

Regulatory Impact Statement: Responding to Gang Harms – Annex on Possession Ban Coversheet

Purpose of Document	
Decision sought:	This analysis informs Cabinet decisions on penalty levels for the offence of displaying gang insignia in public.
Advising agencies:	Ministry of Justice
Proposing Ministers:	Minister of Justice
Date finalised:	17 July 2024
Problem Definition	
Public confidence in law and order would be undermined by low compliance with the prohibition on the public display of gang insignia. Repeat or blatant defiance risks an impression that gang members can operate above the law.	
Executive Summary	
<p>The Government introduced the Gangs Legislation Amendment Bill to make it more difficult for gangs to operate, and to combat the fear and intimidation they cause. The Bill makes it an offence to display gang insignia publicly, punishable by a maximum sentence of 6 months imprisonment or \$5,000 fine. This Annex supplements the analysis of that display ban: Proposal 1 in the Regulatory Impact Statement: Responding to Gang Harms.¹</p> <p>There is a risk that gang members may choose to defy the display ban, particularly in locations or circumstances where the ban is challenging for Police to enforce. This would undermine public confidence in law and order by giving the impression that gang members can break the law with impunity.</p> <p>We considered four options to enhance compliance with the display ban:</p> <ul style="list-style-type: none"> • status quo – offence and related penalty for breaching the display ban as set out in the Bill; • bespoke search power – enabling preventative searches to be conducted by Police where they consider there are reasonable grounds to suspect the display ban is likely to be breached; • escalating penalties – increased penalties for second and subsequent convictions for breaches of the display ban; and • possession ban – mandatory, court-ordered prohibition on the private possession or control of gang insignia (in addition to the existing prohibition on public display). <p>We consider that a possession ban is likely to be more effective than the status quo in deterring repeat display ban breaches, at least for a time. This is because gang members value their patch, and because gang members will be motivated to avoid the disruption associated with repeat searches, enabled by the possession ban.</p>	

¹ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024.

However, we consider the benefit of a possession ban is outweighed by its drawbacks. In particular:

- the deterrent value of the possession ban is likely to diminish over time as gangs adapt how they operate (such as using other methods to express membership);
- a possession ban is likely to focus Police resources on gang members who oppose the state's authority generally, but who are not involved in serious organised crime (i.e. those most motivated to comply will be those involved in serious crime);
- the additional searches enabled by the possession ban, along with the associated residential restrictions, risks disproportionate impacts on whānau and communities in which gang members reside, given the nature of the harms the display ban seeks to prevent; and
- the possession ban risks distorting the general legal basis of search powers, from a tool for collecting evidence of offending to a method of punishment/deterrence, pushing rule of law boundaries.

We consider that a bespoke search power would engage the same challenges as a possession ban (but with additional workability challenges), and that escalating penalties would have limited, if any, enhanced deterrent value.

Based on our analysis of the options set out in this Regulatory Impact Statement, our preferred option is the status quo.

The Government has agreed to introduce possession ban orders, including the residential restriction (i.e. the orders will prohibit insignia at the person's usual place of residence, as well as prohibiting private possession or control). The analysis of the possession ban option includes a subsection on the impact of the residential restriction specifically.

Limitations and Constraints on Analysis

This analysis has been constrained by:

- **Narrow scope:** Agencies were commissioned to develop options for an escalating penalty or bespoke search power regime, focused on ensuring compliance with the prohibition on the display ban. This limited the options under consideration.
- **Lack of broader public consultation:** The timeframes in which the proposals have been prepared did not allow for consultation beyond government agencies affected. The Amendment Paper was developed after the Select Committee's consideration of the Bill, so the process has not provided an opportunity for broader public input.
- **Data limitations:** Due to the uncertainty with how gang members may choose to react to the implementation of the Bill, the rates of compliance with the display ban are uncertain. This means the advice has been developed without the data to make estimates that could better reflect the scale of the potential problem.

A longer timeframe could have allowed officials to consult with stakeholders and the public, particularly communities most likely to be impacted and where compliance and enforcement issues may arise. This could have provided more fully informed advice on the impact of these proposals and operational challenges.

Responsible Manager(s) (completed by relevant manager)

Rajesh Chhana, Deputy Secretary, Policy Group, Ministry of Justice



17 July 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 *RIA: Responding to Gang Harms – Annex on Possession Ban* 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.

This proposal has been developed at pace while the Bill is being considered by Select Committee, which has significantly constrained the time available for analysis. No public consultation has occurred.

The analysis in the Regulatory Impact Statement is clear and comprehensive with a range of options analysed consistently against criteria. The Regulatory Impact Statement notes that more time would have allowed consultation with stakeholders and the public, particularly impacted communities, which could have provided more fully informed advice.

Introduction

- 1. This Annex supplements the analysis on Proposal 1 from the Regulatory Impact Statement: Responding to Gang Harms (RIS), finalised on 14 February 2024.²

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² Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024.

Section 1: Diagnosing the policy problem

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

2. Paragraphs 90-92 of the RIS discuss the existing context of gang patches in New Zealand.³ The display of gang patches and insignia may cause some people to feel fearful or intimidated, and impact the public's perception of the safety of public places.
3. Paragraphs 128-137 of the RIS outline the approach agreed to by the Government: to prohibit the display of gang insignia in public places (the **display ban**). Knowingly breaching the display ban would be an offence liable to a fine of \$5,000 or a maximum term of 6-months imprisonment. In addition, the gang insignia involved in the offending is forfeited to the Crown on conviction and may be destroyed or otherwise disposed of as the court directs.
4. This policy is reflected in clause 7 of the Gangs Legislation Amendment Bill (**the Bill**).⁴

Factors affecting compliance with the display ban

5. We have limited available data with which to confidently estimate the rates of non-compliance with the display ban. In part, this is because it will depend on how gangs and their members choose to react to the new laws, and there are conflicting factors that may affect their incentives for doing so. Additionally, different groups can make different decisions in their relationship with law enforcement.⁵

