

Submission to Northern Ireland Assembly Committee for Health Call for Evidence:

The Abortion Services (Safe Access Zones) Bill

By email: Committee.Health_SafeAccess@niassembly.gov.uk

- CARE NI is troubled by reports of harassment or intimidation of women and notes with concern some of the incidences described in the Second Stage debate. Where harassment takes place it should be addressed under existing legislation.
- However, it is the view of CARE NI that the Bill does not adequately balance competing rights under the ECHR. In particular, the Bill fails to take full cognisance of the rights to freedom of expression and association.
- We are particularly concerned by the drafting of Clause 6 of the Bill, which we believe to be exceptionally broad in scope to the point of being unworkable.
- It is our view that this Bill is both unnecessary due to existing legal provisions, unwarranted due to the nature and scale of the behaviour being targeted (which, again, can be addressed under existing statutes), and wholly disproportionate in terms of its extent and impact on free speech.

Introduction to CARE Northern Ireland

1. CARE (Christian Action Research and Education) Northern Ireland is a well-established mainstream Christian charity providing resources and helping to bring Christian insight and experience to matters of public policy and practical caring initiatives. CARE NI demonstrates Christ's compassion to people of all faiths and none believing that individuals are of immense value, not because of the circumstances of their birth, their behaviour or achievements, but because of their intrinsic worth as people.

General Principles

2. We accept and agree that women seeking to obtain advice or to access abortion services may be vulnerable and experiencing distress. We likewise agree that any woman in this position should be treated with grace and compassion. CARE NI is deeply concerned by any behaviour which compounds vulnerability or distress, and which constitutes harassment, alarm or distress for anyone who is seeking to gain access to an abortion clinic or to utilise its services.
3. Whilst we are clear that harassment or behaviour contributing to distress or alarm for women seeking to access abortion services is unacceptable, it should be noted that the type of behaviour outlined by some contributors at Second Stage is not commonplace. In 2018, the Home Office conducted an extensive review on the need for buffer zones. The then Home Secretary, Sajid Javid, stated before Parliament:

“Anti-abortion activities are more passive in nature. The main activities reported to us that take place during protests include praying, displaying banners and handing out leaflets. There were relatively few reports of the more aggressive activities.”¹

4. When debating the merits of access zones, people who wish to express their opinion outside clinics, are often referred to as ‘protestors.’ However, this does not accurately capture the reality or the motivation for many, who may be there to pray, offer support and to provide an option for women who may wish to consider an alternative choice. Such offers of support (whether practical, financial or of some other kind) are often welcome and provide women with the means to consider other ways forward, for both themselves and their unborn child.²

¹ Statement made on 13 September 2018 <https://questions-statements.parliament.uk/written-statements/detail/2018-09-13/HCWS958>

² <http://behereforme.org/alinas-story/>
<http://behereforme.org/sarahs-story/>

5. The matters being considered by the Bill are sensitive and cut across a number of articles contained in the European Convention on Human Rights (ECHR). Whilst the Bill references Articles 9 (Freedom of thought, conscience and religion), 10 (Freedom of expression) and 11 (Freedom of assembly and association), any change to the current law will also impact on Articles 2 (Right to life) and 8 (Right to respect for private and family life).
6. When law reform is proposed on areas that impinge on convention rights, the European Court of Human Rights (ECHR) is clear that such reform should demonstrate balance.³ It is the view of CARE NI that the Bill does not adequately balance competing rights under the ECHR and in particular fails to take full cognisance of the right to freedom of expression and association. We are deeply concerned by the dangerous precedent which may be set should this Bill become law with respect to freedom of expression where individual conscience is also engaged.

The Current Law in Northern Ireland

7. There are three pieces of legislation which deal with the vast majority of the issues raised by the Bill sponsor at Second Stage, namely, The Public Order (Northern Ireland) Order 1987, common assault provisions under s42 of The Offences Against the Person Act 1861⁴ and The Protection from Harassment (Northern Ireland) Order 1997.
8. Under the Public Order (NI) Order⁵ several relevant criminal offences that are germane to the issues are contained in the Bill, namely: Part III, Articles 9-17 which establish criminal offences of stirring up hatred and arousing fear, this includes the publication, display and distribution of written material
9. Under the Protection from Harassment (Northern Ireland) Order 1997 robust legal provisions criminalising harassment already exist:⁶
 - 9.1. Article 3: makes it an offence to act in a way that causes harassment. A defence is that they did not know or ought to know the conduct was harassment and the defence is subject to the test of reasonableness.
 - 9.2. Article 4: makes harassment an offence carrying a fine or up to 2 years in prison
 - 9.3. Article 5: creates a civil remedy, creating robust injunctive relief for a victim of harassment.

