

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

October 2022

Introduction¹

1. The Irish Council for Civil Liberties (ICCL) welcomes the publication of the General Scheme of the Health (Termination of Pregnancy Services (Safe Access Zones) Bill 2022 and appreciates the opportunity to share our observations with the Joint Committee on Health. In a separate in-depth legal analysis, ICCL has set out why it considers that safe access zones can be compatible with Ireland's constitutional and international human rights obligations and we would encourage the Committee to read this document in conjunction with that analysis, available on ICCL's website [here](#).² Part 1 of this submission summarises our view of how safe access zones can be compatible with human rights law. Part 2 outlines our observations on the General Scheme of the Bill on a head by head basis.
2. In summary, ICCL fully supports the right to protest, including the rights to freedom of expression, assembly and association. We have long defended these rights and will continue to do so, recognising their fundamental importance to democracy and for the realization of a range of other rights. However, these rights are not absolute and human rights law and the Irish Constitution permit limitations to these rights when provided for by law, when necessary and proportionate and when in pursuit of a legitimate aim, including to protect the rights of others. We outline in detail below why we consider that the introduction of safe access zones, when narrowly defined and in pursuit of the protection of the rights to privacy, safety, bodily integrity, including the right to mental and physical health, and the right to access healthcare without discrimination, can constitute a proportionate interference with the right to protest.

Part 1- Safe access zones and human rights law

Restrictions on rights must be provided for by law

3. The first step in ensuring any interference with a right is permissible under human rights law is to ensure that such an interference is provided for by law. This is to ensure that only specified, narrowly defined behaviours can be restricted; restrictions can be objectively assessed on the basis of clear codified standards; and any penalty for engaging in proscribed behaviour is foreseeable and not arbitrary.
4. The General Scheme of the Health (Termination of Pregnancy Services)(Safe Access Zones) Bill 2022 will ensure that any interference with rights, as envisioned by the creation of Safe Access Zones, are provided for by law. The Scheme proposes a 100-metre perimeter around all actual and potential providers of abortion care, including GP clinics and hospitals. The Bill outlines the specific behaviour that will be prohibited in such zones and provides for a range of penalties for those who contravene the new law. Notwithstanding our recommendations

¹ Written by Doireann Ansbro BL with input from Sarah O'Malley BL, Sean Beatty BL and Cheryl Mellett.

² ICCL, A Rights Based Analysis of Safe Zones, 2020. <https://www.iccl.ie/wp-content/uploads/2020/01/ICCL-Investigation-Abortion-Safe-Zones.pdf>

below, we consider that the overall approach of the General Scheme, which sets out the specific, prohibited behaviour in detail, is, in general, appropriate. Narrow definitions of prohibited behaviour are vital to ensure that: the law provides only for as minimal an interference as possible with other rights; what behaviour is prohibited can be understood by all stakeholders; and the law can be properly enforced.

5. We consider that a nationwide awareness programme will be needed to accompany this legislation to ensure that all stakeholders are aware of and understand the new law. Stakeholders must also be reassured that they are free to exercise their rights to freedom of expression, assembly and association in a peaceful manner and in all public places that do not fall within a safe access zone. Government should consider requiring signs at and around abortion providers informing stakeholders of the operation of a safe access zone at that premises.

Necessity

6. The second requirement of human rights law where a right is being limited is that all limitations must be necessary. ICCL considers that demonstrations outside abortion providers designed to shame, harass, and deter women from accessing abortion care and deter service providers from providing such care pose a serious risk to a range of rights. These rights include the right to privacy, the right to bodily integrity, including the right to mental and physical health, and the right to access healthcare without discrimination. Anti-abortion demonstrations can also negatively affect the right of medical service providers to access their place of work safely. Evidence shows that the effect of anti-choice protests outside abortion clinics can have long lasting negative effects on a person's health and well-being and can deter women from accessing the medical care they need.³
7. Since the Termination of Pregnancy Act 2018 came into force in January 2019, Ireland has seen anti-abortion demonstrations outside the National Maternity Hospital, other regional hospitals, and GP surgeries. These protests have ranged from the presentation of small white coffins⁴ clearly designed to suggest that those seeking abortions were engaging in murder; the display of signs condemning service providers⁵, the display of gruesome imagery clearly designed to distress those seeking abortions⁶ and displays of silent contempt using religious and other symbols and imagery⁷, designed to shame and stigmatise people seeking and providing abortions. A report by ARC quotes people accessing abortion services and encountering anti-abortion activity as saying:

