



Law Society
of Scotland

Written Evidence

Abortion Services (Safe Access Zones) (Scotland) Bill

December 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Health, Social Care and Sport Committee of the Scottish Parliament's structured call for evidence¹ on the Abortion Services (Safe Access Zones) (Scotland) Bill ("the Bill").² We have the following comments to put forward for consideration.

Questions in the structured call for evidence

Do you agree with the purpose of the Bill?

We note that the Policy Memorandum states that the aims of the Bill are to:

- protect access to abortion services across Scotland;
- ensure that people can access abortion services without fear of, and free from, intimidation, harassment or public judgement;
- ensure that at the point of access users are protected from attempts to influence or persuade them in relation to their decision to access services;
- take a preventative approach so all abortion services are covered, including those that have not experienced protests;
- ensure that providers or facilitators of the service are protected from attempts to influence their decision to provide or facilitate abortion related services at their place of work or where those services are delivered;
- prevent providers or facilitators from being reluctant to provide or facilitate services for fear of such protests occurring.³

1 <https://yourviews.parliament.scot/health/abortion-services-saz-bill/>

2 <https://www.parliament.scot/bills-and-laws/bills/abortion-services-safe-access-zones-scotland-bill>

3 <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum.pdf>, para 25.

The Policy Memorandum goes on to state that “Importantly, the aim is not to prevent the expression of opposition to the provision of abortion services or restrict the expression of religious views on abortion. It is only to prevent their expression in limited areas to the extent necessary to achieve the overarching aims.”⁴

Our approach to policy issues is directed by our statutory aims under the Solicitors (Scotland) Act 1980, namely to represent the interests of the solicitors’ profession in Scotland and the interests of the public in relation to that profession, and by the regulatory objectives of the Legal Services (Scotland) Act 2010, namely:

- supporting the constitutional principle of the rule of law and the interests of justice
- protecting and promoting the interests of consumers and the public interest generally
- promoting access to justice and competition in the provision of legal services
- promoting an independent, strong, varied and effective legal profession
- encouraging equal opportunities within the legal profession
- and promoting and maintaining adherence to professional principles

Integral to the constitutional principle of the rule of law is that the law must afford adequate protection of fundamental human rights. Accessing abortion within the framework of the Abortion Act 1967 is lawful, and those seeking access to abortion services are entitled to respect for their right to family and private life under Article 8 of the European Convention on Human Rights (ECHR). There are individuals and groups in Scotland who hold strong anti-abortion views, some of whom choose to gather outside healthcare sites which provide abortion to express these views. The right to freedom of thought, belief and religion is protected by Article 9 ECHR. The ECHR also protects the right to freedom of expression (Article 10), and freedom of assembly (Article 11). Any attempt to introduce and enforce safe access zones is therefore likely to engage a range of fundamental human rights. Legislation in this area must seek to balance these competing rights in line with established domestic and international human rights principles.

The Article 9 right to freedom of thought, belief and religion is a qualified right. Whilst public authorities cannot interfere with an individual’s right to hold or change their beliefs, there are some situations in which public authorities can interfere with the right to manifest those beliefs as long as the authority can show that its action is lawful, necessary (i.e. a ‘legitimate aim’) and proportionate in order to protect:

- public safety
- public order
- health or morals, and
- the rights and freedoms of other people.

⁴ Ibid, para 26

Action is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned.⁵ Articles 10 and 11 ECHR are also qualified rights.

Factors that should be weighed in the balance may include:

- The risk of adverse health consequences, complications and even death for a clinic-user if an abortion is delayed.
- An increase in the impact of stress and damage to mental health. In *Dulgheriu*⁶ the Court of Appeal referred to the 'significant emotional and psychological damage' endured by clinic-users who had been exposed to the demonstrations. The objectively likely emotional and mental robustness of those against whom the protests are directed should be considered. Whilst graphic language and images may be a feature of other types of protests, for example those directed at those engaged in fox hunting, protests aimed (solely or partly) at people accessing abortion services may be more likely to cause significant distress.
- The Article 8 rights of those accessing services, and those who work on the premises (e.g. health care professionals). Article 8 of the Convention protects the right to 'access health care in conditions of privacy and dignity, and the right to pursue employment' (*Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32, para 115), and under this Article states are under a positive obligation to enable access to lawful abortion care.⁷ Notably, in *Dulgheriu*, the lawfulness of a Public Space Protection Order was upheld on the basis that the Article 8 rights of women accessing the centre outweighed the rights of the protesters under Articles 9, 10 and 11.
- The right to religious freedoms of individuals. We note that the Policy Memorandum acknowledges that the approach adopted by the Bill "represents the most significant interference with ECHR rights under Articles 9, 10 and 11"⁸ and that, by establishing an automatic zone around all premises where abortion services are provided, the Bill does go further than the approach established in the Abortion Services (Safe Access Zones) Act (Northern Ireland) 2023. In the case of *Reverend Dr William JU Philip and others v Scottish Ministers* [2021] CSOH 32, the Court of Session held that regulations closing churches for worship were beyond the devolved competence of Scottish Ministers on the basis that the regulations constituted a disproportionate interference with Article 9 rights.

