



THE UNIVERSITY OF  
**SYDNEY**

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Senate Legal and Constitutional Affairs References Committee  
By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee Secretary,

**Re: Inquiry into the Anti-People Smuggling and Other Measures Bill 2010**

Please accept this answer to the question on notice asked of us by Senator Barnett during our appearance before the Senate Committee in Sydney on 16 April.

The question asked us to review the relevant offences in other jurisdictions which have criminalized people smuggling. Please find attached our review of the following comparable democratic countries with immigration programs: the United Kingdom, the United States, Canada, New Zealand, and the European Union. We also annex the text of the relevant offences for your convenience. We hope that this supplementary submission will be of assistance to the Committee.

Yours sincerely,

**Associate Professor Ben Saul**  
*Co-Director, Sydney Centre*

**Professor Mary Crock**  
*Professor of Public Law*

## **1. The fault element of the ‘supporting’ people smuggling offence (Anti-People Smuggling and Other Measures Bill 2010 s 73.3A)**

The offence of ‘supporting’ people smuggling in the Anti-People Smuggling and Other Measures Bill 2010 (‘the Bill’) (s 73.3A) does not require a specific or ulterior intent that the support be given for the purpose of people smuggling, nor does it require that a person is reckless, that is, aware of a substantial risk, that people smuggling may occur. In this respect this offence in the Bill departs from the approaches commonly taken elsewhere, as below.

### **1.1 Canada**

Section 117(1) of the *Immigration and Refugee Protection Act 2001* (Can) (see Appendix A) makes it an offence for a person to ‘knowingly’ organise, induce, aid or abet the entry of an illegal entrant into Canada. Accordingly, a person providing money to another person would not violate s 117(1) if that money was ultimately used to procure an illegal entry into Canada if the provider did not know that it would be used for that purpose.

### **1.2 United States**

Section 1324(a)(1)(A) of the *United States Code* (see Appendix B) makes it an offence to (i) bring or attempt to bring to an alien into the United States knowing that they are an alien; or (ii) to encourage or induce an alien to enter the United States knowing that or with recklessness as to whether such entry would violate the law. The first offence may apply even if the alien has a lawful right to be in the US. The applicable penalties are increased where life is endangered or people are brought to the US for profit. Section 1324(a)(1)(A)(v)(II) makes it an offence to aid or abet the commission of those acts.

### **1.3 European Union**

Article 21 of the *2005 Council of Europe Convention against Trafficking in Human Beings* (see Appendix C), which entered into force in 2008, requires States to criminalise aiding or abetting the trafficking of human beings, where such conduct is committed intentionally. The support must accordingly be given for the purpose of facilitating people smuggling.

### **1.4 United Kingdom**

Section 134 of the *Nationality, Immigration and Asylum Act 2002* (UK) is substituted for section 25 of the *Immigration Act 1971* (UK) (see Appendix D). The new s 25(1) makes it an offence for a person to facilitate the commission of a breach of immigration law if the person ‘knows or had reasonable cause for believing’ that the act would constitute such a breach. There must be either subjective fault (the person committing the act actually knew that it would constitute a breach) or objective fault (the person reasonably should have known that their act would constitute a breach). Similarly, the new s 25A(1) makes it an offence to knowingly and for gain facilitate the arrival of an asylum seeker in the United Kingdom.

### **1.5 New Zealand**

We are not aware of offences equivalent to the Bill’s ‘supporting’ people smuggling offence.

## **2. Changes to the offence of people smuggling (*Criminal Code Act 1995* (Cth) s 73, *Migration Act 1958* (Cth) s 233B)**

The Bill imposes absolute liability on persons who bring illegal entrants into Australia. This amendment means that the offence is made out irrespective of whether such persons bring the illegal entrants into Australia for financial gain (amending s 73.1(d) of the *Criminal Code*), and of whether they knew that the illegal entrants were, in fact, illegal rather than legal entrants (amending s 73.2 of the *Criminal Code* and s 233B of the *Migration Act*). A penalty of up to 10 years imprisonment may result even where the conduct was not for profit. There is no exception or defence for those who facilitate entry for humanitarian purposes.

### **2.1 *Canada***

Section 117(1) of the *Immigration and Refugee Protection Act 2001* (Can) (see Appendix A) makes it an offence for a person to ‘knowingly’ organise, induce, aid or abet the entry of one or more persons who are not in possession of a visa, passport or other document authorising entry. This provision thus requires that the offender knows of the alien’s illegal status.

