MAKING GANG LAWS IN A PANIC: LESSONS FROM THE 1990S AND BEYOND

Jarrod Gilbert*

Abstract

New Zealand's most significant legislative drive targeting gangs occurred in the mid-1990s. This legislative push was sparked by several serious incidents of gang violence in two New Zealand cities. Although this spate of gang violence was successfully quelled using existing police powers, public and political outcry resulted in the introduction of a range of new laws to target gangs.

While some academic and legal commenters at the time noted that the laws were poorly justified, and that many were measures with little or no focus on gangs, the perceived threat presented by gangs meant that they were pushed through parliament quickly and without significant debate.

This research examines the outcomes of these laws, primarily by using data provided by New Zealand Police. The results indicate that these laws have been largely ineffective. The implications of this political and regulatory approach are discussed including factors that should inform future gang legislation.

I. The Legislation and its Context

New Zealand experienced a high level of gang violence in the early 1990s that garnered significant police and political concern.[1] In 1996, this type of violence erupted, via two unrelated gang wars in New Zealand's South Island, and provided the springboard for the most aggressive legislative thrust against gangs in New Zealand history. While gangs had been subject to government interventions in the past, they had never been so significantly focused on legislative change.[2]

* Director of Criminal Justice, University of Canterbury. This projected was funded from a grant provided by the New Zealand Law Foundation.

1 Jarrod Gilbert "Gang violence" in Annabel Taylor and Marie Connolly (ed) *Understanding Violence: Context and practice in the Human Services* (Canterbury University Press, Canterbury, 2013) 181 at 181.

2 Jarrod Gilbert "Gangs: The Politics and Political Management of the 'Gang Problem'" in Elizabeth Stanley, Trevor Bradley and Sarah Monod de Froidville (eds) *The Aotearoa Handbook of Criminology* (Auckland University Press, Auckland, 2022) 308 at 311.

In Christchurch, the South Island's largest city, a new chapter of the Road Knights motorcycle club was established; this created tensions and ultimately a war with the Epitaph Riders motorcycle club. The war included a series of public shootings.[3] In April 1996, the Road Knights fired a pistol at a group of Epitaph Riders on their motorcycles at an intersection. The shots missed their intended targets and instead hit a nearby car driven by a couple and their child – the man was injured by glass fragments, while the woman was struck by a bullet that passed through her arm and lodged in her chest.[4] It was, to use Huff's phrase,[5] a "catalytic event" that helped gain political attention, not least because Ron Mark – an unsuccessful Labour party candidate in the 1993 election, who six months after the shooting was elected to parliament as a New Zealand First MP – had a family member unwittingly close to the danger: "But for 0.5 of a second either way, my daughter or her boyfriend could easily have been the person shot".[6] On its own the event would have been enough to garner public and community concern but the close involvement, albeit indirectly, of an MP meant that political concern was heightened as the problem felt closer to those in power.

That concern was to increase. Just as heavy police pressure was helping quell the Christchurch conflict, a second gang war started in Invercargill, New Zealand's southernmost city. In that city, the Road Knights were attempting to stop the establishment of a chapter of the Black Power,[7] a patched street gang. For the Road Knights, an all-white club, the establishment of another gang was unacceptable, especially one made of predominantly Māori (New Zealand's indigenous population) members. During this time the numbers of both gangs swelled as out-of-town chapters joined in support as warfare commenced. A series of public shootings, a failed bombing and brawls occurred, which worried police and community alike, leading local police to take up arms.[8] While the episodes of inter-gang violence in 1996 were very serious, they were no more serious than a number of past conflicts. Despite this, with a national election looming, they were seized upon by politicians, generating a huge political wave.[9] This wave led to a raft of legislative changes that took shape in 1996 and 1997, and in the process led to a significant reframing of the gang issue in the public eye; one which has lasted into the present day. While

3 Katherine Hoby "Urgent meeting to discuss gang crisis" *The Press* (New Zealand, 15 June 1998).
4 Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013) at 208.
5 Ronald Huff "Denial, Overreaction, and Misidentification: A Postscript on Public Policy" in Ronald Huff (ed) *Gangs in America* (Sage Publications, Newbury Park, 1990) 310 at 312.
6 (23 October 1997) 564 NZPD 4969.
7 Diane Keenan "Chch link in gang war; Invercargill police, mayor fear further violence: 2 edition" *The Press* (New Zealand, 14 August 1996) at 1.
8 Gilbert, above n 4, at 210.
9 At 206.

existing legal measures were enough to quell the conflicts, the issue became heavily political, and discussions were characterised by sensational rhetoric rather than evidence. The legislative drive against gangs occurred in 1996, a politically unique year in which the country was set to elect its first Mixed Member Proportional (MMP) government, perhaps adding greater impetus for the need to be heard politically. Law and order issues are often seen as valuable election tools,[10] and gangs had been used in this way since Normal Kirk promised to "take the bikes off the bikies" before the 1972 election.[11] In the election year of 1996, gangs provided an important electioneering plank for the centre-left Labour opposition, and the centre-right National government was forced to respond.

Although the issue that initially sparked the legislative drive was violence, quickly the political conversations became dominated by issues around gang involvement in organised crime that would go on to dominate many political discussions around gangs.[12] This new concern was framed, not as a local issue in the cities that saw violence, but as a nationwide issue. One of the major players who pushed this agenda was the New Zealand Police Association president, Greg O'Connor, who believed the Police required new powers to combat gangs.[13] Labour opposition MP Mike Moore quickly became a supporter of O'Connor, who became the country's most vocal anti-gang spokesperson. His anti-gang and tough on crime rhetoric soon placed pressure on National to respond, which led the Minister of Justice to announce that the Justice and Law Reform Select Committee would begin an investigation into the issue of gangs, beginning in June 1996.[14] Sensing the opportunity for political advantage, Labour put forward Mike Moore as one of their members on the committee, thus providing him with a platform from which he successfully continued his campaign.

Mike Moore took advantage of, and enhanced, the profile the committee brought to the gang issue. He was a constant media presence and began writing opinion pieces for publication in major daily newspapers. Moore claimed, again without any supporting evidence, that gang leaders in Christchurch were "infuriated" by the publicity generated by the gang conflicts and wanted to negotiate peace so

10 Paul Havemann and Joan Havemann "Retrieving the 'Decent Society': Law and Order Politics in New Zealand 1984–1993" in Kayleen Hazlehurst (ed) *Perceptions of Justice*, (Avebury, Aldershot, 1995) at 229.

