

Engender submission of evidence to the Scottish Parliament Health, Social Care and Sport Committee call for evidence on the Abortion Services (Safe Access Zones) (Scotland) Bill

December 2023

1. INTRODUCTION

Engender is a leading feminist policy and advocacy organisation in Scotland. We seek to make visible the impacts of structural gender inequality on women and work towards a Scotland where women and men have equal access to power, safety, resources and rights.

Engender has worked on access to abortion care since 2016 and the devolution of this policy area to the Scottish Parliament. During that time, we have identified issues relating to abortion law, access and care that serve to undermine women's experiences of abortion and impede the full realisation of women's human rights in Scotland.¹ These include, but are not limited to, criminalisation and outmoded laws governing abortion, delays and barriers to access, and the increasing stigmatisation, intimidation and harassment of women and healthcare workers outside of Scotland's abortion clinics. We have also examined the specific experiences of women who face intersecting forms of discrimination and compounded barriers in access to sexual and reproductive healthcare.²

As such, we recognise the increasing need for this legislation and are strong in our overall support for the Abortion Services (Safe Access Zones) Bill. As the Policy Memorandum for the Bill notes,³ and the work of campaign groups including Back Off

¹ Engender (2016) Our bodies, our choice: The case for a Scottish approach to abortion. Available at: <https://www.engender.org.uk/content/publications/Our-bodies-our-choice---the-case-for-a-Scottishapproach-to-abortion.pdf>.

² Engender (2018) Our bodies: our rights. Identifying and removing barriers to disabled women's reproductive rights in Scotland. Available at: <https://www.engender.org.uk/files/our-bodies,-our-rights-identifying-and-removing-barriers-to-disabled-womens-reproductive-rights-in-scotland.pdf>.

³ Abortion Services (Safe Access Zones) Bill, Policy Memorandum 2023. Available at: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum-accessible.pdf>.

Scotland and Abortion Rights Scotland⁴ have documented, we have seen a concerning rise in anti-abortion activity outside of healthcare facilities in Scotland in recent years. This activity works, in effect, to obstruct, harass, intimidate, and/or stigmatise those accessing or involved in the provision of abortion and ultimately interferes in the delivery and experience of vital healthcare. Such action is deeply discriminatory and rooted in patriarchal opposition to gender equality, women's enjoyment of bodily autonomy, and sexual and reproductive rights.

Evolving law and standards set out in the international human rights framework make clear that access to abortion is a critical component of the realisation of the rights to health, privacy and non-discrimination, among others. It also underlines abortion access as critical to securing the economic, social and cultural rights of women and, as such, as a cornerstone of gender equality. Human Rights Treaty Monitoring Bodies, including the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Committee on Economic, Social and Cultural Rights, have set out a wide range of obligations on States to reform, repeal and address laws, policies and practices that create barriers to abortion access, and to create an enabling environment for abortion care.⁵ We therefore consider that the Abortion Services (Safe Access Zones) Bill represents a meaningful and necessary initiative by the Scottish Parliament and Government to uphold and embed its obligations on the realisation of women's human rights.

We also recognise the responsibilities that Parliament and the Scottish Government have in protecting the rights to freedom of expression, religion and belief. We understand that any restrictions pertaining to these rights must meet certain tests in terms of being necessary to pursue a legitimate aim, proportionate and supported by human rights law. In introducing the Abortion Services (Safe Access Zones) Bill, we understand that the Parliament will have to ensure the legislation meets these tests and secures the necessary degree of 'balancing of rights'. It is Engender's view that the Bill has been drafted in a way that is generally sensitive to and meets these thresholds.

We welcome the opportunity to respond to the Committee's call for evidence on the Abortion Services (Safe Access Zones) Bill and outline our answers to its specific questions below. We want to ensure that the Bill provides women and healthcare

⁴ See for example: <https://www.backoffscotland.com/real-experiences> and <https://abortionrights.org.uk/statement-edinburgh-council-backs-abortion-clinic-buffer-zones-to-tackle-harassment/>.

