



Law Society
of Scotland

Consultation Response

Proposed Abortion Services Safe Access Zones (Scotland) Bill

August 2022



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 Gillian Mackay MSP's consultation: *Proposed Abortion Services Safe Access Zones (Scotland) Bill*.¹ We have the following comments to put forward for consideration.

General Comments

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

¹ [Proposed Abortion Services Safe Access Zones Scotland Bill | Scottish Parliament Website](#)

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 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.² Articles 10 and 11 ECHR are also qualified rights.

Factors that should be weighed in the balance may include:

- The adverse health consequences, complications and even death for a clinic-user if an abortion is delayed.
- The increase in the risk of the procedure if the procedure is delayed (eg surgical instead of medical).
- An increase in the impact of stress and damage to mental health. In *Dulgheriu*³ 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.

It has already been held by the English Court of Appeal that a safe access zone in the Borough of Ealing was a proportionate measure when balanced against the right of protesters to manifest their beliefs.⁴ The proportionality of safe access zones or equivalent measures have not yet been considered by the UK Supreme Court,⁵ or by the European Court of Human Rights.

² 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 \(oup.com\)](#)

³ *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490

⁴ *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490

⁵ Although note the *REFERENCE by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill*, case ID 2022/0077, heard by the Supreme Court on 19th and 20th July and currently awaiting judgement.

In developing the current proposals consideration should also be given to the possible impact of the Bill of Rights Bill,⁶ currently scheduled for Second Reading in the House of Commons on 12 September 2022. One of the issues in *Dulgheriu* was whether the local authority had breached their duty under section 72(1) of the Anti-Social Behaviour, Crime and Policing Act 2014 which provided that a local authority, in deciding whether to make a PSPO:

“must have particular regard to the rights of freedom of expression and freedom of assembly set out in articles 10 and 11 of the Convention.”

That argument was rejected by the Court of Appeal at paragraph 91 on the basis that

“articles 8, 9, 10 and 11 are all of equal importance in the sense that none has precedence over the other and where there is a tension between their values, what is necessary is an intense focus on the comparative importance of the rights being claimed in an individual case....We do not consider that.. the requirement [in section 72(1)] to have particular regard to the rights under articles 10 and 11 adds anything of substance to the analysis.”

However, clause 4 of the Bill of Rights Bill provides

“(1) When determining a question which has arisen in connection with the right to freedom of speech, a court must give great weight to the importance of protecting that right.”

Clause 4 would place a duty on the court itself to “give great weight” to protecting the right to freedom of speech, in contrast to the provisions considered in *Dulgheriu* which placed a duty on the local authority to “have particular regard”. A court subject to clause 4, if enacted, may take a different approach to that adopted in *Dulgheriu*. It is not clear whether a court would go so far as to hold that clause 4 intends that, where there is a tension between the Article 8 and 10 rights, greater weight should be placed upon protecting the Article 10 right.

If clause 4 of the Bill of Rights Bill is enacted and in force before any legislation to introduce safe access zones is passed by the Scottish Parliament, the question of whether the Scottish legislation is compatible with the ECHR as it would then fall to be interpreted in light of the provisions of the Bill of Rights and therefore within the legislative competence of the Scottish Parliament could be referred to the Supreme Court under section 35 of the Scotland Act 1998. If any legislation to introduce safe access zones is enacted before clause 4 of the Bill of Rights Bill, any person whose rights under Article 10 are affected by the safe access zones could seek an order quashing the relevant provisions of the safe access zones legislation or a declaration of incompatibility under clause 10 of the Bill of Rights Bill, if the Bill of Rights Bill is enacted in its current form.

The proposed Bill also seeks to create a new criminal offence of committing a prohibited act within a safe access zone. Any new criminal offence would require to be a necessary and proportionate response to a

⁶ [Bill of Rights Bill - Parliamentary Bills - UK Parliament](#)

mischief that is not properly addressed by the existing criminal law. It would require to be clearly drafted and sufficiently specific to allow those likely to fall foul of it to regulate their behaviour accordingly.

Whilst we recognise that there are compelling public policy arguments in favour of safe access zones, we have restricted our comments to the above legal aspects of the proposed Bill. Other organisations will be best placed to comment on the social policy issues involved.

Consultation Questions

Questions 1-8 (“About You”) have been addressed separately by covering email.

Aim and approach

9. Which of the following best expresses your view of the proposed Bill?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please elaborate on your response.

See our comments above. 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.

We recognise that the current legislative landscape in Scotland does not appear to have been effective in addressing protests outside healthcare sites which provide abortion services.

10. What is your view of the proposal for safe access zones being introduced at all healthcare settings that provide abortion services throughout Scotland?