The offence does not require that the illegal entry be facilitated for financial benefit. Section 121 does, however, stipulate that the fact that the offence was committed for profit (whether or not any profit was realised) is an aggravating factor which increases the penalty.

### **2.2 *United States***

Section 1324(a)(1)(A) of the *United States Code* (see Appendix B) makes it an offence to (i) bring or attempt to bring to an alien into the United States knowing that they are an alien; or (ii) to encourage or induce an alien to enter the United States knowing or with recklessness as to whether such entry would violate the law.

A person can be convicted of this offence irrespective of whether they facilitated an illegal entry for financial reward. Section 1324(a)(1)(B)(i), however, recognises the pursuit of financial gain as an aggravating factor: where the offence was committed for the purpose of commercial advantage or private financial gain, the length of possible imprisonment is extended from five to 10 years. (Section 1324(a)(4) similarly provides that a prison sentence may be increased by up to 10 years if a person facilitated an illegal entry as part of an ongoing commercial enterprise.)

### **2.3 *European Union***

Article 1(1)(a) of the *Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence* (see Appendix E) requires states to make it an offence for a person to intentionally assist another person who is not a national of a member state to enter the territory of a member state in breach of that state’s laws. The intention appears to require knowledge that the entry would breach the other state’s laws.

There is no requirement that the assistance be rendered for financial gain. Article 1(2) permits states to implement a discretionary exception for where the purpose of the assistance is humanitarian. This exception could apply to, for example, ship captains who rescue shipwrecked persons on the high seas and bring them into a member state’s territory.

The *Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence* (see Appendix F) also makes relevant the procurement of financial gain in facilitating illegal entry. Article 3 requires that if the infringements in article 1(1)(a) are committed for financial gain, they are punishable by custodial sentences of at least eight years if they were committed as an activity of a criminal organisation, or while endangering the lives of the illegal entrants.

#### **2.4 United Kingdom**

Section 134 of the *Nationality, Immigration and Asylum Act 2002* (UK) is substituted for section 25 of the *Immigration Act 1971* (UK) (see Appendix D). The new s 25(1) makes it an offence for a person to facilitate the commission of a breach of immigration law if the person ‘knows or had reasonable cause for believing’ that the act would constitute such a breach and that the illegal entrant is not a citizen of the European Union. The person committing the act must know that it would constitute a breach or reasonably should have known that their act would constitute a breach. Merely facilitating an illegal entry, without knowledge or reasonable cause for believing that the entry was illegal, is not an offence. The provision does not, however, require that the illegal entry was facilitated for profit.

The new s 25A(1) makes it an offence to knowingly and for gain facilitate the arrival of an asylum seeker in the United Kingdom with knowledge or reasonable cause to believe that the individual is an asylum seeker. Similarly to s 25, there must be either objective or subjective fault. Moreover, the offence requires that the facilitation of the entry of an asylum seeker must be ‘for gain’. Finally, s 25A(3) provides that s 25A(1) does not apply to anything done by a person acting on behalf of an organisation with aims to assist asylum seekers and does not charge for its services. There is thus an humanitarian exception to the offence.

The *Immigration and Asylum Act 1999* (UK) (see Appendix G) deals with persons who carry clandestine entrants into the United Kingdom. Section 32(7) stipulates that, subject to the defences provided in s 34, it is immaterial whether a person carrying clandestine entrants knew or suspected that the clandestine entrant was concealed in the transporter. (There is also no requirement of a financial motive.) Liability is not, however, absolute. The defences under s 34 include that the carrier was acting under duress, and that the carrier did not know or had no reasonable grounds for suspecting that a clandestine entrant may be concealed.

#### **2.5 New Zealand**

Section 343(b) of the *Immigration Act 2009* (NZ) (see Appendix H) makes it an offence for persons to aid, abet, incite, counsel or procure any other person to enter New Zealand illegally if the former knows that or is reckless as to whether the latter’s entry would be illegal. An accused does not commit an offence if he/she does not know and was not reckless as to whether the entry of a person would be illegal.

There is no requirement that the person facilitating an illegal *entry* seeks or obtains a financial benefit (though this is a requirement for the offence of facilitating a person unlawfully *remaining* in New Zealand, under s 343(a) of the *Immigration Act 2009* (NZ)).