⁵ For a detailed breakdown of key international human rights standards on abortion care, see: World Health Organisation (2022), Abortion care guideline. Web Annex A. Key international human rights standards on abortion. Available at <https://iris.who.int/bitstream/handle/10665/349317/9789240039506-eng.pdf>.

workers with the strongest possible protections, whilst remaining human rights compliant. In our answers below, we set out our support for the proposed approach and highlight areas where we consider there may be scope to strengthen the proposed legislation.

2. QUESTIONS

1. Do you agree with the purpose of the Bill?

Yes.

Anti-choice harassment outside abortion services in Scotland and the UK has escalated in recent years,⁶ involving silent vigils, displays of provocative and distressing images, verbal abuse and use of slogans and language including ‘murderer’, filming and photography of those accessing services.⁷

Such harassment interferes with women’s right to access healthcare and their experience of their rights to privacy and non-discrimination, among others. Access to safe abortion care is essential for the realisation of women’s economic and social rights and for progress towards gender equality. Anti-abortion activity outside of healthcare facilities works, in effect, to obstruct, harass, intimidate, and/or stigmatise those accessing or involved in the provision of abortion. It is deeply discriminatory and rooted in patriarchal opposition to gender equality, women’s enjoyment of bodily autonomy, and sexual and reproductive rights.

For many women, accessing abortion can be a deeply personal experience, and one that can unfortunately still be complicated by a range of stressors, including pressures emanating from social norms and stereotypes, family dynamics and financial difficulties,⁸ carrying specific potential concerns for women who are young, disabled, or from minority ethnic groups, and vulnerabilities for survivors of sexual violence.⁹ As such, the experience of accessing abortion care should be one in which individuals can feel safe and secure, assured that their privacy will be respected and that they will receive high-quality care and support. Unfortunately, for too many women accessing

⁶ BPAS (2022): <https://www.bpas.org/about-our-charity/press-office/press-releases/gillian-mackay-msp-has-launched-a-consultation-on-their-proposal-for-buffer-zones-around-abortion-clinics-in-scotland/>.

⁷ Scottish Parliament (2023) Abortion Services (Safe Access Zones) (Scotland) Bill: Policy memorandum. Available at: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum-accessible.pdf>.

⁸ In 2022, the abortion rate in Scotland increased by 19%, with clinicians’ reporting that the cost of living crisis has played a key role in this.

⁹ BPAS (2015). A Hard Enough Decision to Make https://publications.aston.ac.uk/id/eprint/41856/1/A_Hard_Enough_Decision_to_Make.pdf.

abortion in Scotland, their experience of safety, privacy and high-quality abortion care and support has been severely undermined by anti-choice activities outside of healthcare facilities. For healthcare providers, too, their ability to safeguard those in their care and their own personal wellbeing has too often been compromised by these activities.

The proposed legislation to create Safe Access Zones (SAZs) is urgently needed to ensure that women can access high-quality essential healthcare and support, free from discrimination, harassment and stigmatisation, and to provide necessary protections for healthcare workers. The Bill would also bring Scotland's legal framework in line with protections that have been put in place across the rest of the UK.

Gendered harassment and intimidation is a form of violence against women. Allowing the harassment or intimidation of those seeking abortion and accessing other forms of sexual and reproductive healthcare is incompatible with Equally Safe, Scotland's strategy for preventing and eradicating violence against women and girls.¹⁰ It also runs counter to the work undertaken and recommended by the First Minister's National Advisory Council on Women and Girls, the Scottish Government's obligations under international human rights law,¹¹ and the Human Rights Bill (Scotland) currently under development.¹²

This Bill would support the realisation of women's rights to health, privacy, and non-discrimination, amongst others, through preventing and discouraging activities that seek to obstruct access to abortion care.

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

Yes

Our view is that the radius of SAZ must be sufficient in size to fulfil the intended purpose of the Bill – to protect those accessing, providing or facilitating abortion healthcare from intimidation, harassment, coercion and stigmatisation and enable

¹⁰ <https://www.gov.scot/publications/equally-safe-scotlands-strategy-preventing-eradicating-violence-against-women-girls/>.

