations that become incarcerated. This cohort face an increased risk of coming into state care, which is associated with an increased risk of gang membership at paragraph 11. It would also engage the responsibilities of the state under the Oranga Tamariki Act 1989.⁷¹ This includes protecting, upholding, and actively recognising the mana tamaiti (inherent dignity) of the tamariki/rangatahi, their whakapapa, and the whanaungatanga responsibilities of their family, whānau, hapū, iwi and family group.

⁶⁷ Armon Tamatea, [“I know our people”: Exploring community approaches to gang member reintegration II](#), Practice: The New Zealand Corrections Journal, Volume 6 Issue 1, July 2018, at “Agency-specific factors: Operational barriers” and “Gang-specific factors: Responsiveness barriers.”

⁶⁸ [Scottish Violence Reduction Unit: Five-Year Strategic Plan](#), September 2021, Pgs 4-5, 23, 28-32.

⁶⁹ [Toward an understanding of Aotearoa New Zealand’s adult gang environment](#), PMCSA, Pg 25-31.

⁷⁰ Family Violence Death Review Committee, [Fourth annual report: January 2013 to December 2013](#), June 2014, at 3.3.1 “Family violence in the context of gang involvement”

⁷¹ Including relevant international obligations such as the United Nations Convention on the Rights of the Child.

Consultation

86. Consultation with most stakeholders did not occur due to time constraints in preparing the policies within 100-days, as noted at paragraph 36. This includes the general public or communities with high concentrations of gang activity.
87. In the time available, information was obtained from the Western Australia Police Force (at paragraph 20), and consultation was undertaken with relevant government agencies, particularly those tasked with implementing the proposals. These include Police, Crown Law, the Department of Corrections, Treasury, Oranga Tamariki, Te Puni Kōkiri, the Ministry for Pacific Peoples, the Ministry for Women, and the Office of the Privacy Commissioner. Agency feedback has been reflected throughout.
88. In particular, Police identified a range of operational issues that could arise under the various proposals. These are reflected in the discussions of the respective options.
89. Oranga Tamariki has raised concerns about the potential impact on children (aged 12-13 years old) and young people (aged 14-17 years old) who may be gang members or prospects, or have whānau in gangs. The Ministry of Justice considers the most likely impacts on children and young people are the indirect effects (regarding potential imprisonment of whānau), discussed at paragraph 85.

Proposal 1: Prohibiting gang insignia in public

Section 1.1 Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

90. Gang patches and insignia displayed in public may cause some people to feel fearful or intimidated. The display of gang insignia as a status symbol may also assist gangs in marketing themselves to potential prospects and future recruits.
91. As gang members are readily identifiable by their insignia, the display of insignia may exacerbate inter-gang rivalries that eventuate into gang violence in public spaces. This impacts public safety and the public's feelings of fear and intimidation. At the same time, where gang rivalries exist and the members intend to confront one another, they may well recognise members of a different gang even without wearing their insignia.
92. In periods of intergang violence, Police experience is that a concerted enforcement effort and the targeted policing of gangs is necessary to prevent, suppress, and disrupt gang violence. The visibility of gang insignia has assisted Police in identifying members and building an intelligence picture that can inform Police operations.

Western Australian precedent

93. The Government's proposal was, in part, based on Western Australia's ban on displaying gang insignia in public. This includes displays on clothing, tattoos, or accessories.⁷² Its purpose was to address high visibility gang violence and organised criminal gang activity. The ban prohibits displays even if they lack any associated intent or conduct to intimidate or harm the public.
94. The offence for displaying an insignia in public has a maximum penalty of 12 months imprisonment or a fine of \$12,000, unless it falls under one of the exemptions.⁷³ Various other Australian states have also legislated against gang insignia, some including banning patrons with insignia from any licensed venue.⁷⁴

Existing New Zealand powers relating to conduct involving displays of gang insignia

95. The current Prohibition of Gang Insignia in Government Premises Act 2013 (the Insignia Act) makes it an offence to display gang insignia in both central and local government buildings such as schools, hospitals, courts, and other areas for the purposes of reducing gang intimidation. The offence is punishable by a fine not exceeding \$2,000.
96. The Insignia Act lists gangs whose insignia are prohibited and provides that the list can be updated via regulation. Gang insignia includes signs, symbols, or representation commonly displayed to denote membership of, affiliation with, or support for a gang.

⁷² [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia).

⁷³ Such as a genuine artistic or educational purpose, law enforcement, news commentary, etc.

⁷⁴ Queensland Government, Business Queensland: [Liquor licensees and organised crime](#).

97. There is a range of other offences that capture people intentionally causing fear or intimidation. The display of an insignia in public on its own would not be sufficient to make someone liable, though doing so with intimidatory intent and effect might.
98. Where any such offending occurred and involved gang insignia (such as the conduct being done by a group of gang members), then this could increase the penalty. At sentencing, a judge will take account of “the nature and extent of any connection between the offending and the offender’s participation in an organised criminal group... or involvement in any other form of organised criminal association.”⁷⁵

Act	Offence	Key elements	Maximum penalties
Summary Offences Act 1981	Section 21, Intimidation	Intent to frighten or intimidate; Knowing the conduct is likely to cause this; and Actions such as threats, following, confronting the person, etc.	Imprisonment for a term not exceeding 3 months, or A fine not exceeding \$2,000.
Crimes Act 1961	Section 86, Unlawful assembly	An assembly of 3 or more persons who intentionally conduct themselves as to cause persons in the neighbourhood to fear, on reasonable grounds, violence will be used.	Imprisonment for a term not exceeding 1 year.
Harassment Act 1997	Section 8, Criminal harassment	Commits harassment (any specified act, such as following or accosting, on at least 2 occasions within 12 months); Intent to cause the person to fear for their safety; and Knowing the conduct is likely to cause reasonable fear.	Imprisonment for a term not exceeding 2 years.
Harmful Digital Communications Act 2015	Section 22, Causing harm by posting digital communication	Posts a digital communication with the intent to cause harm (meaning serious emotional distress); Doing so causes harm to the victim; and Would cause harm to an ordinary reasonable person.	Imprisonment for a term not exceeding 2 years; or A fine not exceeding \$50,000.

⁷⁵ Sentencing Act 2002, [section 9\(1\)\(hb\), Aggravating and mitigating factors](#).

99. Police undertake significant work to manage events that may risk committing offending (and so cause intimidation) as resources allow. For example, Police operations working with gang motorcycle convoys to bypass towns and manage traffic wherever possible. This allows those groups to proceed where they are behaving lawfully. Police monitoring allows them to take subsequent enforcement action if illegal activity occurs.

Previous insignia bans have limited the freedom of expression

100. The scope of past insignia bans in New Zealand have affected whether they are a justifiable limitation on the rights protected by NZBORA. For example, the Insignia Act has been assessed as being consistent with NZBORA, on the basis that it limits rights in a way that is proportionate to the compelling public interests of preventing intimidation of staff and clients on government premises.⁷⁶
101. In contrast, Whanganui District Council's bylaw was overturned by the High Court in 2011 as it was found to be inconsistent with NZBORA. The bylaw was very broad in effect, with the definition of insignia potentially covering brand names and fashion clothing, and effectively prohibiting gang insignia in all public places in the region, creating an effect that was found to be disproportionate to the objective of reducing the likelihood of intimidation or gang confrontations.
102. The Crown Law advice⁷⁷ noted gang insignia are capable of different meanings depending on context, including the purpose and conduct of the wearer. While some symbolic expression may be perceived as intimidation, others may design and intend it as a simple statement of identity and belonging or have broad political meanings, which are protected by the core right to freedom of expression.⁷⁸

What is the policy problem or opportunity?

103. The Government's coalition agreements commit to progress the policies in the Government's 100-Day Plan. This includes prohibiting the display of gang insignia.
104. This is an opportunity to respond to concerns about the display of gang insignia in the community. The National Party's manifesto stated that gang patches can intimidate and create fear among the general public, and are used by gangs to market themselves and recruit members.⁷⁹ This proposal is part of the Government's goal to reduce gang membership and criminal gang activity and restore public confidence in law and order.
105. This proposal will impact communities and groups with high proportions of gang members and whānau in gangs, particularly Māori, people who experience gang violence, and members of the public that encounter gang violence in public spaces.

What objectives are sought in relation to the policy problem?

106. As noted in the overview, the overarching objective is to reduce gang harm. In respect of prohibition of gang insignia in public, the intended outcome is to inhibit gang members from recruiting and engaging in harassment, intimidation, or inter-gang violence. Doing so is intended to increase public confidence in law and order.

⁷⁶ Attorney-General Legal Advice, [Consistency with the New Zealand Bill of Rights Act 1990: Prohibition of Gang Insignia in Government Premises Bill](#), 18 July 2012.

⁷⁷ Attorney-General Legal Advice, [Consistency with the New Zealand Bill of Rights Act 1990: Wanganui District Council \(Prohibition of Gang Insignia\) Bill](#), 5 February 2008. This Act enabled the Council to make the bylaw.

⁷⁸ Section 14, NZBORA, [Freedom of expression](#).

⁷⁹ National Party, ["Backing police, tackling gangs," full policy document](#).

Section 1.2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

107. As discussed in the overview, at paragraphs 43-44, the following criteria will be used to compare the options to the status quo:

- 107.1. Improving public confidence;
- 107.2. Reducing gang membership;
- 107.3. Reducing rates of offending; and
- 107.4. NZBORA compliance.

What scope will options be considered within?

108. As noted in paragraphs 46-47 of the overview, our scope has been limited by the Government's coalition agreements to introduce legislation progressing the relevant gang policies with a 100-day timeframe. This included a commitment to prohibiting gang insignia in public. The details of this proposal are outlined in option two, below.

What options are being considered?

109. Three options have been identified:

- 109.1. Option One – *Status Quo*;
- 109.2. Option Two – *Prohibition of gang insignia (proposed 100-day commitment)*;
- 109.3. Option Three – *Prohibition of gang insignia (in public only)*.

Option One – *Status Quo (Ministry of Justice's preferred option)*

- 110. Police would continue to make use of the existing legislation described at paragraphs 97-99. Where gang members breach the Insignia Act or commit the offences relating to causing fear, intimidation, or harassment, Police have the powers to investigate and charge those involved.
- 111. These powers respond to the actual behaviour the insignia ban is intended to address, while limiting freedom of expression and association no more than is reasonably necessary. The existing offences differentiate between conduct that has an intimidatory intent and effect and that which does not, including the wearing or display of gang insignia.
- 112. Retaining the status quo will also continue to enable Police to more readily gather information that can help identify leaders and facilitators of gang networks, particularly where they are engaged in organised crime.
- 113. By contrast, any ban may require more effort from Police to gather intelligence to support their operations, as various patches and insignia can indicate a person's role and seniority within gangs.

Option Two – *Prohibition of gang insignia (proposed 100-day commitment)*

114. Option two includes the following key features:

- 114.1. it will be an offence to wear gang patches or to display specified gang insignia in all public places, including
 - 114.1.1. any location visible from a public place, and
 - 114.1.2. publicly accessible social media websites.
- 114.2. tattoos will be exempt; and
- 114.3. the penalty for a breach of this offence would be a maximum fine of \$10,000 and/or maximum 12 months imprisonment.

Scope of criminal liability

- 115. This ban would effectively extend the current prohibition under Insignia Act. However, the Insignia Act currently operates on the basis that there is a person who is actively displaying or wearing the insignia. This may not be the case with passive displays of insignia in private places viewable by the public (e.g. in a window of a house) or on social media. This raises challenging questions of who should be held criminally liable in such cases (discussed further in option three, below).
- 116. This option risks criminalising minor behaviour. For example, if the law applied to a gang member in their house wearing a patch who walked past a street-facing window. Similarly, the potential for criminalising the wearing of insignia without harmful intent or effect is likely to have negative criminal justice outcomes, noted at paragraphs 74-76.
- 117. The extension of the offence to social media is also less consistent with the overall justification for the offence. Insignia encountered online does not risk creating the same level of fear and intimidation in its viewer that an insignia encountered physically in public might do. However, such displays may still be used as a means of recruitment.

Implementation challenges

- 118.

Section(6)(c)

.
- 119. If a public display involves multiple gang members, a larger operational response may be required enforce a ban on the spot.

Offence and penalties

- 120. The penalties proposed for the new offence are comparable to Western Australian legislation where individuals are subject to imprisonment for 12 months and a fine of \$12,000 for display of gang insignia.⁸⁰
- 121. Lifting offences and penalties from other jurisdictions can create challenges in maintaining the coherence and effectiveness of offences and penalties across the New Zealand statute book. In particular, the proposed offence:
 - 121.1. Does not include a mental element, such as intent or knowledge. Such strict liability that carry a term of imprisonment are inconsistent with the right to be presumed innocent until proven guilty.⁸¹ New Zealand guidance requires that

⁸⁰ Section 25, [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia).

⁸¹ Section 25(c), NZBORA, [Minimum standards of criminal procedure](#).

the prosecution must prove the offender had a morally blameworthy state of mind to be liable for imprisonment, as an important safeguard against overly severe punishment.⁸² For strict liability offences to be a proportionate limit on that right, the penalty level should be kept below a sentence of imprisonment;

121.2. Has only one exemption (for tattoos), and does not cover other appropriate exceptions and/or defences to avoid criminalising legitimate displays; and

121.3. Includes penalties significantly higher than the Insignia Act's current penalty level of a fine not exceeding \$2,000. Criminological studies show that severity of punishment has a minimal effect on deterring crime.⁸³

NZBORA implications

122. As noted at paragraphs 101-102, while the existing Insignia Act was found to be consistent with the NZBORA, this was due to the narrow scope. The targeted prohibition was assessed as being proportionate to the public interest in deterring fear and intimidation from the display of insignia on government premises. These are locations where a range of members of the public may be required to gather and where the risk of avoiding the area due to fear or intimidation would be likely to have a negative impact on the public.
123. However, the Whanganui's bylaw was found to be a disproportionate limitation on freedom of expression and therefore inconsistent with NZBORA.
124. This option's full prohibition is more comparable to the latter and is therefore less likely to be demonstrably justifiable for the purposes of limiting fear and intimidation for similar reasons. In particular, displays of insignia may not inherently intend nor cause fear and intimidation, and there are less restrictive ways of achieving the purpose of deterring conduct where it has such a purpose or effect.
125. While Parliament has the authority to enact legislation that is inconsistent with NZBORA (provided it is drafted in clear language that gives effect to this intent), there are trade-offs, for example, it challenges perceptions of the law's constitutional legitimacy.

Implications on Māori and vulnerable communities

126. The insignia prohibition is limited to gang members and associates. We know that Māori make up a disproportionate share of gang membership, as noted at paragraph 9. As such, the ban, and the breach offence, will disproportionately impact Māori.
127. As discussed in the overview at paragraphs 78-79, this is also likely to reinforce anti-social attitudes and behaviour and erode trust in the justice. Particularly as this option includes the potential to impact whānau who live with gang members.

Option Three – Prohibition of gang insignia (in public only)

128. Given the above challenges of extending criminal liability widely, this option takes a narrower approach that more effectively achieves the Government's objective of prohibiting the display of gang insignia without overextending criminalisation.

⁸² Legislation Design and Advisory Committee, [Legislation Design Guidelines \(2021\), Chapter 24: Creating criminal offences](#).

⁸³ Ministry of Justice, *Towards a Humane and Effective Criminal Justice System: Evidence and Issues Paper*, 2017 internal report, Chapter 4, "Punishment and deterrence;" citing Pratt, Cullen, Blevins, Daigle, & Madensen, (2006). The empirical status of deterrence theory. In F. Cullen, J. Wright & K. Blevins (eds). *Taking Stock: The Status of Criminological Theory*. New Brunswick, NJ: Transaction Books.

Scope of criminal liability

- 129. This option would (like option two) make it illegal to wear gang patches or display specified gang insignia in any public place. However, it would not extend the ban to places visible from the public (including private premises or social media posts).
- 130. This narrowing of the scope makes this more feasible for Police to enforce and minimises the risk of criminalising a person who lacks the intent to display the insignia. It would focus on those who are actively displaying or wearing insignia.

Implementation challenges

- 131. By narrowing the ban to public displays of insignia, this makes it more feasible to enforce, in contrast to option two at paragraphs 118-119.
- 132. Option three facilitates Police discretion in how they use police resource to safely and effectively enforce a ban against displays in public by individuals or groups of gang members. This is because they will not have to enforce against displays on private property or social media.