## **Recommendations**

### **1. The primary offence of people smuggling should require that:**

- (a) the first person knew (or reasonably should have known) that the second person was not authorised to enter Australia;**
- (b) the first person organised the entry of the second person for the primary purpose of deriving a financial or material benefit.**

### **2. The offence of ‘supporting’ people smuggling should require that:**

- (a) the first person intentionally provided material support or resources with the specific intent to aid the receiver to commit people smuggling.**

### **3. The Bill should otherwise make clear that the offences do not apply:**

- (a) to conduct the primary purpose of which is humanitarian assistance rather than to obtain a financial or material benefit (including, for instance, rescue of life at sea consistent with the international law of the sea, and other assistance to vulnerable asylum seekers at risk of death, torture, persecution or other inhuman treatment);**
- (b) where the first person does not know or cannot reasonably expect that the second person’s entry would not be authorised by Australian law; and**
- (c) where the first person’s provision of resources is not intended to support people smuggling (or at least where the first person is not reckless as to that result).**

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## **Appendix A.**

### ***Immigration and Refugee Protection Act 2001 (Can), SC 2001, c 27***

#### Section 117. Organizing entry into Canada

(1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(a) on conviction on indictment

(i) for a first offence, to a fine of not more than \$500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than \$1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(b) on summary conviction, to a fine of not more than \$100,000 or to a term of imprisonment of not more than two years, or to both.

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than \$1,000,000 or to life imprisonment, or to both.

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

#### Section 121.

(1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(a) bodily harm or death occurred during the commission of the offence;

(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

(c) the commission of the offence was for profit, whether or not any profit was realized; and

(d) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) For the purposes of paragraph (1)(b), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.

## Appendix B.

### *United States Code, 8 USCS*

#### Section 1324. Bringing in and harboring certain aliens

##### (a) Criminal penalties

(1)

(A) Any person who—

(i) knowing that a person is an alien, brings to or attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)

(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts,

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs—

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of title 18) to, or places in jeopardy the life of, any person, be fined under title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under title 18, or both.

(C) It is not a violation of clauses <sup>[1]</sup> (ii) or (iii) of subparagraph (A), or of clause (iv) of subparagraph (A) except where a person encourages or induces an alien to come to or enter the United States, for a religious denomination having a bona fide nonprofit, religious organization in the United States, or the agents or officers of such denomination or organization, to encourage, invite, call, allow, or enable an alien who is present in the United States to perform the vocation of a minister or missionary for the denomination or organization in the United States as a volunteer who is not compensated as an employee, notwithstanding the provision of room, board, travel, medical assistance, and other basic living expenses, provided the minister or missionary has been a member of the denomination for at least one year.

(2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—

(A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or

(B) in the case of—

(i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,

(ii) an offense done for the purpose of commercial advantage or private financial gain, or

(iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry, be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

...

(4) In the case of a person who has brought aliens into the United States in violation of this subsection, the sentence otherwise provided for may be increased by up to 10 years if—

(A) the offense was part of an ongoing commercial organization or enterprise;

...



## **Appendix C.**

### ***Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16.V.2005***

#### Article 21. Attempt and aiding or abetting

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.
2. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention.

## Appendix D.

### *Nationality, Immigration and Asylum Act 2002 (UK) (c 41)*

Article 143. Assisting unlawful immigration, &c

The following shall be substituted for section 25 of the *Immigration Act 1971* (c 77) (assisting illegal entry)—

“25 Assisting unlawful immigration to member State

(1) A person commits an offence if he—

- (a) does an act which facilitates the commission of a breach of immigration law by an individual who is not a citizen of the European Union,
- (b) knows or has reasonable cause for believing that the act facilitates the commission of a breach of immigration law by the individual, and
- (c) knows or has reasonable cause for believing that the individual is not a citizen of the European Union.

(2) In subsection (1) “immigration law” means a law which has effect in a member State and which controls, in respect of some or all persons who are not nationals of the State, entitlement to—

- (a) enter the State,
- (b) transit across the State, or
- (c) be in the State.

(3) A document issued by the government of a member State certifying a matter of law in that State—

- (a) shall be admissible in proceedings for an offence under this section, and
- (b) shall be conclusive as to the matter certified.

(4) Subsection (1) applies to anything done—

- (a) in the United Kingdom,
- (b) outside the United Kingdom by an individual to whom subsection (5) applies, or
- (c) outside the United Kingdom by a body incorporated under the law of a part of the United Kingdom.

(5) This subsection applies to—

- (a) a British citizen,
- (b) a British overseas territories citizen,
- (c) a British National (Overseas),
- (d) a British Overseas citizen,
- (e) a person who is a British subject under the British Nationality Act 1981 (c. 61), and
- (f) a British protected person within the meaning of that Act.