³ See evidence submitted and relied in the UK Court of Appeal judgment in the case of *Dulgheriu & Anor v The London Borough Of Ealing* [2018] EWHC 1667 (Admin) (02 July 2018).

⁴ <https://www.thejournal.ie/simon-harris-protests-national-maternity-hospital-4951943-Jan2020/>

⁵ Rory Carroll, *Activists Protest against Ireland's Abortion Services*, *The Guardian*, 4 January 2019.

<https://www.theguardian.com/world/2019/jan/04/activists-protest-against-irelands-new-abortion-services>

⁶ Abortion Rights Campaign (ARC) and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland after Repeal*, 2021.

⁷ See e.g. Dr Camilla Fitzsimons, *Irish healthcare workers experiences of anti-abortion protesters and the case for safe access zones*, 2022. See also Bernie English, *Divine Providence Prompts Limerick Abortion Protests*, *Limerick Leader*, 15 February 2022. <https://www.limerickpost.ie/2022/02/15/divine-providence-prompts-limerick-abortion-protests/>

"It was shocking. [They were] waving [a] photo of dead babies." Another respondent said, "It made my experience a lot harder as I was alone." And, "It was awful. I felt sick when I saw them. I just wanted to be left alone."⁸

8. ICCL recognises that Gardaí have a large discretionary power in Ireland to move people on under the Public Order Act 1994 and to offer behaviour warnings under The Criminal Justice Act 2006.⁹ ICCL understands the Garda Commissioner has expressed a view that current legislation is sufficient to deal with the issue of harassment by anti-abortion protesters.¹⁰ However, almost four years after the Termination of Pregnancy Act has come into force, it is unclear when or where Gardaí have successfully used these powers to address ongoing anti-abortion demonstrations that can be considered to constitute harassment, including outside the National Maternity Hospital and Limerick District Hospital.
9. Concerns have been raised repeatedly by women, women's support groups and service providers that such demonstrations are giving rise to distress and are deterring service providers from providing abortion care services.¹¹ The current available legal framework does not necessarily address the kind of behaviour that infringes on the rights of service users to access health care with dignity and in privacy or the kind of behaviour that causes long term harm to mental health or the kind of behaviour that can deter providers from signing up to providing abortion services. ICCL believes safe access zones are therefore necessary to create the safe environment necessary for women to act on their private medical decisions.
10. The proposed law on safe access zones offers clarity and certainty around what behaviour is prohibited, (notwithstanding our comments below), and we consider that it will more effectively deter those that would seek to influence, interfere with and obstruct women and pregnant people from accessing abortion services than existing criminal law.
11. It is however vital that limitations on the right to protest as envisaged by this law are proportionate to a legitimate aim and are as minimal as possible.

⁸ Abortion Rights Campaign (ARC) and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland after Repeal*, 2021, p.60.

⁹Under existing Irish law, protestors who are considered to be breaching the public peace without lawful authority or reasonable excuse or to be causing harassment, alarm or distress may be restricted. The Criminal Justice (Public Order) Act 1994 gives the Gardai a broad power to 'move on' individuals when there is reasonable concern for the maintenance of the public peace. A person commits an offence if he or she, without lawful authority or reasonable excuse, willfully prevents or interrupts the free passage of any person in any public place. The Gardai can also potentially use powers under The Criminal Justice Act 2006 to issue a behaviour warning in response to behaviour which causes or is likely to cause harassment, significant or persistent alarm, distress, fear or intimidation. The fact that the Act applies to behaviour "likely to" cause alarm etc. means that there need not be an actual victim.

