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CONVENOR
HEALTH, SOCIAL CARE AND SPORT COMMITTEE
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ABORTION SERVICES (SAFE ACCESS ZONES) (SCOTLAND) BILL: STAGE 1 REPORT

Dear Convener,

Thank you for the Health, Social Care and Sport Committee's detailed consideration of this Bill, and for the Stage 1 Report. I recognise that the topic of safe access zones introduces important issues and the balancing of fundamental human rights, and I am grateful to you for clearly setting out these issues for the Parliament as a whole to consider.

I attach my response to the recommendations made within the Stage 1 Report. As you will note from my responses, I agree with many of the Committee's recommendations; where I cannot agree or plan to give the matter more consideration, I have provided further details. Crucially, I remain committed to working with all members so that this Parliament can pass a strong and coherent Bill that will successfully protect those accessing and providing abortion services both in the short and long term.

Again, thank you for considering the Bill and I hope you find my responses helpful.

Yours sincerely,

Gillian Mackay MSP

ABORTION SERVICES (SAFE ACCESS ZONES) (SCOTLAND) BILL

RESPONSE BY GILLIAN MACKAY MSP TO THE STAGE 1 REPORT BY THE HEALTH, SOCIAL CARE AND SPORT COMMITTEE

1. I am grateful to the Committee for its detailed and careful scrutiny of the Abortion Services (Safe Access Zones) (Scotland) Bill. This paper provides my response to the specific points and recommendations made by the Committee in their Stage 1 Report.
2. The Committee's comments are shown in boxes below, along with the paragraph number in the Stage 1 report, and my response is given underneath. This response uses the headings from the Stage 1 report. Where appropriate, recommendations have also been grouped together by theme and a single response is provided.

Post-legislative review

Proportionality

7. The Committee considers it important that the legislation is subject to ongoing review to ensure restrictions continue to be proportionate to the legitimate aims of the Bill as circumstances change over time. To enable this, the Committee calls for provision to be made to ensure the Bill's implementation undergoes regular post-legislative review to ensure its continuing effectiveness, including the provision of regular updates on its implementation to the Scottish Parliament. It would also be helpful to clarify which people or bodies are responsible for collecting ongoing evidence about the impact of safe access zones on both people accessing abortion services and those engaged in protests and vigils.

Defining influence – conclusion

22. However, the Committee is also aware that there are areas of implementation that will be subject to ongoing review. The Committee recommends embedding a post-legislative review process into the legislation to ensure it remains human-rights compliant and to assess the extent to which protections in the Bill may need to be adjusted as a result. The Committee suggests this should include a record of any offences committed during the review period and an assessment of the extent to which each safe access zone has fulfilled its purpose.

Recommendation on the general principles of the Bill

31. The Committee is firmly of the view that, to ensure that it remains suitably proportionate, balanced and effective in the light of changing circumstances, the legislation must be subject to a robust process of post-legislative review. It therefore calls on the Member in charge of the Bill

and the Scottish Government to make provision for this, including appropriate opportunities for ongoing parliamentary scrutiny, by way of Stage 2 amendments to the Bill.

3. I am pleased that Committee have concluded that the provisions of the Bill are proportionate to achieving its stated aims. I share their desire to ensure that this remains the case, even as circumstances change over time.
4. I therefore agree with this recommendation and commit to bringing forward an amendment to insert a post-legislative review provision at Stage 2.

Protected Premises

9. ...the Committee notes that any future extension of (the definition of protected premises) is likely to have an impact on the human rights as set out in the ECHR of those protesting or undertaking vigils. To ensure the impact on human rights are assessed and remain proportionate to the aims of the bill, any future changes to this definition should be subject to a further enhanced level of parliamentary scrutiny to that currently provided by the Bill.

5. I welcome the Committee's consideration of this important provision, and their conclusion that the ability to change the definition of protected premise is needed to ensure safe access zones remain fit for purpose in the future. That is why the Bill provides that these powers are subject to affirmative procedure to ensure that scrutiny is provided.
6. I remain committed to listening to the concerns of members ahead of Stage 2. I would, however, note that:
 - a. the affirmative procedure is a robust form of scrutiny that ensures Parliamentary debate and oversight and,
 - b. the Scottish Ministers will always be bound to carry out an assessment of whether proposed legislation is compatible with human rights, and to act proportionately.
7. Importantly, the Bill also sets out the test that must be met before Ministers can use the section 10 power. The test is that any decision to expand the definition of premises can only occur if the Scottish Ministers consider it is necessary to protect service users or providers from behaviour of the type specified in sections 4 or 5. If this test is met, then it is extremely important that service users or providers are not left unprotected longer than absolutely necessary. It is also worth noting that there is a consultation requirement built in to this provision, in recognition of the

importance of ensuring robust scrutiny when considering modifying the definition of protected premises. I am of the view that any additional process would add unacceptable delay, and I therefore believe that the affirmative procedure strikes the right balance between ensuring robust oversight and allowing swift action to be taken.