11 Jarrod Gilbert and Greg Newbold "The control of patched gangs in New Zealand" in Emil W Pływaczewski (ed) *Current problems of the penal law and criminology* (Wydawnictwo CH Beck, Warszawa, 2014) 384 at 393.

12 Mark Lauchs and Jarrod Gilbert "Outlaw Motorcycle Gangs" in Antje Deckert and Rick Sarre (ed) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Switzerland, 2017) 159 at 163.

13 Jarrod Gilbert "The rise and development of gangs in New Zealand" (PhD thesis, University of Canterbury, 2010).

14 Gilbert, above n 13.

they could continue their organised criminal activities.[15] Outside the Fort Street Police Station in Auckland in June 1996, Moore, with fellow Labour MP Phil Goff, told reporters that he wanted the Select Committee to travel further than just the South Island cities. For him, the problem was not regional, but of immediate national importance. Of particular concern was Auckland. Auckland, he said, was where the most serious problems existed: "What we have learned about Auckland is it's more disciplined, it's better organised."[16] It was a part of Moore's belief that the gangs "are no longer groups of hoons who smash the occasional pub. They have graduated into serious organised crime".[17] This was a significant change of tack, and it led to a shift in the wider public's perception of the gangs as dominating profit-driven crime in New Zealand. At this time, the biggest concern with regard to gang involvement in organised crime was around cannabis. By the latter half of the 1990s the police were directly linking drug dealing to gangs, specifically cannabis supply and cultivation.[18] Although the common rhetoric was that gangs dominated the drug trade, supporting evidence was lacking and research showed it to be incorrect,[19] and the trade extended far beyond the gangs. Nevertheless, there is no doubt that gangs were becoming increasingly involved in the drug trade and profit-driven crime became the rationale for new legislation.

The political discussion soon became untethered to the scope and magnitude of the problem. Moore eventually described to parliament that: "Gangs are a time bomb lodged against the heart of the nation … They are a threat to our democracy".[20] The newly appointed Police Commissioner Peter Doone said the country had just five years to destroy gangs or they would be completely beyond control, comments that Moore applauded as a "powerful wake-up call".[21] The rhetoric had reached a crescendo.

Gangs became a moral panic.[22] While acknowledging the term may be overused,[23] the degree of rhetoric employed over this period was such that it elevated the issue beyond the (albeit very real) problems at hand.

During Moore's initial drive to promote the issue, Justice Minister Doug Graham, a lawyer turned politician who enjoyed a level-headed reputation, attempted to

15 Gilbert, above n 13.
16 Gilbert, above n 13.
17 Gilbert, above n 13.
18 Peter Doone "Report of the New Zealand Police for the year ended 30 June 1997" [1996–1999] 43 AJHR G6 at 4.
19 Chris Wilkins and Sally Casswell "Organized Crime in Cannabis Cultivation in New Zealand: An Economic Analysis" (2003) 30 CDP 757 at 772.
20 Gilbert, above n 13.
21 Gilbert, above n 13.
22 Stanley Cohen *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (MacGibbon & Kee, London, 1972).
23 David Garland "On the concept of moral panic" (2008) 4 CMC at 9.

calm matters. Apparently aware that the issue was being blown out of proportion, he said that the subject was not new, and that care needed to be taken in enacting new laws:[24]

> I am always reluctant to keep incrementally adding to the police powers. One never gets them back. So each year we give more, and we have to be very, very careful about that. I would need to be satisfied – and I am certain we all do – that what they [the police] seek is justified, that it will do some good … and that it is the proper thing to do as a Parliament.

He was supported by fellow National MP, and former police officer Ross Meurant, who said: "Overreaction just before election time results in silly legislation."[25]

But very quickly, the pressure from the opposition became politically irresistible for the government, with the National Government responding with a swath of proposed measures seeking to combat gangs. An omnibus Harassment and Criminal Associations Bill was put before Parliament proposing new laws and strengthening existing provisions. Specifically, these included:

A. The Harassment Act 1997

The Harassment Act codified both civil and criminal harassment. A person would commit criminal harassment if they harassed another person causing the victim to fear for the safety of themselves, or those with whom they shared a family relationship twice or more within a 12-month period.

B. Amendments to the Crimes Act 1961

A number of amendments were made in relation to the Crimes Act. Among these amendments was a proposal to create a new offence of participation in a criminal gang. The definition of what constitutes a criminal gang was broad to capture various groups. Police powers to intercept private communication were also expanded by amending the definition of "organised criminal enterprise".

C. Amendments to the Criminal Justice Act 1985

The amendments to the Criminal Justice Act gave greater power to the court in issuing non-association orders; primarily giving judges the discretion to impose

24 (25 June 1996) 556 NZPD 13367.
25 (25 June 1996) 556 NZPD 13363.

non-association orders when sentencing offenders for periods of twelve months or less.

D. Amendments to the Local Government Act 1975

Changes to the Local Government Act broadened the grounds on which removal orders for gang fortifications could be made and made removing these structures quicker and more effective.

E. Amendments to the Misuse of Drugs Act 1975

Under the law as it existed prior, Police had the power to obtain an interception warrant if there were reasonable grounds for believing that a class A or B controlled drug offence was being, or was about to be, committed. This amendment meant that interception warrants became available in a wider range of situations, and, most significantly, such warrants could be obtained in relation to dealing in or cultivating cannabis (a class C controlled drug).

F. Amendments to the Summary Offences Act 1981

Two main changes to the Summary Offences Act were made. Firstly, two new offences, based on an existing law relating to associating with convicted thieves, were added to make it illegal to habitually associate with violent or drug offenders "in circumstances from which it can reasonably be inferred that the association will lead to the commission" of further such offending. Secondly, additional behaviours were to be added to what constituted intimidation, and the *mens rea* element was reduced to include behaviour that was not deliberate.

G. Amendments to the Telecommunications Act 1987

These amendments regulated the obtaining of call-associated data – obtained through the use of telephone analysers or by other technology – by both the Police and Customs, allowing the gathering of information on who people have been calling, and when these calls occurred, but not the content of the calls themselves.

Being focused entirely on criminalising and deterring gang activity, this stable of legislative reform can be classified as a suppressive attempt at gang control, and there was no effort made to enact other social policy initiatives that may do the same.[26]

26 Jarrod Gilbert and Greg Newbold *Youth Gangs: A review of the literature prepared for the Ministry of Social Development* (Ministry of Social Development, Wellington, 2006) at 25–30.