¹¹ The Scottish Government is committed to realising women's economic, social and cultural rights, including rights to health and non-discrimination, under the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on Economic, Social and Cultural Rights (CESCR) amongst other treaties.

¹² Engender (2022) Engender response to the Scottish government consultation on a Human Rights Bill for Scotland. Available at: <https://www.engender.org.uk/content/publications/Engender-response-to-the-SG-consultation-on-A-Human-Rights-Bill-for-Scotland.pdf>.

realisation of the right to healthcare. We are aware that abortion services in Scotland are delivered from a wide range of differently designed facilities and geographic locations, that range from buildings opening onto main thoroughfares to those located on large hospital campuses. It is crucial that the radius of a SAZ is of sufficient size to ensure that anti-abortion activity cannot easily be displaced to another nearby location that continues to obstruct access to abortion care.

The Abortion Services (Safe Access Zones) Act Northern Ireland 2023 provides for a radius of between 100- to a maximum of 250 metres,¹³ whilst provisions in England and Wales provide for a radius of 150 metres.¹⁴ While there may be an argument in favour of standardisation across the UK, this approach would potentially fail to recognise the differences in the geography, patterns of service access, and design of facilities in the different countries.

It is our understanding that the 150m radius that was originally proposed in the initial consultation in Scotland would not provide adequate protection for women accessing abortion at Queen Elizabeth University Hospital (QEUH) in Glasgow. Abortion services at the QEUH are amongst the most frequently and heavily targeted by those harassing women seeking abortion. For the Bill to fulfil its intended purpose, it is vital that this site is adequately provided for as standard.

3. 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?

We agree that there should be clear provisions in the Bill to accommodate the specifications of different premises, provided that they do not undermine the aims of the legislation. Our view is that these adaption processes will help ensure that SAZs will continue to meet the necessary tests of necessity, proportionality, and legality related to human rights compliance.

Regarding the extension of safe access zones beyond 200m, Engender broadly supports the provisions outlined in Section 7 of the Bill, which enable providers to apply to Scottish Ministers to increase the SAZ if required. In line with our comments below on section 7 of the Bill, where Scottish Ministers act to increase the size of a SAZ of their own accord, input from the provider affected should be sought. This duty should be expressly set out in the Bill.

¹³ Available at: <https://www.legislation.gov.uk/nia/2023/1>.

¹⁴ Amendment to the Public Order Act 2023. Available at: <https://bills.parliament.uk/bills/3153/stages/16631/amendments/10002351>.

We are equally concerned that the proposed provision for Scottish Ministers to unilaterally reduce the size of a SAZ at their discretion, as outlined in Section 8, does not contain a requirement to consult with providers. It is inappropriate that there is no provision for consultation with local providers and that the Bill empowers Scottish Ministers to reduce a SAZ “if they consider it appropriate to do so”. Local providers are uniquely placed to understand the evolving geographies, patterns of usage and circumstances in which they operate. We recommend that the Bill be amended such that any proposal to reduce the size of the SAZ includes an obligation to seek the views of the health providers operating in protected premises in question and for these to be taken into account in decision-making.

Given the potential politicisation of this issue, we would urge that a requirement for consultation of service providers, as a minimum, should be articulated on the face of the Bill. We would also support a commitment to further guidance outlining how the decision-making outlined in Sections 7 and 8 of the Bill must be evidence-based. Guidance should detail a minimum appropriate standard of evidence gathering, including potentially considering the views and experiences of abortion service users, in addition to the views of providers.

We would also suggest that there is a need to articulate within the Bill a minimum floor in terms of reductions in a SAZ. Theoretically, the Bill as drafted would allow for a reduction in scale so severe that it could ultimately render a SAZ ineffective or meaningless. Whilst we support the need for flexibility to enable a degree of responsiveness based on protected premises location and design, we are concerned that the lack of any upper limit set out in the legislation could make it more vulnerable to legal challenge.

