LEGISLATION NOTE: THE CRIMES AMENDMENT ACT 2015

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I. INTRODUCTION

Legislation is often introduced in response to international treaty obligations, reflecting that much government policy is developed in the context of international arrangements. The Crimes Amendment Act 2015 is an example of this. It introduces a number of extensions to Part 10 of the Crimes Act 1961 (crimes against rights of property). It adds new offences and rewords existing offences. It also rewrites the people trafficking and bribery offences found in Parts 5 and 6 of the 1961 Act. These changes illustrate the role of international obligations.

The Amendment Act enacts provisions taken from the Organised Crime and Anti-Corruption Legislation Bill 2014. This wider proposal was designed to implement a policy document from August 2011 entitled "Strengthening New Zealand's Resistance to Organised Crime".[1] An important contextual factor to this is international treaty obligations, in particular those arising under the UN Convention Against Transnational Organised Crime 2000[2] and its Protocols;[3] and the UN Convention against Corruption 2003.[4] Both of these fall under the purview of the Vienna-based UN Office on Drugs and Crime, the UN agency that exists to support international collaboration in relation to criminal matters.[5]

The international treaty background is important for a number of reasons. First, the purposive interpretation required by s 5 of the Interpretation Act 1999 puts the

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[1] Ministry of Justice, ISBN 978-0-478-32404-4. It also has proposals to amend various statutes, including the Misuse of Drugs Act 1975, the Customs and Excise Act 1996 and the Anti-Money Laundering and Countering Financing of Terrorism Act 2009.

[2] United Nations Convention Against Transnational Organised Crime 2225 UNTS 209 (opened for signature 12 December 2000, entered into force 29 September 2003); New Zealand signed this on 14 December 2000 and ratified it on 19 July 2002, and so was an early adopter.

[3] There were two Protocols at the outset: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children 2237 UNTS 319 (opened for signature 12 December 2000, entered into force 25 December 2003); and the Protocol against the Smuggling of Migrants by Land, Sea and Air 2241 UNTS 507 (opened for signature 12 December 2000, entered into force 28 January 2004). New Zealand signed both on 14 December 2000 and ratified them on 19 July 2002.

[4] United Nations Convention Against Corruption 2349 UNTS 41 (opened for signature 9 December 2003, entered into force 14 December 2005).

[5] "Organized Crime" UNODC <https://www.unodc.org/unodc/en/organized-crime/index.html>. Other transnational aspects of the Bill, set out in the Explanatory Note to it, include that it "enables implementation of the Agreement between the Government of the United States of America and the Government of New Zealand on Enhancing Cooperation in Preventing and Combating Crime". This can be found at http://www.justice.govt.nz/publications/global-publications/e/enhancing-cooperation-in-preventing-and-combating-crime. It allows the sharing of information, particularly in relation to suspected terrorism. The wider Bill is also said to support improved compliance with such other international conventions as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997, available at http://www.oecd.org/corruption/; New Zealand ratified this on 25 June 2001.

international obligation to the centre if that is the reason for the legislation. Secondly, this is supported by the general proposition that New Zealand statutes should be construed so as to meet international obligations where that is possible.[6] This may involve exploring material that is produced around the treaty, from the discussions of drafting groups to the views of any working parties on its implementation. Further, it may allow consideration of comparative material, including the legislation of other countries and its interpretation by their courts. The more general point is that the legislative language cannot be construed in a vacuum and advocates must be willing to look broadly to assist interpretation.[7] Criminal lawyers in these areas have to be international lawyers as well.