(6) A person guilty of an offence under this section shall be liable—

- (a) on conviction on indictment, to imprisonment for a term not exceeding 14 years, to a fine or to both, or
- (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

25A Helping asylum-seeker to enter United Kingdom

(1) A person commits an offence if—

- (a) he knowingly and for gain facilitates the arrival in the United Kingdom of an individual, and

(b) he knows or has reasonable cause to believe that the individual is an asylum-seeker.

(2) In this section “asylum-seeker” means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom’s obligations under—

(a) the Refugee Convention (within the meaning given by section 167(1) of the Immigration and Asylum Act 1999 (c. 33) (interpretation)), or

(b) the Human Rights Convention (within the meaning given by that section).

(3) Subsection (1) does not apply to anything done by a person acting on behalf of an organisation which—

(a) aims to assist asylum-seekers, and

(b) does not charge for its services.

(4) Subsections (4) to (6) of section 25 apply for the purpose of the offence in subsection (1) of this section as they apply for the purpose of the offence in subsection (1) of that section.

...”

## **Appendix E.**

### ***Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence***

#### Article 1.

Each Member State shall adopt appropriate sanctions on:

- (a) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
- (b) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.

#### Article 2.

Any Member State may decide not to impose sanctions with regard to the behaviour defined in paragraph 1(a) by applying its national law and practice for cases where the aim of the behaviour is to provide humanitarian assistance to the person concerned.

## **Appendix F.**

### ***Council framework Decision 2002/946/JHA of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence***

#### Article 3.

Each Member State shall take the measures necessary to ensure that, when committed for financial gain, the infringements defined in Article 1(1)(a) and, to the extent relevant, Article 2(a) of Directive 2002/90/EC are punishable by custodial sentences with a maximum sentence of not less than eight years where they are committed in any of the following circumstances:

- the offence was committed as an activity of a criminal organisation as defined in Joint Action 98/733/JHA (1),
- the offence was committed while endangering the lives of the persons who are the subject of the offence.

## Appendix G.

### *Immigration and Asylum Act 1999 (UK) (c 33)*

#### Section 32. Penalty for carrying clandestine entrants

- (1) A person is a clandestine entrant if—
- (a) he arrives in the United Kingdom concealed in a vehicle, ship or aircraft,
  - (aa) he arrives in the United Kingdom concealed in a rail freight wagon,
  - (b) he passes, or attempts to pass, through immigration control concealed in a vehicle, or
  - (c) he arrives in the United Kingdom on a ship or aircraft, having embarked—
    - (i) concealed in a vehicle; and
    - (ii) at a time when the ship or aircraft was outside the United Kingdom,
- and claims, or indicates that he intends to seek, asylum in the United Kingdom or evades, or attempts to evade, immigration control.
- (2) The Secretary of State may require a person who is responsible for a clandestine entrant to pay—
- (a) a penalty in respect of the clandestine entrant;
  - (b) a penalty in respect of any person who was concealed with the clandestine entrant in the same transporter.
- (2A) In imposing a penalty under subsection (2) the Secretary of State—
- (a) must specify an amount which does not exceed the maximum prescribed for the purpose of this paragraph,
  - (b) may, in respect of a clandestine entrant or a concealed person, impose separate penalties on more than one of the persons responsible for the clandestine entrant, and
  - (c) may not impose penalties in respect of a clandestine entrant or a concealed person which amount in aggregate to more than the maximum prescribed for the purpose of this paragraph.
- (3) A penalty imposed under this section must be paid to the Secretary of State before the end of the prescribed period.
- (4) Where a penalty is imposed under subsection (2) on the driver of a vehicle who is an employee of the vehicle's owner or hirer—
- (a) the employee and the employer shall be jointly and severally liable for the penalty imposed on the driver (irrespective of whether a penalty is also imposed on the employer), and
  - (b) a provision of this Part about notification, objection or appeal shall have effect as if the penalty imposed on the driver were also imposed on the employer (irrespective of whether a penalty is also imposed on the employer in his capacity as the owner or hirer of the vehicle).
- (4A) In the case of a detached trailer, subsection (4) shall have effect as if a reference to the driver were a reference to the operator.]
- (5) In the case of a clandestine entrant to whom subsection (1)(a) applies, each of the following is a responsible person—
- (a) if the transporter is a ship or aircraft, the owner [F4and] captain;
  - (b) if it is a vehicle (but not a detached trailer), the owner, hirer [F5and] driver of the vehicle;
  - (c) if it is a detached trailer, the owner, hirer [F5and] operator of the trailer.
- (5A) In the case of a clandestine entrant to whom subsection (1)(aa) applies, the responsible person is—

