# Gangs and Guns:
# Is a Blanket Firearms Ban on Gangs Justified?

**Anne Lim**

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"While gangs are formed due to unfortunate social and economic conditions, they are enabled by our freedom to associate and freedom of expression. Lawmakers must be mindful of chipping away at the latter due to an inability or unwillingness to tackle the former."[1]

"What is the attraction of gangs? …Whether riding in a pack of an outlaw club, or walking into a public place with members of a patched street gang, one cannot help but appreciate the sense of power that exists within these groups, knowing each member has the other's back…unless other options exist to achieve status and social fulfilment, gangs will endure."[2]

[1] Jarrod Gilbert *Patched: The History of Gangs in New Zealand* (Auckland University Press, Auckland, 2013), at 294.
[2] At 294-295.

# Introduction

The history of firearms is lengthy.[3] Their invention transformed the scope and intensity of military warfare: not only were firearms used for offensive and defensive purposes, they also served to psychologically shock the world with their destructive potential.[4] Despite the celebration of firearms as tools that helped obtain glorious victories in the Middle Ages, their capabilities have been increasingly harnessed by the mentally impaired, gangs, and terrorists for criminal purposes in the contemporary world. It is through the worsening of firearm violence,[5] increased illegal arms transfers from one criminal to another, and the fear of being a victim to these omnipresent threats that "gun control" emerged as a concept.

New Zealand has not been immune to this global phenomenon of gun and criminal control. Gangs in particular have been the subject of increased media scrutiny where firearms are concerned, as demonstrated by headlines such as "Armed and Dangerous"[6] and "New Zealand, Where Patched Gang Members Can Legally Buy Arms".[7] These headlines reinforce fears of being a victim – regardless of whether these fears are real or perceived.

On 10 March 2016, 14 illegally owned firearms – including military-style semi-automatic weapons (MSSAs) – were seized from a home in Takanini.[8] As a result, Parliament's Law and Order Select Committee established an inquiry into the illegal possession of firearms in New Zealand.[9] The "Inquiry into Issues Relating to the Illegal Possession of Firearms in New Zealand (7 April 2017)" (the 2017 Inquiry) produced 20 recommendations. While many of

[3] While gunpowder was invented in 9th century China, the first recorded use of firearms occurred in 1364: see Public Broadcasting Service "Gun Timeline" <http://www.pbs.org/opb/historydetectives/technique/gun-timeline/> for a chronological timeline on the development and improvement of firearms.

[4] World Wars One and Two were fought with inventions such as the machine gun, which resulted in an unprecedented loss of lives. For more, see Patrick Bishop "Killing Machines: Weapons of the First World War" (The United Kingdom, 4 April 2014) *The Telegraph* <http://www.telegraph.co.uk/history/world-war-one/inside-first-world-war/part-eight/10741687/world-war-one-planes-tanks-submarines.html>.

[5] Public shootouts are high-profiled and involve heavy media scrutiny. The most recent incident is the Las Vegas shooting at the United States on 1 October 2017. See Naaman Zhou "Las Vegas Shooting: Death Toll Hits 59 as Firearm Stockpile Found at Suspect's Home" (The United States, 3 October 2017) *The Guardian* <https://www.theguardian.com/us-news/live/2017/oct/02/las-vegas-two-dead-in-mandalay-bay-casino-shooting-latest-updates>.

[6] New Zealand Police Association "Armed and Dangerous" (1 September 2014) <https://www.policeassn.org.nz/armed-and-dangerous>.

[7] Emigrate to New Zealand "New Zealand, Where Patched Gang Members Can Legally Buy Arms Caches" (27 April 2016) <https://e2nz.org/2016/04/27/new-zealand-where-patched-gang-members-can-legally-buy-arms-caches/>.

[8] Nicole Lawton "AK47, M16 Guns Found in Huge South Auckland Drugs and Firearms Bust" *Stuff.co.nz* (New Zealand, 11 March 2016) <http://www.stuff.co.nz/auckland/77773122/AK47-M16-guns-found-in-huge-South-Auckland-drugs-and-firearms-bust>.

[9] Law and Order Committee *Inquiry into Issues Relating to the Illegal Possession of Firearms in New Zealand* (5 April 2017) at 5.

these recommendations concerned general issues on regulating firearms,[10] one of the recommendations was that the Arms Act 1983 – New Zealand's primary firearms legislation – be amended to clearly state that a gang member or prospect must not be considered a "fit and proper" person to possess firearms.[11] The Inquiry stated that this amendment would "greatly reduce the number of firearms used by criminals and gangs", and that it would provide the Police with the "appropriate mandate to identify and pursue gang members who they believe[d] are in the possession of firearms".[12] The Government accepted this recommendation on 14 June 2017, and is to include it in the Arms (Firearm Prohibition Orders and Firearms Licences) Amendment Bill.[13] This dissertation examines whether this proposed blanket ban is justifiable.

Chapter I analyses gun culture and gangs in the New Zealand context to demonstrate that both have social and political underpinnings. This is done by comparing the United States' and New Zealand's experiences with firearms, outlining the history of New Zealand's firearms law, and then exploring the historical growth of gangs in New Zealand. Chapter I then concludes that New Zealand has increasingly chosen to respond to gangs and guns as an interconnected issue.

Chapter II introduces the "fit and proper" test. It then discusses how New Zealand has answered the question of whether one is "fit and proper" to hold a firearms licence through New Zealand case law.

Chapter III critically analyses the proposed blanket firearms ban to see whether it is justified in principle and policy. It examines provisions in the New Zealand Bill of Rights 1990 to determine whether the ban is excessive in the context of a free and democratic state like New Zealand. Chapter III then examines whether the blanket ban is consistent with New Zealand's current firearms licensing scheme. Practical problems with the blanket ban are also discussed.

Chapter IV examines the firearms regulatory framework of foreign jurisdictions including the United Kingdom and Australia to see whether there are alternative approaches to the proposed blanket firearms ban, such as separating the "fit and proper" test from considerations of public interest. Other possible alternatives such as codifying the "fit and proper" test and amending New Zealand's Police Arms Manual 2002 are also discussed.

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[10] At 3-4. The Inquiry makes recommendations on the sale and supply of firearms and also evaluates the effectiveness of New Zealand's current firearms training courses.

[11] At 14.

[12] At 14.

[13] Beehive "Government Response to Firearms Select Committee Report" (14 June 2017) <https://www.beehive.govt.nz/release/government-response-firearms-select-committee-report>. While uncertainties exist as to the identity of New Zealand's coalition government after the 2017 General Elections, this Bill is likely to pass with the support from all major parties. New Zealand First's minority view was in relation to other aspects of the Inquiry such as sentencing in firearms offences, and the illicit importation and smuggling of firearms: see above n 9 at 25.

Ultimately, this dissertation aims to question the basis of a blanket ban policy to see whether there is any real value in it, rather than provide a one-stop solution for criminal gang activity or the illegal use of firearms in New Zealand. In doing so, this dissertation seeks to provide some reasoned alternatives which may prove to be a better starting point in reducing the problem of illegally owned firearms and firearms-related offences by gangs.

# CHAPTER I
# Gangs, Guns, and the New Zealand Agenda

## *I Guns*

### *A A Context-Dependent Gun Culture*

Gun culture in each state differs according to its historical and social context. By understanding these differences, we can understand issues such as gun control and illegal gun crime afresh without any preconceived bias. The United States, for example, is popularly perceived to have the most liberal gun laws in the world. This is because the Second Amendment of the Constitution of the United States of America guarantees firearms possession,[14] a right which was provided for practical and principled reasons. History demonstrates that the United States was founded by pioneers living on a "savage frontier", where dangers of predatory persons or animals were seen to lurk at every corner.[15] This historical fear of the "other" persists in the present and is used as a pretext for the right of civilian firearms possession, as seen through the United States' experience with the Ku Klux Klan, the red army Russians during the Cold War, and its most recent post 9/11 fear of Muslim religious fundamentalists. John Locke's social contract theory also justifies the right to bear arms through individual property rights, which means that the average citizen has the duty to protect this social contract – even if it means occasionally taking the law into their own hands.[16] For example, the United States Police have rarely been prosecuted for the shooting of civilians – especially where Black men are involved.[17]

New Zealand's experience of firearms is strikingly different. Firearms first arrived in the 1800s through European traders and were seen by Māori as a desirable article of trade.[18] Māori warriors quickly utilised firearms in intertribal conflict, as witnessed in the Musket Wars from 1810-1830s. The Musket Wars were primarily led by rivalling Ngapuhi and Ngāti

[14] The Constitution of the United States of America, Amendment II (1791), provides that "a well-regulated Militia [is] necessary to the security of a free state, [and] the right of the people to keep and bear Arms shall not be infringed".
[15] Elizabeth Hirschman "Social Contract Theory and the Semiotics of Guns in America" (2014) 24 Social Semiotics 541 at 541.
[16] At 549.
[17] Black civilians are three times more likely to be killed by Police than white people in the United States. See Mapping Police Violence "Police Violence Map" <https://mappingpoliceviolence.org/> and the case of Alton Sterling, who was shot by two white Police officers in Louisiana in "Alton Sterling Shooting: No Charges for Police Over Black Man's Killing" *BBC* (the United States, 3 May 2017) <http://www.bbc.com/news/world-us-canada-39788679>.
[18] D.U. Urlich "The Introduction and Diffusion of Firearms in New Zealand 1800-1840" 79 J. Polyn. Soc. 399 at 403.

Whātua in the North,[19] but eventually involved South Island tribes such as Ngāti Toa and Ngāi Tahu.[20] The preservation of tribal *mana* (prestige and influence) depended on firearms acquisition, where captured firearms conveyed to the new owner any *mana* formerly possessed by the vanquished.[21] Firearms then acquired an increased symbolical importance to New Zealanders with the World Wars, where they emulated the United Kingdom's culture of exhibiting trophy guns in memorials and museums.[22] Trophy firearms were popular in urban and rural towns, both to mark New Zealand's contribution to its external wars and to demonstrate New Zealand's military prowess as a young, geographically isolated country.[23]

While firearms in contemporary New Zealand are also important for practical reasons, predators such as wolves and wild bears that exist in the "savage frontier" are not present in New Zealand. Some rural communities require firearms for reasons of animal slaughter,[24] while others shoot and hunt recreationally – be it individually or via participation in shooting clubs. Firearms owners in New Zealand usually become members of shooting clubs to socialise with like-minded individuals, gain access to competitive events, and participate in lobbying.[25] Thus, while the use and possession of firearms are unquestionably important, New Zealand firearms users do not see them as fundamental rights.

### *B A Brief History of New Zealand's Firearm Laws*

New Zealand's gun-licensing regime and firearms restrictions are governed by the Arms Act 1983 and regulations made under it. In 2015, there were 242,056 licensed firearm holders and an estimated 1.2 million firearms amongst New Zealand civilians.[26] This firearms figure,

[19] New Zealand History "Musket Wars" <https://nzhistory.govt.nz/war/new-zealands-19th-century-wars/the-musket-wars>.
[20] Above n 19.
[21] Urlich, above n 18, at 403.
[22] Peter Cooke "The Sorry Steel: Trophy Guns in New Zealand's World War One Commemoration" (2014) 18 JNZS 56 at 57.
[23] At 59.
[24] Council of Licenced Firearms Owners "Submission to the Inquiry into Issues Relating to the Illegal Possession of Firearms in New Zealand 2017" at 2.
[25] Chaz Forsyth "Do the New Zealand Firearm Control Laws Impact Upon Firearm Misuse, and Upon Firearm Use?" J On Firearms & Pub Pol'y 23 (2011) 7 at 14. See also New Zealand Parliament "Submissions and Advice" <https://www.parliament.nz/en/pb/sc/submissions-and-advice/?custom=00dbsch_inq_68642_1> for a full list of submissions on the 2017 Inquiry from various firearms associations in New Zealand.
[26] New Zealand Police *Inquiry into Issues Relating to the Illegal Possession of Firearms in New Zealand: Initial Briefing* (30 March 2016) at 3. Since no record on the number of firearms owned by licenced holders exist, there is no accurate figure on the number of firearms in New Zealand.

however, is only an estimate as it does not take the number of illegal[27] or "grey"[28] firearms into account.

New Zealand's firearms laws were initially rudimentary, commencing with the Arms Importation Ordinance of 1845 to prevent the acquisition of firearms by Māori instead of regulating firearm ownership among European settlers.[29] In the late 1860s, a basic system of registration and licensing that targeted arms dealers was introduced to regulate conflict among Māori in Waikato and Taranaki.[30] These provisions, however, became "dead letters" when armed conflict between Māori and the colonial government ceased.[31] Even in the 1900s, firearms were seen as "familiar and useful tools…to protect the far-flung bounds of the Empire, but did not pose a social problem calling for active control".[32]

Ad hoc development of New Zealand's firearms laws began from the 1960s with an increase in gun crime.[33] The concept of an "arms register" – which would require each gun to be individually registered – was rejected due to the high cost of tracing and tracking down each gun in the country.[34] Instead, tighter screening controls which reduced access to firearms by unsuitable persons were seen to be more cost-efficient.[35] The Arms Act 1983 provided for lifetime licences that could be issued to persons over 16 years who were considered "fit and proper" by the Police to possess a firearm.[36] This change of focus aimed to control firearms users through a preliminary vetting process instead of firearms themselves, with the understanding that it was the user and not the firearm that posed a potential danger to society.[37]

The Aramoana massacre in 1990 (where a 33-year-old licensed gunman killed 13 individuals with two MSSAs) resulted in the 1992 amendment of the Arms Act 1983, limiting previously lifelong firearms licences to a ten-year period.[38] Subsequent shootings in 1995 and 1996[39]

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[27] At 3. "Illegal firearms" are firearms that are not licenced and are used for offences. No estimates of the number of illegal firearms in New Zealand have been undertaken since the Thorp Report's estimation of between 10,000 and 25,000 in 1997.

[28] Law and Order Committee, above n 9, at 20. "Grey" firearms are firearms possessed by unlicensed individuals but are not used for criminal purposes.

[29] Thomas Thorp *Review of Firearms Control in New Zealand: Report of an Independent Inquiry Commissioned by the Minister of Police* (20 June 1997) at 9.

[30] At 9.

[31] At 9-10.

[32] At 10.

[33] At 13.

[34] At 13.

[35] At 14-16.

[36] At 17-18.

[37] At 18.

[38] At 22.

[39] See Greg Newbold "The 1997 Review of Firearms Control: An Appraisal" (1998) 1 Social Policy Journal of New Zealand 115 at 115. In July and September 1995 respectively, the New Zealand Police shot at Ron Lewis and Eric Gellatley after they fired wildly with firearms into the public.

resulted in the commissioning of an independent review of firearms control arrangements in New Zealand. The resulting 1997 Thorp Report recommended a "radical reform of firearms laws", including (amongst others) the banning of all MSSAs, disqualifying persons convicted of certain offences from holding a firearms licence for a set period, and permitting the voluntary disclosure of relevant mental health information by health professionals.[40] However, the Bill did not advance due to strong opposition from pro-gun lobbyists who claimed that many of the Thorp Report's recommendations failed to target illegal gun owners.[41]

The Arms Act 1983 was further amended in 2012 following a 2010 High Court finding which created uncertainty as to whether some semiautomatic firearms were MSSAs or not.[42] During the Select Committee process for this amendment, the Police indicated that the Arms Act 1983 would be reviewed "to identify other amendments that could help address operational issues that have emerged since the Act was last significantly amended in 1992".[43] The next major amendment is thus likely to be the Arms (Firearm Prohibition Orders and Firearms Licences) Amendment Bill, which would incorporate the 2017 Inquiry's proposed blanket ban that deems gang members and prospects as not "fit and proper" persons to possess firearms.

Statistical data on firearms offences in New Zealand is imprecise as data is collected based on broad categories that do not focus on firearms offending alone. 2014 saw a total of 5,791 prohibited and regulated weapons and explosive offences,[44] with the highest figure originating from Manukau (754 offences).[45] Statistical data also show that 7,641 firearms have been seized since 2004, with 1,121 in 2013-2014 alone.[46] Nevertheless, this does not tell us why these firearms have been seized, or how many of these seized firearms were "grey" or illegal.

[40] Thorp, above n 29, at 237.
[41] Kerry Williamson "Registry Idea Shelved After Pro-Gun Lobbying" *Stuff.co.nz* (New Zealand, 22 May 2009) <http://www.stuff.co.nz/national/crime/2415864/Registry-idea-shelved-after-pro-gun-lobbying>.
[42] *Lincoln v New Zealand Police* CIV-2009-454-473, 1 March 2010. The Court concluded that Lincoln's H&K SL8 rifle was an MSSA, which meant that it was subject to use and possession restrictions under the Arms Act 1983.
[43] New Zealand Police *Annual Report 2011-2012* (October 2012) at 22.
[44] New Zealand Police *New Zealand Crime Statistics 2014: A Summary of Recorded and Resolved Offence Statistics* (April 2015) at 5.
[45] At 10.
[46] New Zealand Police, above n 26, at 5.

## *II Gangs and the New Zealand Agenda*

### *A "What's in a Name…"*

The contemporary answer to the question of "what is a 'gang'?" in New Zealand can be found in legislation. Section 4(1) of the Whanganui District Council (Prohibition of Gang Insignia) Act 2009 provides the following:

> **4 Interpretation**
>
> **Gang** means
> (a) Black Power, Hells Angels, Magogs, Mothers, Mongrel Mob, Nomads, or Tribesmen; and
> (b) any other specified organisation, association, or group of persons identified in a bylaw made under section 5.

