



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**NIHRC Response to the Committee for Health
Call for Evidence: Abortion Services (Safe
Access Zones) Bill**

November 2021

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Summary of Recommendations

- 2.15 The Commission recommends the Committee ensure the Department conduct a human rights impact assessment on a case-by-case basis when considering the introduction of a particular safe access zone.
- 2.20 The Commission recommends that the Department of Health should give due consideration to the jurisprudence of the ECtHR in determining the introduction of safe access zones. The Commission recommends further that the Department of Health should keep pace with upcoming cases of the ECtHR on safe access or buffer zones to ensure legislation can evolve and reflect the decision of the ECtHR and therefore compliance with, not least, the ECHR.
- 3.7 The Commission recommends that the “immediate vicinity” of a safe access zone is carefully considered to ensure protection of the Article 8 ECHR rights of patients and staff while ensuring that limitations on the Articles 9, 10 and 11 ECHR rights of protesters are restricted or limited proportionately. The “immediate vicinity” definition should include provision for multi-purpose sites and take account of the layout of health and social care estates.
- 3.12 The Commission recommends that the Committee propose an amendment to the Bill to ensure the offence of photographing and audio recording as well as video recording is explicitly included within the Bill. The Commission also recommends that the use of posters, leaflets and banners can be a form of harassment.
- 3.13 The Commission recommends that chanting and the use of loudspeakers can also be a form of harassment.
- 3.14 The Commission recommends the development of guidance for operators. Such guidance should include notification and dissemination of the nature and extent of the zones.
- 3.17 The Commission recommends the Bill is amended to ensure a police officer can direct a person to cease taking photographs.
- 3.21 The Commission recommends the Committee consider an amendment to the Bill to provide the Department with an additional power to introduce a safe access zone, without an application by an operator, where it sees necessary.
- 3.22 The Commission recommends the Department ensure consultation on safe access zones extends to surrounding business owners and residents where appropriate.

- 3.23 The Commission recommends that safe access zones should be for a time limited period which may be extended following a review.
- 3.26 The Commission recommends the Department's annual effectiveness report includes data on the number of offences and prosecutions.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the Commission), pursuant to section 69(4) of the Northern Ireland Act 1998, if requested to do so or as the Commission thinks appropriate, must advise the Assembly whether a Bill is compatible with human rights. Furthermore, and in any event, under section 69(1) of that Act the NIHRC is obliged to keep under review the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with these statutory functions, the NIHRC provides this advice to the Committee for Health. This advice concerns the Abortion Services (Safe Access Zones) Bill.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards. This includes the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and other relevant treaty obligations of the Council of Europe (CoE) and United Nations (UN). The regional and international treaties that are relevant to this advice include:
- European Convention on Human Rights (ECHR);¹
 - CoE Convention on Preventing and Combating Violence against Women (Istanbul Convention);²
 - UN Convention on Civil and Political Rights (UN ICCPR);³
 - UN Convention on Elimination of Discrimination against Women (UN CEDAW)⁴ and;
 - UN Convention against Torture (UN CAT)⁵.
- 1.3 In addition to treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN.⁶ These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

¹ Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 April 2011.

³ Ratified by the UK 1966.

⁴ Ratified by the UK 1986.

⁵ Ratified by the UK 1988.

⁶ So-called 'soft law' denotes international agreements, principles and declarations that are not directly enforceable or legally binding, such as UN General Assembly resolutions. They can assist in interpreting hard law and can be transitioned into hard law at a future date.

- UN CAT Committee Concluding Observations 2019;⁷
- UN CEDAW Committee Concluding Observations 2019;⁸
- UN Human Rights Committee General Comment 32.⁹

1.1 The Commission welcomes the Bill which aims to protect women and girls from harassment when accessing family planning information and termination services. To protect women and girls, the Bill provides for safe access zones, also referred to as buffer zones, which is in line with the UN CEDAW Inquiry recommendations. In particular that: there is provision for the creation of such zones; there are effective laws in place and fully implemented to enable complaints of harassment to be investigated effectively; and, perpetrators are dealt with in accordance with such laws.

2.0 Human Rights Standards

2.1 The Commission has consistently advised of the imperative to ensure a human rights-based approach to reproductive healthcare in NI.