Belying the bold and confident claims made by politicians and police leaders, the introduction to the Bill housing the measures explained that there was no "independent data or research" that assessed the nature and level of gang offending.[27]

The laws were also not based on the on-the-ground expertise of police officers who were used to dealing with gangs. I was told by a police gang liaison officer who was active at the time of the drafting of the legislation:[28]

> There was no expert advisory panel for the government on gang stuff, where they talk about how you're actually going to apply this law and how's it going to work, what are the benefits and what are the short comings. … They bring in laws without talking to the practitioners at street level that have got to go and enforce them, and they sort of miss the point.

A number of formal submissions critiqued the proposals that were made (notably by the Privacy Commission, the New Zealand Law Society, the Human Rights Commission, the Christchurch Community Law Centre, the Auckland Council for Civil Liberties and others), as well as public comments in the media largely by lawyers and academics. Criticisms suggested that some of the elements of the proposed legislation were unnecessary and or would never be used; that the proposals were general law-and-order provisions rather than "gang" laws; and that they were a "sop" to the public that would have little impact: "These critiques and criticism came to nothing and very few modifications were made to the proposed laws during the select committee process."[29]

The new laws finally passed through their third reading in parliament in November 1997 and came into effect between 1 January 1998 and 1 June 1998. Both of the main political parties, National and Labour, voted for the measures. Indeed, of the six parties (and one independent member) in parliament, only the Alliance members did not support the measures. Ultimately, then, the laws came into force with near universal support.[30]

27 Ministry of Justice *Harassment and Criminal Associations Bill: Report of the Ministry of Justice* (June 1997).
28 Gilbert, above n 4, at 230.
29 Gilbert, above n 13.
30 Ministry of Justice *Harassment and Criminal Associations Bill: Report of the Ministry of Justice* (June 1997).

II. Research Questions

This research seeks to understand the effectiveness of these laws and the extent to which they were utilised and, in particular, the extent to which these laws targeted gangs and impacts these laws had in reality. Specifically, it will answer:

- To what extent have these laws been used?
- Are the laws primarily 'gang laws'?
- Were the laws extensively used in the five years after their passing?

The rationale for these specific questions is outlined further below.

III. Methods

A. Documents and Media

This study is largely quantitative in nature; however, it was necessary to employ a qualitative element to understand the social and political environment that may have influenced the introduction the gang-targeted legislation in the mid-1990s.

To do this, a range of secondary sources were collected and analysed, notably: the laws themselves, relevant New Zealand Parliamentary Debates, submissions for and against the laws, and numerous media reports.

These documents were coded so that an analytical process of thematic analysis could be employed via NVivo software. Thematic analysis is a particularly useful method, as it provides a rigorous technique for identifying, organising and analysing the themes that come through secondary sources.[31] In this instance, this allowed for an understanding to be developed in terms of what the thoughts and attitudes were within the policing, political and different public spheres around these legislative changes.

These assumptions and claims were then compared with the results of the quantitative data analysis (outlined below) to test their accuracy.

B. Data Collection and Analysis

The quantitative elements of this research are based on data acquired from the New Zealand Police regarding the use of each of the laws. These data show the

31 Lorelli S Nowell and others "Thematic Analysis: Striving to Meet the Trustworthiness Criteria" (2017) 16 IJQM 1 at 2.

number of individuals charged with each offence code, broken down by year and by gang alerts (which denote gang association or membership).

These data were used to determine how often the laws in question have been employed and how often they had been used against those with gang alerts relative to those without.

Where possible, each law change was connected with a single offence type, but because of the conventions of Police recordkeeping, not all were connected with specific offences. Intimidation, for example, returned 11 separate offence types, covering offences under the categories of Demand to Steal and Threaten to Kill.

The data for each of the offence types was collected from the day the related law was enacted (1 January 1998 or 1 June 1998), but where existing legislation was expanded, the data was collected earlier to recognise trends when the change in law occurred (that is: to analyse the effects of the amendments). Importantly, a specific focus is brought to bear on the five-year period after the legislation was enacted, to see the impact at that time. As will be recalled, this was spoken about as a crucial timeframe for the enactment of these laws.

Overall, the full date range, (typically, 1998–2020) allowed a sufficient timeframe to measure the impact of the laws and to identify any trends over time.

The data set contained a total of 378,806 charges; 75,303 of which were against by those with gang alerts and 303,503 by those without alerts. A total of 168,501 people were charged with these offences; 22,251 of whom had gang alerts, and 146,250 who did not.

C. Limitations

1. The gang alert dataset

The gang alert data maintained by Police is a central feature that has allowed this research to proceed, but it does present some limitations. These alerts are designed to be a tool for use by Police in the job of everyday policing and as such represent an imperfect tool for research.

The most notable of these limitations is in classification. Rather than separating individuals by gang status – such as member or associate – this dataset makes no distinction between levels of gang association and involvement. Those marked with gang alerts may be gang members, prospects, or simply people with known associations with gangs or gang members. This is a very broad categorisation and as a result the number of individuals with gang alerts recorded in the data provided by Police was 22,251, which is substantially higher than the number of gang members believed to currently exist in New Zealand. Recent statistics provided by the

government have placed the number of gang members at 8,175, but even this figure has also been acknowledged to be inflated by the inclusion of many individuals who have since left their gang, or who have a gang association but not membership.[32]

That this gang alert dataset includes a large number of individuals who are merely associates of gangs – but not actual gang members – means that where gang status is indicated, the numbers will necessarily be inflated.

We therefore need caution in reading the gang numbers used in this report because the "gang alerts" used in this research without question include a large number of associates who are not actual gang members. This will therefore inflate gang involvement.

The other concern with these data is how they are updated. The gang alert list is an actively maintained list from which individuals can be removed, and for which historical records are not kept. This means that some individuals who have left their gangs and subsequently been removed from the list may not appear in older data, particularly in the earliest years of reporting. As noted above, however, accurately removing those who have left gangs from such a list is a difficult undertaking and is unlikely to be a priority for police. This is also likely more than balanced by the large number of associates and other non-members that are captured as well.

2. Missing data

There are a number of provisions in the Bill for which no data are held. Given this, the analysis cannot be fully comprehensive. The most significant are:

(a) Interception warrant data

Many of the measures broaden the criteria under which Police can apply for warrants to intercept telephone communications. A request for interception warrant data was made to the Ministry of Justice, but the Ministry advised that they do not hold data regarding the number of interception warrants issued, and they do not believe that any other government agency holds the data either.