This approach targets and identifies seven specific gangs which are known to the Police and the public. This list of seven was expanded to 34 in s 4(a) of the Prohibition of Gang Insignia in Government Premises Act 2013:

> **4 Interpretation**
> In this Act, unless the context otherwise requires, —
> **gang** means any organisation, association, or group of persons —
> (a) that is known by a name *that is the same as, or substantially similar to* any of the following:
> (i) Aotearoa Natives:
> (ii) Bandidos MC:
> (iii) Black Power:
> …
> or
> (b) identified in regulations made under section 5.
> (emphasis added)

The insertion of the term "that is the same as, or substantially similar to" demonstrates an expanded approach where the precise identification of gangs is concerned, seeing as gangs who change their names slightly would still be covered by the legislation.[47] The full list of the 34 identified gangs can be located in the Appendix.

[47] Law and Order Committee *Prohibition of Gang Insignia in Government Premises Bill: Commentary* (2013) at 2. Australia has similar "anti-bikie" laws in place: Queensland, for example, criminalised association among "criminal organisations" which included and identified all motorcycle gangs in 2013.

The Ministry of Social Development reported in July 2014 that most (86 per cent) of 3,969 known adult gang members were patched, with the other 14 per cent being gang prospects.[48] The Mongrel Mob (1,510 known members) and Black Power (1,154 known members) were the two largest adult gangs that accounted for two-thirds of all known adult gang members in New Zealand.[49] Over three-quarters of adult gang members were Māori, 14 per cent were European, and eight per cent were Pacific peoples.[50]

While contemporary legislation designates and labels what a gang is, it fails to shed light on the essence of gangs or how gangs came to be. The word "gang" evokes emotionalism, myths, and misconceptions that legislation itself cannot identify. To understand gangs as unique entities in New Zealand from an objective point of view, exploring their history is necessary.

New Zealand "gangs" in the pre-1960s were viewed by the public as a passing phase in the lives of young people, where membership arose through loose, informal youthful associations.[51] The 1954 Mazengarb Report stated that a lack of Christian values, a decline in family life due to working mothers, and the spread of negative psychological ideas that undermined traditional morality were factors that increased the number of wayward youths.[52] Popular culture originating from the United States were also seen as negative influences.[53]

The emergence of embroidered patches for gangs vastly changed New Zealand's gang scene. The Hells Angels from Los Angeles arrived as New Zealand's first patched gang in 1960, bringing with it prestige and practical organisational guidance such as rules, weekly fee requirements, democratic elections, and participation requirements which other gangs subsequently utilised.[54] This allowed loose cliques of youth to transform into organised clubs with rules and firm leadership, which enabled their survival and growth.[55] Gangs were therefore more than just groups with human numbers – they were independent entities that could be rejuvenated, even when key figures retired from the gang scene. Patches moreover provided groups with unique identities.[56] As Gilbert states, gang

[48] Ministry of Social Development *Adult Gang Members and Their Children's Contact with Ministry of Social Development Service Lines* (March 2016) at 1. The figures provided do not include gang "associates" and members of youth gangs.
[49] At 1-7.
[50] At 1.
[51] Gilbert, above n 1, at 24.
[52] Jarrod Gilbert and Greg Newbold *Youth Gangs: A Review of the Literature* (Ministry of Social Development, January 2006) at 18.
[53] Gilbert, above n 1, at 16.
[54] At 32.
[55] At 29.
[56] At 32.

members were not just individuals – they functioned as part of an exclusive brotherhood, imbuing the gang with prestige that its members collectively shared.[57] This meant that gang involvement was no longer just a part-time hobby – instead, it was a lifestyle one committed to.[58] In the early 1970s, gang numbers were estimated at 2,000.[59]

The general youth problem was thus reframed as a "gang problem", which drove political measures that specifically targeted gangs as organised criminal groups. This is explored below.

### *B The New Zealand Agenda*

New Zealand's response to adult gangs has varied with the political and social climate of the time. In the 1950s when gangs were viewed as little more than delinquent youth groups, laws restricting the sales of materials that "unduly emphasise[d] matters of sex, horror, crime, cruelty or violence" were passed.[60] In addition, rock 'n' roll music was banned by the New Zealand Broadcasting Services from airing on public.[61] When patched gangs matured in the 1970s, they did so in a liberal period of radicalism characterised by anti-oppression and peace rallies in response to the Vietnam War.[62] Migrant districts in the North Island suffered from substandard housing and overcrowding, which contributed to negative social effects, poor education, unemployment, and economic difficulties.[63] Inter-gang violence exploded in the 1970s[64] just as crime rates doubled, with 255,663 crimes recorded in 1979 in comparison to 139,747 in 1968.[65] At that stage, however, no record existed as to how many of those crimes were committed by gang members. The public

[57] Above 32. Gang membership was mostly a male endeavour, seeing as women were seen to be "weak and unreliable". This, of course, has changed. See, for example, Jeremy Olds "Girl Gangs: When Young Girls Turn to Crime" (New Zealand, 7 August 2016) *Stuff.co.nz* <http://www.stuff.co.nz/national/crime/81063725/girl-gangs-when-young-girls-turn-to-crime>.

[58] Gilbert, above n 1, at 6.

[59] Ministry of Social Development, above n 48, at 14-15.

[60] Gilbert and Newbold, above n 52, at 18.

[61] Gilbert, above n 1, at 15. See also Te Ara, The Encyclopedia of New Zealand "Censorship and a Changing Society, 1930s to 2010s" <https://teara.govt.nz/en/censorship/page-3> where, for example, Little Richard's 1955 version of "Tutti Frutti" was banned in New Zealand for being too suggestive due to the original phrase of "loose booty" in the lyrics. These lyrics were subsequently amended. To listen to the song, see Youtube "Little Richard – Tutti Frutti (High Quality)" <https://www.youtube.com/watch?v=C_C9q4tuwXI>.

[62] Gilbert, above n 1, at 28.

[63] Gilbert and Newbold, above n 52, at 8.

[64] The first inter-gang war occurred in 1974-5 between the Devil's Henchmen and the Epitaph Riders. In 1979, conflict between Storm Troopers and the Black Power ended with the injury of the New Zealand Police.

[65] Statistics New Zealand *The New Zealand Official Yearbook, 1979* (September 1979) <https://www3.stats.govt.nz/New_Zealand_Official_Yearbooks/1979/NZOYB_1979.html>. The number of total offences per year has risen steadily since then, totalling at 350,389 in 2014: see Statistics New Zealand *Annual Recorded Offences for the Latest Calendar Year* (October 2017) <http://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE7405>.

perceived gangs as "troublesome but legitimate communities",[66] with the 1979 Select Committee's Report on Violent Offending stating that gang organisation could "provide a constructive and productive means of drawing together people through loss of identity from rural-urban migration, lack of tribal influence, [and] unemployment".[67] The follow up Comber Report produced by the 1979 Committee on Gangs again did not object to gangs, only to gang violence.[68]

The focus was therefore on reducing gang criminality and improving their social situation. The Group Employment Liaison Scheme (GELS) in 1982 aimed to engage gangs through government-funded schemes like the Project Employment Programmes (PEP), which would serve to reform anti-social behaviour, promote make-work schemes, and train gang members to be self-sufficient.[69] However, rising unemployment in the 1980s meant that policies specifically favouring gangs resulted in negative publicity.[70] Social policy agendas eventually met their demise, which meant that the gang problem came to be perceived as one that required tougher law and order strategies.[71] Political parties in particular advocated for tougher means of crime control to gain political favour.[72] New Zealand First leader Winston Peters spoke of immigration concerns with the rise of Asian organised crime and "gang triads"[73] while the National Party's Police spokesperson, John Banks, pledged to make New Zealand safe for "decent law abiding citizens" and "make [gang members'] lives a misery" if National entered into power.[74] As Gilbert states, "it was not gangs, but society around them [that] changed."[75]

Strong legislative action promoting gang suppression tactics resulted. A new offence of participation in a criminal gang was enacted in 1997, with s 98A of the Crimes Act 1961 stating that a person would be liable if he or she knowingly "participated" in a "criminal gang" and "intentionally promote[d]" or "further[ed]" conduct by a gang member. This development was unprecedented in New Zealand's criminal law as it created an entirely new head of liability that courts had yet to consider.[76] There was criticism that s 98A would result in charges being brought for *attempted* gang participation, which could be too

[66] Gilbert, above n 1, at 28.
[67] Committee of Inquiry into Violence *Report of Ministerial Committee of Inquiry into Violence* (March 1987) at 87.
[68] Gilbert, above n 1, at 121.
[69] Gilbert and Newbold, above n 52, at 19.
[70] Gilbert, above n 1, at 130.
[71] Gilbert and Newbold, above n 52, at 4.
[72] Gilbert, above n 1, at 170.
[73] At 153.
[74] At 184.
[75] At 154.
[76] Timothy Mullins "Broader Liability for Gang Accomplices: Participating in a Criminal Gang" (1998) 8 Auckland UL Rev 832 at 833. See Appendix to compare s 98A as enacted in 1997 with its subsequent version.

remote to warrant criminal liability.[77] Moreover, critics stated that there was no need for an extra s 98A offence as persons who participated in the offending of others would already be subject to the offence of accessory liability under s 66 of the Crimes Act 1961.[78]

The trend of suppressing gangs via legislation continued, with the enactment of the Whanganui District Council (Prohibition of Gang Insignia) Act 2009 and the Prohibition of Gang Insignia in Government Premises Act 2013 as two clear examples. Regardless, from the 2010s onwards a shift to a carrots-and-sticks approach in which a combination of suppression and socially-enabling methods has occurred. The Cabinet in June 2014 approved the "Whole-of-Government Action Plan to Reduce the Harm Caused by New Zealand Adult Gangs and Transnational Crime Groups", a holistic plan that combines "clampdown" measures such as the establishment of a Gang Intelligence Centre with social initiatives to help decrease involvement in the gang lifestyle.[79]

The 2017 Inquiry which recommended the blanket ban is therefore dual-focused: not only does it seek to tackle what it sees as loopholes in New Zealand's firearm laws, it also is well-poised to target issues relating to gang membership. Reports have been produced to bolster the link between the two. For example, the New Zealand Police state that 44 per cent (1,731) of patched members and prospects commit firearms offences at least once in their lifetime.[80] Nine per cent (374) from this pool are charged with five or more of these offences.[81] The New Zealand government therefore sees unlawful firearms possession and use as "an integral aspect of gang culture and their preparedness to possess and use firearms for criminal offending",[82] and continues to cement this trend.

[77] At 852.
[78] At 854.
[79] Beehive "Whole of Government Action Plan on Tackling Gangs" (August 4 2014) <https://www.beehive.govt.nz/release/whole-government-action-plan-tackling-gangs>.
[80] New Zealand Police, above n 26, at 5.
[81] At 5.
[82] At 5.

# CHAPTER II
# "Fit and Proper"

## *I Legislative Guidance*

Under New Zealand's current legislative framework, gang affiliation is merely a factor the Police can consider along with other general factors in deciding whether an applicant is "fit and proper" to possess a firearms licence.

### *A The Arms Act 1983*

To be issued a firearms licence, a member of the Police must be satisfied that the requirements under s 24 of the Arms Act 1983 are met:

> **24 Issue of firearms licence**
> (1) Subject to subsection (2), a firearms licence shall be issued if the member of the Police to whom the application is made is satisfied that the applicant—
> (a) is of or over the age of 16 years; and
> (b) is a *fit and proper* person to be in possession of a firearm or airgun.
> (2) A firearms licence shall not be issued to a person if…access to any firearm or airgun in the possession of that person is reasonably likely to be obtained by any person –
> …
> (c) whose firearms licence has been revoked on the ground that he is not a *fit and proper* person to be in possession of a firearm or airgun; or
> (d) who…is not a *fit and proper* person to be in possession of a firearm or airgun. (emphasis added)

The Arms Act 1983 does not define what "fit and proper" is, nor does it provide any guiding criteria that assists in making that determination. Domestic violence is a special criterion,[83] but an applicant could still be deemed "fit and proper" even if grounds for suspecting domestic violence exist.

### *B The New Zealand Police Arms Manual 2002*

The New Zealand Police Arms Manual 2002 (the New Zealand Manual) provides some guidance as to what "fit and proper" means. Since the New Zealand Manual is not referenced

[83] Section 27A of the Arms Act 1983 states that the police may declare that an applicant is not fit and proper if there are grounds under the Domestic Violence Act 1995 for the making of a protection order against an applicant, or if an order is already in force for that applicant.

to in the Arms Act 1983, the Police and the judiciary do not have to take this guidance into account.[84] Instead, the New Zealand Manual functions as a practical aid to the Police by:[85]

- Explaining New Zealand's firearms legislation;
- Outlining Police policy; and
- Laying out the procedures aimed at promoting the safe use and control of firearms

Para 1.2.1 of the New Zealand Manual states that "a fit and proper person is a person of good character who will abide by the laws of New Zealand and the provisions of the Arms Act 1983, the Arms Amendment Act 1992, and the Arms Regulation 1992". Para 2.29.1 further states that a fit and proper person "is a person who can be trusted to use firearms responsibly".

Para 2.29.2 provides a list of factors (not ranked in hierarchy of importance) in which a person could be considered *not* "fit and proper". While the Police may choose to consider these factors, it is not mandatory for them to do so. This is evidenced by the usage of the term "could" in para 2.29.2:

> **2.29 Fit and Proper Persons**
>
> 2. An applicant *could* be considered *not* a fit and proper person if he/she has:
>
> - Been the subject of a protection order; or
> - Shown no regard for the Arms Act or Arms Regulations; or
> - Been involved in substance abuse;[86] or
> - Committed a serious offence against the Arms Act; or
> - Committed any serious offence against any other Act; or
> - Committed a series of minor offences against the Arms Act; or
> - Committed crimes involving violence or drugs; or
> - *Affiliations with a gang involved in committing violent offences or in conflict with another gang;* or
> - Been or is involved in matrimonial discord involving violence or threats of violence; or
> - Exhibited signs of mental ill health; or

[84] Tompkins J in *Innes v New Zealand Police* [2016] NZDC 4538 at [40] confirmed that the New Zealand Police Arms Manual 2002 "does not have the force of law".
[85] New Zealand Police, *New Zealand Police Arms Manual* (2002), at Introduction.
[86] While prosecutions under the Misuse of Drugs Act 1975 would be covered, "substance" also refers to any alcohol, psychoactive substance, volatile substance, or any other substance declared by regulations to be one under s 4 of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017.

- Attempted to commit suicide or other self injurious behaviour; or
- Not complied with security conditions
- *For some other reason has been considered not fit and proper*.

  (emphasis added)

Para 2.29.3 of the New Zealand Manual reiterates that a person could also be deemed not fit and proper if they possess firearms to which other persons who are not fit and proper may obtain access. Para 2.29.4 states that "it is not possible to prepare a comprehensive list" of what characteristics a "fit and proper" person should possess, but emphasises that where a licence is refused "there must be reasonable grounds for the refusal".

Para 2.29.6 refers to five cases for an "in depth discussion" of how the term "fit and proper" is to be approached.[87] However, these cases have not been updated and do not relate to gang membership as a factor. Thus, they can only be taken as a starting point.

### *C The Right to Appeal*

Under s 62(1) of the Arms Act 1983, an applicant who has had a firearms licence application refused based on the reason that he or she is not "fit and proper" is allowed to appeal to a District Court judge.

## *II Case Law*

While there are many cases that provide general propositions as to what "fit and proper" means,[88] this section focuses on case law where gang membership is a factor as to whether or not an individual is "fit and proper". *Jenner v Police*[89] as discussed further below is an exception: it is analysed to understand how the broad principles that underpin the "fit and proper" test can be integrated into judicial reasoning.

### *A Fewtrell v Police*[90]

In *Fewtrell*, the appellant who applied to the Police for a renewal of his firearms licence was rejected for not being "fit and proper" due to his previous convictions for drinking and driving, his association with the Sinn Fein Motorcycle Club (Sinn Fein MC), and that organisation's convictions for unlawful possession of firearms.[91] Since the Police had

[87] See New Zealand Police, above n 85, at para 2.29.6 for the five listed cases.
[88] See, for example, *Police v Cottle* [1986] 1 NZLR 268 at 273 per Holland J. "Fit and proper" was equated as "a life [lived] without criticism or conviction".
[89] *Jenner v Police* [2016] NZDC 4102.
[90] *Fewtrell v Police* [1997] 1 NZLR 444.
[91] At 446. Parliament has recognised the Sinn Fein Motorcycle Club as a "gang": see s 4(a)(xxviii) of the Prohibition of Gang Insignia in Government Premises Act 2013.

previously renewed the appellant's firearms licence with all of these factors combined, he questioned the Police as to what was different about the situation this time.[92] Moreover, he rejected the allegation that his association with the Sinn Fein MC was such that it made him unfit for a firearms licence.[93] The appellant's association with the Sinn Fein MC was social in nature, seeing as he was part of a social pool and cricket team that had played with the Sinn Fein MC in competitions over the past eight years.[94]

The District Court dismissed the appeal, so the appellant appealed to the High Court. Goddard J held that gang association was not relevant to the question of whether one was "fit and proper" under s 27(1)(a) of the Arms Act (a section worded similarly to s 24 on the basis that firearms licences can be revoked if one is not fit and proper) because s 27(1)(b) was already clearly directed to the licensee's association with others.[95] Ultimately, Goddard J considered that the appellant's convictions, his association with the Sinn Fein MC, and that organisation's conviction for unlawful possession of firearms were questions of fact and not questions of law – which meant that the High Court was not required to answer it.[96]

### *B Mallasch v Police*[97]

In *Mallasch*, the appellant was declined a firearms licence when he applied for one under s 24 of the Arms Act. He had previously possessed a firearms licence in Wellington until it was revoked in 1994 due to his involvement with the Sinn Fein MC.[98] In his most recent application, the Police considered that the appellant was still not fit and proper due to his life membership of the Sinn Fein MC – which could result in illegal possession of the appellant's firearms by others who were not fit and proper.[99] The appellant appealed in 2005.