¹⁰ Jennifer Bray, Existing Laws Adequate to Deal with Abortion Protests Says Garda Commissioner, *The Irish Times*, September 2021. <https://www.irishtimes.com/news/health/existing-laws-adequate-to-deal-with-abortion-protests-says-garda-commissioner-1.4031727>

¹¹See eg National Women's Council, Abortion Working Group Expresses Concern over Planned 40 days of protests, September 2019.

<https://www.nwci.ie/learn/article/abortion-working-group-expresses-concern-over-planned-40-days-of-protests-o>
See also Abortion Rights Campaign (ARC) and Lorraine Grimes, *Too Many Barriers: Experiences of Abortion in Ireland after Repeal*, 2021.

Legitimate Aim

12. Human rights law provides that a legitimate aim when interfering with the right to protest includes the aim of protecting the rights of others.¹²
13. ICCL considers that safe access zones will effectively protect a range of rights that the Irish State is obliged to uphold. These include the rights to privacy, dignity, bodily integrity, including the right to mental and physical health, access to healthcare without discrimination, and the right of medical providers to access their place of work safely under, among others, the Irish Constitution,¹³ the European Convention on Human Rights, (ECHR)¹⁴, the European Social Charter¹⁵, the International Covenant on Civil and Political Rights, (ICCPR)¹⁶, the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW)¹⁷ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁸.
14. Of particular note is the Government's obligation under ICESCR to ensure safe access to medical services in privacy and with dignity, as explained by the UN Committee on Economic, Social and Cultural Rights in their General Comment No. 14.¹⁹
15. As such, ICCL considers there is a legitimate aim in this context.

Proportionality

16. ICCL considers that safe access zones can constitute a proportionate interference with the rights to freedom of assembly, association and expression where such a zone is narrowly and clearly defined in law and constitutes the most minimal interference with rights as possible to protect the rights of others.

¹²For a more detailed analysis please see ICCL, A Rights Based Analysis of Safe Zones, 2020. <https://www.iccl.ie/wp-content/uploads/2020/01/ICCL-Investigation-Abortion-Safe-Zones.pdf>

¹³ Article 40 of the Irish Constitution outlines personal rights of citizens and non-citizens, as expanded upon by the Irish Courts under the doctrine of 'unenumerated rights' to include the right to privacy (McGee v. The Attorney General [1973] IR 284; Kennedy v. Ireland [1987] IR 587 (in which a "right to be let alone" was addressed); Norris v. Attorney General [1984] IR 36 at 71, 80; and the right to bodily integrity including access to healthcare (Ryan v Attorney General 1962. No. 913 P).

¹⁴ Article 10 of the ECHR requires the protection of the right to private and family life. This treaty has been implemented into Irish law by the European Convention on Human Rights Act 2003.

¹⁵ Ratified by Ireland in 2000, see article 11.

¹⁶ ICCPR, ratified by Ireland in 1976, requires the State to protect the right to privacy under article 17.

¹⁷ Article 12 of CEDAW, ratified by Ireland in 1985, asserts women's entitlement to specific gender-related healthcare and requires that States "shall ensure women appropriate services in connection with pregnancy".

¹⁸ Article 12 of ICESCR, ratified by Ireland in 1989, requires the State to uphold the highest attainable standards of physical and mental health.

¹⁹ See CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4 at para. 12,(b). The Committee in the same General Comment links the right to health to both privacy and dignity at para. 3.

