

# **REGULATION OF CARE (SCOTLAND) ACT**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Administration in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **SUMMARY**

3. A consultation paper on Workforce Regulation and Education was published in November 1998. In March 1999 the Government published a White Paper on its proposals to modernise social work services in Scotland. Detailed proposals for new regulatory arrangements for care services and for the social services workforce were set out in a consultation paper published in December 1999. Following this consultation a policy position paper was published in July 2000 setting out proposals for legislation. Separate consultations were also carried out on the regulation of early education and childcare and private and voluntary healthcare.

4. Consultation papers on the first and second tranches of Draft National Care Standards were published in June 2000 and April 2001 respectively. The first set out proposals on care standards for older people, people with mental health problems and for children and young people; the second covered care at home, residential accommodation for people with learning disabilities, physical and sensory impairment and drug and alcohol problems, and in a separate paper – early education and childcare. A consultation paper on the future of care homes under the new legislative arrangements was published in April 2001.

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5. The relevant documents are listed below:

- Modernising Social Work Services: A Consultation Paper on Workforce Regulation and Education, published in November 1998;
- Aiming for Excellence: Modernising Social Work Services in Scotland (Cm 4288), published in March 1999;
- Regulation of Early Education and Childcare, published in June 1999;
- Regulating Care and the Social Services Workforce: A Consultation Paper, published in December 1999;
- Regulating Private and Voluntary Healthcare, published in March 2000;
- Regulation of Early Education and Childcare: The Way Ahead, published in May 2000;
- Draft National Care Standards: First Tranche, published in June 2000;
- The Way Forward For Care, a policy position paper, published in July 2000;
- Regulating the Independent Healthcare Sector, a policy position paper, published in November 2000;
- Draft National Care Standards: Second Tranche, published in April 2001;
- The Future for Care Homes in Scotland: A Consultation Paper, published in April 2001;
- Early education and childcare: Draft National Care Standards consultation paper, published in June 2001.

All these publications are available on the Scottish Executive's Regulation of Care Project website [www.scotland.gov.uk/government/rcp](http://www.scotland.gov.uk/government/rcp)

6. In summary this Act:

- establishes a new independent body to regulate care services in Scotland to be known as the Scottish Commission for the Regulation of Care ("The Commission");

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- establishes a system of care regulation, encompassing the registration and inspection of care services against a set of national care standards and the taking of any enforcement action;
- establishes a new independent body, to be known as the Scottish Social Services Council (“The Council”) to regulate social service workers and to promote and regulate their education and training; and
- makes a number of amendments and minor changes in related areas and legislation.

### **Regulation of care services**

7. Regulation of care services is patchy at present. Many services are regulated under a range of legislation that is now largely outdated and some services are not regulated at all. The Act is intended to modernise and standardise the regulation of care services. Effective regulation of these services is essential if people using them and their families are to be confident that the services they receive are of high quality and are appropriate to their needs.

8. The Act will reform the regulatory system for care services in Scotland. Care services include care homes for adults, residential care for children, children’s early education, day care and childminding, adoption and fostering services, adult placement services, agencies providing care at home (including care for children), nurse agencies, independent healthcare services, day care services for adults, housing support services, care and welfare in boarding schools and school hostels and care and welfare in accommodation for offenders.

9. The Act provides for an independent Scottish Commission for the Regulation of Care to undertake this regulatory function. The Commission will register and inspect all care services against national care standards. These standards will be taken into account when the Commission makes any decisions about registering and inspecting services and in considering whether, and at what level, enforcement action should be taken. For the first time, all local authority care services will be required to register and to meet the same standards as independent sector providers.

10. The current system of care service regulation is principally embodied in the Nursing Homes Registration (Scotland) Act 1938, the Nurses (Scotland) Act 1951, the Social Work (Scotland) Act 1968, and the Children Act 1989, together with various regulations, circulars and guidance notes. The new legislation will replace the entire 1938 and 1951 Acts, sections 60-68 of the 1968 Act and Part X and schedule 9 of the 1989 Act, insofar as it applies to Scotland. A number of other minor and consequential changes and repeals will also be made.

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11. It is intended that the Commission should fulfil the recommendation of the Royal Commission on Long Term Care that there should be a National Care Commission to take a strategic overview of the care system and its funding and to steward the interests of older people. This role will not be limited to older people. The Commission will therefore have a statutory power to advise Scottish Ministers on trends in care provision generally.

### **Regulation of the workforce**

12. There is no comprehensive regulation of the social services workforce at present. Nor is an appropriate framework in place to support and enhance the professionalism of the workforce.

13. The Act provides for the regulation of the social services workforce, by establishing the Scottish Social Services Council. The Council will regulate the education and training of social service workers and raise standards through the publication of codes of conduct and practice. For the first time a national register of social services staff will be set up and maintained by the Council. The Act also provides for the Central Council for Education and Training in Social Work (CCETSW) to cease its functions in Scotland. It currently regulates education and training in social work throughout the UK. CCETSW's functions will transfer to the Council, as will the functions of the Scottish arm of the National Training Organisation, the Training Organisation for the Personal Social Services.

14. The Act sets out the functions and powers of the Council. The Council's main functions will be to publish codes of practice and conduct, establish registers of particular groups in the workforce and to regulate their conduct, education and training.

### **Other provisions**

15. Other provisions in the Act include:

- powers to enable local authorities to make grants in respect of child care and family support and in some care services, make direct payments to children;
- a power to enable local authorities in Scotland to employ nurses to provide nursing care in any residential accommodation they may provide;
- a power to enable Scottish Ministers to delegate a power to make grants and loans for social work;

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- an amendment to section 29 of the Children (Scotland) Act 1995 dealing with local authority provision of after-care for children formerly looked after by local authorities;
- an increase to the age limit of children for whom local authorities may pay discretionary maintenance allowance to relatives or friends who look after them;
- a power to put beyond doubt that under a Child Protection Order granted under section 57 of the Children (Scotland) Act a child may be removed to a suitable place that is not medical premises; and
- powers dealing with the appointment and payment of fees and expenses for safeguarders and training for safeguarders and Children’s Panel Advisory Committee members.

## **THE ACT**

### **Overview**

16. The Act is in seven Parts:

- **Part 1** provides for the establishment of the Scottish Commission for the Regulation of Care and for the regulatory procedures, including inspections, that it will follow. Scottish Ministers are given a duty to issue national care standards applicable to all registered care services and powers to make regulations in relation to the care services regulated under this Part;
- **Part 2** provides registration and enforcement procedures for local authority adoption and fostering services. Local authorities are under a statutory duty to provide adoption and fostering services which means that, unlike care services registered under Part 1, the Commission will not be able to take direct enforcement action. Part 2 also provides for other individual care services where non-registration or cancellation of registration would result in a local authority being in breach of a statutory duty;
- **Part 3** provides for the establishment of the Scottish Social Services Council and sets out its functions and the procedures to be followed in the exercise of these functions;
- **Part 4** sets out the “general principles” of the Act and provides that Ministers, the Commission and the Council should exercise their functions under the Act in accordance with these principles;

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- **Part 5** concerns provisions that are common to both the Commission and the Council, for example a power for Scottish Ministers to make grants to either body;
- **Part 6** contains provisions relating to minor amendments and a number of other policy issues (as outlined in the previous paragraph); and
- **Part 7** contains general provisions, including interpretation of terminology for the purposes of the Act and commencement powers.

17. The Act provides for the Council to have rule making powers on administrative and procedural matters in relation to the exercise of the functions granted to them by the Act. These will not be subject to Parliamentary scrutiny but the Act requires that all the rules made under Part 3 will require the consent of the Scottish Ministers. These are in contrast to the use of regulations for functions of the Commission. A measure of self-regulation is normal for professional bodies like the Council whereas the measures being implemented by the Commission will have a wider application and so need greater public scrutiny.

### **Commentary on sections**

## **PART 1: THE COMMISSION AND CARE SERVICES**

### *Constitution of Commission*

#### **Section 1: Constitution of Scottish Commission for the Regulation of Care**

18. Subsection (1) establishes the Scottish Commission for the Regulation of Care. It will be a statutory body corporate which will exercise the functions given to it by or under the Act or other relevant legislation. Subsection (1)(b) provides that as part of its function, the Commission will be expected to promote improvements in care services in Scotland.