Justice Stretell stated that the appellant's involvement with the Sinn Fein MC was relevant to whether he was "fit and proper". However, Strettell J undertook a detailed analysis that examined the appellant's precise involvement with the Sinn Fein MC. The appellant's contact with members of the Sinn Fein MC was "relatively limited", carried out by providing accommodation for its members (aged on average between 40 and 50) who came to visit Invercargill.[100] No evidence existed to suggest that these members were themselves not fit and proper.[101] Even though there was an occasion where the appellant rode with his patch on

[92] At 447.
[93] At 447.
[94] At 447.
[95] At 453.
[96] At 453. Section 64 of the Arms Act 1983 (see Appendix) states that appeals to the High Court originating from a dissatisfaction in s 62 appeal decisions made by the District Court can only be made on "questions of law". This meant that there was uncertainty as to what the final outcome in *Fewtrell* was.
[97] *Mallasch v Police* [2009] DCR 596.
[98] At [2].
[99] At [5].
[100] At [15].
[101] At [17].

with a number of other motorcycle members of different clubs in the last 12-18 months, the appellant chose to associate only with those he deemed friends or acquaintances.[102] The appellant's association with the Sinn Fein MC was thus more of a way to pass time, where the appellant was provided with support "very much of the kind others might have with men's clubs".[103] This association was therefore social and not criminal in nature, even when a member from the Sinn Fein MC had previously been involved in a serious criminal assault.[104] Moreover, the appellant had been employed in a responsible job for five years, was "well thought of by his employers", had no convictions since 1981, and had a continued interest in hunting.[105] Despite Police concerns, it was necessary to determine the appellant's "right and state, as an individual, in terms of the Act, to have a firearms licence".[106] The appeal therefore succeeded.

### *C Innes v New Zealand Police*[107]

*Innes* involved a revoked licence on the basis that the appellant was no longer "fit and proper" under s 27 of the Arms Act 1983. This was due to the appellant's membership of the Bandidos Motorcycle Club (Bandidos MC) and the fact that he had failed to notify the Police of a change in his address within 30 days of moving as was required under s 34(1) of Arms Act 1983.[108] The appellant appealed.

Justice Tompkins noted the significance of *Fewtrell,* but deemed it to be a "short and now somewhat dated line of authority" that had to be interpreted differently with the enactment of new legislation such as the Prohibition of Gang Insignia in Government Premises Act 2013.[109] This Act prohibited the display of gang insignia in government departments, local authorities, and schools – which meant that Parliament explicitly recognised the overall undesirability of criminal gangs (with the Bandidos MC being one of the listed gangs) in a free and democratic New Zealand.[110] Tompkins J concluded that "on a general level" members of a gang legislatively recognised by Parliament were not the types of people who should be entitled to lawful possession of firearms.[111] Tompkins J then relied on evidence such as photographs and Police evidence to suggest that the appellant knew and associated

[102] At [17]-[19]. The social nature of this association is similar to that of the appellant in *Fewtrell.*
[103] At [15]. As the Committee of Inquiry into Violence, above n 67, at 87 recognised, gang organisations could serve important social functions in the community.
[104] At [16].
[105] At [13].
[106] At [16].
[107] *Innes v New Zealand Police* [2016] NZDC 4538.
[108] At [2].
[109] At [32].
[110] At [38]. Parliament has recognised the Bandidos Motorcycle Club as a "gang": see s 4(a)(ii) of the Prohibition of Gang Insignia in Government Premises Act 2013.
[111] At [39].

with certain members of the Bandidos MC, who in his view were not "fit and proper" due to their criminal histories.[112]

In effect, *Innes* concluded that gang membership was directly relevant to the "fit and proper" person test. This would be in line with the criteria that the New Zealand Manual provided, which had yet to exist when *Fewtrell* was decided.

However, Tompkins J did not conclude that the appellant was not "fit and proper" due to his association with the Bandidos MC alone. The appellant failed to advise the Police of his current address twice, which Tompkins J observed as making his "transgression of s 34 inherently more serious".[113] This was a crucial factor as the Police accepted that a single failure to notify alone would not result in the revocation of a firearms licence.[114] In addition, the appellant did not surrender his firearms licence following revocation, was evasive when questioned about its location, and also failed to respond with "clarity and candour" as expected of a fit and proper person.[115] Ultimately, it was the "cumulative effect" of these factors that resulted in Tompkins J concluding that the appellant was not fit and proper to hold a firearms licence.[116]

*D Jenner v Police*[117]

In *Jenner*, the Police refused to issue the appellant a firearms licence under s 24 of the Arms Act 1983 by concluding that the appellant was not fit and proper. This was because the appellant had sold firearms illegally – including MSSAs, claymore mines, and grenades which were for military use and were not legally available for civilians to purchase.[118] The appellant appealed.

Gang membership was not a relevant factor in this case. However, Cunningham J undertook a structured three-part enquiry in determining whether the appellant met the "fit and proper" person test: [119]

- Is the appellant a risk to himself with firearms?
- Is the appellant a threat to others?
- Is the appellant likely to sell guns to other people?

[112] At [57]. The photographs showed the appellant drinking at a bar and being at a service station with patched members.
[113] At [26].
[114] At [30].
[115] At [59].
[116] At [59].
[117] *Jenner*, above n 89.
[118] At [25].
[119] At [10].

The third part of the enquiry is case-specific, focusing on the nature of the appellant's illegal sales of firearms. Of interest, however, is how Cunningham J re-establishes the principles that underlie the "fit and proper" test. Cunningham J emphasised that the gun licensing regime was in place to ensure that firearms were in the hands of responsible people who would not put the public at risk by allowing firearms to get into the hands of people who should not have them.[120] In other words, in addition to the appellant's individual traits, the Court focused on principles like public safety, safety for themselves and others, and the control and legitimate use of firearms.

The appellant wanted to remain involved in the shooting sport for social purposes.[121] Members of the Waikato Rifles Club testified that the appellant had a good track record of safety when firearms were used, stating that the appellant was safe, responsible, and posed no risk to the public where firearms were concerned.[122] This allowed the appeal to succeed.

## *III Tying the Threads Together*

New Zealand case law demonstrates that determining whether an applicant is "fit and proper" to possess firearms is not about ticking a checklist or satisfying a set of specific criteria. Even if domestic violence – with its special status under the Arms Act 1983, s 27A – is involved, the Police still have the discretion to take other factors that are listed under the New Zealand Manual into account. Such an assessment is flexible, well-rounded, and crucially "individualistic" as Strettell J states in *Mallasch.*

Where gang associations are concerned, however, *Innes* demonstrates that new legislation which recognises gangs can make gang membership relevant to the "fit and proper" test. This would be in line with the New Zealand Manual's approach of recognising gang affiliations in para 2.29.2. Even so, no case exists where an applicant has failed the "fit and proper" test due to gang membership alone.

*Jenner* re-emphasised the principles that underpinned the "fit and proper" test and New Zealand's firearms licensing regime. Such an approach accords with the Arms Amendment Act 1992, which is aimed at "[promoting] both the safe use and the control of firearms and other weapons". Para 2.5 of the New Zealand Manual also provides the following:

> **2.5 Objectives of Firearms Licensing**
>
> 1. To maintain public safety and reduce crime by promoting the safe use and the control of firearms and other weapons.
> 2. To ensure, as far as possible, that only those who are "fit and proper" have access to firearms.

[120] At [61].
[121] At [71].
[122] At [66].

The possibility of adopting such a principled approach for the “fit and proper” test which is separate from the public interest concern of dangerous gang affiliations will be explored in Chapter IV. Before that, the proposed blanket ban will be critically evaluated in Chapter III to assess its viability.

# CHAPTER III
# Critically Examining the Blanket Firearm Ban

## *I Issues in Principle*

This section explores whether a blanket firearm ban on gang members and prospects as not being "fit and proper" persons to possess firearms is justifiable based on the New Zealand Bill of Rights 1990 (NZBORA) and the concept of pre-emptive criminalisation.

### *A The New Zealand Bill of Rights 1990*

Since the NZBORA is not supreme law, Parliament is free to enact any legislation to implement the proposed blanket firearms ban if it wishes to. However, the fact that the NZBORA exists to "protect and promote human rights and fundamental freedoms" and "affirm New Zealand's commitment to the International Covenant on Civil and Political Rights (1966)" means that it holds a vital position in New Zealand's constitution.[123] This means that the proposed blanket ban should be carefully examined to see whether it is justified under the NZBORA. While this discussion is closely linked to the NZBORA's operative frameworks (as contained in sections 4, 5 and 6, which are set out in full in the Appendix), this dissertation has chosen to focus on the NZBORA's conceptual underpinnings.

#### *1 Section 14: Freedom of Expression*

Section 14 of the NZBORA states that every individual has the right to "freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form". This includes the right to express thoughts and opinions "however unpopular, distasteful or contrary to the general opinion of others in the community".[124] Such a right is beneficial for several reasons. For one, classical liberalism favours a marketplace of ideas where autonomous individuals can make informed decisions based on a variety of perspectives.[125] This is linked to the concept of a democratic government, where an effective democracy can only function with vigorous debate allowing for different political expressions.[126] On an individual level, the right to freely express one's self fulfils human aspirations and allows individuals to reach their full potential.[127]

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[123] Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at 11.
[124] *Solicitor-General v Radio New Zealand Ltd* [1994] 1 NZLR 48 at 59.
[125] Butler, above n 123, at 523.
[126] At 525.
[127] At 526.

The term "expression" in s 14 has been interpreted broadly by New Zealand courts to include physical conduct that is naturally expressive such as jogging naked along a track in a park,[128] flag-burning,[129] and gang attire and insignia (*Schubert v Whanganui District Council*, explored below).[130] Since gang membership occurs for expressive reasons – be it for social means or the desire to participate in a subculture that differs from the general population – gang membership is likely to be perceived as a form of "expression".

*Schubert* challenged a Bylaw made under the Whanganui District Council (Prohibition of Gang Insignia) Act 2009 (Whanganui Act) for breaching s 14 of the NZBORA. The Whanganui Act was enacted to curb Whanganui's prevalent gang presence, and in doing so allowed the Whanganui District Council to make bylaws prohibiting the display of gang insignia in public places in Whanganui. Prior to its enactment, Dr Michael Cullen – the Attorney-General – was concerned that the Whanganui Act would be inconsistent with s 14 of the NZBORA, and that this inconsistency would not be justifiable under s 5.[131] Recognising this concern, the Law and Order Select Committee recommended some changes in the Bill[132] which ultimately did not put such concerns to rest.[133] Nevertheless, the Whanganui Act was passed and the Whanganui District Council proceeded to enact the Whanganui District Council (Prohibition of Gang Insignia) Bylaw to prohibit the display of gang insignia in areas encompassing all streets in the city, public parks, and beaches.[134] Schubert – a member of the Hell's Angels – decided to challenge the Bylaw's validity.

In *Schubert*, Clifford J stated that the bylaw could not be justified under s 5 of the NZBORA.[135] He stated that the Bylaw did not impose the minimum impairment on the right to freedom of expression that was necessary to achieve the aims of minimising gang confrontations and reducing public intimidation by gangs.[136] The Bylaw was disproportionate

[128] *Pointon v Police* [2012] NZHC 3208 at [75]. The High Court accepted that it was the appellant's right to run naked to draw attention to his lifestyle choice, and this did not cause such unease as to "inhibit [the complainant's] return to the place".

[129] *Hopkinson v Police* HC Wellington CRI-2004-485-23, [2004] 3 NZLR 704. France J weighed the right to freedom of expression against the state's interest in protecting the New Zealand flag's integrity, concluding that prohibition of this conduct by the Flags, Emblems and Names Protection Act 1981 amounted to a prima facie breach of the right to freedom of expression.

[130] *Schubert v Whanganui District Council* [2011] NZAR 233.

[131] Jarrod Gilbert "The Rise and Development of Gangs in New Zealand" (Sociology (Ph D), University of Canterbury) at 659.

[132] Law and Order Committee *Whanganui District Council (Prohibition of Gang Insignia) Bill: Commentary* (2008). For example, the Committee recommended the enactment of a separate clause to ensure that the bylaw-making process would be consistent with the Local Government Act 2002.

[133] (4 March 2009) 652 NZPD at 1642. Meritia Turei, a Green Party Member of Parliament, was concerned that the Whanganui District Council (Prohibition of Gang Insignia) Bill would have a discriminatory effect on Māori. She stated that the Bill would continue to breach the New Zealand Bill of Rights Act 1990 despite the Law and Order Committee's efforts.

[134] *Schubert*, above n 130, at [1] and [13].

[135] At [101].

[136] At [129].

to the infringement of rights involved, seeing as its extensive coverage stopped gang members from commuting across town or walking to a friend's house with a gang patch on.[137] Therefore, the Bylaw was ultra vires.

Of course, the right to freedom of expression can be justifiably limited for reasons of protecting the public order,[138] which the need to minimise gang confrontations and reduce public intimidation by gangs comfortably sit under. However, *Schubert* demonstrates the necessity to have NZBORA-consistent laws in a free and democratic society to avoid over-broad restrictions. Similarly, the proposed blanket ban might be akin to cracking a nut with a sledgehammer. Since gang membership is likely to be a form of "expression" that is valid in a democratic society, a blanket ban penalising this precise expression is likely disproportionate to the extent of the infringement that is involved.

### *2 Section 17: Freedom of Association*

Section 17 of the NZBORA states that every individual has the right to "freedom of association". This right has received relatively little academic attention, and is usually conceived in instrumental terms – as a means to an end in trade union representation, for example, rather than an end in itself.[139] The fact that s 17 has been enacted separately as a right on its own, however, means that it is as significant as other rights that are commonly perceived to be more important. The right to come together with others allows an individual to collectively express, promote, pursue and defend his or her common interests alongside others to pursue his or her needs, aspirations and liberties. The freedom to associate is therefore intrinsically tied with the freedom to express one's views. Limitations on the expression of group membership have significant implications on the freedom of association, where "freedom of association is [accordingly] subverted to the extent that one cannot express membership of an association".[140]

Some kinds of associations have been criminalised for the purposes of public safety. An example in contemporary New Zealand is the Terrorism Suppression Act 2002, where s 13 criminalises a person who knowingly or recklessly participates in a group or organisation that participates in terrorist acts. Section 98A of the Crimes Act 1961, as previously introduced in Chapter I, also makes participating in an organised criminal group an offence. Such limitations are arguably justified when the association threatens the safety of the state and its citizens.[141] However, as addressed in Chapter I, it must be remembered that what is perceived

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[137] At [130].

[138] *International Covenant on Civil and Political Rights* GA Res 2200A (XXI) (1966) at Art 19.3: "[the exercise of the right to freedom of expression] carries with it special duties and responsibilities…for the protection of national security or of [the] public order".

[139] Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 354.

[140] Butler and Butler, above n 123, at 800.

[141] At 804.

to be a threat to the state is context-dependent and may be in the eye of the beholder.[142] Consorting laws that prevent people from "getting together to hatch crimes" have long dated back to England in the Middle Ages, where statutes in the 1500s convicted individuals who were found in the company of gypsies for over a month.[143] From the threat of Communism during the Cold War to the most recent fear of radicalised Islam, New Zealand's fear of gangs and the legislation enacted to crack down on them is also contextual (as also demonstrated in Chapter I). Criminalising associations because of their declared aim and purpose is an extreme measure and can only be a reasonable limit in extreme circumstances where the aim and purposes of the association threaten the peaceful living of citizens.[144]

A blanket ban on gang members that precludes them from being "fit and proper" persons to possess firearms would not, on the face of it, be understood as a form of criminalisation. After all, "criminalisation" is usually understood as the application of a criminal label to individuals or certain groups, where sanctions are invoked by the state in response.[145] The proposed blanket ban neither explicitly labels gang members as criminals, nor does it trigger sanctions in the conventional sense. However, it is arguable that the proposed blanket ban triggers a form of de facto criminalisation which intrudes into the individual's right to freely associate with others. This is because the ban automatically perceives gangs as "criminal" or "pseudo-criminal", which result in differential treatment to gang members and affiliates just because he or she chooses to associate with that particular company.[146]

Even when prosecution does not occur, stereotypes in everyday life exist in relation to who individuals associate.[147] For example, in *Kerr v Attorney-General*[148] the plaintiff complained that his right to s 18 (freedom of movement) of the NZBORA had been breached. The plaintiff was a member of a motorcycle gang, and had been singled out because of his associates. The police who conducted breath tests advised the plaintiff to either wait at the check-point for 10 minutes or to travel an alternative route so that he could not warn other members of the motorcycle gang of the check-point. While Ryan J concluded that there was a breach of s 18, damages awarded in response to the breach must "reflect the general standing of [the plaintiff] in the community". [149] Ultimately, only nominal damages of $20 was awarded. Ryan J stated that "if…association [was] with violent, dishonest, drug-dealing

[142] At 804.
[143] David Cressy "Trouble with Gypsies in Early Modern England" (2016) 59 The Historical Journal 45 at 56. Queen Elizabeth I's regime required new law on Gypsies due to growing numbers of English-born who were disguising themselves as Gypsies. The solution was to make it a felony for anyone "seen or found…in any company or fellowship of vagabonds" for one month.
[144] Butler and Butler, above n 123, at 804.
[145] Phil Scraton "The Criminalisation and Punishment of Children and Young People: Introduction" (2008) 20 Current Issues Crim Just 1 at 5.
[146] Butler and Butler, above n 123, at 800.
[147] At 800.
[148] *Kerr v Attorney-General* [1996] DCR 951 (DC).
[149] At 951.

persons then it can scarcely be wondered" that the person's reputation "is held in lesser esteem" compared to the reputation of a regular person.[150] While *Kerr* did not involve prosecution, the effects of this differential mode of treatment is discriminatory and punitive in ways that arguably amount to de facto criminalisation.[151]

A counter-argument is that for de facto criminalisation to occur, the intention of such a punishment must be punitive – that is, it needs to be designed to impose a deprivation or hardship which exists not as a collateral consequence of other objectives.[152] For example, when an individual becomes unemployed because of occupational regulations, the resulting unemployment cannot be perceived as a kind of punishment.[153] Put this way, the blanket ban's aim of protecting the public from gang harm arguably makes its discriminatory effects incidental. However, this blanket ban deliberately intrudes on the right to associate without any form of redress. Since certain kinds of discrimination are protected by legislation,[154] greater concern exists for intrusions where no redress is available.[155] For example, Michael Moore, former Prime Minister of New Zealand, proposed in September 1996 that gang members should be punished doubly for offences committed just because they belonged to a gang.[156] Ultimately, nothing came out of this proposal: s 9(hb) of the Sentencing Act 2002 today states that the connection between the offending and the offender's participation in an organised criminal group (within the meaning of s 98A of the Crimes Act 1961) is an aggravating factor, but sentences are not automatically doubled just because of gang membership.

