

A Rights Based Analysis of Safe Access Zones

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Introduction

The Irish Council for Civil Liberties, (ICCL), with many others, campaigned to remove the 8th amendment to the Irish Constitution and allow for legal and safe access to reproductive health services in Ireland, including abortion. For too long, women and pregnant people in Ireland were excluded from such health services and, as a result, suffered disproportionate and discriminatory restrictions to a wide range of rights, including their rights to privacy, dignity, bodily integrity and mental and physical health.¹

With the repeal of the 8th amendment and the introduction of the Health (Regulation of Termination of Pregnancy) Act 2018², Ireland took an important step towards recognising and fulfilling these rights. However, the struggle to access abortion safely, privately and with dignity is not yet complete. Ongoing demonstrations outside abortion providers, including the National Maternity Hospital and GP Practices across Ireland, aim to deter women from accessing health care and doctors from providing it. They can cause anxiety and distress, exacerbate existing societal stigmas and pose a serious risk to a range of rights.

Everyone has a right to access their medical care in private and to be treated with dignity and respect. Where a person seeking medical care is subject to scrutiny by hostile actors outside a medical facility and has to face individually targeted messages that their private decisions are wrong, sinful or constitute murder these rights are clearly affected.³ Evidence shows that 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.⁴ In this way, such demonstrations can affect the right to bodily integrity, including the right to mental and physical health, and the right to access healthcare without discrimination. Such demonstrations can also negatively affect the right of medical service providers to access their place of work safely.

The Irish government is obliged to protect 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,⁵ the European Convention on Human Rights, (ECHR)⁶, the European Social Charter⁷, the

¹See eg *Mellet v Ireland*, UN Human Rights Committee, CCPR/C/116/D/2324/2013, 17 November 2016, accessed here: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR/C/116/D/2324/2013&Lang=en See also *A, B and C v Ireland*, European Court of Human Rights, application no. 25579/05, 16 December 2010, <http://hudoc.echr.coe.int/eng?i=001-102332>. Of particular note, the UK Supreme Court has held that: "for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity." [2018] UKSC 27, [2019] 1 All ER 173, 6

²<http://www.irishstatutebook.ie/eli/2018/act/31/enacted/en/html>

³This is clearly the message of anti-choice protesters. A key example can be found in the use of baby sized coffins outside the National Maternity Hospital on 1 January 2019. <https://www.irishtimes.com/news/health/anti-abortion-protest-sparks-renewed-calls-for-exclusion-zones-1.4128381>

⁴ 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).

⁵ 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).

⁶ 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.

⁷ Ratified by Ireland in 2000, see article 11.

International Covenant on Civil and Political Rights, (ICCPR)⁸, the UN Convention on the Elimination of all forms of Discrimination against Women (CEDAW)⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹⁰. 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. 14.¹¹

Safe access zones outside abortion providers have been successfully introduced in many other jurisdictions to vindicate the rights of those seeking abortion services, including in parts of the USA, Canada, Australia and the UK. Safe zones can take different forms but all seek to limit the activities that can be undertaken legally outside a premises where abortion services are provided. For example, actions or displays designed to obstruct, intimidate, distress, harass, deter or otherwise interfere with a person's right to access abortion services safely, privately and with dignity can be prohibited. Such zones have been promised by the Minister for Health on numerous occasions but have not yet been introduced in Ireland.¹²

ICCL believes safe zones should be introduced in order to create the safe environment necessary for women to act on their private medical decisions. Because such a law may interfere with the right to protest, including the right to freedom of expression, human rights law requires that whatever form of safe zone is chosen by the government must be lawful, proven to be necessary, and proportionate to a legitimate aim. The right to peaceful assembly and the right to protest have been priority issues for ICCL throughout its history.¹³ As such, we are committed to ensuring that legislation around safe zones is in line with the very narrow limits permitted by human rights law.

Below we examine why we consider safe zones necessary in Ireland, how they can be considered a proportionate interference with the right to protest in order to protect the rights of others and how they could be provided for by law. We refer in particular to significant court judgments in other jurisdictions which have confirmed that limited forms of safe zones can be legal and can be considered compliant with human rights law.