Offence and penalties

- 133. The Ministry of Justice had proposed that option three modify the offence of displaying an insignia by:
 - 133.1. Incorporating a mental elemental element that the display was intended to create fear or intimidation or encourage others to join the gang;
 - 133.2. Including further exceptions and defences to allow for legitimate activities such as media reporting, use for satirical purposes, or displaying of insignia for legitimate government purposes (such as Police training), etc.; and
 - 133.3. Retaining the current penalty level of a fine not exceeding \$2,000, in the absence of any evidence of the need to increase the penalties.
- 134. The Ministry of Justice considered these changes would ensure the offence is coherent with other offences and penalties across the New Zealand statute book, and consistent with the guidelines for offence and penalty design.
- 135. Cabinet agreed to an offence for breaching the prohibition “without reasonable excuse” (and with prescribed exceptions). Cabinet agreed to a penalty of a maximum fine of \$5,000 or a maximum term of 6-months imprisonment (matching that for breach of a dispersal notice).
- 136. Liability for the offence is limited with the addition of “without reasonable excuse” and inclusion of exemptions (such as for artistic or educational purposes, satirical commentary or media reporting, law enforcement, etc.). However, it can still capture those who breached the ban without the intent or effect of causing fear or intimidation.

NZBORA implications and population impacts

- 137. Option three is still a significant intrusion onto freedom of expression and association, but is more proportionate than option two in capturing private displays of insignia.

How do the options compare to the status quo?

	Option One – <i>Status Quo</i>	Option Two – <i>Prohibition of gang insignia (proposed 100-day commitment)</i>	Option Three – <i>Prohibition of gang insignia (in public only)</i>
Public confidence	0	++ Reducing displays of gang insignia may make communities feel safer	
Reducing gang membership	0 It is often difficult for gang members to exit, particularly due to having whānau ties.	-- Risks gang membership being entrenched by making it harder to reach communities that distrust authorities with social and economic interventions. Degree of impact reflects scope of criminalisation.	- Risks gang membership being entrenched by making it harder to reach communities that distrust authorities with social and economic interventions.
Reducing rates of offending	0 Law enforcement operations focus on deterring offending, while social and economic investments can build pathways that help people desist from crime	-- Imprisonment for non-harmful displays can entrench anti-social networks and reoffending. Degree of impact reflects scope of criminalisation.	- Imprisonment for non-harmful displays can entrench anti-social networks and reoffending.
NZBORA compliance	0	-- The prohibition significantly affects freedom of expression and association. The prohibition extends to private places and social media where there is a lesser risk of public intimidation, justifying the limitation.	- The prohibition extending to all public places significantly further limits freedom of expression and association.
Overall assessment	0	--	-

Key: ++ much better than the status quo + better than the status quo 0 about the same the status quo
 - worse than the status quo -- much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

138. The Ministry of Justice's preferred option is option one (status quo): the existing offences (at paragraphs 97-99), in combination with the recent interventions underway (described in the overview at paragraphs 58-61).
139. The efforts under the status quo to reduce the impact of gang activities on communities (such as gang runs involving reckless driving) appear to be having a positive impact, and more time is required to implement the other recent changes. With more time to embed, we expect they will be effective at achieving the objective of improving public confidence.
140. While other options are likely to have a significant, immediate impact in increasing public confidence in law and order, they come with a range of negative secondary consequences:
 - 140.1. the risk of overenforcement is heightened by the absence of any intimidatory purpose, as was the case with the Whanganui gang patch bylaw. Mongrel Mob member Brett Beamsley was arrested when a picture of a bulldog was mistakenly identified as an insignia of the gang. The charges were dropped once the nature of the image was established.⁸⁴
 - 140.2. The risk of imprisonment for conduct that is not harmful can be counterproductive to long-term criminal justice outcomes, as discussed at paragraphs 74-76, and can undermine the efforts of the ROCC work programme to cultivate pro-social behaviour (whether by gang exit or, more realistically, desistance from offending), as discussed at paragraphs 78-79.
 - 140.3. Similarly, gangs making use of alternative ways to signify membership may make it harder to enforce the other proposals. Both proposal two (stopping gangs gathering in public) and three (stopping gang members from associating) are impeded if it is more difficult for Police to identify gang members. Police will still be required by the Privacy Act 2020's principle 8 to ensure the accuracy of the information used to identify gang members.

What are the marginal costs and benefits of the option?

141. We have analysed modified option three: the Government's preferred option of prohibition gang insignia (in public only).

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
People displaying gang insignia in public	Ongoing – Those convicted of breaching the ban are liable to a fine or a prison sentence. There is the potential for deliberate, repeat offending in defiance of the ban,	Medium – Offenders may require legal fees for court proceedings for the breach offence, with potential for fine or imprisonment.	High certainty – Will be incurred per arrest of breach against the ban.

⁸⁴ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), PhD Thesis, University of Canterbury, 2010, Pg 663.

	which could result in multiple convictions.		
People indirectly impacted by the prohibition of gang insignia (whānau and people in gang communities)	Ongoing – There will be flow-on impacts to the wider family of gang members convicted for breaching the ban.	High – Indirect impact on children and whānau of the person subject to arrest or court proceedings (with the possibility of fine or imprisonment).	High certainty – Will be incurred per arrest of breach against the ban.
New Zealand Police	One-off – Initial cost of implementing the ban including training on insignia and safe enforcement techniques. Ongoing – Cost of enforcement of the ban with Police monitoring and presence. Also, may be harder to gather intelligence on gang networks.	Medium – Enforcing the ban (especially against non-compliance) could be resource intensive, including arrests of gang members displaying insignia in public.	Medium certainty – It is likely Police would make use of the power in areas with high gang presence to maintain the rule of law (showing that the ban is enforced). Rates of non-compliance are uncertain.
Police prosecutions	Ongoing – Cost of prosecution for breach offences.	Medium – The gang insignia is likely to have the most breaches of all the proposals, resulting in costs for prosecutors.	Low certainty – Limited evidence is available to confidently forecast expected numbers of prosecutions that would occur.
Ministry of Justice	Ongoing – Cost of legal aid and collection of fines.	Medium – Low compliance with any fines would result in costs to collection.	Medium certainty – It is unlikely entrenched gang members will pay fines imposed.
Courts	Ongoing – Cost of court proceedings for breach offences, including appeals.	Medium – Breaches of gang insignia ban will be the most common of the proposals.	Low certainty – Limited evidence is available to confidently forecast expected numbers.
Department of Corrections	Ongoing – Costs for any convicted offenders whose sentences are managed by Corrections.	Low – We expect most convictions would result in a fine (rather than a sentence such as imprisonment or community work).	Low certainty – Limited evidence to estimate the number of convictions resulting in fines or imprisonment.
Independent Police Conduct Authority	Ongoing – cost of reviewing complaints regarding the enforcement of the ban by Police.	Low – We would expect a small proportion of those impact by the ban to make a complaint.	Low certainty – It is unclear the rate at which those subject arrest for the ban would lodge a complaint, or how many would be merited.

Total monetised costs	Ongoing – A broad range of monetised costs	Medium	Medium certainty
Non-monetised costs	Ongoing	Low	Low certainty
Additional benefits of the preferred option compared to taking no action			
People displaying gang insignia in public	N/A	N/A	N/A
General public (most commonly smaller communities with a relative high gang presence)	Ongoing – For communities with heavy gang presence, there may be an increase in a sense of public safety from reducing the visibility of gangs.	Low – This may have a limited impact due to the existing offences against causing fear and intimidation. In addition, members of gangs may remain even without using the insignia, or the risk of repeated flouting of the ban to retain it.	Medium certainty – Gangs might only respond to the ban following enforcement by Police, such as arrests for insignia that was displayed in public.
New Zealand Police	Ongoing – potentially a small secondary preventive effect where a enforcement for breach of the insignia ban deters (re)offending by gang members.	Low – This impact may not have much difference to the status quo in terms of offending, given existing powers and offences relating to intentionally harmful conduct. The Australian evidence suggests this may risk being offset by a lower focus on other organised criminal offending (in favor of monitoring gang members).	Low certainty – There is limited evidence with which to estimate rates of compliance from gang members or the impact on the general public, as well as how it will affect the broader strategic use of Police resources.
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Ongoing	Low	Low certainty

142. As indicated above in the analysis, the primary implications are:

- 142.1. Police will incur an opportunity cost from enforcing the ban, as opposed to investigating or taking enforcement action against other offending.
- 142.2. Ministry of Justice, and Courts will incur costs of additional prosecutions, legal aid, and proceedings that arise from charges of an offence. The Ministry of Justice will also incur the cost of collection of fines.

142.3. Corrections will incur operational and infrastructure costs for any increases in people managed (in prison or in the community) resulting from sentences of imprisonment against the ban. We expect a low rate of people who offend to serve imprisonment or home detention. Any increase (including remand) will be difficult for Correction to absorb within baseline funding, given the tight fiscal environment that Corrections is operating in, and cost pressures relating to existing population growth.

Section 1.3: Delivering an option

143. We have analysed the Government's preferred option: Three – Prohibition of gang insignia (in public only).

How will the new arrangements be implemented?

144. The proposed prohibition of gang insignias require new legislation to implement. This will come into effect when the legislation comes into force, expected to be late 2024.

Initial implementation of the prohibition on gang insignia

145. Police will undertake the bulk of the implementation for the gang insignia ban. Police will make any necessary additions or amendments to operational policy and guidelines (such as for monitoring compliance and charging of the offence), and IT systems (such as reporting codes). These aim to ensure consistency of use.
146. The Ministry of Justice will be the agency responsible for administering the legislation containing the policy. The Ministry of Justice, which provides operational support for the judiciary, will implement the required people capability, system, and process changes to ensure that the courts are prepared..

Enforcement of gang insignia ban

147. Police will be responsible for monitoring compliance with the ban and charging for breaches against the ban. This includes investigating and gathering evidence where a breach occurs.
148. These functions will be governed by the statutory criteria and any specific operational guidance on enforcing the gang insignia ban. They will also be subject to Police's existing internal processes (as with any other law enforcements powers), such as:
- 148.1. In appropriate circumstances, approval from higher ranks within Police and/or consultation with Police legal counsel;
- 148.2. Completion of community impact assessments.
149. Communities where ROCC is underway are involved in the governance arrangements that enable locally led responses to organised crime. These areas also overlap with the places that have a relatively high gang presence. As such, these communities will have input and insight into how the use of the new powers align with their priorities and interventions to address the harms and drivers of organised crime.
150. Prosecutors will follow the existing guidelines in deciding whether to proceed with a charge for the offence of breaching the prohibition on gang insignia. The judiciary is responsible for administering fines and for sentencing on conviction.
151. For any defendants, the Ministry of Justice administers legal aid. For any person convicted and sentenced: the Ministry of Justice will be responsible for the collection of fines; the Department of Corrections will be responsible for managing any persons sentenced to imprisonment, home detention, or community-based sentences.

How will the new arrangements be monitored, evaluated, and reviewed?

152. Existing mechanisms would be able to review the exercise of the insignia ban after the fact and can shape Police's operational procedures. In particular:

- 152.1. The Independent Police Conduct Authority investigates complaints about any Police practice, policy, or procedure, which will include enforcement of the insignia ban. The Independent Police Conduct Authority reports on its investigations, and can make recommendations on Police processes to better ensure they are exercised in a manner consistent with human rights standards;
- 152.2. The courts have the power to judicially review the exercise of enforcement powers, including any legal challenges concerning the enforcement of the insignia ban. If the court determines that any enforcement actions were exercised unlawfully, they can make a declaration of the applicant's legal rights.
153. If the insignia ban is enforced in regions where ROCC is underway, the existing governance structure supports accountability from those local communities.⁸⁵ This provides an avenue for retrospective feedback to Police on how the exercise of these new powers affects community safety and interacts with their ROCC priorities.
154. For any criminal proceedings, the Ministry of Justice maintains records, which will include prosecutions and convictions for the offence against the insignia ban.
155. The legislation will also be subject to the Ministry of Justice's ongoing regulatory stewardship functions, as the agency responsible for administering the legislation. These responsibilities will be informed by:
- 155.1. government data on and feedback from Police operations;
- 155.2. any Independent Police Conduct Authority reports or judicial judgements;
- 155.3. academic studies of these powers (like those referenced in the overview); and
- 155.4. any media reports regarding public stakeholders (including gang whānau and communities affected by both the insignia ban, and changes in gang members' behaviour in response to these new powers).
156. However, it will likely be difficult to statistically measure whether the legislation is achieving the purpose of reducing gang harm. While we have data on crime rates, many different factors that drive criminal activity can change at the same time. This creates uncertainty in determining whether differences in rates of offending are directly attributable to specific amendments. Especially with the risk of pushing gang membership and harmful behaviour underground, as discussed in the overview, at paragraph 67.

⁸⁵ Regional operational groups feed into the ROCC Steering Group, which shapes the overall work programme.

Proposal 2: Stopping gangs gathering in public

Section 2.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

157. Gang gatherings in public areas are associated with harms caused by the gangs from offending behaviour. This can cause fear in communities, and the risk of harm to the public, both of which can undermine public confidence in law and order.
158. For example, if a gang gathering takes the form of a vehicle convoy, this could involve dangerous driving or blocking a road. Alternatively, a gang gathering may precede or escalate to inter-gang conflict, including violence such as firearms offending. These can undermine public confidence in the Government's ability to enforce law and order.
159. Previous Police experience is that in times of escalating gang violence and tension, a concerted enforcement effort and the targeted policing of gangs is necessary to prevent, suppress, and disrupt gang violence. Police adjust their operational response as needed to manage these changing pressures.

Western Australian precedent

160. The Government's proposal was, in part, based on the introduction of dispersal notices in Western Australia.⁸⁶ Their purpose is to disrupt outlaw motorcycle gangs with the aim of reducing violent conflict and risks to public safety.⁸⁷ These notices cover gatherings without requiring a proven link to criminal activity occurring; only membership with designated groups. As dispersal notices are a relatively recent addition, there is limited data or analysis on their use.
161. Western Australia, and other Australian states and territories, also have "move-on" powers, which allow Police to direct people engaged in disorderly behaviour to disperse from a public place for a limited period of time (typically up to 6 or 24 hours, depending on the state or territory).⁸⁸ Failure to comply is an offence, typically liable to a fine.
162. Whereas "move-on" powers can be used against any person, dispersal notices specifically target adults in identified organisations. Dispersal notices are longer in duration (7 days), and the penalties for consorting contrary to a dispersal notice are higher (12 months imprisonment or a fine of \$12,000).

Existing New Zealand powers relating to gangs gathering in public

163. Currently, Police can intervene and respond to gangs gathering in public where unlawful conduct is involved. Police investigate, and can potentially arrest and prosecute, any person who is committing relevant offences (including where such offending is committed by people gathered as a gang). For example:

⁸⁶ [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia).

⁸⁷ [Second Reading](#) of the Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021, 18 November 2021, Extract from Hansard for the Western Australia Legislative Assembly.

⁸⁸ Helen Punter, "[Move-on powers: New paradigms of public order policing in Queensland](#)," Jan 2011.

Act	Offence	Key elements	Maximum penalties
Summary Offences Act 1981	Section 21, Intimidation	Intent to frighten or intimidate; Knowing the conduct is likely to cause this; and Actions such as threats, following, confronting the person, etc.	Imprisonment for a term not exceeding 3 months, or A fine not exceeding \$2,000.
	Section 21, Obstructing public way	Without reasonable excuse, obstructs any public way; and Having been warned to desist, continues obstructing.	A fine not exceeding \$1,000.
Land Transport Act 1998	Sections 35-36A, Contravention of sections 7 (drivers not to be reckless or dangerous) or 22A (street or drag racing)	Operates a motor vehicle recklessly or in a manner dangerous to the public; or Engages in unauthorised street or drag racing.	Not involving injury or death: imprisonment for a term not exceeding 3 months or a fine not exceeding \$4,500; Involving injury: imprisonment for a term not exceeding 5 years or a fine not exceeding \$20,000; Involving death: imprisonment for a term not exceeding 10 years or a fine not exceeding \$20,000.
Crimes Act 1961	Section 86, Unlawful assembly	An assembly of 3 or more persons who intentionally conduct themselves as to cause persons in the neighbourhood to fear, on reasonable grounds, violence will be used.	Imprisonment for a term not exceeding 1 year.
	Sections 306-308A, Threats to people or property	Threatens to destroy property; Discharges firearm with intent to intimidate; Threatens to kill or do grievous bodily harm; or threatens to harm people or property that would risk major damage.	Respectively: Imprisonment for a term not exceeding 3 years; Imprisonment for a term not exceeding 5 years; Imprisonment for a term not exceeding 7 years.
Harassment Act 1997	Section 8, Criminal harassment	Commits harassment (any specified act, such as following or accosting, on at least 2 occasions within 12 months); Intent to cause the person to fear for their safety; and Knowing the conduct is likely to cause reasonable fear.	Imprisonment for a term not exceeding 2 years.