II. The Revised People Trafficking Provision

A. Background

Section 98 of the Crimes Act 1961 reflects the long-prohibited action of dealing in slaves. For some reason, it is classified as an offence against public order and so included in Part 5 rather than being a Part 8 crime against the person. Various supplemental offences have been added this century, all of which are more obviously crimes against the person than against public order. For example, the Crimes Amendment Act 2005 added as s 98AA to the 1961 Act the offence of dealing in people under 18 for sexual exploitation, and also for the removal of body parts or engagement in forced labour: these may be viewed as examples of modern-day slavery. An obvious question arising is why the offending in question is only made out in relation to those under 18. The Explanatory Note to the Crimes Amendment Bill (No 2), which provides the origin of the provision, suggests that the offence was designed to ensure compliance with an Optional Protocol to the UN Convention on the Rights of the Child 1989 which deals with the exploitation of children.[8] Of course, an international requirement to protect those under 18 does not prevent a national legislature deciding to protect those 18 or over.

The Crimes Amendment Act 2002 also added a number of offences relating transnational movement of people, in the form of ss 98B-F, under the heading "Smuggling and trafficking in people". In between s 98AA and ss 98B and following is the offence of participating in a criminal gang, contrary to s 98A. This is a deliberate choice by the legislature, grounded in its view that there is a link between organised crime and these other offences. Section 98A was amended by the 2002 Act. This amendment and the introduction of the further offences started with the Transnational Organised Crime Bill 2002. The origin of this was the implementation by New Zealand of obligations arising by virtue of the ratification of the UN Convention Against Transnational Organised Crime 2000 and two of its Protocols. The Convention requires the criminalisation of organised gangs (Article

[6] See, for example, *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90].
[7] In *R v Chechelnitski* CA160/04, 1 September 2004, an appeal against sentence in a migrant smuggling case, contrary to s 98C Crimes Act 1961, the Court of Appeal gave lengthy consideration to the international background in construing the seriousness of the offence; reference was also made to sentencing under the equivalent provisions in Australia.
[8] Crimes Amendment Bill (No 2), Explanatory Note at 5.

5), action against money laundering, including its criminalisation (Articles 6-7), action against corruption, including its criminalisation (Articles 8-9), and regimes for confiscation (Article 12); there are numerous provisions for international cooperation. The Protocols relate to trafficking and smuggling of people.[9] Article 32 of the Convention requires ongoing meetings as to implementation, which has led to significant material, all of which is compiled by the United Nations Office on Drugs and Crime.

Of this group of trafficking offences, s 98D as originally inserted was "Trafficking in people by means of coercion or deception", and carried up to 20 years' imprisonment. Its elements were either (i) arranging the entry of a person into a state (whether New Zealand or another state, and whether or not the entry occurred): ss 98D(1)(a) and (3)(a); and (ii) using coercion or deception as part of that transfer: s 98D(1)(a). Alternatively, (i) arranging, organising or procuring the reception or concealment or harbouring in a state (whether New Zealand or another state, and whether or not it actually happened): ss 98D(1)(b) and (3)(b); and (ii) knowing that coercion or deception had been used: s 98D(1)(b). As such, the essence of the offence was the making of the arrangements for the trans-border movement of the victim; and different forms of participation were criminalised as principal offending. Section 98E includes various aggravations to be taken into account at sentencing, primarily any maltreatment if the trafficking was carried out.

B. The Amended Section 98D

Section 98D has been renamed and redrafted, though it has the same maximum penalty. The offence is now named simply "Trafficking in persons", although coercion or deception remain necessary. There has to be an arranging, organising or procuring of some activity towards the victim. The essence of the offence is the making of the prohibited arrangements; they do not need to have been put into effect (ss 98D(1) and 98D(3)(b)), though the aggravations in s 98E remain as they were.

The activity that is arranged, organised or procured can be either of

> (i) some transnational movement, whether involving New Zealand or some other state (s 98D(1)(a)); or
> (ii) the facilitation of such movement, in the form of "reception, recruitment, transport, transfer, concealment, or harbouring" (s 98D(1)(b)).

As well as alternative activities, there are alternative mens rea states:

> (i) the arrangement has to be for the purpose of exploiting or facilitating the exploitation of the person (ss 98D(1)(a)(i) and 98D(1)(b)(i)); or

[9] A Third Protocol exists, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition 2326 UNTS 208 (opened for signature 2 July 2001, entered into force 3 July 2005). New Zealand has not even signed this Protocol.