8. For these reasons, I remain confident that the Bill as drafted already provides sufficient Parliamentary oversight. I note that this is also the opinion of the Delegated Powers and Law Reform Committee, which concluded following scrutiny that “The affirmative procedure appears appropriate given the potential significance of the measures such regulations could introduce. The affirmative procedure will give the Parliament an opportunity to ensure it is content that such regulations strike the right balance between Convention Rights.”

Safe Access Zones

Establishment of safe access zones

11. At the same time, the Committee questions why the default radius of safe access zones has been set at 200m when evidence suggests a radius of 150m would be sufficient for all but one protected premises currently providing abortion services in Scotland.

12. The Committee therefore recommends an alternative approach of setting a standard radius of 150m for safe access zones in Scotland and then using the provisions set out in section 7 of the Bill to extend this radius to address the specific circumstances of the Queen Elizabeth University Hospital site.

9. I appreciate the Committee’s thoughtful approach in its consideration of the size of safe access zones, and welcome the acknowledgement that a single size zone is important to provide clarity.
10. I re-iterate that I am committed to working closely with Members wherever reasonable to find common ground. However, in this instance, I must resist any amendment that would set 150m as the default size.
11. The Committee heard evidence about scoping work carried out in 2022, which showed that 150m would be sufficient for all but one premises. However, this has been superseded by extensive additional work during the Bill’s development.

12. As detailed more extensively in the Policy Memorandum which accompanied the Bill, in order for safe access zones to be effective they must capture those areas where a service user or provider is “a captive audience.” This covers, for example, entrances and exits (to the site and the building), bus stops and other areas where anti-abortion activity has already had negative impacts.
13. Additionally, there must be a buffer around these identified areas to ensure that service users and providers cannot be called to or shown graphic images while they remain a “captive audience”. Taking account of all these factors shows that a significant number of premises require zones of more than 150m.
14. Reducing the zone size to 150m in the Bill would therefore provide inadequate protection at these sites, which in turn would prevent the Bill from meeting its aims in respect of those premises. I am sure Members will understand that I cannot endorse a change that would have such a material impact on the Bill’s effectiveness.
15. Although a zone size of 200m has been judged suitable given Scotland’s circumstances, it may be worth noting that, in consideration of the Northern Ireland legislation, the UK Supreme Court stated. that:
- “A zone of up to 250 metres does not represent an unjustifiable restriction of the rights of protesters, when they remain free to protest anywhere else they please, and when the rights of the patients and staff are also taken into consideration”*
16. I am therefore confident that the current zone size, being necessary to meet the Bill’s aims, remains proportionate. Furthermore, I have committed to provide a review of the legislation. The Bill also provides powers to amend the size of the zones if required. That will allow zone sizes to be changed, if required, based on the evidence but will also allow the standardised approach, which Committee recognises as desirable, to be retained as appropriate. These provide an additional layer of safeguarding to ensure that the size of safe access zones remains proportionate even if the circumstances of abortion services change in Scotland.

Extension, reduction, and cessation of safe access zones

14. The Committee recommends that the Member in charge of the Bill and the Scottish Government consider whether there may be justification for setting minimum and maximum requirements for extension and reduction of safe access zones in the legislation to ensure a proportionate approach in terms of the Bill's impact on human rights, and the potential risk of these powers being misused by Scottish Ministers is eliminated.

17. I appreciate the Committee's careful and thoughtful consideration on whether a minimum and maximum distance of zone is required for extension and reduction purposes. This option was considered in depth during the development of the Bill, and was considered to present some significant challenges, which I have outlined below.
18. First, it is vital to ensure that, in the future, zones provide protection for those who access and provide services, while minimising restrictions for those who wish to take part in anti-abortion activity as far as possible.
19. This means that the size of zones must be capable of being adapted to fit the circumstances at the time when any change is needed. Given the complex landscape in which safe access zones will operate, it is not possible to say definitively what future changes may occur. As such, it is impossible to say now what maximum or minimum size would never be disproportionate. Setting such limits would therefore be arbitrary and risk being disproportionate.
20. For instance, a maximum of 250m could be set, and yet in the future, the way in which abortion services are provided may require a zone of 260m to provide adequate protection for service users and providers. In those circumstances, it would not be possible to increase the size of zone and the aims of the Bill would not be met.
21. Similarly, if 200m, or even 100m, were set as a minimum, there may be circumstances in the future where an assessment of the protected premises and zones at that particular point indicated, for example, that 50m would be the appropriate standard distance for all sites.
22. In contrast, the Bill as drafted provides the flexibility to ensure its aims are fulfilled.
23. Importantly, Ministers will always be bound to act in a way that is compatible with human rights and will have to assess all the available evidence before making any decision to reduce or extend to ensure such a decision is proportionate. There is therefore already a strong safeguard to ensure the zone sizes are proportionate and achieve the aims and deliver the protections.
24. Nonetheless, I appreciate that the issue of reduction and extension has raised concern, and I will explore what can be done to address these concerns at Stage 2.

