

EXPLANATORY DOCUMENT

THE PUBLIC SERVICES REFORM (SOCIAL WORK COMPLAINTS PROCEDURE) (SCOTLAND) ORDER 2016

SSI 2016/157

1 Introduction

- 1.1 In September 2015, the Presiding Officer of the Scottish Parliament, on behalf of the Scottish Parliamentary Corporate Body (“SPCB”), requested in writing that the Scottish Ministers bring forward proposals to make provision by order under sections 14 and 17 of the Public Services Reform (Scotland) Act 2010 (“the Public Services Reform Act”) to amend the Scottish Public Services Ombudsman Act 2002 (“the SPSO Act”) to extend the ability of the SPSO to investigate complaints made about the merits of decisions made in the exercise of social work functions, so as to improve the exercise of public functions and to reduce burdens.
- 1.2 The Scottish Ministers consider that this Order will improve the exercise of public functions in regard to efficiency and effectiveness by enabling the Scottish Public Services Ombudsman to exercise parallel functions for social work complaints procedures as they do for complaints about health services.
- 1.3 The Scottish Ministers were requested to propose provision to allow the SPSO to consider complaints about the merits of decisions made in the exercise of social work functions, and also to enable the effective sharing of information between the SPSO and Social Care and Social Work Improvement Scotland (“the Care Inspectorate”) and between the SPSO and the Scottish Social Services Council (“the SSSC”) to improve the effectiveness of those bodies’ respective regulatory and investigation functions.
- 1.4 Provision contained in the draft Order is made under section 14 and section 17 of the Public Services Reform Act.
- 1.5 The draft Order does not confer any functions of legislating.

2 Effect of the provisions of the draft Order

- 2.1 The Order adjusts the functions of the Scottish Ministers, by abolishing the powers in section 5B of the Social Work (Scotland) Act 1968, which set out that Scottish Ministers may require local authorities to establish a complaints procedure in relation to social work and specify the detail of such a procedure in Directions. The Adult Social Care Policy team, within the Integration and Reshaping Care Directorate of the Scottish Government currently has responsibility for issuing directions to Local Authorities on this matter.

2.2 Abolishing these functions will improve the exercise of the SPSO's functions of creating model complaints handling procedures under sections 16A-16F of the SPSO Act. This is because there will be no scope for inconsistent procedures to be established by the Scottish Ministers and so the process of establishing model complaints handling procedures will be more effective and efficient. In particular, local authorities will not be subject to inconsistent duties in relation to the complaints handling procedures that they must establish. This means that the duties in sections 16A and 16C of the SPSO Act to comply with the SPSO's statement of principles and any model complaints handling procedure will apply. If there had been any inconsistent duties in place (as could have been the case if section 5B of the 1968 Act had not been abolished), those duties would not have applied – see section 16F of the SPSO Act.

2.3 Sections 16A-16F of the SPSO Act, referred to in paragraph 2.2 above allow the SPSO to create new model Complaints Handling Procedures (CHPs). The provisions contained in this draft Order will then enable the SPSO to:

- Create a new model CHP for social work complaints;
- Consider the merits of certain decisions when they investigate under section 2 of the SPSO Act as the third stage of an intended model CHP; and
- Share information between the SPSO and the Care Inspectorate, and between the SPSO and the Scottish Social Services Council.

2.4 Section 14 confers power on the Scottish Ministers to make any provision which they consider would improve the exercise of public functions, having regard to:

- (a) efficiency,
- (b) effectiveness, and
- (c) economy.

2.5 Insofar as the order confers on the SPSO the function of considering the merits of social work decisions taken in the exercise of professional judgment, the Scottish Ministers consider that this improves the efficiency and effectiveness of the investigation function of the SPSO. It allows the SPSO to investigate the merits of decisions rather than being confined to questions of process. It also streamlines the complaints process for the service user by removing the Complaints Review Committee stage, and providing a standardised complaints handling system under the SPSO's model complaints handling procedures.

2.6 Insofar as the order relates to the sharing of information by the SPSO with the Care Inspectorate (and vice versa) and by the SPSO with the SSSC, the Scottish Ministers consider that this will improve the effectiveness of those bodies' respective regulatory

and investigation functions. The Crerar and Sinclair Reports (described in more detail below in Section 3) both identified the need for complaints handling bodies and scrutiny bodies to share information in order to help ensure improvements are made.

- 2.7 'Public functions' are functions of the persons, bodies and officeholders listed in schedule 5 to the 2010 Act. Schedule 5 includes the SPSO, the Care Inspectorate, the SSSC and the Scottish Ministers.
- 2.8 Section 17 confers power on Scottish Ministers to make any provision which they consider would remove or reduce any burden, or the overall burdens, resulting directly or indirectly for any person from any legislation.
- 2.9 A burden is defined as any of the following:
- (a) a financial cost,
 - (b) an administrative inconvenience,
 - (c) an obstacle to best regulatory practice,
 - (d) an obstacle to efficiency, productivity or profitability, or
 - (e) a sanction, criminal or otherwise, which affects the carrying on of any lawful activity.
- 2.10 The Scottish Ministers consider that the Crerar and Sinclair Reports demonstrate that the existing social work representations/complaints system, in particular Complaints Review Committees, is time consuming, difficult to administer and thought to be lacking in independence. The existing system therefore imposes a burden (within the meaning of section 17(2)(b) and (d)), both on those wishing to make representations/complaints and on Local Authorities themselves.
- 2.11 The requirement to hold Complaints Review Committees places a financial and administrative burden on Local Authorities. The financial cost of administering Complaints Review Committees was estimated by a number of Local Authorities in 2012-13 as being on average in the region of £1,000 per complaint progressed to Complaints Review Committee. Some Local Authorities have also raised concerns that they have been unable to recruit sufficiently qualified individuals to serve on Complaints Review Committees.
- 2.12 People wishing to complain about social work are subject to the burden of an additional complaints stage compared to complaints about health services. The Complaints Review Committee stage may, according to the 1996 Directions (Circular SWSG5/1996 – Local Authority Complaints Procedures) take up to 98 days between the complainant requesting the Complaints Review Committee to consider their complaint, and the notification of any decisions made by the Local Authority, with the possibility of this timescale extending further subject to agreement between the complainant and the Local Authority. Following the Complaints Review Committee

