



## **ADF UK Response to Proposed Abortion Services (Safe Access Zone) (Scotland) Bill Consultation**

**Which of the following best expresses your view of the proposed Bill?**

Fully Opposed

- i. The Bill intends to limit the otherwise lawful speech and expression of individuals in public spaces and therefore interferes with Articles 9, 10 and 11 of the European Convention on Human Rights (“ECHR”). By infringing on the core rights of individuals, it stands contrary to many of the fundamental and democratic principles that are enshrined in law.
- ii. The Bill seeks to criminalize any activity that is considered an ‘attempt to influence’ the decisions of people using abortion services; yet, this language is too broad and vague to form a predictable foundation for criminal liability.
- iii. A blanket ban on individuals carrying out everyday activities in public spaces has the potential to impose criminal sanctions on individuals for their everyday speech, thought or conduct, as is subjectively determined by law enforcers.
- iv. The wording of the Bill is disproportionate to its stated aims of preventing harassment and intimidation; activities which are already subject to adequate criminal and civil measures in the law.
- v. The Bill is likely to face legal challenge because of its broad and unjustifiable language, exposing the taxpayer to unnecessary public expense.

**What is your view of the proposal for safe access zones being introduced at all healthcare settings that provide abortion services throughout Scotland?**

Fully opposed

- i. The Bill intends to criminalize anyone committing an offending act with up to 2 years imprisonment. This is an extreme and unjustifiable sanction for what could be silent, peaceful, and everyday expression in public spaces. The prevention of the free assembly of citizens and the exchange of information on all areas of public land surrounding abortion facilities is a severe threat to democracy and imposes an unusually low criminal threshold.
- ii. The Bill gives a wide margin of discretion to local councils to individually determine whether to extend any buffer zone beyond 150 meters. Significantly, this could extend the prohibitions unintended venues where religious liberty and speech has historically been unquestionably afforded, including churches, schools, and hospital chaplaincies.

**What is your view of the proposal for the ‘precautionary’ approach to be used. In which a safe access zone is implemented outside every site which provides abortion services?**

Fully opposed

- i. The rationale for this Bill rests in the alleged harassment and harm that free expression outside abortion centres causes to women. Therefore, it is of paramount importance that the Scottish Government properly assesses the evidence of this. Allegations of this nature need to be objectively proved. Yet, the Scottish Government has not been able to prove harm to women. Similarly, any assessment needs to properly consider the testimonies of women who have been supported by individuals offering help outside abortion facilities.
- ii. The Scottish Government should reflectively consider the comparative enactment of Public Spaces Protection Orders (PSPOs) in England by local councils which relied on the assumption that pro-life activities outside abortion centres caused harm to women. In the legal challenges to the buffer zones created in Ealing (2018), Richmond (2019), and Manchester (2020), it was found that the majority of activities undertaken outside abortion centres leading to the measures consisted of peaceful prayer and leaflet distribution. The aim of the volunteers who participated in the vigils was to pray and offer practical assistance to women. While the rationale of harassment or intimidation was stated by the councils to enact the PSPOs, the councils could not prove this. Even the limited video footage available from clinic entrances and body-worn cameras of volunteers participating in vigils failed to show any evidence of harassment or intimidation.
- iii. There is very little evidence that harassment or intimidation occurs outside abortion clinics in Scotland. A freedom of information (FOI) request obtained by the group 'Compassion Scotland' revealed that there had been no recorded incidents of intimidation or harassment at 13 different locations in Scotland between 2016 and 2021.
- iv. Moreover, the government has not demonstrated that the measures are justified even if harassment or intimidation were to be objectively proved. Adequate and robust laws already exist in Scotland to tackle harassment and intimidation outside abortion clinics. These include sections 201-204 of the Local Government (Scotland) Act 1973, the Antisocial Behaviour (Scotland) Act 2004, section 14 of the Public Order Act 1986, section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and the common law offence of Breach of the Peace. The government has failed to articulate why additional laws restricting peaceful speech are required; the government ought not to pass new laws merely based on peoples' subjective 'feelings' of dislike towards individuals who participate in public vigils.

**What is your view of the proposed standard size of a safe access zone being 150 metres around entrances to buildings which provide or house abortion services?**

Fully opposed

- i. A blanket ban of 'influencing' anyone within 150 metres around entrances of all buildings in Scotland which provide abortion services undermines the established principle of proximity which has been shown to be an important component of Articles 10 and 11 of the ECHR. The ruling in *UK Oil & Gas LPC and Others v Persons Unknown* and *Thurrock Council v Adams* affirmed that measures to prevent protest were limited to the direct obstruction of lawful activity.
- ii. If a blanket geographical region of 150 meters were to be imposed as an excluded zone around all abortion centres, the government would limit the religious activities in churches. For example, if a buffer zone were imposed around Glasgow Royal Infirmary, Glasgow Cathedral would be included within the area.

