

Submission on the General Scheme of the Health (Termination of Pregnancy Services (Safe Access Zones)) Bill 2022

Irish Human Rights and Equality Commission

September 2022



Coimisiún na hÉireann um Chearta
an Duine agus Comhionannas
Irish Human Rights and Equality Commission

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The Irish Human Rights and Equality Commission was established under statute on 1 November 2014 to protect and promote human rights and equality in Ireland, to promote a culture of respect for human rights, equality and intercultural understanding, to promote understanding and awareness of the importance of human rights and equality, and to work towards the elimination of human rights abuses and discrimination.

Observations on the General Scheme of the Health (Termination of Pregnancy Services (Safe Access Zones)) Bill 2022

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Recommendations

The Commission makes the following recommendations on the General Scheme:

General Observations

This Bill is progressed and enacted as soon as possible.

Inclusion of all Healthcare Premises (Head 3)

Consideration be given to the principle of proportionality in finalizing the designation of safe access zones.

Definition of a Safe Access Zone (Head 3)

The definition of curtilage of the building is further clarified.

Further consideration be given to the 100m radius so that there is no unintended constitutional interference with freedom of assembly.

Garda Warning (Head 4)

Head 4 Section 11 be amended to ‘The Garda Síochána shall maintain a record of a warning’.

Penalties (Head 8)

Further consideration be given to the provision of increased penalties on indictment in Head 8 Section 1 in relation to repeat offenders who engage in egregious forms of confrontation.

Further consideration be given to the construction of the provision in Head 6, including the addition of safeguards if necessary.

Further consideration be given to the penalties provided for in Head 8.

Data Collection

An obligation be placed on An Garda Síochána to collect disaggregated data; and that this data is anonymised and published to facilitate public scrutiny and research.

An obligation be placed on An Garda Síochána to keep a record of how their powers under this legislation are being enforced and to publish annual reports on this activity.

Review

A review of this legislation be included in the review of the Health (Regulation of Termination of Pregnancy) Act 2018 to monitor the effectiveness of the law in addressing access to termination of pregnancy services without impediment. This review should involve public consultation including with structurally vulnerable groups and with service providers. The Minister should place the review report before the House of the Oireachtas on the operation of the Safe Access Zones Act.

Introduction

The Irish Human Rights and Equality Commission ('the Commission') is both the national human rights institution and the national equality body for Ireland, established under the *Irish Human Rights and Equality Commission Act 2014* (the '2014 Act'). The Commission has a statutory mandate to keep under review the adequacy and effectiveness of law and practice in the State relating to the protection of human rights and equality, and to examine any legislative proposal and report its views on any implications for human rights or equality.¹

The Commission welcomes the opportunity to provide the Minister for Health with its submission on the General Scheme of the Health (Termination of Pregnancy Services (Safe Access Zones)) Bill 2022 ('the General Scheme'). The Commission acknowledges the complexity of the sensitive issues being considered by the Minister in respect of this legislation. In particular the Commission acknowledges that legislating for safe access zones engages several rights, including: the right to privacy and bodily autonomy, and the right to freedom of assembly, and expression.

However, according to recent research, anti-abortion activity has been reported outside of health clinics, GP practices and maternity hospitals, with 44.6% of participating service providers stating that they had experienced protests outside of their premises and reports of protests in two-thirds of all counties where providers responded.² These activities have been cited as an impediment to the provision of abortion services in the State, with only 1 in 10 GPs believed to be providing such services.³ Other research found that the absence of safe access zones impacted health professional themselves, and decisions they made about how and if they could provide termination of pregnancy services within their health setting.⁴ There is a significant body of evidence from other jurisdictions detailing the mental and

¹ Section 10(2)(c) of the Irish Human Rights and Equality Commission Act 2014.

