

## Stage 3 Briefing

# Abortion Services (Safe Access Zones) (Scotland) Bill

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 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.

The Abortion Services (Safe Access Zones)(Scotland) Bill<sup>1</sup> ('the Bill') was introduced as a Member's Bill by Gillian MacKay MSP on 5 October 2023. We responded to a consultation on the proposed Bill in August 2022.<sup>2</sup> We submitted written evidence to the lead committee in December 2023.<sup>3</sup> We provided oral evidence as part of the committee's Stage 1 consideration of the bill on 12 March 2024.<sup>4</sup> We also wrote to the committee following our evidence session on 18 March 2024.<sup>5</sup> The Health, Social Care and Sport Committee's stage 1 Report on the Abortion Services (Safe Access Zones)(Scotland) Bill ('the Stage 1 Report')<sup>6</sup> was published on 22 April 2024. We issued a briefing ahead of the Stage 1 debate on 30 April 2024.<sup>7</sup>

We welcome the opportunity to consider and provide comment on the Bill as amended at Stage 2<sup>8</sup> ahead of the Stage 3 debate scheduled for 12 June 2024.

## General remarks

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;

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<sup>1</sup> [Abortion Services \(Safe Access Zones\) \(Scotland\) Bill – Bills \(proposed laws\) – Scottish Parliament | Scottish Parliament Website](#)

<sup>2</sup> [22-08-11-hea-crim-equ-con-proposed-abortion-services-safe-access-zones-scotland-bill.pdf \(lawscot.org.uk\)](#)

<sup>3</sup> [23-12-20-hea-equ-crim-chr-abortion-services-safe-access-zones-s-bill-written-evidence.pdf \(lawscot.org.uk\)](#)

<sup>4</sup> [Minutes for Health, Social Care and Sport Committee 8th Meeting, 2024 Tuesday, March 12, 2024 | Scottish Parliament Website](#)

<sup>5</sup> [Law Society of Scotland follow up | Scottish Parliament Website](#)

<sup>6</sup> [Stage 1 report on the Abortion Services \(Safe Access Zones\) \(Scotland\) Bill \(parliament.scot\)](#)

<sup>7</sup> <https://www.lawscot.org.uk/media/ocapwenz/26-04-30-hea-abortion-services-safe-access-zones-scotland-bill-stage-1-briefing.pdf>

<sup>8</sup> <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/stage-2/bill-as-amended-at-stage-2.pdf>

- 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.<sup>9</sup>

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.”<sup>10</sup>

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 an abortion 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

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<sup>9</sup> <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policymemorandum.pdf>, para 25

<sup>10</sup> Ibid, para 26



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 and proportionate in order to protect:

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

Action is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned.<sup>11</sup> 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*<sup>12</sup> 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.<sup>13</sup> Notably, in *Dulgheriu*, the lawfulness of a Public Space Protection Order was upheld on

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<sup>11</sup> 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 \(oup.com\)](#)

<sup>12</sup> *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490

<sup>13</sup> *P and S v Poland* (2012) 129 BMLR 120



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”<sup>14</sup> 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 2022<sup>15</sup> 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 (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.’<sup>16</sup> 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’.<sup>17</sup> 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.’<sup>18</sup> The Abortion (Safe Access Zones) (Northern Ireland) Act received Royal Assent on 6 February 2023.

Specific questions have been raised during scrutiny of the Bill in relation to silent prayer and the Article 9 implications of any restriction the Bill may impose on silent prayer within a safe access zone, with amendments in relation to the issue

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<sup>14</sup> <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum.pdf>, para 111

<sup>15</sup> Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32

<sup>16</sup> Ibid, para 114

<sup>17</sup> Ibid, para 114

<sup>18</sup> Ibid, para 154



rejected at Stage 2. There is a lack of case law or precedent on whether any such restriction would or would not be a permitted interference with Article 9 rights, and the issue may ultimately fall to be determined by the courts applying a proportionality assessment.

The Stage 1 Report at paragraph 4 recognised that a precautionary approach is needed when developing and implementing legislation that has implications for conflicting human rights.<sup>19</sup> 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.

In our response to the 2022 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.

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.

## Comments on sections of the Bill

### Section 1

Section 1 sets out the meaning of “protected premises” for the purpose of the Bill.

The proposed definition of ‘protected premises’ and the scope to modify this definition under section 10 of the Bill are sensible. We have no specific comments on the amendments made to this section at Stage 2.

### Section 2

Section 2 makes provision for a safe access zone is established for each protected premises.