17. There is growing and persuasive case law from the superior courts of other jurisdictions confirming that safe zones can constitute a legitimate and proportionate interference with the right to freedom of expression and assembly in order to protect the rights to privacy, dignity and well-being of those seeking abortion services. For example:

- In Australia in April 2019, the highest court dismissed a constitutional challenge to the legality of exclusion zones in two provinces- Victoria and Tasmania.²⁰ The Court stated that “women seeking an abortion and those involved in assisting or supporting them are entitled to do so safely, privately and with dignity, without haranguing”. It highlighted that the right to free speech does not include a right to a “captive audience”.
- In the UK in 2019, the Court of Appeal found a safe zone in Ealing to be in compliance with the UK’s human rights obligations and the Supreme Court declined to hear an appeal.²¹ The Court found that the right to privacy of people accessing abortion services had to be protected and cited evidence that those seeking to use the services of the Centre had cancelled appointments, with “potential adverse consequences to their health”. The Court found that the safe zone struck a fair balance between protecting the rights of service users and the rights of protesters.
- In Canada in 2008, a protester challenged the constitutionality of a safe access zones following his conviction for holding anti-abortion signs within a zone.²² The Court engaged in a proportionality assessment and ultimately found that the aim of “protecting vulnerable women and those who provide for their care to have safe, unimpeded access to health care ... justifies the limited infringement of freedom of expression in the circumstances”.²³ The Canadian Courts have emphasised that it is the location of the protest that made it impermissible, not the content of the relevant speech.

18. On the basis of this comparative analysis coupled with the social and historic context in Ireland in which abortion itself was criminalised until January 2019 and women and pregnant people needing abortion care were subject to ongoing and decades long shame and stigmatisation, ICCL considers that the proposed law can be considered to represent a proportionate interference with the rights to freedom of expression, association and assembly. Nothing will prevent those who wish to express their anti-abortion views from demonstrating peacefully in any other public place in Ireland or peacefully expressing their opinion about any government law and policy at any other place or through any other medium. ICCL’s separate briefing referred to above gives a more in-depth legal analysis of what may constitute a proportionate interference with these rights.²⁴

²⁰*Kathleen Clubb v Alice Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11 (10 April 2019).

²¹*Dulgheriu & Anor v The London Borough Of Ealing* [2018] EWHC 1667 (Admin) (02 July 2018).

²² 2008 BCCA 340.

²³ *Ibid* at 91.

²⁴ ICCL, *A Rights Based Analysis of Safe Zones*, 2020. <https://www.iccl.ie/wp-content/uploads/2020/01/ICCL-Investigation-Abortion-Safe-Zones.pdf>

Part 2- Analysis of the General Scheme

Head 2 – Definitions

19. Clear, unambiguous definitions of key terms are vital to ensure that this legislation can be implemented effectively and comply with general rule of law principles requiring clarity and foreseeability in criminal law.
20. The definition of ‘curtilage’ currently states:

“curtilage” means an area immediately surrounding or adjacent to the premises of a healthcare provider, which is used in conjunction with the premises”

21. Given the recent finding in the High Court case of *Monkstown Road Residents Association and others v An Bord Pleanala and others*²⁵, that curtilage will generally depend on the facts and context of a specific case, ICCL recommends that this definition is given more detail, perhaps giving examples such as car parks, driveways etc.

Head 3 – Designation of Safe Access Zones

Head 3(1)(a)

22. ICCL welcomes the designation of Safe Access Zones around all “healthcare premises”, as provided for in Head 3(1)(a). This is positive given that it provides protection for all potential future providers of these services and may encourage more healthcare providers to opt in to providing the service. As of April 2022, only one in ten GPs and 11 out of 19 maternity hospitals were providing the service, affecting the right to available and accessible healthcare.²⁶

Head 3(1)(b)

23. ICCL considers that the provision for an area of 100 metres, as provided for in Head 3(1)(b), is an appropriate geographic boundary around service providers. This is smaller than the safe access zone provided for in Australian legislation, approved by their Highest Court, which is 150 meters. It is also smaller than the Public Space Protection Order in Ealing, approved by the Court of Appeal of England and Wales, which appears to be over 200 metres along the main road outside the particular clinic that zone protects, when looking at the map provided for in the PSPO²⁷. We note the Irish legislative precedent in the Electoral Act, which provides for a 100-metre zone around polling stations to prevent people from being influenced during