(ii) there has to be knowledge that the person has been subject to coercion or deception, even if not all of the process involved such conduct) (ss 98D(1)(a)(ii), 98D(1)(b)(ii) and 98D(3)(a)).

It can also involve both. In the first alternative, exploitation is defined in s 98D(4) as involvement in sexual services, forced labour and the like, or organ removal (similar to offending that is caught by s 98AA in relation to those under 18). Further, that involvement has to secured through deception or coercion. As such, deception or coercion remains an element of the offence, despite being removed from the name.[10] It is not necessary that the entire process involve such exploitation: s 98D(3)(a).

As can be seen, there are several methods of committing the offence; and the drafting is not the simplest. But it will be necessary to try to reduce it to questions that a jury can follow. If one takes the version involving arranging entry into New Zealand for prostitution, the question trail for the jury might look something like the following:

1. Did the defendant make an arrangement?[11]

2. Did that arrangement involve the entry of a person into New Zealand (irrespective of whether the entry occurred)?[12]

EITHER
3(a). Was the purpose of the defendant exploitation of the person subject to the arrangement,[13] by which is meant involvement in prostitution,[14] and was the person deceived or coerced into that by the defendant (even if not every aspect of the arrangement involved deception or coercion)?[15]

OR[16]
3(b). Did the defendant know that the entry of the person into New Zealand involved coercion or deception?

A question arising is whether the purposive element envisages only a direct intent or whether it also covers an oblique intention, namely knowing full-well that it will happen. In *Police v K*, the Court of Appeal indicated that drafters of legislative language would work on the basis of a "traditional approach" that both direct and oblique intention would suffice when intention was in issue.[17] This statute refers to the "purpose". That is also the language of s 66(1)(b) of the Crimes Act 1961 in relation to party liability through aiding, and was held to cover oblique intention as

[10] In addition, s 98D(3)(b), which makes clear that the person involved does not have to have been moved or subject to any relevant arrangements, refers to "the person exploited, coerced or deceived", which also makes plain that this remains an element.
[11] Alternatively, it might involve the defendant organising or procuring: s 98D(1), opening words.
[12] It might also involve the person leaving New Zealand; it could also involve entry into or exit from any other state: s 98(1)(a) and (3)(b)(i).
[13] Alternatively, facilitating exploitation: s 98(1)(a).
[14] Other sexual services, or forced labour or forced services, or organ removal are alternatives: s 98D(4).
[15] Sections 98D(1)(a)(i) and (4).
[16] Note that both may be made out.
[17] *Police v K* [2011] NZCA 533, (2011) 28 FRNZ 835 at [33].

well in *R v Wentworth*.[18] It seems unlikely that language arising in the context of protecting vulnerable people will be construed so as to allow a person who knows full well that exploitation will occur to avoid conviction on the basis that he or she did not actually want that outcome.

The wider drafting problem of the complexity of the language arises from two decisions: first, to include distinct methods of participating in the offending as part of one sub-section, and, secondly, to define a key aspect (exploitation) in another sub-paragraph. Given that the charging document will have to give proper particulars that indicate what the allegation is, there is no good reason for this. Rather, the drafting of the offence should set out in separate subsections the different elements of the different forms of involvement in trafficking that the legislature has decided to criminalise. That might produce a longer statutory section but it would also provide more clarity.

It should be noted that in the Explanatory Note to the Organised Crime and Anti-Corruption Legislation Bill 2014, it was said that the newly-defined offence "augments" the previous offence.[19] The difficulty with this contention is that the previous language did not make any reference to exploitation, rather referring only to the coercion or deception. Accordingly, the supplemental language – arranging the entry for the purpose of exploitation – relates to a narrow set of circumstances. In light of the definition of exploitation, it must involve some deception or coercion. Previously, the section criminalised arranging the entry by deception or coercion with no need to identify the purpose as being exploitation. That seems to have been a wider offence.