2.2 The United Nations Committee on the Elimination of All Forms of Discrimination against Women (UN CEDAW Committee) published its inquiry report on 6 March 2018. That report made a number of recommendations for the law governing termination of pregnancy in NI. The UN CEDAW report for example recommended, at 86(g), that the NI Executive “protect women from harassment by pro-life protesters by investigating complaints and prosecuting and punishing perpetrators.”¹⁰

2.3 The Commission welcomed the decision of the Westminster Parliament to implement the recommendations in full through the NI (Executive Formation etc.) Act 2019. The Commission further welcomed the enactment of the Abortion Regulations (NI) 2020 and subsequent Abortion (NI) (No 2) Regulations 2020 (the Abortion Regulations), which allow terminations to be conducted in NI in a range of circumstances. However, the Commission remained concerned that the Abortion Regulations did not

⁷ CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019.

⁸ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report’, 8 March 2019.

⁹ CCPR/C/GC/32, ‘UN Human Rights Committee General Comment No 32: Article 14 on the Right to Equality Before the Courts and Tribunals and to a Fair Trial’, 23 August 2007, at para 29.

¹⁰ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at para 86(g).

include provision for safe access or buffer zones, as recommended by the UN CEDAW Committee.

- 2.4 Since the UN CEDAW report in 2018, the relevant UN treaty monitoring bodies have continued to highlight the inadequacy of the law in NI. Those bodies have found that the current law in NI is not human rights compliant.
- 2.5 In March 2019, in its concluding observations on the UK, the UN CEDAW Committee called for the implementation of the recommendations contained in the UN CEDAW Committee's 2018 report. The UN CEDAW Committee stressed that it remained "concerned about obstacles faced by women belonging to marginalised groups, such as asylum-seeking and refugee women, migrant women, Roma and Traveller women, and victims of trafficking in gaining access to healthcare services, including as a result of their inability to provide identity documentation, proof of address or immigration status."¹¹
- 2.6 In June 2019, the UN CAT Committee, in its concluding observations, cited UN CEDAW with approval and recommended that the UK and NI Executive should "ensure that all women and girls in the State Party, including in NI, have effective access to the means of terminating a pregnancy when not doing so is likely to result in severe pain and suffering, such as when the pregnancy is the result of rape or incest, when the life or health of the pregnant woman or girl is at risk and in cases of fatal foetal impairment. The State Party should also ensure that women and girls in NI have effective access to post-abortion health care and that neither patients nor their doctors face criminal sanctions or other threats for seeking or providing such care."¹²

European Convention on Human Rights (ECHR)

- 2.7 The introduction of safe access zones engages several Articles of the ECHR that require consideration. The most relevant are set out below.
- 2.8 Article 8 ECHR provides that everyone has the right to respect for his/her private and family life, his/her home and correspondence. Article 9 ECHR

¹¹ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 49 and 50.

¹² CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 46.

protects the right to freedom of thought, conscience and religion. Article 10 ECHR protects the right to freedom of expression. Article 10 includes the freedom to hold opinions and to receive and impart information and ideas without interference by a public authority. Article 11 ECHR provides that everyone has the right to freedom of peaceful assembly and to freedom of association with others.

- 2.9 None of the above ECHR rights are absolute rights. That means that they can be interfered with and limited under certain circumstances. Those circumstances are set out within the ECHR Articles. Articles 8, 9, 10 and 11 ECHR provide the conditions for restricting those rights and freedoms. For example, there shall be no interference or limitation on the exercise of the rights except where in accordance with the law and necessary in a democratic society. Necessity must be confined to which is necessary: in the interests of national security, public safety or the economic well-being of the country; for the prevention of disorder or crime; for the protection of health or morals; or, for the protection of the rights and freedoms of others.¹³
- 2.10 The European Court of Human Rights (ECtHR), in considering restrictions or limitations, has held that the restriction must be "prescribed by law"; have a legitimate aim under the relevant Article; and must be "necessary in a democratic society".¹⁴ Contracting States enjoy some margin of appreciation in determining these. To demonstrate that a restriction is necessary in a democratic society, it must be proportionate. In other words, there must be a reasonable relationship between the legitimate aim to be achieved and the means used to achieve that aim.¹⁵
- 2.11 In light of the above, the Commission advises that in the case of safe access zones, there are legitimate aims such as the protection of health. Where protests are preventing access to necessary healthcare, causing distress or possibly leading to harassment of patients and staff, protecting their right to physical and psychological integrity (under Article 8 ECHR) is a very important factor.
- 2.12 Moreover, in extreme cases, the attempt by protesters to prevent (physically or psychologically) women and girls from accessing vital reproductive healthcare their right to life (Article 2 ECHR) is engaged and

¹³ Article 8 ECHR; Article 9 ECHR; Article 10 ECHR & Article 11 ECHR.