Potential for a low compliance outcome with the display ban

6. There is a risk of defiance of the display ban, given the value that gang members place on their patches.⁶ It is possible that gang members may be willing to continue wearing their patches in public due to their affinity with the gang, notwithstanding the risk of fines or imprisonment and need to replace their insignia (on forfeiture and destruction of the ones used in breaches of the display ban).
7. Another factor that may affect compliance is the certainty of enforcement, independent of the type of criminal penalties available.⁷ Inconsistent enforcement may create an expectation among gang members that wearing gang patches will not, in practice, be prohibited if they are not otherwise creating concerns among the community.
8. Police may find it difficult to achieve a consistent level of enforcement with the display ban. The New Zealand Police Association's submission on the Bill stated that it will not always be safe or practical to consistently enforce breaches of the display ban: "The reality is police officers will not be confronting every gang member they see in the street and 'ripping off' their patches... There can be no expectation of police officers to dilute

³ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024, Proposal 1: Prohibiting gang insignia in public – Section 1.1: Diagnosing the policy problem, Pg 23.

⁴ The Bill was introduced on 7 March 2024: [New Zealand Parliament, Gangs Legislation Amendment Bill](#).

⁵ Jarrod 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..."

⁶ Anthony Hubbard, [What the gang patch means | Stuff](#), 6 September 2009.

⁷ Legislation Design and Advisory Committee, Legislation Guidelines: 2021 edition, [Chapter 22, Ways to achieve compliance and enforce legislation](#).

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.

their [Threat Exposure Necessity Response] assessment for the purposes of providing a public display of strength against gangs.”⁸

9. This risk may be reinforced by the unintended consequence of any displacement. As noted in the Police Association’s submission, “There is an inherent danger that this legislation will lead to ‘post code’ policing given the most resourced districts are not necessarily the ones with a high percentage of gang members... Taking patches off the two or so gang members living in Queenstown is likely a straightforward task. Applying the same law to 20, 30, or more gang members gathered in Auckland or Whakatāne is resource-heavy, complex, and unlikely to be exercised in public.” Some gang members may relocate to areas where it is harder to enforce (and therefore easier to disregard) the display ban.⁹

Potential for a high compliance outcome with the display ban

10. Notwithstanding the challenges above, New Zealand Police are committed to enforcing the legislation throughout New Zealand regardless of geographic location. This is reflected in the establishment of the National Gang Unit and district-based Gang Disruption Units.¹⁰ These units are intended to ensure officers can effectively enforce the intent of the Bill to disrupt and prevent gang-related crime, disorder, and intimidation across the country.
11. Enforcement of any offending involves Police applying situational and operational awareness, risk assessment processes, and operational training and guidance, where there is potential risk to the public or to the frontline. Whether in a rural or urban setting, Police will make a judgement call whether it is most practical and effective to enforce at the time or to follow up at a time of their choosing.
12. New Zealand’s gangs appear to use patches more commonly than gangs in other countries.¹¹ This currently makes them more visible and identifiable. However, it also suggests they could opt for an approach more common elsewhere in the world, by not displaying their insignia publicly to avoid attracting Police action, particularly with the additional enforcement prioritisation reflected above.
13. For comparison, a 2015 review of Queensland’s 2009 law targeting outlaw motorcycle clubs implied that they experienced gang members becoming less likely to display their insignia in public. They found that: “the Act puts in place an incentive... that they cease being *identifiable*... In due course, [these predictions] were borne out.”¹²

⁸ Submission of the [New Zealand Police Association | Te Aka Hapai on the Gangs Legislation Amendment Bill](#).

⁹ This view aligns with what reportedly happened in Queensland, per Associate Professor Mark Lauchs, interview with Imogen Wells, Stuff, [Australian expert warns against elements of government’s proposed gang laws](#), 27 February 2024.

¹⁰ New Zealand Police press release, [Police to establish new National Gang Unit and frontline teams to increase pressure on gangs](#), 14 May 2024.

¹¹ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, Pgs 273-274, “One element that is unique to the New Zealand street gangs that formed during this period was the adoption of back patches... Numerous less organised and non-patch wearing gangs exist overseas... In comparison to overseas street gangs, the New Zealand situation overall appears to be much more structured and organised...” See also pgs: 615-616, 624, 655, 670, 676, etc.

¹² Justice Alan Wilson SC, Queensland Government, [Review of the Criminal Organisation Act 2009](#), 15 December 2015, pages 64-65.

Attorney-General's report on the Bill of Rights Act implications of the display ban

14. As context to the discussion of options, the Attorney-General found the display ban, although finely balanced, to be an unjustified limitation of the rights under the New Zealand Bill of Rights Act 1990 (**NZBORA**). Specifically, the Attorney-General concluded the display ban in the Bill was a disproportionate limit on the rights to freedom of expression, association, and assembly because more targeted prohibitions could be sought to reduce public fear and intimidation caused by gangs.¹³

Stakeholders

15. The stakeholders for this problem are the same as those identified at paragraphs 35-36 of the RIS.

Comparison with Australian gang insignia prohibitions

16. Three Australian jurisdictions have criminal offences against the public display of insignia – Western Australia, Queensland, and Tasmania.¹⁴ Penalties range from fines only (Tasmania), a set single penalty that includes the possibility of imprisonment (Western Australia), to escalating penalties for multiple breaches (Queensland). We are not aware of any Australian jurisdiction banning private possession or creating bespoke search powers.
17. Another three Australian jurisdictions have limited insignia bans as part of liquor licencing regimes, banning gang insignia from pubs/bars – New South Wales, South Australia, and the Northern Territory.¹⁵ These offences are primarily aimed at pub staff to not allow entry of people displaying gang insignia, though there are some offences if the gang member remains in the premises.
18. To our knowledge, the Australian Capital Territory and Victoria do not have any general restrictions. However, Victoria has control orders that can be made by a Court on application by Police, which may prohibit an individual from a declared organisation from wearing or displaying the patches or insignia of the organisation; (the grounds for making these orders are comparable to the non-consorting orders in the Bill).¹⁶ Beyond Australia, we have not identified gang insignia restrictions in the United States of America, the United Kingdom, or Canada.
19. The New Zealand Law Society's submission on the Bill included an analysis of crime statistics in Western Australian, Queensland, and Victoria following enactment of their most recent anti-gang laws. They did not find significant differences in outcomes despite the different types of penalties.¹⁷ We do not have strong evidence to indicate a

¹³ [Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Gangs Legislation Amendment Bill](#), 26 February 2024, paras 20-29.

