

# **PUBLIC SERVICES REFORM (SCOTLAND) ACT 2010**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Act and to help inform debate on it. They do not form part of the Act and have not been endorsed by the Scottish 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.

### **THE ACT**

3. The overarching purpose is to simplify and streamline the public bodies landscape in Scotland to deliver improved public services and better outcomes for the people of Scotland.

4. The Act comprises the following Parts:

**Part 1** makes provision for the purpose of simplifying public bodies, including the transfer and delegation of certain functions, the dissolution of certain bodies and provision in relation to the regulation of officers of court.

**Part 2** enables provision to be made for the purpose of improving the exercise of public functions and for removing and reducing burdens resulting from legislation.

**Part 3** makes provision for the publication of information on expenditure and certain other matters by the Scottish Ministers and certain public bodies.

**Part 4** establishes Creative Scotland with functions in relation to the arts and culture and industries and other activity the focus of which is the application of creative skills (the creative industries).

**Part 5** establishes Social Care and Social Work Improvement Scotland with scrutiny functions in relation to care services and social work services.

**Part 6** establishes Healthcare Improvement Scotland with scrutiny and other functions in relation to services provided under the National Health Service and independent health care services.

**Part 7** amends the Mental Health (Care and Treatment) (Scotland) Act 2003 to make provision in relation to the Mental Welfare Commission for Scotland, focusing its role

as a protective body, ensuring joined up working arrangements with the new scrutiny bodies and making changes to its structure.

**Part 8** makes provision about the exercise of scrutiny functions by certain bodies, including provision in respect of the involvement of users of scrutinised services, co-operation and joint inspections. It also amends Part 2 of the Public Finance and Accountability (Scotland) Act 2000 in relation to audit authorities and audit reports and examinations under that Part and amends the Scottish Public Services Ombudsman Act 2002 to make provision in relation to complaints handling procedures of listed authorities.

**Part 9** amends the Charities and Trustee Investment (Scotland) Act 2005 in relation to the regulation of charities and charity trustees.

**Part 10** makes other miscellaneous and general provision.

## **PART 1 – SIMPLIFICATION OF PUBLIC BODIES**

### *Transfer of functions*

#### **Section 1 - Transfer to Scottish Natural Heritage (“SNH”) of functions of the Deer Commission for Scotland (“DCS”)**

5. This section transfers all of the functions of DCS under the Deer (Scotland) Act 1996 and other legislation to SNH, and dissolves DCS and transfers its property, rights, liabilities and obligations to SNH. It also provides that where something has been done by or in relation to DCS then it will be treated as if it was done by or in relation to SNH after this section comes into force, and it gives effect to schedule 1 which makes consequential amendments to other legislation including the provisions of the Deer (Scotland) Act 1996.

#### **Section 2 - Transfer to Scottish Natural Heritage (“SNH”) of functions of Advisory Committee on Sites of Special Scientific Interest (“ACSSSI”)**

6. This section dissolves ACSSSI (also referred to as “the Advisory Committee” in the Nature Conservation (Scotland) Act 2004) and transfers its property, rights, liabilities and obligations to SNH. It also repeals the provisions of the Nature Conservation (Scotland) Act 2004 relating to ACSSSI and the requirement on SNH in paragraph 11 of schedule 1 to the 2004 Act to provide a copy of any advice given by ACSSSI to a person who has made a representation as this will no longer be relevant once ACSSSI ceases to exist, and it repeals references to ACSSSI in the Freedom of Information (Scotland) Act 2002 and in the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

7. Subsection (3) also amends section 21(8) of the 2004 Act so that it places a duty on SNH to consider any representations made in accordance with section 21(6) and (7) of that Act, and take such action as it thinks fit in reaching a decision on whether to confirm or withdraw the notification of a site of special scientific interest. Subsection (3) also sets out various amendments that are required to be made to paragraphs 9 and 12 of schedule 1 to the 2004 Act so that they apply in relation to the duty to be placed on SNH to consider any representations, and to take such action as it thinks fit.

### **Section 3 – Transfer to certain bodies of functions of Waterwatch Scotland**

8. This section dissolves the Water Customer Consultation Panels and abolishes the position of their convener. The panels and their convener (known together by the operating name of Waterwatch Scotland) perform complaints-handling and representative functions in relation to customers of Scottish Water. The representative and complaints-handling functions of the panels and their convener are to be taken over by the National Consumer Council (NCC) and the Scottish Public Services Ombudsman (SPSO) respectively.

9. Subsection (2) adds Scottish Water to schedule 2 (*Listed Authorities*) of the Scottish Public Services Ombudsman Act 2002. This permits the SPSO to handle complaints about Scottish Water. Subsection (4) requires the NCC to exercise its functions under the Consumers, Estate Agents and Redress Act 2007 in relation to services provided by Scottish Water. These functions include the power to represent consumers and to give advice and make proposals in relation to consumer matters. Subsections (6) and (7) introduce schedules which make further provision in consequence of this section.

#### *Dissolution of bodies*

### **Section 4 - Dissolution of Scottish Records Advisory Council (“SRAC”)**

10. This section dissolves SRAC and transfers its property, rights, liabilities and obligations to the Scottish Ministers. It also repeals references and provisions relating to SRAC in the Public Records (Scotland) Act 1937, the National Heritage (Scotland) Act 1985, the Freedom of Information (Scotland) Act 2002, the Public Appointments and Public Bodies etc. (Scotland) Act 2003, and the Scottish Register of Tartans Act 2008.

### **Section 5 - Dissolution of Scottish Industrial Development Advisory Board (“SIDAB”)**

11. This section dissolves SIDAB and repeals references and provisions relating to SIDAB in the Scottish Development Agency Act 1975, the Enterprise and New Towns (Scotland) Act 1990, the Freedom of Information (Scotland) Act 2002 and in the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

### **Section 6 - Dissolution of Building Standards Advisory Committee (“BSAC”)**

12. This section dissolves BSAC and repeals references and provisions relating to BSAC in the Building (Scotland) Act 2003 and in the Public Appointments and Public Bodies etc. (Scotland) Act 2003.

### **Section 7 - Historic Environment Advisory Council for Scotland (“HEACS”)**

13. This section dissolves HEACS (also referred to as “the Advisory Council” in the Public Appointments and Public Bodies etc. (Scotland) Act 2003) and transfers its property, rights, liabilities and obligations to Scottish Ministers. It also repeals references and provisions relating to HEACS in the Public Appointments and Public Bodies etc. (Scotland) Act 2003 and the Freedom of Information (Scotland) Act 2002.

## **Section 8 - Dissolution of Regional Boards of the Scottish Environment Protection Agency**

14. This section dissolves the Regional Boards of the Scottish Environment Protection Agency and repeals provision relating to these Boards in the Environment Act 1995.

### *Delegation of functions*

## **Section 9 - Delegation of Ministerial functions under section 7 of the Industrial Development Act 1982**

15. This section inserts subsections (4A) to (4E) into section 7 of the Industrial Development Act 1982 (selective financial assistance for industry in assisted areas). Section 7 of that Act allows Scottish Ministers to award Regional Selective Assistance grants and relates to financial and other assistance to industry.

16. Subsection (4A) enables the Scottish Ministers to delegate their functions relating to provision of financial assistance to such persons as they may determine. Subsection (4B) provides that where the Scottish Ministers delegate under subsection (4A), they may also delegate to the same person their function of being satisfied that assistance cannot, or cannot appropriately, be given in any other way. Subsection (4C) provides that it is not possible for the delegate to use a pre-existing company which the delegate has not set up as a vehicle to invest in another company. The delegation may be to such extent and subject to such conditions as the Scottish Ministers think appropriate.

17. Subsection (4D) provides that if the Scottish Ministers delegate under subsection (4A) or (4B), the Scottish Ministers can still carry out the function themselves, that is, the power is to be shared between the delegate and the Scottish Ministers. Subsection (4E) provides that a delegation under subsection (4A) or (4B) can be varied or revoked at any time.

## **Section 10 - Delegation of Ministerial functions under section 5 of the Science and Technology Act 1965**

18. This section inserts subsections (1A) to (1D) into section 5 of the Science and Technology Act 1965 (further powers of the Scottish Ministers). Section 5 of that Act enables the Scottish Ministers to make certain financial provision in relation to scientific research.

19. Subsection (1A) enables the Scottish Ministers to delegate their functions which are set out in section 5(1)(a) to (c) of the 1965 Act to such persons as they consider appropriate. Any expenses incurred by such persons in such activities can be paid out of the expenses defrayed by the Scottish Ministers out of monies provided by Parliament.

20. Subsection (1B) provides that where the power in paragraph (c) of subsection 1 is delegated, which relates to expenses incurred in specified payments to or in respect of any advisory body established for the purpose of assisting the Secretary of State or, in matters connected with scientific research, the Minister of Agriculture, Fisheries and Food, the paragraph is to be read with the words "Secretary of State" being replaced by reference to the delegate.

21. Subsection (1C) provides that if the Scottish Ministers delegate under subsection (1A), they can still carry out the function themselves. Subsection (1D) addresses the potential limitations on the exercise of a delegate's functions at the 'conferring end'. This means that should a body be delegated the power, any restriction on its functions which might otherwise prevent it from exercising the power will not prevent the delegated power being exercised.

### **Section 11 - Delegation of certain functions of Forestry Commissioners under Forestry Act 1967**

22. This section inserts new sections 7B and 7C into the Forestry Act 1967. New section 7B provides that the Forestry Commissioners may delegate functions relating to the management of the forest estate in Scotland where land is let to a community body. New section 7C defines community bodies for this purpose.

### **Section 12 - Forestry Commissioners: joint ventures etc.**

23. This section widens the application of section 7A of the Forestry Act 1967 to include Scotland. It also amends the Countryside (Scotland) Act 1967. This will allow the Forestry Commissioners to form or participate in bodies corporate, invest in bodies corporate, provide loans or establish charitable trusts for the purpose of exercising their functions in relation to land in Scotland.

### *Regulation of officers of court*

### **Section 13 – Regulation of officers of court**

24. This section gives effect to schedule 4 which contains detailed amendments, principally to Part 3 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 (which is not yet in force) and Part V of the Debtors (Scotland) Act 1987.

25. Part 3 of the 2007 Act creates and defines the remit of the Scottish Civil Enforcement Commission ("the Commission") to supervise the officers responsible to the courts for the enforcement of debts or diligence. The amendments in schedule 4 prevent the Commission from being brought into existence under the 2007 Act.

26. These amendments also retain, repeal and amend some of the regulatory controls introduced by Part 3 of the 2007 Act. In particular, Part 3 of the 2007 Act replaces officers of court (messengers-at-arms and sheriff officers) with judicial officers. These amendments revert all references to "judicial officer" in Part 3 of the 2007 Act so as to maintain the offices of messengers-at-arms and sheriff officers, usually with references to "officers of court".

## **PART 2 – ORDER-MAKING POWERS**

### **Section 14 - Public functions: efficiency, effectiveness and economy**

27. This section enables the Scottish Ministers, by order, to make any provision which they consider would improve the exercise of public functions by the bodies listed in schedule 5 (including the Scottish Ministers) having regard to efficiency, effectiveness and economy.

28. In this context, ‘public functions’ means the functions of the persons, bodies and office-holders listed in schedule 5, subject to any limitations specified in that schedule. The list in schedule 5 includes the Scottish Ministers and any other office-holder in the Scottish Administration, certain Scottish public authorities with mixed or no reserved functions, and a cross-border public authority with mixed functions (the Forestry Commissioners).

29. An order under this section may, for example, reconfigure the way (and means by which) certain functions are delivered. In particular, the order may include, but is not limited to, provision modifying, conferring, abolishing, transferring or providing for the delegation of any function (including, subject to section 16, new functions). The power is not however exercisable in relation to local authorities, except that functions may be transferred or delegated to local authorities (including fire and police authorities).

30. An order made under this section may also amend the constitution of, or dissolve, a body listed in schedule 5 other than the Scottish Ministers, Scottish Court Service, cross-border public authorities, companies and any person listed by virtue of section 15(5)(e); but a body cannot be dissolved unless it has, or will have by virtue of the order, no exercisable functions. The order may also create a new person, body or office-holder on which functions are conferred, or to which functions are transferred or may be delegated.

### **Section 15 – Public functions: further provisions**

31. This section enables certain types of person, body and office-holder to be added to the list in schedule 5 and existing entries removed, and allows corresponding entries to be added to, or removed from, schedule 6. The types that may be added are: office-holders in the Scottish Administration; Scottish public authorities with mixed or no reserved functions (other than local authorities); cross-border public authorities; publicly-owned companies; and any other person who appears to exercise functions of a public nature or otherwise provides a service under contract which is a function of a body listed in schedule 5. In relation to the latter, the functions of a public nature or services being provided must be specified, and only these functions or services are public functions of the body for the purposes of section 14.

### **Section 16 - Preconditions**

32. This section sets out the preconditions for making an order under section 14. In particular, the Scottish Ministers may not make provision (other than provision that merely restates an enactment) unless they consider that the effect of the provision is proportionate to the policy objective (subsection 2(a)) and that the provision does not remove any necessary ‘protection’ (subsection 2(b)). In addition, subsections (2)(c) and (d) provide that ‘public functions’ that are modified, and functions (including new functions) conferred on bodies listed in schedule 5 (unless transferred without substantial modification), must be broadly consistent with the general objects or purpose of the body concerned.

33. If an existing ‘public function’ is transferred without substantial modification to another listed body, a new body created under section 14(3)(c), or a local authority (for example where the function is only modified to the extent necessary to enable its effective exercise), then the function does not need to be broadly consistent with the general objects or purpose of the receiving body. However, for new bodies created under section 14, subsection

(2)(e) still requires that any function conferred on that body must be broadly consistent with either (i) the general objects or purpose of a body listed in schedule 5 which is abolished or whose functions are modified, or (ii) ‘public functions’ that are abolished or modified.

34. For the purposes of subsection 2(b), ‘protection’ includes (without prejudice to the generality of the meaning of the provision) protections in relation to the independence of judicial decision-making, or decision-making of a judicial nature, by a person occupying a judicial office; civil liberties; health and safety of persons; the environment; and cultural heritage. Section 30 gives a very wide definition of cultural heritage such as would include all the types of material whether in material form or otherwise which could be found in museums, art galleries and libraries embracing both the sciences and the humanities. The words in brackets referring to cultural heritage make it clear that the protection extends to the public’s rights of access to the cultural heritage and rights to see it displayed and exhibited.

35. If a ‘protection’ is not necessary it can be removed; and if it is necessary, it can be replaced by provision that delivers the same or similar protection (subsection (7)). In this context, subsections (4) to (6) prescribe that the following are protections that are necessary:

- (i) the continued independence of the judiciary as mentioned in section 1 of the Judiciary and Courts (Scotland) Act 2008;
- (ii) institutional arrangements in terms of which persons separate from Scottish Ministers are charged under statute as trustees for the public with holding, caring for and preserving property which is cultural property, and any statutory restrictions on the trustees on disposal of such property vested in them; and
- (iii) provision in paragraph 7(4) of schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 as to who the convener shall be in relation to certain proceedings i.e. the requirement that certain cases involving restricted patients are to be chaired by the President of the Tribunal or a sheriff.

36. In particular, subsection (5) and the provision relating to cultural heritage in section 16(3)(e) recognise the particular role and importance to the Scottish nation of those functions carried out by the national collections institutions which hold collections as trustees for the public. The national heritage functions of these institutions are more fully stated in the founding legislation of each of the three main collecting bodies - that is, Part 1 of the National Heritage (Scotland) Act 1985 (establishing the National Museums of Scotland), the National Galleries of Scotland Act 1905 (establishing the National Galleries of Scotland) and the National Library of Scotland Act 1925 (establishing the National Library of Scotland).

### **Section 17 - Power to reduce or remove burdens**

37. This section replicates and updates the power to remove burdens by order in respect of both the public sector and the private sector in terms of section 1 of the Deregulation and Contracting Out Act 1994 (which is repealed). ‘Burden’ means a financial cost; an administrative inconvenience; an obstacle to best regulatory practice; an obstacle to efficiency, productivity, or profitability; or a sanction, criminal or otherwise, which affects

the carrying on of any lawful activity. This section mirrors the regime in section 1 of the Legislative and Regulatory Reform Act 2006 and together effectively provides a common regime for the removal or reduction of burdens in devolved and reserved areas in Scotland.

### **Section 18 - Preconditions**

38. This section sets out the preconditions for making an order under section 17(1). These are that the policy objectives could not be secured by non-legislative means; the effect is proportionate to the policy objective; the provision strikes a fair balance between the public interest and the interests of anyone adversely affected; it does not remove any necessary protection (these are the same as those described above in relation to section 16) and does not prevent anyone exercising a right or freedom which they could reasonably expect to exercise.

### **Section 19 - Order in relation to certain bodies: requirement for request and consent**

39. This section prevents the Scottish Ministers from proposing any provision by order under section 14 or 17(1) which relates to any of the bodies listed in schedule 6 unless requested to do so in writing by the Scottish Parliamentary Corporate Body. In addition, subsection (2) provides that the Scottish Ministers cannot lay any subsequent draft order containing such provision without the consent of the Scottish Parliamentary Corporate Body.

#### *General restrictions*

### **Section 20 - Subordinate legislation and powers of direction, appointment and consent**

40. This section provides that an order under sections 14 or 17(1) can only confer a function of legislating on the Scottish Ministers, the First Minister or Lord Advocate and cannot delegate this function. In addition, an order under section 14 or 17(1) cannot transfer to other persons any function of giving directions, appointing a person to any office or position, or consenting to any thing, which is conferred by legislation on Scottish Ministers, the First Minister or the Lord Advocate.

### **Section 21 - Local taxation**

41. This section provides that an order under section 14 or 17(1) cannot be used to impose, vary or abolish any local tax to fund local authority expenditure.

### **Section 22 - Criminal penalties**

42. This section restricts the extent to which criminal penalties can be imposed by an order under section 14 or 17(1).

### **Section 23 - Forcible entry etc.**

43. This section provides that an order under section 14 or 17(1) cannot authorise forcible entry, search or seizure, or compel the giving of evidence except where it merely extends an existing power for similar purposes or restates an enactment.



## **Section 24 - Prohibition on modification of this Part**

44. This section provides that in general an order under section 14 or 17(1) may not make provision modifying any provision of Part 2 other than schedule 5. Section 14(6)(b) does however specifically provide that an order under section 14 may also include provision adding a person, body or office-holder created in pursuance of section 14(3)(c) to schedule 6.

### *Procedure*

## **Section 25 to 28 - Procedure, consultation and explanatory document**

45. Sections 25 to 28 set out the procedure for making orders. The order-making powers are subject to a 'super-affirmative' procedure which requires that if the Scottish Ministers propose to make an order under section 14 or 17(1) they must lay before the Parliament a copy of the proposed draft order and the proposed explanatory document and send copies of these to any person who is required to be consulted under section 26.

46. Scottish Ministers must have regard to any representations made within a period of 60 days (excluding periods when the Parliament is dissolved or in recess for more than 4 days) before laying a draft order before Parliament for approval by affirmative resolution accompanied by a further explanatory document which gives details of the consultation which has been undertaken, any representations received and any changes made as a result of those representations.

47. These sections also set out the procedure for making orders under section 15 which add or remove an entry in schedule 5 (and, if applicable, schedule 6). Before making an order under section 15 which adds an entry to schedule 5, the Scottish Ministers must consult the body in question and lay a draft order and an explanatory document before Parliament, and the draft order must be approved by a resolution of Parliament.

