

**ANALYSIS**

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| 1. Short Title | 3. Money laundering |
| 2. New Part inserted | 4. Providing explosives to commit crimes |
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2004, No. 5

An Act to amend the Crimes Act 1969

(1 June 2004)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled and by the authority of the same as follows:

1. Short Title – This Act may be cited as the Crimes Amendment Act 2004 and shall be read together with and deemed part of the Crimes Act 1969 (hereinafter referred to as “the principal Act”).

2. New Part inserted – The principal Act is amended by repealing sections 109B to 109F (as inserted by the Crimes Amendment Act 2003) and inserting after section 109A (as inserted by that Amendment) the following new Part -

“PART VA
PEOPLE SMUGGLING AND TRAFFICKING

109B. Interpretation – In this Part unless the context otherwise requires –

“authorised person” means any constable, any immigration officer and any customs officer;

“child” means a person who is under the age of 18 years;

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“commercial carrier” includes a company or the owner, operator or other person in charge of any means of transport that engages in the transport of people or goods for commercial gain;

“craft” includes any aircraft, ship, boat or other machine or vessel used or capable of being used for the carriage or transportation of people or goods or both, by air or water or over or under water;

“document” includes a thing that is or is intended to be –

- (a) attached to a document; or
- (b) stamped or otherwise signified on a document;

“exploitation” includes all forms of sexual exploitation (including sexual servitude and exploitation of another person’s prostitution), forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs;

“fraudulent travel or identity document” means a travel or identity document that –

- (a) has been made or altered in any way by a person other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a country; or
- (b) has been issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (c) is being used by a person other than the lawful owner;

“illegal entry” means entering the Cook Islands or any other country without complying with the requirements for lawful entry of that country;

“material benefit” includes any type of financial or non-financial inducement, payment, bribe, reward, advantage or service;

“people smuggling” means the arranging or assisting of an unauthorised person’s illegal entry into any country;

“receiving country” means –

- (a) in relation to people smuggling, the country into which the unauthorised person’s entry is arranged; and
- (b) in relation to people trafficking, the country into which a trafficked person is brought as part of an act of trafficking in persons;

“specified means” means any of the following -

- (a) threat;
- (b) use of force or other forms of coercion;
- (c) abduction;
- (d) fraud;
- (e) deception;
- (f) abuse of power or of a position of vulnerability;
- (g) giving or receiving payments or benefits to achieve the consent of a person having control over another person;

“unauthorised person”, in relation to a country, means a person who is neither a citizen of that country nor in possession of all the documents required by or under the law of that country for the person’s lawful entry into that country.

“unlawful employee” means a person who under the provisions of the Entry, Residence and Departure Act 1971-72 or under the terms of any entry or residence permit issued thereunder, is not lawfully entitled to work in the Cook Islands;

“trafficked person” means a person who is the victim of trafficking in persons;

“trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of a person for the purpose of exploitation.

People Smuggling

109C. People smuggling – (1) Every person is liable to imprisonment for a term not exceeding 20 years or to a fine not exceeding \$500,000 or both, who for a material benefit engages in people smuggling either knowing or being reckless as to the fact that the entry of the person being or to be smuggled constitutes or would constitute illegal entry.

(2) Subsection (1) applies whether or not the person being smuggled actually enters or arrives in the receiving country.

109D. Offence to facilitate stay of an unauthorised person – Every person is liable to imprisonment for a term not exceeding 14 years or to a fine not exceeding \$300,000 or to both, who knowingly facilitates the continued presence of an unauthorised person in a receiving country in order to obtain a material benefit.

109E. Aggravating factors – Every person commits an aggravated offence and is liable to imprisonment for a term not exceeding 20 years or to a fine of \$500,000 or both, who commits an offence under sections 109C, 109D or 109N in one or more of the following circumstances, namely –

- (a) the unauthorised person is subjected to torture or to other cruel, inhuman or degrading treatment (including exploitation); or

- (b) the life or safety of the person being smuggled is or is likely to be endangered.

109F. Protection for smuggled persons – (1) An unauthorised person shall not be liable for prosecution for an offence under sections 109C, 109D, 109E, 109G, 109N or 109O by reason only of the fact that the unauthorised person is the object of the following conduct –

- (a) people smuggling; or
- (b) an offence under section 109D;
- (c) when committed for the purpose of enabling people smuggling, an offence against section 109N.

109G. Boarding, search and detention of craft - (1) This section shall apply to a craft that is a ship, boat, or other machine or vessel used or capable of being used for the carriage of persons by water or over water, except for a foreign warship.

(2) An authorised officer may stop and board the craft within the Cook Islands if the authorised officer has reasonable grounds to believe the craft -

- (a) is being used to commit an offence against section 109C; and
- (b) the craft is in:
 - (i) the Cook Islands; or
 - (ii) the territorial sea of the Cook Islands.

