

Buffer Zones

Summary and Recommendations

This report provides members with an update on proposed 'Buffer Zones' near NHS Reproductive Health Facilities that were raised as issues by a number of Councils earlier this year. In addition, this paper sets out SOLAR's updated advice from the legal opinion provided by Counsel.

This report invites Members to:

- i. Note the summary of the legal opinion provided by Counsel on 'Buffer Zones';
- ii. Provide any comments on the legal opinion; and
- iii. Provide views on our forward activities, including the proposition to run a workshop session to arrive at a consensus between Scottish & Local Government over where we are and the way forward.

References

Previous reports:

- 21-05-12 CWB Board Item 8.3 Buffer Zones

Buffer Zones

Purpose

1. To provide members with an update on proposed 'Buffer Zones' near NHS Reproductive Health Facilities that were raised as issues by a number of Councils earlier this year. In addition, this paper sets out SOLAR's updated legal advice on this matter based on the legal opinion provided by Counsel.

Background

2. COSLA has previously received presentations from members councils over their ongoing concerns about barriers to women accessing NHS Reproductive Clinics or other facilities. There have been reports of intimidation and distress caused by protesters outside such premises.
3. Between the British Pregnancy Advisory Service and Scotland's 'Back Off' campaign there have been calls for buffer zones to be established outside reproductive health clinics for some years. This has been a difficult issue to respond to for local authorities, as the protesters have generally not breached a criminal threshold in what they've been doing and are increasingly passive in what they do. Consequently, there have been no reports of arrests or other interactions over this matter by Police Scotland.
4. A consistent theme emerging in legal advice to the affected local authorities is how to address these local matters balancing the right to protest in accordance with the European Convention for Human Rights (ECHR) legislation, with the ECHR rights of patients and staff to access medical care and facilities in a manner which is free from intimidation and distress.
5. Scottish Govt's view has been that local authorities should be able to address this issue using a byelaw under section 201 of the Local Government (Scotland) Act 1973. However, the Local Authority Professional Association of Lawyers and Administrators, SOLAR, were of the view in May that byelaws cannot be used for the implementation of buffer zones, given the ECHR Article 11 considerations. In addition to this SOLAR has highlighted that where Local Authorities can interfere with ECHR rights, such interference must be minimal and proportionate, and must be based on the specific facts and circumstances of each case.
6. At the last meeting of the Board, it was agreed that COSLA and SOLAR would aim to progress the matter with the Scottish Govt. As a result, this involved meetings between Local Govt and Scottish Govt lawyers that led to SOLAR seeking the legal opinion of a QC, given the divergence in the legal position over the use of byelaws by Local Govt (SOLAR) and Scottish Govt lawyers.

Counsel's Legal Opinion on 'Buffer Zones'

7. To clarify this, Glasgow City Council and the City of Edinburgh Council sought a written Opinion of Gerry Moynihan QC on behalf of SOLAR, on the advice that had been agreed by SOLAR around buffer zones at NHS facilities.
8. The Opinion that SOLAR obtained from Counsel is unequivocal and confirms that local authorities cannot use byelaws to implement buffer zones at NHS reproductive health

facilities. It also went further stating that where powers exist to deal with a matter then Local Authorities cannot implement byelaws. The police have powers in this area including the use of group dispersal orders.

9. SOLAR has shared the Opinion with both Scottish Govt and Police Scotland. To date, we understand Scottish Govt lawyers are still to respond to this legal opinion provided by Counsel. Civil servants have confirmed that they are considering the opinion's terms and will contact SOLAR in due course.
10. A number of key points were addressed by Counsel that are set out in further detail in Annex 1. We anticipate that Elaine Galletly, Senior Vice President of SOLAR/Glasgow City Council will provide a contribution to outline the key points at the Board meeting. We also understand that a summary of the full opinion from Counsel has been provided to local authority solicitors.

Forward Activities

11. It appears clear that local authorities cannot currently put byelaws in place for 'buffer zones'. This leaves the Scottish and Local Government at an impasse, and further discussion will be needed if the Programme for Government commitment on 'buffer zones' is to be acted on.
12. Police Scotland have indicated that they need to be impartial and apolitical on the matter of 'Buffer Zones'. They also need to balance the right to protest with the impact of such a presence on individuals. The police recognise that there may have been some underreporting by women accessing reproductive clinics. Nonetheless evidence would be needed to cover off the proportionality concerns. BPAS would be interested to encourage reporting through either 101 or 999 so that an evidence base can be established over this matter.
13. It is proposed that COSLA facilitate a workshop involving the Scottish Government, Police Scotland, and local authorities to discuss the matter with an intention of arriving at a consensus over where we are and the way forward. This might include the consideration of other potential future legislative options.