It is important to note that the UK Supreme Court held in December 2022⁹ that clause 5(2)(a) of the Abortion (Safe Access Zones) (Northern Ireland) Bill, which creates an offence "to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of – (a) influencing a protected person, whether directly or indirectly", is compatible with the convention rights of anti-abortion protesters

⁵ For a detailed discussion of proportionality considerations in the context of buffer zones, see: Fixed Buffer Zone Legislation: A Proportionate Response to Demonstrations Outside Abortion Clinics in England and Wales? | Medical Law Review | Oxford Academic (oup.com)

⁶ *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490

⁷ *P and S v Poland* (2012) 129 BMLR 120.

⁸ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum.pdf>, para 111

⁹ *Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill* [2022] UKSC 32

(specifically Articles 9, 10 and 11). The court held that these restrictions pursue a ‘legitimate aim’, ‘to ensure that women have access to premises at which treatment or advice concerning the lawful termination of pregnancy is provided, under conditions which respect their privacy and their dignity, thereby enabling them to access the health care they require, and promoting public health.’¹⁰ With regards to the necessity of the clause they also noted ‘a second purpose is to ensure that the staff who work at those premises are also able to access their place of employment without intimidation, harassment or abuse, thereby ensuring that the health care services in question continue to be provided’.¹¹ With regards to proportionality, the Court held that interference with the rights of anti-abortion protesters is proportionate, noting that ‘there is a pressing social need for such restrictions to be imposed, in order to protect the rights of women seeking treatment or advice, in particular, and also in the interests of the wider community, including other patients and the staff of clinics and hospitals.’¹² The Abortion (Safe Access Zones) (Northern Ireland) Act received Royal Assent on 6 February 2023.¹³

We do not seek to adopt a policy position on the matter of safe access zones. However, it is important that any legislation in this area is robust and affords adequate protection to the fundamental rights of all involved.

Do you agree that the Safe Access Zone radius around protected premises should be set at 200 metres?

Healthcare providers and others will be best placed to comment on the practical aspects of the proposed safe access zones.

Ideally, the size for safe access zones should be consistent across Scotland, but as we note below there should be scope for variation where appropriate.

Moreover, the size of safe access zones should be informed by evidence from other jurisdictions which have successfully implemented similar arrangements. In the *Reference by the Attorney General for Northern Ireland*, the Supreme Court analysed whether the establishment of similar zones in Northern Ireland contained a proportionate restriction of the rights of the protesters. Although the provision in that case set the radius around protected premises at 100 metres from each entrance and could be extended up to 150 metres if required, the Court stated: “A zone of up to 250 metres does not represent an unjustifiable restriction of the rights of protesters, when they remain free to protest anywhere else they please, and when the rights of the patients and staff are also taken into consideration.”

It should be clear to protestors and others where the boundaries of the safe access zone are located.

¹⁰ Ibid, para 114

¹¹ Ibid, para 114.

¹² Ibid, para 154.

¹³ Abortion (Safe Access Zones) (Northern Ireland) Act 2023

What is your view on the proposed processes within the Bill to extend or reduce Safe Access Zone distances around protected premises in the event that 200m is not appropriate?

Section 7 of the bill contemplates that Scottish Ministers can extend the radius of the safe access zones as a result of an application made by the operator of the protected premises or may of their own accord extend the distances when “the protected premises does not adequately protect persons who are accessing, providing or facilitating the provision of abortion services at the protected premises from any act of a type mentioned in section 4(1) or 5(1).” The bill does not contemplate any limit for the extension of the safe access zones.

Given the precedent set by the *Reference by the Attorney General for Northern Ireland*, we note that section 4(3) of the Abortion (Safe Access Zones) (Northern Ireland) Bill (and the resulting Act) allows for extension of safe access zones (from 100m to 150m) should the operator of protected premises find that the area is not adequate to afford safe access to the premises. We also note that the same Act does not have a provision for reduction.