¹⁴ For example, *Barraco v. France* (2009); *Galstyan v. Armenia* (2007) & *Vyerentsov v. Ukraine* (2013).

¹⁵ For example, *Dudgeon v United Kingdom* (1981) ECHR 5, at para 53.

potentially infringed. In such circumstances, the Article 2 ECHR right of women and girls will prevail over a protester's Articles 10 and 11 ECHR rights. Additionally, the protesters' actions may amount to torture, inhuman or degrading treatment (Article 3 ECHR). Article 3 is an absolute right, which may never be derogated from. That being the case, the Article 3 rights of women and girls will prevail over a protester's Article 10 and 11 ECHR rights. The range of circumstances in different scenarios should be considered by the Committee and weighed up bearing in mind the rights set out above.

2.13 The Commission welcomes the Bill's inclusion of ECHR rights within the face of the Bill and that the Department must give consideration to these rights. The Commission advises that the Department should be required to carry out a human rights impact assessment when considering safe access zones.

2.14 A human rights impact assessment is an important element to ensuring compliance with the Human Rights Act 1998. The Human Rights Act 1998, section 6, requires that public authorities do not act in a way that is incompatible with the ECHR. The Human Rights Act 1998, section 3, further requires that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with [ECHR] rights". To ensure these two requirements are adhered to it is important that a human rights impact assessment is conducted regarding any laws, strategies, policies and practices. Such an assessment provides policy makers with a focused approach to ensure human rights issues are fully considered and addressed. The purpose of the assessment is to help identify the potential rights engaged and if there are particular aspects that need to be considered, for example, if it is a right that should not be interfered with or if it is a right that can be limited, can any possible limitation be justified.

2.15 The Commission recommends the Committee ensure the Department conduct a human rights impact assessment on a case-by-case basis when considering the introduction of a particular safe access zone.

2.16 The Commission draws the Committee's attention to a number of cases determined by the European Court of Human Rights (ECtHR). These cases have involved the balancing exercise required in the context of Article 8 ECHR rights against the Article 9, 10 and 11 ECHR rights of protesters.

- 2.17 In *Van den Dungen v The Netherlands*, the ECtHR upheld an injunction in which the applicant was prohibited from being within 250 metres of an abortion clinic. The applicant had tried to persuade patients not to proceed and handed out leaflets on abortion with photographs. The Court held that the interference with the applicant's Article 10 right to freedom of expression was justified. It observed that the injunction was aimed at protecting the Article 8 ECHR rights of the clinic's visitors and was proportionate; the injunction was for a limited duration and within a specified area.¹⁶
- 2.18 In *Annen v Germany*, the ECtHR took a different direction. In this case, the applicant was ordered by a German court not to disseminate leaflets in the immediate vicinity of a clinic. In the leaflets, the applicant listed the full names of two of the clinic's doctors and asserted that they performed unlawful abortions. The ECtHR stated that the injunction violated the applicant's Article 10 ECHR right to freedom of expression.¹⁷ The ECtHR found that the domestic courts had failed to consider properly the impact of publication and that the applicant had correctly stated that abortion was technically unlawful under the complicated laws in force in Germany.
- 2.19 The domestic courts have also considered the issue. In 2018, a Public Space Protection Order was put in place by the London Borough of Ealing. It prohibited protests, prayer vigils and counselling within an area of 100 metres of the abortion clinic.¹⁸ The order was challenged by the applicants who claimed a violation of their right to freedom of speech and assembly. The High Court held that the order was justified based on the right to privacy of the clinic's visitors.¹⁹ That was upheld in both the Court of Appeal and then the UK Supreme Court.²⁰ The applicants have since applied directly to the ECtHR. That application is pending before the ECtHR.
- 2.20 The Commission recommends that the Department of Health should give due consideration to the jurisprudence of the ECtHR in determining the introduction of safe access zones. The Commission recommends further that the Department of Health should keep pace with upcoming cases of the ECtHR on safe access or buffer**

¹⁶ *Van den Dungen v The Netherlands* (1995) ECHR 59.