In the United States, courts issue anti-gang injunctions to declare street gangs as public nuisances and prohibit them from carrying out certain activities in particular cities.[157] Such anti-gang injunctions are not criminal offences, but can operate like personal criminal codes if infringed.[158] This is similar to the United Kingdom's Anti-Social Behaviour Orders, which are civil in nature but can result in criminal sanctions if breached.[159] While anti-gang

[150] At 958.
[151] Scraton, above n 145, at 5.
[152] Douglas Husak "Retribution in Criminal Theory" (2000) 37 San Diego L Rev 959 at 964.
[153] At 964.
[154] The Employment Relations Act 2000, for example, protects employees who participate in trade union activities under certain circumstances. The Human Rights Act 1993 also provides protection for the expression of political viewpoints.
[155] Rishworth, above n 139, at 359.
[156] Gilbert, above n 1, at 224. Unlike New Zealand, status-based penalties have been recognised in Australia. For example, South Australia's Serious and Organised Crime (Control) Act 2008 allows the imposition of a seven-year imprisonment on recognised gang members who stalk public officials.
[157] Christopher Yoo "The Constitutionality of Enjoining Criminal Street Gangs as Public Nuisances" (1994) 89 University of Pennsylvania Law School Legal Scholarship Repository 212 at 215.
[158] At 216.
[159] Nicola Lacey "Historicising Criminalisation: Conceptual and Empirical Issues" (2009) 72 Mod L Rev 936 at 944. Anti-Social Behaviour Orders can prevent individuals from going to certain places and associating with

injunctions in the United States have been issued against gangs with hundreds of members,[160] terms prohibiting gang members from associating with other gang members have not been granted for fear of such terms to be "far, far overreaching".[161] Such injunctions would also violate basic constitutional liberties as those affected would not be able to invoke procedural protections that would otherwise be available through conventional criminal sanctions.[162] The proposed blanket firearms ban similarly extends the boundaries of formal criminalisation without any procedural protections,[163] which the Arms Act 1983 supposedly grants through its right to appeal under s 62.

Limitations on the right to associate are arguably only reasonable if membership of a particular organisation has a direct link to the offence committed – for example, if assault was committed because the victim was a member of a rival gang, or if membership of the association aggravates the nature of the offence.[164] This means that a person can lawfully exercise their right to associate freely if they do not actively support any unlawful goals of the association, and if no repercussion stems from that association.[165] The proposed blanket ban is likely to discriminate regardless of an association's purpose, which is problematic as gangs can have both legal and illegal goals.[166] Gangs are often portrayed as only possessing the latter, with very little media emphasis placed on the former. As highlighted in Chapter I, the 1979 Select Committee's Report on Violent Offending noted that gangs can and do serve important community functions. This would render the blanket ban's limitations on the right to associate unreasonable. For example, the Magogs Motorcycle Club host a biannual National Motorcycle Expo, which is a significant social event in New Plymouth.[167] The Mongrel Mob also has a partnership with the Salvation Army to combat the negative effects of methamphetamine drug use in New Zealand through their Hauora Programme, having completed five intakes ridding methamphetamine users of their addictions in 2013.[168] Gangs

certain groups. See Government of the United Kingdom "Antisocial Behaviour Order (ASBO)" <https://www.gov.uk/asbo>.

[160] This occurred in the first anti-gang injunction that made headlines in the United States, between the Los Angeles City Attorney, the Los Angeles Police and the Playboy Gangster Crips in 1987.

[161] Yoo, above n 157, at 218.

[162] At 216.

[163] Lacey, above n 159, at 944.

[164] *Dawson v Delaware* 503 US 153 (1992) at 165, 166.

[165] Butler and Butler, above n 123, at 801.

[166] Yoo, above n 157, at 232.

[167] Gilbert, above n 1, at 163. See Eventfinda "National Motorcycle Expo" (April 2011) <https://www.eventfinda.co.nz/2011/apr/new-plymouth/national-motorcycle-expo>, where the Magog Motorcycle Club promotes their expo as one that is "world class" with an array of motorcycles from the United States, the United Kingdom, and Europe. This event has continued support despite Parliament recognition that the Magogs Motorcycle Club is a "gang" as per s 4(a)(xvii) of the Prohibition of Gang Insignia in Government Premises Act 2013.

[168] The Salvation Army "Journeying Together for a Second Chance" (12 January 2013) <http://www.salvationarmy.org.nz/our-community/faith-in-life/our-people-our-stories/journeying-together>. Roy Dunn, the President of the Mongrel Mob, stated that while the Mongrel Mob "still do and get things wrong

like the Tribal Huk also contribute to the community with their sandwich plan, where 500 sandwiches are made each day for distribution across 30 schools in Ngaruawahia.[169]

Like many criminalised participation offences, the proposed blanket firearms ban is aimed at general deterrence by sending the message that an individual need not be at the heart of the organisation's criminal activities to be treated differently for its actions.[170] However, the mere fact that a person identifies him or herself as a gang member or a prospect does not inform anyone about their level of participation or their reasons for doing so.[171] Many of these contributions by members may not be criminal in nature – they may involve mundane, everyday tasks like organising meetings, doing promotions on the Internet, or be even as simple as grocery shopping or cooking.[172]

As then Māori Party co-leader Pita Sharples argued, laws can be overreaching even if cracking down on crime is a legitimate goal:[173]

> Clamp down on crime, yes. If a gang is doing crime, lock [them] up. But don't assume that people who form or join roopu,[174] as they call themselves, are all breaking the law and are there to intimidate you, even though you are intimidated by them.

### *B Pre-Emptive Criminalisation*

Laws that penalise or discriminate based on who individuals associate with are intrinsically linked to the idea of pre-emptive criminalisation. Pre-emptive criminalisation involves the incarceration of individuals at earlier stages of the criminal enterprise, where the state assumes an overriding role of protecting its citizens with whatever means possible – even if the harm at this stage is remote at best.[175] Liberal democracies with Anglo-American roots

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because [they do not] necessarily know how to do things differently", they had a vision of embracing "*whanau* (extended family and groups who may not have kinship ties to each other), looking out for each other, and having a good future for [their] kids".

[169] Emily Crane "We're Not Exactly Pillars of Society: The Violent Gang Members Turned Volunteers Who Make 500 Sandwiches a Day for Needy Schoolkids" *Daily Mail* (Australia, 7 July 2015) <http://www.dailymail.co.uk/news/article-3151806/Meet-violent-gang-members-extensive-criminal-records-making-500-sandwiches-day-needy-schoolchildren.html>. The Tribal Huk is recognised as a "gang" as per s 4(a)(xxxii) of the Prohibition of Gang Insignia in Government Premises Act 2013.

[170] Julie Ayling "Criminalising Organisations: Towards Deliberative Lawmaking" (2011) 33 Law & Pol'y 149 at 157.

[171] Yoo, above n 157, at 234.

[172] Ayling, above n 170, at 156-157.

[173] Simon Collins "Gangs 'Part of Solution to Youth Violence'" *New Zealand Herald* (New Zealand, 14 April 2008) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10504156>.

[174] Gilbert and Newbold, above n 52, at 23. New Zealand youth gangs often involve Māori and Pacific peoples, which *kaupapa* (policy-based) Māori research argues is linked to the cultural degradation of Māori and colonisation.

[175] Shlomit Wallerstein "Criminalising Remote Harm and the Case of Anti-Democratic Activity" (2007) 28 Cardozo L Rev 2697 at 2697.

have traditionally rejected the idea of pre-emptive prosecution for precautionary purposes as state intervention could only be justified after concrete harms occurred.[176]

The growing number of terrorism-related incidents in Western states,[177] however, have resulted in the enactment and strengthening of pre-emptive anti-terrorism and domestic criminal laws. In 2007, raids were conducted on Ngai Tuhoe land that formed the Te Urewera National Park after concerns that the veteran activist, Tame Iti, was preparing for an Irish Republican Army-style "war on New Zealand" to establish an independent state on Tuhoe land. The Police intervened with powers under the newly enacted Terrorism Suppression Act 2002, although the solicitor-general David Collins subsequently dropped all terrorism charges because they were "unworkable".[178] While unconnected to the subsequent enactment of gang-related legislation, the Ururewa incidents demonstrate the state's hyperawareness of perceived dangers in a global atmosphere of fear. New Zealand's increased focus on pre-empting domestic dangers – with gangs as a priority enemy – is therefore unsurprising.

Preventing criminal activity is a legitimate end. However, preventive criminal strategies differ from pre-emptive ones. Preventive strategies focus on particular dangers and seek to prevent them by conducting balanced risk assessments, while pre-emptive criminalisation strategies anticipate crimes and dangers that have yet to materialise by focusing on "identifying suspicious groups without worrying about false-positive identificators".[179] Pre-emptive criminalisation strategies are thus more forward-looking and blurs the line between offender and suspect by controlling groups, instead of looking at the participating individual on a case-by-case basis.[180] The proposed blanket ban is therefore a pre-emptive strategy as it automatically assigns certain groups of individuals as a criminal risk even if they may only interact with the organisation's members on an infrequent, social basis.

More importantly, pre-emptive criminalisation strategies are often political in nature. Such strategies are accompanied with populist rhetoric about being "tough" on crime, where

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[176] Mark Weinberg "The Move Towards Pre-Emption in the Criminal Law" (2009) 35 Monash UL Rev 25 at 25. See also Wallerstein, above n 175, at 2700 for an example on how thoughts are not criminalised as they have not resulted in concrete harms.

[177] Australian Liberal Democrat, David Leyonhjelm, has called for Australians to have the right to bear arms to combat terrorism. See Matthew Connors "Liberal Democrat David Leyonhjelm calls for armed citizens to combat terrorism" *The Courier Mail* (Australia, 14 June 2017) <http://www.couriermail.com.au/news/queensland/liberal-democrat-david-leyonhjelm-calls-for-armed-citizens-to-combat-terrorism/news-story/79664bf8f757f6dcd520f8fa22b71f59>.

[178] Alex Fensome "The Urewera Raids: Breaking the Story" *Stuff.co.nz* (New Zealand, 20 December 2014) <http://www.stuff.co.nz/national/64348692/the-urewera-raids-breaking-the-story>. The New Zealand Police was heavily criticised for the excessive way they conducted the arrests, which resulted in a formal apology by the Independent Police Conduct Authority in 2013 for "unnecessarily frightening and intimidating" people during the raids.

[179] Teun van Ruitenberg "Raising Barriers to 'Outlaw Motorcycle Gang Related Events': Underlining the Difference Between Pre-Emption and Prevention" (2016) 9 Erasmus L Rev 122 at 125.

[180] At 125.

symbolism is perceived to be more important than the policy's concrete effects.[181] Section 98A of the Crimes Act 1961 is an example of pre-emptive criminalisation that was heavily politicised. In its original form, s 98A was titled as "participation in a criminal gang" and – as highlighted in Chapter I – was enacted in a climate where hard-lined strategies were popular. However, the explanatory note to the first reading of the Bill conceded that no empirical evidence existed to prove that negative gang activity was prevalent in New Zealand.[182] Moreover, while s 98A was modelled on **§** 186.22(a) of the Californian Street Terrorism Enforcement and Prevention Act, there was no evidence on how the Californian provision – enacted for the specific purpose of tackling street gangs in California – would function just as effectively in New Zealand.[183] Subsequent data obtained from the Ministry of Justice by National Member of Parliament Chester Borrows demonstrated s 98A's ineffectiveness: in the first five years after s 98A's enactment, only 13 people were charged and two convicted.[184] It can be speculated, then, that it was this inadequacy that resulted in s 98A to be amended from "participation in a criminal gang" to "participation in an organised criminal group". Even when s 98A was amended in 2002 by redrafting what constituted a "criminal group" to make convictions easier, by 2006 only 45 convictions had occurred.[185] The proposed blanket ban could well likely follow a similar path, where the importance of political rhetoric overshadows the need for effectiveness.

The political nature of pre-emptive criminalisation strategies has been influenced by the rise of victimology, where the rights of victims are selectively promoted and advocated in the assumption that their rights are more important than other competing rights or values in society.[186] Since the voices of victims expressly appeal to the public, the real effects of excessive pre-emptive criminalisation are glossed over for fear of being "soft" on crime. Deputy Prime Minister Paula Bennett's statement leading up to the 2017 New Zealand General Elections that "[gang members] have fewer human rights than others when they are creating a string of victims behind them…[and that] there is a different standard" demonstrates this.[187] The proposed blanket ban similarly targets patched gang members and

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[181] David Brown "Criminalisation and Normative Theory" (2013) 25 Current Issues Crim Just 605 at 620.
[182] Mullins, above n 76, at 833.
[183] At 833.
[184] Gilbert, above n 1, at 230.
[185] At 230.
[186] See The Sensible Sentencing Trust "Sensible Sentencing Trust Goals and Policy" < http://sst.org.nz/our-aims/>. The Sensible Sentencing Trust advocates for the abolishment of name suppression for offenders because "suppression should only protect a victim". The enactment of the Victims' Rights Act 2002 has also contributed to this view.
[187] Amanda Robinson and Lloyd Burr "Decision 17: National Announces $82m to Expand Police Powers to Fight Meth" *Newshub* (New Zealand, 3 September 2017) <http://www.newshub.co.nz/home/election/2017/09/decision-17-national-to-expand-police-powers-to-fight-meth.html>. In response to Bennett's statement, New Zealand Human Rights Commissioner David Rutherford stated that "all human beings are born free and equal in dignity and rights – what we fought [in] World War Two to preserve, what New Zealand declared in 1948".

its prospects without evaluating other competing values in society, such as the concept of guilt being assigned not by status alone.

As stated by Metiria Turei, co-leader of the Green Party, during debates of the Gang Insignia Bill:[188]

> [The Bill] identifies a particular subset of gangs—those that wear patches—as being the problem. What about all those other gangs that cause problems? What about the members of white power gangs…who do not wear patches but have their own…uniform of no hair, big boots, and tight pants? …Will [the House] ban boots and tight pants? Will it ban the shaving of people's heads? No, the House cannot do that because it will not be effective. It could not possibly do that. *So why should we pick on just the gangs that we can identify through their patches?* The answer to that is that it is *easy and it sounds good to the public.*

## *II Issues in Policy*

This section explores whether the proposed blanket firearms ban on gang members and prospects is justified in policy by looking at New Zealand's current firearms licensing process and the practical difficulties such a ban would face.

### *A The Licensing Process*

As discussed in Chapter II, the process of determining whether an applicant is "fit and proper" is a highly individualised one. Interviews are conducted to determine whether an applicant is "fit and proper". Form POL 67K sets out the required interview formats when the applicant's referees such as the applicant's spouse, next-of-kin, or partner are interviewed. These interview formats are designed to elicit information on whether the applicant is "fit and proper". Some of the mandatory questions include:[189]

- For what purpose do you think the applicant needs (access) to firearms?
- What is the applicant's experience with firearms?
- What is the applicant's attitude to, and behaviour, with firearms? How do you know this?
- If there are others who have access to the household the applicant lives in unsupervised, are there any concerns that they may have access to firearms?

[188] NZPD, above n 133, at 1642 (emphasis added).

[189] Form POL 67K was released under the Official Information Act 1982, and was subsequently uploaded online to Kiwi Gun Blog "How the Police Vet Shooters" (25 July 2017) <https://kiwigunblog.wordpress.com/2017/07/25/how-the-police-vett-shooters/>. In this scenario, Kiwi Gun Blog was concerned that the New Zealand Police were not administering the firearms vetting process consistently.

The licensing vetting officer is required to note down other observations, such as whether there is any evidence that the interviewed referee is afraid of the applicant.

When it comes to interviewing the applicant, the officer is required to ask questions such as:[190]

- What the applicant's job is and what they do
- The reasons they would want a licence
- What the applicant's firearm interests are, e.g: collecting, target shooting
- Their lending of firearms to others

Para 2.30.1 of the New Zealand Manual states that interviews must be thorough, that the questions set out are not exhaustive, and that vettors are encouraged to ask whatever extra questions that are appropriate on a case-by-case basis. This means that each interview is highly individualised, requiring the Police to take into account all kinds of factors (and not just who they associate with) in deciding whether an applicant is fit and proper.

The New Zealand Manual also warns that firearms licences should not be refused based on predetermined biases. Para 2.30.1 warns that "there is a danger of interviews becoming stereotyped", which is unsurprising seeing as gangs and the Police often interact in antagonistic circumstances that can result in pigeonholed perceptions such as "guilty", "not guilty", "good guys" and the "bad guys".[191] Para 11.11.1 rejects the usage of "prohibited person" as a term,[192] stating that the notion of a de facto "prohibited" person contains no foundation in law under the Arms Act 1983.[193] As a result, para 11.11.2 states that all applications for firearms licences must be fully considered. The current firearms licensing regime is therefore inconsistent with the concept of refusing firearms licences based on stereotyped criteria (i.e. that gang affiliations automatically "prohibit" an applicant from obtaining a firearm licence). This means that the blanket ban is also inconsistent with the current firearms licensing regime.