19. The Commission will be a non-departmental public body. It will be independent in its day to day running, but will be accountable to Scottish Ministers through its corporate plan and management statement.

20. Subsection (2) provides that the Commission must, act in accordance with directions given to it by, and under the general guidance of, Scottish Ministers and encourage equal opportunities in exercising its functions under the Act. Subsection (3) gives effect to Schedule 1 which sets out the constitutional arrangements and general provisions for the establishment and operation of the Commission.

*Care Services*

**Section 2: Care services**

21. Section 2 sets out the range of “care services” which will be regulated by the Commission and defines each of the services for the purposes of the Act. This section also provides that certain services can be excepted from these definitions by regulation.

22. Subsection (2) defines a support service. This definition includes services traditionally referred to as “home-care” or “domiciliary care”; services provided to people in their own homes or in supported accommodation, sheltered housing or elsewhere. It also includes those services traditionally referred to as “day care” whether they are provided in the home, in a care setting or elsewhere. It covers services provided or purchased by a local authority, services provided by health bodies which are not part of core NHS functions and other services independently provided which include an element of personal care or personal support, except for services provided by an individual through direct arrangements with the recipient (e.g. an informal family carer, a paid personal assistant). It will not include field social work services carried out by social workers in connection with their functions of assessment, care management, child protection, supervision of offenders etc. Such services will be excluded by regulation as required.

23. Services are included if they are provided because of a person’s vulnerability or need, as defined in 2(28). Personal care is also defined for the purposes of the Act as being care related to day to day physical tasks and to mental processes connected with those tasks, for example eating and washing and remembering to eat and wash. It will not include domestic services which are not provided or purchased by a local authority or health body.

24. Subsection (3) defines a care home service. Such a service provides accommodation together with personal care, personal support or nursing for any person, including children, because of their vulnerability or need. Care homes provided by local authorities will be required to register, and section 72 allows them to employ nurses and to provide nursing care. The care and accommodation provided must be inextricably linked for a care service to be considered a care home. If this is not the case, the Commission will register and inspect the care being delivered as a support service under section 2(2). It will be for the Commission to interpret, on an individual basis, whether the care and accommodation provided by a service are inextricably linked and how that service should be registered. Scottish Ministers will issue guidance to assist the Commission with this.

25. This provision brings together the previously separate definitions of residential care homes and nursing homes under the single definition of care home.

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26. Subsection (4) defines school care accommodation. This involves residential accommodation provided to a school pupil by a local authority or an independent or grant-aided school. This covers services provided to children boarding at an independent school, those staying in a school hostel provided by a local authority and special schools.

27. Subsection (7) defines a child care agency. Such a service either supplies child carers or introduces them to people using the service. The definition is sufficiently broad to include a range of services providing childcare, including nanny agencies and sitter services.

28. Subsection (8) defines a “child carer” for the purposes of subsection (7) of the Act. The definition refers to looking after a child wholly or mainly in the home of a child’s parents. An agency providing child carers to others eg grandparents, guardians or foster carers will still be covered by regulation if some of their clients are parents.

29. Subsection (9) defines secure accommodation for children. This is residential accommodation approved by Scottish Ministers in accordance with regulations under section 29(9)(a) of the Act. These care services cater for some of the most vulnerable children and young people in Scotland. The Commission will regulate these services, but statutory approval of secure accommodation will remain with Scottish Ministers under section 29(9).

30. Subsection (10) defines an offender accommodation service. These services, traditionally referred to as residential accommodation for offenders, provide advice, guidance and assistance to people who are subject to specified supervision orders or have recently been released from prison or other detention. They are provided under Section 27 of the Social Work (Scotland) Act 1968.

31. Subsection (11) defines an adoption service. Such a service is provided by either a local authority (under section 1(1) of the Adoption (Scotland) Act 1978) or by other persons whether or not provided as part of the Scottish Adoption Service. Section 7(6) provides that a person (other than a local authority) who provides an adoption service must be a voluntary organisation. Subsection (12) provides that where the proposed adopter is a relative of the child this is not a matter for the Commission’s regulatory regime.

32. Subsection (14) defines a fostering service. By subsection (14)(a) a fostering service is either a public fostering service (that is to say, a fostering service provided by a local authority under paragraph (a) of section 26(1) of the Children (Scotland) Act 1995 or by a person on behalf of a local authority) or it is a private fostering service (that is to say, a fostering service provided by a local authority securing, under sections 3 and 8 to 10 of the Foster Children (Scotland) Act 1984, the welfare of privately fostered children).

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33. Subsection (16) defines an adult placement service. This is a service which provides accommodation for adults, together with personal care and personal support, by reason of their vulnerability or need in the homes of specially recruited individuals to enable them to live in the community.

34. Subsections (17) and (21)(a) define child minding. This involves looking after one or more children on domestic premises for a minimum of two hours per day, for reward. Subsections (18) and (19) provide exceptions to this, for example for care provided by parents or relatives of children and care provided in the parent's home.

35. Subsections (20) and (21)(b) define day care of children. Such a service provides care for children for more than two hours a day on premises other than domestic premises. Subsections (22)-(25) provide exceptions to this definition, for example medical treatment in hospitals (24) and care for children of school age provided in and managed by schools (25).

36. Subsection (27) defines a housing support service. This is a service that provides support, assistance, advice or counselling to people to help them live at home. It is provided that certain services relating to accommodation which is "excepted accommodation" for the purposes of the Housing Act 2001 are outwith the scope of this definition. These services will be provided under the Supporting People initiative and will be targeted on, for example, homeless or potentially homeless people, people fleeing domestic abuse and ex-offenders. The services will provide general support, for example assistance with life skills such as budgeting, minor repairs, security and the use of electrical appliances.

### **Section 3: Power to amend the definition of "care service"**

37. This section enables Scottish Ministers, following consultation, to amend by order the definition of care service. This allows Scottish Ministers to respond to any future changes in the delivery or focus of care services by adding additional services to the regulatory remit of the Commission as and when appropriate. Amendments consequential on amending the definition would be made under Section 80(2).

### **Section 4: Information and advice**

38. Subsection (1) provides that the Commission must make available to the public information on the availability and quality of care services. Subsection (2) provides that this information should be made available in any format that may reasonably be requested. Information provided might include details about the location and types of services available as well as the results of the Commission's inspections of individual care services. This will help members of the public to decide which care services they wish to use.

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39. Subsection (3)(a) allows the Commission to provide advice to Scottish Ministers at any time, and requires it to do so in response to a request by Scottish Ministers. Subsection (3)(b) requires the Commission to provide advice to service users and carers and their representatives, local authorities, health boards, care service providers or prospective providers, and any other bodies set out in regulations, about any aspect of its work. For example, the Commission might offer advice to service providers on how to meet the national care standards.

40. The Commission should also provide information to Scottish Ministers under this section about trends in care provision to fulfil the role recommended by the Royal Commission on Long Term Care. Subsection (4) allows the Commission to charge a reasonable fee for any advice, forms or documents it provides in connection with its obligations under subsection (3)(b).

#### *National care standards*

### **Section 5: National care standards**

41. Section 5 gives Scottish Ministers a duty to prepare and publish national care standards applicable to all care services. These will specify the standards applicable to care services. Subsection (3) and (4) provide that these standards and the Council's codes of practice must be taken into account by the Commission when making any decisions related to registration, inspection and enforcement in respect of care services, whether registered under Part 1 or Part 2 of the Act. This section also ensures that consultation must be undertaken prior to any amending of the care standards. The standards will be focussed on the needs of people using the services, and are being devised by working groups under the auspices of the National Care Standards Committee.

#### *Complaints*

### **Section 6: Complaints about care services**

42. Subsection (1) requires the Commission to establish suitable procedures for dealing with any complaints made to it about regulated care services by users, their relatives or advocates or staff. Subsection (3) requires that, before establishing such procedures, the Commission will be required to consult local authorities, health bodies and such other persons or groups of persons it considers appropriate and that it should submit proposals to Scottish Ministers for approval.

43. While local resolution of complaints by the provider will be the norm there should be no requirement for a user of a service to go through the provider's own system before approaching the Commission. Any procedures developed must be kept under

review by the Commission. The Commission must also ensure that the established procedure is given the appropriate publicity.