15. The Committee recommends that Scottish Ministers undertake a human rights proportionality assessment before making decisions about reducing or increasing the size of safe access zones and that such a requirement should be included on the face of the Bill.

25. I recognise that the human rights implications of the Bill have been a complex topic, and I welcome Committee's detailed consideration of the matter.

26. I will continue to engage with Members on this important issue. However, the Scottish Ministers are duty bound to act proportionately and to assess whether any decision is compatible with the European Convention on Human Rights (ECHR) and must act compatibly with ECHR. That is an overarching legal requirement.

27. Therefore, I am confident that the Scottish Ministers must assess all the available evidence before making a decision and evaluate whether the extension or reduction is compatible with ECHR rights and proportionate based on the circumstances. I am, for the same reasons, confident that an amendment requiring this on the face of the Bill is not necessary and would not have any practical impact on how decisions are made.

16. The Committee recommends that the Bill should be amended to stipulate that processes to either extend or reduce the radius of safe access zones should be subject to consultation with service providers and other relevant stakeholders.

28. I welcome the Committee's recommendation that the reduction and extension should be consulted upon with service providers and other relevant stakeholders. As I am aware from my own policy work, consultation occurs as standard practice for any policy changes, which is why I chose not to include such a requirement in the Bill as introduced.

29. However, having listened carefully to the evidence received by Committee, and in recognition of the particular concerns these powers raise, I am committed to bringing forward an amendment at Stage 2 to require consultation.

17. To ensure appropriate parliamentary oversight, the Committee further recommends that decisions to extend or reduce the size of safe access zones should be made by way of delegated powers and that the relevant instruments should be subject to the affirmative procedure.

30. I appreciate the Committee's concerns about the decision to extend and reduce the size of zones and acknowledge the recommendation for this only to be done through the use of delegated powers. However, it is critical that zones can be extended or reduced quickly to ensure that safe access zones provide adequate protection for service users and providers.

31. In the circumstances where a zone of 200m no longer provides adequate protection, service users cannot wait a potentially significant amount of time for the zone to be extended. In this circumstance, service users and providers would continue to experience harmful behaviour even when there is evidence of this occurring, meaning that the aims of the Bill would not be met in respect of that zone.
32. Equally, if reductions are needed this should be done without delay as to do otherwise would be to subject individuals to criminal sanctions in some places even while the evidence shows the zone does not need to extend as far as it does.
33. In considering this, I also highlight again the requirement that the Scottish Ministers must always act proportionately and compatibly with ECHR, and that all such assessments must be evidence-led. As also outlined above, I propose to lodge an amendment at Stage 2 to ensure that there is adequate consultation with the appropriate parties before any decision is taken to extend or reduce a safe access zone, which I hope will provide further reassurance.

Offences relating to safe access zones

Management and enforcement of offences

19. The Committee recommends further consultation with Police Scotland on proposals to deliver specialist training regarding the enforcement of the offences created by this Bill, and to commit to put in place the necessary funds to develop and deliver that training. The Committee further requests that the financial memorandum (FM) be updated to reflect that commitment.

34. I note the Committee's recommendation in relation to specialist training for Police Scotland, and appropriate funds to finance this.
35. In their letter to Committee, Police Scotland set out their expectations on how they will police any potential breaches of safe access zones. They confirmed that they will approach any potential breaches as they would with other potentially unlawful protest activity: that is, through a graduated response.
36. I have consulted with Police Scotland throughout the development of the Bill, and will continue to do so as it makes its way through Parliament. If additional funding is required for Police training, I will provide updated financial information prior to Stage 2.

24. There is a difference of views within the Committee. Some Members consider that there should be an explicit exemption from the provisions in the Bill for silent prayer, in order to

avoid any criminalisation of private thoughts. However, other Members feel that such an exemption would fundamentally undermine the purpose of the Bill, and that people silently praying can still be intimidating to those seeking to access abortion services. This is an issue we expect we will need to return to at Stage 2 if the Bill proceeds to that Stage.