Next Steps

14. A further update will be provided to the COSLA Community Wellbeing Board at a future meeting.

November 2021

ANNEX 1

Further to the SOLAR briefing note presented at the COSLA Community Wellbeing Board meeting on 12 May 2021, Glasgow City Council and the City of Edinburgh Council sought a written Opinion of Gerry Moynihan QC on behalf of SOLAR as to whether local authorities can use byelaws to implement buffer zones at NHS reproductive health facilities. The Opinion is unequivocal and confirms that local authorities cannot use byelaws to implement buffer zones at NHS reproductive health facilities. SOLAR has shared the Opinion with both Scottish Government and Police Scotland.

As a reminder, it was SOLAR's view in this particular case that local authorities must facilitate peaceful protest, but where these protests stop being peaceful then police powers kick in. Where powers exist to deal with a matter then Local Authorities cannot implement byelaws. Even when Local Authorities can interfere with ECHR rights, any such interference must be minimal and proportionate, and must be based on the specific facts and circumstances of each case.

A number of key points were addressed by Counsel:

1. As set out in the SOLAR briefing note, a byelaw cannot be made where legislative authority to address the matter in question already exists (section 201(3) of the Local Government (Scotland) Act 1973). Given the powers of the Police under the Antisocial Behaviour etc. (Scotland) Act 2004 ("the 2004 Act") to issue dispersal orders, addressing the matter in question, it is outwith the power of Local Authorities to use a byelaw to implement a buffer zone.

The 2004 Act provides a means of controlling "antisocial behaviour" defined as acting "in a manner that causes or is likely to cause alarm and distress" to at least one person. The Act gives power to the police to require dispersal of a group of two or more persons, and Local Authorities must be consulted. For a Local Authority to make a byelaw, would breach the limitation in section 201(3) of the 1973 Act. Transfer of responsibility from the police to a Council, or conferring concurrent responsibility, would require an Act of Parliament.

The exercise of the dispersal order power is contingent upon the level of misconduct specified in the 2004 Act, i.e. where there has been significant, persistent and serious antisocial behaviour and the presence or behaviour of groups is contributing to the issues (s.19(1)) and where the presence of two or more people or their behaviour is causing, or likely to cause, alarm or distress to members of the public (s.21(1)). If protestors are generally passive in nature with no reports of arrests or fixed penalty notices from Police Scotland, the behaviour does not fall within the level of misconduct specified in the 2004 Act.

A buffer zone cannot be introduced to prevent conduct of a less serious kind than would fall within the 2004 Act. Such is the importance of the right to protest (the freedoms of conscience, speech and assembly), there requires to be a certain level of abuse to justify interference.

2. However, even if a byelaw wasn't prohibited by section 201(3) and the current police powers, it would be an unlawful infringement of the ECHR rights of the protestors to put in place a buffer zone as the police powers under the 2004 Act present a less restrictive alternative. ECHR rights are such that any interference must be minimal.

Counsel confirmed that in a variety of contexts the response of imposing a blanket restriction has been disproportionate and hence unlawful. As stated above, Councils, as public authorities, have positive obligations to facilitate the exercise of ECHR rights

associated with peaceful protest as well as negative obligations not to restrict their exercise unduly. Earlier this year, the Supreme Court affirmed the importance attached to the ECHR rights of protestors and confirmed that proportionality is fact specific, there must be an assessment of the facts in each individual case to determine whether the interference with the rights of the protestors is “necessary in a democratic society”. The Court also held that there must be a degree of tolerance to the disruption to ordinary life that demonstrations can cause.

3. The position is different under English Law. The Public Spaces Protection Order (PSPO) provisions in England are conferred by the Anti-social Behaviour, Crime and Policing Act 2014, which was a government initiative to reform the law on antisocial behaviour more generally. Importantly, it repealed the group dispersal order provisions and transferred responsibility from the police (dispersal orders) to Local Authorities (PSPOs).

Whilst the buffer zone in Ealing was held to be lawful (based on the specific facts and circumstances of the case), the group dispersal power had been repealed in England and therefore was not a viable alternative. The group dispersal power remains an option in Scotland and, as between it and a buffer zone, the group dispersal power has the twin merits of (a) being part of the existing law enacted by primary legislation and (b) flexibility. Like a byelaw, a group dispersal direction has an intensely local focus, but with the added flexibility that the ultimate exercise of the power is dependent on a police officer’s assessment of the particular circumstances prevailing at the time. That respects the right to peaceful assembly and protest for so long as the protest is indeed peaceful, while permitting intervention when there is a reasonable basis to believe that a protest will not be peaceful or an initially peaceful protest ceases to be so, which in Counsel’s view, is a proportionate alternative to an inflexible buffer zone.

Counsel acknowledged that the group dispersal order may be of limited utility because it lasts for no more than 24 hours but stressed that this may be thought to be a further limitation to ensure that the intervention is proportionate. One incident when, for example, a particularly disruptive element is present does not necessarily justify a longer-term restriction on peaceful protesters.