¹⁴ [Section 25, Criminal Law \(Unlawful Consorting and Prohibited Insignia\) Act 2021](#) (Western Australia); [Section 10C, Summary Offences Act 2005](#) (Queensland); [Section 6A, Police Offences Act 1935](#) (Tasmania).

¹⁵ [Section 98, Liquor Licence Regulations 2018](#) (New South Wales); [Section 117E, Liquor Licensing Act 1997](#) (South Australia); [Additional License Conditions](#) issued under section [33AA\(2\) of the Liquor Act](#) (Northern Territory).

¹⁶ [Sections 43-45, Criminal Organisations Control Act 2012](#) (Victoria); highlighted by submission of the [New Zealand Law Society | Te Kāhui Ture o Aotearoa on the Gangs Legislation Amendment Bill](#), Appendix 1: Current legislation in Australia, paragraph 2.

¹⁷ Submission of the [New Zealand Law Society | Te Kāhui Ture o Aotearoa on the Gangs Legislation Amendment Bill](#), paragraphs 4.7, "Evidence regarding the... anti-gang laws in Australia is lacking in both quality and

systemic difference in Australian and New Zealand gangs in terms of their likelihood of compliance with a public display ban.¹⁸

What is the policy problem or opportunity?

20. Public confidence in law and order could be undermined in the event of low compliance with the display ban (as discussed at paragraphs 6-9). Blatant defiance would risk giving the impression that gang members can operate above the law.
21. In particular, the possibility of repeat offending by gang members who are not deterred by the potential penalties for breaching the display ban could:
 - 21.1. create a risk in meeting the public's expectations for law and order, if they observe blatant defiance of the display ban;
 - 21.2. undermine the reputation and perceived effectiveness of Police in responding to offending; and
 - 21.3. put higher demands on Police enforcement resources in responding to repeated breaches compared to higher compliance scenarios.
22. In terms of the scale of the issue, there are about 9,500 patched or prospect members on the National Gang List.¹⁹ While there is gang presence across the country; a disproportionate share resides in regions with smaller towns such as Bay of Plenty, East Coast, and Hawke's Bay (approximately 25%).²⁰ It is unclear what the rate of non-compliance will be, as noted at paragraph 5.

Consultation

23. Consultation was limited to Government agencies as noted in paragraph 87 of the RIS. Consultation with other stakeholder did not occur due to constraints in preparing the policy and Amendment Paper in the timeframes that were commissioned. This paper incorporates feedback that was received on the analysis.

What objectives are sought in relation to the policy problem?

24. The objective is to facilitate high compliance with the display ban so as to provide public confidence in law and order. The extent to which this is achieved will also impact on the objectives of the display ban itself, noted at paragraph 106 of the RIS.²¹

quantity. It is evident, however, that crime statistics have not decreased..."; Appendix 2: Comparison of crime statistics (for categories most associated with gang offending, such as violence offences and drug offences).

¹⁸ For example, the relevant research often uses the term 'gang' to refer interchangeably to outlaw motorcycle clubs (the term most used in Australia), as well as patched street gangs, and youth cliques. See: Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, Pgs 15-16. See also: [Toward an understanding of Aotearoa New Zealand's adult gang environment | Prime Minister's Chief Science Advisor](#) (PMCSA), [full report](#), June 2023, 1.1 Gangs are Difficult to Define, Pg 18.

¹⁹ As noted at paragraphs 4-5 of the RIS, as well as a more recent update from New Zealand Police's Gang Harm Insights Centre (GHIC), identifying 9,447 members as of 29 February 2024, per [response dated 22 March 2024 to OIA request made via FYI request #25875 email](#).

²⁰ Jared Savage, New Zealand Herald, [Frustrated emails from Kawerau constable to Police Commissioner Mike Bush led to downfall of Mongrel Mob president Frank Milosevic in Operation Notus drug bust](#), 14 February 2021.

²¹ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024, Proposal 1: Prohibiting gang insignia in public – Section 1.1: Diagnosing the policy problem, Pg 25.

Section 2: Deciding upon an option to address the policy problem

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

25. The following criteria will be used to analyse the options. These broadly align with the criteria at paragraph 43 of the RIS but have been adapted to this specific problem:
 - 25.1. effectiveness at increasing compliance with the display ban: producing fewer breaches, so as to improve public confidence that the law is being enforced;
 - 25.2. proportionality: the extent to which the penalties are justifiable in relation to the nature and size of the problem; and
 - 25.3. reducing gang affiliation and rates of offending: reflecting the underlying objectives of the display ban itself.

What scope will options be considered within?

26. The scope of options has been limited by:
 - 26.1. the narrow nature of the problem, focused on the compliance with a particular offence; and
 - 26.2. Ministers' commissioning of options ruling out non-legislative options.
27. We note some other relevant regulatory options are already being progressed. For example, the Government's commitment to train 500 new frontline police officers will provide more resources, who can assist in facilitating more consistent enforcement. Additionally, gang enforcement is an operational priority for Police, as noted at paragraphs 10-11.

What options are being considered?