Impact of the Bill on the Current Law in Northern Ireland

10. During the Second Stage of the Bill, some MLAs highlighted that people accessing abortion services had been verbally abused in an unpleasant manner, while also being physically blocked from accessing a clinic and faced behaviour that could reasonably be construed as common assault⁷. **All of the alleged behaviour referred to by MLAs is currently a criminal offence under the public order or common assault legislation.**
11. The Cabinet Office Guidance issued in 2015⁸ on creating new criminal offences urges lawmakers to ask a series of questions before introducing new offences, amongst other questions it urges lawmakers to consider:
 - Are there existing offences which cover the targeted behaviour?
 - What is the public interest for criminalising this behaviour?
 - Would civil action or sanctions be more appropriate?
12. With the above in mind, we have considerable concerns regarding Clause 6 of the Bill, which seeks to create an offence “*of causing harassment, alarm or distress to a protected person*” (clause 6(2)(c)).
13. Under existing provisions, the Protection from Harassment (Northern Ireland) Order 1997 Article 2 states, “*In this Order references to harassing a person include alarming the person or causing the person distress*”.⁹ The 1997 legislation clearly defines harassment as including the causing of alarm and distress. By utilising elements of the

³ The issue of balancing rights of buffer zones and the ECHR was considered in the case of *Annen v Germany* [ANNEN v. GERMANY \(coe.int\)](#) which held that the art 10 rights of a Mr Annen who was handing out leaflets at the door of a clinic were violated because the government had failed to balance the rights of Mr Annen and the clinic staff.

⁴ [Offences against the Person Act 1861 \(legislation.gov.uk\)](#)

⁵ [The Public Order \(Northern Ireland\) Order 1987 \(legislation.gov.uk\)](#)

⁶ [The Protection from Harassment \(Northern Ireland\) Order 1997 \(legislation.gov.uk\)](#)

⁷ Common assault is an offence under s.42 of the Offences Against the Person Act

⁸ [Advice on Introducing or Amending New Criminal Offences.doc \(publishing.service.gov.uk\)](#)

⁹ [The Protection from Harassment \(Northern Ireland\) Order 1997 \(legislation.gov.uk\)](#)

existing legal definition of harassment to formulate a new criminal offence, there is considerable potential for confusion due to the imprecise nature of the drafting of Clause 6.

14. Under the 1997 Order, the act of harassment must take place on at least two occasions (article 2). It may well be that a review of the legislation could have recommended that this be looked at and other proposals put forward to amend that legislation to deal with some of the concerns raised at Second Stage of the Bill. Rather than bringing forward primary legislation, amending existing legislation would have ensured that provisions are consistent with current laws.¹⁰
15. At Second Stage, several members supporting the Bill stated that the current law may not be operating effectively, and prosecutions may not be forthcoming due to a lack of resources in the PSNI. Miss Woods MLA typified these comments when she stated: “[T]he police do not come out to every incident that is reported to them. As we are aware, the Police Service is stretched and under extreme pressure to deal with other issues.”¹¹ Accepting that this is an accurate portrayal, it is difficult to see how **creating a new offence will enable the PSNI to deal with the matter more expeditiously**. Adding criminal offences to the statute books will almost certainly only serve to make the PSNI’s job more difficult, particularly if that law is inconsistent with current legal definitions and tests.
16. It is clear that there are existing offences that could be utilised to cover the targeted behaviour; moreover, civil action – namely injunctive relief – could be utilised to deal with many aspects of the troubling behaviour raised by the Bill sponsor. Whilst we acknowledge this harmful behaviour should be addressed, any review of the existing law would have highlighted that mechanisms currently exist to address the issues. The Bill is therefore wholly unnecessary.