Fully supportive

Partially supportive

X Neutral (neither support nor oppose)

- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

Any legislative provisions which lead to a blanket ban may be more open to challenge on the basis of proportionality.⁷ It is not clear from the consultation document whether there is a need, on the basis of current activity, for safe access zones at all locations across Scotland.

11. What is your view of the proposal for the 'precautionary' approach to be used, in which a safe access zone is implemented outside every site which provides abortion services?

- Fully supportive
- Partially supportive

x Neutral (neither support nor oppose)

- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response.

See our response to question 10, above. There is a need to show that the creation of the safe access zone is a necessary and proportionate response.

⁷ See for example the UK Supreme Court decision in *R (on the application of F (by his litigation friend F)) and Thomson (FC) v Secretary of State for the Home Department [2010] UKSC 17* in which the UK Supreme Court repeated the declarations of the lower courts that section 82(1) of the Sexual Offences Act 2003 Act- which provided that all persons sentenced to 30 months' imprisonment or more for a sexual offence became subject to a lifelong duty to keep police notified of where they were living and of travel abroad, with no right to review- was incompatible with Article 8 because it made no provision for individual review of the notification requirements. It was common ground that the interference in the offenders' Article 8 rights were in accordance with law and directed at the legitimate aims of prevention of crime and the protection of the rights and freedoms of others. However, the court held that the notification requirements constituted a disproportionate interference with Article 8 rights because they made no provision for individual review of the requirements.

12. What is your view of the proposed standard size of a safe access zone being 150 metres around entrances to buildings which provide or house abortion services?

- Yes – Support this part of the proposal**
- No – Believe they should be a different standard size**
- No – Believe the size should be decided based on each site**
- No – Do not support the introduction of safe access zones in any form**

x Unsure

- Other – please detail below**

Please explain the reasons for your response.

Healthcare providers and others will be best placed to comment on the practical aspects of the proposed safe access zones. The size for safe access zones should be consistent across Scotland, and should be informed by evidence from other jurisdictions which have successfully implemented similar arrangements. It should be clear to protestors and others where the boundaries of the safe access zone are located.

13. What is your view of the proposal to ban all protests including both protests in support of and those in opposition to:

A person's decision to access abortion services (ie a woman having an abortion)?

- Fully supportive**
- Partially supportive**

x Neutral (neither support nor oppose)

- Partially opposed**
- Fully opposed**
- Unsure**

Please explain the reasons for your response.

See our general comments, above. People accessing abortion services are entitled to respect for their Article 8 rights. However, the fundamental rights of those who may seek to protest must also be respected. We assume that the reference in the consultation question to banning "all protests" is intended to be restricted to all protest within designated safe access zones. The key consideration from a legal

perspective will be whether banning protests within safe access zones amounts to a proportionate interference with the fundamental rights of protestors. It may also be possible to consider mitigating measures to facilitate lawful protest.

14. What is your view of the proposal to ban all protests including both protests in support of and those in opposition to:

A person's decision to provide abortion services (ie a doctor, nurse, or midwife)?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

Please explain the reasons for your response.

See our general comments, above. Healthcare staff should be able to attend their workplace without interference or harassment. However, the fundamental rights of those who may seek to protest must also be respected. We assume that the reference in the consultation question to banning "all protests" is intended to be restricted to all protest within designated safe access zones. The key consideration from a legal perspective will be whether banning protests within safe access zones amounts to a proportionate interference with the fundamental rights of protestors.

15 What is your view of the proposal to ban all protests including both protests in support of and those in opposition to:

A person's decision to facilitate provision of abortion services (ie administrative or support staff)?

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

- Partially opposed**
- Fully opposed**
- Unsure**

Please explain the reasons for your response.

See our response to question 14, above.

16. Which types of activity – when done for the purposes of influencing a person's decision to access healthcare settings including abortion services - do you consider should be banned in a safe access zone? (tick as many from the list as you consider should be covered by the Bill))

- Persistently, continuously, or repeatedly occupying the zone**
- Impeding or blocking somebody's path or an entrance to abortion services**
- Intimidating or harassing a person**
- Seeking to influence or persuade a person concerning their access to or employment in connection with abortion services**
- Demonstrating using items such as leaflets, posters, and pictures specifically related to abortion**
- Photographing, filming, or recording a person in the zone**
- All of the above**
- None of these**

x Other (include details below)

We recognise that all of the above may have a detrimental impact on patients and staff, and could reasonably be described as restricting access to lawful abortion services. However, we consider that the activity of 'seeking to influence or persuade' may be insufficiently specific to allow individuals to regulate their behaviour, particularly if engaging in such behaviour will amount to a criminal offence under the proposed Bill.

17. What is your view on the potential punishments set out in the proposal for

breach of a safe access zone (see pages 15 to 16 of the consultation document)?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)

X Partially opposed

- Fully opposed
- Unsure

Please give reasons for your response, including commenting on whether this should be a criminal offence.