### *B A Reach Too Far: Difficulties in Identifying Gang Members, Prospects, and the Problem of Mistaken Prosecutions*

The nature of identifying who is a gang member or who is affiliated with one is rife with uncertainty. This is because gangs – especially those with a high proportion of youth members – can be fluid in nature.[194] Non-members may experiment with gang clothing, while

[190] At 20-28.

[191] Gilbert, above n 1, at 234.

[192] The United Kingdom uses the term "prohibited persons", which in some ways serves as a blanket ban on some individuals from accessing firearms in the United Kingdom. This is usually related to the severity of the committed offence.

[193] New Zealand Police, above n 85, at 11.11.1.

[194] Organised and Financial Crime Agency of New Zealand "Organised Crime in New Zealand 2010" (2011) 14 Trends Organ Crim 73 at 74.

inactive or retired gang members may continue to wear gang paraphernalia.[195] Gang prospects are especially difficult to identify as they only wear partial colours during their prospecting period.[196]

The difficulties in identifying gang members were noted in the *Acuna*[197] injunction. To determine whether a person was a gang member, the San Jose City Attorney decided to look to factors such as:[198]

- Whether there was admittance in a specific gang;
- Whether the individual bore gang tattoos or wore gang clothing;
- Whether the individual was named as a gang member by two or more members of that specific gang;
- Whether the individual was identified as a gang member by a reliable informant; and
- Whether the person had been observed associating with identified gang members two or more times.

However, such factors are likely to lead to mistakes regardless of how specifically defined they are. This is because street information is often based on rumours or misinformation. Even in New Zealand, much of Police-gathered gang intelligence originates from paid informants or others who have a vested interest in having that information be known to the Police. These include situations such as those seeking bail, getting charges reduced, and so on.[199]

Difficulties in determining who a gang member is can lead to mistaken prosecutions derived from laws that overreach. The day following the Whanganui Bylaw's introduction, Mongrel Mob member Brett Beamsley was arrested for wearing a beanie with a bulldog on it.[200] The charges against Beamsley were eventually dropped as the beanie's motif turned out to be the Georgia University's mascot Uga, a white bulldog bearing the team's colours of red and black. These colours are similar to the Mongrel Mob's colours.

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[195] Yoo, above n 157, at 235.

[196] A "prospect" is a person who is loyal to the gang but has yet to become a fully-fledged patched member. To earn their patch, the prospect must complete errands or "missions" for the gang and report to a patched member who they are assigned to.

[197] Complaint for Temporary Restraining Order, Preliminary and Permanent Injunctions to Abate a Public Nuisance, People *ex rel. City Attorney v Acuna*, No. 729322 (Cal Super Ct Santa Clara County filed 26 February 1993).

[198] Yoo, above n 157, at 234.

[199] Gilbert, above n 1, at 235.

[200] See Appendix for figures of the Mongrel Mob's logo and the University of Georgia's mascot. Anne-Marie Emerson and Colin Rowatt "Police Withdraw Charges Over Bulldog Beanie" *New Zealand Herald* (New Zealand, 22 September 2009) http://www.nzherald.co.nz/wanganui-chronicle/news/article.cfm?c_id=1503426&objectid=10987043.

The same problems are likely to apply with the proposed blanket ban. This is because precise identification of gang members involves more than just looking at what they wear or who they associate with. In *Innes*, Tompkins J relied on photographs showing the appellant socialising with patched members of the Bandidos MC to conclude that the appellant was associated with them. However, without more, such photographs arguably do not serve as proof that this involvement was sufficiently extensive.

### *C Entrenching a More Committed Gang Membership Base*

On 7 September 2009, Hells Angels member Bryan Moore wore a club T-shirt and lingered outside the Whanganui police station until he was arrested for displaying gang insignia based on the newly-enacted Whanganui Bylaw. Moore actively sought arrest to test the Bylaw's effectiveness. Upon arrest he ripped his shirt to pieces, ensuring that the Police were unable to keep it as evidence.[201] This incident – combined with the willingness of the Hells Angels in judicially challenging the Bylaw's validity in *Schubert* – demonstrate a "political awakening" of the wider gang scene.[202] Gangs can attain a sense of victory through such actions, which serve to entrench a more committed gang membership base.

Moreover, laws that overreach can drive gangs underground and advantage them.[203] After the enactment of the Whanganui Bylaw, police reports demonstrated that many gang members chose to relocate from Whanganui to areas near Whanganui such as Marton and Patea.[204] This shows that gangs are likely to find subtle ways to work around the law, rendering its enactment ineffective.[205] Gangs do this by recruiting facilitators and specialists, be they from criminal networks or valid contractors – and these may include professionals like lawyers, accountants, chemists, computer hackers, or those with access to goods like firearms or false documents.[206] It should be remembered that gangs exist in communities who are similar in terms of social and economic demographics, which means that such communities may serve as gang "associates".[207] This means that approaching gangs solely as a crime problem with highly publicised "crackdowns" is insufficient and unjustifiable in policy. This is not an attempt to mask the fact that gangs commit crime – they can and they do. However, as the previous Minister of Justice Jim McLay states, the "problem [of gangs] will not be solved by throwing a law at it".[208]

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[201] Gilbert, above n 131, at 664.
[202] At 665.
[203] Gilbert, above n 1, at 278. Detective Sergeant Daryl Brazier wrote a letter to the editor of the New Zealand Herald on 14 March 2006, stating that proposed laws such as the Whanganui District Council (Prohibition of Gang Insignia) Bill "mean well", but may ultimately be misguided.
[204] New Zealand Police *Policing Fact Sheet: Whanganui District Council (Prohibition of Gang Insignia) Act 2009* (July 2010) at 1.
[205] Gilbert, above n 131, at 663.
[206] Organised and Financial Crime Agency of New Zealand, above n 193, at 75.
[207] Gilbert, above n 1, at 293.
[208] (7 August 1979) 424 NZPD at 2078.

## *III Conclusion*

Ultimately, the proposed blanket firearms ban cannot be justified in principle and policy. While freedoms of expression and association are not absolute rights under the NZBORA, the proposed blanket ban unjustifiably limits these rights as they amount to de facto criminalisation without any form of redress. This criminalisation is pre-emptive in nature and is heavily politicised, which can result in criminal strategies that solely appeal to the public without full consideration of its effects. Moreover, the ban is inconsistent with the current firearms licensing system and will be ineffective due to difficulties in its execution. Without addressing the social complexities of gang membership, the ban is likely to achieve the opposite of what it was intended to do.

Chapter Four will look to overseas jurisdictions to see if there are better approaches which New Zealand can adopt in lieu of the proposed blanket ban.

# CHAPTER IV
# Alternatives to the Blanket Firearm Ban

## *I Firearms Laws in Foreign Jurisdictions*

### *A Choosing the Appropriate Foreign Jurisdictions for Comparative Purposes*

The legal framework for firearms regulations varies from state to state. The United States and Mexico, for example, provide their inhabitants the constitutional right to bear arms.[209] Other states (New Zealand included) address firearms possession and ownership under laws, regulations, and directives.[210] These widespread variations make comparing New Zealand's firearms legal framework with foreign jurisdictions complex, as fruitful comparisons can only be made when foreign jurisdictions are sufficiently similar to New Zealand where firearms are concerned. Comparing New Zealand and the United States, for example, will be unhelpful due to stark differences in gun culture (as highlighted in Chapter I) and constitutional arrangements.[211]

For the purposes of this dissertation, Australia and the United Kingdom have been chosen as research references. While Australia has a federal system of government, it has a sufficiently uniform approach in regulating firearms through its National Firearms Agreement.[212] The terminology used in Australia is also similar (the phrase "fit and proper" is used), which is helpful for comparative purposes.

The United Kingdom was chosen since its legal framework for regulating firearms is similar to New Zealand. The United Kingdom's laws on firearms are located in its Firearms Act 1968, but the United Kingdom Homes Office has issued a Guide on Firearms Licensing Law 2016 (the United Kingdom Guide) which functions similarly to New Zealand's Arms Manual 2002. Just as how the New Zealand Manual is not referenced in New Zealand's Firearms Act 1983, the United Kingdom Guide is not referenced in its Firearms Act 1968.

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[209] Constitution of the United States of America, Amendment II (1791), and the Mexican Constitution of 1857, Art 10.

[210] New Zealand's main firearms provision is the Arms Act 1983, whereas the European Union Directives lay down the minimum standards for the European Union states.

[211] The United States has a federal system of government which varies greatly from New Zealand's Westminster-styled Parliamentary system.

[212] Australia passed the National Firearms Agreement in 1996 as a response to the Port Arthur massacre that killed 35 people. All the Australian state governments passed laws giving effect to this Agreement after 12 days. See also Calla Wahlquist "It Took One Massacre: How Australia Embraced Gun Control After Port Arthur" *The Guardian* (The United Kingdom, 14 March 2016) <https://www.theguardian.com/world/2016/mar/15/it-took-one-massacre-how-australia-made-gun-control-happen-after-port-arthur>.

### *B Australia and the United Kingdom's Three-Limbed Test: A Holy Tripartite*

Australia and the United Kingdom possess a three-limbed test in their firearms legislation that include the following:

- A "fit and proper" test that involves looking at the applicant's individual characteristics[213]
- A "public interest" test that involves looking to factors such as the risks posed to public safety and the need to maintain a coherent licensing standard,[214] and
- A "genuine" or "good reason" test where an applicant has to demonstrate a genuine need for the particular firearms licence or certificate applied for.[215]

This chapter explores this three-limbed test in detail and analyses whether it would be beneficial for New Zealand to adopt a similar structure.

## *II Public Interest: A Separation From the "Fit and Proper" Test*

### *A Australia*

Para 1 of Australia's National Firearms Agreement affirms the "overriding" necessity of firearms regulation to "ensure public safety". Australian state legislation thus explicitly references such concepts. For example, the New South Wales Firearms Act 1996 states that:

> **3 Principles and objects of Act**
>
> (1) The underlying principles of this Act are:
>
> (a) to confirm firearms possession and use as being a privilege that is conditional on the *overriding need to ensure public safety*, and
> (b) to improve *public safety*.
>
> **29 General restrictions on issuing permits**
>
> (1) A [firearms] permit must not be issued unless the Commissioner is satisfied that the applicant is a *fit and proper person* and can be trusted to have possession of firearms without *danger to the public safety or to the peace*.

[213] National Firearms Agreement 2017 (Australia), para 4 states that "fit and proper" person requirements are a fundamental aspect of the Agreement while the Firearms Act 1968 (the United Kingdom), s 27(1)(a) states that a firearm certificate should be granted to an applicant who is "fit to be entrusted with a firearm…and is not a person prohibited from doing so".
[214] National Firearms Agreement 2017 (Australia), para 1, and the Firearms Act 1968 (the United Kingdom), s 27(1)(c).
[215] National Firearms Agreement 2017 (Australia), para 9, and the Firearms Act 1968 (the United Kingdom), s 27(1)(b).

(3A) A permit must not be issued if…having regard to any criminal intelligence report or other criminal information…that:

(a) the person is a *risk to public safety*, and
(b) the issuing of the permit would be *contrary to the public interest.*

(emphasis added)

Public interest in Australia is thus assessed in addition to the "fit and proper" test. An applicant can therefore be fit and proper yet pose a risk to public safety – which will result in a rejection accordingly. This approach is demonstrated via New South Wales case law.

*1 Adams v Commissioner of Police*[216]

*Adams* involved a review by the New South Wales Civil and Administrative Tribunal after the Police refused the applicant's application for a firearms licence, which the applicant applied for recreational hunting purposes.[217] The applicant's firearms licence was suspended in 2015 due to public interest concerns stemming from his life membership of the Outcasts Motorcycle Group ("the Outcasts").[218] The Police submitted that the applicant was not fit and proper, and to hold otherwise would be contrary to the public interest.

While considerations between whether one was "fit and proper" and the public interest could overlap, the Tribunal demonstrated that a distinction could exist between the two. The applicant was fit and proper for several reasons:[219] he was employed, had a lengthy firearms licensing history (33 years), a stable family background, and possessed a long record of active community service with many character references commending his work.[220] The applicant also did not drink, smoke or use drugs.[221]

The Tribunal then looked at the applicant's involvement in the Outcasts. He had been involved in the Outcasts for over 20 years, having been made a life member after 15.[222] Despite being a life member, he was officially inactive and had no say in the club's decisions. This meant that he was no longer required to participate in club rides – even though he could do so wearing club colours if he wanted to.[223] Ultimately, the Tribunal held that to grant the applicant a firearms licence would be contrary to the public interest. This was because the applicant failed to completely disassociate himself from the Outcasts.[224] The applicant

[216] *Adams v Commissioner of Police* [2017] NSWCATAD 194.
[217] At [1].
[218] At [3].
[219] At [59].
[220] At [61].
[221] At [61].
[222] At [74].
[223] At [74].
[224] At [78].

wanted to retain his life membership so that he could continue attending memorial functions for "fallen" members, which indicated a continuing relationship with the Outcasts that created a firearms risk.[225]

The fact that "public interest" remained undefined in the New South Wales Firearms Act 1996[226] meant that the Tribunal had to exercise a "discretionary value judgment" that "operated in areas as to which the character ground was not relevant, or…in circumstances where objection[s] on character grounds would be [insufficient] in its own right to warrant refusal".[227] This meant that "public interest" involved looking into matters beyond an applicant's characteristics, taking into account factors like public protection, public safety, "the good order of society", "the well-being of its members", and the need for public confidence in the administration of the licensing system.[228]

Since the Outcasts were classified as an Outlaw Motor Cycle Gang (OMCG)[229] and had members who were known to be involved in drug dealing and violence, the Tribunal concluded that the confidence in New South Wales' firearms licensing system would suffer if a person associated with an organisation that had the propensity for criminal conduct was granted a firearms licence.[230] The Tribunal concluded that this would lead to the undesirable effect of private citizens engaging in violent self-help[231] in order to defend themselves from OMCGs who could commit crimes at will.[232]

There is potential to criticise the Tribunal's reasoning, especially in its seemingly extreme reasoning that granting the applicant his firearms licence would result in the flow-on effect of violent self-help from law-abiding firearms users. Regardless, *Adams* demonstrates the clear divide between factors internal to the individual ("fit and proper") and factors that could have external effects (policy factors and public safety).

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[225] At [77].
[226] At [91].
[227] At [92].
[228] At [93]-[94].
[229] Outlaw Motor Cycle Gangs or OMCGs are deemed to be one of the most high-profile manifestations of organised crime in Australia and are differentiated from recreational motorcycle clubs. OMCGs have been met with vigorous Australian legislative responses, beginning with South Australia's Statutes Amendment (Anti-Fortification) Act 2003 which sought to prevent the construction of OMCG headquarters in Australia. Gauging how much organised crime OMCG members commit, however, is difficult as they are only one part of the organised crime scene in Australia.
[230] *Adams,* above n 215, at [98].
[231] Australia allows self-defence with firearms so long as there are reasonable grounds that this was necessary: see *Zecevic v DPP* (1987) 162 CLR 645, where the High Court of Australia ruled that the appellant's shooting of his neighbour in self-defence was justified because of the appellant's belief that his neighbour had a knife and shotgun on him.
[232] *Adams,* above n 216, at [97].

### *B United Kingdom*

The United Kingdom does not use the term "fit and proper". Section 27(1)(a) of its Firearms Act 1968 states that firearms certificates should only be granted to applicants "fit to be entrusted with a firearm…and is not a person prohibited from doing so", and if there is no "danger to the public safety or to the peace".

#### *1 Dabek v Chief Constable of Devon and Cornwall*[233]

In *Dabek,* the appellant appealed after her shotgun certificate was revoked due to her association with her husband. The appellant's husband had a record of drugs usage and often received visits from such users, having himself been convicted of a charge of smuggling drugs into the country within his own body.

The Court agreed that the wife was of good character (or "fit and proper" in Australian and New Zealand legal terminology). While it was submitted that the appellant's association with her husband should be disregarded and that attention should be placed "entirely on [the appellant's] own character",[234] the Judge said that this was impracticable. This was because "the fact that an innocent person is in possession of a shotgun is not much of a safeguard if somebody who cannot be relied upon is in a position to have access to it".[235] Just like Australia, the United Kingdom approach demonstrates a separation between the "fit and proper" and public interest criteria.

### *C "To Be, or Not to Be": Separation is the Question*

New Zealand's proposed blanket ban conflates the dangers gang members may pose to the public together with whether an individual is "fit and proper". While the New Zealand Manual mentions public safety as one of the objectives of firearms licensing,[236] the phrase's absence in the Arms Act 1983 has resulted in judicial inconsistencies. As demonstrated in Chapter II, *Fewtrell* and *Mallasch* demarcated a separation between the "fit and proper" test and the public interest by recognising a difference between the appellant's characteristics and the non-criminal nature of their association with the Sinn Fein MC, which did not pose a danger to public safety. This recognition of a separate public interest test is supported by the Arms Act 1983 itself, where s 24(2) and s 27(1)(b) accordingly provide that an applicant's licence application can be rejected or revoked if another person who is not "fit and proper" may gain access to that applicant's firearms. *Innes*, however, takes a U-turn by treating the considerations of "fit and proper" and the public interest as the same.

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[233] *Dabek v Chief Constable of Devon and Cornwall* (1991) 155 JP 55.
[234] At 56.
[235] At 56.
[236] As previously referred to in Chapter II.

A clear legislative mention of "public safety" in the Arms Act 1983 is likely to amend this inconsistency. This is because Courts will be required to address the "fit and proper" test and public interest concerns separately.

## *III Public Interest: Applying a Principled Framework*

An additional criterion of "public interest" itself will not serve any practical benefit and will function as window-dressing if it is not applied in a principled manner.[237] The next step is thus to expand on the principles behind "public interest" to ensure that gang members or prospects are not automatically disqualified on "public interest" grounds without any scrutiny. Some examples are explored below.