## **Section 29 - Order-making powers: modifications of enactments**

48. This section gives effect to schedule 7.

## **Section 30 - Interpretation of Part 2**

49. This section defines certain terms that are used in Part 2.

## **PART 3 – INFORMATION ON THE EXERCISE OF PUBLIC FUNCTIONS**

### **Section 31 - Public functions: duties to provide information on certain matters**

50. This section imposes a duty on each person, body or office-holder listed in schedule 8 to publish a statement, as soon as practicable after the end of each financial year, of any expenditure it has incurred during that financial year on or in connection with public relations; overseas travel; hospitality and entertainment; and external consultancy. Each person, body or office-holder must also publish a statement specifying certain details of any payment made with a value in excess of £25,000 (other than service-related payments to

members/staff) and the total number of members/staff who received remuneration in excess of £150,000 during the financial year. Public bodies must have regard to guidance issued by Scottish Ministers about these duties; and any such guidance must be laid before Parliament.

### **Sections 32 - Public functions: duty to provide information on exercise of functions**

51. This section requires each person, body or office-holder listed in schedule 8 to publish a statement as soon as practicable after the end of the financial year setting out the steps it has taken to promote and increase sustainable growth and to improve efficiency, effectiveness and economy during that financial year. Public bodies must have regard to guidance issued by Scottish Ministers about these duties; and any such guidance must be laid before Parliament.

### **Section 33 - Public functions: duty to provide information on special advisers**

52. This section requires Scottish Ministers to publish a statement as soon as practicable after the end of the financial year setting out the total amount of remuneration paid to special advisers during that financial year.

### **Section 34 - Public functions: duties to provide information: further provision**

53. This section enables the Scottish Ministers, by affirmative order, to vary the periods and frequency of the duties to provide information and to add to, remove or amend certain matters to which they apply. Different provision may be made for different persons, bodies or office-holders listed in schedule 8.

### **Section 35 - Public functions: duties to provide information: further provision**

54. This section enables the Scottish Ministers, by order, to vary the year-end date.

## **PART 4 – CREATIVE SCOTLAND**

### **Section 36 – Establishment of Creative Scotland**

55. Subsection (1) establishes a body corporate known in English as Creative Scotland and in Gaelic as Alba Cruthachail. Subsection (2) gives effect to schedule 9 which makes detailed provision about the status, membership, procedure etc. of Creative Scotland.

### **Section 37 – General functions of Creative Scotland**

56. Subsection (1) lists the general functions of Creative Scotland.

57. Subsection (1)(a) gives Creative Scotland the functions of identifying, supporting and developing quality and excellence in the arts and culture from artists and creative practitioners, these being persons engaged in artistic and other creative endeavours. Creative Scotland might, for example, exercise these functions by selecting particular individuals or

organisations whose practice they believe merits encouragement and advice, or financial support in the form of grants or loans (see also section 39(4)).

58. Subsection (1)(b) gives Creative Scotland the functions of promoting understanding, appreciation and enjoyment of ‘art for art’s sake’. Creative Scotland might, for example, exercise these functions by giving awards that celebrate the work of individual or groups of practitioners, or by encouraging and advising local authorities to make wider provision of cultural facilities in their area.

59. Subsection (1)(c) gives Creative Scotland the functions of improving access to and participation in the arts and culture. When Creative Scotland is pursuing these particular functions it must do so with regard to increasing the diversity of people who have access to and participate in the arts and culture (see subsection (2)). Creative Scotland might, for example, exercise these functions by supporting projects which give persons from socially deprived areas opportunities to express themselves through the arts and culture that they would not have otherwise.

60. Subsection (1)(d) gives Creative Scotland the functions of making real, and bringing to fruition, the value and benefits of the arts and culture in Scotland. The value and benefits referred to include, in particular, the national and international value and benefits of the arts and culture to Scotland’s national culture. The value and benefits referred to also include personal enjoyment of aesthetic quality and the enjoyment involved in cultural participation, benefits in terms of unlocking creative and entrepreneurial potential, and benefits in terms of enhancing well-being and community pride. Creative Scotland might, for example, exercise these functions by supporting a significant play that will tour around Scotland, providing enjoyment and “food for thought” at home, and thereafter internationally.

61. Subsection (1)(e) gives Creative Scotland the functions of encouraging and supporting artistic and other creative endeavours which contribute to an understanding of Scotland’s national culture. Scotland’s national culture in this paragraph means Scotland’s distinctive way of life as a whole, and not only the artistic and cultural output of the arts and culture. Creative Scotland might, for example, exercise these functions by supporting a film project which depicts and challenges Scottish attitudes to drug and alcohol consumption.

62. Subsection (1)(f) gives Creative Scotland the functions of advocating for and supporting the creative industries. The creative industries are industries and other commercial activities which involve as a distinctive element a primary focus on the application of creative skills. These industries include advertising, architecture, arts and antiques, crafts, design, designer fashion, film, computer and video games, music, performing arts, publishing, television and radio. Creative Scotland might, for example, exercise these functions by leading a research and intelligence programme relating to the sustainable development of the computer and video games industry.

63. Subsection (3) provides that Creative Scotland may encourage and support other persons who perform functions similar to Creative Scotland. This may include, for example, Scottish Enterprise and Highlands and Islands Enterprise who have a significant economic development role as regards the creative industries, and local authorities who support the arts

and culture in their areas. Subsection (4) defines “persons” to include groups of persons so that informal associations or groups can be provided with encouragement and support.

### **Section 38 – Advisory and other functions**

64. Subsections (1) and (4) require Creative Scotland to provide the Scottish Ministers with any advice, information and assistance they require (and in the manner they require it) in relation to the arts and culture, the creative industries or Creative Scotland’s functions. Subsection (2) also allows Creative Scotland to provide such other advice and information as it considers appropriate.

65. Subsection (3) allows Creative Scotland to provide other persons with advice, information and assistance in relation to the arts and culture or the creative industries. For example, assistance could be given to persons involved in artistic or other creative endeavours by way of training or through the temporary secondment of an employee of Creative Scotland. Subsection (5) has effect that the forms of assistance provided by Creative Scotland under section 38 do not include financial assistance, which is to be provided through the mechanism of section 39(4). Subsection (6) defines “persons” to include groups of persons so that informal associations or groups can also be provided with advice, information and assistance.

### **Section 39 – Grants and loans**

66. Subsections (1) to (3) allow the Scottish Ministers to make grants to Creative Scotland including for particular purposes and subject to such terms and conditions as the Scottish Ministers think fit.

67. Subsections (4) and (5) allow Creative Scotland to make grants and loans to persons involved in artistic and other creative endeavours and other persons where the grant or loan relates to Creative Scotland’s functions (and subject to such terms and conditions as Creative Scotland think fit). “Persons” in subsection (4) does not include groups of persons because money will only be given to persons enjoying a legal personality (for example, individuals and companies).

68. Creative Scotland has powers to give other forms of financial support and involvement to persons involved in artistic and other creative endeavours by virtue of paragraph 10 of schedule 9.

### **Section 40 – Directions and guidance**

69. Subsections (1) and (2) give the Scottish Ministers power to direct Creative Scotland as to the exercise of its functions, except in relation to Creative Scotland’s functions under section 37(1) (its primary functions relating to artistic and other creative endeavours), section 37(3) (its function to encourage and support persons performing functions similar to Creative Scotland), section 38(3) (its function to provide persons other than the Scottish Ministers with advice, information or assistance) or section 39(4) (its grant and loan making function) insofar as the direction relates to Creative Scotland’s artistic or cultural judgement.

70. The Scottish Ministers may vary or revoke any direction given to Creative Scotland, subject to the requirement that a varied direction cannot affect Creative Scotland's artistic or cultural judgement (see subsection (4)). Subsection (3) requires Creative Scotland to comply with any directions given to it by the Scottish Ministers under Part 4 of the Act and to have regard to any guidance issued by the Scottish Ministers in relation to the exercise of its functions.

*Miscellaneous and general*

**Section 41 – Dissolution of the Scottish Arts Council**

71. This section dissolves the Scottish Arts Council and revokes its Royal Charter.

**Section 42 – Transfer of staff etc.**

72. Subsection (1) provides for the employees, property and liabilities of the Scottish Arts Council and Scottish Screen to transfer to Creative Scotland from the date on which the Scottish Arts Council is dissolved. Scottish Screen will be dissolved by non-legislative means.

73. Subsection (2) provides that the transfer of Scottish Arts Council and Scottish Screen employees does not terminate their contracts of employment and has effect as if their contracts of employment were originally made with Creative Scotland. Subsection (3) provides that all rights, powers, duties and liabilities surrounding a transferred person's contract of employment transfer to Creative Scotland. For example, an Employment Tribunal claim actionable against the Scottish Arts Council or Scottish Screen by an employee would transfer with the employee and become actionable against Creative Scotland (subject to the time limits and other rules for bringing such claims).

74. Subsection (4) provides that a transferred person's right to terminate their contract of employment, where there is a substantially detrimental change to the person's contract of employment, is not affected by the provisions of subsections (1) to (3). However, a change of the identity of a person's employer from the Scottish Arts Council or Scottish Screen to Creative Scotland is not to be treated as a substantially detrimental change to the person's contract of employment.

**Section 43 – Creative Scotland: Modifications of enactments**

75. This section gives effect to schedule 10, which modifies enactments that refer to the Scottish Arts Council and Scottish Screen and where a reference to Creative Scotland is required.

## **PART 5 – SOCIAL CARE AND SOCIAL WORK: SCRUTINY AND IMPROVEMENT**

### **Chapter 1 – Social Care and Social Work Improvement Scotland**

#### *Social Care and Social Work Improvement Scotland*

#### **Section 44 – Social Care and Social Work Improvement Scotland**

76. Subsection (1) establishes Social Care and Social Work Improvement Scotland (referred to as SCSWIS in the Act and throughout these notes). 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, SCSWIS will be expected to further improvements in social services in Scotland.

77. SCSWIS will be a non-departmental public body. It will be independent in its day to day running but will be accountable to Scottish Ministers, given that, by virtue of subsection (2), it must act in accordance with directions and under the general guidance of Scottish Ministers

78. Subsection (4) gives effect to schedule 11 which sets out general provisions for the establishment and operation of SCSWIS.

#### **Section 45 – General principles**

79. This section sets out the “general principles” in accordance with which SCSWIS will be required to exercise their functions under the Act. These are to protect and promote the safety and wellbeing and independence of people who use social services and to promote diversity and good practice in relation to those services.

#### *Key Definitions*

#### **Section 46 – Social services**

80. This section defines “social services” for the purposes of Part 5.

#### **Section 47 – Care services**

81. Subsection (1) sets out the range of “care services” which will be regulated by SCSWIS.

82. Subsection (2) gives effect to schedule 12 which defines the care services listed in subsection (1).

#### **Section 48 – Social work services**

83. This section defines what is meant by “social work services” and “social work services functions” for the purposes of Part 5 of this Act. It also gives effect to schedule 13 which specifies enactments within which those social work services functions are contained.

#### **Section 49 – Power to modify key definitions**

84. This section gives Scottish Ministers a power, following consultation, to change, by affirmative order, the definition of any social service. The power may be used to add to or remove from the range of defined services and to amend the definitions themselves.

#### *Miscellaneous*

#### **Section 50 – Standards and outcomes**

85. This section requires Scottish Ministers to prepare and publish standards and outcomes applicable to care services and to social work services; to keep any published standards under review and to publish revised standards and outcomes when they consider it appropriate. Subsections (4) to (6) provide that both any published standards and outcomes applicable to care, adoption and social work services defined in the Act and the Scottish Social Services Council's Codes of Practice must be taken into account by SCSWIS when making any decisions related to registration, inspection and enforcement in respect of these services. This section also ensures that consultation must be undertaken prior to the publication of the standards and outcomes or any amendment of them. Subsection (7) allows Scottish Ministers to make different standards and/or outcomes for different services. Subsection (8) allows Scottish Ministers to delegate the preparation and publication of such standards and outcomes to other persons (which includes other bodies), where appropriate.

#### **Section 51 – Information and advice**

86. Subsection (1) provides that SCSWIS must make available to the public information on the availability and quality of social 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 SCSWIS's inspections of individual social services.

87. Subsection (3)(a) allows SCSWIS 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 SCSWIS to provide advice to service providers, service users and carers and their representatives, local authorities, health boards, social service providers or prospective providers, and any other bodies set out in an order made under that subsection, about any aspect of its work. For example, SCSWIS might offer advice to service providers on how to meet any standards and outcomes.

88. Subsection (4) allows SCSWIS to charge a reasonable fee for any advice, forms or documents it provides in connection with its obligations under subsection (3)(b).

#### **Section 52 – Dissolution of Scottish Commission for the Regulation of Care**

89. This section dissolves the Scottish Commission for the Regulation of Care (“Care Commission”).

## **Chapter 2 – Social Services Inspections**

### *Inspections*

#### **Section 53 – Inspections**

90. Subsection (1) provides that SCSWIS may inspect any social service and the organisation and coordination of any social service. Subsection (2) sets out possible purposes of an inspection of any social service, namely to review and evaluate their effectiveness, to investigate particular aspects of a service, to encourage improvement in the provision of those services and to make any recommendations necessary for their improvement in reports prepared under section 57 and in the case of care services, whether any improvement or condition notice necessary.

91. Subsection (2)(d) makes provisions that an investigation may be undertaken by SCSWIS into any incident, event or cause for concern. This is separate from the provisions for an inquiry to be undertaken which are set out in section 98.

92. Subsection (3) provides that an inspection may be of any social service or combination of such services or of the services provided to a child, adult or grouping of children or adults and may be undertaken in any part of, or the whole of Scotland.

93. Subsection (4) provides that an inspection is to be conducted in accordance with a plan prepared in accordance with section 54 and which is approved by the Scottish Ministers.

94. Subsection (5) allows an inspection to take any form SCSWIS considers appropriate.

95. Subsection (6) provides that SCSWIS may require a person who provides a social service registered under the Act to supply it with any information to enable SCSWIS to discharge its functions. This may include such aspects as self-evaluation returns or other information.

#### **Section 54 - Inspections under section 53: best regulatory practice**

96. Subsections (1), (2) and (3) require SCSWIS to develop a plan for carrying out inspections, including inspections of services which are subject to self assessment, in accordance with best regulatory practice, that is, in a way which is transparent, accountable, proportionate and consistent. Subsection (4) requires SCSWIS to have regard to any guidance issued by Scottish Ministers for the plan. Subsections (5) and (6) require SCSWIS to review the plan and obtain Scottish Ministers approval for any revision and to consult as appropriate when preparing or revising the plan.

#### **Section 55 – Inspections at request of Scottish Ministers**

97. Subsections (1) and (2) enable Scottish Ministers to request SCSWIS to carry out an inspection of any social service or the organisation or coordination of any social services, to specify the purpose of any such inspection and to approve the timetable for such work. This would, for example, allow Scottish Ministers to ask SCSWIS to carry out an inspection of



social services for people with learning disabilities, including any services which the local authority has contracted with another person to provide. Subsection (3) provides that an inspection is to be conducted in accordance with a timetable approved by the Scottish Ministers. Subsections (4) and (5) enable Scottish Ministers to request an inspection of some or all social services in an area or across areas of Scotland and of services provided to a particular individual or group of individuals.

### **Section 56 – Inspections: authorised persons**

98. Subsections (1) and (2) provide that any inspection must be carried out by a person authorised by SCSWIS – an “authorised person” and that such a person may carry out inspections into any or all social services.

99. Subsection (3) provides powers for an authorised person to enter and inspect any premises being used to provide a social service.

100. Subsection (4) provides that any confidential information that a person acquires during such an inspection is not used or disclosed by that person other than for the purposes of the inspection, or if required under law or a court order to disclose, or to the extent that is necessary for the purpose of protecting the welfare of a child or adult at risk, or the prevention or detection of crime or the prosecution of offenders. Confidential information for these purposes is defined in section 105(3) and is information from which a person’s identity can be discovered, either on its own or when combined with other information, and in respect of which a duty of confidentiality is owed to that person.

### **Section 57 – Inspections: reports**

101. Subsection (1) requires SCSWIS to prepare a report after carrying out an inspection under this Part and to send a copy of the report to the person providing the service being inspected. Subsections (2) and (3) provide that SCSWIS should give that person an opportunity to comment on a draft of that report and that SCSWIS must make the report available to the public.

102. Subsection (4) provides that regulations may make further provision relating to the preparation, content and effect of the reports the circumstances in which SCSWIS inspections reports may be subject to restricted access or withheld, and in particular may require copies of the reports to be sent to Scottish Ministers or other persons specified in the regulations.

### *Regulations*

### **Section 58 – Regulations: inspections**

103. This section provides the power for Scottish Ministers to make regulations in relation to inspections of social services and in particular (but not exclusively), to make regulations in relation to the topics listed in section 58(2)(a) to (j) such as the types of inspection, their timing and frequency, who is authorised to carry out an inspection and requiring information produced to be held and further disclosed in accordance with prescribed conditions.

## **Chapter 3 – Care Services**

### *Registration of care services*

#### **Section 59 – Registration of care services**

104. This section sets out the framework for applications for registration of care services as defined in section 47 and specifies that such registration must be made to SCSWIS and must include details of the person who is to manage the service and such other matters as SCSWIS may reasonably request in addition to such matters as may be prescribed by order.

105. Subsection (4) provides that subsections (1) to (3) do not apply to local authority adoption and fostering services or any other care services registered under section 83(1)(c).

#### **Section 60 – Grant or refusal of registration**

106. Registration will only be granted if SCSWIS 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 SCSWIS.

107. Subsections (1) and (2) provide that an application under section 59 can be granted either unconditionally or subject to any conditions SCSWIS sees fit to impose, or refused. 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.

108. Subsection (3) provides that if SCSWIS is satisfied that the applicant is complying with, or will comply with any applicable regulations under section 78, 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 or with agreed conditions under section 71(1) or subject to conditions to be agreed under section 73(1). Otherwise, it will give notice of its refusal of registration under section 71(2).

109. If SCSWIS grants the application, it must issue a certificate of registration (subsection (4)), which the service provider must display in a prominent position (subsection (5)), either in the premises where the care service is operated from, and if there is a separate management office, in that office too.

#### **Section 61 – Limited registration**

110. Subsection (1) provides for SCSWIS 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.

111. 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 section 59. 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.

#### *Improvement notices*

#### **Section 62 – Improvement notices: care services**

112. This section gives SCSWIS 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.

113. For care services registered under this Chapter, subsection (1)(a) provides for SCSWIS to warn that if the necessary improvements are not made within the time allowed SCSWIS intends to begin procedures under section 64 to cancel a service's registration. Subsection (1)(b) provides for SCSWIS to warn that if improvement notices served on local authority adoption and fostering services and other services registered under Chapter 4 are not complied with SCSWIS intends to make a report to Scottish Ministers under section 91.

114. 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. Subsection (2) therefore provides that when an improvement notice is given to a non-local authority service, the local authority should be informed.

#### **Section 63 – Special provision for certain care services provided by local authorities**

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

116. Subsection (1) requires such a local authority to inform SCSWIS of its view within 14 days of receiving an improvement notice, giving the reasons. Subsection (2) requires SCSWIS 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 Chapter 4 and the provisions in that Chapter in relation to enforcement would apply. If it is not, the normal arrangements under Chapter 3 would apply.

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

#### **Section 64 – Cancellation of registration**

117. This section gives SCSWIS the power to cancel the registration of a care service registered under this Chapter that, having been issued with an improvement notice under section 62, 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.

118. Subsection (2) provides that relevant offences for the purpose of this section are:

- an offence under this Part - for example, providing a care service while not being registered (section 80(1)(a)), knowingly making a false or misleading statement when applying for registration or variation or removal of a condition (section 80(1)(b)) or failing to display a current certificate of registration (section 80(2));
- an offence under regulations made under this Part;
- any other offence which in SCSWIS's view makes it appropriate to cancel a registration.

119. Registration can be formally cancelled 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 SCSWIS will be aware of previous history in dealing with any future applications. Again, SCSWIS must take the standards and outcomes established under section 50 and the Scottish Social Services Council's codes of practice into account in coming to its decisions.

120. 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, SCSWIS will be able to cancel registration.