Safe zones are necessary

In September of last year, the Garda Commissioner said that he believes existing laws on public order provide sufficient tools for Gardaí to deal with anyone causing harassment or intimidation outside a medical centre providing abortions.¹⁴ He also said that he was confident no activity outside abortion providers so far this year had constituted criminal behaviour. However, the Commissioner did not cite any research or communication with doctors and patients in coming to this conclusion. ICCL recognises that Gardaí do have a large discretionary power to move people on under the Public Order Act and to offer behaviour warnings under The Criminal Justice Act 2006.¹⁵ However, ICCL disagrees that this is sufficient to address concerns raised by women,

⁸ ICCPR, ratified by Ireland in 1976, requires the State to protect the right to privacy under article 17.

⁹ 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".

¹⁰ Article 12 of ICESCR, ratified by Ireland in 1989, requires the State to uphold the highest attainable standards of physical and mental health.

¹¹ 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.

¹² Most recently on 1 January 2020: <https://www.thejournal.ie/simon-harris-protests-national-maternity-hospital-4951943-Jan2020/>; <https://www.irishtimes.com/news/health/existing-laws-adequate-to-deal-with-abortion-protests-says-garda-commissioner-1.4031727>

¹³ ICCL has highlighted violations of the right to protest in submissions to UN bodies, campaigns on garda reform and criminal justice reform and during government consultations. We are currently finalising a Know Your Rights manual on the right to protest. See iccl.ie for more.

¹⁴ <https://www.irishtimes.com/news/health/existing-laws-adequate-to-deal-with-abortion-protests-says-garda-commissioner-1.4031727>

¹⁵ Under 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

women's support groups and service providers given reports of ongoing protests causing distress to those accessing and providing abortion services throughout Ireland.¹⁶ A law providing for safe zones would provide clarity and certainty around what behaviour is prohibited and would more effectively deter those that would seek to influence, interfere with and obstruct women and pregnant people accessing abortion services than existing criminal law.

Women's groups, including the National Women's Council of Ireland and the Irish Family Planning Association, have highlighted numerous reasons why safe access zones are necessary. Activities that have occurred in Ireland since the introduction of abortion services, such as placing small white coffins outside the National Maternity Hospital, displaying disturbing images, and holding white crosses outside GP clinics, are having a negative impact on both patients and medical professionals.¹⁷

The threat of anti-choice activities has deterred some GPs from signing up to provide abortion services, directly affecting women's ability to access such services. In fact, a year after abortion was legalised, two entire counties in Ireland remain without abortion services.¹⁸

Some may argue that a strong evidence base for introducing safe access zones has not yet been established in Ireland. In other words, there aren't enough protests doing enough harm to warrant intervention. The Irish Courts have recognised that the protection of rights guaranteed by the Constitution can require preventative action where there is a threat of a violation.¹⁹ In the same way a protection order might be granted where there is a risk to safety or welfare, we don't necessarily have to wait until people are seriously harmed before we take measures to protect them.

Women's groups expressed concern throughout 2019 that the type and scale of protests around abortion service providers in Ireland will increase in the future. This is based on trends in other jurisdictions and on reports that Irish anti-choice activists are being trained by groups based elsewhere, including in the United States.²⁰ There have also been reports that anti-choice groups based in other jurisdictions are planning events in Ireland. These concerns have been borne out when one considers the scale of the demonstration around the National Maternity Hospital on 1 January 2020. This demonstration was deliberately designed so that all individuals accessing the hospital had to go around or go through the gathering, forcing them to come into contact with clearly distressing images that the Health Minister himself described as 'sickening'.²¹

ICCL has been told by doctors' representatives and NGOs providing services to women that more protests are happening in Ireland than are being reported either to the Gardaí or in the media. ICCL was told that many medical practitioners and people seeking their services prefer to protect their privacy rather than publicise these protests.²²

Harmful protests in other jurisdictions

Examples of harmful protests in other jurisdictions where abortion has been legal for decades abound. ICCL is concerned, given the global reach of anti-choice activists as demonstrated by their

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.

¹⁶https://www.nwci.ie/learn/article/abortion_working_group_expresses_concern_over_planned_40_days_of_protests_o and see <https://www.thejournal.ie/simon-harris-protests-national-maternity-hospital-4951943-Jan2020/>

¹⁷The ICCL has been told by doctors that it is not only women seeking abortions who are negatively affected by such demonstrations but also women accessing other services at their GP's office or Maternity Hospitals, including medical services following miscarriages. Maternity patients have expressed concern about having to pass protesters when entering and exiting the National Maternity Hospital. Medical practitioners themselves have been impacted and have reported feeling anxious going to work.

¹⁸At time of writing, there are no medical centres providing abortion services in Cavan or Monaghan.