¹⁷ *Annen v Germany* (2018) ECHR 20.

¹⁸ Mattock Lane Public Spaces Protection Order. Available at: https://www.ealing.gov.uk/downloads/download/4795/mattock_lane_public_spaces_protection_order

¹⁹ *Dulgheriu v Ealing LBC* [2018] EWHC 1667.

²⁰ *Dulgheriu v Ealing LBC* [2020] 1 WLR 609.

zones to ensure legislation can evolve and reflect the decision of the ECtHR and therefore compliance with, not least, the ECHR.

3.0 General Comments on the Bill

- 3.1 The Commission welcomes the legislation to provide safe access zones for premises where abortion treatments are carried out, including provision for premises where information, advice or counselling about abortion treatments are provided.
- 3.2 The UN CEDAW Committee Inquiry found that women’s access to legal abortion services in NI was impeded by the presence and actions of anti-abortion protesters stationed at entrances of public and private health facilities. During their inquiry they witnessed how anti-abortion protesters monitored women entering and exiting premises and displayed large graphic posters of disfigured foetuses. They also heard testimony that anti-abortion protesters had “chased women exiting the facilities, forcing plastic baby dolls into their arms and pro-life literature into their bags, pleading with them “not to murder their babies”.²¹
- 3.3 The Commission welcomes the definition of protected persons to extend to a person(s) accompanying a person and working in or providing services to protected premises. The Commission advises that a broad and inclusive approach should be applied to these definitions.
- 3.4 Through the Commission’s ‘Monitoring Project on Reproductive Healthcare in NI’ the Commission engaged with a number of organisations involved in the provision of reproductive healthcare including those involved in advice and counselling.²² The Commission heard from organisations providing services that the location of clinics had to be kept out of the public domain. Following the slight easing of Covid-19 restrictions, protestors have again started to gather outside clinics, often on a weekly basis, while carrying graphic placards and verbally abusing staff.²³

Safe Access Zone

- 3.5 In regards to the application of a safe access zone within the “immediate vicinity” of a premises, the Commission advises that the extent and nature

²¹ CEDAW/C/OP.8/GBR/1, ‘UN CEDAW Committee Inquiry Concerning the UK of Great Britain and NI under Article 8 of the Optional Protocol to the UN CEDAW’, 6 March 2018, at 19.

²² NI Human Rights Commission, ‘Monitoring Report on Reproductive Healthcare Provision in NI’, May 2021.

²³ NI Human Rights Commission, ‘Monitoring Report on Reproductive Healthcare Provision in NI’, May 2021 at 56.

of the zone should ensure protection from harassment as a priority but while limiting interference with Article 9, Article 10 and Article 11 ECHR rights. The nature and extent of each zone should be determined following consideration of relevant factors such as geography. The aim should be to ensure the privacy and protection of those accessing services and working within the premises. Individual assessment of the premises and assessment of the balance of rights will assist with striking the correct balance. This is discussed in further detail below.

3.6 The Commission also advises that when considering the definition of 'vicinity', the Department of Health should consider expressly whether the operator is within a health and social care premises and whether this is within a larger premises offering a range of health care services, for example a hospital site. Consideration should not be limited to distance. For example, in some geographical locations a protest could occur at some distance from the premises but still have a negative impact on patients and staff. The Department should consider the wider geography of the area and the potential impact of protests within these areas on staff and patients' Article 8 ECHR rights.

3.7 The Commission recommends that the "immediate vicinity" of a safe access zone is carefully considered to ensure protection of the Article 8 ECHR rights of patients and staff while ensuring that limitations on the Articles 9, 10 and 11 ECHR rights of protesters are restricted or limited proportionately. The "immediate vicinity" definition should include provision for multi-purpose sites and take account of the layout of health and social care estates.