Article 3 of the Trafficking Protocol to the UN Convention Against Transnational Organised Crime 2000, it should be noted, defines trafficking as involving the use of deception or coercion and as being for the purpose of exploitation. It indicates that the latter includes "at a minimum" the elements that are included in the statute. The modified version of the offence against s 98D might be explained by a desire to conform more closely with the Protocol. However, in the first place, the Protocol does not limit a country to such situations of exploitation; and exploitation is not a feature of every way of committing the offence.

III. The Revised Bribery Offences

A. The UN Convention Against Corruption

The UN Convention Against Corruption 2003 (UNCAC) was signed by New Zealand on 10 December 2003. However, ratification by New Zealand was a slow process and did not occur until 1 December 2015. For a contrast, Australia ratified it in

[18] *R v Wentworth* [1993] 2 NZLR 450. Note that in *R v Murphy* [1969] NZLR 959, it was held that attempted murder – ie conduct for the "purpose of" accomplishing the crime they intend – requires an "actual intent to kill", which seems inconsistent with *Wentworth* but may be explicable by the specific context of murder having a separate mens rea of recklessness as to death and hence no need for oblique intention.

[19] Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 5.

December 2005, and the UK in February 2006; the USA ratified it in October 2006 and Canada did so in October 2007. New Zealand has therefore been a very slow follower. In accordance with constitutional practice, ratification follows the making of necessary legislative amendments to ensure that domestic law complies with what the treaty requires.[20] This process seems to have been tied in to a more general response to organised crime, including the development of the 2011 policy document "Strengthening New Zealand's Resistance to Organised Crime". Having said that, the UNCAC received only a passing comment in this policy document, with reference being made to progressing its ratification (at page 29).

The UNCAC includes requirements as to the prevention of corruption, both in relation to the public and private sectors; ensuring that there is a wide range of criminal offending, including in relation to trading in influence and the laundering of the proceeds of bribery and embezzlement; ensuring that there are processes for recovering the assets that are the product of corrupt activities; and providing for international cooperation in relation to these matters.

Naturally, various aspects of corruption have long been criminal offences in New Zealand. Part 6 of the Crimes Act 1961 relates to "Crimes affecting the administration of law and justice" and contains long-standing offences relating to the bribery of judges, parliamentarians and law enforcement officials. Section 105 makes it an offence for an official to accept or solicit a bribe in relation to their public duties or for a person to offer one; s 99 defines "official" to include those working for central or local government in New Zealand.

The importance of international trade led to the past amendment of Part 6. Under the Crimes (Bribery of Foreign Public Officials) Amendment Act 2001, ss 105C to 105E were added, to criminalise actions in relation to foreign government officials of the sort that would be covered by s 99, though with significant gaps. Section 105E provided a defence if the conduct in question was not criminal in the overseas state, so creating a dual criminality requirement. In addition, s 105C(3) provides an exemption for small payments designed to speed up routine activities.

According to the Explanatory Note to the Organised Crime and Anti-Corruption Legislation Bill 2014, the further amendments to these provisions in 2015 were designed to "enhance" the legislative provisions and "bring New Zealand into line with international best practice", which is identified as arising from the UNCAC and other bodies such as the OECD.[21] The existing offences contrary to ss 105C and 105D are amended or clarified and new offences of "corruption of foreign public officials" and "trading in influence", contrary to ss 105E and 105F, are added.

[20] Ministry of Foreign Affairs and Trade "International Treaty Making: Guidance for government agencies on practice and procedures for concluding international treaties and arrangements" (September 2014) at 6.

[21] Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 3.

B. Revised Section 105C – Bribery of Foreign Public Official

Section 105C(2) provides for an offence with the following elements: (i) corruptly, (ii) giving/offering/agreeing to give, (iii) a bribe, (iv) with intent to influence, (v) a foreign public official, (vi) in relation to an official act/omission (irrespective of whether it is within their authority), (vii) in order to either obtain or retain business or obtain an improper advantage in the conduct of business. There is an exception in s 105C(3), namely that small benefits to ensure that routine government action is ensured or expedited are outside the section. Section 105C has to be read together with s 105D, which indicates that New Zealand citizens, permanent residents or corporations involved in similar offending outside New Zealand are liable to conviction and the same penalty. Prosecution of these offences, and the others noted below, requires the consent of the Attorney-General: see s 106.