¹⁹East Donegal Co-Op [1970] 1 I.R. 317

²⁰<https://www.rte.ie/news/health/2019/0218/1031284-abortion-services/>

²¹<https://www.businesspost.ie/health/time-to-truly-protect-a-womans-choice-fe11d90e>

²²Sources on file with ICCL.

activities during the period prior to the referendum to repeal the 8th amendment, that Ireland may face similar actions in the future. In the UK, a government review finalised in September 2018 found that at least 36 hospitals and clinics providing abortions described having faced anti-choice demonstrations. Staff members of abortion providers described being physically and verbally accosted and harassed, while individuals attempting to access services at the clinics have been harassed in ways ranging from having holy water thrown at them to verbal intimidation.²³ In some cases, protest activities involved handing out model fetuses, displaying graphic images, following people, blocking their paths and even assaulting those attempting to enter clinics.²⁴ The review gathered examples of harassment and the damaging impact this behaviour has had on individuals, including causing distress and not following medical advice in order to avoid protestors. A decision by the Conservative Government's Home Secretary following this review not to introduce safe zones was widely criticised by medical providers, other politicians and those providing services to women.²⁵

US-based anti-choice groups are often the driving force behind anti-choice organizing globally.²⁶ This should be of significant concern given the type of anti-choice activities that occur in the USA. According to the National Abortion Federation, (NAF) between 1977 and 2017 there were 8,812 instances of violence recorded against abortion providers including 11 murders, 26 attempted murders, 42 bombings, and 663 anthrax/bioterrorism threats.²⁷ 436,868 instances of aggressive disruption and 999 clinic blockades were recorded in the same time period.²⁸

NAF has reported an escalation of hostility and targeted activity in the last few years against abortion clinics because of the current political environment in the US. From 2016 to 2017, incidents of obstruction outside abortion clinics rose from 580 to 1700, incidents of trespassing more than tripled and threats nearly doubled. NAF also reported an increase in targeted hate mail, harassing phone calls, clinic invasions, and "the first attempted bombing in many years."²⁹

The Irish Government would send a clear, loud and powerful message that such tactics will never be tolerated in Ireland with the introduction of legislation providing for safe access zones.

Safe zones can constitute a proportionate interference with the right to protest

The right to protest is protected in the Irish constitution and in human rights law through the rights to freedom of assembly, freedom of expression and freedom of association.³⁰ The right to protest is fundamental to a functioning democracy and has long been recognised as a legitimate means to agree or disagree with public policies and laws, contribute to important debates, and seek social change. ICCL fully supports the right to protest and continues to do significant work towards strengthening this right in Ireland, including by supporting protest groups to understand the

²³See, for example, <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-13/HCWS958/>; <https://www.independent.co.uk/news/uk/politics/abortion-clinic-buffer-zones-uk-government-protests-patients-terminations-family-planning-a8535696.html>; <https://www.standard.co.uk/news/uk/high-court-backs-councils-ban-on-abortion-clinic-protests-a3877141.html>; <https://www.buzzfeed.com/laurasilver/heres-how-things-have-changed-at-the-first-uk-abortion>

²⁴ <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-09-13/HCWS958/>; <https://www.independent.co.uk/news/uk/politics/abortion-clinic-buffer-zones-uk-government-protests-patients-terminations-family-planning-a8535696.html>

²⁵See, for example, <https://www.theguardian.com/world/2018/sep/13/sajid-javid-rejects-call-exclusion-zones-outside-abortion-clinics-england-wales>

²⁶See, for example, <https://www.globalhealthnow.org/2017-10/exporting-anti-choice-insurgency>
<https://www.independent.ie/breaking-news/irish-news/minister-backs-exclusion-zones-as-us-antiabortion-groups-targetireland-37826853.html>
<https://www.theguardian.com/world/2017/jul/27/el-salvador-abortion-ban-human-life-international>

²⁷ See, for example, <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>

²⁸ See, for example, <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>

²⁹ See, for example, <https://prochoice.org/wp-content/uploads/2017-NAF-Violence-and-Disruption-Statistics.pdf>

³⁰These rights are protected under article 40 of the Irish Constitution, the European Convention on Human Rights, (ECHR), (implemented into Irish Law by the European Convention on Human Rights Act 2003); the EU Charter on Fundamental Rights and Freedoms (EU Charter), (relevant when EU law is being applied in Ireland) and the UN International Covenant on Civil and Political Rights (ICCPR), which Ireland has ratified.

relevant law through a Know Your Rights Guide on the right to protest, due to be published at the end of January 2020.³¹

There is, however, a distinction in human rights law between an absolute right and a right that can be limited. Absolute rights include the right never to be tortured, the right to hold ideas and to belong to a religion. Non-absolute rights are those rights that can be limited for certain prescribed reasons in narrow circumstances. So, for example, the right to hold religious beliefs cannot be limited but the right to manifest those beliefs where they might impact on the rights of others, can be limited.