37. I acknowledge the extensive discussions Committee held around the issue of silent prayer, and recognise that it is a particularly complex issue.
38. However, the Bill does not prohibit specific behaviours in a safe access zone. The offences in the Bill are instead drawn to target the impacts of activities or behaviours: that is activities that are intended to (or are reckless as to whether they do) influence, impede the access of or harass, alarm or distress someone within a safe access zone who is attempting to access or provide abortion services.
39. This means that prayer, silent or otherwise, is not an offence under the Bill. Whether someone praying could commit an offence would depend entirely on the facts and circumstances of each case, and it is for Police Scotland and the Crown Office and Procurator Fiscal Service to decide on how to best discharge their duties. As Police Scotland noted to Committee, determining whether enforcement action is needed will require looking at the whole picture of the facts, and as the Minister for Public Health and Women's Health set out in her follow-up correspondence to the Committee, this kind of operational decision-making is not unusual.
40. If someone prays silently on their way to the hospital, it is very unlikely that anyone would be aware that they are saying a prayer. Other conduct and the circumstances could, however, draw attention to the fact that the person is praying. Even then, it is only where the whole facts and circumstances could have the effect of influencing, impeding the access of or harassing, alarming, or distressing someone, that the person praying could be committing an offence.
41. To be clear, it is not the prayer that gives rise to the offence. It is the facts and circumstances of the whole situation that could give rise to an offence.
42. However, I recognise the depths of concerns the Committee has on this issue and welcome the opportunity to continue to discuss the matter with members on this at Stage 2.

Exceptions to offences

25. The Committee acknowledges trade union concerns that the current exception for trade union picketing is narrowly defined and could result in other activities associated with industrial disputes that would seek to influence staff delivering abortion services not to provide those

services, being captured as an offence. The Committee therefore calls on the Member in charge of the Bill and the Scottish Government to consider how and to what extent this exception might be expanded to include other types of trade union activity without undermining the underlying purpose of the Bill.

43. I am aware that this provision has generated some concern, and I am grateful for the Committee for drawing attention to it in their recommendations.

44. I am confident that the Bill as drafted already exempts a wide range of trade union activity. It specifically exempts engaging in conduct that is lawful under section 220 of the Trade Union and Labour Relations (Consolidation) Act 1992. Section 220 makes provision for peaceful picketing and provides that it is lawful for persons or trade union officials in contemplation of a trade dispute to attend at or near their place of work or a union member's place of work, for the purpose of peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working.

45. The exemption in the Bill is there in specific recognition that protest activity related to workers' rights may unintentionally influence decisions to provide abortion services or impede access to them, but that their purpose is distinct from pro- and anti-abortion activity. It is considered that the different intentions and motivations behind workers' rights activities mean that those providing and using services will not experience the harmful effects which safe access zones are designed to prevent, even if the activity takes place within a zone. It is considered appropriate to tie the exemption in the Bill to existing and established legislative provision regarding peaceful picketing.

46. I do, however, appreciate the Committee's concerns and have contacted the Royal College of Nursing, and would welcome the opportunity to discuss this matter further with them and Committee in advance of Stage 2.

Penalties for offences

27. The Committee highlights evidence it has received that penalties could be expanded to include the issuing of warnings or physical removal from a safe access zone as a further means of policing first offences as well as the issuing of an exclusion order prohibiting those found to have committed repeat offences from entering a safe access zone for a defined period of time. It calls on the Member in charge of the Bill and the Scottish Government to consider whether amendments might be required to the Bill to enable the use of such alternative approaches or to what extent they might be covered in operational guidance supporting the Bill's implementation.

47. I listened with interest to the evidence provided to Committee on this matter, and I am pleased that there is general approval for the penalties contained within the Bill as drafted.

48. When developing the Bill, a range of options were explored to ensure that the penalties are appropriate; this included considering penalties in other comparable legislation within the UK, and engagement with Police Scotland and the Crown Office and Prosecutor Fiscal Service (COPFS).

49. During discussion with Police Scotland, and in evidence provided to Committee, they confirmed that they will adopt the 4 Es approach to enforcement. This is to Engage, Explain, Encourage and Enforce. I am of the view that this provides the appropriate means to escalate policing of safe access zones depending on the individual circumstances in each case. Importantly, Police Scotland confirmed to Committee that they do not consider that they require any additional powers to enforce safe access zones.

50. Nonetheless, close consultation with Police Scotland will continue, as will engagement with members and stakeholders to ensure any additional steps that will strengthen the Bill in this area can be taken.

28. The Committee also recommends that the legislation is subject to ongoing review to ensure penalties remain appropriate to achieving the deterrent aims of the Bill. It calls on the Scottish Government to keep the Parliament informed of any significant developments in case law that could have implications in this area.

51. I thank the Committee for their consideration of this issue.

52. It is important to note that it already is the case that legislation will be subject to ongoing review. Zones may, for example, be adjusted if they are too large or small and do not deliver policy aims.

53. However, I fully agree it is important that the impact and effectiveness of the legislation are fully understood over time and that is why, as noted above, I am committing to bringing forward an amendment at Stage 2 that will insert a post-legislative review provision on the face of the Bill.