164. Police also undertake significant work to minimise the risks that any gatherings pose to the public, such as a convoy of gang members riding motorcycles, and take enforcement action where illegal conduct occurs. This includes, for example:
- 164.1. Police operations working with gang convoys to bypass towns and manage traffic wherever possible, as well as monitoring and filming the progression of convoys to enable subsequent enforcement of any offending that occurred; and
 - 164.2. Powers under the Search and Surveillance Act 2012 that enable law enforcement to detect, prevent, and apprehend people committing serious criminal offences. The Act sets out detailed rights and obligations in relation to exercising those powers.
165. The Criminal Activity Intervention Legislation Act 2023 was passed recently to create new warrants to search places and vehicles and seize weapons during a gang conflict.⁸⁹ These have allowed Police to intervene in areas where a judge is satisfied a gang conflict exists (involving, or likely to involve, the use of weapons), and is satisfied the warrant may reduce the risk of harm to people or property.
166. These warrants have been effectively used in Police operations in several regions since they were enacted.⁹⁰ These have enabled the seizure of firearms from gang members who were gathered in the places where these warrants were issued, and improved public safety in the communities where there was a gang conflict (with the likelihood of criminal offending that presented a severe risk to public safety).

What is the policy problem or opportunity?

167. The Government's coalition agreements commit to progress the policies in their 100-Day Plan. This includes creating dispersal notices to stop gangs gathering in public. This is an opportunity to respond to disruptive gang gatherings.
168. The National Party's election manifesto stated that: "Gangs gather in public places in order to create fear in our communities and to intimidate law abiding Kiwis. Time and again we've seen criminal gangs block roads, harass the public, and disrupt the lives of ordinary citizens who are just trying to go about their business peacefully. The public should no longer have to put up with this sort of behaviour."⁹¹

What objectives are sought in relation to the policy problem?

169. As noted in the overview, the overarching objective is to reduce gang harm. In respect of gangs gathering in public places, the intended outcome is to reduce disruption to the lives of citizens and make the public feel safer in their communities.

⁸⁹ Via amendment inserting new sections 18A-18G into the Search and Surveillance Act 2012.

⁹⁰ Police Media Centre, [Manawatu](#) (8 August), [Tairāwhiti](#) (18 October), [Ōpōtiki and Whakatāne](#) (23 October).

⁹¹ National Party, "[Backing police, tackling gangs](#)," [full policy document](#).

Section 2.2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

170. As discussed in the overview, at paragraphs 43-44, the following criteria will be used to compare the options to the status quo:
- 170.1. Improving public confidence;
 - 170.2. Reducing gang membership;
 - 170.3. Reducing rates of offending; and
 - 170.4. NZBORA compliance.

What scope will options be considered within?

171. As noted in paragraphs 46-47 of the overview, our scope has been limited by the Government's coalition agreements to introduce legislation progressing the relevant gang policies within a 100-day timeframe. This included a commitment to stopping gangs gathering in public. The details of this proposal are outlined in option two, below.

What options are being considered?

172. Three options have been identified:
- 172.1. Option One – *Status Quo*;
 - 172.2. Option Two – *Create dispersal notices (proposed 100-day commitment)*; and
 - 172.3. Option Three – *Create dispersal notices (with recommended modifications)*.
173. Options two and three relate to different aspects of the dispersal notice proposal and appropriate safeguards. The following questions have informed the design:
- 173.1. What are the grounds for issuing (and scope of capture of) a dispersal notice?
 - 173.2. How will law enforcement establish who is a gang member or prospect?
 - 173.3. What qualifies as a "group"?
 - 173.4. What is the effect of a notice, and how it will be served?
 - 173.5. How can someone challenge a dispersal notice?
 - 173.6. What exemptions will apply to the issue of dispersal notices?
 - 173.7. What are the elements of the offence of, and penalty for, a breach?
174. An analysis of these elements can be found below.

Option One – Status Quo (*Ministry of Justice’s preferred option*)

175. This would involve Police continuing to use their existing powers (at paragraphs 163-164), in combination with the recent interventions underway (described in the overview at paragraphs 58-61), to respond to unlawful conduct arising from gang gatherings. These offences differentiate between public gatherings that have an intimidatory or harmful intent and effect and those which do not. As noted at paragraphs 18 and 73, these have proven operationally effective at preventing and disrupting offending.

Options Two and Three Overview – *Creating dispersal notices*

176. The table on the following page compares option two (proposed 100-day commitment) and option three (recommended modifications).
177. Both options two and three create dispersal notices to be issued on gang members gathering in a public place, requiring them to leave the area and not associate with one another for seven days.
178. Option three tailors the proposal to more directly respond to the problem of gang harm, such as the risk of disruption to lawful activities of the community.

Table of Options Two and Three – *Creating dispersal notices (proposed 100-day commitment and recommended modifications)*

Design features	Option Two – <i>Proposed 100-day commitment</i>	Option Three – <i>Recommended modifications</i>
<i>What are the grounds for issuing (and hence scope of capture) of a dispersal notice?</i>	Police will have the power to issue a dispersal notice to any group of gang members gathering in a public place.	Police will have the power to issue a dispersal notice to any group of gang members gathering in a public place; and Police reasonably believe that a dispersal notice is necessary to avoid the gang disrupting activities of members of the community.
<i>How will law enforcement establish who is a gang member or prospect?</i>	Police must reasonably suspect the people to be members of an identified criminal organisation, including those on the National Gang List, patched gang members, or suspected gang prospects.	Police must reasonably suspect the people to be members or prospects of a gang designated under the Prohibition of Gang Insignia in Government Premises Act 2013.
<i>What qualifies as a “group”?</i>	<i>Undefined.</i>	A group of gang members will be three or more people of a group designated under the Prohibition of Gang Insignia in Government Premises Act 2013.
<i>What is the effect of a notice, and how will it be served?</i>	A dispersal notice would require the specified gang members to immediately leave the public area, and not associate with one another for seven days.	A dispersal notice would require the specified gang members to immediately leave the public area, and not associate with one another in person for seven days. Police be given the power to issue dispersal notices on site or after the fact, as is operationally appropriate.
<i>How can someone challenge a dispersal notice?</i>	An individual subject to a seven-day dispersal notice may request a review by the Commissioner of Police if they believe it has not been issued in accordance with the legislation. Revocations must be determined by the Commissioner within 72 hours.	No change from initial proposal.

<i>Exemptions</i>	Dispersal notices would not apply to immediate family members, or those engaging in legal activities like work, education, or healthcare.	<p>Dispersal notices would not apply to immediate family members, and those engaging in legal activities like work, education, or healthcare; and</p> <p>A general exemption to the requirements of the notice when the subject of the notice is managed by Corrections, is serving a sentence, or is in lawful custody; and</p> <p>A mechanism to provide for specific exceptions for other lawful activities such as attendance at a funeral or tangi.</p>
<i>Offence and penalty for breach</i>	Breaching the conditions of a dispersal notice will be a criminal offence, punishable by a maximum fine of \$5,000 fine and/or 6 months imprisonment.	<p>Cabinet agreed to incorporate a mens rea element into the offence that the person subject to the order knowingly breached its terms without reasonable excuse.</p> <p>Cabinet agreed to a maximum fine of \$5,000 fine and/or 6 months imprisonment.</p>

Options Two and Three – Details of proposal and recommended modifications

What are the grounds for issuing (and scope of capture of) a dispersal notice?

179. The dispersal notice is proposed to be issued by Police to any group of gang members gathering in a public place.
180. Option two is framed widely, in terms of who the dispersal notice can be served on, with no pre-requisites included other than suspected gang membership. This would provide Police with a wide discretionary power in issuing the notices. This would create the following potential human rights issues and legal risks:
- 180.1. Firstly, it increases the risk that the resulting legislation will be inconsistent with NZBORA.⁹² Limitations on rights will only be justified if they are rationally connected to pressing social objectives. A pressing social objective is more likely to be difficult to establish if the focus is on the identity of the people gathering, rather than the behaviour of those making up the gathering.
- 180.2. Secondly, broad powers are liable to be inconsistently exercised. This creates a risk of actual or perceived instances of misuse or abuse. This experience is likely to be felt most acutely by Māori, even where there is no link between the gathering and harmful gang association (e.g. a family gathering where some of the whānau are gang members). This may also cause some non-gang members to also mistrust state agencies and create sympathy for the gangs.
181. Option three attempts to mitigate these challenges by including an additional element into the prerequisites for issuing a dispersal notice. Specifically, a requirement that Police reasonably believe that a dispersal notice is necessary to avoid the gang disrupting activities of members of the community. This creates a connection between the dispersal notice power and the likelihood of harmful impacts on the wider community by the gang gathering, rather than membership alone.
182. This requirement (in combination with the relatively short seven-day duration) connects the dispersal notices to a more time-sensitive purpose. This aspect better aligns the notice with other powers that are delegated to Police to issue operationally. In contrast, orders that with longer durations and/or even more significant restrictions on the rights and freedoms of those subject to them require judicial authorisation.

How will law enforcement establish who is a gang member or prospect?

183. Option two proposes that dispersal notices may be issued to anyone that the Police reasonably suspect of being a member of an identified criminal organisation, including those on the National Gang List, patched gang members, or suspected gang prospects.
184. Option three proposes that Police be empowered to issue dispersal notices to anyone they reasonably suspect of being a current patched or prospect of one of the groups designated under the Prohibition of Gang Insignia in Government Premises Act 2013, irrespective of whether the individual's name is recorded on the National Gang List.
185. Police have advised that the National Gang List is not suitable for the purpose of operationalising dispersal notices. As noted at paragraph 4, the National Gang List was created to inform intelligence and insights, not to apply prohibitions or other penalties.

⁹² Rights that are likely to be impacted are ss 16-18, [peaceful assembly](#), [freedom of association](#), and [movement](#).

Police recording of gang membership varies between districts, and there is not a clear or consistent process for removing people from the list who have exited gangs.

186. Removing references to the National Gang List does not prevent or restrict Police from using intelligence they have collected about any persons (including their presence on the list) for the purpose of satisfying the “reasonable grounds to suspect” test. Police will also still be required by the Privacy Act 2020’s principle 8 to ensure the accuracy of the information used to identify gang members.
187. As discussed in section 1.1 at paragraph 95, the Prohibition of Gang Insignia in Government Premises Act 2013 can be amended by regulation to add groups to the list of those designated as a gang under that Act. This ensures that the dispersal notices are flexible enough to adapt to, and thwart, attempts by a group to set up a separate organisation for the purpose of avoiding being subject to dispersal notices.

What qualifies as a “group”?

188. Option three specifies how many gang members are considered to form a “group” for the purpose of the dispersal notices. This recommendation was informed by precedents that use the definition of “three or more people” (such as sections 86 and 98A of the Crimes Act 1961⁹³). This integrates into the threshold for Police to issue a notice.

What is the effect of a dispersal notice, and how will it be served?

189. Option two specifies that Police will have the power to issue a dispersal notice, requiring the specified gang members to immediately leave the public area, and not associate with one another for seven days.
190. Option three provides Police with further flexibility in terms of how a dispersal notice can be issued (e.g. whether on-the-spot, or through issuing follow-up notices if real-time service is not operationally safe). This may mean the gang members had left the area before a notice could be issued, but would still be required to refrain from returning to that area or from associating with those persons identified in the notice.
191. This flexibility responds to operational uncertainties. For example, enabling Police to issue a dispersal notice after the event would be particularly useful where there is a problematic pattern of behaviour. It allows Police to serve a dispersal notice at a time and place that mitigates risk to frontline staff (i.e., when the gang member is at home).
192. Frontline safety is a particular issue in regional and smaller towns where the number of Police officers is lower, and the concentration of gang members is high.
193. Option three also clarifies that the requirement to not associate for seven days only applies to associating *in person*. This is aligned with the purpose of preventing large and intimidating gatherings in public. **Section(6)(c)**

How can someone challenge a dispersal notice?

194. The ability to challenge a dispersal notice (and potentially have it revoked before it expires) upholds a person’s right to natural justice.⁹⁴ Whereas people have a right to appeal court orders; this review mechanism is to be operationally administered by

⁹³ Unlawful assembly, and participation in organized criminal group, respectively.

⁹⁴ As reflected in [section 27](#) of NZBORA.

Police. This reflects the fact that a notice is issued by officers rather than a judge, and has a short duration, which requires a review to be able to be completed quickly.

195. Both options two and three specify that an individual subject to a seven-day dispersal notice may request a review by the Commissioner of Police if they believe it has not been issued in accordance with the legislation. Revocations must be determined by the Commissioner within 72 hours.
196. This review mechanism is necessary to ensure citizens have an opportunity to remove a dispersal notice in a timely manner, if they consider the grounds were not met. These grounds being that an officer reasonably suspected a person was a gang member, and (for option three) also that the officer believed that the notice was necessary to avoid the activities of the community being disrupted.
197. There is a degree of operational discretion in making these determinations. However, a person may not be a gang member, or considers the notice should not apply to them as their activities do not contribute to disruption of the community. For example, a parking warden or local business owner who had approached the group gathered in public and were reasonably but wrongly suspected of being part of the gang.
198. There is a risk of a significant resource burden on Police in implementing an appeal mechanism, [Section\(6\)\(c\)](#). Police will develop operational guidelines to manage the risk of frivolous or vexatious requests.
199. In addition, even after a notice has expired, existing oversight mechanisms can review whether it was issued lawfully (as with any other enforcement powers). A person may make a complaint to the Independent Police Conduct Authority about the exercise of Police powers. It can investigate and make reports on individual cases, as well as recommendations for improving operational policies. A person can also seek a judicial review of the issuing of a notice. A court make a declaration of the applicant's legal right. Both mechanisms can shape Police's operational procedures.

Exemptions

200. Option two proposes that dispersal notices would not apply to immediate family members of gang members, or those engaging in legal activities like work, education, or healthcare. This would aim to exclude those who may be gathered with, but are not members of, the gang; or gang members engaged in non-disruptive activities.
201. Option three recommends expanding this list with:
 - 201.1. a general exemption to enable Corrections to effectively manage sentences or Parole Board orders, such as probation officers interacting with gang members gathered in public; and
 - 201.2. a power for Police to authorise exceptions to the conditions of a dispersal notice on a case-by-case basis, such as to enable attendance at a funeral or tangi.
202. These exemptions would allow the orders to operate in a more proportional way, targeted to the problem of gang members gathering in such a way that risks disrupting activities of the community. Without them, the notices could prevent reasonable or lawful behaviours from occurring that do not present the same risks to the public.

203. We note that gang members who are flatmates, and are subject to a dispersal notice, will not be in breach by virtue of living together as a notice will only apply to gatherings in public (not being gathered in the same private home).

Offence and penalty for breach of a dispersal notice

204. Option two proposes that a breach of the conditions of a dispersal notice be an offence punishable by a maximum fine of \$5,000 fine and/or 6 months imprisonment. This is similar to Western Australia's offence for consorting contrary to dispersal notice.⁹⁵
205. Offences that do not include a mental element, such as intent or knowledge, are strict liability offences. Strict liability offences involve a prima facie limitation of the right be presumed innocent until proven guilty as affirmed in NZBORA.⁹⁶ A key justification for limiting this right is that the penalty level is kept below a sentence of imprisonment. This is reflected in New Zealand offence and penalty guidance⁹⁷ that strict liability offences should not carry a term of imprisonment, as requiring the prosecution to prove a mental element is an important safeguard when there is a chance of severe punishment.
206. The Ministry of Justice had proposed that option three either:
- 206.1. remove the availability of a sentence of imprisonment, or
 - 206.2. retain the sentence of imprisonment, but incorporating a *mens rea* element into the offence that the person subject to the order knowingly breached its terms without reasonable excuse.
207. The Ministry of Justice considered these modifications to limit or modify the penalties available would be proportionate to the level of state discretion, and bring this aspect into alignment with the NZBORA.
208. Cabinet agreed to incorporate a *mens rea* element into the offence that the person subject to the order knowingly breached its terms without reasonable excuse. Cabinet agreed to a maximum fine of \$5,000 fine and/or 6 months imprisonment.

