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**An Bille um Cheartas Coiriúil (Smuigleáil ar Dhaoine),  
2021**

**Criminal Justice (Smuggling of Persons) Bill 2021**

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*Meabhrán Míniúcháin agus Airgeadais  
Explanatory and Financial Memorandum*

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**AN BILLE UM CHEARTAS COIRIÚIL (SMUIGLEÁIL AR  
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**CRIMINAL JUSTICE (SMUGGLING OF PERSONS) BILL 2021**

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**EXPLANATORY AND FINANCIAL MEMORANDUM**

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**Main Purpose of the Bill**

The purpose of the Bill is to strengthen the criminal justice aspects of the State's regime in respect of the smuggling of persons, reflecting the provisions of three international instruments against people smuggling:

- EU Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence;
- EU Framework Decision 2002/946/JHA on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence; and
- UN Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (2000).

People smuggling is the facilitated, irregular movement of people across borders for a financial or other benefit. People smuggling is distinct from human trafficking, in that smuggling occurs with the consent of the person, while trafficking involves the recruitment, transportation and exploitation of a victim.

The legislation provides for the repeal and replacement of the provisions in respect of people smuggling contained in the Illegal Immigrants (Trafficking) Act 2000. Notably, it includes:

- the broadening of the scope of conduct encompassed by people smuggling offences to include facilitating transit or presence, as well as entry
- the replacement of the 'otherwise than for gain' exception to the offence with a 'humanitarian assistance' defence, for which the burden is on the accused
- the extension of the geographical scope of the offences to cover smuggling into EU Member States and parties to the UN Protocol
- the extension of extra-territorial jurisdiction
- incidental matters including in respect of enforcement powers

The transposition of the EU instruments is required for Ireland's compliance with its obligations under the Schengen acquis. It is required for Ireland's continuing access to the Schengen Information System (SIS II), which allows national border control, customs and police authorities

responsible for checks at the external Schengen border as well as within the Schengen Area to circulate alerts regarding wanted or missing persons and objects such as stolen vehicles and documents.

Transposition of the EU instruments is required by 31 December 2021 as a condition of continued SIS II access.

## **Provisions of the Bill**

### **PART 1**

#### **PRELIMINARY**

##### **Section 1: Short title and commencement**

*Section 1* is a standard provision, providing for the short title and commencement.

##### **Section 2: Interpretation**

*Section 2* is a standard provision, outlining definitions used in the Act.

It defines ‘designated state’ to include Member States of the EU, the UK, states that are participating or cooperating parties to the Schengen Agreement and states that are party to the UN Protocol. The definition of designated state is used to determine the geographical scope of the offences in *sections 7* and *8*.

##### **Section 3: Repeals**

*Section 3* is a standard provision containing Acts to be repealed in whole or in part by the provisions of the Act.

##### **Section 4: Expenses**

*Section 4* is a standard provision in respect of expenses incurred in the operation of the Act.

### **PART 2**

#### **SMUGGLING OF PERSONS**

##### **Section 5: Interpretation (Part 2)**

*Section 5* provides definitions for the purpose of Part 2.

In particular, it defines ‘specified provision’ to include *sections 4, 5* and *6* of the Immigration Act 2004, and such provisions as may be ordered under *section 28*. This definition is used to determine which provisions of the immigration law of the State it is an offence to facilitate the breach of.

*Subsection (2)* clarifies for the avoidance of doubt that a person does not ‘assist the presence’ of another person in a State or designated state by providing goods or services to that other person in the ordinary course of his or her business, trade or profession.

##### **Section 6: Assisting unlawful entry into, transit across or presence in State**

*Section 6* provides for the offence of assisting unlawful entry into, transit across or presence in the State.

*Subsection (1)* provides that a person commits such an offence where he or she intentionally assists (which includes procures, organises or facilitates) entry into, transit across or presence in, the State of another person, where:

- the entry, transit or presence of the other person is in breach of a specified provision; and

- the perpetrator knows or has reasonable cause to believe that the entry, transit or presence of the other person is in breach of a specified provision.

‘Specified provision’ is defined in *section 5* and includes the relevant provisions of Irish law governing entry into and presence in the State.

As set out in *section 10*, a person convicted of an offence under this section is liable:

- on summary conviction, to a class A fine and/or imprisonment for up to one year;
- on conviction on indictment, to a fine and/or imprisonment for up to ten years.

*Section 9(1)* provides a defence for a person charged with an offence under this section to prove on the balance of probabilities that the conduct was engaged in:

- (a) in order to provide, in the course of his or her work on behalf of a bona fide organisation, assistance to a person seeking international protection in the State or equivalent status in another state if the purposes of that organisation include giving assistance without charge to persons seeking such protection or status; or
- (b) for the purpose of providing humanitarian assistance, otherwise than for the purpose of obtaining, directly or indirectly, a financial or material benefit.