The right to protest, similarly, is not an absolute right. It can be limited in certain circumstances, including for the protection of the rights of others. The Irish Constitution provides that freedom of assembly and expression can be limited for reasons of “public order or morality”.³² The European Convention on Human Rights provides that any restriction on the right to freedom of expression³³, assembly and association³⁴ must be provided for by law and necessary in a democratic society. Limits must be proportionate to a legitimate aim and provide for the least restrictive interference as necessary.

ICCL supports safe zones because we believe this is an example of where one right – the right to protest- should be limited to protect the rights of others.

As noted above, in the context of access to abortion services, relevant rights that must be protected include privacy, dignity, bodily integrity, including mental and physical health, access to healthcare, and the right of medical providers to access their place of work safely. ICCL firmly supports the right of everybody to peaceful protest, including the rights of anti-choice activists. However, we support legislating for safe zones as a form of narrow, exceptional and necessary limit on this right, which must be done in accordance with relevant human rights law.

Case law of the European Court of Human Rights (EctHR) can provide some guidance as to what approach may be taken to limited forms of safe zones. It has previously held that some narrow restrictions on freedom of expression can be permitted to protect the personal rights of those providing abortions.³⁵ The Court has associated the right to communicate a political message in the context of abortion with acts that have legislative significance.³⁶ And the Court, when assessing limits on speech in the context of abortion, said that the historical and social context must be taken into account.³⁷ This approach suggests that the limited restrictions on freedom of expression that safe zones entail are likely to be permissible under the ECHR, taking into account its effect on

³¹For more, see <https://www.iccl.ie/protest/>

³²Article 40.6.1.i and 40.6.1.ii of the Irish Constitution. See also Article 40.6.1.iii which states “Provision may be made by law to prevent or control meetings which are determined in accordance with law to be calculated to cause a breach of the peace or to be a danger or nuisance to the general public”.

³³Article 10(2) states: The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such Public Health and Wellbeing Act 2008 (Vic), s185B(1) (definition of ‘prohibited behaviour’) formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

³⁴Article 11(2) states: No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

³⁵ Plattform “Ärzte für das Leben” v. Austria, App. No. 10126/82, EctHR, (1985), <http://hudoc.echr.coe.int/eng?i=001-57558>; D.F. v. Autriche, App. No. 21940/93, European Commission on Human Rights (EcmHR) (1994), <http://hudoc.echr.coe.int/eng?i=001-1928>; Van Den Dungen v. Holland, App. No. 22838/93, Eur. EcmHR, (1995), <http://hudoc.echr.coe.int/eng?i=001-2059>; Bowman v. United Kingdom, App. No. 141/1996/760/961, EctHR, (1998); Annen v. Germany, App. Nos. 2373/07 and 2396/07, EctHR (2010), <http://hudoc.echr.coe.int/eng?i=001-98315>; Hoffer and Annen v. Germany, App. Nos. 397/07 and 2322/07, EctHR (2011), <http://hudoc.echr.coe.int/eng?i=001-102804>; Annen v. Germany, App. No. 3690/10, EctHR (2015), <http://hudoc.echr.coe.int/eng?i=001-158880>

³⁶ Women on Waves v. Portugal, App. No. 31276/05, EctHR (2009), <http://hudoc.echr.coe.int/eng?i=001-91113>

those accessing and providing services; the fact that those who would protest outside abortion providers have many other channels and spaces to exercise their right to protest with potentially a greater legislative impact; and considering the social and historical context in Ireland where for decades women seeking abortions have been subject to a range of rights violations and societal stigma, exclusion and discrimination.³⁸

Furthermore, there is growing and persuasive case law in other jurisdictions confirming that safe zones can constitute a legitimate and proportionate interference with the right to protest in order to protect the rights to privacy, dignity and well-being of those seeking abortion services.