(b) Non-association orders

Similar problems were encountered with non-association orders. Data regarding non-association orders were requested from the Ministry of Justice, but the Ministry could only provide data for non-association orders issued from 2004, when their Case Management System first became operational. This deficit impeded our ability to assess the impacts of the amendments to the Criminal Justice Act 1985.

32 Jamie Ensor "Number of gang members on national list rises but Government says it's not 'complete picture'" (21 October 2021) Newshub <www.newshub.co.nz>.

3. Outside of scope

Importantly, there are also criteria against which these laws are not assessed here, such as whether they are fair and equitable laws, and whether their application has positive outcomes for society in general. Anti-gang laws have been criticised overseas as presenting civil rights concerns and having disproportionate impacts on marginalised communities – elements that this analysis does not have the capacity to assess.[33]

IV. The Outcomes

Given its well-constructed lobby to push for the new laws, it was of little surprise that Police leadership enthusiastically embraced their passing and promised to use them to "crack down" on gangs. Assistant Commissioner Neville Trendle said the laws gave Police more power to target the gangs, and he thanked all those in the Police who had contributed to getting the legislation passed: "I want to thank all staff who contributed and provided feedback and information. This has helped get legislation through that will make a big difference to our job".[34]

As will be shown, however, little of this optimism has been borne out in the way that the laws have been used.

A. Measuring the Impact of the Laws

Based on the primary rationales identified in the creation of the laws as well as the available data, the effectiveness and suitability of laws can be measured against three criteria. These criteria are based on the argument used to pass the laws: that being that they were urgently necessary for gang control. Specifically, I ask:

- **To what extent have the laws been used?** Given that the laws were drafted as urgent measures that would see regular use, does the number of charges laid reflect the rationale behind them?
- **Are the laws primarily 'gang laws'?** The raft of legislation introduced in 1997 was ostensibly targeting gangs. Is **this** supported in the charge data?

33 David Curry, Scott Decker and David Pyrooz *Confronting Gangs: Crime and Community* (3rd ed, Oxford University Press, New York, 2014); Lorana Bartels, Maximilian Henshaw and Helen Taylor "Cross-jurisdictional review of Australian legislation governing outlaw motorcycle gangs" (2021) 24 TOC 343 at 334; and Josmar Trujillo and Alex Vitale "Misguided strategy: New York City's decision to criminalize gangs" in David Brotherton and Rafael Jose Gude (ed) *Routledge International Handbook of Critical Gang Studies* (Routlege, London, 2021) 225 at 225.

34 Gilbert, above n 13.

- **Were the laws extensively used in the first five years after their passing?** During debate over the laws, Police Commissioner Peter Doone suggested that New Zealand had just five years to tackle the gang problem, or it would become out of control. By examining the extent to which the laws were used in this period, we can determine whether the putative urgency was acted on.

In response to the above three questions, I can divide the laws into three primary categories:

- **Ineffectual or unused**: laws which were absolutely or essentially failures that saw little or no use.
- **General law-and order-provisions**: laws that were used, but which targeted non-gang members far more often than gang members.
- **Gang law**: laws that targeted gangs directly and were used primarily against gangs.

As noted in the limitations section, the absence of relevant data for non-association orders and interception warrants makes quantitatively analysing some elements of the laws impossible. Moreover, use of the intimidation laws could not be measured using the data provided by Police. Thus, we need to add a further category.

- **Unmeasurable**: laws that could not be measured using the data available.

B. Ineffectual or Unused Measures

Given what was publicly said about the urgent need for the laws, perhaps their most basic test is their use. Two components – the new offences of habitually associating with violent or drug offenders, and updates to fortification removal provisions – were found to have failed entirely.

Was this law used regularly? No.

Can it be seen primarily as a 'gang law'? No.

Was this law emphasised within the 5-year timeframe? No.

1. Habitually associating with violent or drug offenders

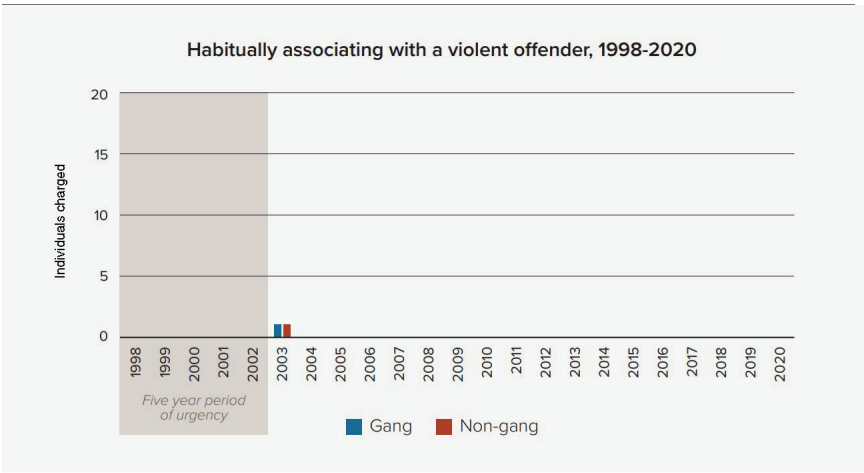

Figure 1: Individuals charged with Habitually Associating with a Violent Offender, 1998-2020

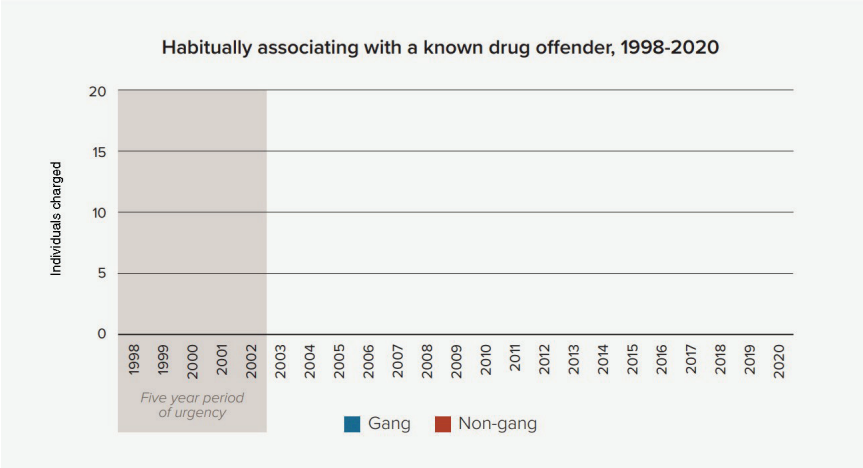

Figure 2: Individuals charged with Habitually Associating with a Drug Offender, 1998-2020

The laws added two offences of habitually associating with a violent offender, and habitually associating with a drug offender, which were designed to allow Police to limit associations between problematic gang members. The offences carry a maximum penalty of three months' imprisonment or a $2,000 fine.