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

We note the comments in the Stage 1 Report questioning why the default radius of safe access zones has been set at 200m when evidence suggests a radius of 150m would be sufficient for all but one protected premises currently providing abortion services in Scotland.<sup>20</sup> We also note discussion at paragraph 12 of the Stage 1 Report of an alternative approach of a standard radius of 150m for safe access zones in Scotland, and then using provisions in section 7 of the Bill to extend this radius to the address of the specific circumstances of the Queen

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<sup>19</sup> Stage 1 report, para 4

<sup>20</sup> Stage 1 report, para 11



Elizabeth University Hospital site.<sup>21</sup> We further note the discussion on these points during Stage 2 proceedings.<sup>22</sup>

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.”

We have no specific comments on the amendments made to this section at Stage 2.

### Section 3

Section 3 makes provision for notification of proposed protected premises.

Where further safe access zones are created it should be clear to protestors and others where the boundaries of the safe access zone are located (see our comments on section 4, below).

We have no specific comments on the amendments made to this section at Stage 2.

### Section 4

Section 4 makes provision for an offence of influencing, preventing access or causing harassment etc. in a safe access zone.

As we stated in our response to the 2022 consultation,<sup>23</sup> 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.

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<sup>21</sup> Stage 1 report, para 12

<sup>22</sup> <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/recent-publication?meeting=15894&iob=135681>

<sup>23</sup> 22-08-11-hea-crim-equ-con-proposed-abortion-services-safe-access-zones-scotland-bill.pdf (lawscot.org.uk)





We note the discussion during Stage 2 proceeding regarding signage. Whilst we acknowledge that signage is only one of the possible ways in which extent of a safe access zone may be publicised, we are concerned that leaving the matter of signage to individual Health Boards or providers may lead to divergences in practice and to a lack of clarity which could potentially undermine the effectiveness of the legislation. If signage is not to be provided for on the face of the Bill, we would suggest that guidance be issued under section 11 to provide clarity for Health Boards, providers and would-be protestors.

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.’<sup>24</sup> We consider that the offence defined in section 4 of the Bill is clear enough to define the prohibited behaviours and their consequences.

Section 4(3) provides that a person who commits an offence under section 4 is liable, on summary conviction, to a fine not exceeding the statutory maximum and on conviction on indictment, to a fine. There are equivalent provisions in respect of the section 5 offence in section 5(4). 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, 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”.

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.

## Section 5

Section 5 makes provision for an offence of influencing, preventing access or causing harassment etc. in an area visible or audible from a safe access zone.

In our previous briefing, we highlighted concerns regarding the clarity of the definition of the section 5 offence. We have not repeated these comments for the purposes of this briefing on the basis that we understand that the provision applies only to persons who are within a relevant area in relation to protected

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<sup>24</sup> Reference by the Attorney General for Northern Ireland – Abortion Services (Safe Access Zones) (Northern Ireland) Bill [2022] UKSC 32, para 155



premises, meaning an area which is not a public area but which is situated within the boundary of the safe access zone.

See our comments above regarding penalties.

## Section 6

Section 6 makes provision for exceptions to offences under sections 4 and 5. A person does not commit an offence where they do anything in the course of:

- accompanying with permission another person who is accessing (or attempting to access) abortion services at protected premises but only to the extent that the person's act affects the other person,
- providing, or facilitating the provision of, abortion services at protected premises,
- providing other health care at protected premises,
- engaging in conduct that is lawful under section 220 (peaceful picketing) of the Trade Union and Labour Relations (Consolidation) Act 1992.

We consider these exceptions appropriate. In our letter following on from our oral evidence, we noted that from the Society's perspective the Bill as introduced is sufficiently specific to exclude other protests, such as trade union demonstrations, from its scope. We note whilst a trade union demonstration or other protest unconnected to the provision of abortion services outside a hospital may be within a safe access zone, there is nothing on the face of the Bill which prohibits all protest within safe access zones.

We consider that the specific references to abortion services should ensure that other, legitimate, forms of protest are not criminalised by the Bill. Further, section 6(d) of the Bill specifically provides that a person does not commit an offence under section 4(1) or 5(1) where the person does anything in the course of engaging in conduct that is lawful under section 220 (peaceful picketing) of the Trade Union and Labour Relations (Consolidation) Act 1992

## Section 7

Section 7 provides for extension of safe access zones.