28. Four options were considered enforcing for the display ban against repeat offending:
 - 28.1. Option One – *Status Quo, – offence and related penalty for breaching the display ban as set out in the Bill;*
 - 28.2. Option Two – *A bespoke search power, enabling preventative searches to be conducted by Police where they consider there are reasonable grounds to suspect the display ban is likely to be breached;*
 - 28.3. Option Three – *increased penalties for second and subsequent convictions for breaches of the display ban;*
 - 28.4. Option Four – *A mandatory, court-ordered prohibition on the private possession of gang insignia (in addition to the existing prohibition on public display.*

Option One – Status Quo: display ban in the Bill

29. This option would rely on the display ban offence, described at paragraph 3. This option imposes a fine or short sentence of imprisonment on conviction for breaching the display ban.
30. In practice, the display ban would be enforced by Police either:
 - 30.1. immediately, if resources and circumstances allow; or

- 30.2. as part of follow-up enforcement action, including searches of vehicles or properties for evidential material (such as for the insignia that was used in the breach of the display ban).
31. Where offending occurs, existing search powers enable evidence to be gathered of that offending, which enables prosecutions and convictions to be successful.

Factors affecting compliance

32. As the Bill has not yet been implemented, the risk of low compliance at paragraphs 6-9 remains as yet hypothetical. The Queensland's experience, described at paragraph 13, indicate that existing offences may be sufficient to induce compliance with the display ban.
33. Further, any repeated offending may not reflect a deficiency in the display ban offence, given that compliance is also impacted by consistency of enforcement (as noted at paragraphs 7-11). Such consistency of enforcement is most dependent on factors such as police resourcing (per paragraph 27). These operational factors are currently being enhanced to facilitate compliance alongside the Bill's display ban offence.

Proportionality of penalties

34. Repeated offending would face the consequence of multiple convictions for each breach of the display ban. Additionally, under section 9 of the Sentencing Act 2002, the Court takes into account factors that are applicable to the case, including the number, seriousness, date, relevance, and nature of any previous convictions.
35. This means that where a person has already received multiple previous convictions, this may be regarded as indicating a general disrespect for the law or contempt for authority, which may enhance the offender's culpability for the offence. Cases with a higher level of culpability can warrant an increase in the starting point of a sentence. Where an offence has occurred within a short time of the previous offending may also be factored in the sentencing decision.

Reducing gang membership and rates of offending (beyond the display ban)

36. The impact on gang affiliation or rates of general offending (other than the display ban) was analysed in the RIS: paragraphs 50-81 (impacts of the overall response) and 138-140 (impact of the display ban specifically).

Option Two – A bespoke search power, enabling preventative searches

37. This option would support Police to deter and prevent repeat offending against the display ban by disrupting it before it happens (rather than relying on policing it afterwards). It would provide a new search power enabling preventative searches to reduce the risk of display ban breaches.
38. Judges would be given the power to issue gang insignia search warrants if satisfied that there are reasonable grounds:
- 38.1. to suspect a breach of the gang insignia ban is likely to be committed by a person;
- 38.2. to believe that the search warrant may reduce the risk of that breach; and
- 38.3. to believe that the search will find insignia.

39. In contrast to existing search powers,²² Police would not require reasonable grounds to suspect offending had actually occurred (i.e. breach of the display ban), nor to believe they would find evidence of offending (i.e. the insignia used in a breach). In other words, this would allow insignia to be seized even if they had not been displayed.
40. This would represent an unprecedented and significant shift in the long-established purpose of searches that would be inconsistent with the rule of law. It would move searches away from being tools for collecting evidence of criminal offending, and towards being a penalty instead of, or in addition to, those imposed on conviction. We are aware of no equivalent in comparable jurisdictions.
41. Judges would be required to have required to various matters in determining whether to issue a warrant, including:
 - 41.1. any previous convictions for breach of the ban by that person;
 - 41.2. any previous suspected breaches of the ban by that person;
 - 41.3. the imminence of the likely breach of the ban by that person;
 - 41.4. the ability and practicality of Police being able to respond to that suspected breach of the ban by that person;
 - 41.5. any other action already taken by Police that may have been effective or ineffective in preventing a breach of the ban by that person or any other person;
 - 41.6. the number of persons that may breach the ban; and
 - 41.7. any other matter the judge considers relevant.
42. Any insignia found under these searches would be forfeited to the Crown and destroyed if no application for return is made within one month. A person with an interest in the property could apply to the Police for the property to be returned if:
 - 42.1. the insignia has not, and will not be displayed in breach of the ban; or
 - 42.2. other exceptional circumstances exist that make it unjust to destroy the insignia (for example, that a person other than the particular person who breached the insignia ban has an interest in the property meaning their financial loss would be disproportionate to the harm addressed by destruction).

Factors affecting compliance

43. We consider this option would deter breaches of the display ban if search warrants were to be made under this bespoke power. Police searches are highly intrusive and disruptive to those affected. Gang members involved in serious organised crime would be particularly incentivised to not breach the display ban, as it could put any wider criminal enterprise they are involved in at risk. This is because searches carried out in anticipation of likely breaches of the display ban could uncover evidence of wider criminal offending.
44. However, the core legal justification for intrusive search powers is that they are necessary to gather evidence of a particular criminal offence. Without an established criminal offence to link the offending to, or another pressing social objective (e.g. preventing imminent risk to life), preventative searches risk straying into becoming a

²² [Section 6, Search and Surveillance Act 2012.](#)

tool of harassment. Not only does this create rule of law challenges, but it also affects the legal workability of a bespoke search power, to the extent that it is unlikely that search warrants would be authorised. Judges need to be satisfied that searches are lawful and reasonable under the New Zealand Bill of Rights Act 1990 before issuing warrants.²³

Proportionality of penalties

45. As noted above, a bespoke new search would distort the general legal basis of search powers – from a tool for collecting evidence of offending, to a method of punishment/deterrence. This effect on the broader law undermines the proportionality of the penalty for the display ban offence.
46. Intrusive searches of family homes also comes at a high cost to the whānau of gang members affected by the search, along with others in the community affected, such as neighbours. The disruptive and traumatic impact of searches on those not involved in criminal offending is high. This is compounded if searches are repeated. We consider the impact of repeated searches of homes to be highly disproportionate in comparison to the nature of the social harms that the prohibition on the public display of gang insignia seeks to prevent.