121. Subsection (4) allows SCSWIS to cancel a registration, without first issuing an improvement notice, where the person providing a registered care services ceases to provide the service.

### **Section 65 – Emergency cancellation of registration**

122. Subsections (1) to (3) enable SCSWIS to apply to the sheriff for an order cancelling the registration of a care service under this chapter. The sheriff may make such an order where he considers that unless the order is made there will be serious risk to the life, health or well-being of users of the service (or other persons). Subsections (4) and (5) require SCSWIS to inform the appropriate local authorities and the provider of the application where an order (or an interim order) is made. Subsection (6) allows the sheriff to determine the application even where the service provider is not present.

123. Subsection (7) provides that the order can come into effect on the day it is made or on some later date decided by the sheriff. An order to cancel a service's registration would have the effect of closing the service. This provision therefore allows a delay if appropriate before closure takes effect in order that the service may be closed down in a proper manner and for instance service users relocated.

124. Subsections (8) and (9) allow an appeal to be made to the sheriff within 14 days of an order being made and for the sheriff principal on hearing such an appeal to confirm, revoke or modify the order. The order remains in force when an appeal is made. No further appeal is allowed.

### **Section 66 – Condition notices**

125. This section gives SCSWIS the power to notify the care service provider by way of a “condition notice” that a condition in force may be varied, removed or added to SCSWIS.

### **Section 67 – Emergency Condition Notices**

126. This section gives SCSWIS the power to give immediate effect to any condition notice which it serves on a registered service. This will only be applied when, in SCSWIS’ view, there is serious risk to life, health or wellbeing if the condition is not imposed. The service provider may make representations to SCSWIS to vary or remove the emergency condition notice. SCSWIS must consider any such representation and inform the provider of the action it proposed to take. Where SCSWIS does not intend to vary or remove the condition, the provider may appeal to the sheriff under section 69(1).

### **Section 68 – Application of Part to condition notices following emergency condition notices**

127. This section disapplies other sections in the Act which outline that 14 days must elapse before a condition notice can be applied, ensuring that immediate action of the emergency conditions notices is allowed within the legislation.

### **Section 69 – Emergency Condition Notices: Appeals**

128. This section gives a right of appeal to the sheriff to any person given an emergency condition notice within 14 days of the imposition of the condition, if they have made not appeal to SCSWIS or have made an appeal and been informed by SCSWIS that the condition notice stands. The sheriff may decide to direct that the condition continues, ceases, is varied or impose additional conditions in relation to the registration.

### **Section 70 – Applications under Chapter 3 in respect of conditions**

129. 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, to apply for the addition of a condition, for example, to limit the type of services which may be provided by a care service, 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 SCSWIS has given notice of intention to, or decided to, cancel registration. Subsection (3) provides that an application shall be accompanied by the appropriate 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 SCSWIS grants an application for a change of conditions it must give notice in writing and issue a new certificate of registration.

### **Section 71 – Further provision as respects notice of proposals**

130. Subsection (1) provides that if SCSWIS proposes to grant an application under section 59 but subject to a condition that has yet to be agreed by the applicant, it must give notice of the proposed condition to the applicant. Subsection (2) requires SCSWIS to give notice if it intends to cancel a registration. Subsection (3) provides that SCSWIS must give notice of a proposal to cancel a registration to the person providing the services; except where the person providing the service has applied to SCSWIS for its cancellation under section 70(1)(b). Subsection (4) provides that SCSWIS must give a person who has applied under section 70(1)(a) for the variation or removal of any condition on their registration, notice of a proposal to refuse that application. Subsection (5) provides that any notice under this section must provide reasons for that proposal.

### **Section 72 – Right to make representations to SCSWIS as respects proposals under Chapter 3**

131. Subsection (1) states that a notice given under section 71, or a condition notice must indicate that the recipient can, if they so wish, make written representations to SCSWIS within a time limit of 14 days. This ensures that the applicant has the opportunity to make their point of view known. Subsection (2) provides that SCSWIS may only implement a proposal that was the subject of a condition notice or a notice under section 71 if it has considered any representations made by the recipient of the notice, the recipient has indicated that they will not make any representations or the 14 day period referred to in subsection (1) has elapsed and subsection (3) provides that if no representation is made, or the 14 day period has elapsed, SCSWIS must implement the proposal unless it would be inappropriate to do so.

### **Section 73 – Notice of SCSWIS’s decision under Chapter 3**

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

133. Subsections (3) to (6) deal with situations where the representations stage has been completed, requiring SCSWIS to serve a notice in writing of their decision on the applicant. The notice must explain the right of appeal conferred by section 75 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 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 74 – Conditions as to numbers**

134. This section provides that SCSWIS 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).

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

136. 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 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 75– Appeal against decision to implement proposal**

137. This section provides for an appeal against a decision made by SCSWIS under section 73(3), based on a proposal made by SCSWIS under section 71. 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.

#### *Fees*

### **Section 76 – Registration fees**

138. This section sets out the fees which are payable to SCSWIS. 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 proposals) and to determine whether or not a fee is payable by order. Subsection (2) sets out the activities for which SCSWIS is able to impose fees and subsection (3) provides that SCSWIS consider its reasonable expenses in carrying out functions under Chapter 3 when fixing fees, but may charge a nominal fee or remit the fee altogether where appropriate.

#### *Regulations*

### **Section 77 – Regulations: registers and registration**

139. Subsection (1)(a) provides for Scottish Ministers to make regulations about how SCSWIS should maintain registers. Subsection (1)(b) allows regulations to be made about the information that should be provided in an application under Chapter 3 or 4 and what certificates of registration should include, for example the conditions of registration of a care service. Subsection (1)(b)(iii) provides for regulations specifying types of applicants who cannot make certain kinds of applications.

140. Subsections (1)(c) and (d) allow regulations to be made that define the circumstances and conditions, including the payment of a fee, under which SCSWIS should provide access to its registers. Subsection (1)(e) gives Scottish Ministers the power to make regulations conferring additional functions on SCSWIS in relation to registration under the Part.

141. Subsection (2) allows for regulations to be made setting out when fees should not be payable and provides that SCSWIS can give access to the register free of charge.

142. Regulations under this section could, for example, be used to prevent unrestricted access to the names and addresses of service users such as users of 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 78 – Regulations: care services**

143. This section gives Scottish Ministers the power to make regulations in respect of care services. Such regulations could cover matters such as the way in which care services are conducted and make further provisions in relation to their scrutiny and the protection of users; they could also be used to cover the normal day to day administrative matters required for well run care services such as provision in relation to management, staffing and premises. The regulations may also give SCSWIS additional functions in relation to care services.

144. Subsection (3) provides that regulations made under this section may make it an offence to fail to comply with specific provisions within the regulations, or with a condition of registration. Subsection (4) provides that a person guilty of such an offence would be liable to a fine not exceeding level 5 on the standard scale (£5,000 at present).

145. Subsection (5) requires the Scottish Ministers to consult such persons as they consider appropriate before making regulations under the powers in this section.

### *Complaints*

#### **Section 79 – Complaints about care services**

146. Subsection (1) requires SCSWIS 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, SCSWIS will be required to consult local authorities, the Scottish Public Services Ombudsman (SPSO) and such other persons or groups of persons it considers appropriate.

147. While local resolution of complaints by the provider will be the norm, subsection (2) makes clear there is no requirement for a user of a service to go through the provider's own system before approaching SCSWIS. Any procedures developed must be kept under review by SCSWIS, who must also ensure that the established procedure is given the appropriate publicity.

### *Offences*

#### **Section 80 – Offences in relation to registration under Chapter 3**

148. This section sets out offences under Chapter 3. 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 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 or up to three months imprisonment, or both.

149. 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.

150. 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 section 75 of the Adoption and Children (Scotland) Act 2007 (asp 4) rather than this Act. This will ensure that there is not duplication of powers under this Act and the 2007 Act.

### **Section 81 – False statements in application under Chapter 3**

151. 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 on summary conviction is a fine not exceeding level 4 on the standard scale.

### **Section 82 – Offences by bodies corporate etc.**

152. This section provides that if an offence under Chapter 3 (or regulations made under Chapter 3) is committed with the consent or connivance of an officer of a body corporate, a local authority, a partnership, or an unincorporated association, or if that officer has been complicit or been negligent, then the officer as well as the organisation is 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 this Chapter will not be able to escape prosecution simply because the organisation is liable: both they and it may be liable to prosecution.

### **Chapter 4 – Local Authority Adoption and Fostering Services etc.**

#### **Section 83 – Local authority applications for registration under Chapter 4**

153. Local authorities are under a statutory duty to provide adoption and fostering services which means that, unlike most care services, SCSWIS will not be able to take direct enforcement action against authorities. It would not be appropriate for SCSWIS 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 SCSWIS will prepare a report to Ministers who will then decide what action should be taken against the local authority.

154. These services cannot therefore be covered by the registration and enforcement provisions in Chapter 3 of the Act. This Chapter 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.

155. Subsection (1)(a) and (b) require a local authority to apply to SCSWIS to register its adoption and fostering services (as set out in paragraph 8(1)(a) and 9(a) and (c) to schedule 12 respectively) and subsection (1)(c) extends this requirement to register 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.

156. Subsection (3) makes provision for SCSWIS to disagree with the local authority's determination in (1)(c) 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, then subsection (5) provides that the application for registration is deemed to have been under the Chapter 3 provisions.

#### **Section 84 – Grant of local authority application under Chapter 4**

157. Subsection (1) provides for SCSWIS to grant registration applications, with or without conditions, from a local authority service applying for registration under section 83(1) and to give the authority notice of its decision. Subsection (2) provides that on granting registration, SCSWIS should issue a certificate of registration, and subsection (3) requires authorities to display such certificates.

#### **Section 85 – Condition notices: services registered under Chapter 4**

158. This section provides that condition notices can be served on local authority care services registered under Chapter 4 in the same way as for other care services.

#### **Section 86 – Applications under Chapter 4 in respect of conditions**

159. This section gives local authorities the power to apply to SCSWIS 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 76. If SCSWIS decides to grant or refuse the application, it must notify the authority and issue a new certificate of registration if appropriate.

#### **Section 87 – Right to make representations to SCSWIS under Chapter 4 as respects conditions**

160. 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 SCSWIS 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.

161. Subsection (2) provides that SCSWIS 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 SCSWIS that it will not be making representations. Subsection (3) provides that where notice to take an action has been given, SCSWIS may only take such action if it has considered any representations made, the authority has notified SCSWIS that no action shall be taken, or a period of 14 days has elapsed.

#### **Section 88 – Notice of SCSWIS’s decision under Chapter 4**

162. This section provides that if SCSWIS has decided to implement a notice to which section 87 applies, it must give the local authority to which the notice applies, written notice of its decision.

163. Subsections (2) to (4) deal with situations where the representations stage has been completed, requiring SCSWIS to serve a notice in writing of their decision on the authority. The notice must explain the right of appeal conferred by section 89 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 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 89 – Appeal against decision under Chapter 4**

164. This section provides that local authorities may appeal to a sheriff against a decision made by SCSWIS under Chapter 4 within 14 days after a notice, under section 88 is given. The sheriff may determine the appeal in the same manner as appeals for other non-local authority care services..

#### **Section 90 – Offences under Chapter 4**

165. This section provides that the offence provisions in sections 80(1) and (3) and 82 shall apply to local authority care services registered under Chapter 4, in the same way as they apply to services registered under Chapter 3, and further that a failure to comply with section 84(3) can lead on summary conviction to a fine not exceeding level 2 on the standard scale.

#### **Section 91 – Report to Scottish Ministers**

166. Subsection (1) provides that SCSWIS shall report to Scottish Ministers if an improvement notice is imposed on a local authority service registered under Chapter 4, and provide them with a copy of that notice. Subsection (2) requires SCSWIS to inform Scottish Ministers (within 14 days) as to whether a notice has been complied with within the specified timescale. Subsection (3) requires SCSWIS to report to Ministers if any person is convicted of an offence in relation to these services, or if it appears to SCSWIS 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 64). Subsection (5) defines relevant requirement for this section and for section 92 as the same as those for section 64, however with the addition that they will also include any requirement or

condition imposed by, under or by virtue of an Act as may be prescribed by an order made by the Scottish Ministers.

167. Subsection (6) requires SCSWIS to report to Scottish Ministers and provide them with information about any issues in relation to a care service registered under Chapter 4 that may be prescribed by order by the Scottish Ministers.

## **Section 92 – Default powers of Scottish Ministers**

168. Subsection (1) provides that Scottish Ministers (having received a report under section 91 or otherwise) may take certain actions if they are satisfied that a local authority providing a service registered under Chapter 4 is, without reasonable excuse, failing to comply with an improvement notice or carrying on the service not in accordance with relevant requirements.

169. 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 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 Scottish Ministers.

## **Chapter 5 – Miscellaneous**

### **Section 93 – Grants to SCSWIS**

170. This section makes provision for Scottish Ministers to make grants to SCSWIS in relation to the expenses that it incurs or will incur through either the initial establishment of the body or through the discharge of its functions.

### **Section 94 – Guarantees**

171. This section gives Scottish Ministers the power to guarantee any borrowing of funds which SCSWIS 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.

### **Section 95 – Duty of SCSWIS to consult Scottish Social Services Council**

172. This section provides that SCSWIS must consult the Scottish Social Service Council on matters where SCSWIS think appropriate. This may include consultation about cases, such as the manager of a care home being removed from the Council's register.

### **Section 96 – Duty of SCSWIS to consult the Mental Welfare Commission**

173. This section provides that SCSWIS must consult the Mental Welfare Commission for Scotland (MWCS) where SCSWIS is exercising its functions in relation to the provision of guidance, advice or information and considers it appropriate to do so, having regard to the MWCS' similar powers to promote best practice.

## **Section 97 – Complaints procedure**

174. This section requires SCSWIS to put in place a complaints procedure to deal with complaints about its operation. Subsection (2) provides that SCSWIS must consult the SPSO before establishing such procedures. Subsection (3) provides that it should keep these procedures under review and must, after suitable consultation, vary the procedure when it considers it appropriate to do so. Subsection (4) provides that it also make appropriate arrangements to publicise the procedures it establishes.

## **Section 98 – Inquiries**

175. Subsection (1) enables Scottish Ministers to act on any concerns over SCSWIS's exercise of its functions or concerns over the provision of a social service, by setting up an inquiry. Subsection (2) allows SCSWIS to set up an inquiry on the exercise of its functions, or over the provision of a social service. SCSWIS needs to have legal authority to investigate issues of serious concern that may arise in respect of its functions or any particular social service.

176. Subsection (3) enables an inquiry to be held in private. This might be necessary to protect, for example, a victim of child abuse.

177. Subsections (4) and (5) provide for section 210(2) to (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.

178. Subsections (6) and (7) allow SCSWIS to determine who should pay their expenses in relation to an inquiry. Subsection (8) allows SCSWIS to award expenses to parties involved in an inquiry and to direct who should pay those expenses.

## **Section 99 – Arrangements entered into by local authority or health body: services to be registered**

179. This section provides that, although a service commissioned by a local authority or health board need not exist as a registered care service at the time the contract is entered into, the service must be registered by SCSWIS by the time it is actually provided.

## **Section 100 – Local authorities and health bodies: awareness of SCSWIS reports etc.**

180. This section ensures that, when providing a care service, or when considering the commissioning of, or contracting for, the provision of such a service, local authorities and health boards must take into account relevant information about the quality of care services, or the organisation or co-ordination of such services as assessed by SCSWIS. (Information might include, for example, the grading of a service, inspection reports, and any other relevant information, such as condition notices, produced by the regulator). In doing this the authorities must follow any guidance issued by Scottish Ministers.

### **Section 101 – Giving of notice**

181. 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.

### **Section 102 - Transfer of staff etc.**

182. This section provides for the employees, property and liabilities of the Scottish Commission for the Regulation of Care ('the Care Commission') to transfer to SCSWIS on the date that the new body is established. It also makes provision for all the staff of the Social Work Inspection Agency ("SWIA"), which is an executive agency of the Scottish Executive, to transfer to SCSWIS on the same date and for the transfer of staff from HMIE to whom section 103 applies immediately before the transfer date. The transfer of Care Commission, SWIA and HMIE employees does not terminate their contracts of employment and has effect as if their contracts of employment were originally made with SCSWIS. All rights, obligations and acts surrounding a transferred person's contract of employment transfer to SCSWIS (see subsection (4)). Staff who are on secondment to SWIA from another part of the Scottish Administration are not to be transferred to the new body.

183. A transferred person's right to terminate their contract of employment, where there is a substantially detrimental change to the person's contract of employment, is not affected by the provisions of subsections (1) to (4). However, the mere change of the identity of a person's employer from the Care Commission, SWIA or HMIE to SCSWIS is not to be treated as a substantially detrimental change to the person's contract of employment (see subsection (5)).

### **Section 103 – Transfer of staff: further provision**

184. This section allows an order to be drafted to specify which (if any) staff currently employed by HMIE may be transferred to SCSWIS. Staff on loan or secondment to HMIE from another part of the Scottish Administration are not to be transferred to the new body.

### **Section 104 - Orders and regulations: procedure**

185. This section provides that any order or regulations made by Scottish Ministers under this Part of the Act, including any consequential, supplemental, incidental, transitional, transitory or saving provision, must be by statutory instrument and may be exercised to make different provisions for different purposes. Orders and regulations made under section 49, 58(1) or 78 or schedule 12 must be made by affirmative procedure, whereas other orders and regulations made under Part 5 must be made by negative procedure.

### **Section 105 – Interpretation of Part 5**

186. This section defines certain terms that are used in Part 5.

**Section 106 – Minor and consequential amendments and repeals: SCSWIS**

187. This section gives effect to schedule 14.

**Section 107 – Minor modifications: Scottish Social Services Council**

188. This section gives effect to schedule 15.

**PART 6 – HEALTH CARE: SCRUTINY AND IMPROVEMENT**

**Section 108 – Healthcare Improvement Scotland**

189. This section amends the National Health Service (Scotland) Act 1978 (c. 29) by inserting the following sections into the Act.

*Healthcare Improvement Scotland*

**Section 10A – Healthcare Improvement Scotland**

190. Subsection (1) creates Healthcare Improvement Scotland, which is referred to in the Act and in these notes as HIS. 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, HIS will be expected to promote improvements in healthcare provided in Scotland.

191. Subsection (2) defines what is meant by healthcare in subsection (1)(b) as services for, or in connection with, the prevention, diagnosis or treatment of illness provided under the health service or by people providing independent health care services

192. Subsection (3) and (4) places HIS under an obligation to act subject to and in accordance with directions given by the Scottish Ministers and enables the Scottish Ministers to vary or revoke such directions.

193. Subsections (5) gives effect to schedule 5A of The National Health Service (Scotland) Act 1978 (contained in schedule 16 to this Act) which sets out the constitutional arrangements and general provisions for the establishment and operation of HIS.

*Principles*

**Section 10B – Principles**

194. This section sets out the principles in accordance with which HIS will be required to exercise their functions. These prioritise the safety and welfare of persons, and the promotion of good practice.

*Functions related to the health service*

**Section 10C – Health service functions**

195. Subsections (1)(a) to (c) require HIS to exercise the functions of supporting, ensuring and monitoring the quality of health care provided by the NHS in Scotland (including quality assurance, and accreditation) the promotion of user involvement in the planning and development of health services by Health Boards, Special Health Boards and the Common Services Agency; and the discharge of those bodies' functions in a way that encourages equal opportunities. Subsection (2) confers certain functions exercisable by the Scottish Ministers under particular provisions of the 1978 Act on HIS. Subsection (3)(a) provides that HIS must make available to the public information on the availability and quality of health service services which under subsection (3)(b) 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 HIS's inspections of services provided under the health service.