The offence against s 105C (and so by extension s 105D) is in substance as it was before the 2015 amendment statute. However, there have been some definitional changes. Taking in turn the elements that require further consideration, first "corruptly": it is not defined but appears in other sections and was considered in the context of a politician (and hence s 103) in *R v Field*.[22] In this case, the Supreme Court held that it covered gratuities offered for work done in an official capacity (except very minor ones that represent the usual courtesies of life) if it was known to be considered corrupt to accept such benefits. The basis for this was that knowingly accepting substantial benefits for action done in an official capacity is simply wrong. This is clearly to be read with the exception provided for in s 105C(3), namely small benefits for routine government actions. The latter phrase is now subject to an extended definition of what does not qualify. Section 105C(1) previously excluded a decision in relation to business or anything that is outside the scope of the ordinary duties of the official. The 2015 amendment has added to the exclusion any action that leads to "an undue material benefit" to the payor or "an undue material disadvantage" to any other person.

There is a statutory definition of a "bribe" for the purposes of Part 6 of the statute, found in s 99: it covers any benefit. There is also a definition of a "foreign public official", found in s 105C(1). It covers the legislative, executive and judicial branches of government, at national, regional or local level, and also any body that carries out a public function and any foreign equivalent of a state-owned enterprise. Also covered is someone who is employed by or acts for a "public international organisation", which covers any organisation of which 2 or more governments are members or send representatives.

The key is the involvement of "business", whether obtaining, retaining or securing a benefit in relation to it. This is not defined save that the 2015 statute has added that it "includes the provision of international aid". If philanthropic activity is covered, then clearly all aspects of trade and commerce are covered, no doubt to be understood as any field of endeavour that involves payments or benefits. There might be difficult questions at the margins. For example, if an investigative

[22] *R v Field* [2011] NZSC 129, [2012] 3 NZLR 1, (2011) 25 CRNZ 693.

journalist pays for information from a government official, and thereby gains an advantage in the development of a story, is that an advantage in the conduct of business within s 105C(2)? That turns on whether the essence of the offence is viewed narrowly as business that flows from or is open to influence by the foreign government; or involves the defendant benefitting somehow as a result of the intervention of the foreign official. On this latter, wider view, benefit to a business that is many steps removed from the government could be important. Indeed, whilst a journalist's story might be one example, another might be information from government sources that has commercially sensitive information. Governments no doubt compile such macro-economic statistics. It would be surprising if that was not covered, so favouring the wider understanding of business. The argument in relation to the investigative journalist scenario might turn on whether an "improper" advantage was obtained. Alternatively, non-prosecution will turn on prosecutorial discretion.

The major change to this offence is that the former defence in s 105E, namely that s 105C (or 105D) does not criminalise something that is legal – or, rather, not a criminal offence - in the foreign country, has been removed. In other words, people are to be judged by the standards set out in the New Zealand context without any requirement for dual criminality.

In addition, added as s 105C(2A) is a wide provision for corporate liability. This is no doubt aimed at ensuring that corporations take appropriate steps to prevent improper conduct. This provides that if an employee commits an offence against subsection (2), then the corporation also commits the offence if the employee has acted within the scope of their employment and was intending to benefit the company. Added to s 105C(1) is a definition of employee that includes any agent. Section 105C(2B) and (2C) together provide that there is no offence if the company has taken reasonable steps to prevent it; but that it is presumed that no reasonable steps were taken.