If safe access zones are to be introduced, we would support the creation of a specific criminal offence for breach of a safe access zone. There is currently no equivalent in Scotland of the Public Spaces Protection Order under section 57 of the Antisocial Behaviour Crime and Policing Act 2014, which has been used in England.⁸ 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. Without appropriate criminal sanctions to support enforcement, we would question the purpose and utility of creating safe access zones. We would suggest 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 offender according to current law and guidelines.

It may be helpful to consider the provisions of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill⁹ and the *REFERENCE by the Attorney General for Northern Ireland - Abortion Services (Safe Access Zones) (Northern Ireland) Bill*, which was heard by the UK Supreme Court on 19th and 20th July 2022. This case deals with whether the Bill is within the legislative competence of the Northern Ireland Assembly. A Bill is outside the competence of the Northern Ireland Assembly if it is incompatible with the rights protected by the European Convention on Human Rights. Clause 5 of the Bill sets out offences in respect of a safe access zone. Submissions in this case have highlighted the absence of a statutory defence for the accused to show that they did not know or had no reasonable way of knowing, that the protected person was in a safe access zone. It has been suggested that the Bill lacks a mechanism for the accused to defend the case on the basis that they were exercising their rights under articles 10 and 11. It has also been argued that clause 5(2)(a) of the Bill is drafted very broadly (and not very clearly). The

⁸ See for example *Dulgheriu v Ealing LBC* [2019] EWCA Civ 1490. That case concerned the creation of a Public Spaces Protection Order under sec 57 of Antisocial Behaviour Crime and Policing Act 2014. Section 59 does not apply in Scotland and there are no equivalent provisions in the Antisocial Behaviour etc (Scotland) Act 2004.

⁹ [Abortion Services \(Safe Access Zones\) Bill \(niassembly.gov.uk\)](https://niassembly.gov.uk)

concern is that this provision lacks clarity and specificity. It could be difficult for the accused person to know where the threshold for criminality might be crossed. There are also concerns about a lack of procedural detail. Clause 8 of the Bill as presented set out in some detail the procedure for designating a safe access zone. Clause 9 required the Department of Health to have regard to matters including the safety and dignity of protected persons, the right to respect for private and family life set out in Art 8 and the right to manifest religious beliefs and rights to freedom of assembly and expression and in particular the right to protest. These provisions have been removed from the final version of the Bill. There is no sunset clause requiring applications to be renewed from time to time, and there is no provision for there to be a designated protest zone within sight and sound of the safe access zone. Clause 5(4) of the NI Bill as passed limits the maximum penalty to level 2 on the standard scale (£500).

If safe access zones are to be created and enforced by way of criminal sanctions, they would need to be advertised as such and the type of behaviour prohibited made clear so that would be protestors would be aware of the likely consequences of their actions. We would also suggest that criminal offences should be accompanied by clear procedures, and by sunset clauses for each safe access zone.

18. Do you think there are other ways in which the Bill's aims could be achieved more effectively?

Yes

No

Unsure

Please elaborate on your response if you'd like to:

We would support proposals to achieve the Bill's aims without criminalising legitimate protests. It may be possible to consider mitigating measures to facilitate lawful protest. We would also support the inclusion of a statutory defence to the criminal offence set out in the Bill.

19. Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think this proposal could have if it became law?

a significant increase in costs

some increase in costs

no overall change in costs

- some reduction in costs
- a significant reduction in costs

x I don't know

Please explain the reasons for your answer, including who you would expect to feel the financial impact of the proposal, and if there are any ways you think the proposal could be delivered more cost-effectively.

Other organisation will be best placed to comment on potential financial impacts.

Equalities

20. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation.

What impact could this proposal have on particular people if it became law?

X Positive

- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative

X Negative

- Unsure

Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

The proposal may have positive impacts on a number of marginalised groups, including women (particularly younger women who may be more easily intimidated by protestors outside clinics), those with the protected characteristics of pregnancy and maternity, disabled people and those from minority ethnic groups. These groups may already face barriers to accessing healthcare. There is strong evidence that harassment outside of abortion clinics can affect decisions to access healthcare, or the wellbeing of

patients after receiving care. There is also evidence of the negative impact that harassment and intimidation outside of clinics can have on staff working there.

The proposals may have a negative impact on certain religious or belief groups who oppose abortion, as the proposals will restrict (but not curtail completely) their ability to manifest their beliefs against abortion. We have suggested above some potential mitigations which could limit this negative impact, whilst preserving the positive impacts on other marginalised groups noted above.

Sustainability

21. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas?

Yes

No

Unsure

Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?

We have no further comments.

General

22. Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?

We have no further comments.

For further information, please contact:

Jennifer Paton

Policy Team

Law Society of Scotland

DD: 0131 476 8136

JenniferPaton@lawscot.org.uk