Offences in respect of a safe access zone

3.8 The Commission welcomes, for the purposes of making protection of the rights effective, the creation of offences in respect of a safe access zone. The offences created enable complaints of harassment to be investigated and perpetrators held to account. The Commission however advises that further is required.

3.9 The Commission welcomes the creation of the offence of recording a protected person in a safe access zone without the consent of that person. The Commission recommends that this is expanded to include reference to the taking photographs and audio recordings. This should not be limited to videoing.

3.10 Furthermore, the Commission advises that the legislation should prohibit specifically the use of audio to harass. This should address for example the use of loudspeakers and chanting as a form of harassment. The Commission advises that the Bill should state expressly that harassment can include the use of posters, banners and the distribution of leaflets with graphic imagery and offensive language.

3.11 As for clause 6(4) in particular, which states “It is a defence for D to show that D did not know, and had no reasonable way of knowing, that the protected person was in a safe access zone”, the Commission advises that further consideration is necessary as to how the Department will work with operators to determine the nature and extent of each zone. Furthermore, that there is careful consideration given to any provisions for notification of zones. Notice should be clear and should include the precise requirements within the safe zone. Guidance for should be developed to ensure consistent implementation.

3.12 The Commission recommends that the Committee propose an amendment to the Bill to ensure the offence of photographing and audio recording as well as video recording is explicitly included within the Bill. The Commission also recommends that the use of posters, leaflets and banners can be a form of harassment.

3.13 The Commission recommends that chanting and the use of loudspeakers can also be a form of harassment.

3.14 The Commission recommends the development of guidance for operators. Such guidance should include notification and dissemination of the nature and extent of the zones.

Enforcement of a safe access zone by a police constable

3.15 The Commission welcomes measures to provide the police with enforcement powers to ensure that safe access zones do protect effectively the rights of those accessing protected premises. This should include enforcement powers in relation to the other offences identified above and cover all forms of harassment including the use of posters, leaflets and banners, chanting and the use of loudspeakers.

3.16 The Commission highlights that further clarification is needed in regards to “Where a constable has reasonable grounds to believe that a person has committed, is committing, or is about to commit an offence under section

6(3), the constable may direct the person to cease recording". The Commission suggests this should extend expressly to situations where the constable believes photographs have been taken, are being taken or are about to be taken.

3.17 The Commission recommends the Bill is amended to ensure a police officer can direct a person to cease taking photographs.

Procedure for designating a safe access zone

3.18 In regards to the procedure for designating a safe access zone the Commission recommends that the Department of Health should have the additional power to direct and apply a safe zone where it is satisfied that it is necessary, without the need for an operator to submit an application.

3.19 The Commission welcomes the requirement for the Department to consult with the operator and the police in determining the safe access zone. This should be in addition to "such other persons as it considers appropriate". The Commission advises that the guidance should make it clear that consultation may also be required with local businesses and local residents.

3.20 The Commission is concerned that the Bill doesn't provide any guidance on the duration of safe zones or the operation of a review mechanism. The Bill currently provides it remains until the operator no longer wishes it. A time period for the duration of the safe zone, which can be extended easily if necessary and a review mechanism to allow for consideration of the proportionality and balancing of ECHR rights is advisable.

3.21 The Commission recommends the Committee consider an amendment to the Bill to provide the Department with an additional power to introduce a safe access zone, without an application by an operator, where it sees necessary.

3.22 The Commission recommends the Department ensure consultation on safe access zones extends to surrounding business owners and residents where appropriate.

3.23 The Commission recommends that safe access zones should be for a time limited period which may be extended following a review.

Monitoring of effectiveness of safe access zones

3.24 The Commission welcomes the inclusion within the Bill of a requirement on the Department “to publish an annual report, setting out whether, in the opinion of the Department, each safe access zone has been effective in protecting the safety and dignity of protected persons”.

3.25 However, the Commission is concerned that as that provision is currently worded, only the opinion of the Department will be considered on whether safe access zones have been effective. This should be expanded to ensure that it is not limited to the opinion of the Department. The Department should be required to consult with those directly affected by the zone including patients, staff, local residents and businesses and the Police Service for NI. Thereafter, their views should be taken into account in the Department’s assessment of the effectiveness of the zone(s).

3.26 The Commission recommends the Department’s annual effectiveness report includes data on the number of offences and prosecutions.

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