### *Registration*

#### **Section 7: Applications for registration under Part 1**

44. This section sets out the framework for applications for registration. Subsection (1) requires that the application for registration must be made to the Commission. Subsection (2) sets out what an application must include. For the purposes of the Act “person” does not only mean an individual but includes, for example, a company or firm.

45. Subsection (3) requires a person providing more than one care service to apply for registration for both services. This would mean, for example, that someone who provides a care home and a separate home care service would have to make a separate application for each. But someone who provides a care home which includes some day care provision might only need to apply once. Scottish Ministers will issue detailed guidance to the Commission on how to register different branches of care services, but it will be for the Commission to decide on receipt of applications whether services could be registered as one or not.

46. Subsections (4) and (5) require that where a person is providing a care service from two or more settings, each setting must be registered as a separate service ie a provider who has more than one care home has to register each. This is to cover situations whereby an organisation or business operates a number of care services but effectively manages them each individually on a day to day basis.

47. Subsection (7) provides that section 7 does not apply to local authority adoption and fostering services and any other care services registered under Part 2 of the Act.

#### **Section 8: Limited registration**

48. Subsection (1) provides for the Commission to register on a limited basis residential accommodation which does not require to be registered as a care service, for the sole purpose of permitting the manager to apply to manage the finances of an adult with incapacity under the provisions of the Adults with Incapacity (Scotland) Act 2000. Applications so granted will be considered limited registrations.

49. Subsection (2) provides that the information to be supplied with such an application should be the same as for a care service seeking registration under Part 1. Subsections (3) and (4) provide that various registration, inspection and enforcement provisions which apply to care services should also apply to those granted limited registration.

## **Section 9: Grant or refusal of registration under Part 1**

50. Registration will only be granted if the Commission is satisfied that the applicant has demonstrated that they have complied with or will comply with the relevant standards and other relevant requirements. The burden of proof is with the applicant rather than the Commission.

51. Subsection (1) provides that an application under section 7 can be granted either unconditionally or subject to any conditions the Commission sees fit to impose. Specific conditions may be required to take account of the circumstances in an individual service, for example, a condition that a particular door is kept locked to prevent children from wandering directly onto a busy road, or that a particular ratio or skill mix of staff is needed.

52. Subsection (2) provides that if the Commission is satisfied that the applicant is complying with, or will comply with, all relevant requirements set out in the care standards and in regulations under section 29, and the requirements of any other legislation that it considers relevant, it should give the applicant notice of its decision to grant registration either unconditionally under section 17(1) or subject to conditions under section 15(1)(a). Otherwise, it will give notice of its refusal of registration under section 15(1)(b).

53. If the Commission grants the application, it must issue a certificate of registration (subsection (3)), which the service provider must display in a prominent position (subsection (4)), either in the premises where the care service is operated from, and if there is a separate management office, in that office too.

54. In making a decision under this section, the Commission must take the national care standards and the Council's codes of practice into account.

### *Improvement Notices*

55. There has been considerable concern that the present statutory arrangements for enforcement are inflexible and resource intensive and do not lend themselves to swift action to protect service users. The legislation therefore enables the Commission to take swift action when appropriate (particularly under section 18) whilst also ensuring that there are adequate safeguards for service providers.

## **Section 10: Improvement notices**

56. This section gives the Commission the power to serve an improvement notice on a care service. Such a notice will specify the improvements required to bring a care service up to the standards required and the timescale for meeting these standards.

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57. For services registered under Part 1, subsection (1)(a) provides for the Commission to warn that if the necessary improvements are not made within the time allowed the Commission intends to begin procedures under section 12 to cancel a service's registration. Subsection (1)(b) provides for the Commission to warn that if improvement notices served on local authority adoption and fostering services and other services registered under Part 2 are not complied with the Commission intends to make a report to Scottish Ministers under section 41.

58. There may be cases where a voluntary or private sector service commissioned by a local authority is essential to the fulfilment of a local authority duty. Local authorities ought to have warning of the possibility of the registration of such services being cancelled. Subsection (2) therefore provides that when an improvement notice is given to a non-local authority service, the local authority should be informed.

59. Improvement notices do not form part of the urgent cancellation procedure set out in section 18.

### **Section 11: Special provision for certain care services provided by local authorities**

60. This section adds to the provisions on improvement notices for local authority services registered under Part 1 to cover cases where the local authority considers that withdrawal of registration would place it in breach of a statutory duty.

61. Subsection (1) requires such a local authority to inform the Commission of its view within 14 days of receiving an improvement notice, giving the reasons. Subsection (2) requires the Commission then to copy the improvement notice to Ministers with the local authority's argument and their views on it. Subsection (3) requires Ministers to decide whether the local authority's view is justified. If it is, the care service is deemed to be registered under Part 2 and the provisions in that Part in relation to enforcement would apply. If it is not, the normal Part 1 arrangements would apply.

### *Proposals and applications in relation to registered care services*

### **Section 12: Cancellation of registration**

62. This section gives the Commission the power to cancel the registration of a care service registered under Part 1 that, having been issued with an improvement notice under section 10, is still not meeting the relevant requirements. This could be concern about how effectively the care standards are being taken into account or that a condition of registration has been breached or where a relevant offence has been committed. Further grounds for cancelling registration may be prescribed by order.

63. Subsection (2)(a) provides that relevant offences for the purpose of section 12 are:

- an offence under this Act – for example, providing a care service while not being registered (section 21(1)(a)), knowingly making a false or misleading statement when applying for registration or variation or removal of a condition (21(1)(b)), failing to display a current certificate of registration (21(2)) or obstructing an inspector (section 25(13));
- an offence under regulations made under this Act (section 29(11)); or
- any other offence which in the Commission’s view makes it appropriate to cancel a registration.

64. Registration can be formally cancelled even if a provider closes a care service before the cancellation process is complete. This will ensure that the provider’s record accurately reflects the situation and the Commission will be aware of previous history in dealing with any future applications. Again, the Commission must take the national care standards and the Council’s codes of practice into account in coming to its decisions.

65. Cancellation of registration would not normally be the first step in a formal enforcement action. It is only likely to be used where the service has not met conditions of registration over time and has ignored the serving of an improvement notice. If a care service provider is convicted of a relevant offence, such as obstructing an inspection and fails to remedy matters at fault, the Commission will be able to cancel registration. These cancellation of registration procedures are not part of the urgent cancellation procedure set out in section 18.

### **Section 13: Condition notices**

66. This section empowers the Commission to impose a “condition notice” on a care service. This notice indicates an intention to vary or remove a condition of registration or impose an additional condition. Condition notices do not form part of the urgent cancellation procedure set out in section 18.

### **Section 14: Applications under Part 1 in respect of conditions**

67. Subsection (1) enables a provider of a care service to apply for a change to their conditions of registration, for example to change the maximum number of people accommodated in a care home, or to apply voluntarily for the cancellation of registration, for example, if they plan to close or sell the business. Subsection (2) prevents a person voluntarily cancelling their registration if the Commission has given notice of intention to, or decided to, cancel registration. Subsection (3) provides that an application shall be accompanied by the fee and that regulations shall say how the application is to be made and what particulars are to be stated in it. Subsection (4)

provides that if the Commission grants an application for a change of conditions it must give notice in writing and issue a new certificate of registration.

### **Section 15: Further provision as respects notice of proposals**

68. Subsection (1) provides for the Commission to give notice of decisions it intends to take, in respect of applications for registration made under section 7, if it intends to grant an application subject to conditions or refuse it. For example, in the case of a person applying for registration for the first time, the notice of proposal will state the conditions subject to which the Commission proposes to grant the application.

69. Subsection (2) requires the Commission to give notice if it intends to cancel a registration other than under the emergency procedures set out in section 18(1). Subsection (3) requires the Commission to give notice if it decides to refuse an application for a variation of conditions made under section 14. Such notice must set out the reasons (subsection (4)). Section 15 does not apply where the Commission decides to grant an application for registration unconditionally, or subject to agreed conditions.

### **Section 16: Right to make representations to Commission as respects proposals under Part 1**

70. This section states that a notice given under section 15 must indicate that the person can, if they so wish, make written representations to the Commission within a time limit of 14 days (subsection (1)). This ensures that the applicant has the opportunity to make their point of view known. Subsection (2) provides that the Commission may not implement the terms of the notice until the 14 day period has ended unless they receive representations during the 14 day period or the person notifies the Commission that they will not be making representations. Subsection (3) provides that this section does not apply in respect of condition notices given under section 35.