196. Subsections (5) to (7) provide a definition for health service functions which HIS may exercise.

197. Subsection (3)(c) requires HIS to provide advice to Scottish Ministers when requested, and subsection (3)(d) allows it to do so at any time even without a request by Scottish Ministers. Subsection (3)(e) requires HIS to provide advice to service users and persons representing carers of such users, local authorities, health boards, special health boards and the Common Services Agency, health service providers or prospective providers, and any other bodies set out in regulations, about any aspect of its functions. For example, HIS might offer advice to service providers on how to meet any standards and outcomes. Subsection (3)(f) provides a power for HIS to publish information arising out of its inspection and other work such as good practice guidance. Subsection (4) allows HIS to charge a reasonable fee for any advice, forms or documents it provides in connection with its obligations under subsection (3)(e).

**Section 10D – Health service functions: further provision**

198. This section permits Scottish Ministers to delegate by order to HIS such of their functions in relation to the NHS as they think is appropriate. This might include, for example, conducting an investigation into serious failure in NHS care.

199. Under subsection (2), HIS is required to carry out tasks for bodies associated with the NHS that Scottish Ministers and the other health bodies agree they should undertake and in the manner that is agreed. When carrying out such tasks or exercising functions on behalf of the Scottish Ministers, HIS may enforce any rights acquired and will incur any liabilities and be fully responsible for those tasks and the exercise of those functions.

**Section 10E – Independent health care functions**

200. Subsections (1) and (2) create functions for HIS in relation to information on the availability and quality of independent health care services similar to those for NHS services described above for section 10C.



201. Subsection (3) provides a list of the sections which confer functions on HIS to be known as independent health care functions. These functions include the registration, regulation and inspection of independent healthcare services and conditions attached to those functions and the designation of authorised persons who may inspect independent health care services. Subsection (4) further explains what is meant by the independent health care functions of HIS for the purposes of the Act.

#### **Section 10F – Meaning of “independent health care services”**

202. Subsections (1) and (2) lists and provides detailed definitions for the services which are to be considered independent health care services for the purposes of the Act namely any independent hospital or clinic, any private psychiatric clinic or any independent medical agency, and any independent ambulance service.

#### **Section 10G – Power to modify definitions**

203. This section gives Scottish Ministers a power, following consultation, to amend by affirmative order the definition of an independent health care service. The power may be used to add to or remove from the range of defined services or to amend the definitions themselves.

#### *Standards and outcomes*

#### **Section 10H – Standards and outcomes**

204. This section gives Scottish Ministers a power to prepare and publish standards and outcomes applicable to services provided under the health service and independent health care services; and to keep any published standards under review. Under subsection (4) any published standards must be taken into account by HIS when making any decisions related to registration, inspection and enforcement in respect of services provided under the health service and independent health care services. This section also ensures that consultation must be undertaken prior to initial publication and consequent amendment of the standards and outcomes.

#### *Inspections*

#### **Section 10I – Inspections of services provided under the health service**

205. As part of the duty of furthering improvement in the quality of healthcare in Scotland, conferred by section 10A under this section, HIS may inspect any service provided under the health service. Such inspections are to be subject to a plan prepared in accordance with section 10L and which is approved by Scottish Ministers.

#### **Section 10J – Inspections of independent health care services**

206. HIS may inspect any independent health care service. The purposes of an inspection of independent health care services are to review and evaluate their effectiveness, to investigate particular aspects of a service and to encourage continuous improvement in the provision of those services. Subsection (3) provides that any service or combination of services in any part or all of Scotland may be inspected. This would enable for instance a

themed inspection of independent health care services provided to older people. Such inspections are to be subject to a plan prepared in accordance with section 10L and which is approved by Scottish Ministers.

207. Subsection (5) provides that HIS may require a person who provides an independent health care service registered under the Act to supply it with any information to enable HIS to discharge its functions. This may include such aspects as pre-inspection questionnaires or other information. Subsection (7) makes provision for HIS to decide the form which any inspection will take, subject to any regulations made under section 10O. This will enable HIS to conduct inspections in a manner appropriate for the type of service being inspected.

### **Section 10K – Authorised persons**

208. This section provides that any inspection must be carried out by a person authorised by HIS – an “authorised person” - and that such a person may carry out inspections of any or all independent health care services.

209. Subsection (3) provides powers for an authorised person to enter and inspect any premises being used to provide an independent health care service. Subsection (4) provides that any confidential information that person acquires during such an inspection may not be used or disclosed by that person other than for the purposes of the inspection, or if required under law or a court order or disclosed to the extent that is necessary for the purpose of protecting the welfare of a child or adult at risk or the prevention or detection of crime or prosecution of offenders. Confidential information for the purposes of the Act is information which can identify an individual and in respect of which a duty of confidentiality is owed to the individual in question.

### **Section 10L – Inspections: best regulatory practice**

210. Subsections (1), (2) and (3) require HIS to develop a plan for carrying out inspections, including inspection of services which are subject to self evaluation, in accordance with best regulatory practice, that is, in a way which is transparent, accountable, proportionate and consistent. Subsection (4) requires HIS to have regard to any guidance issued by Scottish Ministers for the plan. Subsections (5) and (6) require HIS to review the plan, obtain Scottish Ministers’ approval for any revision of the plan and consult as appropriate when preparing or revising the plan.

### **Section 10M – Inspections at request of Scottish Ministers**

211. This section provides that HIS must undertake an inspection of any service provided under the health service and any independent health care service at the request of the Scottish Ministers. Subsection (3) provides that an inspection or investigation is to be conducted in accordance with a timetable approved by the Scottish Ministers. Under this provision, for example, Scottish Ministers might request HIS to undertake an inspection of the services provided to people with mental illness across both NHS and private providers.

### **Section 10N – Inspections: reports**

212. Subsection (1) requires HIS to prepare a report after carrying out an inspection of NHS or independent health care services and send a copy of the report to the person (or body) providing the service(s). Subsection (2) provides that HIS should give that person (or body) an opportunity to comment on a draft of that report. Subsection (3) provides that HIS must make the report available to the public and subsection (4) makes provision for regulation to make further provisions about the preparation, content and effect of reports and, in particular, makes provision specifying the circumstances in which HIS inspection reports may be subject to restricted access or withheld.

### **Section 10O– Regulations relating to inspections**

213. Subsections (1) and (2) provide a power for regulations to make further provision on the detail of inspections at sections 10I, 10J and 10M - and for different types of inspection to be carried out for such services.

214. Subsection (3) provides a list, which is not exhaustive, of the issues which the regulations may address in relation to those inspections such as the frequency of such inspections, the persons who are authorised to conduct such inspection, the interviews and examinations which may be carried out in relation to such inspections, requiring information produced to be held and further disclosed in accordance with prescribed conditions and the creation of offences.

215. Subsection (4) provides a definition for “health records” as referred to in subsection (3)(e).

### *Registration*

### **Section 10P – Registration of independent health care service**

216. This section sets out the framework for applications for registration of an independent health care service and specifies that such applications must be made to HIS and in addition to information that may be prescribed in regulations, the identity of the manager of the service must be included as well as any information HIS may reasonably require from the applicant.

### **Section 10Q – Grant or refusal of registration**

217. Registration will only be granted if HIS 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 HIS.

218. Subsections (1) and (2) provide that an application can be granted either unconditionally or subject to any conditions HIS 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.

219. Subsection (3) provides that if HIS is satisfied that the applicant is complying with, or will comply with, all relevant requirements set out in regulations under section 10Z7, 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 10Z(1)(a) or subject to conditions under section 10Z2. Otherwise, it will give notice of its refusal of registration under section 10Z(1)(b).

220. If HIS grants the application, it must issue a certificate of registration (subsection (4)), which the independent health care service provider must display in a prominent position (subsection (5)), in the premises where the independent health care service is operated from and, if there is a separate management office, in that office too.

#### *Improvement notices*

#### **Section 10R – Improvement notices: independent health care services**

221. This section gives HIS the power to serve an improvement notice on an independent health care service. Such a notice will specify the improvements required to bring an independent health care service up to the standards required and the timescale for meeting these standards. It also provides for the HIS to warn that if the necessary improvements are not made within the time allowed HIS intends to begin procedures under Section 10S.

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

#### **Section 10S – Cancellation of registration**

222. This section gives HIS the power to cancel the registration of an independent health care service that, having been issued with an improvement notice, is still not meeting the relevant requirements. This could be concern about a condition of registration that has been breached or where a relevant offence has been committed. Further grounds for cancelling registration may be prescribed by regulations.

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

- an offence under this group of sections;
- any other offence which in HIS's view makes it appropriate to cancel a registration.

224. Registration can be formally cancelled even if a provider closes an independent health care service before the cancellation process is complete. This will ensure that the provider's record accurately reflects the situation and HIS will be aware of previous history in dealing with any future applications.

225. 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 an independent health care service provider is convicted of a relevant offence, such as obstructing an inspection and fails to remedy matters at fault, HIS will be able to cancel registration.

### **Section 10T – Emergency cancellation of registration**

226. Subsections (1) to (3) enable HIS to apply to the sheriff for an order cancelling the registration of any independent health care service. The sheriff may make such an order where he considers that, unless the order is made there will be serious risk to the life, health or well-being of users of the service (or other persons). Subsections (4) and (5) require HIS to inform the appropriate authorities and the provider of the application where an order (or an interim order) is made. Subsection (6) allows the Sheriff to determine the application even where the service provider is not present.

227. Subsection (7) provides that the order can come into effect on the day it is made or on some later date decided by the sheriff. An order to cancel a service's registration would have the effect of closing the service. This provision therefore allows a delay before closure takes effect in order that the service may be closed down in a proper manner and for instance services users relocated.

228. Subsections (8) and (9) allow an appeal to be made to the sheriff within 14 days of an order being made and for the sheriff principal on hearing such an appeal to confirm, revoke or modify the order. The order remains in force when an appeal is made. No further appeal is allowed.

### **Section 10U – Condition notices**

229. This section enables HIS to notify the registered independent health care service, by a "condition notice" that a condition in force may be varied, removed or a new condition added.

### **Section 10V – Emergency Condition Notices**

230. This section gives HIS the power to give immediate effect to any condition notice which it serves on a registered service. This will only be applied when, in HIS' view, there is serious risk to life, health or wellbeing if the condition is not imposed. The service provider may make representations to HIS to vary or remove the emergency condition notice. HIS must consider any such representation and inform the provider of the action it proposed to take. Where HIS does not intend to vary or remove the condition the provider may appeal to the sheriff under section 10X(1).

### **Section 10W – Application of Act to condition notices following emergency condition notices**

231. Section 10W disapplies the sections that outline that 14 days must elapse before a condition notice can be applied and thus provides that immediate effect of the emergency condition notices is allowed within the legislation.

### **Section 10X – Emergency Condition Notices: Appeals**

232. This section gives a right of appeal to the sheriff to any person given an emergency condition notice within 14 days of the imposition of the condition, if they have made no appeal to HIS or have made an appeal and been informed by HIS that the condition notice stands. The sheriff may decide to direct that the condition continues, ceases, is varied or may impose additional conditions in relation to the registration.

### **Section 10Y – Applications in respect of conditions**

233. Subsection (1) enables a provider of an independent health care service to apply for a change to their conditions of registration, to apply for the addition of a condition, for example, to limit the types of services which may be provided, 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 HIS 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 HIS grants an application for a change of conditions it must give notice in writing and issue a new certificate of registration.

### **Section 10Z – Further provision as respects notice of proposals**

234. Subsection (1) provides for HIS to give notice of decisions it intends to take, in respect of applications for registration made under Section 10P, if it intends to grant an application subject to conditions, or to 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 HIS proposes to grant the application.

235. Subsection (2) requires HIS to give notice if it intends to cancel a registration. Subsection (3) requires HIS to give notice if it decides to refuse an application for a variation of conditions made under Section 10Y. Such notice must set out the reasons (subsection (4)).

### **Section 10Z1 – Right to make representations to HIS as respects proposals**

236. This section states that a notice given under Section 10Z must indicate that the recipient of the notice can, if they so wish, make written representations to HIS within a time limit of 14 days (subsection (1)). This ensures that that person has the opportunity to make their point of view known. Subsection (2) provides that HIS 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 HIS that they will not be making representations.

#### *Notice of decision on application for registration*

### **Section 10Z2 – Notice of HIS's decisions**

237. Subsections (1) and (2) provide that HIS should give notice when granting an application for registration unconditionally or subject to a condition that has been agreed in writing between HIS and the applicant.

238. Subsections (3) to (6) deal with situations where the representations stage has been completed, requiring HIS to serve a notice in writing of their decision on the applicant. The notice must explain the right of appeal conferred by section 10Z4 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 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.

#### *Conditions as to numbers*

#### **Section 10Z3 – Conditions as to numbers**

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

#### *Appeal against decision to implement proposal*

#### **Section 10Z4 – Appeal against decision to implement proposal**

240. This section provides for an appeal against a decision on registration made by HIS under section 10Z2(3). 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.

#### *Fees*

#### **Section 10Z5 – Registration Fees**

241. This section sets powers in relation to the fees which are payable to HIS. 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 regulations. Subsection (2) sets out the activities for which the HIS is able to impose fees.

242. Subsection (3) requires HIS to have regard to its own expenses in setting particular fees within the maxima set by Scottish Ministers. This subsection also allows HIS to waive fees.

#### *Regulations*

#### **Section 10Z6 – Regulations: registers and registration**

243. Subsection (1)(a) provides for Scottish Ministers to make regulations about how HIS should maintain registers. Subsection (1)(b) allows regulations to be made about the information that should be provided in an application under Section 10P and what certificates of registration should include, for example the conditions of registration of an independent

health care service. Subsection (1)(b)(iii) provides for regulations specifying types of applicants who cannot make certain kinds of applications.

244. Subsection (1)(c) and (d) allow regulations to be made that define the circumstances and conditions, including the payment of a fee, under which HIS 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 HIS 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.

245. Subsection (1)(e) gives Scottish Ministers the power to make regulations conferring additional functions on HIS in relation to registration under Section 10P.

### **Section 10Z7 – Regulations: independent health care services**

246. This section gives Scottish Ministers the power to make regulations in respect of independent health care services. Such regulations would cover the normal day to day administrative matters required for well run independent health care services such as provision in relation to management, staffing, premises and the general way independent health care services are conducted.

247. Subsection (2) provides that regulations made under this section may make it an offence to fail to comply with specific provisions within the regulations, or with a condition of registration. Subsection (3) provides that a person guilty of such an offence would be liable to a fine not exceeding level 5 on the standard scale (£5,000 at present).

248. Subsection (4) requires the Scottish Ministers to consult such persons as they consider appropriate before making regulations under the powers in this section.

### *Complaints about independent health care services*

### **Section 10Z8 – Complaints about independent health care services**

249. Subsection (1) requires HIS to establish suitable procedures for dealing with any complaints made to it about independent health care services by users, their relatives or advocates or staff. Under subsection (3), before establishing such procedures, HIS will be required to consult SPSO and such other persons or groups of persons it considers appropriate. Any procedures developed must be kept under review by HIS and after consultation HIS may vary the procedure when appropriate to do so. While local resolution of complaints by the provider will be the norm, subsection (2) makes clear there is no requirement for a user of a service to go through the provider's own system before approaching HIS. HIS must also ensure that the established procedure is given the appropriate publicity.



## *Offences*

### **Section 10Z9 – Offences in relation to registration**

250. This section sets out offences in relation to registration under Section 10P (registration of independent health care services). Subsection (1) makes it an offence for a person to describe any service as an independent health care service for the purposes of this Act when it is not registered as such. If convicted of an offence under this subsection, the person would be liable to a fine not exceeding level 5 on the standard scale or up to three months imprisonment, or both.

251. 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 (£500) on the standard scale.

### **Section 10Z10 – False Statements in applications**

252. This section creates an offence of knowingly giving 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.

### **Section 10Z11 – Offences by bodies corporate etc.**

253. This section provides that if an offence under this group of sections is committed with the consent or connivance of individuals operating a body corporate, a partnership, or an unincorporated association, or if that person has been neglectful, then the person as well as the organisation is 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 this group of sections will not be able to escape prosecution simply because the organisation is liable: both they and it may be liable to prosecution.

## *Inquiries*

### **Section 10Z12 – Inquiries**

254. Subsection (1) allows HIS to set up an inquiry on the exercise of its functions, or over the provision of an independent health care service or a service provided under the health service, giving HIS the authority to investigate issues of serious concern that may arise in respect of their functions or any particular independent health care service or a service provided under the health service.

255. Subsection (2) enables an inquiry to be held in private. This might be necessary to protect, for example, a victim of child abuse.

256. Subsections (3) and (4) provide for sections 210(2) to (6) 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.

257. Subsections (5) and (6) allow HIS to determine who should pay their expenses in relation to an inquiry. Subsection (7) allows HIS to award expenses to parties involved in an inquiry and to direct who should pay those expenses.

258. Scottish Ministers also have a power to ask HIS to set up an inquiry under section 76 of the National Health Service (Scotland) Act 1978 (c. 29).

#### *Arrangements to provide independent health care services: registration*

#### **Section 10Z13 – Arrangements entered into by independent healthcare services: services to be registered**

259. This section provides that, although a service commissioned by a local authority or health board need not exist as a registered independent health care service at the time the contract is entered into, the service must be a registered one by the time it is actually provided.

#### *Duty of certain bodies to be aware of reports, etc.*

#### **Section 10Z14 – Local authorities and health bodies: awareness of HIS reports etc.**

260. This section ensures that local authorities and health boards must, when providing an independent health care service, or when considering the commissioning of, or contracting for, the provision of such a service, take account of relevant information, where available, about the quality of the services, or the organisation or co-ordination of such services as assessed by HIS. (This might include, for example, the grading of a service inspection reports, and any other relevant information, such as condition notices produced by the regulator). In doing this the authorities must follow any guidance issued by Scottish Ministers.

#### *Giving of notice*

#### **Section 10Z15– Giving of notice**

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

#### *Scottish Health Council*

#### **Section 10Z16 – Establishment of Scottish Health Council**

261. This section requires HIS to establish a committee of its board known as the Scottish Health Council and to delegate to the Council the functions, set out at 10C(1)(b) and (c), of supporting, ensuring and monitoring the duties under section 2B of the 1978 Act for Health Boards, Special Health Boards and the Commons Services Agency to encourage public involvement in the health services for which they are responsible; and of supporting, ensuring

and monitoring the promotion under section 2D of that Act, equal opportunities in the delivery of all their functions.

262. This section also provides that Scottish Ministers may at some future time by order, modify the functions delegated or remove the requirement on HIS to delegate specific functions to SHC and then to dissolve the SHC. Any order dissolving SHC may be reversed at some future date.

#### **Section 10Z17 – Transfer of staff**

263. This section clarifies that section 12CA concerning transfer of staff amongst health service bodies is applicable to HIS and provides that the existing staff of NHS Quality Improvement Scotland will transfer to HIS on the date on which it is established as a new body.

#### **Section 10Z18 – “Provide” in relation to independent health care services**

264. This section provides a definition of the term “provide” in this Part of the Act which is to carry on or manage an independent healthcare service.

#### *Consultation with Mental Welfare Commission for Scotland*

#### **Section 10Z19 – Duty of HIS to consult the Mental Welfare Commission for Scotland**

265. This section provides that HIS must consult the Mental Welfare Commission for Scotland (MWCS) where HIS is exercising its functions in relation to the provision of guidance, advice or information and considers it appropriate to do so, having regard the MWCS’ similar powers to promote best practice.

#### **Section 109 – Transfer of staff, etc. to Healthcare Improvement Scotland**

266. This section allows an order to be drafted to specify which (if any) staff currently employed by the Care Commission may be transferred to HIS and what property and liabilities of the Care Commission may be transferred into HIS. The provisions of section 102(1)(a), (3), (4) and (5) apply to staff transferred into HIS and references to SCSWIS in those paragraphs are to be read as references to HIS, and section 102(1)(b) is to be read as applying to property, etc, to be transferred to HIS rather than to SCSWIS.