Section 7 of the bill contemplates that Scottish Ministers can extend the distance between the boundary of the protected site and the boundary of the safe access zone 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 safe access zone does not adequately protect persons who are accessing, providing or facilitating the provision of abortion services at the related 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 the addition of new subsections (6A) and (6B) at Stage 2, which impose consultation requirements on Scottish Ministers before extending a safe access zone under this section. Whilst we welcome the inclusion of a consultation requirement, we do note that the provisions afford significant discretion to the Scottish Ministers as to who they will consult with. We would welcome further clarity about the nature and extent of the consultation which will be required and how it will be ensured that this is suitably robust. Consultation should be with a wide range of individuals and organisations impacted by, or likely to be impacted by, the proposed extension.

## Section 8

Section 8 provides for reduction of safe access zones.

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 had previously suggested 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.<sup>25</sup> We welcomed the recommendation in the Stage 1 Report that the Member in charge of the Bill and the Scottish Government consider whether there may be justification for setting minimum and maximum requirements for extension and reduction of safe access zones in the legislation.<sup>26</sup> In the absence of any amendment on this points, we would welcome clarification as to the safeguards which will ensure unlimited reduction does not undermine the purpose and aim of the Bill.

As above, we welcome the inclusion of a consultation requirement following amendment at Stage 2, but note that the provisions afford significant discretion to the Scottish Ministers.

## Section 9

Section 9 provides for cessation of safe access zones.

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

<sup>26</sup> Stage 1 Report, para 14.

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.

We have no specific comment on the amendments made to this section at Stage 2.

## Section 9A

This new section was added to the Bill at Stage 2, and provides for a report on changes to safe access zones to be laid before the Scottish Parliament within 7 days of the list of safe access zones being updated, setting out the reasons for the change to the safe access zone (or zones) concerned.

Whilst we welcome this reporting requirement, we are disappointed to note that the recommendation in the Stage 1 Report that decisions to extend or reduce the size of safe access zones should be made by way of delegated powers and that the relevant instruments should be subject to the affirmative procedure have not been acted upon.<sup>27</sup> We would welcome clarification as to how suitable public protection will be ensured in the context of a reporting requirement only.

## Section 10

Section 10 provides that Scottish Ministers may by regulation modify the definition of 'protected premises' in section 1. Such regulations are subject to the affirmative procedure. Sub-section 4 provides that, before laying a draft of a Scottish statutory instrument containing regulations under subsection (1)(b) before the Scottish Parliament in relation to a building or place, the Scottish Ministers must consult with the provider of the treatments or services and with the operator of the building or place, and- if they consider it appropriate- the local Health Board, local authority and any other person they consider has an interest in the building or place becoming protected premises.

The proposed definition of 'protected premises' and the scope to modify this definition under section 10 of the Bill are sensible, and the amendment to this section at Stage 2 appears to be proportionate. .

## Section 11

Section 11 provides for Ministerial Guidance. An operator of protected premises (or proposed protected premises) must have regard to any guidance given by the Scottish Ministers in relation to protected premises (or proposed protected premises) and the establishment, extension, reduction or cessation of safe access

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<sup>27</sup> Stage 1 Report, para 17.

zones for protected premises. Guidance issued under this section is not subject to any parliamentary procedure.

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”, we had previously highlighted that 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. We therefore welcomed, in principle, the recommendation in the Stage 1 Report that Scottish Ministers undertake a human rights proportionality assessment before making decisions about reducing or increasing the size of safe access zones and that such a requirement should be included on the face of the Bill. We are disappointed that this does not appear to have been taken forward.

### Section 11A

This new section was added to the Bill at Stage 2, and requires Scottish Ministers to undertake a review of the operation and effectiveness of the Act after two years and then every five years. Scottish Ministers must prepare a report on the review, which must be published and laid before the Scottish Parliament.

We had previously commented that 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, and we therefore welcome this provision. We consider the review periods proposed to be appropriate.

### Section 12

Section 12 sets out an ancillary power for Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate by regulations. Such regulations may modify any enactment, including the Bill once passed. Regulations are subject to the affirmative procedure they add to, replace or omit any part of the text of an Act, and are otherwise subject to the negative procedure.

We have no specific comments on this section.

### Section 13

Section 13 is an interpretation provision.

We have no specific comments on this section.

### Section 14

Section 14 deals with crown application.



We have no specific comments on this section.

### Section 15

Section 15 is the commencement provision. Sections 15, 12, 13 and 16 come in to force on the day after Royal Assent. The other provisions of the Bill will come into force on such day as the Scottish Ministers may by regulation appoint.

We have no specific comments on this section.

### Section 16

Section 16 makes provision for the short title of the Bill.

We have no specific comments on this section.



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