As shown in Figures 1 and 2 above, the offences of habitually associating with violent or drug offenders were essentially never used. Police data show that two individuals were charged with associating with violent offenders in 2003, one of whom had a gang alert, but that no other charges have ever been made for that offence. No charges for associating with drug offenders have ever been laid at any point. No warnings have been recorded for these offences either.

Clearly, these measures were a failure.

2. Fortification removal

Has this law been used regularly? No.

Can it be seen primarily as a 'gang law'? Yes.

Was this law emphasised within the 5-year timeframe? No.

The changes to the Local Government Act 1974 to allow for removal of gang fortifications replaced an older section that had been added in 1987 for the same purpose. This prior version had run into difficulties because any definition of the target problem tended to omit certain gang fortifications or include some common house fences. Only one order was ever made and the process took four years to complete, following various delays and appeals.[35] These problems were believed to have deterred police and councils from attempting other removal orders.[36]

Although somewhat more workable, the version drafted in 1997 proved to be no more effective, with removals requiring lengthy court processes and achieving outcomes that were of little or no practical value. After some early attempts, this law appears to have once again fallen out of use.

Two examples, presented below, indicate the problems that arose in attempting to apply the law.

In September and October 1998, respectively, Police obtained court orders under s 695a of the amended Local Government Act to remove the fortifications of the Black Power and Highway 61 motorcycle club headquarters in Christchurch.[37] In

35 Harassment and Criminal Associations Bill 1997 (215-1), (Explanatory Note, (1)(3)(c)nature of amendments at iv).

36 *ibid*Explanatory Note, (1)(3)(c) at iv.

37 Sinead O'Hanlon "Chch police score win in gang war: 2 Edition" *The Press* (New Zealand, 3 October 1998).

making his judgement on the Highway 61 property, Judge Graeme Noble said he was satisfied that the fences and associated structures (platforms and security cameras) were being used for the concealment of weapons and drug sales.[38] Under the new legislation, the gangs had 30 days to remove the fences or appeal the judgment, otherwise, Police could forcibly remove the fortifications.

Highway 61 fought the measures. Although their appeal was unsuccessful, ongoing legal uncertainties meant the fortification remained in place until July 1999 when, amid much media fanfare, it was destroyed using an excavator.[39] In the end, the new 'streamlined' measures had taken nearly a year to implement. Moreover, as soon as the original wall was removed, the gang replaced it with two-metre-high fence which was legal.

The order against Black Power also ran into difficulties, in this case due to uncertainties over who actually owned the property,[40] before being pulled down by the gang, which they quickly replaced.[41]

Having proved largely ineffective, s 695a was later replaced with a new and differently worded section in the Local Government Act 2002. Despite Police saying more fortifications would now be targeted, attempts to remove them using these newer provisions appear to have been limited. I have only been able to find one successful example, a removal order made against the Outcasts MC (motorcycle gang) in Hamilton in mid-2005, in which the judge ruled that much of the fortification had to be removed but that the fence could remain, along with a single video surveillance camera.[42] Other removal orders have been sought, such as those made against the Mongrel Mob, a patched street gang, in Invercargill in 2009, and the Hells Angels motorcycle club in Whanganui in 2010,[43] but none appear to have succeeded.

Thus, even after refinement and amendment, the new provisions appear to have failed. Gang fortifications, erected primarily to secure gangs from opposition groups, have proven remarkably resilient to the legislative challenges.

C. General Law-and-order Provisions

The legislative approach of the mid-1990s was pitched as a drive against gangs but was suggested by some to be largely comprised of general law-and-order provisions that were not specific to gangs. Two areas – the new offence of criminal

38 *Perry v Kingi* DC Christchurch MA 385-98, 4 May 1999.
39 Gilbert, above n 13.
40 Gilbert, above n 13.
41 Gilbert, above n 13.
42 *Gray v Hamilton Property Investments Limited* DC Hamilton, August 2005 (unreported case on file with author).
43 Interview with Steven Rollo, Lawyer (the author, Christchurch, 16 August 2021).

harassment, and the changes to interception warrants relating to cannabis supply – can be seen to fit this category.

1. Criminal harassment

Has this law been used regularly? Yes.

Can it be seen primarily as a 'gang law'? No.

Was this law emphasised within the 5-year timeframe? Yes.

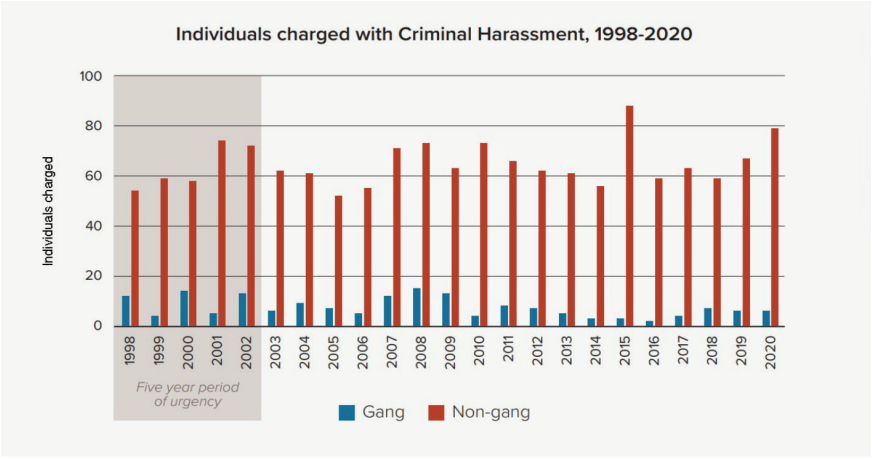

Figure 3: Individuals charged with Criminal Harassment, 1998-2020.

As shown in Figure 3, the number of people who have been charged with criminal harassment in the years is relatively high, and has remained largely consistent, with an average of 71.4 individuals charged each year.

While its use may show value, its connection to gangs is not clear. Charges of criminal harassment have been overwhelmingly brought against non-gang affiliated individuals. On average, only 9.5 per cent of those charged with criminal harassment since 1998 have been the subject of gang alerts. The percentage of those charged with gang alerts was at its highest in 2000, at 19.4 per cent , but was as low as 3.3 per cent in both 2015 and 2016. On this basis there is little reason to conclude that this was a gang law in any sense.