Reducing gang membership and rates of offending (beyond the display ban)

47. The creation of a bespoke search power to enable preventative searches for what is relatively low level offence risks being perceived as a tool of unjustified harassment, particularly if repeated searches are authorised and executed over a short period of time.²⁴ This risks undermining social cohesion and trust in authorities. This could limit Police's ability to pursue prevention and de-escalation opportunities of both criminal offending and anti-social behaviour, as noted at paragraphs 60-61 and 78-80 of the RIS.

NZBORA implications of a bespoke search power

48. Search powers engage the right to be free from unreasonable search and seizure. However, the proposal itself may not be inconsistent with NZBORA, per the protections noted at paragraph 44. This is because the provision would not intend to permit search warrants to be issued where they would be, in any particular case, unreasonable.

Option Three – Increased penalties for second or subsequent convictions

49. Option three proposes doubling the penalty for second and subsequent breaches of the display ban offence: a maximum of 1 year imprisonment or a maximum fine of \$10,000. (A first-time breach of the display ban would remain liable to a maximum penalty of 6 months imprisonment or a \$5,000 fine).

Factors affecting compliance

50. Increased maximum penalties are unlikely to be effective at further deterring breaches of the display ban. This is because:
 - 50.1. there is significant evidence indicating a weak link between increasing penalty levels and deterrence, with criminological studies of the severity of punishment

²³ [Section 21, New Zealand Bill of Rights Act 1990](#).

²⁴ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, "Gang Control – The Response to Gangs" and "The Police Response," Pg 677.

finding a minimal effect on offenders (in part because few offenders know the maximum penalty associated with the crimes they commit);²⁵ and

- 50.2. repeat offending will already practically tend to result in higher penalties for repeated breaches even without specific provisions (as it amounts to an aggravating factor at sentencing, as noted at paragraphs 34-35).

Proportionality of penalties

51. The existing penalties in the Bill for breaching the display ban are already a significant increase from those contained in the Prohibition of Gang Insignia in Government Premises Act 2013 (being a maximum fine of \$2,000 and forfeiture of the insignia used in the offending). The maximum penalties for the display ban are also higher than other comparable offences across New Zealand's statute book (such as disorderly behaviour²⁶). Increasing these further complicates the ability to maintain the coherence and consistency of the penalties for similar behaviour across the statute book.²⁷

Reducing gang membership and rates of offending (beyond the display ban)

52. This option would have the same impact as the status quo on rates of offending and gang membership (per paragraph 36).

Option Four – A mandatory court order prohibiting possession of insignia

53. Option four creates a gang insignia prohibition order (**possession ban**). Cabinet agreed that this order would be mandatory, for the court to make against any person convicted of a third or subsequent breach of the display ban within a five-year period [SOU-24-MIN-0066 refers].
54. The order would prohibit the person from possessing or controlling any gang insignia, whether in public or private (and regardless of whether the insignia had been used in a breach of the display ban). The order would last for five years from the date it is made.
55. We separately analyse the additional residential restriction Cabinet agreed to at paragraphs 70-80 below, due to the difference in implications for proportionality.
56. It would be an offence to intentionally contravene the order, with a maximum penalty of 1 year imprisonment (double the maximum penalty of the display ban offence).
57. For those subject to a possession ban, private personal possession of insignia itself will be a criminal offence. This will mean Police will be able to apply for a search warrant under the existing law in the Search and Surveillance Act 2012 if they have reasonable grounds to:
 - 57.1. suspect that the person intentionally contravened the order (by possessing or controlling gang insignia, regardless of whether it has been used in a public display); and
 - 57.2. believe that the search would find evidence of that offending.

²⁵ A synthesis of 47 studies by Washington State University researchers concluded that severe punishment has a minimal effect on reoffending. Pratt, Cullen, Blevins, Daigle, and Madensen, (2006), *The empirical status of deterrence theory*, in Cullen, Wright, and Blevins, *Taking Stock: The Status of Criminological Theory*. New Brunswick, NJ: Transaction Books.

²⁶ [Section 3, Summary Offences Act 1981](#).

²⁷ Legislation Design and Advisory Committee, Legislation Guidelines: 2021 edition, [Chapter 24, Creating criminal offences, Part 7: What is the maximum penalty that will apply?](#)

Factors affecting compliance

58. It is likely that the possession ban will be effective at increasing the deterrence of repeat offending. This is because of the evidence about how gang members value their patch – it being a core part of their identity.²⁸ Seeing gang members at risk of criminal conviction for merely possessing any insignia (as a result of having repeatedly breached the display ban) may incentivise greater compliance.
59. Secondly, a gang insignia prohibition order is likely to be an effective pathway to the greater use of existing search powers (outlined at paragraph 57). While the primary purpose of search powers is to find evidence, there will be a collateral policy advantage. The ability for Police to more readily search vehicles and properties of those subject to the order (potentially resulting in prosecution for any further offending uncovered) is likely to have some additional deterrent value.
60. However, the deterrent value of any additional searches is likely to lose efficacy over time as gangs adapt by either:
 - 60.1. ceasing to wear patches in public (potentially adopting hand signals, catch cries, colours, or tattoos as an alternative²⁹); and/or
 - 60.2. for the subset of gang members involved in criminal activity (per paragraphs 23-34 of the RIS³⁰), structuring their criminal affairs in such a way as to ensure that contravening a gang insignia prohibition order will not put any wider criminal enterprises at risk.
61. The additional incentives for compliance provided by gang insignia prohibition orders depend on securing the necessary convictions for breaches of the display ban. Without a third conviction, an order will not be available.
62. Even if enforcement is inconsistent, gang insignia prohibition orders could be obtained. However, it will rely on selective enforcement by Police to target their resources towards those repeat offenders they determine would have the largest impact from prosecuting (and therefore receiving an order on a third conviction). There is always some discretion in investigating and prosecuting any offending, such as prioritising cases with sufficient public interest (per paragraph 11). However, the degree of discretion would be higher in the context of inconsistent enforcement of the display ban (per paragraphs 8-9).

