

## ABERDEEN CITY COUNCIL

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<b>COMMITTEE</b>	Council
<b>DATE</b>	24 August 2022
<b>EXEMPT</b>	No
<b>CONFIDENTIAL</b>	No
<b>REPORT TITLE</b>	Buffer Zones
<b>REPORT NUMBER</b>	COM/22/167
<b>DIRECTOR</b>	Gale Beattie – Director of Commissioning
<b>CHIEF OFFICER</b>	Vikki Cuthbert – Interim Chief Officer Governance
<b>REPORT AUTHOR</b>	Deirdre Nicolson/Jenni Lawson
<b>TERMS OF REFERENCE</b>	21

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### 1. PURPOSE OF REPORT

- 1.1 To report back to the Council on progress in liaising with the Scottish Government and COSLA in exploring options to establish protest free buffer zones including but not limited to potentially implementing a local byelaw.

### 2. RECOMMENDATIONS

That Council:-

- 2.1 Note the national activities underway in relation to the matter of establishing protest-free buffer zones, in particular:-
- the legal opinion referred to in the COSLA briefing note at Background Paper 10.1 and;
  - that there is a technical 'mini-summit' to discuss the potential use of byelaws being held on 29<sup>th</sup> August, referred to in detail at paragraph 3.6 below.
- 2.2 Instruct the Interim Chief Officer – Governance to continue to liaise with the Scottish Government and COSLA and report back to the meeting of Full Council on 14 December 2022 with an update on latest developments including:-
- 1) evidence contained in the independent research commissioned by the Scottish Government relating to protests/vigils to gather more robust and objective evidence on the impact of protests/vigils on patients and others if available; and
  - 2) evidence from NHS Grampian, Police Scotland and Back-off Scotland as to the number and nature of protests taking place in Aberdeen.

### **3. CURRENT SITUATION**

3.1 At a specially requisitioned meeting on 13 July 2022, the Council resolved to instruct the Chief Officer - Governance to, amongst other things, liaise with the Scottish Government and COSLA to explore options to establish protest-free buffer zones including but not limited to potentially implementing a local byelaw, and to report back to the next meeting of Full Council.

3.2 In response to the Council's instruction, there are a number of ongoing activities detailed below in relation to the matter of establishing protest-free buffer zones. We do not have full detail at this time on all potential options, and therefore, it is important for officers to continue to liaise with the relevant parties and report back with more detail at the December meeting of Full Council.

#### **3.3 Scottish Government Ministerial Working Group**

3.3.1 A Scottish Government Ministerial-led Working Group on Abortion Buffer Zones around healthcare facilities was formed in 2021 to consider short, medium and long-term actions that may help to address the issue of protests/vigils that take place outside of abortion clinics or other facilities providing healthcare.

3.3.2 The group brings together representatives of affected Councils and Health Boards, along with representatives from the Convention of Scottish Local Authorities (COSLA), the Society of Local Authority Lawyers and Administrators (SOLAR) and Police Scotland.

3.3.3 Officers of Aberdeen City Council have been invited to attend the next meeting scheduled for 23 August 2022.

#### **3.4 COSLA Update**

In November 2021, COSLA produced a briefing note on the matter of buffer zones, which can be found at Appendix 10.4 of this report. This specifically refers to the legal opinion that SOLAR obtained from Counsel, which is unequivocal and confirms that local authorities cannot use byelaws to implement buffer zones at NHS reproductive health facilities. COSLA confirmed that their Community Wellbeing Board has ultimate responsibility for policy direction on this issue, and the first meeting of the 'new' Board is on 22<sup>nd</sup> September. The agenda has yet to be finalised, but it is likely that there will at least be an update on where things stand with respect to Buffer Zones. There is a recognition from COSLA that there are significant complexities in looking to implement any byelaw.

#### **3.5 NHSG and Police Scotland**

3.5.1 A preliminary meeting has been held with representatives of NHSG to request their views on buffer zones, and we are awaiting their views.

3.5.2 Confirmation has been received from the Police that in recent years in Aberdeen there have been various protests/rallies around both sides of the abortion/pro-life debate and related woman's rights issues, however these have passed off as peaceful events posing no significant issue.

### 3.6 Mini-Summit

The Scottish Government held a summit on abortion care in June 2022. A 'mini-summit' is now scheduled to take place on 29<sup>th</sup> August. The Scottish Government has clarified that this will have a reduced invite list and is more a technical meeting, stating "the purpose of this is to discuss the potential use of byelaws, including the process, council powers including legal concerns, and support the Scottish Government could potentially offer in this space." Aberdeen City Council have been invited to attend along with Glasgow and Edinburgh City Councils.