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

We broadly support the definition of “protected premises” outlined in the Bill. We would, however, welcome further clarity on the status of services ‘relating to abortion services.’ Our reading of the Bill is that that related services, for example counselling services, that are not located on the same site as clinical abortion services, could be identified as ‘protected premises’ if deemed necessary via modifications set out in Section 10. We welcome this approach as we would anticipate that such services could potentially become a focus for anti-abortion activity once dedicated clinical services are protected by SAZ. We would encourage the committee to seek clarification on this point.

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

Yes.

We are in favour of the approach within the Bill that prohibits activities within SAZs in terms of intent and impact, rather than setting out a specific set of activities. It is appropriate that the offences relate to:

- a) influencing the decision of others regarding abortion,
- b) preventing or impeding access, provision or facilitation of abortion, or
- c) causing harassment, alarm or distress to others regarding abortion.

It is also important that the accompanying documents to the Bill stipulate that specific harm to an individual does not need to be demonstrated, shifting the onus from the women being harassed to those committing the offence.

We add a note of caution, however, regarding the flexibility of approach the Bill confers on enforcement agencies “to account for the nuances of particular situations.”¹⁵ Whilst we generally support this idea in principle, given the sensitivity and politicised nature of the issue, together with nuanced considerations regarding the balancing of rights, we are concerned that this potentially skews the balance of decision-making too far into the jurisdiction of Police Scotland.

Institutional sexism, misogyny and racism in Police Scotland, as acknowledged by its Chief Constable in May 2023,¹⁶ has the potential to undermine implementation of the protections intended by the Bill. Attitudes to abortion are deeply rooted in structural gender inequality and this must be accounted for in development of a framework in which “it will be for enforcement agencies to reach their own decisions on the behaviours that do and do not give rise to offences”.¹⁷ The gendered stigma that still surrounds abortion must not be allowed to undermine implementation of the Bill. In

¹⁵ Scottish Parliament (2023) Abortion Services (Safe Access Zones) (Scotland) Bill: Policy memorandum. Available at: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum-accessible.pdf>.

¹⁶ Police Scotland (2023) “Chief Constable statement on institutional discrimination”. Available at: <https://www.scotland.police.uk/what-s-happening/news/2023/may/chief-constable-statement-oninstitutional-discrimination/>.

¹⁷ Scottish Parliament (2023) Abortion Services (Safe Access Zones) (Scotland) Bill: Policy memorandum. Available at: <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/abortion-services-safe-access-zones-scotland-bill/introduced/policy-memorandum-accessible.pdf>.

this vein, the list of anticipated activities the Bill is envisaged as capturing, as set out in the policy memorandum, is helpful.¹⁸

Given considerations regarding the balancing of rights, it will also be critical that Police Scotland take a measured approach to enforcement. We note that Section 6 of the Northern Ireland Act gives powers to constables to instruct an individual to leave safe access zones, remove them or require them to cease filming. Whilst we do not think the Scottish legislation needs to address this level of detail on the face of the Bill, it does underline the necessity of clear guidance and training for Police Scotland.

Such guidance and training should work to ensure that discretionary decision-making is gender competent, grounded in a human rights approach, and safeguards against discrimination.

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

The harassment and intimidation of women and others accessing healthcare, as well as staff, should be treated as a serious issue. Broadly, we agree with the content of the offences set out in Sections 4 and 5 of the Bill. In the interests of proportionality and human rights compliance, we consider that the approach that means conviction of any of the offences set out in the Bill will result in a fine only and not a custodial sentence, is a judicious one.

We acknowledge that the fine proposed in the Bill diverges from those outlined in Northern Ireland and England and Wales. However, both these approaches also differ from each other.¹⁹ We agree that the flexibility the Scottish Bill affords to impose fines up to the statutory maximum is helpful, as penalties must be sufficient to act as a meaningful deterrent. This is of particular relevance given that much of the anti-abortion harassment that takes place outside healthcare facilities in Scotland seems to be backed by internationally funded campaigns.²⁰ As such, an approach that limits the scale of fines significantly would likely be inadequate to deal with instances of larger-scale coordination of anti-abortion activity.