#### **Section 110 – Healthcare Improvement Scotland: constitution, etc.**

267. Subsection (1) gives effect to schedule 16 which inserts schedule 5A into the National Health Service (Scotland) Act 1978. Subsection (2) gives effect to schedule 17 which contains modifications of enactments consequential on section 108.

## **PART 7 – MENTAL WELFARE COMMISSION FOR SCOTLAND**

### **Section 111 – Mental Welfare Commission for Scotland**

268. Section 111 amends the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”), in respect of those provisions relating to the Mental Welfare Commission for Scotland.

269. Subsection (2) amends section 4 of the 2003 Act (the Mental Welfare Commission for Scotland) to require the Commission to act in a manner which seeks to protect the welfare of persons who have a mental disorder when it is discharging functions under the 2003 Act, the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”) or any other enactment.

270. Subsection (3) inserts a new section 4A after section 4 of the 2003 Act, making provision in relation to Commission Visitors, who are persons appointed under paragraph 7A(1) or (2) of schedule 1 to the 2003 Act (subsection (6) of section 4A) to exercise the functions conferred on them by the 2003 Act or any other enactment on behalf of the Commission (subsection (1) of section 4A). Commission Visitors may, in addition to the functions conferred on them in Part 2 of the 2003 Act, exercise the Commission’s duty to raise concerns with certain bodies under section 8A of the 2003 Act and its duty under section 9(1)(d) of the 2000 Act to investigate complaints about the exercise of welfare powers by guardians, attorneys and others, if the local authority has not exercised its duty to investigate satisfactorily (subsection (2) of section 4A). Commission Visitors must comply with any directions of a general or specific nature in relation to the exercise by them of Commission functions, which the Commission has power to give, as well as act in accordance with any guidance issued by the Commission in relation to those functions (subsections (3) and (4) of section 4A). Commission Visitors are required under section 4A(5) to produce evidence of their authority if required when exercising any function conferred on them.

271. Subsection (4) amends section 5 of the 2003 Act (duty to monitor operation of Act and promote best practice). Paragraph (a) of section 5 is amended such that the duty on the Commission will now be to monitor the practical application of the observance of Part 1 of the 2003 Act (which includes the principles of the Act). Paragraph (b) of section 5 is amended such that the duty on the Commission is to promote best practice in relation to the practical application of the observance of Part 1 of the 2003 Act.

272. Subsection (5) inserts a new section 8A (duty to raise service concerns with certain bodies) after section 8 of the 2003 Act. The Commission is placed under a duty, as it considers appropriate, to raise any concerns about the provision (including the organisation or co-ordination) of any social service or health care service as respects any person with a mental disorder. Any such concerns are to be raised with SCSWIS, HIS or other relevant persons, or groups of persons.

273. Subsection (6) inserts a new section 9A (duty to give advice: further provision) after section 9 of the 2003 Act, which provides that the Commission must provide advice, so far as is reasonable, when asked to do so, to any person about any matters relevant to its functions.

274. Subsection (7) inserts a new subsection (3) to section 10 of the 2003 Act (publishing information, guidance etc), to enable the Commission to publish any advice which it has provided under section 9A(1), provided that the person to whom the advice is provided agrees to such publication.

275. Subsection (8) amends section 11 of the 2003 Act (investigations), by substituting references to “the Commission” for references to Commission Visitors, and thereby conferring the Commission’s investigation functions under section 11 directly on Commission Visitors. A new subsection (1A) is inserted into section 11, which retains a power to the Commission, where it is brought to its attention that any of the circumstances in subsection (2) may apply in respect of a patient, to instigate an investigation by directing a Commission Visitor to carry out such investigation as the Commission considers appropriate into the patient’s case; the Commission may then, having consulted the Visitor after the investigation, make such recommendations as it considers appropriate in relation to the case.

276. Subsection (9) amends section 12 of the 2003 Act (investigations: further provision), as a technical amendment in light of the changes made to section 11, to make clear the circumstances (those mentioned in section 11(2)) in which the Commission may, if it considers it appropriate to do so, cause an inquiry to be held for the purpose of carrying out an investigation into any case.

277. Subsection (10) amends subsections (1) and (3) of section 13 of the 2003 Act (visits in relation to patients), by substituting various references to “the Commission” and “persons authorised by it” for references to Commission Visitors, and thereby conferring the Commission’s visiting functions under section 13 directly on Commission Visitors. Section 13(5) is substituted with two new subsections, (5A) and (5B); subsection (5A) provides that Commission Visitors may visit the premises mentioned in subsection (2) for the purposes of providing an opportunity for any persons who may be present in the premises to meet a Commission Visitor and discuss with that Visitor any concerns that they have, and for the Visitor to assess whether the relevant statutory requirements of such patients are being met; subsection (5B) enables a Commission Visitor, whilst carrying out such a visit, to conduct an assessment of the suitability of the premises in relation to patients as individuals or as a group; consequential amendments are made to subsection (3) to reflect the new subsections (5A) and (5B). Section 13(7), which requires authorised persons to produce an authenticated document in seeking to conduct an interview, is repealed, as new section 4A(5) now makes general provision in that regard. Finally, subsection (8) of section 13 is updated to reflect that the Regulation of Care (Scotland) Act 2001 is being replaced by provision in this Act.

278. Subsection (11) amends subsections (1), (1)(a)(ii), (2)(a) and (2)(b) of section 14 of the 2003 Act (interviews), by substituting various references to “authorised persons”, i.e. persons authorised by the Commission to conduct interviews, for references to Commission Visitors, and thereby now conferring the Commission’s interview functions under section 14 on Commission Visitors. Section 14(3), which requires authorised persons to produce an authenticated document in seeking to conduct an interview, is repealed, as new section 4A(5) now makes general provision in that regard.

279. Subsection (12) amends section 15(1) of the 2003 Act (medical examination), by substituting the references to a “person authorised by the Commission” for a reference to “Commission Visitor”, and thereby now conferring the Commission’s medical examination function under section 15 on Commission Visitors. The new subsection (1A) then however makes clear that only a Commission Visitor who has also been appointed as a Medical Visitor under paragraph 7C of schedule 1 to the 2003 Act may exercise that medical examination function. Section 15(2), which currently makes provision as to who is an “authorised person” is repealed as a consequence of these changes. Section 15(3), which requires authorised persons to produce an authenticated document in seeking to carry out a medical examination, is repealed, as new section 4A(5) now makes general provision in that regard.

280. Subsection (13) amends section 16(1) of the 2003 Act (inspection etc. of records), by now including a “Commission Visitor”, in addition to those authorised by the Commission, who can require any person holding medical or other records of a patient to produce them for inspection by the authorised person or the Commission Visitor, as the case may be. Subsection (2) of section 16, which sets out who is an “authorised person” for the purposes of the section, and subsection (3) are also amended, to remove the references to a member of the Commission or “the Commission”, such that staff members only (and not Board members) will now be able to carry out this function in future.

281. Subsection (14) amends section 17(1) of the 2003 Act (duties of Scottish Ministers, local authorities and others as respects Commission), such that the relevant persons mentioned in its subsection (2) must afford Commission Visitors, as well as the Commission and those authorised by it, all facilities necessary to enable them to discharge their functions under the 2003 Act.

282. Subsection (15) gives effect to schedule 18 which makes provision about the governance of the Commission, and about Commission Visitors, modifying the 2003 Act.

## **PART 8 – SCRUTINY AND COMPLAINTS**

### *User focus*

#### **Section 112 - Scrutiny: user focus**

283. Subsection (1) imposes a duty on listed scrutiny authorities to secure continuous improvement in user focus in the exercise of their scrutiny functions and to demonstrate that improvement. Scrutiny functions of a person, body or office-holder are defined in subsection (7).

284. Subsection (2) provides that “user focus” is the involvement of users of scrutinised services in the design and delivery of scrutiny functions in relation to those services and the governance of the listed scrutiny authorities. Subsection (3) defines “scrutinised services” to mean services that are scrutinised and also persons, bodies or office-holders (providing services) that are scrutinised.

285. Subsection (4) provides that the phrase “users of a service” includes people who have not yet used the service but may use it in the future, people who act on behalf of others for whom the service is provided, and persons with a direct interest in, or directly affected by, the service. It also includes a person, such as a local authority, with a direct interest in, or directly affected by the scrutiny of a service (i.e. it includes the person providing the service, such as, the local authority) and it includes a person with a direct interest in, or directly affected by the scrutiny of a person, body or office-holder providing services.

286. Subsection (5) allows the Scottish Ministers to add, by order, a person, body or office-holder which has scrutiny functions to the list of authorities that are subject to the duty in schedule 19. Subsection (6) requires the Scottish Ministers to consult those in question, before making such an order.

### **Section 113 - User focus: guidance etc.**

287. Subsection (1) requires listed scrutiny authorities to have regard to any guidance in relation to the duty provided by the Scottish Ministers, and to what are otherwise regarded as proper arrangements for securing and demonstrating continuous improvement in user focus.

288. Subsection (3) provides that arrangements may be regarded as proper arrangements by reference to generally recognised published codes or otherwise. Reference could therefore be made to professional codes of practice. Subsection (2)(a) provides that the guidance issued by Scottish Ministers may include guidance on how to make, and what is to be included in, such arrangements.

289. Subsection (5) provides that if there is a conflict between guidance provided by Scottish Ministers and these proper arrangements, then it is the guidance that must be followed. Subsections (6) and (7) enable the Scottish Ministers to require a listed scrutiny authority to explain why it has not complied with guidance provided by Scottish Ministers, and to publish that explanation.

### **Section 114 - Scrutiny: duty of co-operation**

290. Subsection (1) imposes a duty on scheduled scrutiny authorities to co-operate and coordinate activity with each other and, where appropriate, the Scottish Ministers, with a view to improving the exercise of their scrutiny functions in relation to local authorities (including public services provided by them or on their behalf), social services and health services. This must be with regard to efficiency, effectiveness and economy. Scrutiny functions of a person, body or office-holder are defined in subsection (10). This duty requires, for example, SCSWIS and Her Majesty’s Inspectors of Education to co-operate and carry out integrated inspections in relation to the inspection of school care accommodation services (as defined in schedule 12).

291. Subsection (3) allows the Scottish Ministers to add, by order, a person, body or office-holder to the list of authorities that are subject to the duty in schedule 20. An authority can only be added to the list if it has scrutiny functions in relation to local authorities or public services provided by them or on their behalf, social services or health services. Subsection (4) requires the Scottish Ministers to consult those in question, before making such an order.

292. Subsection (5) disapples the duty to the extent that compliance with it would prevent or delay action that the scheduled scrutiny authority considers necessary as a matter of urgency. Subsection (6) requires scheduled scrutiny authorities to comply with any directions given by the Scottish Ministers and have regard to any guidance issued by Scottish Ministers. Subsection (7) provides that such directions and guidance may be of a general or a specific nature, and may apply to all or some scheduled scrutiny authorities and to all or some of their functions.

### *Joint inspections*

#### **Section 115 - Joint inspections**

293. Subsection (1) requires any two or more of the persons or bodies specified in subsection (6), on being requested to do so by the Scottish Ministers, to conduct jointly an inspection of the provision of children's services, such other services within the inspection remit of the bodies involved as Scottish Ministers specify, or a combination of such services. The intention is that the Scottish Ministers would be able to require a joint inspection of, for example, child protection services, adult mental health services or services for people (that is adults and children) with learning disabilities.

294. Subsection (11) defines "children's services" to mean services provided predominantly to, or for the benefit of, children to which the provisions of section 15(1) of the Local Government in Scotland Act 2003 apply. Section 15(1) of that Act makes provision regarding community planning by local authorities. The services to which the community planning process may apply are all public services provided in the area of the local authority. These public services may be provided by public bodies or community bodies as defined in section 15(4) of that Act.

295. Subsections (2) to (4) enable the Scottish Ministers to specify the purposes for any joint inspection and to specify that any or all of the services to be jointly inspected are inspected by reference to the area in which they are provided (which can be the whole of Scotland or any part of Scotland) or to the person or group of persons to whom they are provided.

296. Subsection (5) requires a joint inspection to be carried out to a timetable approved by, and in accordance with any directions issued by, Scottish Ministers. Such directions might include which person or body is to co-ordinate the arrangements for the joint inspection and the arrangements for the publication of the report.

297. Subsection (6) lists the persons and bodies which may be required to conduct a joint inspection in terms of a request from the Scottish Ministers under subsection (1). Subsection (9) enables the Scottish Ministers, by order, to add other persons or bodies to or remove bodies from the list.

298. Subsection (7) allows any person or body listed in subsection (6) who considers a joint inspection would be appropriate to bring this to the attention of Scottish Ministers.



299. Subsection (8) enables the joint inspection team to submit their report and recommendations to Scottish Ministers following an inspection. It also requires persons or bodies participating in a joint inspection to have regard to any code of practice prepared by Scottish Ministers giving practical and general advice and promoting desirable practices. Matters such as access to and the use and destruction of confidential information are examples of the kind of matter which might be dealt with in such a code.

300. Subsection (11) defines confidential information for the purposes of this section and section 117(3).

### **Section 116 - Participation in joint inspections**

301. Subsection (1) allows Scottish Ministers to direct persons or bodies not listed in section 115(6) but which have inspection functions to participate in a joint inspection. The direction to participate may specify that participation is only to a limited extent or for a limited purpose. This section would enable Scottish Ministers to include lay people or specific organisations with particular knowledge or expertise, for example, in any aspect of services for children; provided of course any person so included was given inspection functions as an authorised person of an inspection body.

302. Subsection (2) gives Scottish Ministers the power, when directing the participation in a joint inspection of a person or body in terms of subsection (1), to limit the exercise by that person or body of the powers conferred under regulations under section 117 in relation to the conduct of joint inspections. In some cases, it would not be appropriate for such a person or body to have access to, for example, sensitive and personal information.

### **Section 117 - Regulations relating to joint inspections**

303. Subsection (1) provides for regulations relating to how inspections may be conducted, and subsection (2) provides a non-exhaustive list of what the regulations may provide for including provision as to entering premises, seizure of items, persons authorised to carry out inspections, the sharing of information, the handling of confidential information, interviews and examinations, reports and the creation of offences.

### *Public Finance and Accountability*

### **Section 118 - Amendment of Public Finance and Accountability (Scotland) Act 2000**

304. Subsection (2) transfers responsibility for appointing the three other members of Audit Scotland under section 10(2)(c) of the Public Finance and Accountability (Scotland) Act 2000 (the “2000 Act”) from the Auditor General for Scotland and the Chairman of the Accounts Commission (acting jointly) to the Scottish Commission for Public Audit (the “SCPA”).

305. Subsections (3) and (9)(a) update the 2000 Act to reflect the new name for the Public Audit Committee.

306. Subsection (4) provides that a person appointed Auditor General for Scotland holds office for a period of 8 years, vacates office on the expiry of that period and is not eligible for reappointment.

307. Subsection (5) disappplies the duty on Scottish Ministers to publish accounts and reports under section 22(5)(b) of the 2000 Act where these are published by the body or office-holder in question.

308. Subsection (6) gives the Auditor General for Scotland a power to publish the results of any examination carried out under section 23 (economy, efficiency and effectiveness examinations) of the 2000 Act.

309. Subsection (7) provides that, for the purposes of the law of defamation, reports that are sent by the Auditor General to the Scottish Ministers under section 22(4) of the 2000 Act and the results of any examination that are carried out and reported by the Auditor General to the Parliament under section 23 of the 2000 Act are absolutely privileged. Absolute privilege is a complete defence against proceedings for defamation.

310. Subsections (8)(a) and (b) provide that members of the staff of Audit Scotland and members of the Accounts Commission are not eligible for appointment as a member of Audit Scotland under section 10(2)(c) of the 2000 Act, that such appointments must not exceed three years, and that appointees may only be reappointed for one further such period.

311. Subsection (8)(c) transfers responsibility for the terms and conditions of the three other members of Audit Scotland appointed under section 10(2)(c) of the 2000 Act from the Auditor General for Scotland and the Chairman of the Accounts Commission to the SCPA, and provides that the SCPA will receive any notices of resignation from these members, rather than the Auditor General and the Chairman. Subsection 8(d) provides that the SCPA, rather than the Auditor General and the Chairman, may remove these members if they consider that the member is for any reason unable or unfit to exercise the functions of a member.

312. Subsection (8)(e) provides that the SCPA must appoint one of the three other members of Audit Scotland appointed under section 10(2)(c) of the 2000 Act to preside at the meetings of Audit Scotland, except that Audit Scotland must do this if that member is not present.

313. Subsection (9)(b) provides that for the purposes of the law of defamation, statements made in the proceedings of the SCPA, the publication under the authority of the SCPA of any statement and any report to Parliament under section 12(4) of the 2000 Act are absolutely privileged.

*Complaints handling procedures*

**Section 119 - Complaint handling procedures**

314. This section amends the Scottish Public Services Ombudsman Act 2002 by inserting the following sections 16A to 16G into that Act.

**Section 16A – Statement of principles**

315. This section requires the Ombudsman to publish a statement of principles concerning complaints handling procedures of the “listed authorities” in schedule 2 to the Scottish Public Services Ombudsman Act 2002. The Ombudsman must consult on the first such statement and any material changes and must obtain Parliamentary approval before publishing these.

316. Subsection (12) defines “complaints handling procedures” to mean procedures of listed authorities which examine complaints or review decisions in respect of action taken by a listed authority where the matter in question is one in respect of which a complaint to the Ombudsman can be made and investigated under that Act.

317. Subsection (2) requires every listed authority to have a complaints handling procedure (or procedures) in respect of action taken by that listed authority, and these procedures must comply with the published statement of principles. Subsection (3) also requires a listed authority which has statutory responsibility for a complaints handling procedure in relation to, or operated by, another listed authority, to ensure that these procedures comply with the statement of principles.

**Section 16B - Model complaints handling procedures**

318. This section enables the Ombudsman to publish model complaints handling procedures (“model CHPs”) for listed authorities. Model CHPs must also comply with the statement of principles published by the Ombudsman. Subsection (6) ensures that listed authorities specified under section 16C(1) must comply with any published changes to the relevant model CHP, but it is left to the Ombudsman to decide whether to direct the listed authority to resubmit a description if its complaints handling procedure under section 16E(1). If the Ombudsman withdraws a model CHP, any related specifications under section 16C(1) cease to have effect.

**Section 16C - Model complaint handling procedures: power to specify**

319. This section enables the Ombudsman to specify any listed authority to which a model CHP is relevant. A specified listed authority must have a complaints handling procedure that complies with the relevant model CHP. On being specified, a listed authority must submit a description of its complaints handling procedure which takes account of the model CHP within 6 months. The listed authority may, with the Ombudsman’s consent, disapply aspects of the model CHP if this is necessary for its effective operation. Specifications can be revoked at any time.

### **Section 16D - Declarations of non-compliance**

320. This section enables the Ombudsman to declare that a complaints handling procedure of a specified listed authority does not comply with the relevant model CHP, and if not specified, that the procedure does not comply with the statement of principles. The Ombudsman must give reasons in writing and may also specify changes that would allow the declaration to be withdrawn. The listed authority must send a description of its complaints handling procedure to the Ombudsman within 2 months of the declaration, having taken account of the reasons for non-compliance and any changes specified by the Ombudsman.

### **Section 16E - Submission of description of complaints handling procedure**

321. This section gives the Ombudsman a power to require a listed authority to submit a description of its complaints handling procedure within 3 months or such other period as the Ombudsman thinks fit. A shorter period has effect even if the period given in section 16C(3) or 16D(4) has not yet expired. A listed authority is also required to provide additional information on request. This enables the Ombudsman to get an adequate description of a listed authority's complaints handling procedure.