² Dr Camilla Fitzsimons, Irish healthcare workers experiences of anti-abortion protesters and the case for safe access zones' Maynooth University, July 2022 at p.9

³ National Women's Council, Accessing Abortion in Ireland: Meeting the Needs of Every Woman at p. 23

⁴ Dr Catherine Conlon, Dr Kate Antosik-Parsons, Dr Éadaoin Butle, Jo Greene & Wenyu Li, Unplanned Pregnancy & Abortion Care (UnPAC) Study (2022) at 15.1

physical harm the stress of witnessing anti-abortion activity can have on service users, even giving rise to significant health problems;⁵ and that anti-abortion activity has led to service users avoiding medical advice, delaying appointments and deferring treatment in order to avoid interacting with protesters.⁶ In Ireland, research has found that anti-abortion activity has a particular negative impact on service users⁷; with significant levels of insecurity found among women in the certainty of the provision of and access to termination of pregnancy services, specific concerns regarding judgement and stigma, and the potential for protests affecting the accessibility of the service⁸; and maternity patients expressing concern about having to pass protests.⁹

Over the past number of years, the Commission has been actively engaged on the topic of reproductive rights and has previously called on the State to meet its obligations, under international law, to vindicate the human rights of women and girls in accessing health care in private and without discrimination, their right to bodily integrity and to be treated with dignity, as well as to ensure the safety of service providers.¹⁰ Therefore, the Commission welcomes the progress on the implementation of safe access zones and the intention to

⁵ Respondents to studies in the US, UK and Australia reported feelings of intimidation, distress, anxiety and pervasive concerns about the unpredictable behaviour of protesters and their own physical safety. See Sifris and Penovic 'Anti-Abortion protest and the effectiveness of Victoria's safe access zones: an analysis' (Monash University Law Review 2018 (Vol 44, No 2)) 317-340; Foster, Kimport, Gould, Roberts & Weitz Effect of abortion protestors on women's emotional response to abortion, Contraception (2013); Lowe and Hayes, Anti-Abortion Clinic Activism, Civil Inattention and the Problem of Gendered Harassment (2019) *Sociology* 53(2) 330-346.

⁶ Penovic, T. and Sifris, R. (2018) Expanding the feminisation dimension of international law: targeted anti-abortion protests as violence against women, *Cambridge International Law Journal* 7(2) 241-267, 259-260; See also Judgments in *R v Spratt* [1990] 1 WLR 1073 and *Dulgheriu v The London Borough of Ealing* [2019] EWCA Civ 1490 in which substantial evidence was cited that protest activity was causing patients to eschew medical advice and make decisions which were detrimental to their health.

⁷ Abortion Rights Campaign and Lorraine Grimes, Too Many Barriers: experiences of abortion in Ireland after Repeal (Sept 2021) at p. 60.

⁸ UnPAC Study at 14.4

⁹ Irish Council for Civil Liberties (ICCL) (2020) A Rights Based Analysis of Safe Access Zones at p 3.

¹⁰ The Commission made a number of submissions in the past calling on the state to enact a framework for access to termination of pregnancy services that is fully compliant with Ireland's obligations. Most recently, as part of Ireland's fifth periodic review by the Human Rights Committee (2022), the Commission recommended that the Government urgently enact legislation to provide for the establishment of safe access zones. See also, IHREC's Submission to the UN Committee on Economic, Social and Cultural Rights for the List of Issues on Ireland's Fourth Period Report (2021); IHREC's Submission to the United National Committee on the Elimination of Discrimination Against Women on the follow-up procedure to Ireland's combined 6th and 7th periodic report (2020).

protect the safety and wellbeing of those accessing and providing termination of pregnancy services. The Commission welcomes the acknowledgement in the Explanatory Note under Head 3 of the General Scheme that there has been significant support for safe access zone legislation. Given the impact of protests on access to and provision of healthcare, the Commission calls on the Government to progress this legislation as soon as possible.

The Commission details its recommendations below, but briefly, it is of the view that safe access zones are necessary to protect the safety and well-being of women accessing termination of pregnancy services and to allow access to termination of pregnancy services without impediment, and that the restrictions placed on certain rights within the General Scheme are proportionate.