### **Section 17: Notice of Commission's decision under Part 1**

71. Subsection (1) provides that the Commission should give notice when granting an application for registration unconditionally or subject to a condition that has been agreed in writing between the Commission and the applicant.

72. Subsections (3)-(6) deal with situations where the representations stage has been completed, requiring the Commission to serve a notice in writing of their decision on the applicant. The notice must explain the right of appeal conferred by section 20 and in the case of a decision to grant an application subject to conditions or to vary conditions, set out those conditions. A decision to cancel registration, to grant an application subject to conditions which are not agreed, or to change conditions will

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take effect only after the outcome of any appeal has been determined, or after 14 days if no appeal is brought. In the case of a decision to grant an application subject to conditions which are not agreed, if the applicant decides not to pursue an appeal the decision will take effect immediately.

### **Section 18: Urgent procedures for cancellation of registration etc.**

73. This section provides that the Commission may apply to a sheriff for the immediate cancellation of registration or change in the conditions of registration of a care service. The sheriff may only make the order where it appears that unless the order is made there is a serious risk to a person's life, health or well-being. The conditions might include that no new clients are taken on by the service, or that the manager or a particular member of staff is replaced.

74. Subsection (2) requires the Commission to notify the local authority and health board as well as any other statutory authority it considers appropriate, of the making of an urgent application. This is necessary so that the local authority can comply with their statutory duties as required, for example to provide or arrange alternative care for the service users in accordance with their duties under section 12A of the Social Work (Scotland) Act 1968, and that the health board may consider whether to make provision for NHS services.

75. The Commission will be expected to inform such bodies as soon as possible in order that necessary arrangements can be made. The Commission will be expected to have agreed protocols with the Convention of Scottish Local Authorities (COSLA) and the NHS to deal with such situations should they arise. Subsection (5) defines a statutory authority for this purpose.

### **Section 19: Conditions as to numbers**

76. This section provides that the Commission can limit the number of people using certain services or to whom certain services are provided either on initial registration, through a subsequent condition notice or in association with an improvement notice. For example it may be appropriate for a new provider to be restricted on numbers until they get fully established, or where a care provider is causing concern the power could be used as an alternative to enforcement action (i.e. withdrawing registration).

77. The services covered by this section are care homes, school care accommodation, secure accommodation, adult placement services, support services, independent health care, child minding, day care for children and nurse agencies

78. It is not appropriate to apply this condition where there is a statutory duty on the local authority to provide the service. This is why adoption and fostering services are not covered by this provision. Offender accommodation services and housing support

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services are also not covered by the provision. These are examples of where imposing a limit on numbers would mean there had to be a parallel limit on the local authorities' duty to provide such services.

## **Section 20: Appeal against decision to implement proposal**

79. This section provides for an appeal against a decision on registration made by the Commission under section 17. The appeal must be made to a sheriff within 14 days of the notice of decision. Subsection (2) provides for the sheriff's powers on considering an appeal.

## *Offences*

### **Section 21: Offences in relation to registration under Part 1**

80. This section sets out offences under Part 1 of the Act. Subsection (1) makes it an offence for a person to describe any service as a care service for the purposes of this Act when it is not registered as such. This would catch, for example, an unscrupulous hotel owner who tried to pretend their hotel was a care home. If convicted of an offence under this subsection, the person would be liable to a fine not exceeding level 5 on the standard scale (£5000 at present) or up to three months imprisonment, or both.

81. Subsection (2) makes it an offence not to display a certificate of registration in a prominent place. The penalty on summary conviction is a fine not exceeding level 2 on the standard scale (£500 at present).

82. Subsection (3) provides that an individual or body, other than an adoption agency, making arrangements for the adoption of a child would be prosecuted under the Adoption (Scotland) Act 1978 rather than this Act. This will ensure that there is not duplication of powers under this Act and the Adoption Act.

### **Section 22: False statements in applications under Part 1**

83. This section makes it an offence to knowingly give information which is false or misleading in a material respect when making an application for registration, or for variation or removal of a condition. The penalty is a fine not exceeding level 4 on the standard scale (£2500 at present).

### **Section 23: Offences by bodies corporate etc.**

84. This section provides that if an offence under Part 1 is committed with the consent or connivance of an officer of a body corporate, a local authority, a partnership, or an

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unincorporated association, or if that officer has turned a blind eye or been negligent, then the officer as well as the organisation are guilty of the offence. Individual officers of a body corporate, partners of a partnership, or persons managing or controlling an unincorporated association who are complicit in an offence under the Part will not be able to escape prosecution simply because the organisation is liable: both they and it may be liable to prosecution.

### *Fees*

#### **Section 24: Registration fees**

85. This section sets out the fees which are payable to the Commission. Subsection (1) gives Scottish Ministers power to prescribe maximum levels of fees which may be imposed (following consultation with those who will or may be affected by the fees or their potential effect) and to determine whether or not a fee is payable by order. Subsection (2) sets out the activities for which the Commission is able to impose fees.

86. Subsection (3) gives power to the Commission to have regard to its own expenses in setting particular fees within the maxima set by Scottish Ministers. This subsection also allows the Commission to waive fees, for example in the situation described under section 7 where a person operates more than one care service. Detailed guidance will be issued to the Commission on the circumstances when it may be appropriate to reduce or waive fees.

### *Inspections*

#### **Section 25: Inspections**

87. Subsection (1) provides that the Commission may require a person who provides a care service registered under the Act to supply it with any information to enable the Commission to discharge its functions. This may include such aspects as pre-inspection questionnaires or other information.

88. Subsection (2) enables inspection at any time of a care service and in particular allows an inspector authorised by the Commission to enter and inspect premises at any time if they are used or are believed to be used in connection with a care service. These powers are necessary to ensure compliance with the regulatory framework. However, inspectors are not authorised to enter the home of a person receiving a support service in their own home.

89. Subsections (3) and (4) provide that all care services offering 24 hour care away from home should be subject to a minimum of two inspections per year, and that one (or both) of these inspections should be unannounced. Unannounced inspections are an important part of the current regulatory system. The services subject to two

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inspections per year are care homes, school care accommodation, secure accommodation and those independent health care services which offer 24 hour care.

90. Subsection (5) requires the Commission to ensure that all other care services are subject to a minimum of one inspection every twelve months. It is likely that the Commission will inspect new services and services about which there are concerns more frequently. Inspections by the Commission can be planned in advance with the provider or carried out unannounced at any time.

91. Subsections (6), (7) and (8) provide that inspectors may also require relevant records or other documents to be produced for inspection on the premises wherever they may be kept. Where they are stored on computer they should be produced in a legible, not encrypted, form. Inspectors will be able to conduct any interviews about the running of a service or the treatment of service users as they consider appropriate. They will also be able to copy or remove relevant records (other than medical records), and will be able to interview, in private, the manager, employees, or any persons accommodated or cared for by the service who consent to be interviewed, including with family, carers or other representative where appropriate.

92. Subsection (9) allows an inspector who is a medical practitioner or registered nurse to examine in private, with their consent, a patient or resident, or their medical records, where they believe that the person may not be receiving proper care. Subsection (10) makes the same provision in respect of dentists. When any other inspector has such concerns, they would arrange for a medical practitioner, nurse or dentist to examine the individual as appropriate. The person may choose to be examined in the presence of, say, a friend or member of their family where appropriate. Subsection (11) defines an appropriate examination and consent for the purposes of these sections.

93. Subsection (13) makes it an offence for a person to intentionally obstruct an inspection under this section or section 27. The penalty on summary conviction is a fine not exceeding level 4 on the standard scale (£2500 at present).

## **Section 26: Integrated inspections**

94. This section requires the Commission and Her Majesty's Inspectorate of Schools to collaborate in the regulation and inspection of care services which include an educational element. The care services in question are set out in subsection (2). They are school care accommodation; secure accommodation and day care of children. Scottish Ministers will back up these provisions with detailed directions about integrated inspections.

## **Section 27: Further provision as regards inspections**

95. This section allows an inspector (authorised to enter and inspect premises by virtue of section 25) to remove any material which could be used as evidence of possible non-compliance with requirements. Subsection (2) imposes a requirement on owners, managers and employees to assist the inspector and permits the inspector to take such measurements and photographs and make such recordings as considered necessary to enable him or her to exercise powers under this section.