2. Cannabis supply

Has this law been used regularly? Unclear.

Can it be seen primarily as a 'gang law'? No.

Was this law emphasised within the 5-year timeframe? Unclear.

The amendment made to the Misuse of Drugs Act 1975 expanded the Police's ability to gain drug interception warrants by including cases relating to dealing in, or cultivating, cannabis (a class C controlled drug). Although unsupported by data and indeed highly challengeable,[44] the change was made under the assumption that gangs dominate the cannabis trade in New Zealand.

As noted in the 'unmeasurable' section below, data regarding the number of interception warrants issued are not available from any government source. Thus, the application of this law cannot be properly analysed. Nevertheless, it is possible roughly to gauge the impact of the amendment by examining various cannabis supply charges over time. As a measure designed to make it easier for Police to pursue cannabis suppliers, it follows that this law change can be considered effective if it resulted in an increase in the number of individuals charged for cannabis supply in the years following its passage.

Data for a variety of cannabis related offences were provided to us by Police. These included the supply of cannabis, and possession of cannabis for supply, which are shown in Figures 4 and 5.

44 Chris Wilkins and Sally Casswell "Organized Crime in Cannabis Cultivation in New Zealand: An Economic Analysis" (2003) 30 CDP 757 at 758.

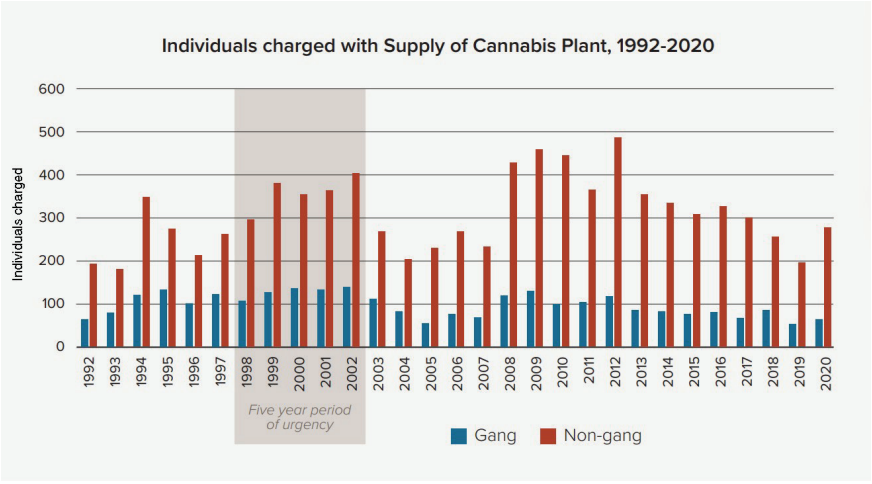

Figure 4: Individuals charged with Sell/Give/Supply/Administer/Deal Cannabis Plant, 1992-2020

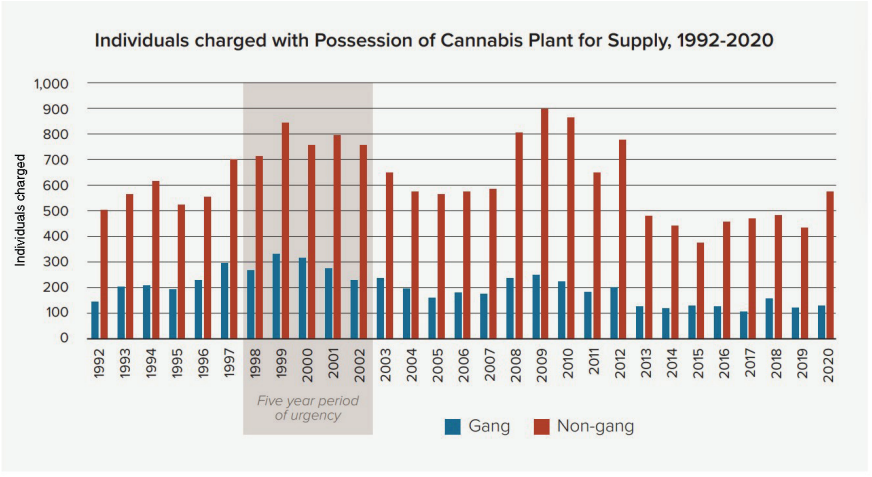

Figure 5: Individuals charged with Possession of Cannabis Plant for Supply, 1992-2020

There is tentative evidence that the addition of interception warrants positively impacted overall cannabis supply charges in the years following 1997, but no evidence that the warrants had any greater effect on those with gang alerts. As can be seen in Figures 4 and 5, charges for supply and possession for supply both increased somewhat from 1998 onwards. The increase was clearest for those without gang alerts, meaning that it primarily affected those not associated with gangs. However, it is not clear that the increase in charges was related to the new interception warrant provisions. Charges had also increased in 1997, before the laws were enacted, and then numbers of charges fell away again in the early 2000s. In

the case of both offences, the proportions of those charged that had gang alerts was generally slightly higher in the period prior to 1998.

It is also notable that these data show a level of gang participation in cannabis supply offending that is much more limited than was widely believed, and they demonstrate that claims of gang dominance in cannot be substantiated at any point in the 28-year period between 1992 and 2020. As shown in Figures 4 and 5, supply of cannabis and possession of cannabis for supply, are offences that have historically contained a minority of individuals with gang alerts. On average, 23.7 per cent of those charged with supply of cannabis in the 1992–2020 period had gang alerts, with the proportion peaking in 1995 at 32.8 per cent. Gang alerts were similar in the offence of possession of cannabis for supply, with an average of 24.1 per cent of those charged having gang alerts, and a peak of 29.5 per cent in 1997.

Overall, therefore, this new law appears to have had little application to gangs. It can be seen as a general law and order provision that has primarily been used against those without gang connections.

D. Gang Law

1. Participation in an organised criminal group

Has this law been used regularly? No. It took a rewording of the law in 2002 to make it workable.

Can it be seen primarily as a 'gang law'? Yes.

Was this law emphasised within the 5-year timeframe? No.