The Commission also recommends the obligations placed on An Garda Síochána be strengthened to ensure there is a record of how their powers under this legislation are being enforced. This would assist in determining whether the legislation is fit for purpose, in terms of policing prohibited conduct.

The Commission remains available to assist the Minister if further scrutiny of the General Scheme is required and on any specific issue which may arise.

Relevant Human Rights and Equality Standards

The legislation proposes to introduce safe access zones around healthcare premises to protect the safety and well-being of women accessing termination of pregnancy services, as well as service providers, staff and others who need to access health care settings, and to protect the privacy and dignity of women accessing termination of pregnancy services, as well as the service providers and their staff. As such, a number of human rights and equality issues are engaged, as protected by the Constitution, the European Convention on Human Rights ('ECHR'), and international human rights law. It is noted that the provisions of the legislation may impact on the broader rights of those who wish to protest in opposition to termination of pregnancy, such as the rights to freedom of assembly and freedom of expression. In particular, the core rights and principles engaged by the creation of safe access zones in the legislation include:

- Privacy¹¹
- Bodily integrity¹²
- Freedom of expression¹³
- Freedom of assembly¹⁴
- Religious freedom¹⁵

In addition, State parties are required under the Convention on the Rights of Persons with Disabilities (CPRD) to take measures to ensure the full and equal enjoyment by disabled women and girls of all human rights and fundamental freedoms given that they are subject to multiple discrimination.¹⁶ CPRD also requires that disabled persons are provided with the same standard of healthcare and programmes as provided to other persons, and that health services are provided as close as possible to people's own communities, including in rural areas.¹⁷

The Commission notes that the General Scheme seeks to balance the rights of service users and providers with the rights of those engaged in prohibited conduct.

¹¹ Although not explicitly set out in the Irish Constitution, the Irish courts have found that the right to privacy is one of the unenumerated rights which flows from Article 40.3 in cases such as *McGee v The Attorney General* [1973] IR 284 and *Kennedy and Arnold v Attorney General* [1987] IR 587. Also found in Article 8 ECHR, Article 17 ICCPR and Article 12 ICESCR.

¹² Article 40.3.1 of the Irish Constitution

¹³ Article 40.6.1.i of the Irish Constitution, Article 10 ECHR and Article 19 ICCPR.

¹⁴ Article 40.6.1.ii, Article 11 ECHR, and Article 21 ICCPR.

¹⁵ Article 44 Irish Constitution, Article 9 ECHR and Article 18 ICCPR.

¹⁶ Article 6 CPRD.

¹⁷ Article 25 CPRD.

General observations

Anti-abortion activity has been reported outside health premises since termination of pregnancy was commenced in 2019. Research suggests that this activity is not rare and the impact of same is likely to be harmful to the well-being of women accessing abortion services. As such, the Commission considers that a response that engages the criminal law, as opposed to merely civil remedies like an injunction, is justified since civil measures are not effective to address widespread and repeated protests.

The Commission is of the view that the General Scheme is a proportionate response to a significant problem affecting the rights of women accessing termination of pregnancy services, and service providers.

The Commission also notes that any interference with the rights to freedom of expression, religion and/or assembly must satisfy the principle of proportionality. Therefore, the Commission observes that the General Scheme is measured in its proposed sanctions, and it contains a number of safeguards, such as the availability of defence of ‘honest belief’ and ‘reasonable excuse’, as well as the requirements for a graduated response including giving a warning before a prosecution can be brought.

It must be recognised that an anti-abortion perspective is in many instances linked to strong religious beliefs, with some people feeling a religious or moral duty to protest even at the expense of upsetting or distressing other people.

However, abortion is lawful in Ireland and the decision to terminate involves an exercise of core personal autonomy, in a deeply private context. A stranger seeking to interfere with or influence that decision through confrontation is likely to cause tremendous upset at a difficult time.

