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Dear Clare,

I am writing to follow up on the commitments I gave during the session on 19 March. I hope the Committee finds this helpful, but if there are any further points on which clarification would be useful, I would be happy to provide that where possible.

For clarity, this response covers the following points:

- Silent prayer, and how policing silent prayer might work in practice;
- Other offences in which police officers are required to use their judgement as to whether an offence has been committed in terms of the intended effect on individuals;
- Places of worship that are situated within the boundary of a safe access zone, and the types of action which might be captured as an offence, and
- Extension and reduction of safe access zones, particularly the timescales for consultations and how that compares with timescales for consultations and subordinate legislation.

Silent prayer and how it may be enforced

As I set out in my evidence to Committee, whether a particular activity may constitute an offence under the provisions of the Bill, will be dependent on the facts and circumstances of each case. As I also said at Committee, women have a right to access abortion services free from unwanted influence, harassment and public judgement. Behaviours which are attempts

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to prevent or impede access to, or persuade women in terms of accessing those services, are actions which interfere with their rights and it is those behaviours that the Bill seeks to prevent.

It is therefore an offence where the act is carried out with the intention of (or recklessness as to its effect of) influencing the decision of a person to access, facilitate or provide abortion services; preventing or impeding such access; or causing harassment, alarm or distress in connection with a person's decision to access, provide or facilitate such services. The offences are therefore designed to capture types of behaviour with an intended effect. Whether an offence has been committed would be an operational decision for enforcement agencies.

Prayer, silent or otherwise, is not of itself an offence under the Bill. Whether the behaviour or actions of persons who undertake this activity within a zone could be an offence would depend entirely on the facts and circumstances of each case, and the Scottish Government rightfully cannot interfere in how Police Scotland and the Crown Office and Procurator Fiscal Service discharge their duties. It is important to note that the Bill requires that the behaviour is carried out with the intention of (or recklessness as to its effect) having an effect set out in sections 4 and 5 to discourage types of behaviour which prevent or impede access or seek to influence women (and staff) in accessing abortion services. Otherwise, an offence would not be committed.

When considering the potential effects of silent prayer, it is important to note both the evidence Committee has heard about the impact of silent judgement, and the fact that the Supreme Court noted that silent protests can have a negative impact. The Supreme Court found that a significant aspect of the circumstances with which the Northern Ireland Bill was concerned was that women and staff attempting to access services are a captive audience for protesters who wait outside the premises and that those women and staff "*are compelled to listen to speech or witness silent prayer which is unwanted, unwelcome and intrusive*". It is clear that, in some circumstances, it may be detrimental, even if that may not always be the case. In its own decision on the Northern Ireland Bill, the Supreme Court quoted a judgment from the High Court of Australia: "*Silent but reproachful observance of persons accessing a clinic for the purpose of terminating a pregnancy may be as effective, as a means of deterring them from doing so, as more boisterous demonstrations*", and commented that "*that observation is strongly supported by the evidence in the present case*". This Parliament has heard the same evidence. We have clear testimony from women that having to pass people standing in silent judgement is profoundly upsetting.

During their evidence to Committee, Police Scotland described the facts they may take into account when deciding whether an offence had been committed. They described that they would "provide a picture" of what was occurring and the physical demeanour of the person. I note that Committee have written to Police Scotland to ask them to provide further information on how they will manage and investigate incidents of silent prayer outside of abortion services, and I hope that information proves useful to Committee in their scrutiny of the Bill.

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Other offences

During my appearance at Committee, I committed to highlighting comparable offences; that is, offences that require police officers to make a judgement call as to whether an offence has been committed and the impacts on individuals. I have included some examples of such offences below. These offences rely on the police making an assessment of whether behaviour has been undertaken that either is intended to (or is reckless as to whether it does) have particular effects on another person or persons.

- Threatening or abusive behaviour offence - Criminal Justice and Licensing (Scotland) Act 2010 (legislation.gov.uk)
- Stalking offence - Criminal Justice and Licensing (Scotland) Act 2010 (legislation.gov.uk)
- Domestic abuse offence - Domestic Abuse (Scotland) Act 2018 (legislation.gov.uk)

Places of worship

As Committee is aware, the only building that forms part of the safe access zone is the protected premises itself. However, an offence could be committed under section 5 of the Bill if activity inside a building, or in a private space, including a place of worship, within the safe access zone is visible or audible to people accessing, providing or facilitating abortion services. Such activity must be capable of having one of the effects set out in section 5.

This is designed to prevent those who carry out anti-abortion activities circumventing the legislation by simply relocating to areas of the zone that are exempt whilst still targeting patients and staff. Whether an offence is committed in any case will be a matter for Police Scotland and the Crown Office and Procurator Fiscal Service, based on the facts and circumstances of the case and the evidence available to them. The Scottish Government of course would not interfere in those matters.

Members sought clarity on whether particular signage outside of places of worship, or hymns that can be heard from a safe access zone, could be caught by the provisions of the Bill. I would reiterate that the sign or message must meet the requirements set out in the offence provisions so would need to be clearly conveying a message designed to influence a person's decision to access, facilitate or provide abortion services or impede access or cause harassment, alarm or distress.

I note that religious hymns and signage outside of places of worship are commonplace in Scotland and, unless they were specifically targeting people who were accessing or providing abortion services in this way, I would not anticipate that they would be caught by the offences in section 5 of the Bill. This, in my view, would encompass general signs with messages, such as those suggested by Committee, setting out views on sin or repentance.

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Extension and reduction of safe access zones

It may be helpful to set out here the different provisions which the Bill makes in terms of, first, changes to be made to the size of existing zones and, second, powers to extend the protections under the Bill to new types of premises which do not fall within section 1 of the Bill. I have set out for clarity the various circumstances in which each of these can be used. I hope this aids the Committee in its consideration of the Bill as a whole.

