

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

**December 2023**

## **Executive Summary**

The Scottish Human Rights Commission is satisfied that the purpose of the Bill, to protect individual access to abortion and the rights of those involved in the provision of healthcare, represents a legitimate aim.

The Scottish Parliament should ensure that respect for ECHR Article 8 through the protection of private lives and autonomy of women and access to abortions without harassment allows for proportionate restriction of ECHR Articles 9, 10, and 11.

The Scottish Parliament should demonstrate it has a robust evidence base for its decision-making. This should include evidence (both quantitative and qualitative) of activities near clinical care services from those accessing services and providers, as well as human rights analysis of comparable measures in other jurisdictions.

The Scottish Parliament should conduct a robust assessment of the level of restrictions on rights created by the proposed Bill.

The Scottish Parliament should ensure the proposed Bill includes duties on those responsible for implementing Safe Access Zones to monitor and report on their effectiveness and to demonstrate their ongoing human rights impact assessments.

## **1. About the Commission**

- 1.1. The Scottish Human Rights Commission is a public body funded by but fully independent of the Scottish Parliament. Our legal mandate is laid out in the Scottish Commission for

Human Rights Act 2006<sup>ii</sup>. Our main functions, powers and duties are:

- To promote awareness, understanding and respect for all human rights to everyone and encourage best practice.
  - To recommend changes to law, policy, and practice.
  - To promote human rights through education, training, and publishing research.
  - To intervene in relevant civil court cases.
  - To conduct inquiries into the policies and practices of Scottish public authorities.
  - To promote and protect the human rights guaranteed by the European Convention on Human Rights (ECHR), as well as other human rights which are guaranteed by international conventions ratified by the United Kingdom (UK).
- 1.2. In discharging these functions, the Commission keeps watch over human rights in Scotland, striving for a fairer society where everyone can live with human dignity. We are an independent, expert body that works for the people of Scotland; we investigate, listen, speak up for rights and respond when things go wrong.
- 1.3. The Commission also guides those responsible for human rights and holds them accountable for their duties, including the Scottish Government, local authorities, and other public bodies. Our work is rooted within the human rights-based PANEL principles<sup>iii</sup>.

## **2. Background to this Evidence**

- 2.1. As Scotland's National Human Rights Institute (NHRI), the Commission bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights (ECHR)<sup>iv</sup>, as incorporated by the Human Rights Act (HRA) 1998<sup>v</sup>.
- 2.2. The Commission recommends that the Scottish Parliament should also consider other relevant treaty obligations of the Council of Europe (CoE) and the United Nations (UN) alongside relevant general comments and observations. In

respect of this proposed Bill, the regional and international treaties which can offer further insight include:

- Convention on Preventing and Combating Violence against Women (Istanbul Convention)<sup>vi</sup>.
- Convention on Civil and Political Rights (ICCPR)<sup>vii</sup>.
- Convention on Elimination of Discrimination against Women (CEDAW)<sup>viii</sup>.
- UN Convention against Torture (CAT)<sup>ix</sup>.

2.3. 2.3 The Commission offered initial guidance on the human rights basis of the Abortion Services (Safe Access Zones) (Scotland) Bill in the 2022 consultation<sup>x</sup>. The following written evidence to the Health, Social Care and Sport Committee is supplementary to the Commission's original consultation response and focuses on the validity of the purpose of the Bill and the impact of the Bill on the rights enshrined under Articles 8, 9, 10, and 11 of the European Convention on Human Rights.

2.3.1 Under the heading of other comments, the Commission has offered reflections on the following:

- Accessing legislation against restriction of rights.
- Radius of Safe Access Zones.
- Implementation and monitoring of the Bill.

### **3. Purpose of the Bill**

3.1. The Commission recognises abortion as a vital aspect of women's political, social, and economic rights and of gender equality. While human rights law is an evolving discipline that has not yet fully embraced a standalone right to abortion, international and domestic law have confirmed the growing consensus that where abortion is permitted, interference in access can amount to a violation of human rights, including health, privacy and in some cases the protection against torture and degrading treatment.