The definitional provision noted under *section 5(2)* above applies to this offence, to clarify for the avoidance of doubt that a person does not ‘assist the presence’ of another person in the State or a designated state by providing goods or services to that other person in the ordinary course of his or her business, trade or profession.

A person does not commit an offence by virtue of being smuggled. The primary offence under this section must be in respect of another person, while *section 9(2)* provides that a person does not commit an offence by aiding, abetting, counselling or procuring his or her own smuggling.

*Subsections (2) and (3)* provide for extra-territorial jurisdiction in respect of the offences. *Subsection (2)* provides that a person commits an offence by engaging in conduct outside the State which would constitute an offence under *subsection (1)* had it occurred inside the State. Similarly, *subsection (3)* provides that aiding, abetting, counselling, procuring or attempting an offence under *subsections (1) or (2)* outside the State constitutes an offence.

### **Section 7: Assisting unlawful entry into, transit across or presence in designated state**

*Section 7* provides for the offence of assisting unlawful entry into, transit across or presence into a designated state.

*Subsection (1)* makes provision for the offence in respect of designated states. The elements and penalties applicable for this offence are similar to those of an offence in respect of the State under *section 6(1)*, except that the *section 7* offences relate to entry into, transit across or presence in, the designated state rather than the State, and the relevant immigration law is that of the designated state rather than of the State.

More limited extra-territorial jurisdiction applies in respect of offences under *section 7* than under *section 6*. *Subsections (2), (3) and (4)* provide for extra-territorial jurisdiction where the conduct—

- occurs on board an Irish ship;

- occurs on an aircraft registered in the State;
- is engaged in by a person who is an Irish citizen or a person ordinarily resident in the State;
- is engaged in for the benefit of a company or any other body established under the law of the State;
- occurs on board a ship registered in a Protocol state (subject to the proviso noted below);
- occurs on board a ship not registered in any country or territory;
- constitutes an offence for which the person would be liable to extradition or surrender but such extradition or surrender has been refused.

While extra-territorial jurisdiction extends to Protocol ships under this section, proceedings in relation to conduct occurring on a Protocol ship outside Irish waters are limited by *section 17(3)* and may apply only where the enforcement powers of Irish authorities have been exercised.

*Subsection (5)* makes provision for the definition of ‘ordinarily resident’ in the context of the offence.

**Section 8: Provision etc. of fraudulent travel or identity document for purpose of assisting entry into, travel across, or presence in State or designated state**

*Section 8* provides for offences in respect of fraudulent travel or identity documents for people smuggling.

*Subsections (1)* and *(4)* provide that a person is guilty of an offence where he or she produces, procures, provides, possesses or controls such a document with the intention that it will be used for people smuggling.

*Subsections (2), (3), (5), (6)* and *(7)* provide for extra-territorial jurisdiction in respect of the offences in line with that of *sections 6* and *7*.

**Section 9: Offences under Part 2: further provisions**

*Section 9* makes further provisions in respect of the offences under *sections 6, 7* and *8*.

*Subsection (1)* provides a defence for a person charged with an offence under this section to prove on the balance of probabilities that the conduct was engaged in:

- (a) in order to provide, in the course of his or her work on behalf of a bona fide organisation, assistance to a person seeking international protection in the State or equivalent status in another state if the purposes of that organisation include giving assistance without charge to persons seeking such protection or status, or
- (b) for the purpose of providing humanitarian assistance, otherwise than for the purpose of obtaining, directly or indirectly, a financial or material benefit.

*Subsection (2)* excludes a person from the commission of an offence by the aiding, abetting, counselling or procuring of his or her own smuggling.

**Section 10: Penalties (Part 2)**

*Section 10* provides for the penalties to be imposed for offences under *sections 6, 7* and *8*.

*Subsection (1)* provides that a person committing such an offence is liable:

- on summary conviction, to a class A fine and/or imprisonment for up to one year
- on conviction on indictment, to a fine and/or imprisonment for up to ten years

*Subsections (2) and (3) provide for certain aggravating factors to be considered and to increase the sentence to be imposed.*

## **PART 3**

### **ENFORCEMENT MEASURES AGAINST SMUGGLING OF PERSONS**

#### **Section 11: Interpretation (Part 3)**

*Section 11 provides the definitions which apply to Part 3.*

#### **Section 12: Exercise of enforcement powers in respect of ships**

*Section 12 sets out the conditions under which the enforcement powers contained in section 14 may be used. Such powers apply where an enforcement officer has reasonable grounds to suspect that an offence under section 6 or 7 is being committed. The enforcement powers may be used in respect of any ship within the territorial seas, or in respect of ships outside the territorial seas where the authorisation conditions are met.*

#### **Section 13: Protocol state powers and Irish ships**

*Section 13 provides for the Minister for Foreign Affairs to give authorisation for a Protocol State to exercise enforcement powers corresponding to those outlined in section 14 in respect of an Irish ship that is suspected of participating in the smuggling of persons.*

#### **Section 14: Enforcement powers in respect of ships**

*Section 14 provides for the powers that may be exercised in respect of ships where reasonable grounds exist to suspect that a people smuggling offence is being committed. Such powers are exercised by enforcement officers (defined under section 11 as including members of the Garda Síochána, customs officers, relevant members of the Naval Service and Defence Forces, and immigration officers).*

*Subsection (1) sets out the primary powers, including those to stop, board, search and detain the ship, and to search a person on the ship or to require a person to give information concerning himself or herself, the ship or other persons or things on the ship.*

*Subsection (2) provides that where an enforcement officer suspects a people smuggling offence has been committed, he or she may arrest persons suspected of an offence, and seize anything on the ship which appears to be evidence.*

The remaining subsections make provision for related and incidental matters in respect of the enforcement powers.