- (a) where the entrant arrived concealed in a freight train, the train operator who, at the train's last scheduled stop before arrival in the United Kingdom, was responsible for certifying it as fit to travel to the United Kingdom, or
  - (b) where the entrant arrived concealed in a freight shuttle wagon, the operator of the shuttle-train of which the wagon formed part.
- (6) In the case of a clandestine entrant to whom subsection (1)(b) or (c) applies, each of the following is a responsible person—
- (a) if the transporter is a detached trailer, the owner, hirer [F7and] operator of the trailer;
  - (b) if it is not, the owner, hirer [F7and] driver of the vehicle.
- (6A) Where a person falls within the definition of responsible person in more than one capacity, a separate penalty may be imposed on him under subsection (2) in respect of each capacity.
- (7) Subject to any defence provided by section 34, it is immaterial whether a responsible person knew or suspected—
- (a) that the clandestine entrant was concealed in the transporter; or
  - (b) that there were one or more other persons concealed with the clandestine entrant in the same transporter.
- (8) Subsection (9) applies if a transporter (“the carried transporter”) is itself being carried in or on another transporter.
- (9) If a person is concealed in the carried transporter, the question whether any other person is concealed with that person in the same transporter is to be determined by reference to the carried transporter and not by reference to the transporter in or on which it is carried.
- (10) “Immigration control” means United Kingdom immigration control and includes any United Kingdom immigration control operated in a prescribed control zone outside the United Kingdom.

#### Section 34. Defences to claim that penalty is due under section 32

- (1) A person (“the carrier”) shall not be liable to the imposition of a penalty under section 32(2) if he has a defence under this section.
- (2) It is a defence for the carrier to show that he, or an employee of his who was directly responsible for allowing the clandestine entrant to be concealed, was acting under duress.
- (3) It is also a defence for the carrier to show that—
- (a) he did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed in the transporter;
  - (b) an effective system for preventing the carriage of clandestine entrants was in operation in relation to the transporter; and
  - (c) on the occasion in question the person or persons responsible for operating that system did so properly.
- (3A) It is also a defence for the carrier to show that—
- (a) he knew or suspected that a clandestine entrant was or might be concealed in a rail freight wagon, having boarded after the wagon began its journey to the United Kingdom;
  - (b) he could not stop the train or shuttle-train of which the wagon formed part without endangering safety;
  - (c) an effective system for preventing the carriage of clandestine entrants was in operation in relation to the train or shuttle-train; and
  - (d) on the occasion in question the person or persons responsible for operating the system did so properly.]
- (4) In determining, for the purposes of this section, whether a particular system is effective, regard is to be had to the code of practice issued by the Secretary of State under section 33.

(6) Where a person has a defence under subsection (2) in respect of a clandestine entrant, every other responsible person in respect of the clandestine entrant is also entitled to the benefit of the defence.



## **Appendix H.**

### ***Immigration Act 2009 (NZ)***

#### Section 343. Aiding and abetting

(1) Every person commits an offence against this Act who,—

- (a) for a material benefit, aids, abets, incites, counsels, or procures any other person to be or to remain unlawfully in New Zealand or to breach any condition of a visa granted to the other person; or
- (b) whether in or outside New Zealand, and whether or not the other person in fact enters New Zealand, aids, abets, incites, counsels, or procures any other person to unlawfully enter New Zealand (by arriving in New Zealand in a manner that does not comply with section 103 or by arriving in New Zealand without holding a visa where the other person requires a visa to travel to New Zealand),—
  - (i) knowing that the other person's entry into New Zealand is or would be unlawful; or
  - (ii) being reckless as to whether the other person's entry into New Zealand is or would be unlawful; or
- (c) whether in or outside New Zealand, aids, abets, incites, counsels, or procures any other person to complete a document in a manner that the person aiding or assisting knows to be false or misleading in any particular, being a document required for the purposes of—
  - (i) section 98 or 103; or
  - (ii) any application or request (whether by that person or by another person) for a visa or entry permission, or any expression of interest in a visa; or
  - (iii) any request for variation, waiver, or cancellation of the conditions of a visa; or
  - (iv) any appeal or application in the nature of an appeal to the Minister or the Tribunal; or
- (d) aids, abets, incites, counsels, or procures any other person to be or to remain unlawfully in New Zealand or to breach any condition of a visa granted to the other person under this Act.

(2) In subsection (1)(a), for a material benefit has the same meaning as in section 2(1) of the Crimes Act 1961.