

# Abortion Services (Safe Access Zones) (Scotland) Bill

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## Delegated Powers Memorandum

### Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders in relation to the Abortion Services (Safe Access Zones) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 34–EN);
  - a Financial Memorandum (SP Bill 34–FM);
  - a Policy Memorandum (SP Bill 34–PM);
  - statements on legislative competence made by the Presiding Officer and the Member who introduced the Bill (SP Bill 34–LC).
3. This Memorandum has been prepared by the Scottish Government, on behalf of Gillian Mackay MSP, in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### Outline of Bill Provisions

4. In brief, the Abortion Services (Safe Access Zones) (Scotland) Bill provides for the creation of protected premises which provide abortion services and around which safe access zones will be established. The Bill further sets out the circumstances in which behaviour within these zones will give rise to criminal offences.
5. The Bill is divided into 5 headings:
  - The first is concerned with the definition of “protected premises” and the establishment of safe access zones for protected premises and includes the mechanisms by which new protected premises (and their safe access zones) can take effect.

This document relates to the Abortion Services (Safe Access Zones) (Scotland) Bill (SP Bill 34) as introduced in the Scottish Parliament on 5 October 2023

- The second creates offences in relation to acts done within a safe access zone or within a building situated inside the boundary of a safe access zone and where the act is capable of being seen or heard by another person in the safe access zone. Provision is also made for exceptions to these offences.
- The third creates mechanisms by which existing safe access zones can be extended, reduced or cease to have effect and provides power to amend the definition of protected premises in order to create new zones for premises providing abortion services or treatments or services relating to abortion services.
- The fourth makes provision related to Ministerial guidance relating to the establishment and operation of safe access zones.
- The fifth contains the general provisions that are common to every Bill.

## Rationale for Subordinate Legislation

6. The Bill contains provision conferring delegated powers. In deciding whether provisions should be specified on the face of the Bill or left to subordinate legislation, the importance of each matter has been considered against:

- The need to ensure sufficient flexibility in the future to respond to changing circumstances and to make changes quickly without the need for primary legislation;
- The need to ensure proper use of parliamentary time;
- The possible frequency of amendment; and
- The need to anticipate the unexpected, which might otherwise impact on the purpose of the legislation.

7. The relevant provisions are detailed below and this memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

8. Subordinate legislation has been considered appropriate and each power is discussed below. For the decision on negative or affirmative procedure, the degree of Parliamentary scrutiny that is thought to be required for the instrument has been carefully considered, balancing the need for the appropriate level of scrutiny with the need to avoid using up Parliamentary time unnecessarily. The balance reflects the views on the importance of the matters being delegated by the Parliament.

## Delegated Powers

### Section 10: Power to modify meaning of “protected premises”

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

#### Provision

9. The Bill makes provision for the creation of safe access zones which will attach to certain premises providing abortion services. Those premises are “protected premises” within the meaning of section 1 of the Bill. The safe access zones will encompass the premises, the public areas of grounds associated with the premises and public areas of land within a 200m boundary. All premises which meet the definition in section 1 will automatically become protected premises. Those are NHS hospitals which provide abortion services or, for private providers, any place (not being a class of place) which is approved under section 1(3) of the Abortion Act 1967 (“the 1967 Act”) by the Scottish Ministers. Abortion services means any treatment for the termination of pregnancy authorised under the 1967 Act and the definition of “protected premises” applies in respect of clinical premises where abortion services are currently provided.

10. Section 10 provides that Ministers may, through regulations, amend the definition of protected premises in two respects. First, section 10(1)(a) allows the definition to be amended to include other premises which may in future provide abortion services where those are a class of place mentioned in section 1(3A) of the 1967 Act that is approved under section 1(3) of that Act for the purposes of that section (section 1(3A) allows a class of place to be approved where the treatment consists primarily in the use of medicines specified in the approval and carried out in such manner as may be specified). Currently the power to approve a class of place has not been used in respect of clinical premises. However, in future, the power may potentially be used in this way, for example, to allow certain treatment to be provided at GP practices, which would amount to treatment under the 1967 Act and would require approval under section 1(3) (to note, this is an illustrative example only). Section 10(1)(a) therefore allows the status of protected premises to extend to new abortion service providers which are approved as a class of place.