Population analysis

209. Any interventions that target gatherings by gang members will have a disproportionate impact on populations that are overrepresented in gangs and their whānau. As noted at paragraph 9-10, gang membership is known to be concentrated among populations that are on average younger, disproportionately male, live in more deprived communities, and are Māori.
210. All the options (including the status quo) have this disproportionate impact. However, options two and three provide additional powers and offences that would affect this group that will target gang members, and further indirectly impact gang whānau. Option three is more limited, given the narrower grounds for issuing a dispersal notice.
211. The prevalence of gang membership within Māori communities also means that Māori are more likely to be the victims of gang-related harm. To the extent that any interventions reduce this harm they are likely to have a positive impact for Māori.

⁹⁵ [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia), section 42(1).

⁹⁶ [Section 25\(c\), Minimum standards of criminal procedure](#), NZBORA.

⁹⁷ Legislation Design and Advisory Committee, [Legislation Guidelines \(2021\): Chapter 24, Creating criminal offences](#).

How do the options compare to the status quo?

	Option One – <i>Status Quo</i>	Option Two – <i>Create dispersal notices (proposed 100-day commitment)</i>	Option Three – <i>Create dispersal notices (recommended modifications)</i>
Public confidence	0	<p>++</p> <p>Reducing visible gang presence in public areas may make communities feel safer</p>	
Reducing gang membership	<p>0</p> <p>It is often difficult for gang members to exit, particularly due to having whānau ties</p>	<p>–</p> <p>Makes it more difficult to implement social and economic interventions focused on creating pro-social pathways (for which gang members may gather to access), and which may make it harder to exit gangs</p>	
Reducing rates of offending	<p>0</p> <p>Law enforcement operations focus on deterring offending, while social and economic investments can build pathways that help people desist from crime</p>	<p>–</p> <p>Focusing law enforcement on membership risks imprisoning people who may not have committed otherwise harmful conduct; and imprisonment can entrench anti-social networks, increasing the risk of (re)offending. However, the short duration and narrow terms (to avoid associating in a public place) could make compliance relatively likely</p>	
NZBORA compliance	0	<p>–</p> <p>May limit freedoms of peaceful assembly and association under NZBORA more than is reasonably necessary to achieve the objectives</p>	<p>0</p> <p>The power limits freedom of association, though this is tempered by the requirement for officers to believe that the notice is necessary to prevent disruption to the community, which should effectively guide Police discretion in practice</p>
Overall assessment	0	–	0

Key: ++ much better than the status quo + better than the status quo 0 about the same the status quo
 – worse than the status quo -- much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

212. The Ministry's preferred option is option one (status quo): the existing powers (at paragraphs 163-164), in combination with the recent interventions underway (described in the overview at paragraphs 58-61). Their focus on harmful conduct more effectively complements social and economic interventions to reduce the drivers and harms of crime, as noted at paragraphs 12-13.
213. The efforts under the status quo to reduce disruptive public gatherings appear to be having a positive effect, and more time is required to implement the other recent changes. With more time to embed, we expect they will be more effective at achieving the objectives than the alternative options.
214. Options two and three add to Police's toolkit for responding to events like gang convoys, shifting the focus towards the visibility of gangs and their impact on their communities, rather than specific criminal offending. The key differences are that option three has more targeted scope of capture for both:
- 214.1. the dispersal notice (requiring Police to believe a notice is necessary to avoid a gang disrupting the community), and
 - 214.2. the breach offence (requiring a person to knowingly breach the conditions without reasonable excuse).
215. Both options would have the benefit of enabling Police to deter gang convoys, based on the experience of similar powers in Australia (noted at paragraph 63). Reducing these convoys can improve public confidence.
216. However, the empirical evidence suggests that such powers do not reduce crime rates relative to the status quo.⁹⁸ At the same time they create a lower threshold for a potential sentence of imprisonment, as issuing a dispersal notice does not require there to be criminal offending, and the offence requires intent to breach a notice but a person need not intend nor cause harm to the public.⁹⁹ This can be counterproductive to long-term criminal justice outcomes, as discussed at paragraphs 74-76.
217. The issuing and monitoring of such notices can place significant pressure on the professional judgment of individual Police in complex situations.¹⁰⁰ This discretion risks a lower emphasis on de-escalation and arrest as a last resort, relative to the enforcement of currently-available offences.¹⁰¹ Australia also observed unintended consequences against groups such as homeless people and young people.¹⁰² While

⁹⁸ James Farrell, [All The Right Moves? Police 'move-on' powers in Victoria](#), 1 March 2009, Alternative Law Journal, Volume 34, Issue 1.

⁹⁹ Helen Punter, [Move-on powers: New paradigms of public order policing in Queensland](#), January 2011, Criminal Law Journal 35 (6) pgs 386-397.

¹⁰⁰ Adam Crawford and Stuart Lister, [The use and impact of dispersal orders: Sticking plasters and wake-up calls](#), Joseph Rowntree Foundation, January 2007, pgs ix.

¹⁰¹ Queensland Crime and Misconduct Commission, [Police move-on powers: A CMC review of their use](#), December 2010, 'Summary,' 'Key findings,' pg xiii.

¹⁰² Ombudsman, New South Wales, [The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900](#), April 2016, Chapter 5.3. The extent of police discretion, Chapter 5.4. Unintended consequences on vulnerable or disadvantaged people, Pgs 23-25.

this proposal is limited to gang members, it retains some similar risk in combination with the prohibition on gang insignia making it harder to identify gang members.

218. These impacts could undermine the efforts of the ROCC work programme to cultivate pro-social behaviour (whether by gang exit or, more realistically, desistance from offending), as discussed at paragraphs 78-79.
219. The use of dispersal notices may be affected by the level of enforcement of the prohibition on gang insignia. If gang members become less likely to wear patches, or continue to wear their insignia but spend more time gathering on private property, this may reduce the likelihood of dispersal notices being exercised. Alternatively, gang members may increase their gathering as groups in defiance of the insignia ban.

What are the marginal costs and benefits of the option?

220. We have analysed option three: the Government's preferred option of creating dispersal notices (with recommended modifications).

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
People subject to a dispersal notice	Ongoing – For each notice, those affected must comply with dispersal and non-association conditions. A person could be subject to multiple notices per year.	Low – Costs of compliance with seven-day dispersal notices, as well as a small share likely requiring legal fees and court proceedings for the offence of breaching a notice (with possibility for imprisonment).	High certainty – Will be incurred per issue of a notice.
People indirectly impacted by a dispersal notice (such as whānau of gang members)	Ongoing – There will be flow-on impacts to the family of those complying with the conditions of a notice, as well as more significant impacts where breach of a notice results in imprisonment.	Low – Indirect impacts of compliance, or on the family of a person going through court proceedings (and possibly serving a prison sentence).	High certainty – Will be incurred per issue of a notice.
New Zealand Police	One-off – An initial cost of implementing (including creating the notice template and training). Ongoing – Costs of issuing dispersal notices, monitoring compliance with conditions, operationally reviewing any challenges to a notice, investigating and gathering evidence to prosecute any breaches.	Low – As dispersal notices apply to public gatherings, we do not expect it to be resource-intensive to determine whether the criteria for issuing are met, or for monitoring compliance. There is a risk of undue focus on gang members, partially mitigated by the requirement that an officer reasonably believes a notice is necessary to avoid disruption to the community.	Low certainty – There is limited evidence with which to estimate the frequency or volume of dispersal notices, their relative geographic distribution, or opportunity cost for other Police activities in those areas.

		<p>There is an opportunity cost of other enforcement activities, for other tasks staff would complete in the alternative.</p> <p>There is a risk for the review mechanism to create some trade-offs, given the short time in which these must be completed.</p>	
Police prosecutors	Ongoing – Breaches of the conditions of a notice may lead to prosecution.	Low – The number of notices issued may be low overall, and we expect only a small share to result in a prosecution. So this number is likely to be low relative to the total number of prosecutions.	Low certainty – While we anticipate some notices to result in prosecutions, the total number of notices and rate of breaches is unknown.
Ministry of Justice	Ongoing – Cost of legal aid (for defendants of the breach offence). Also, collection of any fines.	Low – As above, we expect low volume of legal aid.	Low certainty – Low compliance with any fines would result in costs to collection.
Courts	Ongoing – Cost of proceedings for breaches of the conditions of a notice.	Low – As above, we expect low volume of trials of the breach offence.	Low certainty – Limited evidence to confidently forecast expected numbers.
Department of Corrections	Ongoing – Costs for any offenders convicted for a breach offence whose sentences are managed by Corrections.	Low – As above. Also we expect most convictions would result in a fine (rather than a sentence such as imprisonment or community work).	Low certainty – Limited evidence to estimate the number of fines or imprisonment.
Independent Police Conduct Authority	Ongoing – Cost of reviewing complaints regarding the use of dispersal notices by Police.	Low – We would expect only a small proportion of those subject to a dispersal notice to make a complaint; and notices are expected to be a small share of enforcement actions liable to complaint (such as arrests or excessive use of force).	Low certainty – It is unclear the rate at which those subject to a notice would lodge a complaint, or how many would be merited.
Total monetised costs	Ongoing – A broad range of monetised costs	Low	Medium certainty
Non-monetised costs	Ongoing	Low	Low certainty

Additional benefits of the preferred option compared to taking no action			
People subject to a dispersal notice	Ongoing – Gang members may self-moderate behaviour when gathering in public to avoid a notice.	High – Evidence from Australia has shown relatively high rates of compliance with these orders, once made	Low certainty – This is a new power for NZ, and we have a different gang environment
General public (most commonly smaller communities with a relative high gang presence)	Ongoing – For those communities where gang gatherings are relatively common, we assume a potential increase in a sense of public safety and freedom of movement.	High – Members of the public concerned by gang gathering would have less need to adapt their travel, where those gatherings are reduced or diverted elsewhere. This assumes those subject to a notice largely comply.	Medium certainty – It may require time for gangs to adjust their conduct after notices start being issued.
New Zealand Police	Ongoing – potentially a small preventive effect in some cases, given the link to prevention of disruption. If a notice stops some gatherings escalating to offending, this may result in fewer arrests for other offences. (Though there would now be a chance of prosecution for a breach of the new notices).	Low – This impact is dependent on how Police implement the power, and particularly how closely it adheres to the necessity of preventing disruption in practise. The Australian evidence suggests this may risk being offset by a lower focus on other organised criminal offending (in favor of monitoring gang members).	Low certainty – There is limited evidence with which to estimate both how well the notices will be used in practise, and how it will affect the broader strategic use of Police resources.
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Ongoing	Low	Low certainty

221. As indicated in the above analysis, the primary implications are:

- 221.1. Police will incur an opportunity cost (of taking other law enforcement activities) from issuing dispersal notices, reviewing operational challenges to a notice, and monitoring compliance (as well as charging for the offence of a breach).
- 221.2. Courts will incur the costs of additional legal aid, and proceedings that arise from charges of the breach offence. The Ministry of Justice will also incur the costs of collection of fines, where sentenced on conviction for the breach offence. Any additional cases will have an impact on court scheduling.
- 221.3. Corrections will incur operational and infrastructure costs for any increases in people they managed (in prison or in the community), resulting from sentences for a breach offence where a person would not otherwise have been convicted. We expect this to be small: we expect a low rate of notices to proceed to a breach, and a low share of those convicted to result in a sentence of home

detention or imprisonment.¹⁰³ Any increase (including remand) will be difficult for Correction to absorb within baseline funding, given the tight fiscal environment that Corrections is operating in, and cost pressures relating to existing population growth.

222. Due to the novel nature of the dispersal notices in the New Zealand context, it is difficult for agencies to model specific financial implications.

¹⁰³ This would be comparable to the low number of dispersal notices (171) issued in Western Australia per the [2022 WA Police Force Annual Report](#). As well as the general drop-off from Police orders to convictions to share of sentences higher than a fine observed in New Zealand, from compliance of those subject provisions, or from Police and prosecutorial discretion, to Judicial sentencing decisions.

Section 2.3: Delivering an option

223. We have analysed option three: the Government's preferred option of creating dispersal notices (with recommended modifications).

How will the new arrangements be implemented?

224. The proposed dispersal notices require new legislation to implement. This will take effect when the legislation comes into force, expected to be late 2024.

Initial implementation of dispersal notices

225. Police will undertake the bulk of the implementation for dispersal notices. Police will develop the appropriate forms for the notices, make any necessary additions or amendments to operational policy and guidelines (for officers issuing dispersal notices and charging of the breach offence), and IT systems (such as reporting codes). These will support consistent application of the dispersal notice provision by police officers.
226. The Ministry of Justice will be the agency responsible for administering the legislation containing the policy. The Ministry of Justice, which provides operational support for the judiciary, will implement the required people capability, system, and process changes to ensure that the courts are prepared.

Exercise of dispersal notices

227. Police will have responsibility for:
- 227.1. issuing dispersal notices in appropriate circumstances;
 - 227.2. monitoring compliance with the conditions of a dispersal notice;
 - 227.3. reviewing challenges to a dispersal notice (discussed further below); and
 - 227.4. charging for knowingly breaching a dispersal notice without reasonable excuse.
228. These functions will be governed by the statutory criteria and any specific dispersal notice guidance. They will also be subject to Police's existing internal processes (as with any other law enforcements powers), such as approval from higher ranks within Police and/or consultation with Police legal counsel, in appropriate circumstances.
229. Communities where ROCC is underway are involved in the governance arrangements that enable locally-led responses to organised crime. These areas also overlap with the places that have a relatively high gang presence. As such, these communities will have input and insight into how the use of the new powers align with their priorities and interventions to address the harms and drivers of organised crime.

Prosecution of the breach offence

230. Police prosecutors will follow the existing guidelines in deciding whether to proceed with a charge for the offence of breaching a dispersal notice. The judiciary is responsible for administering any trials, and for sentencing on conviction.
231. For any defendants, the Ministry of Justice administers legal aid. For any person convicted and sentenced: the Ministry of Justice will be responsible for the collection of fines; the Department of Corrections will be responsible for managing any persons sentenced to imprisonment, home detention, or community-based sentences.

How will the new arrangements be monitored, evaluated, and reviewed?

Operational reviews of challenges to dispersal notices

- 232. A Commissioned Officer of Police will be responsible for reviewing challenges to a dispersal notice within 72 hours. The Commissioner of Police must consider whether the issuing of the notice complied with the statutory criteria, and revoke the dispersal notice if they determine it was not in accordance with the legislation.
- 233. The purpose and design of this short-term mechanism is discussed in section 2.2, at paragraph 194, regarding the options for challenging a dispersal notice.
- 234. It would be appropriate for Police to keep records and report on the use of dispersal notices for transparency and accountability. This is consistent with other statutory requirements for Police to report on the use of discretionary powers. For example, the exercise of warrantless search powers, or the collection of bodily samples.¹⁰⁴

Broader oversight of dispersal notice powers

- 235. Existing mechanisms would also be able to review the exercise of dispersal notices after the fact, and can shape Police's operational procedures. In particular:
 - 235.1. The Independent Police Conduct Authority investigates complaints about any Police practice, policy, or procedure, which will include the use of dispersal notices. The Independent Police Conduct Authority reports on its investigations, and can make recommendations on Police processes to better ensure they are exercised in a manner consistent with human rights standards;
 - 235.2. The courts have the power to judicially review the exercise of enforcement powers, including any legal challenges concerning the issuing of dispersal notices. If the court determines a notice was not issued unlawfully, they can make a declaration of the applicant's legal rights.
- 236. If the dispersal notices are used in regions where ROCC is underway, the existing governance structure supports accountability from those local communities.¹⁰⁵ This provides an avenue for feedback to Police on how the exercise of these new powers affects community safety and interacts with their ROCC priorities.
- 237. For any criminal proceedings, the Ministry of Justice maintains records, which will include prosecutions and convictions for the offence of breaching a dispersal notice.
- 238. The legislation will also be subject to the Ministry of Justice's ongoing regulatory stewardship functions, as the agency responsible for administering the legislation. These responsibilities will be informed by:
 - 238.1. the above government data and feedback from Police operations;
 - 238.2. any Independent Police Conduct Authority reports or judicial judgements;
 - 238.3. academic studies of these powers (like those referenced in the overview); and

¹⁰⁴ Search and Surveillance Act 2012, ss 169-172; Criminal Investigations (Bodily Samples) Act 1995, s 76.