The precise language here is worth noting, because the question may arise as to whether the corporation has to prove this exception (ie meeting a reverse burden of proof to establish that it has not committed a crime). Section 105C(2C) indicates that the presumption of a lack of reasonable steps arises "unless the body corporate or corporation sole puts the matter at issue". This language can be contrasted to "unless the contrary is proved" terminology such as was considered in *R v Hansen*[23] and held to amount to a legal burden on the defendant to prove that they did not commit an offence even though that breaches the presumption of innocence. It is suggested that this statutory language is entirely consistent with an evidential burden of proof only (ie sufficient evidence to raise a doubt), particularly as s 105C(2B) indicates not that there is a defence of reasonable steps but that the offence is not committed if it has taken reasonable steps. Whilst the prosecution will argue that the entire purpose of the section is best secured by having a legal burden on the corporation, especially as the liability of the

[23] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

corporation is predicated on an offence having been committed by the employee, this cannot be justified in light of the statutory language.

Of course, if the employee is the embodiment of the corporation, it may commit the offence under s 105C(2) in any event. It might be thought that the wide coverage of s 105C(2A) means that there is no need to take an expansive view of the ambit of corporate liability in the context of s 105C(2).

The addition of the corporate liability section has led to a change in the sentencing provision: it carries up to 7 years' imprisonment, as it did previously, but there is also now a provision for a fine of up to $5 million or 3 times the value of any commercial gain. (See ss 105C(2D) and (2E).)

C. Section 105E – Corruption of Foreign Public Officials

The first of the two new offences is that under s 105E. This mirrors the offence under s 105C in that it criminalises the taking of a bribe, with a sentence of up to 7 years' imprisonment. Its coverage is of foreign public officials who carry out the relevant conduct in New Zealand; and also of New Zealand citizens, permanent residents and corporations who are acting as foreign public officials and commit the offence outside New Zealand. In the latter category, the person or corporation does not have to be acting in a role linked to New Zealand. The wide definition of "foreign public official" noted above is applicable.

The elements are (i) corruptly, (ii) accepting, obtaining, agreeing, offering to accept or attempting to obtain, (iii) a bribe, (iv) for the person or another, (v) relating to the act or omission of the foreign public official in that capacity (even if outside their authority). These terms are all discussed above or arise elsewhere (such as the concept of an attempt). There may be an issue in relation to whether obtaining includes retaining, as it does in relation to property offences, in light of the definition set out in s 217. There could no doubt be a situation in which funds are due to be repaid and are retained, and the question of whether that amounts to an obtaining may arise. Section 2 defines "obtain a material benefit" as including an indirect obtaining, and one suspects that a purposive interpretation of s 105E will encourage a wider rather than narrow understanding on the basis that a retention amounts to a benefit to which there is no entitlement.

D. Trading in Influence

In addition, there is an offence of seeking to be a "middle-man", namely "Trading in influence", contrary to s 105F; this also carries up to 7 years' imprisonment. It consists of the first four elements noted above in relation to s 105E, and an intent to influence an official in their actions or omissions as an official (even if beyond their authority). This, it should be noted, relates to an official. This word is defined in s 99 as a New Zealand official; the non-inclusion of trading in influence with foreign public officials is difficult to understand.

IV. Changes to Part 10 of the Crimes Act

Also included in the 2015 Act are various amendments to the property offences in the Crimes Act 1961, creating several new offences and expanding significantly the money laundering provisions. These also started life in the Organised Crime and Anti-Corruption Legislation Bill 2014, no doubt on the basis that the extended coverage will capture activities that are sometimes carried out by the limited group of people who treat crime as their occupation.

A. Passing on Documents that are Illegally Obtained

Section 228 of the 1961 Act criminalises the conduct of (i) taking, obtaining (including retaining, by reason of s 217), using or attempting to use, (ii) a document (which is also widely defined in s 217, and includes items such as credit cards). The fault elements are (iii) dishonesty, (iv) lack of a claim of right and (v) intention to obtain property or a service, pecuniary advantage or valuable consideration. This carries up to 7 years' imprisonment. In some ways similar is s 240(1)(c), which covers the obtaining by deception of a document or other thing capable of being used to derive a pecuniary advantage. This carries up to 7 years if the value of the document or thing is more than $1000. In addition, s 256 criminalises the making of a false document, with separate offences depending on whether there is an intent to obtain some form of benefit (s 256(1), which carries up to 10 years) or that it be used as a genuine document (s 256(2), which carries up to 3 years). Section 258(1) mirrors s 256(1) but involving altering, concealing, destroying or reproducing a document.