**What is your view of the proposal to ban all protests including both protests in support of and those in opposition to: A person's decision to access abortion services (ie a woman having an abortion)?**

Fully opposed

- i. The proposals stand contrary to the established case law of the European Court of Human Rights that fiercely protects freedom of religion and belief and freedom of thought. In *Stavropoulos and other v Greece*, the court held that freedom of thought, particularly in relation to the conception of life is "a precious asset for atheists, agnostics, sceptics and the unconcerned".
- ii. The attempt by the Scottish Government to ban all forms of protest within certain public spaces fails to distinguish between actual harmful activities and activities which people merely disagree with or find disagreeable. This significantly limits core democratic freedoms of individuals in Scotland to peacefully protest.

**What is your view of the proposal to ban all protests including both protests in support of and those in opposition to: A person's decision to provide abortion services (ie a doctor, nurse, or midwife)?**

Fully opposed

- i. The government ought to seriously consider and replace the use of the word 'protest', which connotes a different type of activity to the peaceful prayer vigils which usually operate around abortion centres by groups like 40 Days for Life.
- ii. The government has not provided any evidence to show that pro-life vigil group members threaten, block, or prevent any staff member of any abortion centre in Scotland through their peaceful presence.
- iii. The criminal law already contains sufficient provisions for police officers to arrest and charge members of the public who threaten or harass members of the emergency services or other individuals.

**What is your view of the proposal to ban all protests including both protests in support of and in opposition to: A person's decision to facilitate provision of abortion services (ie administrative or support staff)?**

Fully opposed

As above

**Which types of activity – when done for the purposes of influencing a person's decision to access healthcare settings including abortion services – do you consider should be banned in a safe access zone?**

Persistently, continuously, or repeatedly occupying the zone

Impeding or blocking somebody's path or an entrance to abortion services

Intimidating or harassing a person

Seeking to influence or persuade a person concerning their access to or employment in connection with abortion services

Demonstrating using items such as leaflets, posters, and pictures specifically related to abortion

Photographing, filming, or recording a person in the zone

All of the above

None of these

Other (include details below)

**What is your view on the potential punishments set out in the proposal for breach of a safe access zone?**

Fully supportive

Partially supportive

Neutral (neither support nor oppose)

Partially opposed

Fully opposed

Unsure

- i. The Bill proposes to impose a blanket non-harassment order on an infinite number of unknown persons without the need to show any prior evidence of harassment or harm. The lack of clarity as to which activities are to be caught within the scope of the buffer zone would impose an undue burden on police officers to interpret the unclear law and risk unjustifiably limiting individuals' liberty and creating a chilling effect.
- ii. The sanctions proposed for individuals who break the law include both financial penalties and imprisonment. This could result in people peacefully and non-obtrusively offering information or assistance to women facing significant sanctions.

**Do you think there are other ways in which the Bill's aims could be achieved more effectively?**

Yes

No

Unsure

- i. Provision should be made for the direct monitoring of activities outside abortion clinics, frontloading efforts towards a strong evidential basis from which prosecution can be made against persons guilty of harassment and intimidation.
- ii. The government could issue guidance to assist law enforcers to apply the existing law to protect women against genuine harassment and intimidation outside abortion centres.

**Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think the proposal could have if it became law?**

- a significant increase in costs
- some increase in costs
- no overall change in costs
- some reduction in costs
- a significant reduction in costs
- I don't know

**Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation.**

**What impact could this proposal have on particular people if it became law?**

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

**Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.**

- i. This Bill will have a disproportionate and discriminatory impact on persons who hold pro-life views on abortion – either from a religious or philosophical basis.
- ii. The Bill would also have a negative impact on women who are pregnant and are not firmly decided in whether to have an abortion. Across the UK, hundreds of women have publicly spoken about how the presence of pro-life vigil members outside abortion centres have helped them come to an informed decision about abortion, increasing their choice. For example, a grassroots campaign group called 'Be Here For Me' was formed by women in England when buffer zones were previously debated in Parliament. This campaign showcases hundreds of women who have decided to keep their babies as a result of interaction with pro-life groups outside clinics, and who have received wide-ranging assistance including housing, clothing (for newborn babies), financial, and emotional support.
- iii. The government has not demonstrated that they have complied with their Public Sector Equality Duty under section 149 of the Equality Act 2010 because a thorough impact

assessment on how this Bill will impact persons with religious or philosophical beliefs has not been undertaken.