¹⁰⁵ Regional operational groups feed into the ROCC Steering Group, which shapes the overall work programme.

- 238.4. any media reports regarding public stakeholders (including gang whānau and communities affected by both the exercise of the notices, and changes in gang members' behaviour in response to these new powers).
239. However, it will likely be difficult to statistically measure whether the legislation is achieving the underlying purpose of reducing gang harm. While we have data on crime rates, many different factors that drive criminal activity can change at the same time. This creates uncertainty in determining whether differences in rates of offending are directly attributable to specific amendments. Especially with the risk of pushing harmful behaviour underground, as discussed in the overview, at paragraph 67.

Proposal 3: Stopping gang members from associating

Section 3.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

240. Offending such as drug trafficking or violent inter-gang conflict (including assaults or shootings) are often preceded by coordination and planning among the relevant gang members or organised criminal groups. There is “a nexus between the tendency to associate in groups and the ability of some members to participate in criminal activities.”¹⁰⁶ Those crimes can risk harm to the public. It is preferable to intervene and disrupt this planning to prevent those harms from occurring, where possible.
241. Some gangs are a key part of New Zealand’s drug trade. This has a significant harm on our communities, feeding addiction and mental health issues, and driving increases in other crimes, such as burglary and theft. Competition over drug territory can also create rivalries and violent tensions among organised criminal groups. Both types of offending are precipitated by coordination and planning.
242. As is the case for gang gatherings; where members of gangs or organised criminal associate in the context of escalating gang tensions, Police undertake a concerted enforcement effort to prevent, suppress, and disrupt gang violence. Police adjust their operational response as needed to manage these changing pressures.

Western Australian precedent

243. This proposal was based, in part, on the introduction of unlawful consorting notices in Western Australia.¹⁰⁷ Their purpose is to disrupt and prevent persons previously convicted of certain offending from planning or engaging in future criminal activity.¹⁰⁸ These powers aim to do this by restricting the capacity of those people to communicate or associate with other relevant offenders.
244. Western Australia’s unlawful consorting notices may be issued by an officer:
- 244.1. against any adult that qualifies as a relevant offender; and
 - 244.2. if the person has consorted with other relevant offenders, or if the officer suspects on reasonable grounds the person is likely to do so; and
 - 244.3. the officer considers it is appropriate to issue the notice in order to disrupt or restrict their capacity to engage in conduct that would be an offence.
245. Any notice issued remains in effect for 3 years (unless revoked by a court, following an application by the affected person, if the grounds for issuing a notice no longer apply).

¹⁰⁶ [Queensland Organised Crime Commission of Inquiry](#), October 2015, Chapter 7.5.2, Outlaw Motorcycle Gang members associate together in public and identify themselves as members, Pgs 49-50.

¹⁰⁷ [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia).

¹⁰⁸ [Second Reading](#) of the Criminal Law (Unlawful Consorting and Prohibited Insignia) Bill 2021, 18 November 2021, Extract from Hansard for the Western Australia Legislative Assembly.

246. It is an offence for a person subject to a notice to consort with other gang offenders named in the notice on 2 or more occasions.¹⁰⁹ There are defences to a charge of consorting contrary to unlawful consorting notice: the person must show that the consorting was with family members, or was reasonable in the circumstances (such as for a lawful purpose such as employment or health services). If convicted for the offence, the maximum penalty is a term of imprisonment of 5 years.
247. There is a significant difference between New Zealand's existing offences (below) and Western Australia's unlawful consorting notices. Once a notice is in place, Western Australia's offence for a breach functionally avoids any requirements that the prosecution prove contact between two parties was for the purpose of advancing criminality. They effectively criminalise any association at all, even if it was wholly otherwise lawful. While there are defences, they are limited, and put the burden of proof on the defendant, and so still have the potential to criminalise association that had no criminal purpose.
248. Most other Australian states and territories also have a Police-issued notice or court order, and a related offence, for consorting or associating with convicted offenders.¹¹⁰ The exact details vary. Generally, they apply to people who continue to communicate with convicted offenders, after having received a warning by an officer to cease. They typically include limitations, such as excluding family members; and/or that the officer considers it appropriate, or court is satisfied that it is reasonably necessary, to ensure the offender does not commit further offences.

Existing New Zealand powers relating to gang members associating

249. Currently, there are offences for people associating or communicating if done for the purpose of planning or preparing to commit offending. Police can investigate such cases, and potentially arrest and prosecute, any person proven to have committed relevant offences. Police can use search warrants for investigating imprisonable offences; and where the offending involved has a penalty of seven years imprisonment or more, Police can also make use of surveillance and interception devices to assist in gathering evidence. For example:

Act	Offence	Key elements	Maximum penalties
Summary Offences Act 1981	Sections 6-6C, Associating with convicted offenders	Habitually associates with a convicted thief, violent offender, or serious drug offender; Has received warnings by a constable on at least 3 occasions within 2 years; and It can reasonably be inferred that the association will likely lead to similar offending.	Imprisonment for a term not exceeding 3 months, or A fine not exceeding \$2,000.

¹⁰⁹ Consorting is defined as seeking or accepting the company of the named person, and/or communicating with them directly or indirectly (such as in-person or by means such as phone or electronic messages).

¹¹⁰ Queensland, South Australia, and New South Wales have an offence requiring a warning from an officer; New South Wales also has court orders; Western Australia has Police-issued notices only; Victoria has Police-issued notices and court orders; Tasmania has an offence only. Most maximum penalties are 3 years imprisonment.

Crimes Act 1961	Section 66(1)(d), Parties to offences	A person incites, counsels, or procures any person to commit an offence (even if the first person is not directly involved in the offending themselves).	Same maximum penalty as the offence that was committed by the person who was induced to offend.
	Sections 310-311(2), Conspiring to commit, or attempting to procure, any offence.	Conspiring with any person to commit any offence, or Inciting, counselling, or attempting to procure any offence; Where the offence is not in fact attempted or committed. ¹¹¹	Imprisonment for a term not exceeding 7 years, for conspiring to commit an offence liable to a maximum penalty that exceeds 7 years imprisonment, otherwise liable to the same penalty as the offence; Imprisonment for a term not exceeding 10 years, for attempting to procure an offence liable to life imprisonment, otherwise liable to the same penalty as the offence.
	Section 98A, Participation in an organised criminal group	Participates in an organised criminal group, Knowing that the group shares criminal objectives (such as obtaining material benefits from offending or committing serious violent offences) Knowing or being reckless as to whether their conduct contributes to the occurrence of criminal activity and the objectives of the group.	Imprisonment for a term not exceeding 10 years.
Sentencing Act 2002	Section 112-118, Making, and breach, of non-association order (as part of sentencing)	The court is satisfied that an order is reasonably necessary to ensure that the offender does not commit further offences; An offender is directed to not associate with any specified person; Breaches this condition without reasonable excuse.	Imprisonment for a term not exceeding 3 months, or A fine not exceeding \$1,000.

¹¹¹ Sections 310 and 311 do not require the offence to come to fruition, merely that there was an intention that such steps be taken. Where the offence is committed, a person is liable under s 66(1)(d). Westlaw, Adams on Criminal Law, [CA310.01 "Common intention to commit offence"](#), CA311.03 "[Subsection \(2\) — incitement](#)."

Parole Act 2002	Sections 14, 61, 66, 71, Breach of release conditions	An offender is released on parole and directed to not associate with any specified person by a probation officer; Breaches this condition without reasonable excuse.	Recall of parolee to continue serving their sentence in prison (if applicable); or Imprisonment for a term not exceeding 1 year, or A fine not exceeding \$2,000.
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250. As part of their standard operations, Police undertake significant work to investigate the commission of offences. Police will take enforcement action where they are able to gather evidence that such illegal conduct has occurred. This includes, where the relevant thresholds are met, utilising the powers under the Search and Surveillance Act 2012 that enable law enforcement to detect, prevent, and apprehend people committing serious criminal offences. The Act sets out detailed rights and obligations in relation to exercising those powers.
251. The Criminal Activity Intervention Legislation Act 2023 was passed recently, creating new warrants to search places and vehicles and seize weapons during a gang conflict.¹¹² These have allowed Police to intervene in areas where a judge is satisfied a gang conflict exists (involving, or likely to involve, the use of weapons), and is satisfied the warrant may reduce the risk of harm to people or property.
252. These warrants supplement the tools available to Police to help avert offending once it escalates to the point where it risks harming public safety. They have been effective in enabling Police to seize firearms from gang members in regions where these warrants were issued, reducing the likelihood of further firearm offending.¹¹³
253. In addition, as noted above, New Zealand already has a range of offences for Police to prosecute anyone who engages in behaviour that is a precursor to crimes, such as conspiring, inciting, or procuring an offence. Police prosecute these where they have sufficient evidence to prove them. The number of prosecutions depends on Police's ability to obtain that evidence to detect, prevent, and apprehend such offending.
254. In this regard, the joint Law Commission-Ministry of Justice *Review of the Search and Surveillance Act 2012* included recommendations to ensure the Act's continued effectiveness.¹¹⁴ These have not yet been progressed. In particular, the report included recommendations around digital searches to better overcome criminal exploitation of end-to-end encryption, and for covert operations warrants to recognise the legitimacy of undercover investigations, in appropriate cases. These have particular relevance to organised criminal offending, given the propensity of these groups to engage in and attempt to conceal planned criminal activity.

What is the policy problem or opportunity?

255. The Government's coalition agreements commit to progress the policies in their 100-Day Plan. This includes creating consorting prohibition notices to prevent known gang offenders from associating. This is an opportunity to respond to gang members conspiring for criminal purposes, as occurs with inter-gang conflict.

¹¹² Via amendment inserting new [sections 18A-18G](#) into the Search and Surveillance Act 2012.

¹¹³ Including [Manawatu](#) (8 Aug), [Tairāwhiti](#) (18 Oct), [Ōpōtiki and Whakatāne](#) (23 Oct), Police Media Centre.

¹¹⁴ Law Commission-Ministry of Justice, [Review of the Search and Surveillance Act 2012](#), 30 January 2018.

256. The National Party's election manifesto stated: "Gangs in New Zealand have become more aggressive and more willing to engage in violence, particularly when it comes to rival gangs, accessing illegal weapons, or competing over the supply of illicit drugs. Crimes like this don't just happen – they require coordination and planning. Police often know exactly who these criminals are, but are powerless to prevent them from planning and committing these crimes before it's too late. We believe Police should be able to act on the intelligence they have, and stop known gang offenders from associating or communicating with one another whenever they believe it will keep our communities safe."¹¹⁵

What objectives are sought in relation to the policy problem?

257. As noted in the overview, the overarching objective is to reduce gang harm. The intended outcome is to deter and prevent the planning or attempted commission of offending by gang members or previously convicted persons, and to make communities feel safer. In particular, by pre-emptively disrupting associating or communicating for the purpose of planning or committing criminal activity.

¹¹⁵ National Party, "[Backing police, tackling gangs,](#)" [full policy document](#).

Section 3.2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

258. As discussed in the overview, at paragraphs 43-44, the following criteria will be used to compare the options to the status quo:
- 258.1. Improving public confidence;
 - 258.2. Reducing gang membership;
 - 258.3. Reducing rates of offending; and
 - 258.4. NZBORA compliance.

What scope will options be considered within?

259. As noted in paragraphs 46-47 of the overview, our scope has been limited by the Government's coalition agreements to introduce legislation progressing the relevant gang policies within a 100-day timeframe. This included a commitment to stopping gang members from associating. The details of this proposal are outlined in option two, below.

What options are being considered?

260. Three options have been identified:
- 260.1. Option One – *Status Quo*;
 - 260.2. Option Two – *Create consorting prohibition notices (proposed 100-day commitment)*; and
 - 260.3. Option Three – *Create consorting prohibition orders (with recommended modifications)*.
261. Options two and three relate to different aspects of the consorting prohibition proposal and appropriate safeguards. The following questions have informed the design:
- 261.1. Who has the power to issue?
 - 261.2. Who can be subject to the power?
 - 261.3. What are the grounds for exercising the power?
 - 261.4. How can a decision be challenged?
 - 261.5. What exemptions will apply?
 - 261.6. What is the effect of the conditions, and scope of who they apply to?
 - 261.7. What are the elements of the offence of, and penalty for, a breach?
262. An analysis of these elements can be found below.

Option One – Status Quo (Ministry of Justice’s preferred option)

263. This would involve Police continuing to use their existing powers (at paragraphs 249-252), in combination with the recent interventions underway (described in the overview at paragraphs 58-61), to respond to gang members associating for the purposes of planning or preparing to commit offending. These offences differentiate between consorting that has a criminal purpose and that which does not. For example, the new gang conflict search warrant has proven operationally effective at disrupting offending, as noted at paragraphs 18 and 73.
264. In addition, there are opportunities to better enable Police to gather sufficient evidence to detect, prevent, and apprehend such offending. Increasing evidence collection will allow more prosecutions for the existing range of offences for behaviours that are direct precursor to crimes, such as conspiring, inciting, or procuring an offence.
265. The Ministry of Justice and Law Commission jointly conducted the *Review of the Search and Surveillance Act 2012*, which included recommendations to ensure the Act’s continued effectiveness.¹¹⁶ This included recommendations on digital searches to better overcome criminal exploitation of end-to-end encryption, and covert operations warrants to clarify and authorise of the appropriate use of undercover investigations. These have particular relevance to organised criminal offending, given the propensity of these groups to engage in (and attempt to conceal) planned criminal activity. These recommendations have not yet been progressed.

Options Two and Three Overview – Creating a consorting prohibition power

266. The table on the following page compares option two (proposed 100-day commitment) and option three (recommended modifications).
267. Both options two and three would create a consorting prohibition power against known gang offenders, requiring them not to associate or communicate for three years.
268. Option three tailors the proposal to more directly respond to the problem of gang harm: requiring that orders are necessary and appropriate to prevent a person engaging in serious offending, includes exemptions, and providing more clarity on scope.

¹¹⁶ Law Commission-Ministry of Justice, [R141 Review of the Search and Surveillance Act 2012](#), 30 January 2018.

Table of Options Two and Three – *Creating a consorting prohibition power (proposed 100-day commitment and recommended modifications)*

Design features	Option Two – <i>Proposed 100-day commitment</i>	Option Three – <i>Recommended modifications</i>
<i>Who has the power to issue?</i>	Police will be empowered to issue consorting prohibition notices.	The courts will have the power to make consorting prohibition orders.
<i>Who can be subject to the power?</i>	Notices may be issued to a “known gang offender,” which includes any gang member who is subject to a firearms prohibition order, or has been convicted of a category 3 or 4 serious offence, or any offence under the law of another jurisdiction that, if committed in New Zealand, would constitute one of these offences.	Orders may be applied to a person if the court is satisfied: <ul style="list-style-type: none"> ► on the balance of probabilities, that the person is a member or prospect of a gang designated under the Prohibition of Gang Insignia in Government Premises Act 2013; and ► the person is subject to a firearms prohibition order, or has been convicted of a category 3 or 4 serious offence, or any offence under the law of another jurisdiction that, if committed in New Zealand, would constitute one of these offences; and ► the qualifying offending occurred after the legislation comes into force (so that the orders have no retrospective effect).
<i>What are the grounds for exercising the power?</i>	Police must consider the consorting prohibition notice is appropriate in order to disrupt or restrict the capacity of a known gang offender to engage in conduct that amounts to a serious offence.	Cabinet agreed that a court may make a consorting prohibition order if satisfied that the order would assist to disrupt or restrict the capacity of a known gang offender to engage in conduct that amounts to a serious offence, unless satisfied that the person has shown that its detrimental effects on the person outweigh its societal benefits.
<i>How can a decision be challenged?</i>	<p>The subject of a notice will be able to appeal to the Commissioner of Police and/or request a judicial review.</p> <p>A gang member who can demonstrate they have left a gang and is no longer considered at risk of committing a further serious offence can apply to</p>	<p>A person against whom a consorting prohibition order is made may:</p> <ul style="list-style-type: none"> ► appeal the decision to a higher court, which may rescind the initial decision if the grounds for making an order were not satisfied; or ► make an application to the court to have an order revoked, if the court is satisfied that the criteria are no longer met. This includes that the court is satisfied that the person is no longer being a member or prospect of a gang,

	the Commissioner of Police to have the notice withdrawn.	or that an order is no longer necessary and appropriate to prevent the person from engaging in serious offending.
<i>Exemptions</i>	<i>Not specified.</i>	<p>Consorting prohibition orders would not apply to immediate family members, and those engaging in legal activities like work, education, or healthcare; and</p> <p>A general exemption to the requirements of an order when the subject of the order is managed by Corrections, is serving a sentence, or is in lawful custody; and</p> <p>A mechanism to provide for specific exceptions for other lawful activities such as attendance at a funeral or tangi.</p>
<i>What is the effect of the conditions, and scope of who they apply to?</i>	Once issued, the specified gang members would be prohibited from associating or communicating with one another for up to three years.	The order prohibits association and communication for three years among: the subject of the order and any other known gang offenders <u>listed</u> in the order.
<i>Offence and penalty for breach</i>	The penalty for breaching a notice on two or more occasions is a \$15,000 fine and/or 5 years imprisonment.	<p>The offence requires knowingly breaching the consorting prohibition order without reasonable excuse.</p> <p>Cabinet agreed that the penalty be a maximum fine of \$15,000 or a maximum term of 5 years imprisonment, or both.</p>

Options Two and Three – Details of proposal and recommended modifications

Who has the power to issue?