#### **Section 15: Power to detain vehicle**

*Section 15 provides powers to members of the Garda Síochána to detain vehicles where a person has been arrested for an offence under section 6 or 7 and it is suspected that the vehicle has been used for the purpose of committing the offence.*

#### **Section 16: Forfeiture of ship, aircraft or other vehicle**

*Section 16 provides powers to the court, where a person is convicted on indictment of an offence under section 6 or 7, to order the forfeiture of any ship or other vehicle used in the commission of the offence.*

## PART 4

### MISCELLANEOUS MATTERS

#### **Section 17: Proceedings related to offences committed outside State or on a ship**

*Section 17* contains provisions in respect of proceedings for offences committed outside the State or on board a ship. *Subsection (1)* provides that such proceedings may be taken in any place in the State. *Subsection (2)* provides that proceedings under the provisions set out may only be taken with the consent of the Director of Public Prosecutions. *Subsection (3)* limits the taking of proceedings in respect of offences committed outside the territorial waters on a Protocol ship under *sections 6, 7 and 14* to where the enforcement powers under *section 14* have been used.

#### **Section 18: Evidence in proceedings under Act**

*Section 18* provides for evidence in respect of certain matters to be given by certificate. These matters include evidence in relation to whether:

- a person is an Irish citizen;
- the entry, transit or presence of a person in a designated state is in breach of the immigration law of that state;
- authorisation was given by the Minister for Foreign Affairs for the exercise of enforcement powers;
- a state is a designated state.

#### **Section 19: Double jeopardy**

*Section 19* makes provision to avoid double jeopardy.

#### **Section 20: Offences by bodies corporate, etc.**

*Section 20* makes provision for liability of corporate bodies.

## PART 5

### AMENDMENTS TO OTHER ENACTMENTS

#### **Section 21: Amendment of the Criminal Law Act 1976**

*Section 21* amends section 8 of the Criminal Law Act 1976 to apply the search powers under that section to the offences under *sections 6, 7 and 8*.

#### **Section 22: Amendment of Schedule to Bail Act 1997**

*Section 22* deletes paragraph 27A of the Schedule of Bail Act 1997 and inserts the offences provided for in sections 6, 7 and 8 of the present Act into the Schedule. The effect of these changes is to replace the offence under section 2 of the Illegal Immigrants (Trafficking) Act 2000 (which is being repealed) with the offences under *sections 6, 7 and 8* of this Act in the definition of ‘serious offence’ under the Bail Act.

#### **Section 23: Amendment of Road Transport Act 2011**

*Section 23* amends section 2 of the Road Transport Act 2011 to include offences under *sections 6, 7 and 8* among those for which convictions must be notified to the Minister under that Act.

#### **Section 24: Amendment of Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012**

*Section 24* of the Bill amends section 12 of the Road Safety Authority (Commercial Vehicle Roadworthiness) Act 2012 to include offences under *section 6, 7 or 8* among those for which convictions must be notified to the Minister under that Act.



**Section 25: Amendment of Schedule to Taxi Regulation Act 2013**

*Section 25* amends Part 2 of the Schedule of the Taxi Regulation Act 2013, to include the offences provided for in *sections 6, 7 and 8* among those for which a disqualification for a period of time may be imposed.

**Section 26: Amendment of European Communities (Communication of Passenger Data) Regulations 2011**

*Section 26* amends the European Communities (Communication of Passenger Data) Regulations 2011 to refer to this Act in the definitions of ‘immigration offence’ and ‘smuggling’.

**Section 27: Amendment of European Union (Passenger Name Record Data) Regulations 2018**

*Section 27* amends Schedule 2 of the European Union (Passenger Name Record Data) Regulations 2018, which defines ‘serious crime’ for the purposes of those Regulations, to include offences under *sections 6, 7, and 8* of this Act.

**PART 6**

**MISCELLANEOUS**

**Section 28: Specified provision**

*Section 28* provides for the Minister, under certain circumstances, to designate provisions as ‘specified provisions’ for the purposes of this Act.

**Section 29: Transitional arrangements**

This section provides for transitional measures in respect of certain provisions of the Illegal Immigrants (Trafficking) Act 2000.

**Financial Implications**

The Bill is not expected to give rise to significant costs to the Exchequer.

*An Roinn Dlí*

Lúnasa, 2021.