### **Section 16F - Complaint handling procedures: application of other enactments**

322. This section provides that the duties in sections 16A(2) and (3) and 16C(2) do not apply to the extent that the relevant listed authority lacks the necessary powers to ensure compliance with the duties, for example, where another body is responsible for determining or approving the procedures to be followed. In addition, the duties in sections 16A(2) and (3) and 16C(2) do not apply to the extent that they are inconsistent with any other enactment. The latter applies to the extent, for example, that another piece of legislation expressly provides on the face of that legislation that the relevant procedures of a listed authority must apply in a way, or contain provision, that is inconsistent with these duties.

### **Section 16G – Complaints handling procedure: promotion of best practice etc.**

323. This section imposes duties on the Ombudsman in relation to complaints handling by listed authorities to (1) monitor practice, (2) promote best practice and (3) encourage co-operation and the sharing of best practice. Listed authorities must co-operate with the Ombudsman in the exercise of these duties except to the extent that they lack the necessary powers to ensure compliance with the duty, or the duty is inconsistent with any other enactment.

## **PART 9 - CHARITIES**

### **Section 120 – Information to appear on charity websites**

324. This section amends the Charities and Trustee Investment (Scotland) Act 2005 (the '2005 Act') to include websites and webpages within the scope of the regulation-making powers in sections 15 and 52 of the 2005 Act.

325. New sections 15(3) and 52(5) of the 2005 Act provide that a charity, including a Scottish Charitable Incorporated Organisation (SCIO), which has a website, either operated directly or on its behalf, may be required to include information relating to its charitable status on such webpages as are specified in regulations.

326. Section 15 of the 2005 Act introduced a requirement for a charity to include a statement that it is a charity, and such other information specified in regulations, on such documents as may be specified in regulations. The information which must be included and the documents on which it must be included are specified in the Charities References in Documents (Scotland) Regulations 2007, as amended.

327. Section 52 of the 2005 Act introduces a requirement for a SCIO to state that it is a SCIO on documents issued or signed by, or on behalf of, the SCIO. Regulations will set out the documents to which the requirement will apply.

### **Section 121 - Variation, revocation and review of directions**

328. This section allows a charity to request a review of a decision by Office of the Scottish Charity Regulator (OSCR) to issue it with a direction under section 30(1)(a) of the 2005 Act requiring it to take steps to meet the charity test. The section also allows OSCR to vary or revoke a direction – either on its own volition or at the request of the charity – after it has been issued. This may be used to take account of new information or a change in circumstances.

329. New section 71(ia) of the 2005 Act introduces a right of review of OSCR's decision to issue a charity a direction under section 30(1)(a) of the 2005 Act where it appears to it not to meet the charity test. This allows the charity to request a review of the decision – something which the legislation did not previously allow. As consequentially amended, section 73(2) prevents the direction issued under section 30 from having any effect until such time as any review and/or appeal – if requested – has been concluded.

### **Section 122 - Powers of Court of Session: deemed removal of persons**

330. This section introduces a new section 34(5)(ea) to the 2005 Act to provide that the Court of Session may make an order which has the effect of deeming a person to be removed from the management or control of a charity or body, even if that person is no longer involved with the management or control of the charity or body, the charity or body has ceased to exist, the body is no longer a charity or the body is no longer controlled by a charity.

331. The effect of this order is that the person in respect of whom it was made is disqualified, under section 69 of the 2005 Act, from acting as a charity trustee in the future.

### **Section 123 - Delegation of functions**

332. This section delegates the power provided by section 126 to the Scottish Ministers, in respect of Registered Social Landlords.

### **Section 124 - Reorganisation of charities**

333. This section amends the 2005 Act to allow OSCR to approve a charity reorganisation scheme where the charity is proposing to insert a new administrative provision to its constitution, and the new amendment will enable the charity to be administered more effectively.

334. The new sections 39(1A) and 40(2A) of the 2005 Act prevent OSCR and the Court of Session approving a scheme where the inserted clause allows the charity to change its purposes beyond the spirit of its constitution.

### **Section 125 - Reorganisation of restricted funds**

335. This section introduces a new Chapter 5A to the 2005 Act, which makes provision for OSCR to approve the reorganisation of restricted funds held by a charity. The new section 43A(1) sets out the criteria that must be met for OSCR to be able to approve a restricted fund reorganisation, while subsection (2) sets out what the conditions referred to in paragraph (a)(i) are, at least one which must be satisfied in order for OSCR to be able to approve a reorganisation scheme.

336. Subsection (3) gives the Scottish Ministers the power to make regulations setting out further details in relation to the application process. Subsection (4) sets out examples of what those regulations may provide, including publication requirements and the timescale within which OSCR must make a decision. Subsection (4)(d) makes clear that the regulations may make further provision relating to the action which a charity applying for a reorganisation may take to satisfy OSCR that it has been unable to ascertain the wishes of the donor.

337. Section 43B allows OSCR, either of its own accord or on the application of a charity, to apply to the Court of Session for approval of a restricted fund reorganisation scheme. Subsection (1) sets out the conditions that OSCR must be satisfied of in order for it to make such an application. Subsection (5) provides the Scottish Ministers with a power to make regulations setting out the action OSCR may take to satisfy itself in relation to seeking the views of the donor. Subsection (6) adds a clarification that this does not affect the Court's ability to consider, and approve, a *cy pres* scheme in relation to a charity.

338. Section 43C provides that an approved restricted fund reorganisation scheme allows the funds to be used in a manner permitted by that scheme, despite any contrary provision.

339. Section 43D provides definitions of terms used in the Chapter, and adds the refusal of an application under the chapter to the decisions which can be reviewed and appealed.

## **Section 126 - Appointment of charity trustees**

340. New section 70A makes provision for OSCR to appoint charity trustees. Section 70A(1) sets out the conditions which must apply for OSCR to be able to act, i.e. that a charity has an insufficient number of charity trustees to be able to appoint a charity trustee under its constitution and that charity's constitution does not provide a mechanism to appoint a charity trustee in those circumstances. Section 70A(2) sets out who may request that OSCR act, while subsection (3) makes clear that OSCR may only make as many appointments as is necessary to enable the charity to appoint further charity trustees itself. Subsection (4) makes clear that the appointment of a charity trustee in this manner is for a time limited period of no more than 12 months and that the appointed charity trustee has the same functions as a charity trustee appointed under the charity's constitution. This includes the charity trustee duties set out in section 66 of the 2005 Act.

341. Subsection (5) allows the appointed charity trustee's term of appointment to be extended by one period of up to 3 months where OSCR, the charity trustees and the acting charity trustee agree. This is to allow further time for any necessary amendments to be made to the constitution to prevent the situation occurring in the future, in the event that the changes have not been completed within the initial 12 month period.

342. Subsection (6) allows the acting charity trustee to be appointed as a charity trustee under the charity's constitution at any time during the period in which they are an acting charity trustee. Subsection (7) prevents an acting charity trustee voting on their own appointment as a charity trustee in order to avoid any conflict of interest, while subsection (8) makes clear that a person's appointment as an acting charity trustee ends if they are appointed as a charity trustee under the charity's constitution.

## **Section 127 – Charity trustees' indemnity insurance**

343. This section inserts section 68A into the Charities and Trustee Investment (Scotland) Act 2005.

344. Section 68A(1) allows charity trustees to purchase, from charity funds, indemnity insurance against personal liability in their role as charity trustee or as directors or officers of any body corporate carrying on any activities on behalf of the charity.

345. Sections 68A(2) and (3) set out certain types of liability that must be excluded from the provision of any indemnity, for example liability incurred by a trustee to pay a fine imposed in criminal proceedings.

346. Section 68A(4) clarifies that this provision does not allow the purchase of insurance if it is expressly prohibited by the charity's constitution and clarifies that indemnity insurance can be provided despite any provision prohibiting the charity trustees receiving any personal benefit from charity funds.

## **PART 10 – MISCELLANEOUS AND GENERAL PROVISIONS**

### *Miscellaneous*

#### **Section 129 - Local Government (Scotland) Act 1973: minor amendment**

347. This section amends section 102(2A) of the Local Government (Scotland) Act 1973 to repeal an obsolete reference.

#### **Section 130 - Consultation by water and sewerage services providers**

348. This section amends the Water Industry (Scotland) Act 2002 to make provision for the consultation of those persons who are licensed to provide water and/or sewerage services under section 6 of the Water Services etc. (Scotland) Act 2005 (“licensed providers”) on certain matters affecting the water industry. Licensed services may include meter reading, billing and charge collection. Subsections (1) to (6) amend the Water Industry (Scotland) Act 2002 to add licensed providers as a statutory consultee on certain matters relating to the water sector. Subsection (7) requires the Scottish Water to send licensed providers a copy of its annual report to Ministers

#### **Section 131 - Complaints about water services and sewerage services providers**

349. This section inserts a new section 11A into the Water Services etc. (Scotland) Act 2005 to make provision for the Scottish Public Services Ombudsman, on the request of the licensed provider, to exercise powers under the Scottish Public Services Ombudsman Act 2002 in respect of complaints made against that licensed provider. The section provides that once this arrangement has begun, it may only be brought to an end by the licensed provider with the agreement of the Water Industry Commission for Scotland.

### *General*

#### **Section 132 – Ancillary provision**

350. This section allows the Scottish Ministers, by order, to make consequential, supplemental, incidental, transitional, transitory or saving provision for the purposes of, in consequence of, or for the purposes of giving full effect to, any provision of the Act.

#### **Section 133 - Orders and regulations: Parts 8 and 10**

351. This section regulates the powers conferred on Scottish Ministers by Parts 8 and 10 to make orders and regulations. It requires these powers to be exercised by statutory instrument and provides that the powers may be used to make different provisions for different purposes. It also establishes the type of Parliamentary procedure which applies to these instruments.



### **Section 134 – Short title and commencement**

352. This section provides that sections 103, 109, 132, 133 and 134 come into force on Royal Assent, with the remaining provisions coming into force on such days as the Scottish Ministers may, by order, appoint.

353. Subsection (3) imposes a ‘sunset provision’ on the provisions in Part 2 by providing that sections 14 to 30 and schedules 5, 6 and 7 cease to have effect 5 years after they come into effect. Subsection (6) ensures that if this ‘sunset provision’ is triggered, the repeal of the provisions in Part 2 does not affect the provisions of any order already made under that Part. Subsection (4) allows the Scottish Ministers, by affirmative order, to extend or further extend, the period for which the order-making provisions in Part 2 have effect.

### **SCHEDULE 1 - DEER COMMISSION FOR SCOTLAND: CONSEQUENTIAL AMENDMENTS**

354. Schedule 1 is introduced by section 1 and sets out consequential amendments and repeals to other legislation required as a result of the provisions of that section.

355. Paragraphs 2 to 4 deal with various amendments to the Natural Heritage (Scotland) Act 1991 (“the 1991 Act”) required to give SNH aims and purposes, functions and duties in relation to deer. The amendments also extend the general function of commissioning research to “any research, inquiry or investigation”.

356. Paragraphs 5 to 27 amend various provisions of the Deer (Scotland) Act 1996 (“the 1996 Act”) including amendments so as to substitute all references to “the Deer Commission for Scotland” and “the Commission” with “Scottish Natural Heritage” except where this is not appropriate. There are also two consequential repeals made to the 1996 Act in paragraphs 25 and 26.

357. Paragraphs 28 to 31 cover further consequential amendments required to remove entries for the Deer Commission for Scotland in the Ethical Standards in Public Life etc.(Scotland) Act 2000, the Scottish Public Services Ombudsman Act 2002, the Freedom of Information (Scotland) Act 2002 and the Public Appointments and Public Bodies etc. (Scotland) Act 2003 as a result of section 1.

### **SCHEDULE 2 – TRANSFER OF WATERWATCH SCOTLAND FUNCTIONS: MODIFICATION OF ENACTMENTS**

358. Schedule 2 is introduced by section 3(6) and modifies enactments in consequence of the transfer of functions from the Water Customer Consultation Panels and their Convener (known together by the operating name of Waterwatch Scotland) to the Scottish Public Services Ombudsman (SPSO) and the National Consumer Council (NCC) and makes repeals in consequence of the dissolution of Waterwatch Scotland.

**Part 1 - Amendments**

359. In Part 1 of this schedule, paragraphs 1 to 13 amend the Water Industry (Scotland) Act 2002 (the 2002 Act). Paragraph 2 introduces a new section 2A into the 2002 Act which places certain bodies including Scottish Ministers and Scottish Water under a duty to have regard to representations made by NCC and to publish responses to any proposals made by it.

360. Paragraph 3 gives the Water Industry Commission for Scotland (WICS) a power of direction over Scottish Water to ensure that the NCC can obtain information needed from Scottish Water for the exercise of its functions.

361. Paragraph 4 requires the WICS to include information on representations from NCC in its annual report to Ministers and to explain any decision not to act upon these representations.

362. Paragraph 5 gives Ministers a power of direction over Scottish Water to pay NCC sums in respect of its expenses in representing Scottish Water's customers. The power is exercisable after consultation with NCC.

363. Paragraphs 8 to 12 add NCC in place of Waterwatch Scotland as the statutory consultee in relation to various consultation processes under the 2002 Act. Paragraph 13 requires Scottish Water to send a copy of its annual report to NCC.

364. Paragraph 14 amends the Water Services etc. (Scotland) Act 2005 to add NCC in place of the Convener to the list of bodies that the WICS must consult when making a disconnections code.

365. Paragraphs 15 to 20 amend the Consumers, Estate Agents and Redress Act 2007 (2007 Act). Paragraph 17 inserts a new section 7A into the 2007 Act to require NCC to provide Scottish Ministers with an annual report on all activities in relation to Scottish Water and for Scottish Ministers to lay this report before the Scottish Parliament.

366. Paragraph 18 inserts a new section 20A into the 2007 Act to require those bodies representing water customers' interests (NCC, the SPSO and the WICS) to enter into a co-operation arrangement.

367. Paragraph 19 adds the WICS as a "designated regulator" for the purposes of section 24 (*Provision of information to the Council*) of the 2007 Act. This has the effect both of allowing NCC to obtain information relevant to its functions from the WICS and for the WICs to obtain information from NCC under section 27 of the 2007 Act. Paragraph 20 adds Scottish Water and the WICS as a 'regulated provider' and "relevant regulator" respectively, for the purposes of section 25 (*Enforcement by regulator of section 24 notice*) of the 2007 Act. This means that if Scottish Water fails to comply with an information notice issued to it by NCC under section 24 of the 2007 Act, NCC can refer the matter to the WICS for investigation and possible enforcement.

***Part 2 - Repeals***

368. Part 2 repeals sections of the Water Industry (Scotland) Act 2002, the Scottish Public Services Ombudsman Act 2002, the Freedom of Information (Scotland) Act 2002 and the Water Services etc. (Scotland) Act 2005 to remove obsolete references to the Convener and Water Customer Consultation Panels.

**SCHEDULE 3 – DISSOLUTION OF WATERWATCH SCOTLAND:  
ARRANGEMENTS FOR STAFF, PROPERTY ETC.**

369. Schedule 3 is introduced by section 3(7) and transfers the staff and property, liabilities and ongoing matters of Waterwatch Scotland to the Scottish Public Services Ombudsman (SPSO) and the National Consumer Council (NCC).

370. Paragraphs 1 to 6 make provision for the transfer of staff from Waterwatch Scotland Limited (the company created to provide staffing for the Convener of the Panels and whose employees perform work in relation to complaints-handling and representation) to the relevant body. Those staff whose primary function is complaints-handling transfer to the SPSO and those whose primary function is customer representation transfer to NCC. Where staff undertake both customer representation and complaints-handling functions the Convener is given the power to determine to which organisation staff should transfer. The transfer preserves the employees' original terms and conditions.

371. Paragraph 7 makes provision for the transfer of property and liabilities to either SPSO or NCC based on primary function.

372. Paragraph 8 makes provision where there are ongoing complaints which transfer to the SPSO but which may not be dealt with using the SPSO's powers under the Scottish Public Services Ombudsman Act 2002. The provision permits the SPSO to take forward the complaints using the Convener's existing powers under section 6A of the Water Industry (Scotland) Act 2002, despite its repeal.

**SCHEDULE 4 - REGULATION OF OFFICERS OF COURT: MODIFICATIONS OF  
ENACTMENTS**

373. Schedule 4 is introduced by section 13 and sets out amendments and repeals relating to the existing provisions which regulate officers of court.

***Part 1 - Amendments***

374. Part 1 amends the rules in relation to officers of court in Part V of the Debtors (Scotland) Act 1987 ("the 1987 Act") and confers functions upon the Lord President, the Court of Session and Sheriffs Principal in order to implement provisions of Part 3 of the Bankruptcy and Diligence etc. (Scotland) Act 2007 ("the 2007 Act").

375. Paragraph 2 amends section 75 of the 1987 Act (regulation of organisation, training, conduct and procedure). New powers are given to the Court of Session, allowing it to regulate by Act of Sederunt court rules the conduct of officers of court when exercising their extra-official functions and to prescribe the procedure in relation to appeals under section 82 of the 1987 Act. Additional powers are also given to Sheriffs Principal allowing them to revoke permissions for remuneration under section 75(2).

376. Paragraph 3 amends section 76 of the 1987 Act (Advisory Council on Messengers at Arms and Sheriff Officers) so as to allow the Lord President to make additional lay appointments to the Advisory Council as considered appropriate.

377. Paragraph 4 amends section 79 of the 1987 Act (investigation of alleged misconduct). The amendments to section 79(1) extend the application of section 79 and expand the definition of “misconduct” as it applies under sections 79 and 80 to match its scope under the 2007 Act.

378. Paragraph 5 amends section 80 of the 1987 Act (courts’ powers in relation to offences or misconduct). The Court of Session’s powers and the powers of Sheriffs Principal under section 80(1) and (2) are extended to include powers to restrict the functions and activities of messengers-at-arms and sheriff officers respectively. New powers are introduced under section 80(3A) and (3B) giving the Court of Session and Sheriffs Principal the power to suspend messengers-at-arms and sheriff officers placed under investigation or charged with an offence. Section 80(4A) is introduced to give the Court of Session powers to restrict the functions and activities of, or suspending, messengers-at-arms at the end of disciplinary proceedings under section 79(3). Section 80(6A) is introduced to give Sheriffs Principal powers to make orders restricting the functions and activities of, or suspending, sheriff officers.

379. Paragraph 6 amends section 81 (provisions supplementary to section 80) to ensure that any orders in relation to offences or misconduct made under section 80(1)(a), (2)(a), (3A), (3B), (4), (4A), (6), (6A) or (8)(b) are intimated to the professional association designated under section 63(1) of the 2007 Act. Subsection (3) of section 81 is amended to give Sheriffs Principal power, on receipt of intimation of an order under section 80(3A), (3B), (4A) or (6A), to make an order suspending a sheriff officer.

380. Paragraph 7 amends section 82 (appeals from certain decisions under sections 79(5) and 80) so as to extend the remit for appeals to the Inner House of the Court of Session to include appeals from the decision of a Lord Ordinary or Sheriff Principal in relation to section 77(1) (appointment of messengers-at-arms) and section 80(3A), (3B), (4A), (6A) or (8)(b) (various orders in relation to officers’ misconduct).

381. Paragraph 8 introduces a new section 86A (Electronic communications) so as to include within the scope of Part V admissions (e.g. in section 79(2)) given in electronic format.

382. Paragraph 9 introduces the amendments to the Bankruptcy and Diligence etc. (Scotland) Act 2007.

383. Paragraph 11 amends section 51 of the 2007 Act (information and annual report) so as to require the Advisory Council on Messengers at Arms and Sheriff Officers (“the Advisory Council”), as opposed to the Scottish Civil Enforcement Commission (“the Commission”), to prepare an annual report on its activities. The report may contain statistical analysis in relation to officers of court. The professional association designated under section 63 has a duty to provide information for the report if asked to do so by the Advisory Council. The report must be published and a copy given to the Scottish Ministers.