**Any new law can impact work to protect and enhance the environment, achieve a sustainable economic, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact any of these areas?**

Yes

No

Unsure

**Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?**

- i. Considering that there are already public concerns about freedom of expression with attempts to silence legitimate debate on the topic of abortion, the Bill could be interpreted as an attempt by the Scottish Government to illegitimize the voices of pro-life advocates. This could equate to censorship of certain beliefs, undermining the pluralist and democratic features which are at the core of a free Scottish society. Consequently, the Bill stands in danger of silencing free speech as enshrined in the Article 10 of the ECHR right to freedom of expression, and developed in the common law.
- ii. The wording of the Bill also stands in danger of advancing a culture of hostility and intolerance against persons who hold certain religious or philosophical beliefs about abortion, as explicitly protected by the ECHR.

**Do you have any other additional comments or suggestions on the proposed Bill (which have not already been covered in any of your responses to earlier questions)?**

There are four significant legal issues with the proposed Bill:

1. As outlined above, the proposals undermine the foundational principles of the Rule of Law and introduce an unjustifiably low bar for establishing criminality.
2. The Bill fails to safeguard the right to freedom of expression, freedom of religion or belief, or freedom of assembly. Moreover, the government has failed to qualify the restrictions to these rights through a strongly protective 'reasonable excuse' clause. Further still, the Bill fails to contain a mechanism for ensuring that the buffer zones, or their extensions by local councils, are proportionate in accordance with the law.
3. The Bill interferes with the non-derogable fundamental human right of freedom of thought in the instance of prohibitions on private prayer, due to its broad drafting.
4. The Bill disproportionately targets pro-life groups whose members hold philosophical and religious beliefs about abortion. These beliefs are fiercely protected by the jurisprudence of the European Court of Human Rights and are likewise protected in domestic law.

These issues are outlined in detail below.

1. Rule of Law

- i. The Bill uses vague terminology which seeks to place a ban on any ‘influencing’ activity within 150 metres of any abortion facility in Scotland. Such vague and imprecise language stands contrary to the tenets of the Rule of Law which requires clarity, predictability, and intelligibility.
- ii. Even if some claim the Bill is well-intentioned, the vague and broad wording will place law enforcement officers in an uncomfortable position where they are required to interpret certain words which cannot be objectively understood. The impacts of this could be unjust arrests or confusion among citizens who do not know with sufficient clarity whether their actions reach the criminal threshold.
- iii. The lack of clarity and predictability attached to the wording of the Bill is pertinent considering that the government proposes to criminalise pro-life activities which do not obstruct women or staff from choosing to have an abortion or enter an abortion facility. Because the usually strong evidential threshold for proving harm is not required, the Bill seeks to create criminal offences using a substantially lower standard of due process than would be normally applied law-making as well as employing vague and novel concepts at the heart of the new offence

2. Articles 9, 10 and 11 of the ECHR and a “reasonable excuse”

- i. The Bill potentially violates Articles 8 (right to private and family life), 9 (freedom of thought, conscience and religion), 10 (freedom of expression), and 11 (freedom of assembly) of the ECHR through unjustifiable restrictions, and therefore ought to be withdrawn on this basis.
- ii. Restrictions to speech, as enshrined in domestic law by the Human Rights Act, are only permitted where it is ‘necessary in a democratic society’. This requires a rigorous and intensive proportionality review of the impact on the fundamental rights of its citizens, with the aim of concluding on the least restrictive limitation.
- iii. In *Director of Public Prosecutions v Ziegler*, the appellants had deliberately obstructed a highway in a protest relating to the arms trade. The UK Supreme Court was tasked with considering whether they had lawful excuse for the protest. In the highly significant decision in which the Justices fiercely protected the appellants’ human rights, the court held that actions carried out in pursuit of Articles 10 and 11 of the ECHR could form a lawful excuse even when the protest takes the form of intentional disruption obstructing others. In the instant case, the activities targeted are incomparably broader, including silent prayer and the wordless offering of a leaflet.
- iv. It is also pertinent to consider that since the activities of pro-life groups under the Bill engage Convention rights, every buffer zone should be subject to a rigorous and fact-specific proportionality test before being created. Moreover, local councils would need to be cognizant of the principle of proportionality considering that they would be granted powers to extend the 150 meter zone; this would create an unduly complicated regime.
- v. A prominent example of how the courts interpret the legal requirements in this regard was noted in the English courts’ consideration of the vigils on Clapham Common triggered by the tragedy faced by Sarah Everard. When members of the public congregated in 2021 during the height of the Covid-19 pandemic, the police were publicly criticised for threatening to fine the organisers and arresting participants instead of sensitively facilitating and managing the vigils which posed no real threat to public order. When members of the public faced trial for breaching the Covid-19 laws by attending the vigil, the High Court ruled that the police should have first considered if freedom of expression and assembly might provide a “lawful excuse” under the relevant Regulations, rather than dismissing the legality of the gathering outright.

