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Clare Haughey MSP  
Convener, Health, Social Care and Sport Committee

Sent by email –  
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Your ref:

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15 March 2024

Dear Ms Haughey

Many thanks for your letter dated 6 March 2024 in relation to the Abortion Services (Safe Access Zones) (Scotland) Bill (the "Bill").

The Lord Advocate has asked me to respond on behalf of the Crown Office and Procurator Fiscal Service (COPFS).

I note the Committee seeks urgent views on the criminal offences created in clauses 4 and 5 of the Bill and has asked for further detail of what the COPFS guidelines to Police Scotland on prosecution might entail.

In relation to the proposed offences, I have included some general comments which may be helpful to members of the Committee.

### **Offence creating provisions**

As set out in the explanatory notes to the Bill, clause 4 broadly makes it an offence for a person who is in a safe access zone to act in a certain way towards a person who is also in the safe access zone for the purpose of accessing, providing or facilitating the provision of abortion services at a protected premises. The offence in those circumstances is committed if the person does an act with the intention of, or is reckless as to whether the act has the effect of:

- (a) influencing the decision of another person to access, provide or facilitate the provision of abortion services at the protected premises,
- (b) preventing or impeding another person from accessing, providing or facilitating the provision of abortion services at the protected premises, or
- (c) causing harassment, alarm or distress to another person in connection with the other person's decision to access, provide or facilitate the provision of abortion services at the protected premises.

The terms of clause 5 are similar and extend to individuals within relevant areas. A relevant area being a place that is not a public area forming part of a safe



access zone but is situated inside the boundary of a safe access zone. For instance, a private dwelling or factory.

### **Application by prosecutors**

Following a review of the recent evidence session, it may be useful if I touch on two particular points and how prosecutors may approach them: (i) the *mens rea* required and (ii) the concept of influencing.

As the Committee has heard in relation to this Bill a key consideration, when it comes to enforcement, will be proving that the accused had the required mental element (the *mens rea*) to establish criminal responsibility.

Sections 4 and 5 of the Bill make clear that the court would require to be satisfied beyond reasonable doubt that either (a) the accused intended by their behaviour to influence, prevent access etc., or cause harassment, alarm or distress to a protected person, or (b) that the accused was reckless as to whether the behaviour has those effects.

Evidence of intent or recklessness may be obtained from a variety of sources, for example from an accused's admissions, or may be inferred from the surrounding facts and circumstances of a case. Prosecutors and police are familiar with these concepts and deal with these terms in relation to other statutory offences on a daily basis.

A concept which is perhaps less familiar is that of influencing. Influencing is likely to be fact specific: what is objectively capable of influencing a person in one context would be different in another. It is not the view of the Crown that any act (for example a mother taking a child into the hospital for care) could constitute influencing, nor is it likely that the required mental element of recklessness or intent would be established in such circumstances.

### **Public interest considerations**

Assuming that a report from the police discloses sufficient admissible, reliable, and credible evidence of a crime committed by the accused, the prosecutor must consider what action is in the public interest.

Assessment of the public interest includes consideration of competing interests, including the interests of the victim, the accused, and the wider community.

As the Committee will be aware, prosecutors in Scotland have a range of options available to them, from taking no action or issuing financial penalties through to prosecution.

A particular consideration in cases involving protest is the proportionality of any interference with the accused's rights under the European Convention on Human Rights, and it is of great assistance to prosecutors that similar (albeit not identical) legislation was considered by the Supreme Court in the 2022 [Reference by the Attorney General for Northern Ireland in relation to the Abortion Services \(Safe Access Zones\) \(Northern Ireland\) Bill](#).



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## Guidelines to the police

No decision has been reached as to whether Lord Advocate's guidelines will be required for this Bill.

Lord Advocate's guidelines would be issued in terms of section 12 of the Criminal Procedure (Scotland) Act 1995 in relation to the reporting of cases to the Procurator Fiscal. Any guidelines could not and would not undermine the operational independence of Police Scotland to carry out investigations and take such action as is necessary to deal with any ongoing offending.

It is essential that any such guidance should not be relied upon by Parliament to infill any perceived gaps or weaknesses in the legislation.

I hope this is of assistance to the members of the Committee.

Yours sincerely,



Laura Buchan  
Procurator Fiscal  
Policy & Engagement



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