11. In addition, section 10(1)(b) allows the definition of protected premises to be amended to include a building or place in which treatment or services that are related to abortion services are provided. These are not treatment for the termination of pregnancy under the 1967 Act but will be associated services or treatment (for example counselling services). Regulations made under section 10(1)(b) may be made where the Scottish Ministers consider it necessary to do so in order to protect against an act of a type mentioned in section 4(1) or 5(1) of the Bill. Ministers are also required to consult the provider of the treatment or services or the operator of the premises and, where they consider it appropriate, the Health Board and local authority for the area within which the premises are situated and any other person they consider has an

interest (see section 10(4)). Section 10(6) provides that regulations made under section 10(1)(b) may make consequential modifications to the Bill. That allows the regulations to apply the Act with modifications where appropriate to ensure that it may operate in respect of these different types of premises.

12. Regulations made under section 10(1)(a) or (b) may also make incidental, supplementary, consequential, transitional, transitory or saving provision, or make different provision for different purposes.

### Reason for taking power

13. The power set out in section 10(1)(a) has been taken because the nature and delivery of abortion services, like all healthcare services, is continually developing and therefore is expected to be subject to developments and changes as different types and methods of treatment progress and evolve. Currently there are 30 premises which provide treatment for the termination of pregnancy under the 1967 Act. It is possible that in future abortion treatment may be carried out in a wider range of clinical settings if the power to approve a class of place (as mentioned in section 1(3A) of the 1967 Act) was used to allow other places to provide treatment. Having established that there is a need to protect service users and providers from acts and behaviours that are harmful in their impacts, in respect of abortion services it is important to ensure that the Bill provides sufficient flexibility to continue to offer that protection should there be changes to the ways in which treatment is provided or services are delivered and the power in section 1(3) of the 1967 Act is used in this way.

14. When the 1967 Act became law, surgical abortion was the only treatment for the termination of pregnancy. Medical abortion, which involves the taking of mifepristone and misoprostol, has since been developed and now accounts for the majority of abortion treatment in Scotland<sup>1</sup>.

15. It would be unwise to attempt to predict the kind of scientific changes that might happen in the years to come, but equally unwise to assume that changes of similar significance will not occur. Likewise, reorganisations or re-evaluations within the NHS cannot be ruled out, which could impact where services are delivered. It is possible that new types of clinical premises (which do not fall within the definition of section 1 of the Bill) will be approved under section 1(3) of the 1967 Act (as a class of place as mentioned in section 1(3A) of that Act). The ability to extend safe access zones to a class of place approved under section 1(3) and (3A) of the 1967 Act will therefore allow the protection afforded to those premises which currently provide abortion services (as defined in section 1) to be extended if required to those premises which may provide treatment in future where approved as a class of place under the 1967 Act. Having established that anti-abortion activity can negatively impact those accessing or providing services at the premises where services are currently offered, it is important to ensure that such activity can be prevented at other premises that may be approved in the future. To do otherwise could result in unequal protection for those accessing or providing services. The ability to do this for a class of place will simplify the process,

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<sup>1</sup> [Termination of pregnancy \(publichealthscotland.scot\)](https://publichealthscotland.scot)

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and ensure that premises that form part of that class approval can be protected, if necessary, through a single set of regulations.

16. The power under section 10(1)(b) has been taken in recognition that the behaviour of groups who oppose abortion, and the venues they target, may also change in future. For example, at present, some hospitals may dispense mifepristone and misoprostol and send it to pharmacies for women to collect. The pharmacies do not dispense the medication, nor offer abortion treatment so are not providing treatment under the 1967 Act and therefore are not protected premises under section 1 of the Bill. Similarly, there may be clinics which provide services or treatment which are not treatment under the 1967 Act but are otherwise connected to that treatment, for example counselling services. These are purely illustrative examples. Were anti-abortion groups to change their focus to places such as these, and attempt to influence, prevent or impede access to these services or types of treatment which are provided, it is important that there is flexibility to respond so that harmful activity is not simply displaced.

