

**Health Social Care & Sport Committee
Abortion Services (Safe Access Zones) (Scotland) Bill
Committee Meeting Tuesday March 5th 2024.**

The Scottish Solicitors Bar Association has been asked to provide feedback on our vice president Simon Brown's attendance at the above committee meeting. In particular we have been asked to comment how prosecutorial discretion could be applied in relation to the offences proposed in the bill.

At the outset it is important to state that prosecutorial discretion is solely the province of the Lord Advocate and COPFS. We can give an opinion from the perspective of the defence bar as to how these cases are likely to be dealt with when they come to court but prosecution guidelines are a matter for the Crown.

As Mr Brown said in his evidence, we would feel it likely that there will not be an issue in proving to a court that protestors arrested under this legislation were there to protest. Evidence seen so far both in Scotland and in other jurisdictions seems to indicate that those arrested will be quite clear on what their intentions were and it should not be an issue to establish whether or not they intended to commit a crime.

As was pointed out at the committee meeting however there is the issue of "silent prayer" type protests, and whether or not someone can be arrested for simply standing praying silently without any other interaction with the public. We feel this limited offence would in practice be unlikely, evidence shows so far most such protestors have banners or placards proclaiming their intentions, but even so, "silent prayer" alone remains behaviour intended to influence those seeking an abortion and is in our view correctly prohibited by this bill as it currently stands.

To properly enforce such a prosecution however the bill will require to be fairly strictly drawn as to what constitutes an offence within the enforcement zone.

It would seem likely that in practice simply being in the enforcement zone will be enough to commit an offence. This will be further complicated given the fact that, as we understand it, the bill will not contain an "reasonable excuse" provision. The question then arises on what could be done in situations where the actions of a person or persons on paper contravene the legislation but in matter of fact have nothing to do with safe access zones.

To take the hypothetical situation which was raised in the committee meeting of a legitimate protest taking place at a hospital, for example to protest against pay cuts to staff, but with that protest taking place within the area of the safe access zone, then that would on paper contravene the legislation. It is however clearly not a protest designed to influence those seeking an abortion. The question then becomes how does the prosecutor square that intention with the contravention of the Act.

What can normally happen in any criminal prosecution is that the Procurator Fiscal can take a decision that the case although on paper constituting an offence will not be prosecuted as to do so would not be in the interests of justice. This is clearly something that could be done in this hypothetical situation. All that it would require would be a direction from the Lord Advocate that Procurator Fiscals on prosecuting such cases satisfy themselves that the intention behind any conduct leading to an arrest was to influence those seeking an abortion, and if that intention was not present then the case should not be prosecuted.

We can however envisage certain practical issues with such a policy. Similar circumstances have arisen over the years with a number of types of offences. Prosecutions under the Offensive Behaviour at Football Act, prosecutions under the Domestic Abuse (Scotland) Act Section 1 and various sexual offences have all caused difficulties for the Crown. The problem is essentially that with such politically sensitive cases no one wants to be the person who takes the decision not to prosecute. This results in police officers who take an initial report or make an arrest, even if they believe an offence probably hasn't been committed, not wanting to take a decision and passing the case onto the Procurator Fiscal. The Procurator Fiscal then doesn't want the responsibility of taking the decision themselves, and the easy way out there is to make it the decision of the Sheriff by prosecuting. Thus, you are in a situation where prosecutorial discretion could be applied but for fear of political repercussions it is not.

Again, as Mr Brown indicated in his evidence, we would anticipate a relatively small number of prosecutions arising out of this legislation. We would think also it is almost certain that all of those prosecutions will proceed to trial, given the views of the protestors and their desire for publicity. However, given the relatively small numbers it should not be overly difficult to have internal procedures in place within COPFS to allow a senior Fiscal to review every prosecution. Again, however we reiterate that this is very much something that falls entirely within the province of the Crown and they would require to be consulted by the committee on how to best implement this.

From a defence point of view, were we to be faced with a situation where we felt an accused had been wrongly arrested and their intentions were not to influence those seeking an abortion, then there are procedures in place where meetings can be sought with senior Fiscals and the case discussed. If sufficient information confirming our client's position was thereafter advanced then it would be expected that the Crown would be persuaded to take a view on such prosecutions and not take them any further.

We apologise for the lack of any precision in these submissions however this is very much a grey area outwith black letter law where common sense and discretion will require to prevail.

Please do not hesitate to contact our Mr Brown if you require any further information or clarification on any of the above.

Simon Brown

Vice-President, SSBA