Proportionality of penalties

63. Compared to the status-quo, possession bans are likely to have a more significant impact on whānau of gang members who reside at the same place as the person subject to an order. In particular, additionally, repeated searches are likely to be disruptive, invasive, and particularly traumatic for children. There is also a risk of gang members coercing family members to take responsibility for possession to evade accountability (even if this may not work per paragraph 74).
64. A possession ban also engages rule of law concerns. This is because the majority of the deterrent value of the possession ban comes from the enhanced access to existing search powers that it enables. While the primary purpose of searches executed in

²⁸ Anthony Hubbard, [What the gang patch means | Stuff](#), 6 September 2009

²⁹ Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, Pg 663, “A successful ban may make back patches used for ceremonial purposes only, but there are any number of other ways gang members can express membership, if they so choose.”

³⁰ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024, Pgs 10-12.

response to suspected breaches of the possession ban will be to collect evidence, the wider policy rationale underpinning the possession ban is that it enables disruptive searches to be conducted. This risks distorting the general legal basis of search powers, from a tool for collecting evidence to a method of punishment/deterrence.

Reducing gang membership and rates of offending (beyond the display ban)

65. The new order has the same risks as the display ban offence, of incentivising gangs to be less visible without necessarily reducing gang affiliation or offending. Searches and/or convictions for the possession ban may also increase the risk of counterproductively entrenching gang membership and criminal activity, as detailed at paragraphs 74-76 of the RIS.³¹ Namely, imprisonment for non-harmful conduct risks entrenching reoffending behaviour, due to the impacts of incarceration.
66. To the extent that searches are perceived by those in the affected community to be unreasonable or disproportionate, this could be expected to undermine social cohesion. This may further undermine relationships between gangs and law enforcement and encourage a confrontational approach by Police.³² This could limit the ability to pursue prevention and de-escalation opportunities of both criminal offending and anti-social behaviour, as noted at paragraphs 60-61 and 78-80 of the RIS.
67. The order may also shift the focus away from gangs most involved in organised offending, discussed at paragraphs 23-34 and 64-67 of the RIS. We anticipate that gangs most involved in organised crime are the most likely to comply with the display ban to avoid attracting Police attention.

NZBORA implications of gang insignia prohibition orders

68. As noted at paragraph 14, the display ban was found to be a disproportionate limitation on rights to freedom of expression, association, and assembly. As such, proposals that increase the penalties for the display ban involve further limits on these rights.
69. Despite this, the possession ban has a number of features intended to support the justifiability of the additional limitation on rights under NZBORA. Notably:
 - 69.1. A court may only make an order on conviction for a third offence of the display ban;
 - 69.2. their aim is to deter repeated breaches of the display ban, and do not create a universal prohibition on the private displays of expression and association; and
 - 69.3. the gang insignia prohibition orders expire after five years.

Addition to Option Four – prohibiting insignia at usual place of residence

70. Cabinet agreed to option four with this addition, to address the problem at paragraphs 20-21, as well as the operational concerns described below.
71. The details of the gang insignia prohibition order are the same (as at paragraphs 53-57). However, they would additionally prohibit the person from having gang insignia present at their usual place of residence (the **residential restriction**), whether or not

³¹ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024, Pgs 19-20.

³² Jarrod Gilbert, [The rise and development of gangs in New Zealand](#), University of Canterbury PhD Thesis, 2010, "Gang Control – The Response to Gangs" and "The Police Response," Pg 677.

the person has possession or control over the insignia. This will make it easier to obtain search warrants and secure prosecutions.

72. Police raised concerns that, without a residential restriction, there will be operational challenges to collecting evidence that the person subject to the order was in possession or control of an insignia. This has a risk of unsuccessful prosecutions where the insignia could belong to someone else visiting or residing at the household, rather than the particular person subject to the order. Police are concerned this would risk diminishing the deterrent value of the ban.
73. In contrast, the inclusion of a broader residential restriction:
- 73.1. firstly, will enable Police to obtain search warrants in a wider range of circumstances. Police would only require reasonable grounds to suspect that the person intentionally contravened the order by allowing gang insignia to be present at their usual place of residence, regardless of whether the insignia was in their possession or control. This will mean that, for example, warrants can be obtained if the person subject to a gang insignia prohibition order is visited by another patched gang member, or if they reside with whānau who are also patched gang members; and
- 73.2. secondly, it will support Police to more easily secure prosecutions. With the residential condition, the offence will not require proving that the insignia was in the person's possession or control.
74. We consider that, while it would be more difficult to obtain a warrant and/or prosecute breaches of the possession ban without a residential restriction, these challenges are not so great as to undermine the deterrent value of the ban. The operational concerns identified by Police reflect the type of challenges that arise in any investigation. Notably:
- 74.1. factors that might lead to a reasonable suspicion that a person was in continued possession or control of a gang insignia could include things like them being observed wearing insignia, or statements by that person or others that they have not given up their patch; and
- 74.2. when investigating *any* offence, Police will need to establish the link between a particular suspect and any particular evidence of offending collected during a search. Indicators that might establish such a connection between an offender and any insignia found could include the insignia being found in the offender's room or the insignia being found alongside the person's other possessions.