(3) The authorised officer may, when reasonably necessary for the exercise of his or her functions in connection with an offence against section 109C -

- (a) direct the craft to stay where it is, or direct it to be taken to a suitable place in the Cook Islands for the purpose of search; and
- (b) search and detain the craft, anyone on it and anything on it; and
- (c) question any person on board the craft; and
- (d) require the production of any documents relating to the craft or any travel or identity documents of a person on the craft; and
- (e) take a copy of any documents produced; and
- (f) seize and detain anything found on the craft that appears to him or her to be evidence of an offence against section 109C; and
- (g) remain on the craft for such period as is reasonably necessary for the purpose of boarding, searching and directing the craft or carrying out an investigation for an offence against section 109C.

(4) If the craft fails to stop at the request of an authorised officer, the officer may pursue it into international waters and take any action that is reasonably necessary to stop the craft to enable it to be boarded (other than in the territorial sea of another country).

(5) The authorised officer may require the person in charge of the craft, a member of the crew or any person on board to take any action that may be directed by the officer for paragraph (a) of subsection (3).

(6) The person in charge of the craft must give any authorised officer who remains on board the craft proper and sufficient food and suitable accommodation without charge.

(7) Every person who fails to comply with a direction of the authorised officer under paragraph (a) of subsection (3) or who obstructs the authorised officer in the exercise by him or her of any powers under this section is liable to imprisonment for a term not exceeding 14 years or to a fine of \$300,000 or to both.

People Trafficking

109H. Trafficking in persons – Every person is liable to imprisonment for a term not exceeding 20 years or to a fine not exceeding \$500,000 or to both, who engages in trafficking in a person, or is involved in the arranging of trafficking in a person, knowing that the person's entry into the Cook Islands or any other state is or was arranged by specified means.

109I. Trafficking in children - Every person is liable to imprisonment for a term not exceeding 30 years or to a fine not exceeding \$800,000 or to both, who intentionally engages in trafficking in a person who is a child or is involved in the arranging of trafficking in a person who is a child, regardless of whether the child's entry into the Cook Islands or any other country is or was arranged by specified means.

109J. Consent not a defence – It shall not be a defence to any prosecution under section 109H or section 109I -

- (a) that the trafficked person consented to the intended exploitation; or
- (b) that the intended exploitation did not occur.

109K. Aggravating factors – (1) When determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against this 109H or 109I, the court shall take into account –

- (a) whether bodily harm or death (whether to, or of a person in respect of whom the offence was committed, or some other person) occurred during the commission of the offence;
- (b) whether the offence was committed for the benefit of, at the direction of, or in association with, an organised criminal group within the meaning of section 109A(2);
- (c) whether a person in respect of whom the offence was committed was subjected to torture, or other inhuman or degrading treatment including exploitation, as a result of the commission of the offence;
- (d) the number of people in respect of whom the offence was committed.

(2) When determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against section 109H or 109I, the court shall also take into account -

- (a) whether a person in respect of whom the offence was committed was subjected to physical abuse (for example, rape or assault) as a result of the commission of the offence;
- (b) the age of the person in respect to whom the offence was committed and, in particular, whether the person was a child;
- (c) whether the person convicted committed the offence, or took actions that were part of it, for a material benefit.

(3) The examples in paragraph (a) of subsection (2) do not limit the generality of that paragraph.

(4) This section does not limit the matters that the court may take into account when determining the sentence to be imposed on, or other way of dealing with, a person convicted of an offence against sections 109H or 109I.

109L. Protection for trafficked persons - (1) A trafficked person shall not be liable to criminal prosecution for -

- (a) the act of trafficking in persons or being a party to an offence of trafficking in persons; or
- (b) the trafficked person's illegal entry into the Cook Islands in connection with the act of trafficking in persons if the Cook Islands is the receiving country; or
- (c) the trafficked person's period of unlawful residence in the Cook Islands after being trafficked, if the Cook Islands is the receiving country; or
- (d) the trafficked person's procurement or possession of any fraudulent travel or identity documents that the person obtained, or with which the trafficked person was supplied, for the purpose of entering the receiving country in connection with the act of trafficking in persons.

(2) Subsection (1) shall not prevent the removal of a trafficked person in accordance with the Entry Residence and Departure Act 1971-72 as an illegal immigrant or as an illegal resident as defined in that Act.

Exploitation

109M. Exploitation of people not legally entitled to work - (1) Every employer is liable to imprisonment for a term not exceeding 5 years or to a fine of \$50,000 or to both who -

- (a) allows an unlawful employee to undertake employment in the employer's service; and
- (b) takes any action with the intention of preventing or hindering the employee from:
 - (i) leaving the Cook Islands; or

- (ii) ascertaining or seeking that person's entitlement under the law of the Cook Islands; or
 - (iii) disclosing to any person the circumstances of that person's employment by the employer.
- (2) Without limiting the generality of subsection (1), the following are examples of actions of the kind mentioned in that subsection -
- (a) taking or retaining possession or control of a person's passport, any other travel or identity document, or travel tickets;
 - (b) preventing or hindering a person from:
 - (i) having access to a telephone; or
 - (ii) using a telephone; or
 - (iii) using a telephone privately; or
 - (iv) leaving premises; or
 - (v) leaving premises unaccompanied;
 - (c) preventing or hindering an inspector appointed and acting pursuant to the provisions of the Industrial and Labour Ordinance 1964 from entering or having access to any place or premises to which the person is entitled to have access under any law.