²⁵ *Monkstown Road Residents Association, James Barry, Bairbre Stewart and Christopher Crag v An Bord Pleanala, The Minister for Housing, Heritage and Local Government, Ireland, the Attorney General and Irish Water (Respondants) and Lulani Dalguise Limited and Dun Laoghaire-Rathdown County Council (Notice Parties)* [2022] IEHC 318, 2020/737JR

²⁶ NWCI, Half of counties in Ireland have less than 10 GPs offering abortion care, May 25 2022.

https://www.nwci.ie/learn/article/half_of_counties_in_ireland_have_less_than_10_gps_offering_abortion_care

²⁷ See the map of this safe zone here

https://www.ealing.gov.uk/downloads/download/4795/mattock_lane_public_spaces_protection_order

elections, which appears to be generally viewed as appropriate.²⁸ Given the Irish context, including in particular the need to create a safe environment for more providers to sign up to the service, we consider this to be a reasonably sized safe access zone.

24. The wording “may include any part of that area that is a public place” could be open to interpretation that public places may not always be included in the zone. In order to avoid this potential interpretation, ICCL recommends that the wording of 3(1)b is changed to:

“the area of 100 metres surrounding or adjacent to a healthcare premises, including any part of that area which is a public place”.

25. The broad definition of “public place” is welcome here to ensure that the safe access zone is effective. We would question, however, why this definition is placed in Head 3 rather than in Head 2?
26. We also note the risk that people who wish to exercise their right to freedom of expression, assembly and association on issues not related to abortion at other public buildings or in public spaces generally used by protesters may be concerned that this zone interferes with their rights. It is vital therefore that the prohibited behaviours outlined in Head 4 very clearly reference the fact that only behaviour related to influencing or interfering with access to termination of pregnancy services is prohibited and that a specific link is drawn between this Head and Head 4.

Head 4 – Prohibited conduct

Head 4(2)

27. Head 4(2) states that prohibited conduct shall mean conduct which is intended to, or may reasonably have the effect of-
- a. Influencing the decision of a person in relation to availing of, or providing, termination of pregnancy services, or
 - b. Interfering with a person’s access to or provision of termination of pregnancy services,
 - c. Or both.
28. On 4(2)(a) ICCL considers that behaviour that ‘may reasonably have the effect of *influencing* the decision of a person’ could be construed as too broad and may not provide the necessary clarity and foreseeability required for criminal law, given that ‘being influenced’ can be considered a subjective experience. To reach the threshold of behaviour that can be criminalised we consider a higher degree of intention should be required. We also consider that all attempts to influence must be unsolicited to fall within prohibited behaviour. We would suggest adding a threshold of distress to this provision, perhaps wording along the lines of ‘in a manner that may cause foreseeable distress’.

²⁸ Electoral Act, S118(1) A person shall not interfere with or obstruct or impede an elector going to or coming from or in the vicinity of or in a polling station.

29. On 4(2)(b), we consider that the threshold provided for by 'may reasonably have the effect of' may be appropriate in this provision given that 'interfering with a person's access to or provision of termination of services' is an action that can be more objectively assessed.

Head 4(3)

30. In relation to Head 4(3), as a general point, ICCL considers that there is some overlap in the proscribed behaviors. To be clearer and more concise, the drafters should consider what language or provisions can be removed where the proscribed behaviour is covered by another provision.
31. ICCL considers that some of the conduct that would be prohibited by this Head may not reach an appropriate threshold for criminal behaviour and could be open to criticism in this regard. We encourage the department to review each provision with this in mind. For example, ICCL considers that the behaviour proscribed by Head 4(3)(n), namely, unsolicited counselling, is too broad, in particular given that 'counselling' has no clear definition. We would also contend that where such behaviour was problematic it could be responded to as behaviour proscribed by 4(3)(c), 4(3)(d) or 4 (3)(e). We therefore recommend the removal of 4(3)(n).
32. We would also question whether the behaviour proscribed in 4(3)(f) namely, conduct that may seek to or have the impact of 'exert[ing] moral pressure' would withstand a test of clarity in relation to ensuring that individuals understand what behaviour is prohibited. As above, we think this behaviour could also be covered by 4(3)(c), (d) or (e). We recommend the removal of 4(3)(f).