17. As above, it is not possible to say with certainty where or if these changes will occur. However, it is important to note that the scale of anti-abortion activity has increased markedly over the last five years, and that groups, such as 40 Days for Life, which operate in Scotland are offshoots of large US organisations. If current views around abortion remain as polarised as they currently are (or indeed if this increases), it cannot be ruled out that tactics will alter or escalate. Importantly, however, Ministers can only use the powers under section 10(1)(b) if they are of the opinion that it is necessary to establish a safe access zone in relation to that building or place to protect persons who are accessing, providing or facilitating treatment or services related to abortion services at that building or place against any act of the type mentioned in section 4(1) or 5(1) of the Bill.

18. Where regulations are made under section 10(1)(b), the building or place to be given protected premises status will necessarily be providing different kinds of services and treatments than the protected premises currently provided for in section 1. As a result, consequential amendments to the Bill provisions may be required such as tailoring of the offence provision to reflect the services or treatments being impacted, and so the power at section 10(6) to modify the Bill's provisions is required in order to ensure that the provisions can operate in respect of these new premises and the services or treatment it provides. The status of protected premises is a core element of the Bill and its framework. The Bill is also cast in terms of the nature of the services being delivered at those premises as abortion services under the 1967 Act. Where premises providing other types of service or treatment are to be given protection, the offences set out in sections 4 and 5 would, for example, require to be amended to reflect that the services being accessed or provided are not abortion services as they are not treatment for the termination of pregnancy, but rather services associated with such treatment. Section 10(6) therefore provides that Regulations under section 10(1)(b) may modify the Act where such modification is consequential to the definition of "protected premises". However, as set out below, this will be subject to significant Parliamentary scrutiny.

This document relates to the Abortion Services (Safe Access Zones) (Scotland) Bill (SP Bill 34) as introduced in the Scottish Parliament on 5 October 2023

19. In addition, before laying regulations made under section 10(1)(b), the Scottish Ministers must consult the provider of the treatment or service provided at the building or place, or the operator of the building or place. As noted in paragraph 11, the Bill also includes provision for appropriate consultation with those most likely to be impacted by the application of safe access zones to premises that provide treatment or services related to abortion services.

20. Finally, for both the section 10(1)(a) and (b) powers, it is recognised that the evolution of services and potentially of anti-abortion activity may be swift. The process of creating primary legislation would not necessarily be able to move at the speed required to ensure that women can access, and staff provide, abortion services free from influence, harassment or intimidation. Taking the powers in section 10(1)(a) and (b) gives the flexibility to ensure that, should abortion services and treatment change in the future to be delivered in different types of premises, or should anti-abortion activity become focused on premises providing treatment or services related to abortion services, safe access zones can be established around those premises in order to protect the women accessing, and staff providing, the services.

## Choice of procedure

21. It is appropriate that this power is subject to the affirmative procedure because it allows the definition of “protected premises” at section 1 of the Bill to be modified. Section 10(6) also allows regulations made under section 10(1)(b) to make consequential amendments to the Bill. The modification of primary legislation, as is standard in such cases, deserves robust scrutiny. In this particular case, the impact of the power is to extend the premises around which safe access zones can be established. The concept of “protected premises” is pivotal to the Bill, and safe access zones may only be established in respect of such premises. It is therefore appropriate that any regulations to expand the protection of safe access zones to other premises is subject to this level of parliamentary scrutiny.

## Section 11 – Ministerial guidance

Power conferred on: Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

## Provision

22. Section 11 places a duty on the operators of protected premises to have regard to any guidance issued by the Scottish Ministers in relation to protected premises, or proposed protected premises as well as the establishment, extension, reduction or cessation of safe access zones. Where Scottish Ministers choose to issue such guidance, they must publish that guidance and can subsequently revise or revoke the guidance.