7. 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?

Women, girls and others accessing services where abortion care is provided have the right to access sexual and reproductive healthcare safely, without discrimination. The

¹⁸ Ibid.

¹⁹ The Northern Ireland Act provides for fines up to £2,500 (level 4 on the Standard Scale). In England and Wales, provisions allow for fines up to Level 5 on the standard Scale that are potentially unlimited.

²⁰ See for example the '40 days for life campaign': <https://www.40daysforlife.com/en/>.

Bill will better facilitate the realisation of these rights and will have a positive impact on the realisation of Article 8 – Right to respect for private and family life through reducing barriers to women’s access to abortion. As with any other form of healthcare, women have a right to access abortion care privately, and this should be without fear of harassment, intimidation or intentional obstruction by those who oppose abortion on principle. Current law does not adequately protect women from healthcare-based harassment, which has a negative impact on their rights under Article 8. The Bill offers an opportunity to address this gap.

Articles 9, 10 and 11 provide rights of freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. Arguments against the use of safe access zones often lean heavily on the rights to freedom of expression and peaceful assembly. However, these rights are not absolute. They can be restricted when prescribed by law, in the pursuit of legitimate aims (such as protecting public safety, preventing disorder or crime, and protecting the health or rights of others), and where necessary and proportionate to the aims pursued.

It is our view that the Bill as drafted meets the requirements and spirit of these criteria. The bill does not prevent exercise of rights outlined within articles 9/ 10/ 11 of ECHR; rather, it limits the places where those rights may be exercised. Similarly, we contend that the offences and exceptions created by the bill are proportionate to achieve the legitimate aim of protecting women’s and healthcare workers’ exercise of their right to privacy. We believe a balance has been struck in ensuring that these offences carry a meaningful penalty, without reliance on custodial measures. We are also of the view that the 200-metre radius of SAZ is proportionate and necessary given the varying size and design of service provision in Scotland. As outlined in our answer to Question 3, we would welcome further consideration regarding the articulation of maximum and minimum limits on the radius for SAZ to ensure both effectiveness and proportionality. We would also recommend the establishment of guidance to ensure human rights-compliant and gender-competent policing and Ministerial decision-making and have outlined detail in our answers to Questions 3 and 5.

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

No.

Engender supports a national approach to safe access zones. We do not consider that a piecemeal, localised approach would provide the necessary protections for those accessing or providing abortion care. Experiences elsewhere in the UK, where localised

approaches to safe access zones were pursued by local authorities prior to national legislation being introduced²¹, demonstrated that such an approach is ultimately unworkable. The initial piecemeal and very limited introduction of safe access zones in England yielded positive results at the clinics in question, but unrestricted harassment of women accessing abortion care continued elsewhere.

The resources required to implement and maintain individual localised safe access zones also create a disproportionate burden on local bodies, risking a chilling effect against their introduction that could result in inequitable protections across the country. We strongly oppose the suggestion that discretion and decision-making around this issue should sit with local authorities that face extreme budgeting pressures and are potentially subject to the personal or politicised views of staff in key positions.

9. Do you have any further comments to make about the provisions in the Bill?

We note that the offences set out in the legislation do not expressly cover filming and photography. Whilst we understand and support the rationale of focusing on intent, or recklessness rather than a prescribed list of actions, we would urge the committee to explore whether these actions would be sufficiently covered by the offences as drafted.

FOR FURTHER INFORMATION

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ABOUT US

Engender is a leading feminist policy and advocacy organisation in Scotland, working to increase women's social, political and economic equality, enable women's rights, and make visible the impact of sexism on women and wider society. We work at Scottish, UK and international level to produce research, analysis, and recommendations for intersectional feminist legislation and programmes.

²¹ See for example the legal challenge made to the Public Spaces Protection Order ("PSPO") adopted by the London Borough of Ealing in April 2018. *Dulgheriu & Orthova v LB Ealing* [2019] Ruling available at: <https://cornerstonebarristers.com/wp-content/uploads/old/finaljudgmentdulgheriu-v-lbealing.pdf>.