96. Subsection (5) requires the Commission to prepare a report after carrying out an inspection under section 25 and send a copy of the report to the registered person, and subsection (6) provides that the Commission should give that person an opportunity to comment on a draft of that report. Subsection (7) provides that the Commission must make the report available to the public. Subsection (9) requires the Commission to make these reports available in any form (for example Braille) that may reasonably be requested.

### *Regulations*

## **Section 28: Regulations relating to the Commission, to registration and to registers**

97. Subsection (1)(a) gives Scottish Ministers the power to make regulations conferring additional functions on the Commission. Providing for Scottish Ministers to give the Commission further functions through regulations will give it the necessary flexibility to react to future needs of service users and developments in care service provision without the need for primary legislation.

98. Subsection (1)(b) provides for Scottish Ministers to make regulations about how the Commission should maintain registers. Subsection (1)(c) allows regulations to be made about the information that should be provided in an application under Part 1 and Part 2 and what certificates of registration should include, for example the conditions of registration of a care service. Subsection (1)(c)(iii) provides for regulations specifying types of applicants who cannot make certain kinds of applications.

99. Subsections (1)(d) and (e) allow regulations to be made that define the circumstances and conditions, including the payment of a fee, under which the Commission should provide access to its registers. Subsection (2) allows for regulations to be made setting out when fees should not be payable and provides that the Commission can give access free of charge. These regulations would be, for example, to prevent unrestricted access to the names and addresses of services, such as children's services, where there might be a consequent risk to children. The regulations could contain a requirement for someone to show they had a legitimate interest before they could be granted access to certain registers.

## **Section 29: Regulations relating to care services**

100. This section provides regulation-making powers which will cover the management, staff, premises and conduct of care services. It also provides for regulations to be made regarding the health and welfare of service users.

101. Subsection (1) provides a general power to make regulations imposing any requirements the Scottish Ministers see fit. Subsection (2) allows regulations to be made to ensure that care services are suitably managed, staffed and equipped and that premises are fit for their purpose.

102. Subsections (2)(e) and (6) provide powers to make regulations regarding the welfare of persons provided with care services. Subsection (6) allows for regulations under subsection (2)(e) to specifically make provision about promoting and protecting people's health and about the control and restraint of service users where necessary.

103. Subsection (2)(j) provides that people acting as a GP, or another professional capacity to be specified by regulation, for persons at a care service should not have a financial interest in that service.

104. Subsection (3) in conjunction with 29(2)(1)(i) provides that Scottish Ministers may make regulations requiring any receiver or liquidator of a company, a trustee of an individual registered as an owner of a care service or a supervisor/administrator of a company appointed under the Insolvency Act 1986 to notify the Commission of their appointment. 29(2)(1)(ii) provides for regulations to be made requiring that such a person appoint a person to manage the care service in question. The Commission will need to know if another individual has taken over managing of a care service because of financial difficulty. The replacement manager will have to meet the registration requirements set out in regulations.

105. Subsections (4) and (5) provide that regulations may be made prohibiting a person's appointment as manager of, or employment in, a care service unless they are on a register of social care workers, maintained by the Scottish Social Services Council.

106. Subsection (7) gives the Scottish Ministers power to regulate how the provision of a care service should be conducted, including the provision of facilities and services, record keeping, notification of events, arrangements for dealing with complaints and in relation to independent hospitals and clinics, the arrangements to be made to secure that any medical or psychiatric treatment or listed services meet appropriate standards.

107. Subsection (7)(d) gives the power to make regulations that a person providing a care service must produce reports to the Commission, while (e) sets out what should

be in reports and the timing of their submission. Subsection (7)(f) provides for regulations to require care service providers to notify the Commission of events arising in relation to care services. It will be necessary to inform the Commission of events such as accidents, fires or death.

108. Subsection (7)(m) deals with notice of changes in the ownership or the officers of a company which was registered in respect of a service. Subsection (7)(k) sets out when notice is required, while (l) sets out arrangements for when the provider of a care service dies.

109. Subsection (7)(o) allows Scottish Ministers, through regulations, to require owners or managers of independent health care services to put in place policies and procedures to secure that the quality and standards of healthcare are appropriate. Subsection (7)(o)(i) requires that these are in place for medical or psychiatric treatments. Subsections (7)(o)(ii) and (8) allow regulations to specify other types of treatment or technology that should also be covered.

110. The regulations might specify what policies and procedures are required and, where necessary, how they should be managed and recorded. The regulations might say, for example, how a critical incident should be dealt with, what must be recorded and what needs to be reported and to whom. By setting these requirements out in secondary legislation, policies and procedures can be modified to respond to changes in safety procedures and other aspects of healthcare delivery, without having to amend primary legislation.

111. Subsection (9) concerns regulations made in respect of secure accommodation for children, which may cover both its provision and its use.

112. Subsection (10) provides that regulations made under subsections (1), (2), (7) or (9) may make it an offence to fail to comply with specific provisions within the regulations, or with a condition of registration. Subsection (11) provides that a person guilty of such an offence would be liable to a fine not exceeding level 5 on the standard scale (£5000 at present).

113. Subsection (12) requires the Scottish Ministers to consult such persons as they consider appropriate before making regulations under the powers in subsections (1) (2) and (7) and (9) of this section. Subsection (13) provides that any such regulations may make different provision for different purposes. This will enable certain regulatory requirements to be imposed on a limited number of services, for example regulations may be very different in relation to a childminder as to a large care provider. Regulations under 29(2)(i) may not, for example, require the Commission to look at the financial position of childminders, but they would require it to assess this in respect of those providing care home services.

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### **Section 30: Transfer of staff**

114. This section provides that schemes must be made for the transfer of staff to the Commission bodies, provided that prescribed requirements for consultation have been met in respect of every individual to be transferred.

115. All transfers made under the Act will reflect the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981 No 1794) (TUPE) principle that staff transferred will do so on their existing terms and conditions. In addition, the new bodies may make provision for occupational pensions and compensation for loss of employment.

116. Subsection (4) provides that under a scheme an employee's existing contract of employment would not be terminated, but would transfer to the new employer and be treated as having effect from the date it was originally made.

117. Subsections (6) and (7) provide that an employee may object to transferring to a new employer, and that their contract of employment can be terminated before the date of transfer. This would not be treated as a dismissal.

118. Subsection (8) provides that these arrangements will not affect the right of an employee to terminate his or her contract if their working conditions were to suffer a significant change which was to their detriment.

### *Miscellaneous*

### **Section 31: Arrangements entered into by local authority or health body: services to be registered**

119. This section makes it clear that, although a service commissioned by the body in question need not exist as a registered care service at the time the contract is entered into, the service must be a registered one by the time it is actually provided.

### **Section 32: Giving of notice**

120. This section deals with the serving of notice on a care service provider or a person seeking to be a care service provider, and sets out when notice is deemed to have been delivered.

## PART 2: LOCAL AUTHORITY ADOPTION AND FOSTERING SERVICES ETC

121. Local authorities are under a statutory duty to provide adoption and fostering services which means that, unlike most care services, the Commission will not be able to take direct enforcement action against authorities. It would not be appropriate for the Commission to de-register a local authority's adoption service, for example, since that would prevent the authority from fulfilling its statutory duty. There may also be some other individual care services where non-registration or cancellation of registration would result in a local authority being in breach of a statutory duty. Instead the Commission will prepare a report to Ministers who will then decide what action should be taken against the local authority.

122. These services cannot therefore be covered by the registration and enforcement provisions in Part 1 of the Act. Part 2 therefore provides similar requirements and rights that will apply to local authorities providing adoption and fostering services and other services needed so as to fulfil a statutory duty. The substantive difference is the role of Scottish Ministers in being informed of improvement notices and being empowered to take default action where they consider that the provision of these services is unsatisfactory.

### **Section 33: Local authority applications for registration under Part 2**

123. Subsection (1) requires a local authority to apply to the Commission to register its adoption and fostering services, and subsection 1(c) extends this to cover any other care service which a local authority determines they must provide in order to fulfil a statutory duty. Subsection (2) empowers Ministers to prescribe the manner and content of applications and that a fee should be payable.

124. Subsection (3) makes provision for the Commission to disagree with the local authority's determination and refer the matter to Ministers, giving its reasons. Ministers must then decide (subsection (4)) whether the local authority's determination is justified. If it considers that it is not, the application for registration is deemed to have been under the Part 1 provisions.