Factors affecting compliance

75. The residential restriction, by making it easier to obtain search warrants and secure prosecutions (as per paragraph 73), will enhance the deterrent effect of the new orders (noted at paragraphs 58-59).

Proportionality of penalties

76. The residential restriction compounds the proportionality issues, discussed at paragraphs 63-63, by increasing ease by which search warrants and prosecutions may be secured.
77. Notably, a similar residential restriction is an element contained in the Firearm Prohibition Orders regime. It is a standard condition of such orders that the person must

not reside at any premises in which any firearms are stored.³³ However, the rationale for such a condition is less justifiable in the context of the possession ban, as:

- 77.1. the risk associated with a person having ready access to firearms is not comparable to that posed by access to gang insignia;
- 77.2. gang insignia can be core to the identity of gang members (as compared to firearms), impacting the ability of whānau in gangs to reside together without significant limits on expression; and
- 77.3. it increases the risk that a person is held criminally liable for being proximate to somebody in possession of gang insignia, even when the insignia was outside the person's possession or control (i.e. creating guilt by association).

Reducing gang membership and rates of offending (beyond the display ban)

- 78. The order retains the same impacts as discussed at 63-67. The addition of the residential restriction marginally increases those impacts by making both searches and convictions more likely.

NZBORA implications arising from a residential restriction

- 79. The addition of a residential restriction to the gang insignia prohibition orders increases the risk of a person being held criminally liable for being proximate to somebody in possession of gang insignia, even when the insignia was outside the person's possession or control. This risks limiting the right to be presumed innocent, under section 25(c) of NZBORA. The restriction moves the orders closer towards being a strict or absolute liability offence. However, the requirement that the order must be intentionally contravened mitigates this risk.
- 80. The residential restriction has the same protections and risks for the right to freedom from unreasonable search and seizure under section 21 of NZBORA, at paragraphs 68-64. Issuing officers will assess the reasonableness of Police applications for search orders (related to intentional contravention of the residential restriction) – the provision is not intended to authorise unreasonable searches to be executed.³⁴

³³ [Section 39C\(1\)\(b\) of the Arms Act 1981](#).

³⁴ Under [section 6 of NZBORA](#).

How do the options compare to the status quo?

	Option One – Status Quo	Option Two – Bespoke search power	Option Three – Increased maximum penalties	Option Four – Possession ban orders (including residential restriction)
Increased compliance with the display ban	0 Uncertain levels of compliance	0 Bespoke warrants unlikely to be made due to inherent workability challenges	0 Unlikely to affect rates of compliance by gang members	++ Likely to increase deterrence of repeat offending; though may only apply to a small number of people (convicted at least three times over five years)
Proportionality of the penalties	0 Repeat offending dealt with as aggravating factors	-- Significant risk of disproportionately by undermining the core legal basis for conducting searches, using them as a preventative punishment	- Increases the disproportionately of penalties compared with those for similar offending	-- Gang insignia prohibition orders are more likely to impact whānau of gang members, which can be disruptive, invasive, and traumatic for children and other residents. Residential restriction limits the ability to reside or associate with others wearing insignia at a person's usual place of residence, further restricting freedom of expression.
Reducing gang membership and rates of offending (beyond the display ban)	0	- In the event that warrants are made, the search risks entrenching anti-social behaviours	0 Unlikely to have a different impact from the status quo under the Bill	- May increase imprisonment for non-harmful conduct (with a risk of entrenching anti-social behaviour), and reduce prevention and de-escalation opportunities by Police
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?

- 81. Our preferred option is the status quo. We consider there is sufficient scope within the existing legislative and operational interventions for effective enforcement to deter criminal offending by gang members.
- 82. The risk of low compliance remains as yet hypothetical, and the additional resources and prioritisation provided by Police may be sufficient to achieve the objectives of the Bill, as noted at paragraphs 32-33. This means that additional options might not be necessary to ensure consistent enforcement of, and compliance with, the display ban.
- 83. Giving Police more tools to crack down on gangs is likely to increase deterrence of repeated breaches of the display ban because of the value gang members place on their patch, and the motivation to avoid associated searches enabled by the possession ban order (as noted at paragraphs 58-62 and 75). However, these additional incentives for compliance are likely to diminish over time, as gang members adapt by changing how they operate (such as by using methods other than wearing patches in public to express membership).
- 84. We also anticipate that gangs most involved in organised crime are the most likely to comply with the display ban to avoid attracting Police attention. This means those most likely to receive gang insignia prohibition orders are those who may be anti-social but not necessarily the offenders with the most negative impact on communities. As such, increasing the prioritisation of compliance with the display ban may successfully reduce the visibility of gangs at the expense of law enforcement focus on harmful offending.
- 85. Further, the possession ban risks being a disproportionate penalty, due to the impact on the wider whānau and community affected by it (as noted at paragraph 63). This is particularly the case with the residential restriction. It also engages rule of law concerns, as noted at paragraphs 64 and 79-80.
- 86. This new tool may also reinforce trade-offs inherent in building on top of the display ban, as noted at paragraph 65-67. The general effect of enforcing these orders on gang members’ attitudes to law enforcement may risk further limiting Police’s ability to pursue crime prevention and de-escalation opportunities.

What are the marginal costs and benefits of the option?

- 87. We have analysed option four: a mandatory gang insignia prohibition order, on a third display ban conviction in 5 years, which prohibits possession and control of insignia and the presence of insignia at the person’s usual place of residence.

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 three times within five years will be subject to a gang insignia prohibition order for five years. This is liable to a fine or a prison sentence.	High – A significant marginal impact of the order (including searches and potential convictions) for those eligible. The new breach offence has the potential for fine or imprisonment.	High certainty – Will be incurred on repeated offending for the display ban, and any contravention of resulting orders.

