
COURT JUDGEMENT – DAY SERVICES

Report by Chief Legal Officer (Monitoring Officer)

Scottish Borders Council

29th September 2022

1 PURPOSE AND SUMMARY

- 1.1 The purpose of this report is to advise Members of the content and effect of a decision of the Court of Session which was issued on 20 September 2022.**
- 1.2 In June 2019, the Executive Committee decided that it would decommission the then existing Day Centres. One of those centres was the Teviot Day Centre in Hawick. In late 2021 a Petition was lodged in the Court of Session seeking a Declarator that the decision was unlawful. The case was heard by Lady Carmichael on 28 April 2022.
- 1.3 On 20 September, Lady Carmichael issued her judgment. She found that the Council's decision to close the Teviot Day Centre was unlawful and she "reduced" that decision. That means, in effect, that the Council has not decided to close that Centre. The Court found that SBC had failed to properly undertake an Equality Impact Assessment and, also, that it had failed to properly consult with effected parties.
- 1.4 The Council now requires to reach a decision on how best to provide services for those adults in need of day care in the Hawick area. In doing so, it must ensure it complies fully with the Court Judgment. A further report will be brought to Council in October providing further detail on the next steps.

2 RECOMMENDATIONS

- 2.1 **I recommend that Council:**
 - (a) notes the update on the Court Judgement with regard to Teviot Day Centre; and**
 - (b) agrees to receive a further report at the next meeting of Council in October 2022 on the next steps in reviewing Day Service provision in Teviot and Liddesdale.**

3 BACKGROUND

- 3.1 Through 2017 and 2018 Scottish Borders Council and the Borders Health and Social Care Partnership sought to consider how best the needs of Day Service users could be met within the Scottish Borders. Through that process it was noted that there had been a sharp decline in the number of service users who attended Day Centres (from 240 in 2014/15 to 43 in 2019). It was considered, at that point, that service users gained more from alternative community based services rather than the traditional Day Centre model. This was also in line with government guidance.
- 3.2 Ultimately on 4 June 2019, a paper was taken to the Executive Committee and that Committee agreed that individual Day Centres would be de-commissioned. Importantly, that would not happen until "suitable alternatives that met assessed needs were identified for older adults".
- 3.3 In March 2020, the Teviot Day Centre was closed as a result of Covid. It has not yet re-opened.

4 THE LEGAL CHALLENGE

- 4.1 In 2021, Mr Elliot, the Petitioner, had been engaging with Scottish Borders Council on the issue of Day Centres. A petition was made to the Council's Audit & Scrutiny Committee, and following a hearing, the Committee remitted the petition to the Health and Social Care Partnership to examine the scope of buildings-based services that the Borders may require in the future, including the alternatives of day centres and social centres. A Carers' group has been formed and work is on-going.
- 4.2 Late that year Mr Elliot also lodged a Petition in the Court of Session, seeking Declarator that the Decision to close the Teviot Day Centre was unlawful. The Court gave permission for the case to proceed in February 2022 and the full hearing took place on 28 of April 2022, when the matter was heard by Lady Carmichael.
- 4.3 As a Public Body the Council is subject to the Public Sector Equality Duty. Regulation further requires that, to fulfil that duty, the Council must carry out an impact assessment on any new or revised policy or practice. This is an Equality Impact Assessment. Among other things, the law further explains that this assessment must be carried out before a decision is made; it must be carried out with rigour (i.e. it must not be a box ticking exercise) and it is a continuing duty (i.e. the assessment must be kept up to date).
- 4.4 The court noted that an EIA had been carried out, but that it related to a proposal to close some day care provisions, rather than the specific closure of the Teviot Day Centre itself. Lady Carmichael concluded that the EIA lacked sufficient evidence about existing service users as there had been insufficient consultation with those users. She considered that the EIA lacked the necessary rigour and that the decision was therefore not properly taken.

- 4.5 In addition the Court held that SBC has failed to properly consult on the proposal to close the Day Centre and that it had a legal obligation to have done so.

5 EFFECT OF THE DECISION AND NEXT STEPS

- 5.1 This matter is complex and it is extremely important that SBC takes the correct steps to move forward. As noted above, the decision by the Court was to “reduce” the decision to close the Teviot Day Centre. A fresh decision making process will therefore be required. As of today’s date, the Teviot Day Centre is no longer a registered care service, nor are there any staff in place, so the centre cannot simply re-open its doors immediately.
- 5.2 It is important to understand that the Court did not say that it is unlawful to close Day Centres full stop. Rather, the way in which the Council reached that decision was unlawful. It was noted by Lady Carmichael that the “fresh decision-making process will inevitably be one taken in the context of circumstances that differ from those which obtained in June 2019”. She went on to say she was not “prepared to speculate as to what the outcome of it would be or to find that it is inevitable that the same decision would be taken”. Likewise, this report will not speculate on what the outcome will be of the decision making process to follow.
- 5.3 In addition, this decision was focussed entirely on the Teviot Day Centre. As Members are aware, however, that decision was taken as part of a wider approach to transforming adult day care services. Whether there are actions required in respect of that wider programme, is a matter which also requires to be considered.
- 5.4 Therefore Senior Officers are due to meet with Counsel tomorrow morning to discuss all these issues and the next steps to be taken. A further report will be brought back to Council in October regarding the next steps proposed.

6 IMPLICATIONS

6.1 Financial

There are no financial implications to the proposals included in this report at this stage. The further reports which will be brought will include any financial implications.

6.2 Risk and Mitigations

If Council does not respond appropriately to the decision of the Court of Session it will suffer reputational damage and may face further legal challenge. This report therefore proposes meeting with Counsel to fully understand the implications of the Judgment and to explore the next steps the Council should take. The risk is further mitigated by the fact that another report will be brought to Council in October detailing the next steps.

6.3 Integrated Impact Assessment

This report seeks to inform Members of a Court Judgment. It does not propose a course of action to respond to that judgment, other than to advise that legal guidance will be sought and the matter will be brought back to Council next month. No IIA is therefore required.

6.4 **Sustainable Development Goals**

While future reports on this topic are likely to give rise to issues relevant to the Sustainable Development Goals, there are none arising from this paper.

6.5 **Climate Change**

The meeting with Counsel at the end of the week will take place via Microsoft Teams and so its carbon footprint will be minimised. Future reports on this topic may give rise to further Climate Change considerations.

6.7 **Data Protection Impact Statement**

There are no personal data implications arising from the proposals contained in this report.

6.8 **Changes to Scheme of Administration or Scheme of Delegation**

There are no changes required to either the Scheme of Administration or the Scheme of Delegation as a result of this report.

7 CONSULTATION

- 7.1 The Acting Chief Financial Officer, the Chief Officer Audit and Risk, the Director (People Performance & Change), the Clerk to the Council and Corporate Communications have been consulted. Comments received have been incorporated into the report and Council will be advised of any further update.

Approved by

Nuala McKinlay

Monitoring Officer

Author(s)

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Background Papers: Nil

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