### **Section 34: Grant of local authority application under Part 2**

125. Subsection (1) provides for the Commission to grant registration applications, with or without conditions, from a local authority service applying for registration under section 33(1) and to give the authority notice of its decision. Subsection (2) provides that on granting registration, the Commission should issue a certificate of registration, and subsection (3) requires authorities to display such certificates.

**Section 35: Condition notices: services registered under Part 2**

126. This section provides that condition notices can be served on local authority care services registered under Part 2 in the same way as for other care services.

**Section 36: Applications under Part 2 in respect of conditions**

127. This section gives local authorities the power to apply to the Commission for the variation or removal of any condition. Applications must comply with the manner and content of applications, including a fee if appropriate, as for applications under section 33. If the Commission decides to grant or refuse the application, it must notify the authority and issue a new certificate of registration if appropriate.

**Section 37: Right to make representations to Commission under Part 2 as respects conditions**

128. This section gives a local authority the right to make, within 14 days after receiving a notice to which the section applies, written representations to the Commission about any matter which they may wish to dispute. The notices in question are: any notice of a proposal to grant an application for registration but to do so subject to conditions, any notice of a proposal to vary, remove or impose a condition in relation to an existing registration and any notice of a proposal to refuse such an application.

129. Subsection (2) provides that the Commission may not implement the terms of the notice until the 14 day period has ended unless they receive representations during the 14 day period or the authority notifies the Commission that it will not be making representations. The intention is that the Commission should review its decision in light of any representations and that it should operate a fair and transparent process for the consideration of such representations.

**Section 38: Notice of Commission's decision under Part 2**

130. This section provides that if the Commission has decided to implement a notice, such as mentioned in paragraph 128 above, it must give the local authority to which the notice applies, written notice of its decision.

131. Subsections (2)-(4) deal with situations where the representations stage has been completed, requiring the Commission to serve a notice in writing of their decision on the authority. The notice must explain the right of appeal conferred by section 39 and in the case of a decision to grant an application subject to conditions or to vary conditions, set out those conditions. A decision to implement a notice, such as is mentioned in paragraph 128 above, will take effect only after the outcome of any

appeal has been determined, or after 14 days if no appeal is brought. If an authority decides not to pursue its appeal the decision will take effect immediately.

### **Section 39: Appeal against decision under Part 2**

132. This section provides that local authorities may appeal to a sheriff against a decision made under Part 2 within 14 days after a notice, such as is mentioned in paragraph 128 is given. The sheriff may determine the appeal in the same manner as appeals for other non-local authority care services in section 20(2).

### **Section 40: Offences under Part 2**

133. This section provides that the offence provisions in sections 21(1), 21(3) and 23 shall apply to local authority care services registered under Part 2, in the same way as they apply to services registered under Part 1.

### **Section 41: Report to Scottish Ministers**

134. Subsection (1) provides that the Commission shall report to Scottish Ministers if an improvement notice is imposed on a local authority service registered under Part 2, and provide them with a copy of that notice. Subsection (2) requires the Commission to inform Scottish Ministers (within 14 days) as to whether a notice has been complied with within the specified timescale. Subsection (3) requires the Commission to report to Ministers if any person is convicted of an offence in relation to these services, or if it appears to the Commission that a service is being carried on other than in accordance with the relevant requirements. Subsection (4) defines a relevant offence for the purposes of this section (they are the same as for section 12 above) and relevant requirements for this section and for section 42.

135. Subsection (5) requires the Commission to report to Scottish Ministers and provide them with information about any issues in relation to a care service registered under Part 2 that may be prescribed.

### **Section 42: Default powers of Scottish Ministers**

136. Subsection (1) provides that Scottish Ministers (having received a report under section 41) may take certain actions if they are satisfied that a local authority providing a service registered under Part 2 is, without reasonable excuse, failing to comply with an improvement notice or carrying on the service not in accordance with relevant requirements.

137. Subsection (2) sets out what those actions are, either to make an order to declare an authority in default or to make a direction setting out the steps that should be taken to remedy the matter. Subsection (3)(a) provides that if an authority fails to

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comply with that direction Scottish Ministers can take the necessary action themselves or make arrangements for someone to do it on their behalf. Subsection (3)(b) provides that the Court of Session may order specific performance of those steps on application from the Lord Advocate.

## PART 3: THE COUNCIL

### *Constitution*

#### **Section 43: Constitution of Scottish Social Services Council**

138. Subsection (1) establishes the Scottish Social Services Council. It is a statutory body corporate which will exercise the functions given to it by or under the Act or other relevant legislation. Subsection (2) provides that the Council must, in the exercise of its functions act in accordance with written directions given to it by, and under the general guidance of, Scottish Ministers, and encourage equal opportunities in exercising its functions under the Act. Subsection (3) gives effect to Schedule 2 which sets out the constitutional arrangements and general provisions for the Council. The Council will be a non-departmental public body.

### *Registration*

#### **Section 44: Register of social workers and of other social service workers**

139. This section provides for the Council to establish and maintain a register of social service workers. Subsection (2) provides that there should be separate parts of the register for social workers, for each prescribed description of other social service worker, and for students training to become social workers or prescribed social service workers.

140. The social services workforce is large and diverse: more than 100,000 people with a range of qualifications and experience. It would be impractical to register this many people in one go and it was therefore decided to begin with a limited qualifications based register. The White Paper identified 3 groups of staff which would be registered. The responses of the consultation document urged that these groups should be extended. It was therefore decided that initially, registers should cover social workers and 4 specified groups of other social service workers. A second tranche of 2 other groups of staff would be registered in due course and other staff would be registered as soon as this was practicable. Subsection (3) will enable specific parts of the register to be closed, for example to reflect any changes to the nature of service delivery in future.

### **Section 45: Applications for registration under Part 3**

141. This section provides for the Council to make rules, subject to approval by Scottish Ministers, governing how applications to register shall be made. Subsection (3) makes it an offence to knowingly give information which is false or misleading in a material respect when making an application for registration. The penalty is a fine not exceeding level 4 on the standard scale (£2500 at present).

### **Section 46: Grant or refusal of registration under Part 3**

142. Subsection (1) provides that applications for registration may be granted either unconditionally or subject to conditions. Subsection (2) lists the conditions an applicant must satisfy in order to be registered with the Council. The Council must be satisfied as to an applicant's good character. Applicants must satisfy any requirements imposed by the Council as to education and training, conduct and competence. Social service workers other than social workers must meet any other requirements that the Council may establish through rules. The Council must refuse an application for registration if it is not satisfied that an applicant meets the conditions. The Council must give notice to an applicant if it proposes to refuse an application or impose conditions. Subsection (3) provides that this notice should set out the Council's reasons for the proposal.

143. Subsections (4)-(7) provide for the Council to recognise, for the purposes of registration, qualifications gained outwith Scotland. The Council can accept professional qualifications of nationals from any EEA state if these are prescribed as having Community equivalence. Such nationals may also have to satisfy other requirements imposed by rules made by the Council. Where the training of applicants from outwith Scotland is not recognised by the Council, additional training can be required, in accordance with Council rules.

144. As each of the UK countries will have its own regulatory body, this section applies to qualifications obtained in England, Wales and Northern Ireland as well as those gained in other EEA states and in other parts of the world.

### **Section 47: Variation etc. of conditions in relation to registration under Part 3**

145. This section allows for the Council to give notice to a person on its register that it intends to vary or remove an existing condition of registration or to impose a new condition. This notice must set out the Council's reasons for the proposal.

### **Section 48: Right to make representations to Council as respects proposals**

146. Subsection (1) gives an applicant or a registered person the right to make written representations to the Council about a proposal to vary or remove an existing

condition or impose a condition or an additional condition on registration. It would give the same right to an applicant, where the Council proposes to refuse an application or to grant an application subject to conditions. In all cases, written representations would need to be made within 14 days of the Council giving notice of a proposal. Subsection (2) provides that no action can be taken by the Council in relation to a proposal until the period for representation has elapsed or a representation has been made within that period.

147. This section provides an applicant or a registered person with a first stage of appeal to the Council about its decisions rather than the first stage of appeal being to the sheriff. This should avoid a situation where the courts are burdened with cases that should rightly be considered by the Council in the first instance.