269. Option two proposes that Police be empowered to issue consorting prohibition notices. The rationale for this is to ensure that the notice can be imposed quickly and decisively.
270. Option three instead proposes that a consorting prohibition order be imposed by a court. This is because:
- 270.1. the consorting prohibition power will significantly restrict a person's freedom of association for several years. Given the extended period of time they will last, there is a less clear-cut rationale for urgency as compared to, for example, gang dispersal notices (proposal 1), which only last for a period of seven days;
 - 270.2. orders made through a court process are likely to have higher rates of compliance. This is because respondents are more likely to follow restrictions if they understand them and consider they are reasonable and fairly made. Such procedural fairness is part of the goals of the judicially-led Te Ao Mārama initiative. However, this effect may be limited, given gang members are more likely to mistrust authorities and thus consider such orders unfair targeting;
 - 270.3. orders are more likely to be upheld, whereas Police-issued powers are more likely to be challenged as a defence against any charge. This is particularly important given the courts will expect any order made to comply with a person's NZBORA and natural justice rights if a prosecution for breach is sought.

Who can be subject to the power?

271. Option two proposes that notices may be issued to a "known gang offender," which includes any gang member who is subject to a firearms prohibition order, or has been convicted of a category 3 or 4 serious offence,¹¹⁷ or any offence under the law of another jurisdiction that, if committed in New Zealand, would constitute one of these offences. (This proposal also referred to "a child sex offence," however, officials consider that the relevant offences are captured under category 3 or 4).¹¹⁸
272. This option raises similar issues as dispersal notices in establishing who is a gang member, discussed at paragraphs 184-187.
273. Option three uses the same list of qualifying offences for the purposes of establishing that a person is a "known gang offender." In addition, option three proposes that:
- 273.1. the court must be satisfied, on the balance of probabilities (meaning more likely than not), that the person is a member or prospect of a gang designated under the Prohibition of Gang Insignia in Government Premises Act 2013; and
 - 273.2. the relevant offending must only be offending that a person commits after the legislation establishing the consorting prohibition orders comes into force.

¹¹⁷ Category 3 offences are those punishable by 2 years or more imprisonment, and category 4 offences are the most serious, and must be tried in the High Court. Category 4 offences are listed in a schedule to the Criminal Procedure Act 2011, and includes offences such as murder and manslaughter.

¹¹⁸ Including, under the Crimes Act 1961: [s 131AB](#) (grooming, maximum of 3 years imprisonment); [s 132](#) and [s 134](#) (sexual conduct under 12 or under 16, maximum of 14 years or 10 years imprisonment, respectively).

274. The second condition ensures that there is no risk of double jeopardy or retrospective punishment. If this is not the case, the orders may be seen as a second or retrospective punishment for previous offending, which could infringe NZBORA.¹¹⁹
275. We note that any changes to the eligibility of firearm prohibition orders will also affect the scope of capture of the non-consorting orders (for the subset of people who are both subject to a firearm prohibition order and are also gang members).

What are the grounds for exercising the power?

276. Option two proposes that a consorting prohibition notice should be available whenever Police consider a notice to be “appropriate” in order to disrupt or restrict capacity of a known gang offender to engage in conduct that amounts to a serious offence.
277. The Ministry of Justice had proposed that option three use the standard be “necessary and appropriate.” The Ministry of Justice considered the inclusion of necessity considerations would ensure that less rights-infringing alternatives to the order be ruled out as impractical or ineffective before the order is imposed. This will help ensure the orders are more likely to be enforced if Police seek to prosecute for a breach.
278. Cabinet agreed to an alteration to the proposed grounds for exercising the power, being that the court may make a consorting prohibition order to disrupt or restrict the capacity of a known gang offender to engage in conduct that amounts to a serious offence unless satisfied that the person has shown that its detrimental effects on the person outweigh its societal benefits.

How can a decision be challenged?

279. The ability to challenge the exercise of decision-making powers (in issuing a notice or making an order) upholds a person’s right to natural justice.¹²⁰
280. Option two proposes that the subject of a notice:
- 280.1. may appeal to the Commissioner of Police and/or request a judicial review of the decision to issue the notice; and
 - 280.2. may apply to Commissioner of Police to subsequently have the notice withdrawn, if they can demonstrate they are no longer a member of a gang and are no longer considered at risk of committing a further serious offence.
281. In the case of Police-issued notices, existing oversight mechanisms can review whether it was issued lawfully (as with any other enforcement powers). A person may make a complaint to the Independent Police Conduct Authority about the exercise of Police powers. It can investigate and make reports on individual cases, as well as recommendations for improving operational policies. A person can also seek a judicial review of the issuing of a notice. A court can make a declaration of the applicant’s legal right. Both mechanisms can shape Police’s operational procedures.
282. Conversely, as option three involves a court order, the person subject to an order:
- 282.1. has a right to appeal the decision to a higher court, which may rescind the initial decision if the grounds for making an order were not satisfied. However, as option three has stricter criteria, and the decision-maker is the judiciary, it is

¹¹⁹ [Section 26, Retroactive penalties and double jeopardy](#), NZBORA.

¹²⁰ As reflected in [section 27, Right to justice](#), of NZBORA.

more likely that an order will be upheld upon appeal or judicial review as compared with Police-issued notices.

- 282.2. is additionally proposed to have the opportunity to make an application to the court to have an order revoked. The court must do so if satisfied that the criteria are no longer met – including that the person is no longer being a member or prospect of a gang, or that an order is no longer necessary and appropriate to prevent the person from engaging in serious offending.

Exemptions

283. Option two does not explicitly specify any exemptions. However, it is reasonable to infer that similar exemptions as proposed for dispersal notices (at paragraph 200) may be intended to apply to the consorting prohibition notices.
284. Option three proposes that consorting prohibition orders would:
- 284.1. not apply to immediate family members, and those engaging in legal activities like work, education, or healthcare; and
 - 284.2. include a general exemption to the requirements of an order when the subject of the order is managed by Corrections, is serving a sentence, or is in lawful custody; and
 - 284.3. include a mechanism to provide for specific exceptions for other lawful activities such as attendance at a funeral or tangi.
285. These exemptions recognise that there will be people and circumstances where the prohibitions on consorting should not apply. These would ensure the orders operate in a more proportional way, more targeted to interactions that have a risk of leading to serious offending. Without these exemptions, the orders could prevent reasonable or lawful behaviours from occurring that are unlikely to give rise to criminal activity.

What is the effect of the conditions, and scope of who they apply to?

286. Option two proposes that a consorting prohibition notice would prohibit the “specified gang members” from associating or communicating with one another. Both options two and three propose these conditions would last for 3 years, unless revoked sooner.
287. There is some ambiguity around who the option two is intended to capture. If a notice only specifies the “known gang offender” subject to the notice, then that person may not know which other people with whom they must not associate or communicate.
288. Option three proposed that a non-consorting order would prohibit association and communication among the subject of the order and any other known gang offenders *listed* in the order. This was to provide more clarity both to those subject to a consorting prohibition order and to law enforcement who must enforce the order.
289. Using a list of those with whom the person must not consort also:
- 289.1. provides legal certainty as to which interactions the conditions cover and may result in an offence if breached. This better enables compliance so a person can avoid committing an imprisonable offence that could risk their liberty.¹²¹

¹²¹ As reflected in [section 22, Liberty of the person](#), NZBORA.

- 289.2. Is more likely to comply with NZBORA: while the orders inherently limit the right to freedom of association;¹²² this impact is mitigated by using a list determined at the time of the order. And limiting the orders to known gang offenders is more proportionate to the purpose, affecting a clear and narrow scope of people (whose freedom of association is also restricted).
290. For any persons subject to the order, there will be privacy impacts, as the orders limit communication (as well association). These could extend to third parties not subject to the order, particularly if enforcement involves monitoring digital communications. Police operations will still be required to comply with the Privacy Act 2020 principles governing the appropriate collection, use, retention, and disposal of personal information.

Offence and penalty for breach

291. Option two proposes that the penalty for breaching a consorting prohibition notice on two or more occasions is a \$15,000 fine and/or 5 years imprisonment. This is based on Western Australia's offence for consorting contrary to unlawful consorting notice.¹²³
292. These proposed penalties would be out of step with other offences in the New Zealand context. This is inconsistent with the rule of law principle that like offences be treated alike, as per New Zealand's Legislation Guidelines.¹²⁴ Of the provisions listed in the table after paragraph 249, the most comparable are the Summary Offences Act 1981 offences of non-association. They are punishable by a fine not exceeding \$2,000 or imprisonment not exceeding 3 months. While the offences require proof that contact was for the purpose of advancing criminality, the non-consorting orders would be for any consorting but only where an order has been applied to a known gang offending.
293. Option two's proposed offences also do not include a mental element, such as intent or knowledge, are strict liability offences. Strict liability offences involve a prima facie limitation of the right be presumed innocent until proven guilty as affirmed in NZBORA.¹²⁵ A key justification for limiting this right is that the penalty level is kept below a sentence of imprisonment. This is reflected in New Zealand offence and penalty guidance¹²⁶ that strict liability offences should not carry a term of imprisonment, as requiring the prosecution to prove a mental element is an important safeguard when there is a chance of severe punishment.
294. The Ministry of Justice had also proposed that option three make the penalty for a breach a fine not exceeding \$2,000 or a maximum of 1 year imprisonment. The Ministry of Justice considered that a breach of the order would involve contact between the relevant parties that would otherwise be wholly lawful in nature. If the breach amounted to criminal conduct in its own right then the penalty for the substantive criminal offence would be available following conviction (such as those listed at paragraph 249).
295. Cabinet agreed to the offence incorporating *mens rea* elements – that the person must *knowingly* breach the order *without reasonable excuse* to be held criminally liable.

¹²² [Section 17](#), NZBORA.

¹²³ [Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia), section 17(1).

¹²⁴ Legislation Design and Advisory Committee, [Legislation Guidelines \(2021\): Chapter 24, Creating criminal offences](#), Part 7, "The whole statutory context... need to be considered before taking an offence from another jurisdiction and proposing it for inclusion in New Zealand law."

¹²⁵ [Section 25\(c\) Minimum standards of criminal procedure](#), NZBORA.

¹²⁶ Legislation Design and Advisory Committee, [Legislation Guidelines \(2021\): Chapter 24, Creating criminal offences](#).

These modifications make the offence more proportionate to the risk of harm involved, mitigating the risk or degree of infringing the NZBORA. Cabinet also agreed to retain the higher penalty range of a maximum fine of \$15,000 or a maximum term of 5 years imprisonment, or both.

Population analysis

296. Any interventions that target gang members associating with one another will have a disproportionate impact on populations that are overrepresented in gangs. As noted at paragraph 9-10, gang membership is known to be concentrated among populations that are on average younger, disproportionately male, live in more deprived communities, and Māori.
297. All the options (including the status quo) have this disproportionate impact. However, options two and three provide additional offences that would affect this group that will target gang members, and further indirectly impact gang whānau. Option three is more limited, given the narrower grounds for issuing a consorting prohibition order.
298. Given the duration and conditions of a consorting prohibition power, there is the potential to significantly impact whānau of gang members (particularly where two gang members are family or live together). However, this may reduce the interactions these whānau if known gang offenders are compelled to not associate. The exemptions proposed in option three mitigate this indirect impact but intending to continue to enable familial associations.
299. The prevalence of gang membership within Māori communities also means that Māori are more likely to be the victims of gang-related harm. To the extent that any interventions address this harm they are likely to have a positive impact for Māori.

How do the options compare to the status quo?

	Option One – <i>Status Quo</i>	Option Two – <i>Create consorting prohibition notices (proposed 100-day commitment)</i>	Option Three – <i>Create consorting prohibition orders (modifications)</i>
Public confidence	0	+	
		The orders may make communities feel safer, but consorting is not as highly visible as gatherings	
Reducing gang membership	0 It is often difficult for gang members to exit, particularly due to having whānau ties	-	
		Makes it more difficult to implement social and economic interventions focused on creating pro-social pathways (in which gang members may consort while accessing), and may make it harder to exit gangs. Overseas experience also indicates gang membership was not reduced, but may drive more covert associations that may be harder to detect, and breed mistrust of state interventions trying to reach them	
Reducing rates of offending	0 Law enforcement operations focus on deterring offending, while social and economic investments can build pathways that help people desist from crime	-	-
		Powers focused on gang offenders risks creating an undue focus of law enforcement on <i>gangs</i> , drawing attention away from <i>offending</i> behaviour by organised criminal groups (gang or otherwise), particularly where a breach does not require proof that the association was for the purpose of advancing criminal offending	Focusing law enforcement on stopping gang offenders consorting (even if not with criminal intent) risks drawing attention away from focusing on organised crime, as occurred in Australia. Though the design of the proposal as an order mitigates some of this risk.
NZBORA compliance	0	--	0
		May limit freedoms of association under NZBORA more than is reasonable necessary to achieve the objectives	The judge must be satisfied the order disrupts or restricts serious offending (unless the detrimental effects outweigh the benefits). This may target the orders to those people more likely to have a real potential of serious offending
Overall assessment	0	--	-

Key: ++ much better than the status quo + better than the status quo 0 about the same the status quo
 - worse than the status quo -- much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

300. The Ministry's preferred option is option one (status quo): the existing powers (at paragraphs 249-252), in combination with the recent interventions underway (described in the overview at paragraphs 58-61).
301. The efforts under the status quo to prevent and deter consorting for criminal purposes appear to be having a positive effect. More time is required to implement the other recent changes. With more time to embed, we expect they will be more effective at achieving the objectives than the alternative options.
302. To the extent that those who conspire to commit offending are not held to account, this is likely to be due to difficulties gathering evidence, rather than issues with the relevant offences. These obstacles might be better addressed by initiatives such as recommendations on encryption and covert operations from the joint Law Commission-Ministry of Justice *Review of the Search and Surveillance Act 2012*, as noted at 254.
303. Options two and three add to Police's toolkit for deterring association and communication among gang members, which can reduce the visibility of gangs and increase public confidence in law and order. Option two is more closely aligned with Western Australia's unlawful consorting notices (as outlined at paragraphs 244-246), whereas option three is more targeted as:
- 303.1. the power is an order made by the court, rather than Police, and requires that the court be satisfied that a consorting prohibition order is necessary and appropriate to prevent the person from engaging in serious offending;
- 303.2. the order has exemptions (such as for immediate family and lawful activities); and
- 303.3. the breach offence requires the person to knowingly breach the order without reasonable excuse.
304. Consorting prohibition powers would cover similar behaviour as the existing offences for habitual association with violent offenders or drug offenders (noted at paragraph 249). These offences had a similar purpose of limiting consorting between gang members. However, they were ineffective in practise,¹²⁷ likely due to:
- 304.1. the cost of gathering evidence of habitual association (maintaining records of multiple warnings being given by a constable);
- 304.2. the difficulty proving that the association was for the purpose of advancing criminality; and
- 304.3. where such intent could be proved then other Crimes Act 1961 offences would likely be available with higher penalties.
305. It is reasonable to expect the proposed consorting prohibition powers to be used more frequently, due to the fact that a consorting prohibition power has a lower threshold for directing a person to cease consorting before reaching a criminal threshold. For

¹²⁷ Jarrod Gilbert, New Zealand Law Foundation, [Making Gang Laws in a Panic](#), Pg 28-29.

example, New South Wales' Gangs Squad reported making extensive use of their state's consorting law to disrupt gangs' ability to publicly associate.¹²⁸

306. There is still a risk that the powers fall into disuse. In Queensland, several metropolitan Police units they surveyed "discontinued use and advised they found their use of the consorting law in [public areas] to be resource intensive with little tangible results... or [that criminal gangs] were addressed through other policing strategies such as major and/or covert investigations."¹²⁹
307. This is consistent with studies indicating that Australia's consorting laws had "no discernible impact on general crime."¹³⁰ This could happen if non-consorting orders incentivise use of encrypted communication by gangs to avoid detection. This could put a greater demand on law enforcement resources at the expense of detecting organised criminal offending, as observed in Australia per paragraphs 66-67.
308. The other reason that the powers may not reduce offending is that while they would apply to persons who are gang members and have previous convictions, the breach offence applies to any subsequent consorting among them. While the intent is to prevent all consorting (and thereby any subset of criminal consorting), the Australian evidence indicates this may not realistically be achievable. As such, it is not clear that the significant step of policing of consorting that does not have a criminal purpose (even with the specified exemptions) will contribute to fulfilling the intended objective.¹³¹

What are the marginal costs and benefits of the option?