### 3.7 Back-off Scotland

[Back Off Scotland](#) is a grass roots organisation which was established in 2020 to campaign for the Scottish Government to introduce 150 metre 'buffer zones' (protest-free areas) around clinics that provide abortion services across Scotland and maybe able to provide evidence as to the situation in Aberdeen.

### 3.8 Proposed Abortion Services Safe Access Zones Bill

3.8.1 Gillian Mackay MSP has proposed an Abortion Services Safe Access Zones Scotland Bill which would introduce safe access zones around healthcare settings that provide abortion services.

3.8.2 As this is a Member's Bill, distinct from a Government Bill, the first step is for the proposal to be published on the Parliament's website and a consultation lodged. The consultation for this proposed Bill closed on 11 August 2022.

3.8.3 If the MSP has support from at least 18 other MSPs, from a number of political parties, the Scottish Government will have the opportunity to stop the MSP's proposal, but only by confirming that they will change the law in much the same way.

3.8.4 If at least 18 other MSPs support the proposal, and it isn't stopped by the Scottish Government, the MSP gets the right to introduce a Members' Bill. It would likely take at least a few months to get the Bill ready for introduction to the Scottish Parliament. Once introduced the Bill will follow a 3 stage process as would any Government Bill.

3.8.5 Scottish legislation needs to be compatible with Human Rights legislation.

### 3.9 Abortion Services (Safe Access Zones) (Northern Ireland) Bill

3.9.1 The Supreme Court are considering whether the [Abortion Services \(Safe Access Zones\) \(Northern Ireland\) Bill](#) is outside the legislative competence of the Northern Ireland Assembly.

3.9.2 The Bill makes provision for the establishment of safe access zones around abortion clinics and other premises which provide sexual and reproductive health services, in order to protect the people who use and work in those premises. The Bill criminalises certain behaviour in a safe access zone.

3.9.3 A Bill is outside the competence of the Northern Ireland Assembly if it is incompatible with the rights protected by the European Convention on Human Rights. These include the rights to freedom of thought, conscience and religion, freedom of expression and freedom of assembly and association guaranteed by Articles 9, 10 and 11 of the Convention. The Supreme Court is deciding whether the Bill is outside the Northern Ireland Assembly's legislative competence because it disproportionately interferes with these rights.

3.9.4 The Hearing took place on 19 and 20 July 2022. The judgement is expected to be issued in the autumn. It is sensible to await the outcome of this case, as it will help understand any potential limitations that may be relevant to the Scottish Government and potentially the Council.

### 3.10 Public Safety Protection Orders

English local authorities have the power to implement Public Safety Protection Orders but this is not a remedy which is available to Scottish local authorities. It is however worth noting that the validity of the Public Spaces Protection Order made by the London Borough of Ealing prohibiting anti-abortion protests in the immediate vicinity of Marie Stopes UK West London Centre which provides family planning services, including abortion services was considered by the Appeal Court. The court considered the human rights aspects on a fact specific basis. Any legal challenge to a Scottish Byelaw would also be fact specific necessitating evidence.

#### **Byelaws and Alternative Considerations**

### 3.11 Powers to Implement a Byelaw

3.11.1 Councils have a general power under the Local Government (Scotland) Act 1973 to implement byelaws. The byelaw has to be created for the good rule and government of the whole or any part of their area and for the prevention and suppression of nuisances therein and requires evidence of the nuisance.

3.11.2 A byelaw cannot be created if there are any other existing laws which could/should be used to prevent the nuisance.

3.11.3 In addition, any byelaw has to be compatible with Human Rights legislation.

### 3.12 Process to create a Byelaw

The process for implementing a byelaw would be:

1. Decision by Full Council to approve a byelaw.
2. Advertise
  - a. Must be advertised for at least one month
3. Request confirmation from Scottish Ministers
4. Scottish Ministers to consider any objections
  - a. Scottish Ministers could decide to hold a local inquiry which requires to be conducted by a Sheriff
5. Scottish Ministers confirm Byelaw
6. Advertise Notice of Confirmation
7. Byelaw comes into force.
  - a. Normally agreed between ACC and Scottish Government. If no date fixed, the byelaws come into operation at expiration of one month from date of SG confirmation.

### 3.13 Prevention and Suppression of Nuisance

3.13.1 It is noted that protests, by groups and individuals have already taken place at Aberdeen Royal Infirmary this year, and further noted that some of these have been organised under the guise of being 'prayer vigils'.