#### **Section 49: Removal etc. from the Council's register**

148. This section provides for the Council to make rules, subject to the approval of Scottish Ministers, about the circumstances under which a person can be removed or suspended from any part of the register. It also provides for rules to be made about the circumstances under which a person can be restored to the register or their entry altered. The section explains that the rules will make provision for the procedure to be followed, standard of proof required, and for the rules of evidence in proceedings by which the matter can be determined. The intention is that the burden of proof should be on the balance of probabilities. These proceedings may be held in public.

#### **Section 50: Notice of Council's decision**

149. This section requires the Council to give an applicant notice of a decision to grant an application for registration or to implement a proposal to refuse registration or to grant registration subject to conditions. It also requires the Council to give a registered person notice of a decision to remove, suspend, restore or alter an entry in a part of the register or to implement a proposal to vary or remove conditions or impose an additional condition on registration.

150. Subsection (3) provides that the Council would have to explain in the notice the right of appeal against the decision and, where appropriate, any new or varied conditions imposed on registration. The amendment would allow no action to be taken in relation to the decision until the period of appeal (ie 14 days) has elapsed or the appeal, if brought, is finally determined or abandoned.

#### **Section 51: Appeal against decision of the Council**

151. This section provides for an applicant or registered person, given notice, following an appeal period or process, of a decision to implement a proposal relating to registration, to appeal that decision to the sheriff within 14 days. People will have

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the right to appeal against decisions made by the Council in respect of registration, for example, a decision not to register them or to remove them from the register. Access to an appeals procedure is essential because such decisions could affect an individual's ability to secure employment.

### *Offence*

#### **Section 52: Use of title “social worker” etc.**

152. This section provides for protection of the title “social worker” by the creation of an offence punishable by a fine up to level 5 on the standard scale (£5000 at present), for a person who is not registered as a social worker (whether in Scotland or elsewhere in the UK) to use that title or hold themselves out as a registered social worker with an intention to deceive. Subsection (1)(b) provides that Scottish Ministers may prescribe by order other job titles to be protected under this section.

153. Registration as a social worker with the Council will in effect grant a license to practise and thereby provide access to work with vulnerable people.

### *Codes of practice*

#### **Section 53: Codes of practice**

154. Under section 53 the Council is required to produce codes of practice for social service workers and for employers of such staff. No such nationally agreed codes exist at present. This is a fast developing field, therefore the codes will not be static. The Council will be obliged to gain consent from Scottish Ministers before publishing codes, and to consult the Commission, other bodies, persons and groups of persons that may be prescribed and anyone else, as appropriate. The Council shall keep the codes under review and amend them where it thinks necessary, consulting as above. Adherence to the codes will be taken account of in the work of the Commission.

### *Training*

#### **Section 54: Approval of courses etc.**

155. The Council will take over the regulation of professional social work training and related post-qualifying training from the Central Council for Education and Training in Social Work (CCETSW).

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156. Section 54 gives wide powers to the Council to promote education and training and to approve courses with the intention of ensuring the consistency and quality of the education and to secure or provide appropriate training when this is not, in the opinion of the Council, already being made available. The Council will co-operate with relevant regulatory bodies and awarding bodies to ensure that education and training for all social service workers is appropriately provided and regulated.

### **Section 55: Grants and allowances for social service workers' training**

157. This section provides that the Council may make grants and pay allowances to persons resident in Scotland to enable them to undertake education and training, and make grants to organisations providing approved courses. Subsection (2) provides that the Council can only make grants or pay allowances to individuals for purposes specified by Scottish Ministers. Subsection (3) provides that Scottish Ministers may, by direction, specify the terms and conditions under which the Council is able to make such grants and allowances, and subsection (4) allows them to determine which students and which courses may receive grants and the maximum grants payable.

### *Regulations and rules*

### **Section 56: Regulations relating to the Council**

158. Subsection (1)(a) gives Scottish Ministers the power to make regulations conferring additional functions on the Council in relation to workforce regulation and the education and training of those on the Council's register. Regulations might, for example, extend the scope of staffing registers or introduce new regulatory processes, like exams, for certain categories of applicant.

159. Subsection (1)(b) allows regulations to be made that require the Council to provide access to parts of the register. For example, there might be circumstances under which it is not appropriate to make registers, or parts of registers such as home addresses, available. A fee may be charged for access to the register.

### **Section 57: Power of Council to make rules**

160. This section refers to the power of the Council to make rules about the issues in Part 3 of the Act. Rules can only be made with the consent of Scottish Ministers.

161. Subsection (1) deals with the register and registration. Subsection (2) concerns rules about the charging of fees in connection with the Council's functions. For example fees may be charged for registration, approval of courses, provision of training or provision of codes of practice.

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162. It is common in many professions eg nursing, for continued registration with a regulatory body to be linked to continuing professional education and development. Subsections (3) and (4) provide that the Council may, having consulted as appropriate, require registered persons to undertake additional education and training. If they do not undertake this education and training, their registration may be suspended or cancelled. Subsection (5) gives wide powers to the Council to make rules about the approval of courses with the intention of ensuring the consistency and quality of the education to be provided for social service workers at pre- and post-qualifying levels.

163. As part of its powers to approve and monitor the effectiveness of individual training courses in social work the Council will need to be able to visit and report on the places delivering this training. Subsections (6)-(8) gives the Council powers to be able to appoint and pay the visitors to undertake this work on its behalf and to visit the places offering training. Provision is made in respect of visits both to higher education institutes, which deliver the academic element of the training, and to social services agencies that provide the practice placements where students can develop their practical skills.

164. Subsection (9) sets out the scope of the Council's rule making powers and provides that rules should be consistent, but should reflect different circumstances as appropriate.

### *Functions of the Scottish Ministers*

#### **Section 58: Functions of the Scottish Ministers under this part**

165. This section gives certain functions to Scottish Ministers, who can in turn delegate such functions to the Council.

166. Subsection (1) gives Scottish Ministers responsibility to ascertain the size of the social services workforce that will be needed and its training needs. They are also given responsibility to encourage provision of assistance, and for the drawing up of occupational standards in social services. It will be necessary for the Council to work closely with National Training Organisations in allied fields and awarding bodies.

167. Subsections (2) and (3) establish the promotion of social services training as a function of Scottish Ministers, which they can devolve to the Council. Promotion of social services training is one of the functions currently undertaken by CCETSW. Promotion of training includes publicising training opportunities, attracting potential students to training and providing information for social care staff and recruits enquiring about training.

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#### PART 4: GENERAL PRINCIPLES

##### **Section 59: General principles**

168. This section sets out the “general principles” in accordance with which Ministers, the Commission and the Council will be required to exercise their functions under the Act.

#### PART 5: PROVISIONS COMMON TO THE COMMISSION AND COUNCIL

##### *Grants and guarantees*

##### **Section 60: Grants**

169. This section makes provision for Scottish Ministers to make grants to the Commission and Council in relation to the expenses that they incur. Both bodies will be funded wholly through this route initially, although it is intended that once they assume their functions registration fees paid by care services for the Commission and social services staff for the Council will meet or largely meet the cost of the bodies.

##### **Section 61: Guarantees**

170. Section 61 gives Scottish Ministers the power to guarantee any borrowing of funds which the Commission or Council undertakes. Scottish Ministers will be required to lay details of any such guarantees before Parliament, and also provide the Parliament with an annual statement setting out the sum or sums borrowed, until these have been repaid. It is not expected that this power will be widely used but it is considered that to include it provides flexibility.

##### *Duty to consult*

##### **Section 62: Duty of Commission and Council to consult each other**

171. This section provides that the Commission and Council should have a constant dialogue with each other on matters which are of interest to both parties. This may include consultation about cases such as the manager of a care home being removed from the Council’s register.

### **Section 63: Guidance as to consultation**

172. This section imposes a duty on Scottish Ministers to issue guidelines to the Commission and Council on how they should fulfil the consultation requirements of the Act. This could include examples of the kind of bodies that it is expected should be consulted in particular circumstances. The guidelines would have statutory force - ie they would be regarded much more seriously by the courts than guidelines issued without a specific statutory provision.