Head 4(5)-4(11)

33. As a general point in relation to Head 4(5)-4(11), we consider that the legislation would be clearer if Garda powers were contained in a separate Head.
34. On Head 4(5), ICCL welcomes the provision for a graduated response from the Garda Síochána to the breaching of provisions. However, Head 4(11), states that a Garda 'may' record a warning. ICCL consider that in order for a graduated response to be effective, the Garda should be required to record a warning. Therefore, we recommend that the "may record" should be replaced with "shall record".²⁹
35. In regards to Head 4(8), we consider that a defence of 'honest belief' may provide those who would seek to breach the provisions of this law with a broad scope for excusing behaviour that is deliberately setting out to interfere with service users or providers. We make two recommendations in relation to this provision. First, we recommend that the defence provided for within the legislation should encompass an objective standard, such as 'reasonable belief'.³⁰ Second, as noted above, we recommend that a national awareness

²⁹ See Isle of Mann legislation for precedent in this regard.

³⁰ For example of this type of defence, see new proposals in relation to sexual offences.

campaign accompanies this legislation to ensure widespread awareness of the operation of safe access zones.

36. ICCL considers that both service providers and users should feel empowered to engage those seeking to interfere with their access to or provision of relevant services, in the first instance. As such, we would suggest adding a provision to Head 4 that states that the provisions in this legislation are ‘without prejudice to ordinary civil remedies including the ‘self help’ doctrine contained in the law on nuisance and ordinary injunctive relief that can be sought in the civil courts.’³¹

Head 5

37. ICCL strongly recommends the addition of an exception in this Head explicitly protecting the activities of trade unions. For example, the Bill could provide that “nothing in this legislation shall prejudice the rights accruing to individuals and trade unions under the Industrial Relations Act.”

Head 6

38. While ICCL agrees that a prohibition on harassment in the form as contained in this Head is appropriate in general, we would question the need to include such a provision in this legislation given the general prohibition of harassment contained in the Non-Fatal Offences against the Person Act. We would welcome further explanation on the rationale for including this prohibition in this legislation.

Summary of Recommendations

1. Remove the provision in 4(2)(a) providing for the prohibition of behaviour that ‘may reasonably have the effect of influencing’ decisions given the subjective nature of interpreting what may or may not ‘influence’ someone.
2. Any overlap in proscribed behaviours in Head 4 should be removed to ensure the Bill is concise.
3. Remove 4(3)(n) and 4(3)(f) as these behaviours are, in our view, covered under 4(3)(c),(d), or (e).
4. An Garda Síochána should be required to record a warning given under this legislation to render that a ‘graduated response’ is effective. Head 4(5) should be amended accordingly.
5. The defence of honest belief provided for in Head 4(8) should be amended to encompass an objective standard such as ‘reasonable belief’.
6. Add a provision stating that the provisions in this legislation are ‘without prejudice to ordinary civil remedies including the ‘self help’ doctrine contained in the law on nuisance and ordinary injunctive relief that can be sought in the civil courts,’ or wording to that effect.
7. Ensure Head 5 includes an exception for the activities of trade unions, including the exercise of all rights protected under the Industrial Relations Act.

³¹ In terms of legislative precedence, we would highlight S.3(8) of the Criminal Justice (Public Order) Act 2011, which states “This section shall not operate to limit the right of the owner or occupier of a private place to require a person who is begging at that place to— (a) desist from begging, or (b) leave that place.”

8. Provide further information on the rationale for including a prohibition of harassment in this legislation, as provided for in Head 6.