3.13.2 The extent of these protests and the impact on those accessing and using these services is unknown.

3.13.3 The Scottish Government Ministerial Working Group also "*noted that there was dispute between the groups on both sides around the scale of the problem and some of the incidents which had been reported. It would therefore be helpful to gather more information on the locations, size and timings of protests/vigils, potentially with help from NHS Boards. It was agreed that it would be useful to commission independent research to look at protests/vigils to gather more robust and objective evidence on the impact of the protests/vigils on patients and others.*"

3.13.4 It would therefore be useful to have sight of the outcome of this independent research.

### 3.14 Existing Legislation which could be used to prevent or suppress any nuisance

3.14.1 As referenced in paragraph 3.11.2, a Byelaw can only be created if there is no existing legislation which could be used to prevent or suppress a nuisance. The following paragraphs reference existing legislation which could possibly be used.

3.14.2 Dispersal Orders under Antisocial Behaviour etc. (Scotland) Act 2004

The Antisocial Behaviour etc. (Scotland) Act 2004 allows police to issue a dispersal order which can order a group of two or more people to disperse. They can be issued where the public has been alarmed or distressed and where behaviour has become significant, persistent, and serious. Dispersal orders can only be issued if other approaches have been tried and failed, and they only last for three months at which point the same test would need to be met again.

#### 3.14.3 AntiSocial Behaviour Orders under Antisocial Behaviour etc. (Scotland) Act 2004

The Act also provides for antisocial behaviour orders to be issued, but these are applied to specific, named individuals and not to groups or gatherings, and there is evidence from other areas that anti-abortion activists travel between protests, often over long distances.

#### 3.14.4 Public Order Act 1986

The Public Order Act 1986 allows the police to give written directions which impose conditions on public assemblies to prevent disorder or disruption, or to stop groups gathering to intimidate others with a view to preventing them doing something that they have a legal right to do. This provision has been used before for this purpose by the Metropolitan Police in London but was retracted and the police force claimed it had been issued in error - so its practicability is questionable.

#### 3.14.5 Civic Government (Scotland) Act 1982

The Civic Government (Scotland) Act 1982 prohibits the obstruction of pedestrians. Any person who, being on foot in any public place — (a) obstructs, along with another or others, the lawful passage of any other person and fails to desist on being required to do so by a constable in uniform, or (b) wilfully obstructs the lawful passage of any other person shall be guilty of an offence and liable, on summary conviction.

### 3.15 Compatibility with Human Rights

3.15.1 The Human Rights Act 1998 make it unlawful for Aberdeen City Council to act in a way which is incompatible with a Convention right. These rights include:

- Article 8 Right to respect for private and family life
- Article 9 Freedom of thought, conscience and religion
- Article 10 Freedom of expression

3.15.2 These rights however are qualified and Aberdeen City Council can interfere with these rights when the action is lawful, necessary and proportionate which would include taking action taken to:

- protect health
- protect the rights and freedoms of other people

3.15.3 Action is 'proportionate' when it is appropriate and no more than necessary to address the problem concerned. This is why it is important to understand the location, size, nature, and timings of protests/vigils.

### 3.16 Challenges to Implementing Byelaws

#### 3.16.1 Judicial Review

A judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action taken by a public body. Members of the public have the right to ask for a judicial review of any decisions taken by the Council and Scottish Government which are claimed to be out with their powers (ultra vires). This could include a decision to implement a byelaw and decision, by the Scottish Ministers, to confirm the byelaw. Judicial Reviews take place in the Court of Session. Timescales between a member of the public raising an action for judicial review and the actual hearing vary on a case by case basis.

#### 3.16.2 Objections to Byelaws

All proposed byelaws require to be advertised prior to confirmation by the Scottish Ministers. Members of the public have thirty days to object to the Byelaw. The Scottish Ministers may decide to hold a local inquiry conducted by a Sheriff if a number of objections are raised.

## 4. **FINANCIAL IMPLICATIONS**

### 4.1 Cost of Promoting Byelaws

Byelaws require to be advertised twice in the local press. Cost of advertisement would be in the region of £1000 and a source of funding would need to be identified. The Scottish Minister may also choose to hold a local inquiry which may require Aberdeen City Council to instruct an advocate or QC to act on its behalf.

### 4.2 Costs of defending a Judicial Review

As referenced in paragraph 3.16.1 members of the public have the right to ask for a judicial review of any decisions taken by the Council. As Judicial Reviews take place in the Court of Session, the Council's costs will be significant and are unlikely to be less than a six-figure sum, due to the requirement to instruct an advocate or QC.