3.2. The Commission also reaffirms that rights connected to protest are fundamental – albeit not absolute – in a democratic

society. Restrictions on the rights of assembly and free expression of views and beliefs should be carefully and narrowly constituted.

- 3.3. Any measure that seeks to interfere with individual human rights must demonstrate that it is (1) necessary to achieve a legitimate aim and (2) that the interference with rights is proportionate, the least restrictive means to achieve the aim.
- 3.4. The Commission supports the general proposition in favour of protection for individual access to abortion and the rights of those involved in healthcare provision.
- 3.5. The Commission recognises that striking a balance between rights, particularly Articles 8, 9, 10, and 11 of the ECHR, will be challenging. However, in this case, the Commission is satisfied that the intended purpose of the Bill, to create Safe Access Zones around medical settings where abortions take place, represents a legitimate aim.
- 3.6. The Supreme Court recently supported this position<sup>xi</sup>. The Supreme Court found that 5(2)(a) of the Abortion Services (Safe Access Zones) (Northern Ireland) Bill,<sup>xii</sup> which makes it a criminal offence “*to do an act in a safe access zone with the intent of, or reckless as to whether it has the effect of ...influencing a protected person, whether directly or indirectly*”<sup>xiii</sup> was compatible with convention rights of those who seek to express their opposition to abortion services.
- 3.7. This judgement considered The Attorney General for Northern Ireland's concern that section 5(2)(a) of the Bill did not provide a reasonable excuse and disproportionately interfered with anti-abortion protestors' ECHR Articles 9,10, and 11. The Attorney General suggested that the Bill was, therefore, outside of the legislative competence of the Northern Ireland Assembly.
- 3.8. In this case, the Supreme Court based its judgement on three points:
  - Restriction of the exercise of ECHR rights is allowed by law.
  - The restriction of articles 9,10, and 11 pursues a legitimate aim: ensuring women can access advice and treatment

under conditions with privacy and dignity, thereby protecting public health and ensuring staff can work in these settings without intimidation, harassment, or abuse.

- Restrictions imposed by clause 5(2)(a) are proportionate and were not found to be unduly restrictive but instead necessary for the Bill to achieve its desired aims.
- The Supreme Court also highlighted that “...*in a sensitive context like this one, states have a wide margin of appreciation in situations where it is necessary to strike a balance between competing Convention rights*”.

The Scottish Human Rights Commission is satisfied that the purpose of the Bill, to protect individual access to abortion and the rights of those involved in the provision of healthcare, represents a legitimate aim.

#### **4. Impact of the Bill upon the rights enshrined under Articles 8, 9, 10, and 11 of the European Convention on Human Rights**

- 4.1. The Abortion Services (Safe Access Zones) (Scotland) Bill engages with several articles in the ECHR. As correctly identified, Articles 8, 9, 10, and 11 will require further consideration throughout the Bill's development. As stated in the Commission's initial consultation response, Article 3 of ECHR is also engaged, and relevant existing case law<sup>xiv</sup> in this area should be explored.
- 4.2. Concerning ECHR Articles 8, 9, 10 and 11, each is a qualified right with potential scope for restriction. The Scottish Parliament must analyse if the Bill's impact on these rights is proportionate.
- 4.3. Article 8 is clear: there shall be no interference with the right unless in circumstances relating to national security, public safety, economic well-being, prevention of disorder and crime, protection of health and morals and the protection of rights and freedoms of others.