## Reason for taking power

23. Operators of protected premises, or proposed protected premises, will require to consider a range of matters in relation to the establishment or operation of safe access zones. The Bill, for example, provides operators with the ability to request an extension to a safe access zone (section 7(1)). Guidance issued by Scottish Ministers is intended to provide support to operators of protected premises, or proposed protected premises, and will highlight matters in greater detail than is considered appropriate for legislation. Such guidance may include information for operators on how to apply for an extension of a safe access zone, examples of when an application for extension may be appropriate and the information that an application for extension would be expected to contain.

24. Any guidance issued will be developed in discussion with operators, and may require updating over time; for example, if the way abortion services are delivered changes and evolves, or regulations are made under section 10(1)(a) or (b).

25. For these reasons, guidance is considered a more responsive and flexible way of supporting operators rather than a power to make subordinate legislation. Additionally, guidance is considered appropriate because it will be able to set out and adapt to what is considered best practice. This is important given the matters for which guidance is likely to be provided – as noted above, this could include the kind of evidence expected to be provided in application for extension. As such, best practice is likely to evolve as it is informed by real world experience, and this will be more easily reflected in updated guidance. To account for this, section 11(2) provides Scottish Ministers with a power to publish revise guidance.

## Choice of procedure

26. Guidance made by the Scottish Ministers under section 11 is intended to ensure a consistent approach is taken for all protected premises as appropriate. The power to issue guidance is not subject to any Parliamentary procedure, which is considered appropriate because the power is an administrative power.

## Section 12: Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if adding to, replacing or omitting any part of the text of an Act; otherwise negative.

## Provision

27. This section enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision for the purposes of, in connection with or for giving full effect to the Bill.

This document relates to the Abortion Services (Safe Access Zones) (Scotland) Bill (SP Bill 34) as introduced in the Scottish Parliament on 5 October 2023

## Reason for taking power

28. Careful consideration has been given to the provisions of the Bill to ensure they can give full effect to the policy aims. However, it is accepted that circumstances may arise in the future that require ancillary powers in order to ensure that remains the case. This power is considered necessary to ensure that any unexpected issues which require further changes can be dealt with effectively and so that the purpose of the Bill is not inadvertently obstructed. For example, while the composition of a safe access zone under section 2 has been carefully considered to try to take into account the full range of structures which may provide abortion services, it is recognised that future services may be provided in settings that do not neatly fit within the parameters set out in section 2. In such circumstances, the legislation may need to be adjusted to accommodate that.

29. Every effort has been made, as outlined above, to mitigate against changes to how abortion treatment is delivered or how anti-abortion activity may be expressed. Nonetheless, it is considered reasonable to provide for ancillary powers should any unexpected issues arise which require further changes in order to ensure that the aims of the Bill can continue to be delivered. Such provision is common in Bills to provide flexibility to make any adjustments that may arise in light of experience in relation to the operation of the Act as timeously as possible. The potentially broad application of this power, which includes the power to modify primary legislation, and to alter the provisions of the Bill, is recognised however the powers can only be used for the purposes of, in connection with or for giving full effect to the Act or any provision made under it and would be strictly construed by any court considering the matter.

## Choice of procedure

30. Regulations made under this section which contain a provision which adds to, replaces or omits any part of an Act are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type and reflects the fact that the Parliament should be able to carefully scrutinise any amendments to primary legislation, while ancillary changes to subordinate legislation are likely to be of a more technical nature and so merit a lesser degree of parliamentary scrutiny.

## Section 15: Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no further procedure

## Provision

31. This section provides the power for Ministers, by regulations, to appoint a day when the provisions of the Bill, once passed, will come into force. The power does not apply to sections 12 to 16 of the Act as they come into force on the day after Royal Assent. The Bill further provides, in section 15(3) that such regulations may include



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transitional, transitory or saving provision, and make different provision for different purposes.

### Reason for taking power

32. The Scottish Ministers consider it appropriate for the substantive provisions of the Bill (those that do not come into force on the day after Royal Assent) to be commenced at such a date as they appoint to be suitable. It is usual practice for such commencement provisions to be dealt with by subordinate legislation. Such provisions may require to make transitional or transitory provision, or the saving of repealed or amended provisions.

### Choice of procedure

33. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

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