Australia

In April 2019, the highest court in Australia, the High Court, dismissed a constitutional challenge to the legality of exclusion zones in two provinces- Victoria and Tasmania.³⁹ The appellants argued the right to free speech⁴⁰ was breached by laws providing for safe access zones. In Victoria, the law prohibits communicating about abortion in a manner “reasonably likely to cause distress or anxiety” within a zone of 150 metres around abortion clinics.⁴¹ In Tasmania, the law prohibits “a protest in relation to terminations” that is able to be seen or heard by a person accessing a clinic within 150 metres.⁴²

The Court concluded that both exclusion zones were legal because they infringed the right to free speech only in so far as was necessary to protect privacy and dignity, as well as safety and well being. 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”.

United Kingdom

In the UK, the Court of Appeal recently found a safe zone in Ealing to be in compliance with the UK’s human rights obligations.⁴³ All abortion related protest within the safe zone was prohibited except for limited protest within a designated area 100 metres away from the entrance.

The Court found that the right to privacy of people accessing abortion services had to be protected. The Court said that this right is engaged because the fact of being pregnant and the fact of accessing such services may be aspects of life people want to keep private. The Court drew on judgements from the European Court of Human Rights, (ECtHR)⁴⁴ and the UK Supreme Court in coming to this conclusion.⁴⁵

The Court of Appeal distinguished between ordinary protests which might cause “irritation, annoyance, offence, shock or disturbance” which would be protected by the rights to freedom of expression and assembly and association⁴⁶ and the protests that had been occurring outside the Ealing abortion provider. It highlighted that the activities of the protest groups had a “detrimental effect on the quality of life of those visiting the Centre which was, or was likely to be, of a persistent or continuing nature. There is evidence of lasting psychological and emotional harm of service

³⁷ *Annen v. Germany*, App. Nos. 2373/07 and 2396/07, supra note 4. ³⁹ *Hoffer and Annen v. Germany*, supra note 4 at § 48.

³⁸ *Supra*, note 2.

³⁹ *Kathleen Clubb v Alice Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11 (10 April 2019).

⁴⁰ Protected under the Australian Constitution as a right to “political communication”.

⁴¹ *Public Health and Wellbeing Act 2008* (Vic), s185B(1) (definition of ‘prohibited behaviour’).

⁴² *Reproductive Health (Access to Terminations) Act 2013* (Tas), s9(1).

⁴³ *Dulgheriu & Anor v The London Borough Of Ealing* [2018] EWHC 1667 (Admin) (02 July 2018).

⁴⁴ For example in *A v Ireland* (2011) 53 EHRR 13, the European Court of Human Rights concluded that the right to privacy includes a right to personal autonomy, personal development, sexual life, and a person’s physical and psychological integrity, as well as a decision to have or not to have a child.

⁴⁵ [2018] UKSC 27, [2019] 1 All ER 173, 6.

⁴⁶ The CA cited *Plattform ‘Ärzte für das Leben’ v Austria* (1991) 13 EHRR 204 at [32], *Sánchez v Spain* (2012) 54 EHRR 24 at [53], *Animal Defenders v United Kingdom* (2013) 57 EHRR 21 at [100].

users". The Court 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.

Canada

Different forms of safe zones are legal in different States in Canada. A key example can be found in British Columbia, where zones are provided for around abortion providers and their homes. The zones are 10 metres from a doctor's office and up to 50 metres for a medical facility. The 10 metre zone applies to all doctors' offices. Medical facilities must apply for a zone and the distance is decided by Cabinet on a customised basis. The behaviour prohibited within the zone includes: sidewalk interference; protesting; besetting; physical interference with, or attempted interference with, a patient, doctor, or abortion service provider; intimidation of a patient, doctor, or abortion service provider.

An protester challenged the constitutionality of the zones in *R v Spratt and Watson*⁴⁷ following his conviction for holding anti-abortion signs within a zone. 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".⁴⁸ The Canadian Courts have emphasised that it is the location of the protest that made it impermissible, not the content of the relevant speech.

United States

In the United States, legislation passed in 1994 creates a limited form of safe access zone across the whole country. This is the Freedom of Access to Clinic Entrances (FACE) Act, which prohibits a range of physical activity outside abortion service providers, including obstructing access.⁴⁹ Since then the US Supreme Court has upheld other types of safe zones that were introduced at State level. This is particularly notable given the much broader protections for free speech in the US constitution compared to the Irish Constitution or the ECHR.