- vi. A further example of the complications that the Scottish Government would face for failing to balance Convention rights can be observed by the recent English case of *Rosa Lalor*. Here, a Liverpool-based grandmother was arrested, detained, and fined by the police under Covid-19 Regulations for praying silently while walking alone outside an abortion facility. In contesting the fine, Lalor argued that she had a “reasonable excuse” under the law; not least originating from her fundamental right to pray in the privacy of her mind under Article 9 of the ECHR. As a result, the Merseyside Police had to drop the charges.
- vii. Importantly, the Bill provides no mechanism for satisfying the requirement for proportionality which underpins the way in which Member States to the ECHR can limit Convention rights. The Scottish Government has not demonstrated that the measures to limit rights are the least restrictive, in the public interest, and for public good.
- viii. Therefore, while it is acknowledged by the government that the proposed Bill will engage with the Article 9, 10 and 11 Convention rights, it conspicuously fails to take steps to safeguard them in accordance with such a ‘reasonable excuse’ clause, which can be used as a defence by people subject to sanctions. The Bill proposes to criminalize pro-life protest activities which do not obstruct women or staff from having an abortion or entering an abortion facility.
- ix. The Scottish Government also ought to be mindful of the recent referral to the UK Supreme Court of the Northern Ireland Abortion Services (Safe Access Zones) Bill by the Northern Ireland Attorney General’s office. Comparative to the Scottish proposal, the Northern Ireland Bill attempts to criminalise any ‘influencing’ activity within 100 meters of an abortion clinic. The Attorney General specifically mentioned the lack of a “reasonable excuse” to be a reason behind the decision to refer the matter to the Supreme Court. The court will hand down its decision later this year.

### 3. Freedom of thought

- i. By establishing such a low threshold of criminality, the Bill endangers the criminalizing of the fundamental, non-derogable right to freedom of thought in the form of private prayer.
- ii. The right to freedom of thought is enshrined in Article 18 of the International Covenant on Civil and Politics Rights, Article 9 of the ECHR, Article 18 of the Universal Declaration of Human Rights and Article 10(1) of the EU Charter of Fundamental Rights.
- iii. The jurisprudence of the European Court of Human Rights moreover affirms that Member States should uphold and protect the activities which the Bill seeks to ban. As the court ruled in *Stavropoulos and other v Greece*, freedom of thought, conscience and religion is “a precious asset for atheists, agnostics, sceptics and the unconcerned”. Further, the court in *Kosteski v. the former Yugoslav Republic of Macedonia* ruled that “the notion of the State sitting in judgment on the state of a citizen’s inner and personal beliefs is abhorrent and may smack unhappily of past persecutions”. These principles were recently affirmed in the case of *Nolan v Russia*.
- iv. Therefore, the Bill proposes a direct and unqualified interference with individuals’ human rights that are “the foundation of democratic society” and “the basis and origin of all other rights”, both religious and non-religious.

### 4. Specific protection for pro-life activities

- i. The Scottish Government ought to be mindful of the specific protections that the European Court of Human Rights has granted to pro-life activities outside abortion facilities. In *Knudsen*

- v. Norway and Schijndel and Others v. the Netherlands*, the court held that opposition to abortion was protected under Article 9 of the ECHR.
- ii. Moreover, in *Annen v Germany*, the court held that a civil injunction imposed in Germany to prevent the distribution of pamphlets and a website that named doctors involved in abortions constituted a violation of the right to freedom expression under Article 10 of the ECHR. Notably, the court emphasised the importance of protecting freedom of expression, including specific views on abortion, when made in the course of a debate on matters of public interest. Pertinently, it stated that the claimant's Article 10 rights could not be removed even if the expression is provocative and inflammatory. The court communicated, "[the right to] freedom of expression...is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb... Another principle that has consistently been emphasised in the Court's case-law is that there is little scope under Article 10 of the Convention for restrictions on political expressions or on debates of questions of public interest...".
  - iii. Considering that the European Court of Human Rights grants Member States little scope to restrict speech or activities outside abortion centres, and the Scottish Government has not demonstrated that the restrictions target specifically harmful actions, we submit that the Bill cannot be justified.