### *A Australia*

#### *1 Azzopardi v Commissioner of Police*[238]

In *Azzopardi,* the applicant had his firearms licence revoked on public interest grounds due to his association with known OMCG members, including his cousin J.V. who was a known member of the Rebels Motorcycle Club ("the Rebels"). The applicant had been seen riding into the driveway of the Rebels' clubhouse in company of J.V. and others who were wearing club colours.[239] A police search of the applicant during that incident revealed that he had been carrying a knife, which he was subsequently charged for.[240]

The applicant was fit and proper. He had held a firearms licence for 15 years with no breaches, had no other previous criminal convictions apart from traffic-related convictions (the most recent one being 13 years ago), possessed a stable domestic background, and had his own business working as a contractor for large companies.[241]

The Tribunal also held that there were no public interest concerns as the applicant's association with J.V. and the other OMCG members were "not unlawful or improper in character".[242] The applicant had offered J.V. temporary residence at his house after J.V.'s release from jail, and the evidence demonstrated that the applicant's productive and responsible lifestyle was helping J.V. take a more positive path in life.[243] The Tribunal held that a better option was to impose conditions on the applicant's firearm licence and reinforce

[237] While there are difficulties in the scope of this dissertation to fully examine whether Australia has applied the "public interest" test in a principled manner, it is arguable that *Adams* did not do so. Its focus on the OMCG's nature as a dangerous entity was similar to New Zealand's conclusion in *Innes,* where the nature of the applicant's association with the organisation and whether these associations truly presented a risk to the public were not adequately examined.
[238] *Azzopardi v Commissioner of Police* [2013] NSWADT 205.
[239] At [4].
[240] At [5].
[241] At [62].
[242] At [51].
[243] At [56].

his awareness on the public safety concerns OMCGs could bring.[244] Ultimately, the Police's decision was set aside.[245]

### *2 CSC v Commissioner of Police*[246]

*CSC* was not a case involving gang members, but like the New Zealand case of *Jenner* it reiterated the principles that underpinned the "public interest" test. The Tribunal held that the firearms licensing regime is not punitive, where licensees are punished for making mistakes.[247] Instead, the licensing regime protects the public through identifying possible risks and reducing them to a minimum.[248] While there could never be complete satisfaction that a risk would never exist when an applicant is granted a firearms licence,[249] no risks must virtually exist when the decision on whether or not to grant the applicant a firearms licence is being made.[250] In addition, an applicant's individual interest in retaining his or her licence must be subordinate to the public interest of ensuring public safety.[251]

## *B United Kingdom*

The United Kingdom Guide emphasises that the "public interest" test does not serve as a "catch-all" that would disqualify individuals who may have negative associations. On the contrary, emphasis is placed on the need to scrutinise information on a case-by-case basis. Para 12.16 refers to allegations that have been received from different sources, and states in para 12.17 that such information may not have been tested in criminal courts and proven beyond reasonable doubt. Para 12.17 relates this to the fact that courts place less weight on hearsay evidence than on direct evidence.[252] In addition, para 12.18 states that the Police should critically consider the reliability of sources when allegations are made against an applicant, including whether the sources have motivations to discredit the applicant.

The United Kingdom case law has demonstrated that any danger to the public should arise out of possession or use of the firearm itself, which indicates a principled approach in relation to the "public interest" test. Para 12.13 of the United Kingdom Guide provides a list of

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[244] At [64].

[245] Compare *Azzopardi* to *Adams*, above n 229 and 237. The *Azzopardi* approach of analysing whether J.V.'s association with the other OMCG's members posed a danger to the public (the nature of the association) parallels the New Zealand conclusion in *Mallasch*, above n 97, where Strettell J looked to the "social" and "non-criminal" nature of the appellant's association with the Sinn Fein Motorcycle Club.

[246] *CSC v Commissioner of Police* [2016] NSWCATAD 211.

[247] At [41].

[248] At [41].

[249] At [42].

[250] At [42].

[251] At [160].

[252] See Appendix: while some hearsay evidence is superior to oral evidence as per *Myers v DPP* [1965] AC 1001 (where car records were more reliable than the oral recollection of workers), most hearsay evidence run the risk of errors as they are repeated by different people who are not available for cross-examination.

judgments which offer broad guidance on this matter, with *Spencer-Stewart* being an example.

### *1 Spencer-Stewart v Chief Constable of Kent*[253]

In *Spencer-Stewart,* the defendant had previously been granted a shotgun certificate to pursue his hobby of shooting in a clay pigeon shooting club.[254] He was convicted of handling stolen goods in 1987, which resulted in the revocation of his licence due to Police fears that the defendant might still be associating with criminals which presented a danger to public safety.

The Divisional Court held that while there was indeed a risk that the defendant might still be associating with criminals, there was no indication that this risk arose out of possession of a shotgun.[255] Thus, it was necessary that the "carrying [of the firearms be] in connection with the breach of the peace that [is] feared."[256] While the defendant was a bad-tempered individual and had handled stolen goods, no danger arose out of possession or use of his shotgun.[257] Ultimately, it was unjustified to revoke the defendant's licence based on "any [and all] form of criminal behaviour".[258]

## *C Moulding the "Public Interest" Test to Suit the New Zealand Context*

A "public interest" test avoids the NZBORA-related issues that a blanket ban is likely to cause (as addressed in Chapter Three). The language and considerations of a "public interest" test is not pre-emptive in ways that would penalise an individual by association, but is preventive by analysing the risk an individual may pose to the public.[259] This strikes a better balance between the civil liberties of individuals and society's need to protect itself from gang-related criminal conduct. The language of "public interest" also evokes less sensationalism, reducing an "us versus gangs" mindset which would only serve to embolden gangs and drive the firearms trade underground.

The United Kingdom approach of linking public safety to the use of firearms is therefore appropriate. In the New Zealand context, the factors applicable to the "fit and proper" test are also likely to be applicable in public interest considerations. For example, certain offences (such as firearms offences or offences that indicate reckless behaviour) may lead to the inference that a firearms risk which may endanger the public exists. Domestic violence, as a special criterion under the Arms Act 1983, would also deserve special attention.

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[253] *Spencer-Stewart v Chief Constable of Kent* (1989) 89 Cr App R 307.
[254] At 308.
[255] At 310.
[256] At 312.
[257] At 312.
[258] At 312.
[259] Ruitenberg, above n 179, at 125. As highlighted in Chapter III, pre-emptive strategies seek to anticipate dangers that have yet to eventuate by controlling groups perceived to be "dangerous". Preventive strategies, on the other hand, undergo a more balanced risk assessment.

The Australian approach of expanding on what "public interest" entails as seen in *CSC* should also be encouraged. While *Jenner* referred to the principles that served as the foundation of New Zealand's "fit and proper" test, case law like *Innes* and *Mallasch* did not do so even when those decisions involved associations which could have an impact on public safety.

However, transplanting *CSC*'s approach in such a straightforward manner – where the applicant's individual interest in retaining his or her licence must *always* be subordinate to the public interest in ensuring public safety – has to be scrutinised with care. This could contradict the United Kingdom approach, which requires a more obvious link between firearm usage and the public risk. The Australian approach could cause the "public interest" test to serve as a de facto "catch-all" if unrestrained, which would be no different to the proposed blanket ban.

## *IV "Good Reason" or "Genuine Need": Complementing Public Interest and the "Fit and Proper" Test*

In addition, Australia and the United Kingdom adopt an extra criterion of "good reason" where an applicant must detail the reasons as to why they deserve to possess firearms (as explored below). This section argues that New Zealand would benefit from this addition.

### *A Australia*

Paras 9 and 11 of the National Firearms Agreement respectively state that individuals must demonstrate a "genuine reason" and "genuine need" for acquiring, possessing or using a firearm. The "genuine reasons" are listed in paras 13-23 (as set out in the Appendix) and include reasons like recreational hunting, sports shooting, occupational requirements, firearms as heirlooms, and firearm-collection.

#### *1 Anderson v Commissioner of Police*[260]

In *Anderson*, the applicant's firearms licence was revoked due to her association with a senior member (S.L.) of an OMCG named "God's Garbage". She had been in a relationship with S.L. for approximately 2 ½ years. S.L. had previous convictions for disorderly conduct, cannabis cultivation, and unlawful damage.

The Tribunal found that the applicant had a genuine reason for her application as she was involved in recreational shooting and hunting on a pastoral station.[261] These sports kept her active, and she enjoyed the camaraderie of socialising with people who harboured similar interests.[262] The Tribunal concluded that the genuineness of the applicant's reason "could not

[260] *Anderson v Commissioner of Police* [2008] WASAT 75.
[261] At [4].
[262] At [90].

be doubted", even if the applicant herself was in her 40s and had an OMCG member as a current partner.[263]

The genuineness of the applicant's reason was then used to complement the "fit and proper" and "public interest" tests. The applicant was a "mature, single-minded, determined" individual who "knew her own mind" and would not be easily influenced by her partner.[264] She was aware that her partner was a member of God's Garbage, but emphasised that she had neither financial nor social connections with the gang or its members.[265] Police concerns that the applicant's firearms could be provided to her partner or to members of God's Garbage were therefore "speculative", even if OMCGs like God's Garbage were seen to have a strong propensity for collecting and using both legal and illegal firearms.[266]

### *B United Kingdom*

Section 27(1)(b) of the Firearms Act 1968 states that a firearms certificate shall be granted if the applicant has a "good reason" for possessing firearms. Para 13.6 of the United Kingdom Guide states that while "good reason" is not equated with "need" or "desire", a simple wish to own a particular sort of firearm is not in itself a "good reason" without further supporting evidence.[267] Para 13.3 states that there can be no exhaustive list as to what a "good reason" is, and that each case must be judged on its own merits – with attention paid to ensure "consistent administration of the Act" and "the need to provide fair and equitable treatment to all applicants while preventing firearms abuse to protect the public".

Para 10.40 states that applications must firstly be considered "from the standpoint of the applicant rather than that of a possible objector". The case of *Anderson v Neilans*[268] is referenced in para 13.6 of the United Kingdom Guide to illustrate this:[269]

> No definition is attempted to be given in the Act of what constitutes 'good reason'…the possessor of a firearm [and the chief officer of Police] may have [different] standards or tests in [their] mind. The police should bear in mind that [his] duty is the judicial or quasi-judicial one of deciding whether the reason is in itself a good one, not whether objections can be raised against it.

### *C "Good Reason" or "Genuine Need" in New Zealand*

An added criterion of "good reason" or "genuine need" in New Zealand would avoid practical problems of identifying gang members and prospects. This is because the question is not whether one is affiliated with a gang. Instead, the focus is on the purpose an individual

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[263] At [156].
[264] At [163].
[265] At [78].
[266] At [44], [168].
[267] See Appendix: the United Kingdom Guide provides examples of "good reasons" that are similar to Australia. Applicants need to be able to demonstrate that they use firearms on a regular, legitimate basis for work, sport or leisure, collection, or research.
[268] *Anderson v Neilans* 1940 SLT (Sh Ct) 13.
[269] At 14.

may have when he or she seeks to obtain a firearms licence. Moreover, a "good reason" or "genuine need" criterion fits in with the concept of firearms licensing as an individualised process.[270] This would benefit individuals who may associate or have close relationships with known gang members, but who are not gang members or prospects. Situations such as *Anderson* (where the applicant enjoyed the camaraderie of being in a social shooting group) and *Azzopardi* (where the applicant used his licence to go on hunting trips with family and friends four to six times a year) would be covered.[271] A "good reason" or "genuine need" criterion would cover situations where individuals are gang members but have good reason to possess firearms and are fit and proper to do so, such as *Mallasch* (where the applicant was involved in hunting and shooting for almost twenty years),[272] and perhaps even *Adams* (had it been decided in New Zealand, seeing as it bears a resemblance to *Mallasch* in terms of the applicant's minimal contact with the respective gang's members). It could even cover non-gang situations like *Jenner,* where the appellant had sold firearms illegally but still had a deep interest in hunting and target shooting – both of which were his lifelong hobbies.[273]

It is arguable that adding a "good reason" or "genuine need" criterion may be seen as a measure that penalises legitimate firearms users.[274] However, legitimate users would not need to take any extra steps to prove their legitimacy. Hunters, shooters, and those working in the rural community already have a "good reason" as a matter of fact and would not need to go out of their way to obtain more "reasons" to obtain a firearms licence.

## *IV "Fit and Proper": Codification*

In the 2017 Inquiry, one of the recommendations was that the "fit and proper" guidelines in the New Zealand Manual be codified within the Arms Act 1983, with any necessary modifications to improve the overall certainty and consistency of the licensing process.[275] This recommendation, however, was rejected.[276]

Regardless, there is persuasiveness in the argument that codifying the "fit and proper" guidelines in the Arms Act 1983 would allow for judicial consistency by making what is in

[270] As per *Mallasch,* above n 97, at [16], where it is the applicant's "right and state, as an individual" to have his or her firearms licence application determined. This is consistent with New Zealand's current firearms licencing process, as addressed in Chapter III.
[271] *Azzopardi,* above n 238, at [24].
[272] *Mallasch,* above n 97, at [8].
[273] *Jenner,* above n 89, at [32].
[274] See Derek Phillips "Wrong and Rights: Britain's Firearms Control Legislation at Work" (2003) 15 J on Firearms & Pub Pol'y 123 at 134, where gun-support groups commonly argue that "controls on those who are prepared to act are strict, while controls on those who are not are non-existent".
[275] Law and Order Committee, above n 9, at 13.
[276] See Nicholas Jones "Police Association Slam Paula Bennett for 'Bowing to Gun Lobby'" *New Zealand Herald* (New Zealand, 14 June 2017) <http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11876027>. Out of the Law and Order Committee's 20 recommendations, only seven (including the proposed blanket ban) were accepted.

the New Zealand Manual an official part of New Zealand law. It would also provide the judiciary and the public with consistent terminology to work with, since a varying range of descriptions have been put forward where "fit and proper" is concerned. For instance, *Hore v Police*[277] makes the inference that the "fit and proper" test would be satisfied if there was adherence to the New Zealand Arms Code 2013[278] while *Police v Cottle* stated that the "fit and proper" test would be met where an applicant "[had] lived a life without criticism or conviction".[279] Some form of codification of the "fit and proper" test will enable certainty without sacrificing the need for flexibility. It would also allow for more efficiency so that separate sources do not have to be consistently referred to.

## *V Updating the New Zealand Police Arms Manual 2002*

Regardless of whether any of the above recommendations are implemented, the New Zealand Manual is likely to require an update. This is because some of the New Zealand Manual's wordings and phrasings are vague and require additional explaining. For example, para 2.30 merely states that "there is a danger of interviews becoming stereotyped". Such a phrasing – without setting the appropriate context – is unlikely to provide the vetting officer with much assistance. In contrast, the United Kingdom Guide provides extensive assistance where interviewing is concerned. Para 12.36 of the United Kingdom Guide states that interviews with partners who may be victims of domestic violence need to be "conducted with sensitivity", with the need to "take into account that a victim of domestic violence may be unwilling to speak openly". Para 12.36 of the United Kingdom Guide also states that officers must be "aware of the indicators of domestic abuse". Neither the New Zealand Manual nor Form POL 67K (which provides the format for conducting interviews, as introduced in Chapter III) offer such intricate guidance, much less so when gang members or prospects are concerned.

The cases that are provided to assist in defining "fit and proper" under para 2.29.6 of the New Zealand Manual could also be expanded on, with cases carefully classified so that clearer guidance is provided on what they stand for. The United Kingdom Guide provides cases under each relevant heading or theme and proceeds to outline the defining principle of each case, which gives the immediate reader a clearer picture of the United Kingdom's current state of law on each issue. For example, para 13.6 of the United Kingdom Guide sets out the

[277] *Hore v Police* [2017] NZDC 5623 at [43]. The appellant was an occasional duck shooter and had utilised firearms while consuming alcohol, which the New Zealand Arms Code 2013 firmly cautions against. Crosbie J ruled that the appellant was "fit and proper" regardless, seeing as the appellant was aware of his transgression and had witnesses who spoke highly of him.

[278] The New Zealand Arms Code 2013 is a safety manual that addresses the practical safety aspects of handling firearms, such as ensuring that firearms must always be pointed in a safe direction, that targets should be identified beyond all doubt, and that alcohol and firearms should never be mixed. It also looks to the process of firearms licensing, most of which reiterates what is addressed in the New Zealand Police Arms Manual 2002.

[279] *Cottle*, above n 88, at 273.

case of *Anderson v Neilans* as a guiding case on "good reason" and provides the principle from it: which is that applications should be considered firstly from the applicant's standpoint. While the New Zealand Manual expands on some cases in detail, this is mostly done in relation to issues of natural justice during the appeal process.[280] Cases related to what "fit and proper" entails are not explained in terms of their relevance or guiding principles.

A comprehensive list of cases under each factor that is listed under the "fit and proper" criteria in para 2.29 of the New Zealand Manual will prove useful to the Police and the public. This would look something like the following:

> **2.29 Fit and Proper Persons**
>
> 1. An applicant could be considered not a fit and proper person if he/she has:
>
>  - Been the subject of a protection order
>
>  *(cases listed with their general principles explained)*
>
>  - Affiliations with a gang involved in committing violent offences or in conflict with another gang
>
>  *(cases listed with their general principles explained: Innes, Mallasch, etc)*

## *VI Alternatives to the Blanket Firearm Ban: A Summary*

Australian and the United Kingdom's firearms law demonstrate a separation between the individual ("fit and proper") and any concerns their associations or activities may have on the public ("public interest") – a separation which will result in more judicial uniformity if applied in New Zealand. The "public interest" test should be applied in a principled way that links public safety to the firearms usage itself, so that what transpires is not a de facto blanket ban that automatically deems gang members or associates as individuals who would put the public in danger. A "good reason" criterion would complement the "fit and proper" and public interest approaches, allowing different kinds of "grey" area cases to be determined in a balanced, principled manner.