The offence against s 228 is now contained in s 228(1). Added as s 228(2) is the offence of passing on or offering to do so ("sells, transfers, or otherwise makes available") a document that has been the object of an offence contrary to s 228(1). The defendant must know its criminal history and be acting without a reasonable excuse. This seems most obviously to cover someone who has made use of a document for a dishonest purpose and then passes it on for further use or someone who acts in the middle of such a transaction. In the latter situation, it could include a person who comes into possession of the document without any relevant guilty knowledge, then obtains that knowledge and passes the document on.

Also added as s 240(1A) is a similar offence with a similar maximum sentence in relation to a document (or other thing capable of being used to secure a pecuniary advantage) that has been obtained in circumstances that would amount to obtaining by deception under s 240(1)(c). This is also subject to a reasonable excuse exception. In addition, there is a new s 258(3), which covers the passing on without a reasonable excuse of a document with knowledge that it has been reproduced, altered or so on in circumstances that would breach s 256(1); it carries up to 3 years' imprisonment.

Section 256(5) has also been added. It imposes up to 3 years' imprisonment for making available a false document knowing that it is false and was made as a

forgery in circumstances that would be in breach of s 256(2).[24] This will cover someone who has discovered after its acquisition that a document is a forgery and passes it on. For example, if someone has been the victim of a forgery (such as by buying something that turned out to be a forgery) there would be an offence in passing that on. This might be made out even if the item was sold expressly as a forgery. This arguable over-reach will be avoided by construing a reasonable excuse to include a sale that was accompanied by clarity as to status.

B. Preparatory Offences Relating to Theft or Other Offences of Dishonesty

Section 227 of the Crimes Act 1961 makes it an offence to have an instrument for conversion with intent to use it, and s 233 contains a similar offence in relation to burglary and a more general offence of being disguised with intent to commit an imprisonable offence. These are examples of specific offences that criminalise conduct that is a precursor to another offence but may well not amount to an attempt because of a lack of proximity.[25] There was a gap in coverage in relation to other offences: for example, there was no offence covering possession of an item to be used for theft. As such, the person could only be apprehended for a criminal offence once he or she had taken steps that were sufficiently proximate to the theft. Accordingly, a shoplifter equipped with a bag lined with material designed to fool store alarms - clearly equipped for theft – would be arrestable only they had passed the proximity threshold. This gap has been filled by the Crimes Amendment Act 2015, which has added ss 228A-C to the Crimes Act 1961. These criminalise designing, manufacturing, adapting, dealing in or possessing items that are to be involved in offences of dishonesty. The fault element is the intention to facilitate or commit an offence of dishonesty. The various offences carry a maximum of 3 years' imprisonment.

Note that an "offence involving dishonesty" is defined in s 2 to include not just property offences (except criminal damage offences) but also the various corruption offences in ss 100-105F, and those in the Secret Commissions Act 1910. The latter statute was also amended last year, by the Secret Commissions Amendment Act 2015, which increased the maximum sentence from 2 years' imprisonment to 7 years (and no doubt provided a reminder as to its existence). It sets out various offences by agents involving the giving and taking of gifts and benefits, failing to disclose pecuniary interests, using false invoices and receipts and so on. In many ways, it reflects the offences set out in ss 105C-F noted above but in the context of private business.

[24] Most situations that are in breach of s 256(1) would also be in breach of s 256(2), but not all, since there is no requirement that the document be thought of as genuine: see *R v Li* [2008] NZSC 114, [2009] 1 NZLR 754, in which the Supreme Court determined that a person who made to order a document that was ordered as a false document had committed the offence against subs (1) by reason of the payment for the services.