The goal of the legislation is to ‘protect the safety and well-being of women accessing termination of pregnancy services, as well as service providers, staff and others who need to access health care settings’; and to protect ‘the privacy and dignity of women accessing termination of pregnancy services, as well as the service providers and their staff.’ In that

regard, the Commission is of the view that the goals sought to be addressed are legitimate and pressing and the Bill is a proportionate response to anti-abortion activity outside healthcare facilities.

The Commission is of the view that having regard to the aims sought to be achieved by the General Scheme, the restrictions on the rights of those who may engage in protest to express their opposition to termination of pregnancy are proportionate and necessary. In this regard, the Commission notes that a graduated response to prohibited conduct is mandated under the General Scheme with significant safeguards in place, and that religious expression within places of worship is also protected.

The Commission recommends that this Bill is progressed and enacted as soon as possible.

Specific observations

Inclusion of all Healthcare Premises (Head 3)

Head 3 provides for the designation of a safe access zone around healthcare premises. The Bill includes all healthcare premises where termination of pregnancy services could lawfully be provided, not just those that currently do.

The Commission acknowledges that termination services can potentially be offered in the State by a broad range of healthcare providers, in many different hospitals, clinics and GP surgeries. The full list of healthcare providers currently offering termination is not generally available and changes over time. For this reason, the Commission considers that it is necessary to ensure that all potential future providers are covered. However, having such widespread Safe Access Zones does give rise to issues of proportionality in respect of the capacity of protesters to gather and march in built-up areas.

The Commission recommends that consideration be given to the principle of proportionality in finalizing the designation of safe access zones.

Definition of a Safe Access Zone (Head 3)

The definition of a Safe Access Zone in the Bill is somewhat convoluted. It requires consideration of a number of interrelated definitions and Heads. In summary, a safe access zone will extend 100m all around a 'healthcare premises', which is defined as the land or building in which the healthcare provider is located, including the curtilage of that premises. Curtilage is defined as an area 'used in conjunction with the premises'. The Commission is of the view that while in so far as there may be grey areas about what constitutes the 'premises' in individual cases, the risk of unfairness can be addressed by the necessity of the Gardaí to warn protestors of their potential prohibited conduct, by the defence of honest belief, and by the application of the criminal standard of proof beyond a reasonable doubt in respect of the boundaries of the zone. However, the Commission is concerned that the definition of 'curtilage' could create uncertainty.

The Commission recommends the definition of curtilage of the building is further clarified.

The Commission is of the view that the definition of a Safe Access Zone is sufficiently clear to meet the requirement of intelligibility of a criminal statute. The choice of 100m reflects a compromise between the sizes of the various zones in other jurisdictions. It does appear to meet the basic requirement of ensuring that persons attending a healthcare provider will not be subject to up-close prohibited conduct. However, the Commission is concerned that the size of the zones in particularly built up areas may result in there being too large an exclusion zone and create unintended consequences such as interference with freedom of assembly in urban centres.

The risk of any potential unfairness can be addressed by the necessity of the Gardaí to warn protesters of their potential prohibited conduct; by the defence of honest belief; and by the application of the criminal standard of proof in respect of the boundaries of a zone.

The Commission recommends that further consideration be given to the 100m radius so that there is no unintended constitutional interference with freedom of assembly.

Garda Warning (Head 4)

Head 4 specifies the type of conduct that is prohibited within a Safe Access Zone, as well as the defences available to someone who may be found in breach of this legislation. This Head also provides for a number of safeguards.

The Commission is of the view that the Garda powers provided for are adequate to ensure unimpeded access to, and provision of, termination of pregnancy services. In this regard, the Commission welcomes the graduated response mandated by the Bill.

The inclusion of the requirement of the warning is an important safeguard. The Commission is of the view that the unlimited nature of the warning power is proportionate. If a warning was limited in scope to one location, it would mean that a protester could breach every Safe Access Zone in the country at least once with impunity. .

Gardaí have an obligation to effectively police protests and it is to be expected that the Gardaí would check if protesters have previously received a warning. However, the General Scheme only provides that Gardaí '*may maintain*' a record of warnings given. The

Commission considers that there should be an obligation on members of the Garda Síochána to record such warnings.