#### *Complaints, inquiries and maladministration*

### **Section 64: Complaints procedure**

173. This section requires the Commission and the Council each to put in place a complaints procedure to deal with complaints about their own operation. Subsection (2) provides that both bodies shall get consent from Scottish Ministers before establishing procedures. Subsection (3) provides that they should keep these procedures under review. Subsection (4) provides that the bodies also make appropriate arrangements to publicise the procedures they establish.

### **Section 65: Inquiries**

174. Subsection (1) enables Scottish Ministers to act on any concerns over the Commission or Council's exercise of its functions or concerns over the provision of a care service, by setting up an inquiry. Subsection (2) allows the Commission to set up an inquiry on the exercise of its functions, or over the provision of a care service. Subsection (3) allows the Council to set up an inquiry on the exercise of its functions. The Commission and the Council need to have legal authority to investigate issues of serious concern that may arise in respect of their functions or any particular care service.

175. Subsection (4) enables an inquiry to be held in private. This might be necessary to protect, for example, a victim of child abuse.

176. Subsections (5) and (6) provide for section 210(2)-(8) of the Local Government (Scotland) Act 1973 to apply in relation to an inquiry. This will enable the person holding the inquiry to issue a summons requiring an individual to give evidence or produce any documents in their custody or under their control at a stated time and place. If that person fails to attend (for reasons other than not having the necessary expenses of their visit paid or tendered), they are liable to a fine or imprisonment.

177. Subsections (7) and (8) allow the Commission and the Council to determine who should pay their expenses in relation to an inquiry. Subsection (9) allows both

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bodies also to award expenses to parties involved in an inquiry and to direct who should pay those expenses.

### **Section 66: Maladministration**

178. This section gives the Scottish Parliamentary Commissioner for Administration power to investigate the Commission and the Council in cases of maladministration.

## **PART 6: MISCELLANEOUS**

*Central Council for Education and Training in Social Work: cessation of Scottish functions*

### **Section 67: Cessation of exercise of certain functions by Central Council for Education and Training in Social Work**

179. This section ensures the functions of CCETSW cease in relation to Scotland.

*Grants, loans and other payments*

### **Section 68: Grants in respect of activities relating to child care and family support**

180. This section gives Scottish Ministers a clear statutory power to make grants to a wide range of organisations or persons involved in child care and family support activities.

181. Organisations or persons to whom grants could be made would include local authorities, other public bodies, private companies, voluntary organisations, charities, academic researchers, or any other relevant persons. Grants could be made to support a wide range of activities; including (but not limited to) service provision, research activities, and developmental and promotional work.

### **Section 69: Amendment of Social Work (Scotland) Act 1968: delegation of power to make grants and loans to certain voluntary organisations etc.**

**182.** Section 10 (1) of the Social Work (Scotland) Act 1968 empowers Scottish Ministers to make grants and loans to voluntary organisations and others engaged in any activity connected with the functions of Scottish Ministers or local authorities under the Social Work (Scotland) Act 1968 and other specified enactments. It is not entirely clear that the organisations in receipt of grants and loans under this section can then pass on some or all of the money to other organisations or people. Section 69 adds a new subsection to section 10 of the 1968 Act to clarify the position and

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enables secondary grants and loans to be made for the activities described in section 10(1). Scottish Ministers may also determine that specific conditions are attached to the secondary grants and loans.

**Section 70: Amendment of Social Work (Scotland) Act 1968: direct payments to children for care services**

183. The Community Care (Direct Payments) Act 1996 amended the Social Work (Scotland) Act 1968 to insert new sections 12B and 12C and to make a consequential amendment to section 13, with the effect of enabling local authorities responsible for providing (or arranging the provision of) community care services, to make direct payments to persons in respect of their securing the provision of such services. The definition of 'community care services' excludes children's services. The Community Care (Direct Payments) (Scotland) Regulations 1997 and The Community Care (Direct Payments) (Scotland) Amendment Regulations 2000 specify the persons to whom direct payments may be made under the Act.

184. Section 70 amends the definition of 'community care services' for the purposes of sections 12B and 12C of the 1968 Act so that direct payments can be made to children for services available under section 22(1) of the Children (Scotland) Act 1995. The 1997 Regulations will be further amended to specify that direct payments may only be made to children aged 16 and 17.

**Section 71: Amendment of Children Act 1975: maintenance payments to children**

185. Local authorities use their discretionary powers to pay relatives or friends maintenance payments for children they look after. Payments are dependent on individual cases and the resources available to authorities. Section 71 increases the age limit of children for whom local authorities may make these payments from 16 to 18.

*Nursing in local authority residential accommodation*

**Section 72: Provision by local authorities of residential accommodation in which nursing is provided**

186. Section 52 amends sections 13A(1)-(2) and 59(1) of the Social Work (Scotland) Act 1968 to allow local authorities to provide and maintain residential accommodation where nursing care is provided. This will allow local authorities to maintain care homes under the single definition in section 2(3).

*Aftercare*

**Section 73: Amendment of Children (Scotland) Act 1995: after-care**

187. This section amends the current provisions in Section 29 of the Children (Scotland) Act 1995 which deal with local authority provision of after-care for children formerly looked after. Local authorities will be required to make an assessment of qualifying young people's needs and establish a procedure for considering representations about the work they do on this. Scottish Ministers will be empowered to make regulations specifying to whom assistance may be given and how assistance is to be provided.

*Place of safety*

**Section 74: Amendment of Children (Scotland) Act 1995: "place of safety"**

188. Section 57 of the Children (Scotland) Act 1995 includes a provision for sheriffs to make child protection orders for the emergency protection of children. A child protection order may among other things authorise the removal of the child to a "place of safety" which is defined in section 93(1) of the 1995 Act. In practice the interpretation of the definition has not always been straightforward, particularly in relation to private houses. Section 74 therefore amends the definition to remove possible doubt about what may constitute a place of safety so that children can be placed in the home of a relative, friend or foster carer as appropriate.

*Panels*

**Section 75: Panels for curators *ad litem*, reporting officers and safeguarders**

189. Section 41 of the Children (Scotland) Act 1995 requires a children's hearing (or sheriff) to consider whether to appoint a person to safeguard the interests of the child in certain proceedings before them. Such individuals are known as "safeguarders". Panels of persons from which safeguarders may be appointed, exist at local authority level. Appointments are made, following consultation with the sheriff principal and the chairman of the local authority children's panel. The primary role of the safeguarder is to provide an independent opinion on the child's circumstances and recommend what he or she considers is in the best interests of the child. In doing so the safeguarder must take into account the child's wishes and feelings and, if necessary, represent them to the hearing or court. Safeguarders may belong to more than one panel.

190. Section 75 clarifies the arrangements for the training of safeguarders and for the payment of their fees, allowances and expenses. Section 101 of the 1995 Act currently permits the Scottish Ministers to make regulations on certain matters in

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respect of a single panel. This is amended to allow for the establishment and running of panels at local authority level. A duty is placed on local authorities to provide training for safeguarders and the Scottish Ministers may, as they do for children's panel members, assist with training.

### **Section 76: Amendment of Children (Scotland) Act 1995: Children's Panel Advisory Committees**

191. This section amends the Children (Scotland) Act 1995 to place a duty on local authorities to train members of Children's Panel Advisory Committees and their sub-committees, and to give Scottish Ministers the power to assist in that training.

## **PART 7: GENERAL**

### **Section 80: Repeals and transitional provisions etc**

192. Subsection (2) gives Scottish Ministers an order-making power to make incidental, supplementary, consequential, transitional, transitory or saving provisions as required. Subsection (4) provides that before making such an order Ministers must consult as they consider appropriate.

### **Section 81: Short title and commencement**

193. This section sets out the short title of the Act, makes standard provision for commencement and enables Scottish Ministers to decide when certain sections of this Act will come into force. For example, not all the care services set out in section 2 will be regulated by the Commission from the start of its operation. Regulation of some services, such as home care will probably start at least a year later.

SCHEDULES 1 and 2: (introduced by sections 1 and 43)

### ***The Scottish Commission for the Regulation of Care and the Scottish Social Services Council***

194. Schedules 1 and 2 make detailed provision as to the constitution of, respectively, the Commission and the Council.

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SCHEDULE 3: (introduced by section 79)

***Minor and consequential amendments***

195. Schedule 3 details existing legislation that will be amended by this Act.

SCHEDULE 4: (introduced by section 80)

***Repeals***

196. Schedule 4 details existing legislation that will be repealed by the Act.

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