A key example that has withstood a constitutional test in the US Supreme Court is the safe access zone in Colorado.⁵⁰ This was introduced in 1993. It created a mixed system of a floating zone within a fixed zone. The zone consisted of an 8 foot floating zone around all individuals seeking to access medical facilities for 100 feet around all medical clinics, not confined to those offering abortion services. Within each 8 foot floating zone it is illegal to "knowingly" approach an individual without that person's consent in order to pass a leaflet, display a sign or engage in oral protest, education or counselling.⁵¹ The law also outlaws any action that "obstructs, detains, hinders, impedes, or blocks another person's entry to or exit from a health care facility."⁵² Both provisions are prosecutable as a minor offence and are subject to civil liability.⁵³

The 8 foot floating zone was challenged as incompatible with the right to free speech in the US Supreme Court, while the section on obstructing entry or exit was not challenged. The Court upheld the law in 2000. It identified a number of legitimate aims met by the zones, including "unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests". The Court addressed the right to free speech in some detail. It distinguished between a speaker's right to address a willing audience and an interest in

⁴⁷ 2008 BCCA 340.

⁴⁸ Ibid at 91.

⁴⁹ Civil Rights, 18 U.S.C. Chapter 13 (1988).

⁵⁰ *Hill v Colorado*, Jun 28 2000 530 U.S. 703 (2000) Accessed here: <https://casetext.com/case/hill-v-colorado>

⁵¹ <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>

<https://www.nytimes.com/1997/02/20/us/high-court-upholds-15-foot-buffer-zone-at-abortion-clinics.html>

⁵² <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>

⁵³ <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>

protecting listeners from unwanted communication.⁵⁴ The Court identified a “right to be let alone” and the right of “passage without obstruction” that must be addressed.⁵⁵ Additionally, the Court distinguished between the regulation of speech and the regulation of “places of speech”. Of importance was the fact that all messages within the zones were restricted, not just anti-choice messages.

Experiences in other jurisdictions suggest that safe zones can be introduced in a way that can withstand constitutional and human rights tests. The challenge for the Irish Government will be to design a safe zone that is appropriate for Ireland, taking into account relevant laws, the social and historical context of abortion provision and the activities of anti-choice activists so far. ICCL support the suggestions by Lawyers for Choice that:

Prohibited activities should not be confined to acts of violence, ‘obscenity’ or efforts to directly obstruct access to a healthcare facility by impeding individuals’ free movement, but should also include any threatening behaviour likely to intimidate or distress potential service users or disrupt employees’ working conditions. Protection should extend to those inside the facility, who can hear and see activities outside. The law should be drafted to take account of the likelihood of causing distress to those hearing or seeing the offending behaviour, irrespective of the anti-abortion activist’s stated intentions.⁵⁶

Conclusion and Recommendations

A person who has made the decision to seek an abortion is entitled to keep that decision private and to access health services with dignity, respect for their well-being and in private. She should not have to deal with people seeking to monitor her movements, influence her personal decisions or otherwise dissuade or deter her from accessing services directly outside her doctor’s place of practice.

The Irish Government has a duty to protect women and pregnant people from unwanted harassment, intimidation and distress when accessing abortion services and it has a similar duty to those providing such services. It must take steps to prevent such activities and to protect the fundamental right to safe access to private medical care.

ICCL recommends that, in line with previous commitments, the Minister for Health should introduce legislation providing for safe zones around abortion providers in Ireland. This legislation must be drafted in very clear terms that impose as minimal a restriction on the right to protest as necessary to protect the rights of those seeking to access health services. The experience in other jurisdictions is that safe zones can make a difference to those accessing services and can withstand constitutional and human rights challenges. In choosing what form of safe zone is appropriate for Ireland, the government must take into account the Irish legal context, including what our Constitution and human rights legal obligations prohibit and permit.

ICCL recommends that fixed safe zones around all medical establishments are introduced that prohibit specific behaviours designed to interfere with and influence people accessing or providing abortion services. ICCL recommends that existing remedies through criminal law should only be used in the most severe cases and the main remedies for breaching the law on safe zones should be civil remedies, such as fines.

ICCL reiterates its firm support for the right of everybody to peaceful protest, including the rights of anti-choice activists. We support safe zones as a form of narrow, exceptional and necessary limit on this right, in line with applicable human rights law.

⁵⁴ Hill v Colorado, Jun 28 2000 530 U.S. 703 (2000) Accessed here: <https://casetext.com/case/hill-v-colorado> at 716.

⁵⁵ Ibid at 717, 718

⁵⁶ <https://www.irishlegal.com/article/mirad-enright-exclusion-zones-and-possibilities-for-reform>

ICCL considers that protests directly outside abortion providers are not typical protests which seek to influence policy and effect societal change. These are targeted messages to individuals seeking to access legal health services that they are doing something wrong. These are targeted messages to doctors and nurses seeking to deliver medical services that they are guilty of complicity. These are targeted messages to other women who might one day seek such services to dissuade them. The aim is to deter, to stigmatise and to shame. This country has done enough of that.