The Commission recommends Head 4 Section 11 be amended to ‘The Garda Síochána shall maintain a record of a warning’.

Penalties (Head 8)

Head 8 sets out the penalties arising for offences under the Bill.

The Commission acknowledges that the offences for conduct under Heads 4 and 7 are summary in nature, and are graduated in severity and notes that the range of proposed escalating fines and terms of imprisonment are in line with those found in other summary-only offences. However, the Commission considers that it would not be disproportionate to also provide for an indictable offence in respect of Heads 4 and 7, with a two year maximum sentence, for repeat offenders who engage in egregious forms of confrontation.

The Commission recommends that further consideration be given to the provision of increased penalties on indictment in Head 8 Section 1 in relation to repeat offenders who engage in egregious forms of confrontation.

The offence proposed in Head 6 is potentially problematic, given that there is an existing offence of harassment provided for in section 10 of the Non-Fatal Offences Against the Person Act which carries a 10-year maximum sentence on indictment. The conduct defined in Head 6 may amount to harassment under s. 10 of the 1997 Act. There is no express requirement that the conduct under Head 6 must cause distress or alarm to the recipient or ‘seriously interfere with the other’s peace and privacy’. It would appear to be intended therefore that this offence could be prosecuted in respect of less serious conduct which would not be captured by s.10 of the 1997 Act.

This raises some concerns about the interference with the right to free expression. The Commission is concerned that there may not be a basis for criminalising such behaviour if the repeated communication does not reach the level of causing harm or distress. If it is intended to criminalise repeated communications *per se*, irrespective of the tone of the

communication or the likely effect on the recipient, then the language of Head 6 might be amended to remove the references to intimidation and harassment as otherwise these terms may be treated as necessary ingredients which must be proven by reference to the potential effect on the healthcare provider.

If the intention is to criminalise repeated communication *per se*, then given the significant interference with freedom of expression involved, it might be appropriate to provide same safeguard as in Head 4: that a prior warning to desists communication with any healthcare providers in respect of the 'decision to provide termination of pregnancy' services would be required, before an offence could be prosecuted. Such a warning could usefully be given after the first such communication without waiting for a repeat.

The Commission recommends that further consideration be given to the construction of the provision in Head 6, including the addition of safeguards if necessary.

The Commission is also concerned about the penalty provided for under Head 8 section 2, specifically with regards to (b). The District Court could impose the same level of sentence provided for, so there seems to be little reason to provide for a trial on indictment. Ordinarily, an indictable offence would provide for a maximum penalty of at least 2 years imprisonment.

The Commission recommends further consideration be given to the penalties provided for in Head 8.

Data Collection

The General Scheme lacks a provision that places an obligation on An Garda Síochána to keep a record of how their powers under the legislation are being enforced; such provision would assist in determining whether the legislation is fit for purpose.

The Commission recommends an obligation be placed on An Garda Síochána to collect data disaggregated on equality grounds; and that this data is anonymised and published to facilitate public scrutiny and research.

The Commission recommends an obligation be placed on An Garda Síochána to keep a record of how their powers under this legislation are being enforced and to publish annual reports on this activity.

Review

The General Scheme does not provide for a mechanism to review the adequacy and effectiveness of the legislation. Given that there is an existing obligation on the Minister in section 7 of the Health (Regulation of Termination of Pregnancy) Act 2018, the operation of this legislation should be reviewed under the same review process. This would provide an opportunity to assess how the legislation relating to safe access zones is operating, and whether it is achieving its purpose in a way that is not disproportionate.

The Commission recommends that a review of this legislation be included in the review of the Health (Regulation of Termination of Pregnancy) Act 2018 to monitor the effectiveness of the law in addressing access to termination of pregnancy services without impediment. This review should involve public consultation including with structurally vulnerable groups and with service providers. The Minister should place the review report before the House of the Oireachtas on the operation of the Safe Access Zones Act.



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