Even if the courts uphold the decision in Aberdeen City Council's favour, applicants can apply for a Protective Expenses Order which may limit the amount of legal expenses the Council can recover. Criteria for considering if a Protective Expenses Order should be granted are:

- The issues raised have to be of general public importance;
- The public interest required that those issues be resolved in the proceedings that the application related to;

- The applicant should have no private interest in the outcome of the case;
- Having regard to the financial resources of the parties and the amount of costs likely to be involved, it would fair and just to make the order; and
- If the order was not made, the applicant would probably discontinue the proceedings and would be acting reasonably in doing so.

## 5. LEGAL IMPLICATIONS

5.1 Given the legal implications mentioned above, a byelaw may not be the appropriate route in order to address the issue of protest free buffer zones, if there are other potential legislative options to prevent or suppress any nuisance. Existing legislative options available are set out in sections 3.11 to 3.12 of the report.

5.2 A byelaw could potentially conflict with Human Rights legislation, so it is important that the Council continues to work closely with all relevant parties mentioned above, including the Scottish Government, NHS, Police Scotland etc to identify further options and awareness of any risks, including the potential risk of judicial review for either the Council or the Scottish Government.

## 6. ENVIRONMENTAL IMPLICATIONS

6.1 No impact

## 7. RISK

7.1 The assessment of risk contained within the table below is considered to be consistent with the Risk Appetite Statement.

Category	Risks	Primary Controls/Control Actions to achieve Target Risk Level	*Target Risk Level (L, M or H)  *taking into account controls/control actions	*Does Target Risk Level Match Appetite Set?
<b>Compliance</b>	Risk that the decision to create a byelaw is ultra vires	1. Only proceed with promotion of byelaw once outcome of Supreme Court is known  2. Only proceed with promotion of byelaw once sufficient evidence has been received	L	<b>Yes</b>
<b>Operational</b>	Insufficient resources to promote and defend any court actions	1. Instruct legal framework partner if required	L	<b>Yes</b>

	arising from the promotion of a byelaw			
<b>Financial</b>	Costs incurred in defending a court action	1. Investigate funding from Scottish Government and/or COSLA	M	<b>Yes</b>
<b>Reputational</b>	Risk that the decision to create a byelaw is ultra vires	1. Only proceed with promotion of byelaw once outcome of Supreme Court is known 2. Only proceed with promotion of byelaw once sufficient evidence has been received	M	<b>Yes</b>
<b>Environment / Climate</b>	n/a			

## 8. OUTCOMES

<u><a href="#">COUNCIL DELIVERY PLAN</a></u>	
	<b>Impact of Report</b>
<b>Aberdeen City Council Policy Statement</b>	No impact
<u><a href="#">Aberdeen City Local Outcome Improvement Plan</a></u>	
Prosperous Economy Stretch Outcomes	No impact
Prosperous People Stretch Outcomes	Having safe, secure access to abortion services 4.3 Improving health and reducing inequalities 5.1 Improving timely access to support
Prosperous Place Stretch Outcomes	No impact
<b>Regional and City Strategies</b>	No impact

## 9. IMPACT ASSESSMENTS

Assessment	Outcome
<b>Integrated Impact Assessment</b>	A full impact assessment will be required to assess the impact of implementing a potential Byelaw in Aberdeen on the following protected characteristics: <ol style="list-style-type: none"><li>1. Sex</li><li>2. Pregnancy and Maternity</li><li>3. Religion or Belief</li></ol> Human Rights: <ol style="list-style-type: none"><li>1. Article 2 – Right to Life</li><li>2. Article 8 – Right to Respect for Family and Private Life</li><li>3. Article 9: Freedom of thought, conscience and religion</li><li>4. Article 10: Freedom of expression</li><li>5. Article 11: Freedom of assembly and association</li></ol>
<b>Data Protection Impact Assessment</b>	Not required
<b>Other</b>	Not applicable

## 10. BACKGROUND PAPERS

10.1 – [Requisitioned Meeting of the Council on 13 July 2022](#)

10.2 [Ministerial Working Group – Abortion Buffer Zones - gov.scot \(www.gov.scot\)](#)

10.3 [Proposed Abortion Services Safe Access Zones Scotland Bill | Scottish Parliament Website](#)

[10.4 COSLA report on Buffer Zones](#)

## 11. APPENDICES

None

## 12. REPORT AUTHOR CONTACT DETAILS

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