We note that various factors including location may require the amendment of the radius of some safe access zones once in place, and as we note above healthcare providers and others will be best placed to comment on the practical aspects of the radius required. While any scope for unlimited extension of safe access zones may be open to challenge on the basis of proportionality, scope for reduction of safe access zones by Scottish Ministers under section 8(1) of the Bill has the potential to undermine its purpose and aim. We therefore suggest that reasonable limits are placed on both the minimum and maximum radius of safe access zones. The inclusion of a limit could be beneficial to the desirability of a uniform approach to the safe access zones as set out in the Policy Memorandum.¹⁴

Do you agree with the definition of “protected premises” outlined in the Bill and its accompanying documents?

The proposed definition of ‘protected premises’ and the scope to modify this definition under section 10 of the Bill are sensible.

¹⁴ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum.pdf>, para 32

Do you feel the criminal offences created by the Bill are proportionate in terms of the activities they cover?

As we stated in our response to the consultation,¹⁵ we support the creation of a specific criminal offence for breach of a safe access zone. The proposal to create a safe access zone within which it would be a criminal offence to engage in prohibited behaviour removes the need for the service user to report the matter to the police, to be able to identify the perpetrators, and for the prosecution to show that the behaviour was threatening or abusive for example. We also noted the need for the extent of the safe access zone and the type of behaviour prohibited to be made clear so that would-be protestors are made aware of the likely consequences of their actions.

As noted above, the UK Supreme Court recently held that legislation for safe access zones and associated criminal sanctions are proportionate (i.e. in accordance with the ECHR). In particular, it is worth drawing attention to the following quote from the judgment: ‘As regards the courts, there is no proportionality assessment required when a defendant is being tried for an offence under clause 5 [which creates the relevant offence under NI law]. That is because either the defendant’s conduct will not engage Articles 9 to 11, for example because it is violent, or, if rights under those Articles are engaged, the proportionality balance has been struck by the Bill itself.’¹⁶

We consider that the offence defined in section 4 of the Bill is clear enough to define the prohibited behaviours and their consequences.

However, we have some concerns with the definition of the offence in section 5. Doing an act that could be seen or heard by a user or provider in the protected premises could cover a wide range of activities in an indefinite perimeter. We are of the view that any restriction to convention rights should be clearly defined, in particular in cases such as this in which certain activities cannot be done in a specific zone. We consider that an objective and verifiable radius in which the forbidden activities are restricted is the key for considering the provision proportionate.

Do you feel that the penalty for offences related to the Bill is appropriate?

The penalties appear to be on a par with those imposed in other jurisdictions in the UK.

In our response to the consultation on the Bill proposal,¹⁷ we suggested that “there should be no difference between the maximum penalty for a first and subsequent offence. Sentencing powers should be consistent with other criminal offences in Scotland. The court can exercise its powers to sentence first or subsequent offenders according to current law and guidelines”.

¹⁵ 22-08-11-hea-crim-equ-con-proposed-abortion-services-safe-access-zones-scotland-bill.pdf (lawscot.org.uk)

¹⁶ Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32, para 155

¹⁷ 22-08-11-hea-crim-equ-con-proposed-abortion-services-safe-access-zones-scotland-bill.pdf (lawscot.org.uk)

We are content that the Bill does not consider any penalty differentiation between first and subsequent offenders in either of the two new offences created in sections 4 and 5.

What are your views on the impact of the Bill upon the rights enshrined under Articles 8, 9, 10, and 11 of the European Convention on Human Rights?

See our response to question 1, above, and in particular our comments on the decision of the UK Supreme Court in Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32.

As stated above, any restriction on Article 8, 9, 10 and 11 rights requires a careful balancing exercise and it is important to recognise that, while restrictions on protest may be compatible with convention rights in one context, that may not be the case in other areas. The Bill should not be seen as setting a precedent for the wide-spread curtailment of protest, for example in relation to climate change or other issues.

Do you think that the Bill's intended policy outcomes could be achieved through another means, such as existing legislation?

In our response to the previous consultation, we recognised that the current legislative landscape in Scotland does not appear to have been effective in addressing protests outside healthcare sites which provide abortion services.

Do you have any further comments about the Bill?

We note that the Bill as introduced does not set out any principles or factors which should be considered in determining the boundaries of safe access zones, nor does it specify the competing rights which must be taken into account. Whilst the Bill makes provision for Ministerial Guidance (section 11) “in relation to protected premises (or proposed protected premises) and the establishment, extension, reduction or cessation of safe access zones for protected premises”, it may be appropriate for the overarching principles to be included on the face of the Bill to assist with the proper balancing exercise required for ECHR compliance.

In our response to the previous consultation, we suggested that the Bill should make provision for sunset clauses for safe access zones. We have not repeated these comments in this submission, on the basis that the Bill includes provision for cessation of safe access zones and for both the extension and reduction of safe access zones where the Scottish Ministers consider this appropriate. However, there may be merit in providing for a post-implementation review of the legislation after it has been in operation for an appropriate period of time.

BUSINESS

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