

# REGULATION OF CARE (SCOTLAND) ACT 2001

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on sections*

#### **Part 2: Local Authority Adoption and Fostering Services Etc**

121. Local authorities are under a statutory duty to provide adoption and fostering services which means that, unlike most care services, the Commission will not be able to take direct enforcement action against authorities. It would not be appropriate for the Commission to de-register a local authority's adoption service, for example, since that would prevent the authority from fulfilling its statutory duty. There may also be some other individual care services where non-registration or cancellation of registration would result in a local authority being in breach of a statutory duty. Instead the Commission will prepare a report to Ministers who will then decide what action should be taken against the local authority.
122. These services cannot therefore be covered by the registration and enforcement provisions in Part 1 of the Act. Part 2 therefore provides similar requirements and rights that will apply to local authorities providing adoption and fostering services and other services needed so as to fulfil a statutory duty. The substantive difference is the role of Scottish Ministers in being informed of improvement notices and being empowered to take default action where they consider that the provision of these services is unsatisfactory.

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

123. Subsection (1) requires a local authority to apply to the Commission to register its adoption and fostering services, and subsection 1(c) extends this to cover any other care service which a local authority determines they must provide in order to fulfil a statutory duty. Subsection (2) empowers Ministers to prescribe the manner and content of applications and that a fee should be payable.
124. Subsection (3) makes provision for the Commission to disagree with the local authority's determination and refer the matter to Ministers, giving its reasons. Ministers must then decide (subsection (4)) whether the local authority's determination is justified. If it considers that it is not, the application for registration is deemed to have been under the Part 1 provisions.

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

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

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

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

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

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

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

128. This section gives a local authority the right to make, within 14 days after receiving a notice to which the section applies, written representations to the Commission about any matter which they may wish to dispute. The notices in question are: any notice of a proposal to grant an application for registration but to do so subject to conditions, any notice of a proposal to vary, remove or impose a condition in relation to an existing registration and any notice of a proposal to refuse such an application.
129. Subsection (2) provides that the Commission may not implement the terms of the notice until the 14 day period has ended unless they receive representations during the 14 day period or the authority notifies the Commission that it will not be making representations. The intention is that the Commission should review its decision in light of any representations and that it should operate a fair and transparent process for the consideration of such representations.

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

130. This section provides that if the Commission has decided to implement a notice, such as mentioned in paragraph 128 above, it must give the local authority to which the notice applies, written notice of its decision.
131. Subsections (2)-(4) deal with situations where the representations stage has been completed, requiring the Commission to serve a notice in writing of their decision on the authority. The notice must explain the right of appeal conferred by section 39 and in the case of a decision to grant an application subject to conditions or to vary conditions, set out those conditions. A decision to implement a notice, such as is mentioned in paragraph 128 above, will take effect only after the outcome of any appeal has been determined, or after 14 days if no appeal is brought. If an authority decides not to pursue its appeal the decision will take effect immediately.

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

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

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

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

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

134. Subsection (1) provides that the Commission shall report to Scottish Ministers if an improvement notice is imposed on a local authority service registered under Part 2, and provide them with a copy of that notice. Subsection (2) requires the Commission to inform Scottish Ministers (within 14 days) as to whether a notice has been complied with within the specified timescale. Subsection (3) requires the Commission to report to Ministers if any person is convicted of an offence in relation to these services, or if it appears to the Commission that a service is being carried on other than in accordance with the relevant requirements. Subsection (4) defines a relevant offence for the purposes of this section (they are the same as for section 12 above) and relevant requirements for this section and for section 42.
135. Subsection (5) requires the Commission to report to Scottish Ministers and provide them with information about any issues in relation to a care service registered under Part 2 that may be prescribed.

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

136. Subsection (1) provides that Scottish Ministers (having received a report under section 41) may take certain actions if they are satisfied that a local authority providing a service registered under Part 2 is, without reasonable excuse, failing to comply with an improvement notice or carrying on the service not in accordance with relevant requirements.
137. Subsection (2) sets out what those actions are, either to make an order to declare an authority in default or to make a direction setting out the steps that should be taken to remedy the matter. Subsection (3)(a) provides that if an authority fails to comply with that direction Scottish Ministers can take the necessary action themselves or make arrangements for someone to do it on their behalf. Subsection (3)(b) provides that the Court of Session may order specific performance of those steps on application from the Lord Advocate.