[25] See also s 264 re instruments for forgery. These offences provide an argument against the approach identified in *R v Harpur* [2010] NZCA 319, 24 CRNZ 909. See *Ah Chong v R* [2015] NZSC 83 at [72] and [121] for commentary that the *Harpur* decision may be thought overly broad. Its propriety will no doubt be a focus when *R v Johnston* [2015] NZCA 162 is heard on appeal by the Supreme Court; see the leave judgment [2015] NZSC 143.

C. The Extended Money Laundering Offences

The final change to note in the Crimes Amendment Act 2015 may well be the most important one in practice. Section 243 of the Crimes Act 1961 contains the offence of money laundering. It originates with the Crimes Amendment Act 1995 and carries 7 years' imprisonment. Its elements as it stood prior to amendment, set out in s 243(2), were: (i) entering into a money laundering transaction, (ii) involving property that (iii) is the proceeds of a serious offence, (iv) with knowledge or recklessness as to the origin of the property as proceeds of a serious offence. Conduct that amounted to laundering was further defined in ss 243(1) and (4): essentially dealing with property in order to conceal it by converting or otherwise disguising it. A serious offence was one carrying 5 years or more. That could be made out by conduct outside New Zealand that would be an offence here – but subject to s 245, which excluded conduct that is not an offence abroad. A separate offence of possession of the property with intent to launder also exists: s 243(3). It carries up to 5 years.

There are various amendments. According to the Explanatory Note to the 2014 Bill, the purpose of the changes is to ensure the effectiveness of the offences and that they are compliant with international obligations.[26] The need for a serious offence has now been removed: as such, any offence is covered. In addition, the extra-territoriality provision is changed. Section 245, which covers conduct that occurs outside New Zealand, provides that the ambit of s 243 applies to an act that is an offence where committed, is an offence in New Zealand even if committed abroad, or is sufficiently linked to New Zealand as to give jurisdiction.

These changes extend the scope of money laundering by a significant degree. Section 243A, which was added by the Crimes Amendment Act (No 4) 2011, indicates that the person who committed the underlying offence, does not need to have been charged or convicted. This has been reworded, but the change seems only to be semantic. It remains necessary to show that an offence was committed: as that is an element of the offence, it will have to be proved beyond a reasonable doubt. The fact that there is no need for a conviction raises the question of what should happen if there has been an acquittal of the person alleged to have committed the offence. It is suggested that the language of the offence will preclude money laundering being made out because there is a model for the contrasting situation: the Civil Proceeds Recovery Act 2009 expressly allows recovery even if someone has been acquitted: s 6(2). That model could have been followed in s 243A but was not.

In addition, there has been a change to definition of what amounts to laundering. There is no need for it to be shown that the defendant acted in order to conceal the property. Rather, it is sufficient that the property be concealed in the sense of being converted or otherwise disguised. This conclusion arises from the changed language of s 243(4) and the addition of s 243(4A) to make clear that the

[26] Organised Crime and Anti-Corruption Legislation Bill 2014, Explanatory Note at 2.

prosecution do not have to prove any such intent. Article 6(1)(a)(i) of the UN Convention Against Organised Crime 2000 requires the criminalisation of the conversion of proceeds "for the purpose of concealing or disguising" or to help the person who committed the underlying crime to escape the consequences. However, Article 6(1)(a)(ii) requires that concealment also be a criminal matter. Moreover, Article 6(2) requires that "the widest range of predicate offences" be covered: as such, it is arguable that the provisions have been non-compliant with international obligations hitherto.

One additional and welcome piece of tidying up has occurred. There was a separate offence in relation to drugs offending in s 12B of the Misuse of Drugs Act 1975, but it has been repealed by the Misuse of Drugs Amendment Act 2015, thereby leaving just the general provision in the Crimes Act. Section 243(7) has been added to the latter to make clear that offending against the 1975 Act is covered.