- 4.4. As this right is not absolute, it must be balanced against other engaged rights. Existing case law gives examples of how this issue has been previously addressed.
- 4.5. In *Dulgheriu v Ealing Borough Council*<sup>xv</sup>, The Court of Appeal in England and Wales considered Ealing Council's use of a Public Spaces Protection Order. The High Court and Court of Appeal relied on case law from the European Court on Human Rights (ECtHR) in holding that abortion was an "intensely personal and sensitive matter" within the ambit of Article 8. In this case, the Court found that the restriction of the protesters' freedom of expression, assembly and conscience was justified and proportionate.
- 4.6. However, ECtHR decision-making on this issue has been made on a case-by-case basis. This is due to differences in national legislation and those directly impacted. The differing decisions in the case of *Van Den Dungan v The Netherlands*<sup>xvi</sup> and *Annen v Germany*<sup>xvii</sup> best illustrate this.
- 4.7. In *Van Den Dungan v The Netherlands*, the ECtHR upheld a case where an individual had been prohibited from being within 250 metres of a clinic where they had been trying to persuade those attending the clinic against abortions. In this case, it was found to be a proportionate measure to protect those attending the clinic's Article 8 rights. This was considered the case as the measure was for a limited period and within a specific area.
- 4.8. However, in *Annen v Germany*, the ECtHR found that a person banned from distributing leaflets claiming doctors at the clinic were practising unlawful abortions had their Article 10 rights violated due to the fact the leaflets being distributed were legally correct<sup>xviii</sup>.
- 4.9. As illustrated in *Annen v Germany*, complexities around the use of Safe Access Zones are enhanced when examining the impact of the proposed Bill on ECHR Articles 9, 10, and 11. As stated, like Article 8, these rights are not absolute, and each has limitations. These limitations must only be used as outlined in the ECHR and must be proportionate. The UK Courts have outlined a series of questions<sup>xix</sup> to ensure proportionality is correctly assessed:

- Is the aim sufficiently essential to justify the interference?
  - Is there a rational connection between the means chosen and the legitimate aim?
  - Is the measure the least restrictive?
  - Is there a fair balance between the rights of the individual and the general interest of the community, including the rights of others?
- 4.10. As the Abortion Act (1967)<sup>xx</sup> permits abortion to be accessed in Scotland, it will be up to the Scottish Parliament to examine the evidence base to determine whether access to abortions in a way which respects the privacy and autonomy of women and without harassment allows for restriction of ECHR Articles 9,10 and 11.
- 4.11. When considering a similar issue, The Supreme Court<sup>xxi</sup> found it was justifiable that restrictions enacted by the Bill would only occur within designated Safe Access Zones, allowing protesters to exercise their rights elsewhere.
- 4.12. Beyond this, the proposed Bill will need to allow for discretion in how it is applied to ensure proportionality in each circumstance.

The Scottish Parliament should ensure that respect for ECHR Article 8 through the protection of private lives and autonomy of women and access to abortions without harassment allows for proportionate restriction of ECHR Articles 9, 10, and 11.

The Scottish Parliament should demonstrate it has a robust evidence base for its decision-making. This should include evidence (both quantitative and qualitative) of activities near clinical care services from those accessing services and providers, as well as human rights analysis of comparable measures in other jurisdictions.

## **5. Do you have any further comments about the Bill?**

### Assessing legislation against restriction of rights

- 5.1. The Commission believes all legislative options to meet the desired outcome of the proposed Bill must be explored as part



of the process required for assessing the proportionality of any restriction on anti-abortion protests. The impact of each option and the extent to which it protects the legitimate aim of ensuring access to healthcare, the personal dignity and privacy of individuals seeking or providing abortion must be assessed on their own merits. Throughout the legislative process, the Commission is aware that the Scottish Parliament have examined existing legislation's ability to meet the proposed Bill's purpose. Beyond this, the Commission wants to ensure the proposed Bill uses the minimum restriction of rights required. To achieve this, an assessment of the level of restrictions on rights created by the Bill will be required.

The Scottish Parliament should conduct a robust assessment of the level of restrictions on rights created by the proposed Bill.

#### Radius of Safe Access Zones

- 5.2. As stated above, the Commission is clear that establishing the geographical extent of any restrictive zone must demonstrate that the least restrictive means has been used. The Scottish Parliament may also want to consider, The Organisation for Security and Cooperation in Europe (OSCE) Guidelines on Freedom of Peaceful Assembly<sup>xxii</sup> and recent legislation passed in Northern Ireland<sup>xxiii</sup>.

#### Implementation and Monitoring

- 5.3. Ongoing monitoring of the use of the Bill's powers and effectiveness will be critical to ensuring a human rights basis for the Bill's implementation. As part of this, relevant services providing abortions should undertake human rights assessments when introducing a Safe Access Zone as well as on their ongoing use. This has relevance as existing proposals suggest futureproofing of the Bill, which could include powers for Scottish Ministers to extend or reduce the distance of Safe Access Zones, remove Safe Access Zones and modify the definition of protected premises<sup>xxiv</sup>.