Other General Observations on the Bill

17. Given the scope and scale of the infringement on rights to freedom of expression and association encapsulated by the Bill, we are concerned that the Bill has not received appropriate pre-legislative scrutiny. In particular, we are concerned with the options put forward by the Bill sponsor in the explanatory memorandum¹². Only two options were considered in pre-legislative consultation, namely, to do nothing or to legislate. At no time was there a formal review or assessment of the current law to establish if it is fit for purpose. Rather than proposing a new criminal sanction a viable option would have been to recommend modest legal reform to current provisions. It is of note, that at no point during this Assembly term has any member sought to amend the law in respect of public order or harassment.
18. As noted above (paragraph 11) in proposing new criminal offences, the interest of the public to criminalise the activity should be ascertained. CARE NI is concerned that the Bill sponsor has not engaged in sufficient consultation with the public to answer that question. The Explanatory Memorandum only refers to an eight-week consultation that took place in 2016/17.¹³ There is little information given as to who was consulted and why those particular groups were selected over others. It is noteworthy that recent polling has shown only 21% of the UK population stated they were in favour of access/buffer zones being established at clinics. For persons aged 18-34 support for access zones dropped to just 15%.¹⁴
19. The UK government and the Scottish government, having weighed the competing rights involved in the debate, have both concluded that buffer zones do not fairly balance competing ECHR rights.¹⁵ In Ireland, following the introduction of their legislation in 2018, the Minister for Health abandoned plans for safe access zones and consulted with An Garda Síochána, to ensure the current law was enforced.¹⁶ It is unfortunate that this was not the course of action followed in the north.
20. CARE NI is of the opinion that this Bill is unnecessary because it fails to take adequate cognisance of the law as currently enacted and the reality that current criminal and civil law deal with the issues raised by the Bill sponsor.

¹⁰ It should be noted that persons work in clinics and if there is repeated behaviour (on two or more occasions) that meets the test of harassment outside a particular building, this would fall under the remit of the current law. Even an amendment to the current laws, if indeed its even needed, would be extremely modest.

¹¹ [Official Reports \(niassembly.gov.uk\)](https://niassembly.gov.uk/official-reports/)

¹² [EFM - As Introduced \(niassembly.gov.uk\)](https://niassembly.gov.uk/efm-as-introduced/)

¹³ [EFM - As Introduced \(niassembly.gov.uk\)](https://niassembly.gov.uk/efm-as-introduced/), para 8

¹⁴ [Press release - Only 21% of population support proposal to introduce nationwide ‘censorship zones’ around abortion clinics \(righttolife.org.uk\)](https://righttolife.org.uk/press-release-only-21-of-population-support-proposal-to-introduce-nationwide-censorship-zones-around-abortion-clinics/)

¹⁵ [Women’s health minister rejects abortion clinic protest ban call \(thecourier.co.uk\)](https://thecourier.co.uk/women-health-minister-rejects-abortion-clinic-protest-ban-call/) and 1 above

¹⁶ [Abortion Services – Tuesday, 13 Jul 2021 – Parliamentary Questions \(33rd Dáil\) – Houses of the Oireachtas](https://www.oireachtas.ie/en/debates/questions/2021/07/13/parliamentary-questions-33rd-dail/)

Moreover, the Bill fails to balance the rights of people accessing abortion clinics and those who wish to offer support outside.

The Bill Provisions

Clause 1

21. CARE NI is concerned with the scope of the Bill. In the explanatory memorandum it is stated at paragraph 5 that the Bill *does not include provision for protesters*. Not all persons who seek to engage with people entering a clinic are protestors. As Sajid Javid noted in Parliament, most activity is not aggressive¹⁷ and is non-confrontational in nature. The Bill fails to distinguish between people who are legitimately exercising their ECHR Article 9 right of expression and those who are acting in a way that is already considered criminal under existing law. Even the most benign activity of sitting silently and praying is potentially criminalised under the Bill.
22. CARE NI is concerned about further erosion of article 9,10 and 11 ECHR rights. If the Bill becomes law, it has the potential to set a precedent to limit rights in other public spaces and to designate other public areas as places where people could be prohibited from expressing a legitimately held opinion. Under UK and Irish law, freedom of expression and expressing opinions publicly has been preserved and defended, sacrificing that right should be something that is only undertaken when no other remedy or course of action exists, which is not the case with this Bill.

Clauses 2 & 3

23. CARE NI is concerned with the definition of a protected premises. The definition is wide ranging and could in theory apply to any medical facility or hospital, including doctor's surgeries.

Clause 4

24. Access or buffer zones are often presented as neutral space that can only be used by women wishing to access abortion services. Clause 4 of the Bill makes it clear that is not the case. The Bill seeks to exclude only certain opinions from the access zone and to criminalise some forms of help and support from being offered. While people who would seek to offer support that is considered 'pro-life' are criminalised, other types of influence and opinion is protected. Rather than offer choice, only the opinion of which a provider of abortion advice or service approves is permitted in the access zone.