Codifying the "fit and proper" test provides a common framework for all actors involved in the firearms licensing process to work with and minimises discrepancies. The New Zealand Manual should also be updated, with a more thorough inclusion of cases and guidance to assist the Police and the public.

[280] Para 11.4 of the New Zealand Police Arms Manual 2002 provides some examples. The importance of the need for the New Zealand Police to hear submissions from the licence holder and provide a written decision setting out the basis for the revocation were emphasised in *Dobbs v Police* [1992] DCR 650 and *Bush v Police* [1991] DCR 385, while in *Robert Cornelius Van Delft v New Zealand Police* (Masterton Court, MA No 4/2001, 5 July 2001) it was stated that natural justice must be done before firearms licences can be revoked.

## Conclusion

Gang criminality and the illegal transfer of firearms are undesirable in New Zealand, and arguably the law should play an active role to prevent the reoccurrence of massacres and shootouts that have harmed the public. However, laws that overextend their reach should be scrutinised to ensure that they are sound in principle and policy. This dissertation has sought to prove that the proposed blanket ban in which a gang member or prospect is automatically deemed to not meet the "fit and proper" test under the Arms Act 1983 is untenable.

This dissertation has established that terms such as "gangs" and "guns" are embedded in a social and historical framework, which imbue them with a commonly-perceived meaning. It is easy to perceive any and all gun crime to have been committed by gang members, even though statistics from the New Zealand Police show that it is 44 per cent of patched members and prospects who commit firearms offences at least once in their lifetime.[281] By exploring the history of gangs and guns, we can wipe away our previous misconceptions and approach our task – seeing whether the proposed blanket ban is justifiable – afresh.

While Parliament has the power to turn the blanket ban into law, this dissertation contends that the blanket ban is a political measure which has not had its effects considered in full. Since the blanket ban is inflexible in its application, it is likely to discriminate against gangs who may harbour legal purposes or serve important community functions. The blanket ban is also likely to target gang members or prospects who may contribute to their organisations in non-criminal ways, or who may participate in gangs purely for social reasons.

Alternatives to the blanket ban lie in Australia and the United Kingdom's firearms laws. Overall, such alternatives encourage judicial consistency and certainty of the law without compromising the flexible nature of New Zealand's firearms licensing process. To achieve these aims and avoid the issues as noted in Chapter III, the following three-limbed test should be implemented:

- The "fit and proper" test, where factors pertaining to an individual's physical and mental traits are assessed.
- The "public interest" test, where failing the test would require the use of firearms to be connected to the danger presented to the public.
- The "good reason" test, which complements the two criteria above and allows for a wider variety of "grey area" situations to be addressed.

Codifying the "fit and proper" test and updating the New Zealand Police Arms Manual would also improve the comprehensiveness of the firearms licensing system on a whole.

[281] This was addressed in Chapter I. See New Zealand Police, above n 26 and 80, at 5.

This dissertation does not mask the fact that gang crime and the illegal transfer of firearms are genuine concerns. However, to enact a blanket ban that specifically labels and excludes a certain group from accessing firearms is an inappropriate answer. An aggressive approach which does not consider the social underpinnings of issues concerning gangs and guns is likely to fail, or worse – cause long-lasting social damage. As Gilbert states, "we need to understand the complexities of the issue that we are dealing with before we will have a reasonable chance of addressing it".[282]

[282] Gilbert, above n 1, at 295.

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# Appendix

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## New Zealand

*1. Arms Act 1983*

**24 Issue of firearms licence**

(1) Subject to subsection (2), a firearms licence shall be issued if the member of the Police to whom the application is made is satisfied that the applicant—

(a) is of or over the age of 16 years; and

(b) is a fit and proper person to be in possession of a firearm or airgun.

(2) A firearms licence shall not be issued to a person if, in the opinion of a commissioned officer of Police, access to any firearm or airgun in the possession of that person is reasonably likely to be obtained by any person—

(a) whose application for a firearms licence or for a permit under section 7 of the Arms Act 1958, or for a certificate of registration under section 9 of the Arms Act 1958 has been refused on the ground that he is not a fit and proper person to be in possession of a firearm or airgun; or

(b) whose certificate of registration as the owner of a firearm has been revoked under section 10 of the Arms Act 1958 on the ground that he is not a fit and proper person to be in possession of a firearm; or

(c) whose firearms licence has been revoked on the ground that he is not a fit and proper person to be in possession of a firearm or airgun; or

(d) who, in the opinion of a commissioned officer of Police, is not a fit and proper person to be in possession of a firearm or airgun.

**27 Revocation and surrender of firearms licence**

(1) Where, in the opinion of a commissioned officer of Police,—

(a) any person who has been issued with a firearms licence is not a fit and proper person to be in possession of a firearm or airgun; or

(b) access to any firearm or airgun in the possession of the person to whom a firearms licence has been issued is reasonably likely to be obtained by any person—

(i) whose application for a firearms licence or for a permit under section 7 of the Arms Act 1958, or for a certificate of registration under section 9 of the Arms Act 1958 has been refused on the ground that he is not a fit and proper person to be in possession of a firearm or airgun; or

(ii) whose certificate of registration as the owner of a firearm has been refused under section 10 of the Arms Act 1958 on the ground that he is not a fit and proper person to be in possession of a firearm; or

(iii) whose firearms licence has been revoked on the ground that he is not a fit and proper person to be in possession of a firearm or airgun; or

(iv) who, in the opinion of a commissioned officer of Police, is not a fit and proper person to be in possession of a firearm or airgun—

the commissioned officer of Police may, by notice in writing under his hand, revoke the firearms licence, and the person to whom that firearms licence has been issued shall upon demand surrender the licence to a member of the Police.

(2) Any person may at any time surrender a firearms licence held by him.

(3) Where a licence is revoked under subsection (1) or surrendered under subsection (2), the person to whom the licence has been issued shall cease to be licensed to possess firearms, airguns, pistols, or restricted weapons by virtue of that licence or any endorsement on it.

**27A Domestic violence and firearms licences**

Without limiting the generality of sections 24 and 27, it is hereby declared that a commissioned officer of Police may, under either or both of those sections, decide that a person is not a fit and proper person to be in possession of a firearm or airgun if that commissioned officer of Police is satisfied—

(a) that there are grounds under the Domestic Violence Act 1995 for the making against that person of an application for a protection order; or

(b) that such an order is in force under that Act in respect of that person.

**62 Right of appeal from official decisions**

(1) This subsection applies to—

(a) a person who is affected by a determination by the Commissioner that a firearm is a military style semi-automatic firearm; and

(b) a person whose application for 1 of the following has been refused:

(i) a dealer's licence:

(ii) consent under section 7A:

(iii) a permit for the purposes of section 16(1):

(iv) a firearms licence:

(v) an endorsement under section 30, 30B, or 36:

(vi) a permit under section 35 to procure a pistol, military style semi-automatic firearm, or restricted weapon; and

(c) a person who has had 1 of the following issued subject to conditions imposed by a member of the Police or revoked:

(i) a dealer's licence:

(ii) a permit for the purposes of section 16(1):

(iii) a firearms licence:

(iv) an endorsement under section 30, 30B, or 36:

(v) a permit under section 35 to procure a pistol, military style semi-automatic firearm, or restricted weapon; and

(d) a person who has been served with a notice under section 41 or 59.

(1A) A person to whom subsection (1) applies may, by way of originating application, appeal to a District Court Judge from the determination, refusal, imposition of conditions, revocation, or service.

(2) On the hearing of an appeal under subsection (1A), the District Court Judge may, subject to subsection (3), confirm, vary, or reverse the decision appealed against.

(3) Where—

(a) an application for a firearms licence has been refused on the ground set out in section 24(2); or
(b) a firearms licence has been revoked on the ground set out in section 27(1)(b)—
the District Court Judge may, notwithstanding that he finds any such ground established, vary or reverse the decision appealed against if he is satisfied that, since the decision was given, adequate measures have been taken to deny access to the firearm to the person whose likelihood of access to it was the basis of the refusal or revocation.
(4) Notwithstanding that any appeal under this section may have been determined in favour of the appellant, any commissioned officer of Police, in exercise of the powers conferred on him by this Act, may, subject to the like right of appeal, revoke any licence or permit to which the appeal related or any licence or permit granted in compliance with the decision of the District Court Judge on the appeal, on any sufficient grounds supported by facts or evidence discovered since the hearing of the appeal.
(5) Subject to subsection (4) and to section 64, the decision of the District Court Judge on any appeal under this section shall be final and conclusive.
(6) No person shall be excused from complying with any of the provisions of this Act on the ground that an appeal is pending under this section.

**64 Appeal on a question of law**
(1) Where any party to any appeal under section 62 or to any application under section 63 is dissatisfied with the decision of the District Court Judge as being erroneous in point of law, he may appeal to the High Court on the question of law only.
(2) Subpart 8 of Part 6 of the Criminal Procedure Act 2011 applies as far as applicable with the necessary modifications to every appeal under this section.

*2. Arms Amendment Act 1992*

**9 Duration of firearms licence**
The principal Act is hereby amended by repealing section 25, and substituting the following section:
"25 Every firearms licence shall come into force on a date to be specified in the licence and, unless sooner revoked or surrendered, shall continue in force for the period of 10 years beginning on that date."

*3. Crimes Act 1961, as amended with the Crimes Amendment Act (No 2) 1997 (1997 No 93)*

**98A Participation in criminal gang**
(1) In this section --

'Criminal gang' means any organisation, association, or group (whether formal or informal) of 3 or more persons where -
(a) At least 3 of the members have each been convicted of the commission or attempted commission of at least 1 serious offence (together) referred to in paragraphs (b) and (c) as the 3 qualifying offences; and
(b) The 3 qualifying offences were committed on separate occasions; and
(c) At least 1 of the qualifying offences was committed within the 3 years immediately preceding the alleged commission of the offence under this section.
(2) Every one is liable to imprisonment for a term not exceeding 3 years who -
(a) Participates in any criminal gang knowing that it is a criminal gang; and
(b) Intentionally promotes or furthers any conduct by any member of that gang that amounts to an offence or offences punishable by imprisonment.
(3) In any prosecution for an offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of either paragraph (a) or paragraph (b) of that subsection that the accused has committed any other offence, or that the accused was a party within the meaning of section 66 to any particular offence committed by any other person.
(4) In any prosecution for any offence against subsection (2), it is not necessary for the prosecution to prove for the purposes of paragraph (b) of that subsection that-
(a) The accused knew or intended that any particular offence would be committed by any member of the criminal gang:
(b) The accused promoted or furthered the commission of any particular offence:
(c) Any member has been convicted of any offence in respect of particular conduct.
(5) Without limiting the manner in which the prosecution can prove that the accused knew that the gang was a criminal gang, it is sufficient if the prosecution proves that a member of the Police had warned the accused on at least 2 separate occasions that the gang was a criminal gang.

*4. Crimes Act 1961*

**98A Participation in organised criminal group**
(1) Every person commits an offence and is liable to imprisonment for a term not exceeding 10 years who participates in an organised criminal group—
(a) knowing that 3 or more people share any 1 or more of the objectives (the **particular objective or particular objectives**) described in paragraphs (a) to (d) of subsection (2) (whether or not the person himself or herself shares the particular objective or particular objectives); and
(b) either knowing that his or her conduct contributes, or being reckless as to whether his or her conduct may contribute, to the occurrence of any criminal activity; and

(c) either knowing that the criminal activity contributes, or being reckless as to whether the criminal activity may contribute, to achieving the particular objective or particular objectives of the organised criminal group.
(2) For the purposes of this Act, a group is an organised criminal group if it is a group of 3 or more people who have as their objective or one of their objectives—
(a) obtaining material benefits from the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
(b) obtaining material benefits from conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of offences that are punishable by imprisonment for a term of 4 years or more; or
(c) the commission of serious violent offences; or
(d) conduct outside New Zealand that, if it occurred in New Zealand, would constitute the commission of serious violent offences.
(3) A group of people is capable of being an organised criminal group for the purposes of this Act whether or not—
(a) some of them are subordinates or employees of others; or
(b) only some of the people involved in it at a particular time are involved in the planning, arrangement, or execution at that time of any particular action, activity, or transaction; or
(c) its membership changes from time to time.

5. *Whanganui District Council (Prohibition of Gang Insignia) Act 2009*

**4 Interpretation**
(1) In this Act, unless the context otherwise requires,—
**Council** means the Wanganui District Council
**district** means the district of the Wanganui District Council
**gang** means—
(a) Black Power, Hells Angels, Magogs, Mothers, Mongrel Mob, Nomads, or Tribesmen; and
(b) any other specified organisation, association, or group of persons identified in a bylaw made under section 5
**gang insignia**—
(a) means a sign, symbol, or representation commonly displayed to denote membership of, an affiliation with, or support for a gang, not being tattoos; and
(b) includes any item of clothing to which a sign, symbol, or representation referred to in paragraph (a) is attached
**public place**—
(a) means a place—
(i) that is under the control of the Council; and

(ii) that is open to, or being used by, the public, whether or not there is a charge for admission; and
(b) includes—
(i) a road, whether or not the road is under the control of the Council; and
(ii)any part of a public place
**specified place** means a public place designated as a specified place for the purpose of this Act in a bylaw made under section 5.
(2) Without limiting the definition of the term **public place** or **specified place** in subsection (1), for the purposes of this Act, a person is in a **specified place** if he or she is in or on a vehicle that is in a **specified place**.

**5 Power to make bylaws designating specified places or gangs**
(1) The Council may, from time to time, make bylaws—
(a) designating any public place as a specified place for the purposes of this Act:
(b) identifying an organisation, association, or group of persons as a gang for the purposes of this Act.
(2) In making a bylaw under subsection (1), the Council must use the special consultative procedure set out in section 83 of the Local Government Act 2002.
(3) Section 86(2)(a) and (b) of the Local Government Act 2002 apply to the making of a bylaw under subsection (1) as if it were an activity described in section 86(1) of that Act.
(4) The Council must not make a bylaw identifying a gang under subsection (1)(b) unless it is satisfied that the organisation, association, or group proposed to be identified has the following characteristics:
(a) a common name or common identifying signs, symbols, or representations; and
(b) its members, associates, or supporters individually or collectively promote, encourage, or engage in a pattern of criminal activity.
(5) The Council may make a bylaw under this section only if it is satisfied that the bylaw is reasonably necessary in order to prevent or reduce the likelihood of intimidation or harassment of members of the public in a specified place or to avoid or reduce the potential for confrontation by or between gangs.
(6) A bylaw must not be made under subsection (1)(a) if the effect of the bylaw, either by itself or in conjunction with other bylaws made under subsection (1)(a), would be that all the public places in the district are specified places.

*6. Prohibition of Gang Insignia in Government Premises Act 2013*

**4 Interpretation**
In this Act, unless the context otherwise requires,—
**gang** means any organisation, association, or group of persons—

(a) that is known by a name that is the same as, or substantially similar to, any of the following:
(i) Aotearoa Natives:
(ii) Bandidos MC:
(iii) Black Power:
(iv) Devils Henchmen MC:
(v) Epitaph Riders:
(vi) Filthy Few MC:
(vii) Forty-Five MC:
(viii) Greasy Dogs MC:
(ix) Head Hunters MC:
(x) Hells Angels MC:
(xi) Highway 61 MC:
(xii) Hu-Hu MC:
(xiii) Killerbeez:
(xiv) King Cobras:
(xv) Lone Legion MC:
(xvi) Lost Breed MC:
(xvii) Magogs MC:
(xviii) Mongrel Mob:
(xix) Mangu Kaha:
(xx) Mothers MC:
(xxi) Nomads:
(xxii) Outcasts MC:
(xxiii) Outlaws MC:
(xxiv) Rebels MC:
(xxv) Red Devils MC:
(xxvi) Road Nights MC:
(xxvii) Satans Slaves MC:
(xxviii) Sinn Fein MC (not being a branch, or an associated organisation, of the political party known by a similar name):
(xxix) Southern Vikings MC:
(xxx) Storm Troopers:
(xxxi) Taupiri MC:
(xxxii) Tribal Huk:
(xxxiii) Tribesmen MC:
(xxxiv) Tyrants MC; or
(b) identified in regulations made under section 5

**gang insignia**—

(a) means a sign, symbol, or representation commonly displayed to denote membership of, an affiliation with, or support for a gang, not being a tattoo; and
(b) includes any item of clothing to which a sign, symbol, or representation referred to in paragraph (a) is attached

**Government premises**—
(a) means the whole or part of any structure (including any associated grounds) that is owned by, or is under the control of,—
(i) the Crown, acting through a department, the Police, or a Crown entity; or
(ii) a local authority; and
(b) includes the buildings and grounds of any school; and
(c) includes the grounds of—
(i) any public hospital or health facility that is owned by, or is under the control of, a district health board; and
(ii) any public swimming pool or aquatic centre that is owned by, or is under the control of, a local authority; but
(d) excludes any residential dwelling that is owned by, or is under the control of, Housing New Zealand Corporation or a local authority

*7. New Zealand Bill of Rights 1990*

**4 Other enactments not affected**

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b)decline to apply any provision of the enactment—
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

**5 Justified limitations**

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

**6 Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

**14 Freedom of expression**

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

**17 Freedom of association**

Everyone has the right to freedom of association.