Appendix One:

Relevant case law in other jurisdictions in more detail

Australia

On April 10th 2019 the highest court in Australia, the High Court, upheld the legality of exclusion zones in two provinces- Victoria and Tasmania.⁵⁷ The Australian constitution protects free speech in the form of a right to ‘political communication’. The appellants argued this right was breached by laws providing for safe access zones. In Victoria, the law prohibits communicating about abortion in a manner “reasonably likely to cause distress or anxiety” within a zone of 150 metres around abortion clinics.⁵⁸ In Tasmania, the law prohibits “a protest in relation to terminations” that is able to be seen or heard by a person accessing a clinic within 150 metres.⁵⁹

The judges concluded that while the right to political communication was infringed by the law in Victoria, it was minimal because the infringement was geographically limited, non-discriminatory and limited to the topic of abortions. They found the law served a legitimate purpose which was to protect privacy and dignity. Applying a legal test similar to the one that would be applied by the Irish Courts when balancing rights⁶⁰, the Court found that the impact of the law on protestors’ right to political communication was limited, necessary, and proportionate.

When assessing the law in Tasmania, the Court held that, whilst the law prohibiting a protest on abortion within a 150m zone does restrict freedom of political communication, it serves a legitimate purpose of protecting the safety, well-being, privacy and dignity of persons accessing medical centres providing abortion services. They found that the limits on the right therefore constituted a proportionate interference. The Court found 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”. The Australian Court highlighted that the right to free speech does not include a right to a “captive audience”.

United Kingdom

In the UK, the Court of Appeal recently found a safe zone to be in compliance with the UK’s human rights obligations. A Public Spaces Protection Order (PSPO) prohibited anti-choice protests in the immediate vicinity of Marie Stopes UK West London Centre. This order was made by the London Borough of Ealing on 10 April 2018. The Centre provides family planning services, including abortion services. The Court assessed whether the restrictions were compatible with article 9, (thought, conscience and religion), 10 (expression), and 11 (assembly and association) of the European Convention on Human Rights (ECHR). The PSPO prohibited all abortion related protest

⁵⁷ *Kathleen Clubb v Alyce Edwards & Anor; John Graham Preston v Elizabeth Avery & Anor* [2019] HCA 11 (10 April 2019).

⁵⁸ *Public Health and Wellbeing Act 2008* (Vic), s185B(1) (definition of ‘prohibited behaviour’).

⁵⁹ *Reproductive Health (Access to Terminations) Act 2013* (Tas), s9(1).

⁶⁰ *See the test laid out in Heaney v Ireland* ([1994] 3 IR 593).

within a safe zone save as to limited protest within a designated area 100 metres away from the entrance.

The Court found that the protection afforded to the right to privacy by Article 8 ECHR was engaged by service users. This was because the facts of both being pregnant and accessing such services may be aspects of life service users want to keep private. The Court drew on Judgements from the European Court of Human Rights, (ECtHR) and the UK Supreme Court. For example, the ECtHR in *A v Ireland* concluded that the right to privacy protected by article 8 includes a right to personal autonomy, personal development, sexual life and a person's physical and psychological integrity, as well as a decision to have or not to have a child.⁶¹ The UK Supreme Court in *Re Northern Ireland's Human Rights Commission's application for judicial review*⁶² held that: "for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity."

The Court of Appeal distinguished between ordinary protests which might cause "irritation, annoyance, offence, shock or disturbance" which would be protected by the rights to freedom of expression and assembly and association⁶³ and the protests that had been occurring outside the Ealing abortion provider. It highlighted that the activities of the protest groups had a "detrimental effect on the quality of life of those visiting the Centre which was, or was likely to be, of a persistent or continuing nature. There is evidence of lasting psychological and emotional harm of service users". The court cited evidence that those seeking to use the services of the Centre had cancelled appointments, with "potential adverse consequences to their health". In effect, the Court found that the safe zone or PSPO struck a fair balance between protecting the rights of service users and the rights of protesters.