384. Paragraph 13 amends section 61 of the 2007 Act (regulation of judicial officers). Powers allowing the Scottish Ministers to make regulations in relation to fees and charges levied by an officer of court under section 61(2)(d) and the obligation to consult the Commission before making such regulations under section 61(3) are removed. There are, however, existing powers in relation to fees levied by officers of court under the Sheriff Courts (Scotland) Act 1907, the Execution of Diligence (Scotland) Act 1926 and the 1987 Act as with the current Act of Sederunt (Fees of Sheriff Officers). The obligation to consult the Commission otherwise under section 61(2) becomes an obligation to consult the Lord President of the Court of Session (“the Lord President”) and each Sheriff Principal.

385. Paragraph 14 amends section 62 of the 2007 Act (duty to notify Commission of bankruptcy etc.) so as to make the obligation to notify the Commission under section 62(1) an obligation to notify the Lord President or the Sheriff Principal from whom an officer holds a Commission.

386. Paragraph 15 amends section 63 of the 2007 Act (judicial officers’ professional association). Section 63 gives the Scottish Ministers powers to designate and make provision for a professional association for officers of court. Section 63(1A) extends these powers by allowing the Scottish Ministers to include provision requiring officers of court to provide information to the professional association (for statistical purposes related to the Advisory Council power in section 51). The obligation to consult the Commission prior to making such regulations becomes an obligation to consult the Lord President and each Sheriff Principal.

387. Paragraph 16 introduces section 63A (code of practice), replacing the Commission’s duty under section 55. The professional association must, subject to prior approval of the Lord President, prepare and publish a code of practice in relation to the functions of officers of court and may prepare and publish a code of practice in relation to the undertaking of activities by officers of court. Either code may be revised. Where revisals are substantial, the code must be published; otherwise, it may be published. Copies must be sent to the Scottish Ministers, the Lord President, each Sheriff Principal and each officer of court.

388. Paragraph 17 amends section 64 of the 2007 Act (duty of professional association to forward complaints to Commission). The professional association’s duty to forward complaints to the Commission will become a duty to forward complaints to the Lord President and the appropriate Sheriff Principal.

389. Paragraph 18 amends section 65 of the 2007 Act (information from professional association connected with discipline). The Lord President or any Sheriff Principal, as opposed to the Commission, may require the professional association to provide information under section 65.

390. Paragraph 19 introduces section 65A (annual fee) to replace provision in the 2007 Act. The professional association may, subject to the approval of the Lord President, make rules requiring officers of court who hold a commission to pay an annual fee. Rules made under this provision may make provision in relation to when and in what manner the fee must be paid, and other matters the professional association considers appropriate.

391. Paragraph 20 amends section 66 of the 2007 Act (inspection of judicial officer). The Commission's powers to appoint a person to inspect and report back on the works or particular aspects of the work of an officer of court will be transferred to the Lord President or any Sheriff Principal. The obligation to pay a person appointed will be borne by the Scottish Ministers, as opposed to the Commission.

392. This part also replaces various references to "judicial officers" in the 2007 Act with references to messengers-at-arms and sheriff officers.

### ***Part 2 - Repeals***

393. Part 2 repeals the provisions superseded by the changes made by Part 1 of this schedule, including sections 50 and 60 of the 2007 Act which would establish the Commission and abolish messengers-at-arms and sheriff officers.

### **SCHEDULE 5 - IMPROVEMENT OF PUBLIC FUNCTIONS: LISTED BODIES**

394. Schedule 5 is introduced by section 15 and lists the persons, bodies and office-holders to which the order-making powers in section 14 (public functions: efficiency, effectiveness and economy) apply.

### **SCHEDULE 6 - PART 2 ORDER-MAKING POWERS (REQUEST AND CONSENT): LISTED BODIES**

395. Schedule 6 is introduced by section 19 and lists the bodies in respect of which the Scottish Ministers cannot propose any provision by order under section 14 or 17(1) unless requested to do so in writing by the Scottish Parliamentary Corporate Body, and in respect of which the Scottish Ministers cannot lay any subsequent draft order containing such provision unless the Scottish Parliamentary Corporate Body consents.

### **SCHEDULE 7 - ORDER-MAKING POWERS: MODIFICATIONS OF ENACTMENTS**

396. Schedule 7 is introduced by section 29 and contains minor amendments and amendments consequential on Part 2.

### **SCHEDULE 8 - INFORMATION ON EXERCISE OF PUBLIC FUNCTIONS: LISTED PUBLIC BODIES**

397. Schedule 8 is introduced by section 35 and lists the persons, bodies and office-holders to which the duties to provide certain information in sections 31 and 32 apply.

## **SCHEDULE 9 - CREATIVE SCOTLAND: ESTABLISHMENT ETC.**

398. Schedule 9 is introduced by section 36(2) and makes further provision about the status, constitution, proceedings etc. of Creative Scotland.

### *Paragraph 1 – Status*

399. Creative Scotland is a body corporate but is not a Crown body.

### *Paragraph 2 – Membership of Creative Scotland*

400. The membership of Creative Scotland is to consist of a chairing member and no fewer than 8 nor more than 14 other members. All members of Creative Scotland are to be appointed by the Scottish Ministers.

401. Sub-paragraph (2) gives the Scottish Ministers power to substitute, by order made by statutory instrument, different numbers of minimum or maximum members in sub-paragraph (1)(b). A statutory instrument under sub-paragraph (2) is subject to negative resolution procedure.

### *Paragraph 3 – Terms of appointment etc.*

402. Each member of Creative Scotland is to be appointed for such period as the Scottish Ministers think fit. A member of Creative Scotland holds and vacates office in accordance with the terms and conditions of appointment but may resign office as a member by giving written notice (see sub-paragraph (2)).

403. Sub-paragraph (3) provides that once a person ceases to be a member of Creative Scotland they are eligible to be reappointed as a member.

### *Paragraph 4 – Removal of members*

404. The Scottish Ministers have the power to remove a member of Creative Scotland from office if they are satisfied that the member is insolvent (see sub-paragraphs (a) and (b)), has been absent from meetings without permission, or is otherwise unfit or unable to discharge the functions of a member of Creative Scotland.

### *Paragraph 5 – Disqualification from membership*

405. Members of the Scottish Parliament, members of the House of Commons and members of the European Parliament are disqualified from appointment and from holding office as members of Creative Scotland.

### *Paragraph 6 – Remuneration and allowances for members*

406. Creative Scotland is to pay to each of its member's remuneration, allowances and expenses determined by the Scottish Ministers.

*Paragraph 7 – Chief executive and other employees*

407. Creative Scotland is to employ a chief executive and sub-paragraph (2) provides that the chief executive of Creative Scotland may not be a member of Creative Scotland. The first chief executive of Creative Scotland is to be the individual employed as the chief executive designate of Creative Scotland 2009 Limited immediately before the coming into force of paragraph 7. If for whatever reason there is no such person, the first chief executive of Creative Scotland is to be appointed by the Scottish Ministers (see sub-paragraphs (3) and (4)). Each subsequent chief executive of Creative Scotland is to be appointed, with the approval of the Scottish Ministers, by Creative Scotland. Creative Scotland will determine, with the approval of the Scottish Ministers, the chief executive's terms and conditions (see sub-paragraph (5)).

408. Creative Scotland may appoint employees other than the chief executive and may determine their terms and conditions of employment (see sub-paragraph (6)). The Scottish Ministers may give directions to Creative Scotland in relation to the appointment of employees and their terms and conditions of employment (see sub-paragraph (7)).

409. Sub-paragraph (8) gives Creative Scotland power to arrange, with the approval of the Scottish Ministers, for pensions, allowances or gratuities in relation to employees of Creative Scotland. The reference in sub-paragraph (8) to pensions, allowances and gratuities includes a reference to pensions, allowances and gratuities by way of compensation for loss of employment (see sub-paragraph (9)).

*Paragraph 8 – Committees*

410. Creative Scotland may establish committees for any purpose relating to its functions. Creative Scotland may appoint persons who are not members of Creative Scotland to be members of a committee, but such persons are not entitled to vote at meetings of the committee.

411. A committee of Creative Scotland is to comply with any directions given to it by Creative Scotland (see sub-paragraph (4)).

*Paragraph 9 – Procedure and meetings*

412. Creative Scotland determines its own procedure and the procedure of its committees. The validity of any proceedings of Creative Scotland or any of its committees is not affected by any irregularity in the membership of Creative Scotland.

413. Sub-paragraph (3) provides that members of the Scottish Executive and persons authorised by the Scottish Ministers may attend and take part in meetings of Creative Scotland or any of its committees, but are not entitled to vote at such meetings.

*Paragraph 10 – General powers*

414. Paragraph 10 provides for the general legal powers of Creative Scotland.



415. Sub-paragraph (1) gives Creative Scotland wide power to do anything related to the exercise of its functions. Without prejudice to the generality of this power, sub-paragraph (2) sets out particular powers of Creative Scotland.

*Paragraph 11 – Delegation of functions*

416. Creative Scotland has power to authorise the chief executive, any other employee or any of its committees to exercise its functions. Sub-paragraph (2) restricts Creative Scotland's power to delegate its functions by providing that Creative Scotland may not authorise any other person to exercise functions relating to financial accounting.

417. Any delegation under sub-paragraph (1) does not affect the responsibility of Creative Scotland for the exercise of its functions (see sub-paragraph (3)).

*Paragraph 12 – Location of office*

418. Paragraph 12 requires Creative Scotland to obtain the approval of the Scottish Ministers before determining the location of its office premises.

*Paragraph 13 – Accounts*

419. Sub-paragraph (1) requires Creative Scotland to manage its financial accounting and requires Creative Scotland to do so in accordance with any directions the Scottish Ministers may give.

420. Sub-paragraph (2) requires Creative Scotland to send its annual statement of accounts to the Auditor General for Scotland for auditing.

*Paragraph 14 – Reports*

421. Creative Scotland is required to prepare an annual report. Sub-paragraph (2) requires Creative Scotland to publish its annual report, lay a copy before the Scottish Parliament and send a copy to the Scottish Ministers.

422. Creative Scotland may publish other reports and information on matters relevant to its functions.

**SCHEDULE 10 - CREATIVE SCOTLAND: MODIFICATIONS OF ENACTMENTS**

423. Schedule 10 is introduced by section 43 and modifies specified Acts of the Scottish Parliament to insert new references to Creative Scotland and delete redundant references to the Scottish Arts Council and Scottish Screen (which will be dissolved by non-legislative means).

**SCHEDULE 11 - SOCIAL CARE AND SOCIAL WORK IMPROVEMENT  
SCOTLAND: ESTABLISHMENT ETC.**

424. Schedule 11 is introduced by section 44(4) and makes further provision about the status, constitution, proceedings etc. of SCSWIS.

*Paragraph 1 – Status*

425. SCSWIS is a corporate body but not a Crown body.

*Paragraph 2 – Membership of SCSWIS*

426. The membership of SCSWIS is to consist of a chairing member, the chair of Health Improvement Scotland, the convener of the Scottish Social Services Council and no fewer than 9 nor more than 12 other members. All members of SCSWIS are to be appointed by Scottish Ministers.

427. Sub-paragraph (2) gives the Scottish Ministers power to substitute, by order made by statutory instrument, different numbers of minimum and maximum members in sub-paragraph (1)(d).

428. Paragraph 3 at sub-paragraph (1) provides that it is desirable to include as members of SCSWIS persons with experience of the provision of any social service, persons who use or have used any social service, persons who care for or have cared for such persons or persons with other relevant skills, knowledge or experience. Sub-paragraph (2) provides that the Scottish Ministers must appoint at least:

- (a) 2 people who are past or present users of care services,
- (b) 2 people who are past or present carers for past or present users, or
- (c) one person from (a) and (b).

*Paragraph 4 – Terms of appointment etc.*

429. Each member of SCSWIS is to be appointed for such a period as the Scottish Ministers think fit. A member of SCSWIS holds and vacates office in accordance with the terms and conditions of appointment but may resign office as a member by giving written notice to Scottish Ministers.

430. Sub-paragraph (3) provides that once a person ceases to be a member of SCSWIS they are eligible to be reappointed as a member for another term.

*Paragraph 5 – Removal of members*

431. The Scottish Ministers have the power to remove a member of SCSWIS from office if they are satisfied that the member is insolvent (see sub-paragraphs (a) and (b)), has been

absent from three consecutive meetings without permission, or is otherwise unfit or unable to discharge the functions of a member of SCSWIS.

*Paragraph 6 – Disqualification from membership*

432. This paragraph provides that members of the Scottish Parliament, members of the House of Commons and members of the European Parliament are disqualified from appointment and from holding office as members of SCSWIS.

*Paragraph 7 – Remuneration and allowances for members*

433. SCSWIS is to pay its members remuneration, allowances and expenses as determined by the Scottish Ministers.

*Paragraph 8 – Chief Executive and other employees*

434. SCSWIS is to employ a chief executive and sub-paragraph (2) provides that the chief executive may not be a member of SCSWIS. The chief executive is to be appointed and their terms and conditions determined, with the approval of the Scottish Ministers, by SCSWIS.

435. SCSWIS may appoint employees other than the chief executive and can determine their terms and conditions. The Scottish Ministers may give directions to SCSWIS in relation to the appointment of employees and their terms and conditions of employment (see sub-paragraph (5)).

436. Sub-paragraph (6) gives SCSWIS power to arrange, with approval from the Scottish Ministers, for pensions, allowances or gratuities in relation to employees of SCSWIS. The reference in sub-paragraph (6) to pensions, allowance and gratuities includes a reference to pensions, allowance and gratuities by way of compensation for loss of employment (see sub-paragraph (7)).

*Paragraph 9 – Committees*

437. SCSWIS may establish committees for any purpose relating to its functions. SCSWIS may appoint persons other than board members to be members of a committee, however such persons are not entitled to vote at meetings of the committee.

438. A committee of SCSWIS is to comply with any directions given to it by SCSWIS (see sub-paragraph (4)).

*Paragraph 10 – Procedure and meetings*

439. SCSWIS determines its own procedure and the procedure of its committees, including quorum. The validity of any proceedings of SCSWIS or any of its committees is not affected by any irregularity in the membership of SCSWIS or vacancy in the membership.

440. Sub-paragraph (3) provides that members of the Scottish Executive, persons authorised by the Scottish Ministers, members of Healthcare Improvement Scotland and persons authorised by it, and members of the Scottish Social Services Council and persons authorised by it may attend and take part in meetings of SCSWIS or any of its committees, but are not entitled to vote at such meetings.

*Paragraph 11 – General powers*

441. Paragraph 10 provides for the general legal powers of SCSWIS.

442. Sub-paragraph (1) gives SCSWIS wide power to do anything related to the exercise of its functions. Without prejudice to the generality of this power, sub-paragraph (2) sets out particular powers of SCSWIS.

*Paragraph 12 – Delegation of functions*

443. SCSWIS has power to delegate functions to the chief executive, any other employee or any of its committees, with the exception of approval of annual reports and accounts and approval of any budget or financial plan (see sub paragraph (2)) Any delegation under sub-paragraph (1) does not affect the responsibility of SCSWIS for the exercise of its functions (see sub-paragraph (3)).

*Paragraph 13 – Location of office*

444. This paragraph requires SCSWIS to obtain the approval of the Scottish Ministers before determining the location of its office premises.

*Paragraph 14 – Accounts*

445. Sub-paragraph (1) requires SCSWIS to keep accounts, to prepare a statement of accounts each financial year and to send a copy of it to Scottish Ministers, and to do so in accordance with any directions the Scottish Ministers may give.

446. Sub-paragraph (2) requires SCSWIS to send its annual statement of accounts to the Auditor General for Scotland for auditing.

*Paragraph 15 – Reports*

447. SCSWIS is required to prepare an annual report. Sub-paragraph (2) requires SCSWIS to publish its annual report, lay a copy before the Scottish Parliament and send a copy to the Scottish Ministers.

448. SCSWIS may publish other reports and information on matters relevant to its functions.

## **SCHEDULE 12 - CARE SERVICES: DEFINITIONS**

449. Schedule 12 is introduced by section 47(2) and provides definitions for the purposes of section 47(1) (care services) including definitions of support services, care home services, adoption services, child minding, housing support services and other associated services.

## **SCHEDULE 13 - SOCIAL WORK SERVICES FUNCTIONS: SPECIFIED ENACTMENTS**

450. Schedule 13 is introduced by section 48 and specifies the relevant enactments for the purposes of the definition of “social work services functions” in that section.

## **SCHEDULE 14 - SOCIAL CARE AND SOCIAL WORK IMPROVEMENT SCOTLAND: MODIFICATIONS OF ENACTMENTS**

451. Schedule 14 is introduced by section 106 and makes minor modifications of enactments and modifications consequential on the provisions of Part 5.

## **SCHEDULE 15 – SCOTTISH SOCIAL SERVICES COUNCIL: MODIFICATIONS OF REGULATION OF CARE (SCOTLAND) ACT 2001**

452. Schedule 15 is introduced by section 107 and makes minor modifications of Part 3 of the Regulation of Care (Scotland) Act 2001.

## **SCHEDULE 16 - HEALTHCARE IMPROVEMENT SCOTLAND: ESTABLISHMENT ETC.**

453. Schedule 16 is introduced by section 110(1) and inserts schedule 5A into the National Health Service (Scotland) Act 1978. Inserted schedule 5A (Healthcare Improvement Scotland) makes the further provision for the establishment etc. of HIS as follows.

### *Paragraph 1 – Status*

454. HIS is a corporate body but not a Crown body.

### *Paragraph 2 – Membership of HIS*

455. The membership of HIS is to consist of: a chairing member, the chair of Social Care and Social Work Improvement Scotland and no fewer than 10 or more than 13 other members. All members of HIS are to be appointed by Scottish Ministers.

456. Sub-paragraph (2) gives the Scottish Ministers power to substitute, by order made by statutory instrument, different numbers of minimum and maximum members in sub-paragraph (1)(c).

457. Sub-paragraph (3) provides that it is desirable to include as members persons with experience of the provision of any social service, persons who use or have used any social service or persons with other relevant skills, knowledge or experience.

*Paragraph 3 – Terms of appointment etc.*

458. Each member of HIS is to be appointed for such a period as the Scottish Ministers think fit. A member of HIS holds and vacates office in accordance with the terms and conditions of appointment but may resign office as a member by giving written notice to Scottish Ministers, however once a person ceases to be a member of HIS they are eligible to be reappointed as a member for another term.

*Paragraph 4 – Removal of members*

459. The Scottish Ministers have the power to remove a member of HIS from office if they are satisfied that the member is insolvent (see sub-paragraphs (a) and (b)), has been absent from three consecutive meetings without permission, or is otherwise unfit or unable to discharge the functions of a member of HIS.

*Paragraph 5 – Disqualification from membership*

460. This Paragraph provides that members of the Scottish Parliament, members of the House of Commons and members of the European Parliament are disqualified from appointment and from holding office as members of HIS.

*Paragraph 6 – Remuneration and allowances for members*

461. HIS is to pay its members remuneration, allowances and expenses as determined by the Scottish Ministers.

*Paragraph 7 – Chief Executive and other employees*

462. HIS is to employ a chief executive and sub-paragraph (2) provides that the chief executive must be a member of HIS. The chief executive is to be appointed and their terms and conditions determined, with the approval of the Scottish Ministers, by HIS.

463. HIS may appoint employees other than the chief executive and can determine their terms and conditions. The Scottish Ministers may give directions to HIS in relation to the appointment of employees and their terms and conditions of employment (see sub-paragraph (5)).

464. Sub-paragraph (6) gives HIS power to arrange, with approval from the Scottish Ministers, pensions, allowances or gratuities in relation to employees of HIS. The reference in sub-paragraph (6) to pensions, allowance and gratuities includes a reference to pensions, allowance and gratuities by way of compensation for loss of employment (see sub-paragraph (7)).