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, from potential searches or convictions for breaches of the order.	High – Direct impact of searches and indirect impact on children and whānau of the person subject to convictions for breach of the order (with the possibility of fine or imprisonment).	High certainty – Will be incurred per searches or breaches of the order.
New Zealand Police	One-off – Initial cost of implementing the orders including training. Ongoing – Cost of enforcement of the ban with Police monitoring of compliance.	Medium – Enforcing the display ban consistently to secure the orders, and monitoring compliance for breaches (including searches), could be resource intensive.	Medium certainty – The rates of compliance will with the display ban are uncertain, which will impact the cost of enforcement by Police.
Police prosecutions	Ongoing – Cost of prosecutions for breach offences for the order (as cost of prosecutions of the display ban is part of the status quo).	Low – Breaches of the order are intended to be rare due to deterrence; and will follow repeated convictions of the display ban before new convictions for breach of the order may occur.	Medium certainty – Uncertain rates of compliance, however, the requirement for three convictions in five years limits the numbers eligible for prosecution.
Ministry of Justice	Ongoing – Cost of legal aid and collection of fines.	Low – Costs of collection should be low from few additional fines arising from the limited number of breach offences for the order.	Medium certainty – As above – uncertain rates of compliance but limited number of additional prosecutions.
Courts	Ongoing – Cost of court proceedings for breach offences, including appeals.	Low – Additional cases arising from breach of the new possession ban should be low.	Medium certainty – As above – uncertain rates of compliance but limited number of additional prosecutions.
Department of Corrections	Ongoing – Costs for any convicted offenders whose sentences are managed by Corrections.	Low – Additional sentences managed by Corrections arising from breach of the possession ban should be low.	Medium certainty – As above – uncertain rates of compliance but limited number of additional prosecutions.
Independent Police Conduct Authority	Ongoing – cost of reviewing complaints regarding the monitoring of the new orders by Police.	Low – As there should be few orders, the number of new complaints to be reviewed should also be low.	Low certainty – It is unclear how many of those subject to an order, and monitoring by Police, will lodge a complaint.

Total monetised costs	Ongoing – A broad range of monetised costs	Low	Medium certainty
Non-monetised costs	Ongoing	Medium	Medium certainty
Additional benefits of the preferred option compared to taking no action			
General public (most commonly smaller communities with a relative high gang presence)	Ongoing – Any increased compliance with the display ban as a result of deterrence from the orders may increase public perceptions that law and order is being upheld.	High – A possession ban is likely to be an effective deterrent against repeated breaches of the display ban	Low certainty – The counterfactual is highly uncertain.
New Zealand Police	Ongoing – Any deterrence from the orders will reduce the cost of enforcement of the display ban.	High – A possession ban is likely to be an effective deterrent against repeated breaches of the display ban	Low certainty – The counterfactual is highly uncertain.
Total monetised benefits	Ongoing	Low	Low certainty
Non-monetised benefits	Ongoing	Low	Low certainty

88. Generally, we expect an overall low number of people likely to be eligible for possession bans. For any orders made, we expected additional search warrants, which will have a resource impact for Police and the courts. Any evidence of offending uncovered is likely to lead to more criminal court proceedings, and higher levels of imprisonment.
89. Financial implications are not expected to result in a material increase in the cost of implementing the Bill. A Budget bid to support frontline court services in relation to the Bill secured \$9.001 million in additional funding over four years. However, the aim of this policy is also to deter repeated breaches of the display ban. To the extent this succeeds, any increased costs from the orders may be offset by reduced costs in enforcing the display ban.
90. The Department of Corrections notes that it does not have the information it would require to calculate an estimate of what impact these changes might have on the prison population, or the number of people being managed in the community by Corrections. Any law change where imprisonment is listed as a penalty could result in more people in prison and may add pressure to an already overstretched frontline custodial workforce. Should the prison population increase as a result of these changes, additional resourcing would need to be considered to ensure that there is capacity in Corrections infrastructure, and that frontline staff are supported to manage additional people safely and effectively.

Section 3: Delivering an option

91. We have analysed the Government's preferred option: Four – mandatory gang insignia prohibition orders (on third conviction for a display ban offence), including the condition that insignia are prohibited from being present at the person's usual place of residence.

How will the new arrangements be implemented?

92. The implementation arrangements follow similar processes as for the Bill's non-consorting orders, as analysed in the RIS:
- 92.1. The implementation and exercise of gang insignia prohibition orders is substantially the same as non-consorting orders (both being orders made by the court), as detailed at paragraphs 314-319 of the RIS.³⁵ The main difference is that gang insignia prohibition orders will be mandatory for courts to make once a person has been criminally convicted of a third display ban offence, rather than a discretionary order made on application by the Commissioner of Police;
- 92.2. The implementation and prosecution of the offence for contravention of a gang insignia prohibition order is the same as for breach of a non-consorting order, as detailed at paragraphs 313-315 and 320-321 of the RIS.³⁶
93. In short, the courts will make the orders if satisfied that the relevant grounds are met. Police will undertake the monitoring of compliance with the new order, and gathering of evidence necessary for prosecution of the new offence.

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

94. The review arrangements follow similar processes as for the Bill's non-consorting orders, as analysed in the RIS at paragraphs 48-49 and 322-326.³⁷ These include court appeals of display ban convictions, and judicial review of the making of orders; and Independent Police Conduct Authority oversight of Police in monitoring compliance with the orders, and investigations for the offence of breaching orders.
95. The primary difference is that gang insignia prohibition orders are mandatory on convictions for repeated breaches of the display ban. This means that challenging an order that has been made would typically require appealing the pre-requisite criminal conviction(s) for the display ban offence, rather than the making of the order in itself.

³⁵ Ministry of Justice, [Regulatory Impact Statement: Responding to Gang Harms](#), 14 February 2024, Proposal 3: Stopping gang members from associating – Section 3.3: Delivering an option, Pg 77.

³⁶ *Ibid*, Pgs 77-78.

³⁷ *Ibid*, Pgs 15, 78-79.