It may also be helpful to set out here how the Bill applies in terms of the creation of new zones when abortion services (as defined under the Bill) are provided in new NHS premises or approved private clinics.

Firstly, the Bill provides that those premises where treatment for abortion is currently carried out in clinical settings under the Abortion Act 1967 will automatically be protected premises. For any new premises which then become protected premises after the Bill is commenced (for example if abortion services are to be provided at an NHS hospital for the first time), those premises will automatically become “protected premises” under section 1 of the Bill. For premises where services begin to be delivered after the Bill is commenced, the zone is created only once the Scottish Ministers update the list of protected premises and specify the date on which the zone will take effect. For example, if a new hospital were to provide abortion services, the premises would automatically be protected premises; a safe access zone would then be established 14 days after the Scottish Ministers updated the list, they are required to publish under section 3(3). No consultation is required for this as the premises automatically assume protected premises status by virtue of section 1 and the zone is comprised in the same way as existing premises. This reflects the automatic approach of providing safe access zones for premises which provide abortion services.

Secondly, the Bill contains provisions to extend and reduce the size of safe access zones once the zones are in place. It is important to note that the powers apply only in relation to the 200m area (that is the area taken from the outer boundary of the grounds or the protected premises where there are no grounds). The protected premises and the grounds will always remain part of the zone and are not affected by the powers.

Finally, the Bill makes provision to extend the protections under the Bill to new types of premises – those that would not be protected premises under the section 1 definition. The mechanism for this is a power to modify the definition of protected premises so that the protections in the Bill may be extended to include other types of premises. It may be helpful if I set out the process for both changing zone size and the protected premises definition.

<u>Power to extend and reduce size of safe access zones</u>

These powers have been included because we must ensure zones can continue to operate effectively even if circumstances change, such as the ways service users and providers access a particular premises, or how anti-abortion activity is carried out. It is important to note also that, in exercising powers to extend or reduce, Ministers must act compatibly with

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Convention rights therefore an assessment will be done to consider whether that change is compatible with the European Convention on Human Rights. All decisions to extend or reduce will also be based on information and evidence at the time.

Under section 7, an operator may apply for Ministers to extend a safe access zone. The operator and Ministers must be satisfied that the safe access zone for the protected premises does not adequately protect persons who are accessing, providing or facilitating the provision of abortion services at the protected premises from any act of a type mentioned in section 4(1) or 5(1) where a decision is made in respect of that zone. As the Bill provides for a standardised approach in terms of the zone size and design (all zones are currently set at 200m) it is important that the powers provide flexibility to allow that standardised approach to continue if that is appropriate. Ministers therefore have the power to extend one or more zones to move the zones *en bloc* to preserve the standardised approach.

Under Section 8, Ministers may reduce one or more zones of their own accord if satisfied that it is appropriate to do so. The powers also reflect that the standardised approach may be preserved if that is appropriate to do so. As noted earlier Ministers must act compatibly with ECHR when exercising their powers. The reduction of a zone would only be appropriate if the aims of the Bill – the protections it provides – were still provided by the reduced zone.

At my evidence session on 19 March, I explained the need for these powers to be used quickly, and members questioned how consultation might impact that, and whether a requirement for subordinate legislation would meaningfully delay the process when that consultation process was factored in.

In deciding whether an extension or reduction is appropriate, Ministers will consider and assess the evidence and will consider whether any change will remain proportionate based on the applicable circumstances. Consultation and engagement with affected parties would be carried out in that decision-making process.

The process may vary for each case for any specific change, as it will be dependent on the circumstances at the time and the nature of the changes being sought. In every case, it will be important that sufficient time is taken to gather and weigh up all relevant evidence.

Nonetheless, it is also important that, if this work has been carried out and a decision is reached on the need for an extension or reduction, the required change can be implemented quickly. Where an extension is needed, women should not have to wait a potentially significant amount of time even while there is evidence that the protection they are being provided is inadequate. Where a reduction is needed, this should also be done without delay.

Requiring changes to be made through subordinate legislation will necessarily extend the length of time required to make a change which could extend any harm caused to women in the case of an extension.

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I want to emphasise again that the absence of secondary legislation does not mean there are no checks and balances. There will always be engagement and consultation carried out, as an essential part of reaching a decision on the need for change. The Scottish Ministers will only decide to proceed with a change in the zone size if they are satisfied that it would be proportionate to do so. And a decision to extend or reduce will also be subject to the supervisory jurisdiction of the courts.

Power to modify definition of protected premises

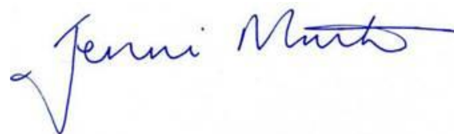
The Bill provides Scottish Ministers with a power, in section 10, to make regulations to extend the premises which are protected. The power allows for two changes: to include new premises if they are approved as a class of place providing abortion treatment in the future, and to cover premises at which treatment or services related to abortion services (such as counselling) are provided.

As Committee has heard, this is to ensure that the Bill has a degree of future-proofing and is able to achieve its aim even if abortion treatments, or the way services are provided, change. It also provides flexibility in the premises to be protected should the behaviour of groups who oppose abortion, and the venues they target, change.

Section 10 requires affirmative regulations to enact any changes to protected premises, thus ensuring appropriate Parliamentary oversight. As is standard when drafting any regulations, consultation with relevant parties, such as service providers and anti-abortion groups, would be an integral part of the process.

I hope Committee finds this information helpful. I thank you again for the opportunity to appear before you last week.

Yours sincerely,



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