309. We have analysed option three: the Government's preferred option of creating consorting prohibition orders (with recommended modifications).

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
People subject to a consorting prohibition order	Ongoing – For each order, those affected must comply with non-association conditions. An order will last for three years, and also affects those listed.	Medium – Costs of compliance with orders, as well as a small share likely requiring legal fees and court proceedings for the offence of breaching an order (with possibility for imprisonment).	High certainty – Will be incurred per order.
People indirectly impacted by a consorting prohibition order	Ongoing – There will be flow-on impacts to the family of those complying with the conditions of an	Medium – Indirect impacts of compliance, or on the family of a person going through court proceedings	High certainty – Will be incurred per order.

¹²⁸ [Queensland Organised Crime Commission of Inquiry](#), October 2015, Chapter 7.4 Use of the consorting law in relation to organised crime and criminal gangs, Chapter 7.5, Use by the Gangs Squad, Pgs 47-51.

¹²⁹ Ibid, Chapter 7.8 Use by general duties police officers, Pg 56-58.

¹³⁰ Goldsworthy & McGillivray, March 2017, [An examination of outlaw motorcycle gangs and their involvement in the illicit drug market and the effectiveness of anti-association legislative responses](#), *The International Journal of Drug Policy*, Vol 41, 110-117, Pgs 115-116.

¹³¹ Ombudsman, New South Wales, [The consorting law: Report on the operation of Part 3A, Division 7 of the Crimes Act 1900](#), April 2016, Chapter 5.1. The potential criminalisation of everyday interactions between people, Pgs 22-23.

(such as friends or whānau of gang members)	order, as well as more significant impacts where breach of an order results in imprisonment.	(and possibly serving a prison sentence).	
New Zealand Police	<p>One-off – An initial cost of implementing (including creating the order template and training).</p> <p>Ongoing – Costs of seeking consorting prohibition orders from the courts, and monitoring compliance with conditions, and investigating and gathering evidence to prosecute any breaches.</p>	<p>Medium – The requirements of a consorting prohibition order to avoid association with anyone listed in the order could be resource-intensive to monitor compliance.</p> <p>There is a risk of undue focus on gang members, partially mitigated by the requirement that the court be satisfied that an order is appropriate to prevent a person engaging in serious offending.</p> <p>There is an opportunity cost of other enforcement activities, for other tasks staff would complete in the alternative.</p>	<p>Low certainty – There is limited evidence with which to estimate the frequency or volume of consorting prohibition orders, their relative geographic distribution, or opportunity cost for other Police activities in those areas.</p>
Crown Law	Ongoing – Breaches of the conditions of an order may lead to prosecution.	Low – The number of orders made may be low overall, and we expect only a small share to result in a prosecution. So this number is likely to be low relative to the total number of prosecutions.	Low certainty – While we anticipate some orders to result in prosecutions, the total number of orders and rate of breaches is unknown.
Ministry of Justice	Ongoing – Cost of legal aid (for defendants of the breach offence). Also, collection of any fines.	Low – Low number of orders expected, which would mean a low number of legal aid cases or fines.	Low certainty – Low compliance with any fines would result in costs to collection.
Courts	Ongoing – Cost of proceedings the making (and appeal) of orders, and for breaches of the conditions of an order.	Low – Low number of orders expected, which means a low number of cases.	Low certainty – Limited data to confidently estimate volume.
Department of Corrections	Ongoing – Costs for any offenders convicted for a breach offence whose sentences are managed by Corrections.	Low – Low number of sentences expected. It is possible that convictions may result in a fine (rather than a sentence such as imprisonment or community work).	Low certainty – Limited data to confidently estimate the number of sentences resulting in a fine versus imprisonment.

Independent Police Conduct Authority	Ongoing – Cost of reviewing complaints regarding the monitoring of consorting prohibition order conditions by Police.	Low – We would expect only a small proportion of those subject to a consorting prohibition order to make a complaint; and orders are expected to a small share of enforcement actions liable to complaint (such as arrests or excessive use of force).	Low certainty – It is unclear the rate at which those subject to an order would lodge a complaint, or how many would be merited.
Total monetised costs	Ongoing – A broad range of monetised costs	Medium	Medium certainty
Non-monetised costs	Ongoing	Low	Low certainty
Additional benefits of the preferred option compared to taking no action			
People subject to a consorting prohibition order	N/A	N/A	N/A
General public (most commonly smaller communities with a relative high gang presence)	Ongoing – If the orders successfully deter known gang offenders consorting, and this does reduce rates of offending, communities where gang membership is high may see a increase in a sense of public safety.	Medium – This initiative, as part of an overall package, is likely to give public confidence in the maintenance of law and order.	Low certainty – We anticipate it will take several years before we see orders being made under this power.
New Zealand Police	Ongoing – potentially a small positive disruption effect, given the link to prevention of the risk of serious offending. If an order stops some associating escalating to offending, this may result in fewer arrests for other offences. (Though there would now be a chance of prosecution for a breach of the new orders for association with no criminal purpose).	Low – This impact may not have much difference to the status quo in terms of offending. Any association for the purposes of planning or committing offending is already criminal. The Australian evidence suggests this may risk being offset by a lower focus on other organised criminal offending (in favour of monitoring gang members).	Low certainty – There is limited evidence with which to estimate both how well the orders will affect rates of offending in practice, and how it will affect the broader strategic use of Police resources.
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	Ongoing	Low	Low certainty

310. As indicated in the above analysis, the primary implications are:

- 310.1. Police will incur an opportunity cost (of taking other law enforcement activities) from seeking consorting prohibition orders from the courts, as well as for charging for the offence of a breach.

- 310.2. Crown Law, Ministry of Justice, and Courts will incur the costs of additional prosecutions, legal aid, and proceedings that arise from charges of the breach offence. The Ministry of Justice will also incur the costs of collection of fines, where sentenced on conviction for the breach offence. Any additional cases will have an impact on court scheduling.
- 310.3. Corrections will incur operational and infrastructure costs for any increases in people they managed (in prison or in the community), resulting from sentences for a breach offence where a person would not otherwise have been convicted. We expect this to be small: we expect a low rate of orders to proceed to a breach, and a low share of those convicted to result in a sentence of home detention or imprisonment.¹³² Any increase (including remand) will be difficult for Correction to absorb within baseline funding, given the tight fiscal environment that Corrections is operating in, and cost pressures relating to existing population growth.
311. Due to the novel nature of the consorting prohibition orders in the New Zealand context, it is difficult for agencies to model specific financial implications. Given that an individual subject to an order, as well as any person listed in the terms for non-consorting, must be a known gang offender, and that the provision is not retrospective, the numbers of orders will be very small in the first few years.

¹³² This would be comparable with the general drop-off from Police orders to convictions to share of sentences higher than a fine observed in New Zealand, from compliance of those subject provisions, or from Police and prosecutorial discretion, to Judicial sentencing decisions.

Section 3.3: Delivering an option

312. We have analysed option three: the Government's preferred option of creating consorting prohibition orders (with recommended modifications).

How will the new arrangements be implemented?

313. The proposed consorting prohibition orders require new legislation to implement. This will take effect when the legislation comes into force, expected to be late 2024.

Initial implementation of consorting prohibition orders

314. Police will undertake the bulk of the implementation for consorting prohibition orders. Police will make any necessary additions or amendments to operational policy and guidelines (for making applications to the court for an order and charging of the offence), IT systems (such as reporting codes), and financial requirements. These aim to ensure consistency of use.
315. The Ministry of Justice will be the agency responsible for administering the legislation containing the policy. The Ministry of Justice, which provides operational support for the judiciary, will implement the required people capability, system, and process changes to ensure that the courts are prepared. .

Exercise of consorting prohibition orders

316. The courts will have the power to make consorting prohibition orders, on application made by the Commissioner of Police. The courts must be satisfied the relevant grounds are met. The courts will also hear any appeals made against a decision to impose an order, as well as any applications to have an order revoked.
317. Police will have responsibility for:
- 317.1. providing evidence to support an application for a consorting prohibition order;
 - 317.2. gathering evidence of any breaches of a consorting prohibition order; and
 - 317.3. charging for knowingly breaching a consorting prohibition order without reasonable excuse.
318. These functions will be governed by the statutory criteria and any specific operational guidance on consorting prohibition orders. They will also be subject to Police's existing internal processes (as with any other law enforcements powers), such as approval from higher ranks within Police and/or consultation with Police legal counsel, for charging for a breach offence, in appropriate circumstances.
319. Communities where ROCC is underway are involved in the governance arrangements that enable locally-led responses to organised crime. These areas also overlap with the places that have a relatively high gang presence. As such, these communities will have input and insight into how the use of the new powers align with their priorities and interventions to address the harms and drivers of organised crime.

Prosecution of the breach offence

- 320. Crown Law prosecutors will follow the existing guidelines¹³³ in deciding whether to proceed with a charge for the offence of breaching a consorting prohibition order. The judiciary is responsible for administering any trials, and for sentencing on conviction.
- 321. For any defendants, the Ministry of Justice administers legal aid. For any person convicted and sentenced: the Ministry of Justice will be responsible for the collection of fines; the Department of Corrections will be responsible for managing any persons sentenced to imprisonment, home detention, or community-based sentences.

How will the new arrangements be monitored, evaluated, and reviewed?

- 322. Existing mechanisms would be able to review the exercise of consorting prohibiting orders. In particular:
 - 322.1. Higher courts have the power to hear appeals against any orders made by district courts. As discussed at 282, we expect that most orders made by lower courts will be upheld, given that the court process is more robust than discretionary powers, involving an independent decision-maker (the judge receiving an application for an order from Police);
 - 322.2. The Independent Police Conduct Authority investigates complaints about any Police practice, policy, or procedure, which will include how Police monitor compliance with the consorting prohibiting orders. The Independent Police Conduct Authority reports on its investigations, and can make recommendations on Police processes to better ensure they are exercised in a manner consistent with human rights standards.
- 323. If the consorting prohibiting orders are used in regions where ROCC is underway, the existing governance structure supports accountability from those local communities.¹³⁴ This provides an avenue for retrospective feedback to Police on how the exercise of these new powers affects community safety and interacts with their ROCC priorities.
- 324. For any criminal proceedings, the Ministry of Justice maintains records, which will include prosecutions and convictions for the breach offence.
- 325. The legislation will also be subject to the Ministry of Justice's ongoing regulatory stewardship functions, as the agency responsible for administering the legislation. These responsibilities will be informed by:
 - 325.1. any judicial judgements and Independent Police Conduct Authority reports;
 - 325.2. government data on and feedback from Police operations;
 - 325.3. academic studies of these powers (like those referenced in the overview); and
 - 325.4. any media reports regarding public stakeholders (including gang whānau and communities affected by both the exercise of the orders, and changes in gang members' behaviour in response to these new powers).

¹³³ Crown Law, [Solicitor-General's Prosecution Guidelines](#), as at 1 July 2013.

¹³⁴ Regional operational groups feed into the ROCC Steering Group, which shapes the overall work programme.

326. However, it will likely be difficult to statistically measure whether the legislation is achieving the underlying purpose of reducing gang harm. While we have data on crime rates, many different factors that drive criminal activity can change at the same time. This creates uncertainty in determining whether differences in rates of offending are directly attributable to specific amendments. Especially with the risk of pushing harmful behaviour underground, as discussed in the overview, at paragraph 67.

Proposal 4: Making gang membership an aggravating factor at sentencing

Section 4.1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

327. The Government is concerned, as indicated in the Government's 100-Day commitment, that the current aggravating factor is not being used as often as intended by Parliament, or being given sufficient weight by judges, to hold gang members to account for their crimes. The Government considers the resulting sentence may appear too lenient, undermining public confidence in law and order.

How gang membership currently factors into sentencing outcomes

328. The process for sentencing an offender convicted of a crime involves the judge setting a 'starting point' that takes into account the circumstances of the offending and relevant case law. Judges then consider factors which might uplift or discount the starting point.¹³⁵ Aggravating factors include the use of a weapon and particular cruelty in the commission of the offence. Mitigating factors include the age of the offender and any remorse shown.

329. Currently, participation in an organised criminal group or involvement in any other form of criminal association is an aggravating factor under section 9(1)(hb) of the Sentencing Act 2002 (the Sentencing Act). The definition of "participation in organised group" is broad enough to include most known criminal gangs.¹³⁶

330. For the section 9(1)(hb) aggravating factor to apply:

330.1. it needs to be both applicable to the case (as with any of the other aggravating and mitigating factors under section 9(1)); and

330.2. the judge must consider "the nature and extent of the connection between the offending and the offender's participation in an organised criminal group... or involvement in any other form of organised criminal association."

331. Courts currently take a broad view on whether an offender's participation in an organised criminal group is relevant to the case, including considering the importance of deterrence and protection of the public. Courts have ruled that the mere fact an offender is a gang member is not an aggravating factor itself.¹³⁷

332. In practice, the court considers factors such as the position of the offender within the gang, whether the gang members pre-planned the offence, and the extent to which the gang instigated the offence. Consideration of these factors can result in gang membership not being factored in the sentencing decision at all or judges may reduce the weight it is given when deciding upon the final sentence.

¹³⁵ Sentencing Act 2002, [section 9, Aggravating and mitigating factors](#).

¹³⁶ Crimes Act 1961, [section 98A, Participation in organised criminal group](#).

¹³⁷ *R v Mako* [2000] 2 NZLR 170.

Most known criminal gangs are covered by the definition of “organised criminal group”

333. The Sentencing Act currently refers to “participation in an organised criminal group” within the meaning of section 98A of the Crimes Act 1961, rather than using terminology of “gang” or “gang membership”. Therefore, for the existing factor to apply, the offending must have arisen from the offender’s participation in a group of three or more people who had as their objective one or more of the matters listed in subsection 98A(2)(a) (particularly obtaining material benefits from offending or the commission of violent offences) or through the offender’s involvement in any other form of “organised criminal association”.
334. The definition encompasses a wide range of groups, whether formally or informally structured. This includes both leaders and facilitators of organised crime (such as criminal gangs), and those who assist them. There are several examples where courts have applied the existing aggravating factor (s 9(1)(hb)) to a member of a gang.¹³⁸
335. However, gangs and organised criminal groups are not synonymous. As noted in the overview, gang membership does not inherently entail offending, and an organised criminal group need not be a gang (such as a drug trafficking or money laundering network). This means members of gangs that are not involved in offending will not be captured by the definition of “participation in an organised criminal group.”

What is the policy problem or opportunity?

336. The Government’s coalition agreements commit to progress the policies in their 100-Day Plan. This includes making gang membership an aggravating factor in the Sentencing Act. This is an opportunity to review whether the harm caused by gangs is appropriately reflected in gang members sentences.
337. The National Party’s manifesto state that gang membership should always be an aggravating factor,¹³⁹ regardless of the offence an offender is being sentenced for, or any connection between the offending and the offender’s status as a gang member. It is envisaged that this would result in tougher sentences for known gang members.
338. The commitment appears to respond to public concerns that sentencing outcomes for offenders, particularly gang members, do not appropriately reflect the gravity of the offending, or the harm inflicted on victims of crime. A further concern could relate to a perception that there is no certainty that the courts will utilise, or to what extent they will apply, the existing aggravating factor.

What objectives are sought in relation to the policy problem?

339. As noted in the overview, the overarching objective is to reduce gang harm and “make gang membership as unappealing as possible.”¹⁴⁰ This includes the commitment to make sentences more severe for gang members. The increase in punishment is intended to publicly denounce and deter harmful gang behaviour and gang membership.