- 5.4. The Scottish Parliament should, therefore, ensure that any Bill includes duties on all those responsible for implementing the Safe Access Zones, including Scottish Ministers, on monitoring and reporting on the Safe Access Zones' effectiveness and to ensure ongoing consideration of balancing EHRC rights.

The Scottish Parliament should ensure the proposed Bill includes duties on those responsible for implementing Safe Access Zones to monitor and report on their effectiveness and to demonstrate their ongoing human rights impact assessments.

## 6. Conclusion

- 6.1. The Commission is clear that the purpose of the Bill serves a legitimate aim in line with Article 8. It will now be up to the Scottish Parliament to determine if this aim allows for proportionate restriction of Articles 9, 10, and 11. As outlined above, the decision-making process undertaken by the Scottish Parliament must be underpinned by a robust evidence base and a human rights analysis of comparable measures undertaken elsewhere. Any legislation, therefore, must include duties for ongoing monitoring of the effectiveness of the Bill's aim and to allow for ongoing analysis of human rights issues at stake.
- 6.2. If members of the Committee require further information, the Commission ask members to refer to the Commission's original consultation submission or for more information on this submission please contact:

[Oonagh.Brown@scottishhumanrights.com](mailto:Oonagh.Brown@scottishhumanrights.com)

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<sup>i</sup> See: [Home | Scottish Human Rights Commission](#)

<sup>ii</sup> See: [Scottish Commission for Human Rights Act 2006 \(legislation.gov.uk\)](#)

<sup>iii</sup> See: [Human Rights Based Approach | Scottish Human Rights Commission](#)

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- iv See: [European Convention on Human Rights \(coe.int\)](#)
- v See: [Human Rights Act 1998 \(legislation.gov.uk\)](#)
- vi See: [Full list - Treaty Office \(coe.int\)](#)
- vii See: [International Covenant on Civil and Political Rights | OHCHR](#)
- viii See: [Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979 | OHCHR](#)
- ix See: [Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment | OHCHR](#)
- x See: [safe-access-abortion-services-scotland-bill-consultation-final-web-version.pdf \(scottishhumanrights.com\)](#)
- xi See: [REFERENCE by the Attorney General for Northern Ireland - Abortion Services \(Safe Access Zones\) \(Northern Ireland\) Bill - The Supreme Court](#)
- xii See: [Abortion Services \(Safe Access Zones\) Act \(Northern Ireland\) 2023 \(legislation.gov.uk\)](#)
- xiii See: [Abortion Services \(Safe Access Zones\) Act \(Northern Ireland\) 2023 \(legislation.gov.uk\)](#)
- xiv See: [CASE OF A, B AND C v. IRELAND, CASE OF TYSIAC v. POLAND , CASE OF P. AND S. v. POLAND](#)
- xv See: [Court of Appeal Judgment Template \(judiciary.uk\)](#)
- xvi See: [Van Den Dungan V The Netherlands](#)
- xvii See: [ANNEN v. GERMANY \(coe.int\)](#)
- xviii *"In the Court's view, however, the applicant's statement that "unlawful abortions" had been performed was correct from a judicial point of view, because the domestic law merely distinguished between abortions which were considered "unlawful", but were exempt from criminal liability, and abortions which were considered justified and thus "lawful". See: [Annen v. Germany \(coe.int\)](#)*
- xix See: [Director of Public Prosecutions \(Respondent\) v Ziegler and others \(Appellants\) \(supremecourt.uk\)](#)
- xx See: [Abortion Act 1967 \(legislation.gov.uk\)](#)
- xxi See: [REFERENCE by the Attorney General for Northern Ireland - Abortion Services \(Safe Access Zones\) \(Northern Ireland\) Bill - The Supreme Court](#)
- xxii See: [73405.pdf \(osce.org\)](#)
- xxiii See: [Abortion Services \(Safe Access Zones\) Act \(Northern Ireland\) 2023 \(legislation.gov.uk\)](#)
- xxiv See: [Policy Memorandum accessible \(parliament.scot\)](#)