Miscellaneous

109N. Offence related to fraudulent travel or identity documents – Every person is liable to imprisonment for a term not exceeding 5 years or to a fine not exceeding \$5,000 or to both, who knowingly, in order to obtain a material benefit -

- (a) produces to any person, a fraudulent travel or identity document purporting it to be genuine; or
- (b) procures, provides or possesses a fraudulent travel or identity document.

109O. Obligation on commercial carriers – (1) A commercial carrier is liable to a fine of \$500,000 if that commercial carrier transports a person into a receiving country where on entry to the receiving country, the person does not have the travel documents required for lawful entry into that country.

- (2) A commercial carrier shall not be guilty of an offence under subsection (1) if -
- (a) the commercial carrier had reasonable grounds to believe that the documents that the person has are the travel documents required for lawful entry of that person into the receiving country; or
 - (b) the person possessed the travel documents required for lawful entry into the receiving country when that person boarded or last boarded the commercial carrier to travel to the receiving country; or

- (c) entry into the receiving country occurred only because of illness of or injury to a person on board, stress of weather or other circumstances beyond the control of the commercial carrier.

(3) Nothing in this section shall affect the liability of a commercial carrier under section 31 of the Entry Residence and Departure Act 1971-72.

109P. Obligation to extradite or refer for prosecution – If the Attorney-General refuses a request from another country to extradite a person under the Extradition Act 2003 and the extradition request relates to an act or omission under this Part, the Attorney general must refer the matter to the Solicitor-General for prosecution.

109Q. Attorney-General's consent to prosecutions required – (1) Proceedings for an offence against this Part cannot be brought without the Attorney-General's consent.

(2) A person alleged to have committed an offence against this Part may be arrested, or a warrant for the person's arrest may be issued and executed, and the person be remanded in custody or in bail, even though the Attorney-General's consent to the bringing of proceedings against the person has not been obtained."

3. Money laundering – The principal Act is amended by repealing section 280A (as inserted by the Crimes Amendment Act 2003) and substituting the following -

"280A. Money laundering – (1) For the purposes of this section, "serious offence" means -

- (a) an act or omission that constitutes an offence against the law of the Cook Islands punishable by imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000; or
 - (b) an act or omission that constitutes an offence against the law of another country that, had that act or omission occurred in the Cook Islands, it would have constituted an offence against the law of the Cook Islands punishable by imprisonment for not less than 12 months or the imposition of a fine of more than \$5,000.
- (2) A person commits the offence of money-laundering if the person -
- (a) acquires, possesses or uses property, or engages in a transaction that involves property, knowing or having reason to believe that it is derived directly or indirectly from a serious offence;
 - (b) converts or transfers property with the aim of –
 - (i) concealing or disguising the illicit origin of that property; or
 - (ii) aiding any person involved in the commission of the offence, to evade the legal consequences thereof,
 knowing or having reason to believe that the property is derived directly or indirectly from a serious offence;

- (c) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property knowing or having reason to believe that it is derived directly or indirectly from a serious offence;
 - (d) renders assistance to another person for any of the above.
- (3) A person commits an offence under this section if the person –
- (a) acquires, possesses or uses property, or engages in a transaction that involves property and is wilfully blind as to the fact that the property is derived directly or indirectly from a serious offence;
 - (b) converts or transfers property with the aim of –
 - (i) concealing or disguising the illicit origin of that property; or
 - (ii) aiding any person involved in the commission of the offence, to evade the legal consequences thereof,and is wilfully blind as to the fact that the property is derived directly or indirectly from a serious offence;
 - (c) conceals or disguises the true nature, origin, location, disposition, movement or ownership of the property and is wilfully blind as the fact that the property is derived directly or indirectly from a serious offence;
 - (e) renders assistance to another person for any of the above.
- (4) Knowledge, intent or purpose required as an element of the offence under subsections (2) or (3) may be inferred from objective factual circumstances.
- (5) Any person may be convicted of an offence under this section notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered.
- (6) A person guilty of an offence under the provisions of subsection (2) is liable on conviction, in the case of a person, to a term of imprisonment of up to 5 years or a fine of up to \$50,000 and in the case of a person which is a body corporate, five times such fine plus (notwithstanding the provisions of any other Act) suspension or cancellation of any licence which it may hold in order to carry out its business activities as determined by the Court.
- (7) A person guilty of an offence under the provisions of subsection (3) is liable on conviction, in the case of a person, to a term of imprisonment of up to 3 years or a fine of up to \$30,000 or to both, and in the case of a person which is a body corporate, five times such fine plus (notwithstanding the provisions of any other Act) suspension or cancellation of any licence which it may hold in order to carry out its business activities as determined by the Court.
- (8) For the avoidance of doubt, a person may be found guilty of an offence under subsections (2) or (3) even if the property involved in the offence is property that is derived directly or indirectly from a serious offence committed by that person.”

4. Providing explosives to commit crimes – Section 328 of the principal Act is amended by deleting the words “2 years” and substituting the words “7 years”.

This Act is administered by the Ministry of Police