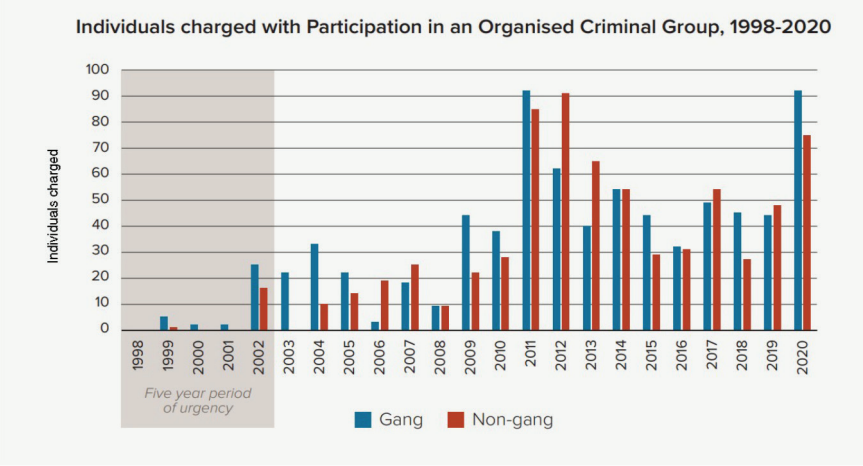

Figure 6: Individuals charged with Participation in an Organised Criminal Group, 1998-2020.

Of all the measures enacted in 1998, participation in an organised criminal group is the only one that has been used more often against those with gang alerts than those without. Since 1999 (it was not used in 1998), an average of 59.8 per cent of those charged with this offence have had gang alerts.

While an average of 59.8 per cent gang members and associates is large relative to the other laws under study, it must also be acknowledged that even this is relatively low considering the rhetorical target against which the laws were aimed, particularly if we recall the broad criteria for a gang alert. The fact that nearly 40 per cent of those charged with this offence were not affiliated with a gang at all, and yet were still considered to be participating in organised criminal groups, speaks to the degree of non-gang participation in organised criminal offending – a fact that has been acknowledged in literature,[45] but which is rarely recognised in political discussion around gangs.

In terms of its use, this law appears to have been somewhat successful, having eventually come into relatively regular use, particularly from the start of the 2010s.

While its later application would appear to support its value, the law as it appeared in 1998 was not fit for purpose. It was not until the law was amended in 2002, by redefining what constituted a criminal group, that it began to see semi-regular use. Due to flaws in its original form, it had very limited use within the first five years. Of the 51 individuals charged during that period, the large majority were in 2002.

The 2002 amendment also allowed for the interception of communications in an increased range of circumstances, but as noted, no government source holds data regarding the number of such warrants granted. Thus, no analysis of the impact of this element of the law is possible.

Participation in an organised criminal group is a measure which can clearly be applied to gangs and has been one of the most regularly used. Of the laws whose impact could be quantitatively assessed, this has the greatest potential to have an impact on gangs and gang behaviour. But in practice the law has generally been used to load charges – that is, it is used to add to charges against a person for more serious offending. In these instances, a conviction for participating in a criminal group seldom attracts any extra penalty (due to concurrent sentencing). Given that fact, there is little reason to expect that it has had any genuine deterrent effect on organised criminal activity.

45 Greg Newbold *Crime, Law and Justice in New Zealand* (Routlege, New York, 2016) at 209.

E. Unmeasurable

As noted, some of the provisions lack the data to be measured in any meaningful way. This notwithstanding, some minor observations can be made.

1. Interception warrants

Data regarding the number of interception warrants issued under these provisions were requested from the Ministry of Justice. As noted in the limitations section, however, the Ministry advised they could not be provided because such data are not held by any government agency.

This is an area in which it appears clear that the data held by the government is insufficient. Data regarding the number of such warrants issued, and, where possible, the number of charges (or lack thereof) that result from these warrants, is something that it is clearly in the public interest. As demonstrated here, failure to collect suitable data is a serious impediment to the study of how warrants are being used, and the impact that legal changes have on that use.

2. Intimidation

While intimidation was already an offence prior to 1997, changes to the Summary Offences Act 1981 expanded the definition of intimidation to include stopping, confronting, or accosting a person in a public place, and reduced the *mens rea* element so that the offender only had to be "reckless" as to whether or not their behaviour was intimidating.

The data provided by the Police covered some forms of intimidation – under the categories of threats to kill/do grievous bodily harm and demands to steal – but no offences which appeared to correspond meaningfully to the type of harassment added in cl 88 of the Summary Offences Act 1981. With only limited data available, it was not possible to draw conclusions about the effectiveness or value of the law change relating to intimidation.

3. Non-association orders

These amendments increased a court's ability to impose non-association orders, giving judges the discretion to impose non-association orders when sentencing offenders to 12 months imprisonment or less, and allowing the imposition of orders that lasted 12 months instead of six.

In 2021, the Ministry advised that data regarding non-association orders were limited. It was able to provide data for all non-association orders issued from 2004 onward, which was the point at which their Case Management System became

operational. While these data were interesting on their own, they provided no insights that were useful for our purposes here.

F. Outcomes Summary

The table below summarises the outcomes of the new laws in relation to each of the three questions. Under the measures used here, success would be defined by many answers of 'yes'. This is not what we find.

	Has this law been used regularly?	Can it be seen primarily as a 'gang law'?	Was this law emphasised within the five-year timeframe?
Habitual association with drug offenders	No	No	No
Habitual association With violent offenders	No	No	No
Fortification removal	No	Yes	No
Criminal harassment	Yes	No	Yes
Cannabis changes	N/A	No	N/A
Participation in a criminal group	Yes	Yes	No

1. To what extent have the laws been used?

Despite the putative need for urgency when these laws were being drafted, the majority saw little use during the five-year timeframe we have examined.

Charges for the two types of habitual association were essentially unused, with two charges laid for associating with a violent offender, and none for associating with a drug offender. Attempts were made to use the provisions for fortification removal, but the law proved ineffective and difficult to apply, and were seldom successfully employed.

There were only two laws that were used regularly:

- Criminal harassment has been used regularly and consistently since 1998.
- Participating in a criminal group is now being used, but it only became workable after amendments were made in 2002.

2. Are the laws primarily gang laws?

Overwhelmingly, the gang laws created in the mid-1990s have been used against non-gang members more often than those with gang alerts.

Of the laws considered, only two have a majority of gang targets – fortification removal and participation in an organised criminal group. Fortification removal was used exclusively against gangs, but the law was difficult to apply and was essentially

a failure. With regard to participation in a criminal group, 59.8 per cent of charges were laid against those with gang alerts. These can therefore be considered to be gang laws.

The other two laws that were used and whose impact could be measured did not have a clear relationship with gangs. In the case of criminal harassment, on average only 9.5 per cent of those charged had gang alerts. Cannabis supply charges were primarily made against those without gang associations, with an average of less than a quarter having gang alerts.