Canada

British Columbia The Access to Abortion Services Act creates safe access zones around facilities that provide abortion services, the homes and offices of doctors who provide abortion services, and the homes of other abortion service providers (e.g., clinic staff). The dimensions of these zones are calculated from the edge of the lot on which the home or facility is located and are set at:

- 160 metres for a doctor's or service provider's home
- 10 metres for a doctor's office (which can be extended up to a maximum of 20 metres through an Order in Council)
- up to a maximum of 50 metres for a facility (the distance to be determined by Cabinet; facilities must apply for a zone so it can be customized)

Within those access zones, it is an offence to engage in any of the following activities:

- sidewalk interference
 - protesting
 - besetting
 - physical interference with, or attempted interference with, a patient, doctor, or abortion service provider
 - intimidation of a patient, doctor, or abortion service provider
- Homes and offices of abortion providers are automatically protected, while facilities must apply for a zone.

An anti-choice protester challenged the constitutionality of the zone in *R v Spratt and Watson*⁶⁴ following his conviction for holding signs within the zone. 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".⁶⁵

⁶¹ *A v Ireland* [2011] [\(2011\) 53 EHRR 13](#), 212.

⁶² [\[2018\] UKSC 27](#), [\[2019\] 1 All ER 173](#), 6

⁶³ The CA cited *Plattform 'Ärzte für das Leben' v Austria* [\(1991\) 13 EHRR 204](#) at [32], *Sánchez v Spain* [\(2012\) 54 EHRR 24](#) at [53], *Animal Defenders v United Kingdom* [\(2013\) 57 EHRR 21](#) at [100].

⁶⁴ 2008 BCCA 340

⁶⁵ *Ibid* at 91.

United States

In the United States, legislation passed in 1994 creates a limited form of safe access zone across the whole country. This is the Freedom of Access to Clinic Entrances (FACE) Act.⁶⁶ Since then the US Supreme Court has upheld certain types of broader zones provided for at state level. This is particularly notable given the much broader protections for free speech in the US constitution compared to the Irish Constitution or the ECHR. A key example that has withstood a constitutional test in the US Supreme Court is the safe access zone in Colorado.⁶⁷ This was introduced in 1993. It created a mixed system of a floating zone within a fixed zone. The zone consisted of an 8 foot floating zone around all individuals seeking to access medical facilities. The 8 foot floating zone is in place for 100 feet around all medical clinics, not confined to those offering abortion services. Within each 8 foot floating zone it is illegal to “knowingly” approach an individual without that person’s consent “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counselling.”⁶⁸ The law also outlaws any action that “obstructs, detains, hinders, impedes, or blocks another person’s entry to or exit from a health care facility.”⁶⁹ Both provisions are prosecutable as a minor offence and are subject to civil liability.⁷⁰

The 8 foot floating zone was challenged as incompatible with the right to free speech in the US Supreme Court, while the section on obstructing entry or exit was not challenged. The Court upheld the law. It identified a number of legitimate aims met by the zones, including “unimpeded access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests”. In addressing the right to free speech, the Court distinguished between a speaker’s right to address a willing audience and an interest in protecting listeners from unwanted communication, (emphasising that interfering in the latter may only be legitimate where the speech is “so intrusive that the unwilling audience cannot avoid it”. (716) The Court identified a “right to be let alone” (717) and the right of “passage without obstruction”(718) that must be addressed. Additionally, the Court distinguished between the regulation of speech and the regulation of “places of speech”. Of importance was the fact that all messages within the zones were restricted, not just anti-choice messages. The Court identified the State’s interest in protecting access and privacy, (720) with reference to the fact that the statute sought to protect “those who wish to enter health care facilities, many of whom may be under special physical or emotional stress, from close physical approaches by demonstrators”. (729) The Court also referred to the fact that protesters could continue to demonstrate outside the zones. The court clearly distinguished between removing ideas from the general discourse and placing limits on times and places and manners of speech, narrowly tailored to meet a legitimate aim and where “alternative channels for communication of the information” are available. (736) The Court emphasised that limits on free speech can’t be imposed because of disagreement with the message but because of “offensive behaviour identified with its delivery”. (737)

⁶⁶Civil Rights, 18 U.S.C. Chapter 13 (1988).

⁶⁷Hill v Colorado, Jun 28 2000 530 U.S. 703 (2000) Accessed here: <https://casetext.com/case/hill-v-colorado>

⁶⁸ <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>
<https://www.nytimes.com/1997/02/20/us/high-court-upholds-15-foot-buffer-zone-at-abortion-clinics.html>

⁶⁹ <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>

⁷⁰ <https://law.justia.com/codes/colorado/2016/title-18/article-9/part-1/section-18-9-122/>