Clause 5

25. The definition of safe access zone is open ended. It is unclear what precisely constitutes the immediate vicinity of a protected premises. In a small village or town, if a doctor's surgery was designated as a protected premises under the legislation, it is conceivable that the whole of the village could constitute the immediate vicinity of the premises. This lack of drafting precision creates potential interpretation issues and legal pitfalls for those who would be tasked with enforcing the legislation.

Clause 6

26. Notwithstanding that offences already exist to deal with concerns raised, this clause creates wide ranging and potentially significant criminal offences. CARE NI is particularly concerned with:
- 26.1. **Clause 6(2)(a)** - *influencing a protected person, whether directly or indirectly*. It is unclear what would constitute influencing a protected person. It is not without irony that persons designated as 'protected' under clause 4 could potentially be accompanying another person to an abortion clinic with a view to influencing that individual to take a particular decision. This highlights the main deficiency of the Bill. In creating new criminal offences that do not relate to established criminal law and practice, the Bill creates new offences that may be unenforceable or even lead to perverse outcomes at odds with the intentions of the Bill sponsor.
- 26.2. **Clause 6(2)(c)** – the drafting of this clause is confused and is at odds with the definition of harassment in the 1997 Order, which defines harassment as alarm or distress (see the commentary above).

Clause 7

¹⁷ Statement made on 13 September 2018 <https://questions-statements.parliament.uk/written-statements/detail/2018-09-13/HCWS958>

27. This clause places additional duties and responsibilities on the PSNI. Moreover, the Bill requires a police officer to assess what a person's intention may be. It is unclear as to what would constitute reasonable grounds to assume a person may influence a protected person. This clause gives unfettered power to the police to determine what an individual's intention may be before any action or activity has even taken place. To give a power of determining what a person may or may not do, is not good criminal law and it is yet another example of why the current law should have been scoped before any Bill was introduced.

Clause 8

28. Clause 8 states:

*(1) The operator of protected premises **may** notify the Department that the operator wishes there to be a safe access zone in respect of the protected premises.*

*(2) Within eight weeks of receiving this notification, the Department **must** designate an area as a safe access zone*

29. The Bill gives no discretion to the Department. If a request is made, then the Department **must** designate the area as a safe access zone. The Department are only granted the power to consult in determining the extent of the access zone, not whether it is appropriate that the zone should be established.

30. Clause 8 (3) requires the Department to consult with relevant parties (on the extent of the zone), but having consulted, the Department are powerless to reach a conclusion that the zone is not required. If a clinic asks for a zone, a zone must be designated without question or appeal.

31. Once the Department has consulted and set the prescribed limit for the zone, there is no right of appeal against the Department's determination of the zones geographic scope. Owners of adjoining properties, while consultees, have no recourse to challenge the decision (other than by judicial review and only if the prescribed procedure is not followed). Other interested parties are not consultees as-of-right and moreover anyone who feels the imposition of the zone adversely affects them cannot appeal the process. The Bill sets an 8-week consultation period. This consultation period is limited and unlikely to provide enough time to properly consult with all relevant parties, which may lead to the Department exercising caution and establishing zones larger than are necessary, with no right for people with concerns to challenge the Department's view.

Financial Implications

32. The Bill fails to be clear about the financial implications of setting up an access zone, referring only to the experiences of Ealing Council.¹⁸ The establishment of the zone could adversely affect business, adjoining properties and individuals, not to mention the costs to the Department and the clinic. There is no estimate of how often such safe access zones would be used and how often there would need to be enforcement. The financial costs of the Bill should be scrutinised by the Committee.

The Way Forward

33. Given the deficiencies within the drafting of the Bill and the lack of clear costs, before further consideration is given to the Bill it would – as a minimum – be preferable for a review to be commenced of the current law and recommendations brought forward as to how to amend current provisions, if that is deemed necessary.

34. In the opinion of CARE NI, the current law is robust, and any amendment required to the law, would be relatively minor, if indeed it is needed at all. Given harassment and criminal activity at an abortion clinic is a rare occurrence that can be dealt with under existing legal provisions, there is no public policy need for the current Bill and it should be opposed by the Committee and any legal reform delayed until after a proper legislative review has taken place.

¹⁸ [EFM - As Introduced \(niassembly.gov.uk\)](#), paras 13-16