¹³⁸ *R v Crawford* [2022] NZHC 1588; *R v Jennings* [2022] NZHC 746; *Mata v R* [2012] NZCA 593; *R v Muraahi* [2020] NZHC 346; *R v Sanders* [2019] NZHC 164.

¹³⁹ National Party, “[Real consequences for crime](#),” [full policy document](#).

¹⁴⁰ “[Real consequences for crime](#),” [full document](#).

Section 4.2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

340. As discussed in the overview, at paragraphs 43-44, the following criteria will be used to compare the options to the status quo:
- 340.1. Improving public confidence;
 - 340.2. Reducing gang membership;
 - 340.3. Reducing rates of offending; and
 - 340.4. NZBORA compliance.

What scope will options be considered within?

341. As outlined in paragraphs 46-47 of the overview, our scope has been limited by Government's coalition agreements to introduce legislation progressing the relevant gang policies within a 100-day timeframe. This included a commitment to make gang membership an aggravating factor in the Sentencing Act, outlined in option two, below.
342. Following advice from officials, the Government agreed to adjust its approach to this commitment. Rather than making gang membership an automatic aggravating factor as described above, the Government decided to amend the existing aggravating factor to give greater weight to gang membership at sentencing (option two below) but agreed to consider whether this legislative change should go further as part of wider reforms of the Sentencing Act in 2024.
343. The narrow and specific nature of this proposal has restricted the range of options which can reasonably be considered. In practical terms, the only alternative is to retain the status quo, which would not achieve the element of certainty that the Government wants. Officials also considered specifying gang-conduct related to offending that the court must consider (option three below) as an alternative approach to option two.
344. The Government has also agreed to retain the current terminology, and therefore the definition of "participation in an organised criminal group", as defined in s 98A of the Crimes Act 1961. For this reason, we have not considered any options to define or adopt the term "gang."

What options are being considered?

345. Three options have been identified:
- 345.1. Option One – *Status Quo*;
 - 345.2. Option Two – *Give greater weight to gang membership as an aggravating factor at sentencing*; and
 - 345.3. Option Three – *Specify gang-conduct related to the offending the court must consider*.
346. The options are based on limited data as adjustments for aggravating and mitigating factors are only ever recorded in sentencing notes, with varying levels of specificity.

Option One – Status Quo (*Ministry of Justice’s preferred option*)

- 347. The status quo, as described above, could be maintained. Offenders can, under the existing framework, be charged with participation in an organised criminal group under section 98A of the Crimes Act 1961. Where offending takes place in the context of organised criminal group activities, this can be accounted for at sentencing via the existing aggravating factor under 9(1)(hb) of the Sentencing Act.
- 348. Case law indicates that being a member of a gang cannot on its own increase the seriousness of the offending. For example, cases of family violence where the membership of a gang may be entirely coincidental to the offending behaviour are unlikely to elicit greater sentences.
- 349. Rather, the courts consider contextual factors which show a connection between the offender’s membership and the particular offending. This may include an offender’s position in the gang, or whether their offending was gang motivated. Where a connection is established, the Court of Appeal has emphasised the seriousness of the offending and upheld higher sentences in several cases.
- 350. Maintaining the status quo would not achieve the Government’s objective. If no action is taken, the courts will continue to interpret and apply the current aggravating factor in line with relevant case law. However, if other government commitments aimed at introducing stronger sentences are progressed (i.e., limiting the ability of judges to apply sentencing discounts and restoring Three Strikes), it is likely there will be an increase in the severity of punishments for gang members, and offenders more generally. This would be the case even if neither option two or three were progressed.

Option Two – *Give greater weight to gang membership as an aggravating factor at sentencing*

- 351. As noted above, for section 9(1)(hb) to apply, it needs to be applicable to the case and judges need to consider the nature and extent of any connection between the offending and the offender’s participation in an organised criminal group or organised criminal association.
- 352. This option proposes to give greater weight to gang membership as an aggravating factor by removing the need to establish a link between the offending and the offender’s participation in an organised criminal group. This would switch the factor from its current application to the offending and instead apply it to the offender.
- 353. This means the court would only need to consider whether the fact of being a participant of an organised criminal group is applicable to the offending. This would send a signal to judges and prosecutors that this factor should apply to the fullest extent possible. As a result, we expect gang membership would be given greater weight at sentencing.
- 354. We expect that removing the requirement to consider the connection between the offending and the offender’s participation would also make it more straightforward for the prosecution to prove that the aggravating factor applies. This lower threshold means that the aggravating factor could apply in more cases.
- 355. The proposed amendment would not require the court to take any specific action in terms of the type or severity of sentence imposed. If applicable, the court would be required to take this factor into account – along with other specified and unspecified aggravating factors – in arriving at the appropriate sentence to be imposed in a particular case.

356. There are, however, risks with this proposal. As judges would still be able to exercise discretion about whether to uplift or discount sentences, it is not possible to quantify the impacts of this option on sentencing decisions. Notably, there is a risk judges will not give the aggravating factor the intended weight.
357. If judges do give this factor more weight, it is likely to lead to increased sentences and apply in more cases, which in turn will have impacts on the prison population. We anticipate this option, in conjunction with the other changes described in this paper, will have financial, operational, and infrastructure implications for Corrections.
358. This proposal also raises human rights concerns in relation to discrimination and arbitrary detention because “organised criminal group” is defined very broadly, and gang membership may only be a peripheral factor in the offending. In addition, the proposal may limit the right of freedom of association because it simply requires the judge to consider whether or not the offender is a participant in an organised criminal group. For this reason, the proposal may be treating people differently on the basis of membership of an association, which is inconsistent with the right affirmed by section 17 of the NZBORA. However, these concerns are somewhat mitigated by the continued application of the overarching section 9(1) provision, which still requires the judge to only consider the aggravating factor to the extent it is applicable in the case.

Option Three – Specify gang-conduct related to the offending the court must consider

359. This option would introduce a new aggravating factor which specifies gang-related conduct the court must consider. Gang-related conduct could include intimidation, which was identified in the National Party manifesto as a key concern. Unlike option two, this option relates to the context of the offending (i.e., not the offender themselves), and, as such, would only apply if the offender engages in the specified conduct.
360. Strengthening consequences for those who engage in harmful gang-related behaviours would clearly denounce this type of offending. This may help to increase public confidence in the criminal justice system.
361. Focusing on the offending behaviour rather than the offender themselves minimises the impact on some human rights, in particular, freedom of association. However, as gang-related conduct (such as intimidation, violence, or coercion) is largely covered by the Crimes Act 1961, this option may engage s 26(2) of the NZBORA, which protects against double punishment. This is because there is a risk of double counting, which might occur if the presence of the aggravating factor is already reflected in the penalty for the offence.
362. It would be difficult to construct an aggravating factor in a way that would avoid double-counting. Careful consideration would need to be given so to avoid specifying conduct in the aggravating factor that is not already an element or feature of an offence in the Crimes Act 1961.

How do the options compare to the status quo/counterfactual?

	Option One – <i>Status Quo</i>	Option Two – <i>Give greater weight to gang membership</i>	Option Three – <i>specify gang-related conduct</i>
Public confidence	0	+	
		Enacting amendments may send a visible signal of increased consequences for gang members who offend. This may make communities feel safer by denouncing gang membership (even if the marginal change in sentences is small).	
Reducing gang membership	0	0	
		Unlikely to have any impact on gang membership rates. There is no evidence that increasing the severity of punishment deters gang membership. In addition, those receiving longer penalties are people who have already been convicted.	
Reducing rates of offending	0	-	
		May result in convicted offenders serving a (longer) prison sentence than they would otherwise. Any addition time served in prison will prevent offending for that additional period of incarceration. However, unlikely to reduce rates of offending in the long-term. Incarceration is correlated with increased criminal activity and rates of reoffending following release from prison are high. In some cases, imprisonment can entrench anti-social networks, which increases the risk of reoffending.	
NZBORA compliance	0	-	-
		Raises human rights concerns in relation to discrimination, freedom of association, and arbitrary detention. This is because this option switches the focus of the aggravating factor from the offending to the offender's membership/participation in an organised criminal group. "Participation in an organised criminal group" is defined very broadly, and a gang member's involvement in the group might not be related to a specific instance of offending.	Raises human rights concerns in relation to s 26(2) of the NZBORA which protects against double punishment. Most harmful gang-related conduct is already a crime under the Crimes Act, increasing the risk of judges double counting at sentencing.
Overall assessment	0	-	-

Key: ++ much better than the status quo + better than the status quo 0 about the same the status quo
 - worse than the status quo -- much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

363. The Ministry's preferred option is option one (status quo). There are existing offences which already provide for the prosecution of organised crime-related offending, such as illicit drug and firearms offences. Where the offending takes place in the context of organised criminal group activities, this can be taken into consideration by the courts via the existing aggravating factor under section 9(1)(hb) of the Sentencing Act.
364. As noted above, sentencing judges currently can, and do, take a generally broad view on whether an offender's participation in an organised criminal group is relevant, including considering the importance of deterrence and protection of the public. There are several cases where an uplift has been applied to members of criminal gangs.¹⁴¹
365. We consider that the existing aggravating factor is sufficient to recognise the harm caused by members of gangs and organised criminal groups in a way that is consistent with the rights contained within the NZBORA. This is because the court can only consider aggravated sentences in cases where there is a connection between the offending and the offender's participation in an organised group or criminal association. This means judges will not apply the factor in circumstances where gang membership may be purely coincidental to the offending behaviour.
366. Options two and three involve trade-offs relative to the status quo. They both partially achieve the Government's policy objective by publicly denouncing harmful gang behaviour and increasing punishments for gang members. However, they are both unlikely to impact the rate of gang membership, as the changes to sentencing will only apply to people who are convicted of offending regardless. They are also both unlikely to reduce rates of reoffending because increasing the severity of punishment has minimal effect on reoffending, and increasing the likelihood of serving a prison sentence is associated with higher rates of reoffending following release from prison.¹⁴² Relevant research is discussed further at paragraphs 73-76 of the overview.
367. The insignia prohibition is limited to gang members and associates. We know that Māori make up a disproportionate share of gang membership, as noted at paragraph 9. As such, the effect of amending the aggravating factor will disproportionately impact Māori.
368. Option two and three also have possible human rights implications:
- 368.1. Option two switches the existing aggravating factor from its current application to offending and instead applies it to the offender. Targeting gang members in this way may result in indirect discrimination on the grounds of race or ethnic origin, and therefore, limit the right to be free from discrimination in section 19 of the NZBORA. There may also be potential for adverse comment about how the proposal fits within New Zealand's international commitments, such as the International Convention on the Elimination of All Forms of Racial Discrimination.
- 368.2. Conversely, option three may trigger s 26(2), which affirms that no one who has been finally convicted of, or pardoned for, an offence shall be tried or punished

¹⁴¹ R v Crawford [2022] NZHC 1588; R v Jennings [2022] NZHC 746; Mata v R [2012] NZCA 593; R v Muraahi [2020] NZHC 346; R v Sanders [2019] NZHC 164.

¹⁴² Around 56% of New Zealand prisoners with previous convictions will reoffend, and around 35% will be reimprisoned after 2 years following release from prison. Ministry of Justice, [Hāpaitia te Oranga Tangata – Safe and Effective Justice](#), 18 July 2023.

again. This may occur if the behaviour specified in the aggravating factor is behaviour which is already criminalised under the Crimes Act. However, unlike option two which targets the offender, this option targets specific conduct, and is therefore less likely to have implications for freedom of association and discrimination.

What are the marginal costs and benefits of the option?

369. We have analysed option two: the Government's preferred option of giving greater weight to gang membership as an aggravating factor at sentencing.

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
People who may be subject to the amended aggravating factor	Ongoing – Costs associated with legal fees.	Low – likely to be incremental.	Low certainty – no data about the use of the current law or the impact of this change.
Whānau of people who may be subject to the amended factor	Ongoing – indirect costs associated with having a parent or family member in prison and legal fees.	Low – likely to be incremental.	Low certainty – no data about the use of the current law or the impact of this change.
Courts	Ongoing – may give rise to more appeals, the cost of which would be absorbed within the current system.	Medium – depending on nature of proceedings, substantial crown involvement in gathering information and legal costs may be required.	Low certainty – no data about the use of the current law or the impact of this change.
Department of Corrections	Ongoing – amendment to Sentencing process may result in small extension to sentence length and an increase in the prison population. Incarceration is expensive and has flow-on consequences of requiring various resources. The marginal return on investment from imprisoning lower-risk offenders tends to produce less benefit than the cost.	Low – may add some pressure to an already overstretched frontline custodial and community workforce.	Low certainty – The extent of the increase in the prison population is unknown at this stage.
Crown Law	Ongoing – If judges give more weight to a factor, or there is uncertainty as to how it is interpreted, this could give rise to more appeals and the cost of this would be absorbed	Medium – depending on nature of proceedings, substantial crown involvement in gathering information	Low certainty – no data about the use of the current law or the impact of this change.

	within the current system. May also lead to Waitangi Tribunal and human rights claims.	and legal costs may be required. Would likely involve legal fees and engagement in court proceedings	
Ministry of Justice	Ongoing – Cost of legal aid (for defendants who appeal any sentence made longer due to these changes).	Low – The number may be low overall, and we expect only a small share to appeal who were not already likely to appeal their conviction relative to the total number of prosecutions.	Low certainty – no data about the use of the current law or the impact of this change.
Total monetised costs	Ongoing – A broad range of monetised costs	Low certainty	Low certainty
Non-monetised costs	N/A	N/A	N/A
Additional benefits of the preferred option compared to taking no action			
People who may be subject to the amended aggravating factor	N/A	N/A	N/A
Victims of gang members who offend	Ongoing – There may be a small impact for some victims who feel a factor that made the offending worse is recognised where it may not otherwise have been.	Low – It is likely most victims may not recognise how much the factor weighted the sentence to a different outcome.	Low certainty – no data about to estimate the impact of this change.
Whānau of people who may be subject to the amended factor	N/A	N/A	N/A
Courts	Ongoing – Sentencing hearings where the aggravating factor may apply may take less time as judges will no longer need to consider the nature and extent of the link between gang membership and the offending.	Low – Likely to be incremental. Savings may be offset by potential increase in appeals.	Low certainty – the volume of possible additional saving is unknown
Corrections	N/A	N/A	N/A
Crown Law	Ongoing – decrease in prosecution (Police and Crown Law) costs resulting from lower threshold and no longer needing to tie offending directly to the offender's participation in an organised criminal group.	Low – likely to be incremental. Savings may be offset by increased defence costs (Legal Aid and Public Defence Service)	Low certainty – the volume of possible additional saving is unknown

Total monetised benefits	Ongoing – The option has the potential to result in an increase in funds recovered to some extent, but the amount of increase is unknown.	Low	Low certainty
Non-monetised benefits	Ongoing – The option has the potential to result in an increase in funds recovered to some extent, but the amount of increase is unknown.	Low	Low certainty

Section 4.3: Delivering an option

How will the new arrangements be implemented?

370. The proposed change requires a minor amendment to the Sentencing Act. This will take effect when the legislation comes into force, expected to be late 2024.
371. After the effective date, courts will no longer be required to consider the nature and extent of the linkage between the offending and the offender's participation in an organised criminal group or organised criminal association. No new administrative procedures are required for implementation. There are no compliance costs associated with this change.
372. It will remain the case that, the prosecution or offender may appeal to a higher court where the sentence imposed in a particular case is considered to be either inadequate or excessive. Such appeals often hinge on whether a particular factor has been given undue weight and appeal decisions shape the way a particular factor is taken into account in subsequent cases. The actual effect of the proposed amendment will therefore be influenced by the way it is interpreted by higher courts in appeals against sentence. The judiciary will continue to be responsible for administering sentencing decisions, and the trials for any appeals, which would involve Crown Law prosecutors.
373. The Department of Corrections will continue to be responsible for managing the sentences of any person who receives either a community-based sentence, or a sentence of imprisonment, as a result of the amendments.

How will the new arrangements be monitored, evaluated, and reviewed?

374. Statistically assessing the impact of the proposed amendment would require a formal record of the weight given to specific aggravating factors at sentencing. The changes this would require to the way judges impose sentences and the Ministry of Justice's recording systems are not seen as necessary or desirable in the circumstances.
375. If and when cases are decided in which these changes are relevant, the legal commentary from judges at sentencing (as well as any appeals) may provide insight into how the judiciary interprets and applies the amendments.