*Paragraph 8 – Committees*

465. HIS may establish committees for any purpose relating to its functions. Other than the provision at Section 10Z10 to establish the Scottish Health Council as a committee, HIS may determine the composition of its own committees and appoint persons who are not members

of HIS to those committees (sub-paragraphs (2) and (3)). A committee of HIS is to comply with any directions given to it by HIS (see sub-paragraph (4)).

*Paragraph 9 – Procedure and meetings*

466. HIS may determine its own procedure and the procedure of its committees, including any necessary quorum. The validity of any proceedings of HIS or any of its committees is not affected by any irregularity in the membership of HIS.

467. Sub-paragraph (3) provides that members of the Scottish Government, persons authorised by the Scottish Ministers, and members of Social Care and Social Work Improvement Scotland and persons authorised by it may attend and take part in meetings of HIS or any of its committees, but are not entitled to vote at such meetings. This will enable for instance a member of SCSWIS to attend a meeting when their chair person is unable to do so.

*Paragraph 10 – General powers*

468. Paragraph 10 provides for the general legal powers of HIS.

469. Sub-paragraph (1) gives HIS wide power to do anything related to the exercise of its functions. Without prejudice to the generality of this power, sub-paragraph (2) sets out particular powers of HIS.

*Paragraph 11 – Delegation of functions*

470. HIS has powers to delegate functions to its chief executive, its staff or any of its committees, with the exception of approval of annual reports and accounts and approval of any budget or financial plan (see sub-paragraph (2)) Any delegation under sub-paragraph (1) does not affect the responsibility of HIS for the exercise of its functions (see sub-paragraph (3)).

*Paragraph 12 – Location of office*

471. Paragraph 12 requires HIS to obtain the approval of the Scottish Ministers before determining the location of its office premises.

*Paragraph 13 – Accounts*

472. Sub-paragraph (1) requires HIS to keep accounts, to prepare a statement of accounts each financial year and to send a copy of it to Scottish Ministers, and to do so in accordance with any directions the Scottish Ministers may give.

473. Sub-paragraph (2) requires HIS to send its annual statement of accounts to the Auditor General for Scotland for auditing.

*Paragraph 14 – Reports*

474. HIS is required to prepare an annual report. Sub-paragraph (2) requires HIS to publish its annual report, lay a copy before the Scottish Parliament and send a copy to the Scottish Ministers.

475. HIS may publish other reports and information on matters relevant to its functions.

**SCHEDULE 17 - HEALTHCARE IMPROVEMENT SCOTLAND: MODIFICATION OF ENACTMENTS**

476. Schedule 17 is introduced by section 110(2) and makes provision for the modification of other Acts as a consequence of the establishment of HIS.

**SCHEDULE 18 – MENTAL WELFARE COMMISSION FOR SCOTLAND: MODIFICATIONS OF THE MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003**

477. Schedule 18 is introduced by section 111(15) and modifies the Mental Health (Care and Treatment) (Scotland) Act 2003 (“the 2003 Act”) in relation to the governance of the Mental Welfare Commission for Scotland (MWCS).

478. Paragraph 1 of schedule 18 amends section 326(4)(a) of the 2003 Act, which sets out the order or regulation making powers which are subject to affirmative procedure. The new powers under paragraph 2A(2) and 7A(4), which enable Scottish Ministers to adjust the numbers of those who can be appointed as Board members and Commission Visitors respectively, are added to section 326(4)(a) in replacement for the existing order making power in relation to numbers of Board members.

479. Paragraph 2 of schedule 18 provides for schedule 1 to the 2003 Act to be amended in accordance with the remainder of schedule 18.

480. Paragraph 3 of schedule 18 repeals paragraphs 3 (Membership), 4 (Terms of office etc.) and 5 (Eligibility for reappointment) of schedule 1 to the 2003 Act with paragraph 4 of schedule 18 making replacement provisions, to be inserted after paragraph 2 of schedule 1, as follows:

481. New paragraphs 2A and 2B inserted into schedule 1 to the 2003 Act make replacement provision about membership of MWCS. Paragraph 2A provides that membership of MWCS is to consist of a chairing member, and no fewer than 6 nor more than 8 other members. All members of MWCS are to be appointed by Scottish Ministers. Its sub-paragraph (2) gives the Scottish Ministers power to substitute, by order made by statutory instrument, different numbers of minimum and maximum members in sub-paragraph (1)(b).

482. New paragraph 2B provides that it is desirable to include as members of MWCS persons with experience of the provision of any service to those with mental disorder, persons who use or have used mental health services, persons who are or have been carers of those



with a mental disorder, and persons with other relevant skills, knowledge or experience relating to the MWCS' functions. Sub-paragraph (2) provides that the Scottish Ministers must appoint at least:

(a) 1 person who is a past or present user of mental health services, and

(b) 1 person who is a past or present carer of a person with a mental disorder.

483. New paragraph 2C (Terms of appointment etc) provides that each member of MWCS is to be appointed for such a period as the Scottish Ministers think fit. A member of MWCS holds and vacates office in accordance with the terms and conditions of appointment but may resign office as a member by giving written notice to Scottish Ministers. Sub-paragraph (3) provides that once a person ceases to be a member of MWCS they are eligible to be reappointed as a member for another term.

484. New paragraph 2D (Removal of members) provides that the Scottish Ministers have the power to remove a member of MWCS from office if they are satisfied that the member is insolvent (see sub-paragraphs (a) and (b)), has been absent from three consecutive meetings without the MWCS' permission, or is otherwise unfit or unable to discharge the functions of a member of MWCS.

485. New paragraph 2E (Disqualification from membership) provides that members of the Scottish Parliament, members of the House of Commons and members of the European Parliament are disqualified from appointment and from holding office as members of MWCS.

486. Paragraphs 5 and 6 of schedule 18 amends paragraph 7 of schedule 1 to the 2003 Act (Appointment etc. of chief officer and other staff). The amendments substitute references to the updated terminology of chief executive from the existing references to chief officer in paragraph 7, including in its title.

487. Paragraph 7 of schedule 18 inserts a raft of new paragraphs into schedule 1 to the 2003, after its paragraph 7, making provision in relation to Commission Visitors (new paragraphs 7A and 7B), Medical Visitors (new paragraph 7C), Committees (new paragraph 7D), Procedure and meetings (new paragraph 7E), Exercise of certain functions (new paragraph 7F), Delegation of functions (new paragraph 7G), Mandatory delegation of functions to chief executive (new paragraph 7H) and Location of office (new paragraph 7I), as follows:

488. New paragraphs 7A and 7B make provision in relation to Commission Visitors. Paragraph 7A requires the MWCS to appoint Commission Visitors to exercise the functions conferred on them under the 2003 Act or any other enactment.

489. Paragraph 7A provides for Commission Visitors to be appointed by the MWCS from amongst its staff (sub-paragraph (1)) or by the MWCS arranging for such other non-staff persons as it thinks fit to be appointed (sub-paragraph (2)). Those non-staff appointees as Commission Visitors do not become staff by virtue of that appointment, but the MWCS may

arrange to pay them remuneration and allowances or amounts under the appointment (paragraph 7B). There cannot be more than 10 non-staff appointments as Commission Visitors, but sub-paragraph (4) gives the Scottish Ministers power to substitute, by order made by statutory instrument, a different maximum number of such non-staff appointments. Sub-paragraph (5) of paragraph 7A provides that it is desirable for the MWCS to include as Commission Visitors persons with experience of the provision of any service to those with mental disorder, persons who use or have used mental health services, persons who are or have been carers of those with a mental disorder and persons with other relevant skills, knowledge or experience relating to the MWCS' functions; and sub-paragraph (6) provides that the MWCS must appoint as Commission Visitors at least:

- (a) 1 person who is a past or present user of mental health services, and
- (b) 1 person who is a past or present carer of a person with a mental disorder.

490. New paragraph 7C makes provision in relation to Medical Visitor, by requiring the MWCS in appointing Commission Visitors under paragraph 7A of schedule 1 to appoint one or more persons who have qualifications, training and experience as Ministers prescribe in regulations for the purposes of carrying out the medical examination functions under section 15 of the 2003 Act which have been conferred on Commission Visitors. Persons appointed to carry out that medical examination function may be known as Medical Visitors as well as the more generic name of Commission Visitors.

491. New paragraph 7D (Committees) enables the MWCS to establish committees for any purpose relating to its functions. The MWCS may appoint persons other than board members to be members of a committee, however such persons are not entitled to vote at meetings of the committee. A committee of MWCS is to comply with any directions given to it by MWCS (see sub-paragraph (4)). The MWCS is required to establish at least one advisory committee, constituted of persons of a description which Scottish Ministers can prescribe in regulations, for the purpose of giving advice to it about matters connected to its functions; the MWCS is bound when considering how to exercise its functions to have regard to relevant advice and information which an advisory committee gives it, whether or not the MWCS has requested that advice or information).

492. New paragraph 7E (Procedure and meetings) enables the MWCS to determine its own procedure and the procedure of its committees, including quorum. The validity of any proceedings of the MWCS or any of its committees is not affected by any irregularity in the membership of the MWCS or vacancy in the membership. Sub-paragraph (3) provides that members of the Scottish Executive, and persons authorised by the Scottish Ministers, may attend and take part in meetings of the MWCS or any of its committees, but are not entitled to vote at such meetings.

493. New paragraph 7F (Exercise of certain functions etc.) makes clear how certain functions are to be exercised. Members of the MWCS cannot be appointed as a Commission Visitor, and neither members nor any member of staff who is not so appointed as a Commission Visitor cannot otherwise exercise Visitors' functions (sub-paragraphs (1) and (3)). It is also made clear at sub-paragraph (4) that appointment as a Commission Visitor does not affect that person's employment status, whether a staff or non-staff appointment, nor does

it affect any other duties which they have been employed to perform (sub-paragraph (4)). Sub-paragraph (2) sets out that the chief executive cannot be a member of the MWCS.

494. New paragraph 7G (Delegation of functions) enables the MWCS to delegate functions to the chief executive, any other employee or any of its committees (sub-paragraph (1)), although any such delegation does not affect the responsibility of MWCS for the exercise of its functions (see sub-paragraph (4)). Sub-paragraphs (2) and (3) set out a number of exceptions to the functions that the MWCS can delegate: its functions under section 12 in relation to investigations, the approval of any acquisition or disposal of land or other property above £50,000 (or such other amount as the MWCS may with consent of Scottish Ministers determine), the approval of annual reports and accounts and approval of any budget or financial plan (see sub paragraph (2)); and any function which has been conferred on a Commission Visitor under the 2003 Act or other enactment. Sub-paragraph (5) enables the chief executive, with consent of the MWCS, to delegate his or her functions to any other employee or any MWCS committee.

495. New paragraph 7H (Mandatory delegation of functions to chief executive) requires the MWCS to delegate its functions relating to discharge of patients under the 2003 Act and its powers to recall welfare guardianship orders under the 2000 Act. Sub-paragraph (2) in exercising those delegated functions to consult the Commission, to consult a Commission Visitor in every case as appears appropriate to do so, and also requires the chief executive to have regard to any relevant MWCS guidance. Sub-paragraph (3) makes clear that delegation of those functions to the chief executive does not affect the responsibility of the MWCS for their exercise.

496. New paragraph 7I (Location of office) requires the MWCS to obtain the approval of the Scottish Ministers before determining the location of its office premises.

497. Paragraph 8 of schedule 18 repeals paragraph 8 of schedule 1 to the 2003 Act, which makes provision for regulations to be made as to the MWCS' proceedings and delegation of its functions. Provision in respect of the MWCS' proceedings and delegations of its functions is now on the face of schedule 1 instead (new paragraphs 7E, 7G and 7H).

498. Paragraph 9 of schedule 18 inserts new paragraphs 10A (Transitional provision: first chief executive) and 10B (Transitional provision: Commissioners) into schedule 1 to the 2003, after its paragraph 10.

499. New paragraph 10A (Transitional provision: first chief executive) provides for the person who is the MWCS' chief officer immediately before the provision takes effect to become the first chief executive of the MWCS under the new arrangements, under his or her existing terms and conditions of employment. If there is no chief officer at the relevant date, or the person who is chief officer is unwilling or unable to be the new chief executive, then Scottish Ministers are to appoint and determine the terms and conditions of the first chief executive. But thereafter the chief executive is to be appointed and their terms and conditions determined, with the approval of the Scottish Ministers, by the MWCS, in accordance with paragraph 7 of schedule 1 to the 2003 Act.

500. New paragraph 10B (Transitional provision: Commissioners) is a sunset provision, to terminate the appointment of any members of the Commission (including the ex officio membership of the MWCS which its chief officer holds) who continue to hold office as at the date that the new arrangements come into place.

**SCHEDULE 19 - SCRUTINY FUNCTIONS: PERSONS ETC. SUBJECT TO USER FOCUS DUTY**

501. Schedule 19 is introduced by section 112 and lists the persons, bodies, and office-holders that are subject to the user focus duty and related guidance provisions in sections 112 and 113.

**SCHEDULE 20 - SCRUTINY FUNCTIONS: PERSONS ETC. SUBJECT TO DUTY OF CO-OPERATION**

502. Schedule 20 is introduced by section 114 and lists the persons, bodies and office-holders that are subject to the duty of co-operation provisions in that section.

**PARLIAMENTARY HISTORY**

503. The following table sets out for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

<b>Proceedings and Reports</b>	<b>Reference</b>
<b>Introduction</b>	
Bill as introduced	<b><u>SP Bill 26</u></b>
<b>Stage 1</b>	
<b><i>(a) Finance Committee (lead)</i></b>	
18 <sup>th</sup> Meeting 2009 (Session 3)	<u>1 September 2009, Cols 1392 - 1410 &amp; Minutes</u>
19 <sup>th</sup> Meeting 2009 (Session 3)	<u>8 September 2009, Cols 1413 - 1457 &amp; Minutes</u>
20 <sup>th</sup> Meeting 2009 (Session 3)	<u>15 September 2009, Cols 1477 - 1504 &amp; Minutes</u>
21 <sup>st</sup> Meeting 2009 (Session 3)	<u>22 September, Cols 1523 - 1539 &amp; Minutes</u>
22 <sup>nd</sup> Meeting 2009 (Session 3)	<u>29 September 2009, Cols 1542 - 1572 &amp; Minutes</u>
23 <sup>rd</sup> Meeting 2009 (Session 3)	<u>6 October 2009, Cols 1574 - 1601 &amp; Minutes</u>
24 <sup>th</sup> Meeting 2009 (Session 3)	<u>27 October 2009, Cols 1608 - 1628 &amp; Minutes</u>

*These notes relate to the Public Services Reform (Scotland) Act 2010 (asp 8)  
which received Royal Assent on 28 April 2010*

<b>Proceedings and Reports</b>	<b>Reference</b>
8 <sup>th</sup> Report 2009 (Session 3) Finance Committee Report	<u>11 December 2010, Stage 1 Report</u>
<b><i>(b) Education and Lifelong Learning Committee (secondary)</i></b>	
21 <sup>st</sup> Meeting 2009 (Session 3)	<u>1 September 2009, Cols 2561 - 2601 &amp; Minutes</u>
23 <sup>rd</sup> Meeting 2009 (Session 3)	<u>9 September 2009, Cols 2659 - 2692 &amp; Minutes</u>
24 <sup>th</sup> Meeting 2009 (Session 3)	<u>16 September 2009, Cols 2693 - 2710 &amp; Minutes</u>
25 <sup>th</sup> Meeting 2009 (Session 3)	<u>23 September 2009, Cols 2715 - 2746 &amp; Minutes</u>
Report to Finance Committee	<u>12 October 2010, Secondary Committee Report</u>
<b><i>(c) Health and Sport Committee (secondary)</i></b>	
22 <sup>nd</sup> Meeting 2009 (Session 3)	<u>9 September 2009, Cols 2125 - 2154 &amp; Minutes</u>
23 <sup>rd</sup> Meeting 2009 (Session 3)	<u>16 September 2009, Cols 2156 - 2198 &amp; Minutes</u>
24 <sup>th</sup> Meeting 2009 (Session 3)	<u>23 September 2009, Cols 2202 - 2228 &amp; Minutes</u>
Report to Finance Committee	<u>12 October 2010, Committee Report</u>
<b><i>(d) Rural Affairs and Environment Committee (secondary)</i></b>	
21 <sup>st</sup> Meeting 2009 (Session 3)	<u>16 September 2009, Cols 1914 - 1946 &amp; Minutes</u>
Report to Finance Committee	<u>12 October 2009, Committee Report</u>
<b><i>(e) Standards, Procedures and Public Appointments Committee</i></b>	
10 <sup>th</sup> Meeting 2009 (Session 3)	<u>8 September 2009, Col 323 &amp; Minutes</u>
11 <sup>th</sup> Meeting 2009 (Session 3)	<u>29 September 2009, Col 325 &amp; Minutes</u>
Submission to Finance Committee	<u>Committee Submission (PSR 59)</u>
<b><i>(f) Local Government and Communities Committee</i></b>	
25 <sup>th</sup> Meeting 2009 (Session 3)	<u>7 October 2009, Cols 2486 - 2487 &amp; Minutes</u>
<b><i>(g) Subordinate Legislation Committee</i></b>	
23 <sup>rd</sup> Meeting 2009 (Session 3)	<u>8 September 2009, Cols 647 - 657 &amp; Minutes</u>
25 <sup>th</sup> Meeting 2009 (Session 3)	<u>22 September 2009, Cols 670 - 689 &amp; Minutes</u>
26 <sup>th</sup> Meeting 2009 (Session 3)	<u>6 October 2009, Cols 695 - 700 &amp; Minutes</u>

*These notes relate to the Public Services Reform (Scotland) Act 2010 (asp 8)  
which received Royal Assent on 28 April 2010*

<b>Proceedings and Reports</b>	<b>Reference</b>
Report to Finance Committee	<u>16 October 2009, Committee Report</u>
<b><i>(h) Consideration by Parliament</i></b>	
Stage 1 debate, 7 January 2010	<u>Debate, Cols 22495 - 22534</u> <u>Debate, Cols 22573 - 22619</u> <u>Financial resolution, Col 22620</u> <u>Decision time, Cols 22621 - 22625</u>
<b>Stage 2</b>	
<b><i>Finance Committee</i></b>	
2 <sup>nd</sup> Meeting 2010 (Session 3)	<u>26 January 2010, Cols 1764 - 1802 &amp; Minutes</u>
3 <sup>rd</sup> Meeting 2010 (Session 3)	<u>2 February 2010, Cols 1805 - 1840 &amp; Minutes</u>
4 <sup>th</sup> Meeting 2010 (Session 3)	<u>9 February 2010, Cols 1855 -1870 &amp; Minutes</u>
5 <sup>th</sup> Meeting 2010 (Session 3)	<u>23 February 2010, Cols 1919 - 1932 &amp; Minutes</u>
6 <sup>th</sup> Meeting 2010 (Session 3)	<u>2 March 2010, Cols 1974 - 1995 &amp; Minutes</u>
<b>Bill (as amended at Stage 2)</b>	<b><u>SP Bill 26A</u></b>
<b>After Stage 2</b>	
<b><i>Subordinate Legislation Committee</i></b>	
9 <sup>th</sup> Meeting 2010 (Session 3)	<u>16 March 2010, Cols 933 - 934 &amp; Minutes</u>
10 <sup>th</sup> Meeting 2010 (Session 3)	<u>23 March 2010, Col 937 &amp; Minutes</u>
Report to Finance Committee	<u>25 March 2010, Committee Report</u>
<b>Stage 3</b>	
Stage 3 debate, 25 March 2010	<u>Amendments, Cols 25002 - 25083</u> <u>Amendments, Cols 25122 - 25164</u> <u>Debate, Cols 25165 - 25183</u> <u>Decision Time, Cols 25195 - 25197</u>
Bill as passed, 25 March 2010	<b><u>SP Bill 26B</u></b>
<b>Royal Assent</b>	
Royal Assent, 28 April 2010	<b><u>Public Services Reform (Scotland) Act 2010</u></b>