*8. New Zealand Police Arms Manual 2002*

**2.29 Fit and Proper Persons**

1. A fit and proper person is a person of good character who can be trusted to use firearms responsibly - this is central to Arms Control in New Zealand.
2. An applicant could be considered not a fit and proper person if he/she has:
• been the subject of a protection order; or
• shown no regard for the Arms Act or Arms Regulations; or
• been involved in substance abuse; or
• committed a serious offence against the Arms Act; or
• committed any serious offence against any other Act; or
• committed a series of minor offences against the Arms Act; or
• committed crimes involving violence or drugs; or
• affiliations with a gang involved in committing violent offences or in conflict with another gang; or
• been or is involved in matrimonial discord involving violence or threats of violence; or
• exhibited signs of mental ill health; or
• attempted to commit suicide or other self injurious behaviour; or
• not complied with security conditions
• for some other reason been considered not fit and proper.
3. Not being fit and proper also includes any person who has possession of firearms or airguns
to which a person who is not considered fit and proper may obtain access.
4. It is not possible to prepare a comprehensive list. However where a licence is refused there must be reasonable grounds for the refusal. Patterns of behaviour are important indicators.
5. Domestic violence has been made a special criterion in considering the issue or revocation of a licence.
6. For more in depth discussion of the term "Fit and Proper" see *Corby v Police* (reported in the Bulletin, July 1981 and April 1984) *Police v Cottle* [1986] 1NZLR 268, *Bush v Police* [1991] DCR 385 and *Dobbs v Police* [1992] DCR 650 (reported in Ten-One No 37, 12 March 1993), and *Van Delft V Police* (M A N 4/2001).
7. Any member of Police who at any time has reason to consider a person is not fit and proper

should make a NIA noting outlining those reasons in detail.

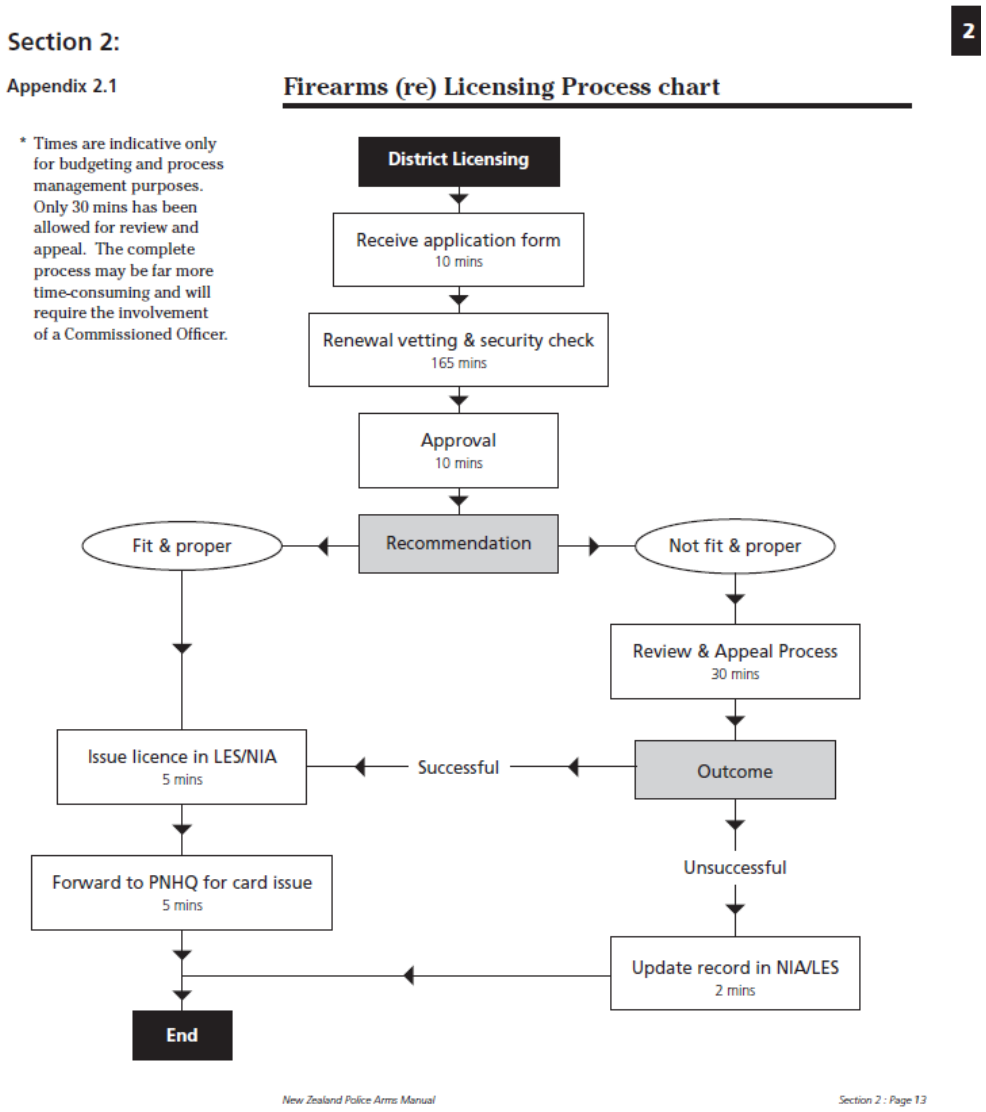
### 2.30 Interviews

1. The Firearms Licence Vetting Guide, Pol 67K, sets out required formats for interviews of the applicant, spouse, next-of-kin, partner, referees etc. The interviews are designed to elicit whether the applicant is "fit and proper" and must be thorough. The points set out in the formats are not exhaustive and vettors are encouraged to ask whatever extra questions they consider are appropriate in each case. There is a danger of interviews becoming stereotyped.
2. The applicant must not be present when referees are interviewed. This especially applies to spouse/partner/next of kin.

### 2.5 Objectives of Firearms Licensing

1. To maintain public safety and reduce crime by promoting the safe use and the control of firearms and other weapons.
2. To ensure, as far as possible, that only those who are "fit and proper" have access to firearms.
3. To issue all (except Visitors) Firearms Licences in the form of a durable, high security plastic card bearing the photographic image of the holder.
4. To establish and maintain a computer database comprising the photo images of all Firearms Licence holders, Firearms Licence details, and a record of those firearms required to be taken into possession on a permit to procure, or other requirement for the possession of that firearm to be notified to Police.
5. To establish an ongoing licensing system which allows for the vetting of licence holders and the reissue of licences at ten year intervals.
6. To ensure that all District Firearms Licensing operations uniformly meet the requirements of legislation, and the expectations of Government as communicated in the annual Departmental Forecast Report (DFR).

**Firearms (re) Licensing Process Chart**




## 11.11 Prohibited Person/Application for Licence Refused/Revocation

1. The term "Prohibited Person" is now obsolete and has no foundation in law relating to the Arms Act 1983. A person cannot be "prohibited" from obtaining a Firearms Licence.
The person and their behaviour of concern should be entered on NIA to guard against the contingency that the person may apply for a Firearms Licence at some future date.
2. An application for a Firearms Licence made by any person must be fully considered. Information recorded on NIA must be considered, and can form a basis for the application to be refused.
3. Where an application for a Firearms Licence is refused, a NIA noting shall be entered listing the reasons for refusal and the relevant file number.
4. Where revocation occurs, computer action as per the Computer Manual is to be taken.

*9. A Comparison: Mongrel Mob Insignia and the University of Georgia Mascot*[283]


*Figure 1: Mongrel Mob insignia*

*Figure 2: University of Georgia bulldog (cartoon)*

*Figure 3: University of Georgia bulldog, Uga*

## Australia

*1. National Firearms Agreement*

OPENING STATEMENT

1. The National Firearms Agreement constitutes a national approach to the regulation of firearms. The Agreement affirms that firearms possession and use is a privilege that is conditional on the overriding need to ensure public safety, and that public safety is improved by the safe and responsible possession, carriage, use, registration, storage and transfer of firearms.

2. This Agreement sets out minimum requirements in relation to the regulation of firearms. Nothing in this Agreement prevents jurisdictions from adopting additional – including more restrictive – regulations.

3. Having regard to the National Firearms Trafficking Policy Agreement, first agreed in 2002, jurisdictions agree to establish or maintain substantial penalties for the illegal possession of a firearm.

GENUINE REASONS AND NEED FOR ACQUIRING, POSSESSING OR USING A FIREARM

9. Individuals must demonstrate a genuine reason for acquiring, possessing or using a firearm. The genuine reasons and relevant qualifying statements are listed in paragraphs 13-23.

10. Personal protection is not a genuine reason for acquiring, possessing or using a firearm.

[283] Figure 1: Gabworthy "Wear It With Pride" < http://gabworthy.com/lifestyle/9-terrifying-photos-of-new-zealands-infamous-gang/2/>; Figure 2: PinArt "Georgia Bulldog Logo" <http://moziru.com/explore/Logo%20clipart%20georgia%20bulldog/>; Figure 3: Bleacher Report "Georgia to Introduce New Mascot Uga X During 2015 Season" < http://bleacherreport.com/articles/2522717-georgia-to-introduce-new-mascot-uga-x-during-2015-season>.

11. Over and above satisfaction of the "genuine reason" test, an applicant for a licence must demonstrate a genuine need for the particular type of firearm (excluding Category A firearms).

12. Only certain categories of firearms can be acquired, possessed or used under each genuine reason. Categories of firearms are listed in paragraphs 25-29.

GENUINE REASONS

13. Sports shooters – long arms

(a) Sports shooters must have a valid membership with an approved club (defined as clubs participating in shooting sports recognised in the charters of such major sporting events as the Commonwealth Games, Olympic Games or World Championships).

(b) Firearms permitted for acquisition, possession or use under this genuine reason are:

i. Category A

ii. Category B

iii. Category C shotguns, limited to 1 members of the Australian Clay Target Association or clubs affiliated with the Australian Clay Target Association with a medical need to use a Category C shotgun due to a lack of strength or dexterity, or 2 individuals who were on 15 November 1996 registered shooters with the Australian Clay Target Association and who, at that time, possessed a semi-automatic shotgun or pump action repeating shotgun for use in clay target events.

14. Sports shooters – handguns

(a) Sports shooters must have a valid membership with an approved club.

(b) Firearms permitted for acquisition, possession or use under this genuine reason are: i. Category H – the firearm must be designed or adapted for competition target shooting, or must have a barrel length of at least 120mm for a semi-automatic handgun or 100mm for a revolver or a single shot handgun. If the firearm is fitted with a firearm magazine or cylinder, it must have a capacity of not more than 10 rounds. The calibre of the firearm must not exceed .38" (with the exception of cases listed under paragraph 14(c)).

(c) Handguns with a calibre greater than .38" but no greater than .45" are permitted only where shooters are competing in the two accredited events known as Metallic Silhouette and Single (Western) Action.

15. Recreational shooters/hunters

(a) Recreational shooters/hunters must produce proof of permission from a landowner.

(b) Firearms permitted for acquisition, possession or use under this genuine reason are:

i. Category A

ii. Category B

16. Primary producers

(a) Primary producers must satisfy the licensing authority that there is a genuine need for the use of the firearm which pertains to the applicant's occupation and which cannot be achieved

by some other means. The application is to be approved by the Commissioner of the Police who may impose conditions as to the use of the firearms, including as to the geographical location of its use.

(b) Firearms permitted for acquisition, possession or use under this genuine reason are:

i. Category A

ii. Category B

iii. Category C – where the licensing authority is satisfied that there is a genuine need for the use of the firearm which cannot be achieved by some other means (including the use of Category A or B firearms). Primary producers are limited to one Category C shotgun and one Category C rifle

iv. Category D – where the licensing authority is satisfied that there is a genuine need for the use of a Category D firearm for the purposes of controlling vertebrate pest animals in the course of primary production activities. Jurisdictions may require individuals to meet additional requirements (for example, safety training and marksmanship) to qualify for Category D acquisition, possession or use, or to establish certain facts (for example, lack of other pest control options) in order to demonstrate need.

17. Occupational requirement (other rural purposes and professional shooters for nominated purposes)

(a) Persons with an occupational interest must satisfy the licensing authority that there is a genuine need for the use of the firearm which pertains to the applicant's occupation and which cannot be achieved by some other means. The application is to be approved by the Commissioner of the Police who may impose conditions as to the use of the firearms, including as to the geographical location of its use.

(b) Firearms permitted for acquisition, possession or use under this genuine reason are:

i. Category A

ii. Category B

18. Security employees

(a) Firearms permitted for acquisition, possession or use under this genuine reason are:

i. Category A

ii. Category H

19. Collectors

(a) Collectors will be regulated by means of a licence and permit system which tests their bona fides.

(b) Firearms permitted for acquisition and possession under this genuine reason are:

i. Category A – must be rendered temporarily inoperable

ii. Category B – must be rendered temporarily inoperable

iii. Category C – must be rendered temporarily inoperable

iv. Category D – must be rendered permanently inoperable

v. Category H – must be rendered temporarily inoperable
(c) For the purposes of handguns, jurisdictions agree that they will accredit historical societies. Historical societies are required to notify police of a member's expulsion as well as the reasons for expulsion. Accredited historical societies will be indemnified from civil or legal liability where they notify police in good faith of their belief that a person is unfit to hold a collector's licence.
20. Heirlooms

(a) Jurisdictions agree that where the owner of an heirloom firearm is unable to establish a genuine reason for possession of that firearm and/or does not qualify for a collector's licence, jurisdictions may issue the heirloom owner with a special category of licence. The requirements of that heirloom licence must be that: i. before the licence is issued, the owner provides sufficient proof of inheritance of the heirloom

ii. the licence apply only to a single gun, or a matched pair or set

iii. all heirloom firearms be rendered permanently inoperable

iv. the licence not authorise the discharge of the heirloom firearm or firearms in any circumstance.
21. Firearm dealers
(a) Jurisdictions must have regulations addressing firearm dealers.
22. Firearm manufacturers
(a) Jurisdictions must have regulations addressing firearm manufacturers.
23. Film and/or theatrical armourers
(a) Jurisdictions must have regulations addressing film and theatrical armourers.

## United Kingdom

1. *Firearms Act 1968*

**27 Special provisions about firearm certificates.**

(1) A firearm certificate shall be granted where the chief officer of police is satisfied—

(a) that the applicant is fit to be entrusted with a firearm to which section 1 of this Act applies and is not a person prohibited by this Act from possessing such a firearm;
(b) that he has a good reason for having in his possession, or for purchasing or acquiring, the firearm or ammunition in respect of which the application is made; and
(c) that in all the circumstances the applicant can be permitted to have the firearm or ammunition in his possession without danger to the public safety or to the peace.
(1A) For the purposes of subsection (1) above a person under the age of eighteen shall be capable of having a good reason for having a firearm or ammunition in his possession, or for... acquiring it, only if he has no intention of using the firearm or ammunition, at any time before he attains the age of eighteen, for a purpose not authorised by the European weapons

directive.
(2) A firearm certificate shall be in the prescribed form and shall specify the conditions (if any) subject to which it is held, the nature and number of the firearms to which it relates, including if known their identification numbers, and, as respects ammunition, the quantities authorised to be purchased or acquired and to be held at any one time thereunder.
(3) This section applies to the renewal of a firearm certificate as it applies to a grant.

2. *Home Office Guide on Firearms Licensing Law 2016*

**Applications**

12.35 Background checks will always be carried out on applicants to assess their fitness to possess a firearm. These checks should encompass local information as well as checks on national databases. Where there is information indicating domestic violence and abuse, wider interviews or enquiries should be considered with a range of family, friends or associates of the applicant prior to issue or renewal of a firearm/shotgun certificate. Those interviewed need not be confined to those persons put forward by the applicant. The police response should be proportionate to the risk involved and care must be taken to consider every case on its merits.

12.36 Interviews with partners who may be victims of domestic violence may be judged essential to making a complete assessment of an application. Such interviews need to be conducted with sensitivity, and officers must take into account that a victim of domestic violence may be unwilling to speak openly with the police for fear of further violence or reprisals. Information provided during interview must be treated as confidential. Officers must have received adequate training so that they are aware of the indicators of domestic abuse, and how to support victims and keep them safe. They should be aware that there may be a need to take active steps to protect an applicant's partner from reprisals. This is particularly important in the event that the partner is interviewed in connection with the application and provides information which leads to a refusal or revocation since the applicant might blame their partner and resort to violence.

12.37 An applicant's partner is not required to give approval for the issue of the firearm or shotgun certificate and this should be made clear to them. The responsibility lies with the police to make the decision based on all the evidence available. Similarly, the police will assess evidence provided by other family members, friends or associates of the applicant where this is considered to be necessary.

12.38 Police domestic violence/public protection units should be consulted and multi-agency liaison may be necessary to properly assess whether the applicant can hold a firearm or shotgun without danger to public safety or the peace.

12.39 Chief officers need not rely only on convictions when considering the suitability of applicants to possess firearms without danger to the safety of the public or the peace. In particular chief officers should be aware that they can take hearsay evidence into account and not have to rely directly on spouses/partners when considering domestic related incidents. Hearsay evidence could include the evidence of police officers attending scenes of domestic incidents. Chief officers must also consider whether the applicant or certificate holder has been the subject of a Domestic Violence Protection Notice (DVPN) or a Domestic Violence Protection Order (DVPO) issued under the Crime and Security Act 2010 and whether the applicant or certificate holder has breached the terms of that notice/order.

12.40 Conduct which has not resulted in a conviction can be considered. For example, a bind over may be relevant, particularly if in relation to a partner or a former partner. Evidence falling short of a conviction (e.g. police intelligence, which has not been tested in the criminal court and proved beyond reasonable doubt) should be treated with caution and an assessment made by chief officers of police as to what weight should be attached to it. In each case the police must ensure a fair process by analysing how recent the incident was and whether it should be viewed as an isolated incident or part of an ongoing pattern. They should conduct an assessment of future risk based on all of the evidence.

12.41 Information from GPs, especially an indication of alcohol or drug abuse, or mental health issues may indicate that an applicant is not fit to possess a firearm. Consideration may be given to requesting the medical records of spouses, partners or family members (with their consent) if there is concern over previous domestic violence or abuse.

12.42 It should be noted, however, that in the event of challenge a court is likely to attribute less weight to hearsay evidence than to direct evidence, and less weight to evidence falling short of a conviction (which has not been tested under cross-examination) than to actual convictions. The chief officer must therefore make a judgement about the reliability and credibility of hearsay evidence before relying upon it to refuse or revoke a certificate.