Clearly, this was not the basis for which the laws were expressly designed and promoted. While there is no inherent problem with general laws being used to target gang (and non-gang) behaviours, by couching such provisions as "gang laws", other issues and problems can be created, something I will discuss further below.

3. Were the laws extensively used in the first five years after their passing?

As noted earlier, in 1996 Commissioner of Police Peter Doone claimed that New Zealand had just five years to tackle the gang problem, or it would veer out of control. The laws were argued for on the basis they were needed urgently.

This urgency is not evident in the laws' use.

Of the laws for which data were available, only one appeared to have been used significantly within the five-year timeframe. Criminal harassment was put into immediate effect and used consistently throughout the period. Criminal harassment was not used primarily against gang members, however, and was not used any more heavily during the five-year timeframe than beyond it. Fortification removal has seldom been used successfully. Participation in an organised criminal group was eventually used relatively regularly, but only after a law change in 2002, and was essentially unused during all but the last year of the five-year period. Habitually associating with violent or drug offenders was either essentially or entirely unused, both inside the five-year period and afterwards.

V. Conclusion

The data presented above, in many ways, speak for themselves.

It needs to be acknowledged, though, that my analysis is far from exhaustive and there is a chance that the provisions with little or no data did have an impact. However, there is no evidence from which to draw a conclusion in these cases.

It is possible that the broadening of criteria for interception warrants has reduced gang crime in some areas, but there is little supporting evidence. As noted earlier, charges against gang members for cannabis supply, for example, did

not show any strong evidence of change after 1997, meaning that the addition of interception warrants for cannabis offences appears not to have had any effect on gang activity in that area.

The new offence of criminal harassment has proven without doubt to be a general law and order provision rather than a gang-specific one, and there is no reason to expect that it has had any notable influence on gang activity. Only a small fraction of those charged with criminal harassment have gang alerts.

Participation in an organised criminal group had potential value as a deterrent to gang members, given that it is regularly used. In practice, however, its impact is softened by the fact that it is usually combined with other charges and that penalties for it are usually given concurrently with those other charges.

Overall, then, we can conclude that there is little evidence that the new laws have had any meaningful impact on gang activity or offending.

One of the most interesting features of this suite of laws is their lack of apparent relationship to one another. They are a disparate collection of individual measures, and there is no visible strategy that binds them together in any obvious way. Ostensibly the laws were designed to confront a gang problem, but instead they highlight a political problem with the way in which they were promoted, devised, and implemented.

VI. Discussion

The legislative drive against gangs in New Zealand in the mid-1990s was sparked by a series of violent offences committed during two gang wars that occurred in Christchurch and Invercargill. These events created a significant and understandable degree of community concern, which in turn sparked a concerted political drive around gangs. Long after those acute issues had been quelled with existing provisions, the political drive remained; indeed, it grew in the fertile environment of a looming election in October 1996.

Led by the opposition Labour Party, the government was forced to respond and respond it did. The rush to pull the agenda together meant that there was a dearth of research, something that, as previously mentioned, was even acknowledged in the omnibus bill containing the laws.[46] The measures were not based on evidence but rhetoric.

The legislative drive garnered only modest scrutiny. Still, many of the criticisms or observations that were levelled at these measures by academics and lawyers

46 Ministry of Justice *Harassment and Criminal Associations Bill: Report of the Ministry of Justice* (June 1997).

proved to be remarkably prescient. The primary concerns were, in short, that they were not gang-specific measures, that many were likely never to be used, and that the legislation overall was a sop to appease public discontent; all of which proved to be remarkably accurate.

But the political mood of the time – largely in line with public opinion, I would suggest – meant that both the select committee looking at them, and ultimately parliament, were unmoved. The laws were near universally supported. Indeed, those who questioned the measures in parliament were roundly and sharply criticised.

The result of this political environment meant this raft of legislation, seen as so urgent and critical, demonstrably failed to achieve the purposes for which it was ostensibly created. Many of the laws were not used or were underused, and those that did see significant use were targeted more often at those without gang associations than those who were.

By constructing general laws, but framing them as "gang laws", they escaped the scrutiny they might ordinarily receive. While a number of the provisions have clearly fallen spectacularly flat, it is entirely possible – in fact likely – that some of these measures have proven to be useful general law-and-order provisions; but they were not scrutinised with any such use in mind, at least raising the spectre of law creation by stealth or disguise.

The conclusions of this paper do not mean that there were not – or are not – significant problems caused by gangs in New Zealand that required or require attention. It does, however, conclude that political rhetoric can escalate issues away from evidence and rationality, and lead to a rushed legislative response that does not meaningfully tackle the issues.

The timing of this project examining gang laws is, I believe, particularly important. The current political climate in New Zealand, in which concerns around gang violence have come back to the fore, is ripe for another political drive targeting gangs.

Given what we know based on the experience from the mid-1990s, if any new laws are developed in New Zealand, it is important that we be alert to the process by which any new laws are developed, and the climate in which laws are derived. There are three key elements that are needed for future efforts to avoid the pitfalls of the 1997 laws:

(1) Efforts at targeting gangs should at least acknowledge that suppressive or legislative measures are just one tool that can be employed. The complexity of the drivers that draw people toward gangs, and the forces that keep them in gangs, are unlikely to be effectively tackled by such provisions alone.

(2) The purpose or goals of any efforts need to be clearly defined and articulated

and supported by a strong evidence base, particularly if the proposed measures use significant state power. Those goals should have some clear measures of success and, ideally, be measured as to test their effectiveness and any unintended consequences.

(3) Finally, we must consider any proposals in the wider context of the fundamental principles that underpin our justice system. While this might go without saying, laws targeted at gangs are, I would argue, likely to garner a lesser degree of public scrutiny than is ideal. This is particularly important because Māori are greatly overrepresented in gangs in New Zealand for a number of reasons,[47] and, therefore, measures targeting gangs will be felt deeply not just by gang members but by wider Māori communities. These broader considerations ought to be given consideration in ideal policy making.

The experiences of the mid-1990s shows us that, arguably, the primary factor that inhibits a considered approach to gang law making as described above is a highly charged political environment whereby political considerations appear to dictate terms, often driven by high profile events. We should be mindful, perhaps scornful, of legal efforts that stem from political rather than policy consideration. This is not to say that politicians should not respond to significant community concerns, but that it is essential that we think about optimising that response to create effective measures and avoid kneejerk reactionism.

47 Gilbert, above n 4, at 65.