stage, at present, a complainant is then able to seek a review of the case by the SPSO if they believe it was subject to maladministration by the Local Authority.

- 2.13 The Scottish Ministers consider that removing the Complaints Review Committee stage of social work complaints procedures therefore removes a burden from those wishing to progress their complaint through the complaints system.
- 2.14 The Scottish Ministers are satisfied that the conditions in section 16(2) and 18(2) of the Public Services Reform Act are satisfied.

3 Policy objectives

- 3.1 The broad purposes of the provision contained in the draft Order are to improve the exercise of public functions, in particular those of the Scottish Public Services Ombudsman, Care Inspectorate, SSSC and the Scottish Ministers having regard to efficiency, effectiveness and economy, and also to reduce or remove any burden resulting directly or indirectly for any person from any legislation.
- 3.2 The Crerar Review (Report of the Independent Review of Regulation, Audit, Inspection and Complaints Handling of Public Services in Scotland, published September 2007) looked into regulation, audit, inspection and complaints handling of public services in Scotland. A key finding was that complaints processes are not always accessible or easy to use, are often complex and far too variable in their content. The Crerar Review recommended reducing the complexity of the existing complaints handling systems, the introduction of a single system led by a single agency with clear remit to allocate responsibility for dealing with complaints, and allowing the lessons learned from each case to be applied more easily across all public services.
- 3.3 The Crerar Review in particular recommended that “a standardised complaints handling system should be introduced for scrutiny organisations and service providers in all public services; and [that] the Scottish Public Services Ombudsman should oversee all public service complaints handling processes”. (Crerar Review, 11.14)
- 3.4 In response to the Crerar Review, Scottish Ministers established a number of groups to consider the recommendations in more detail, including the Fit for Purpose Complaints System Action Group (FCSAG). The report of this group, known as the Sinclair Report, was published in July 2008 providing Ministers with proposals for simplifying public service complaints handling procedures, including recommendations that are specific and relevant to social work complaints.
- 3.5 The particular recommendation in the Sinclair Report for social work complaints was that Complaints Review Committees (CRCs), established as the result of Ministers’ directions under the Social Work (Scotland) Act 1968, cease to operate. Instead, the SPSO should investigate social work complaints which had not been resolved within a

local authority in order to provide a standardised system. This would increase consistency across the country and address the potential imbalance between the experience of complainants in larger and smaller authorities.

3.6 The Sinclair Report recommended that the SPSO should:

- Develop and approve, for each sector, standardised public service complaints handling systems which include realistic but challenging timescales and processes to keep all parties informed of progress;
- Coordinate training for complaints handlers, develop a complaints handling network and website, and issue guidance about how to deal effectively with complainants, including those whose behaviour is unacceptable, unreasonable or inappropriate;
- Coordinate the way outputs and outcomes from complaints are reported and followed through to improve services; and
- Allocate responsibility to service providers (or scrutiny bodies, if appropriate) to lead on individual complaints where more than one body could handle it, to ensure clarity over responsibility and eliminate duplication of effort.

3.7 The Sinclair Report further recommended that in order to reduce the complexity and perceived inconsistencies in approach, and in the structure of the complaints landscape:

- Legislation should be introduced to allow changes to the complaints landscape and to allow better sharing (e.g. to allow the SPSO and complaints handling bodies to share headline information on cases under consideration);
- The number of stand-alone complaints handling bodies should be reduced, and functions should be transferred, where appropriate, to simplify the process and landscape for consumers.

3.8 In response to the Sinclair Report, the Public Services Reform Act gave the SPSO the authority to lead the development of simplified and standardised Complaints Handling Procedures (CHPs) across the public sector. Following consultation, a Statement of Complaints Handling Principles and Guidance on Model Complaints Handling Procedures were developed by the SPSO and published at the beginning of 2011. The SPSO has set up an internal unit, the Complaints Standards Authority (CSA), which is working in partnership with individual public sector areas to oversee the process of developing model CHPs for each sector in line with the framework of the Principles and Guidance.

3.9 Following these reports, the Scottish Government conducted a consultation on proposed changes, which was undertaken between December 2011 and March 2012. The results of this consultation were that there was considerable support for the streamlining of the complaints process and the removal of the Complaints Review Committees, but there was no consensus on a preferred model.

- 3.10 The Scottish Government convened a short-life working group in 2013, chaired by Very Revd Dr Graham Forbes CBE. The working group recommended to Scottish Ministers in January 2014 that the SPSO should be enabled to investigate complaints made about the merits of decisions made in the exercise of social work functions.
- 3.11 The SPSO guidance sets out the process to be followed in a model CHP and who should be accountable at each stage. The aim of the model CHP is to provide a quick, simple and streamlined process with a strong focus on local, early resolution by empowered and well-trained staff.
- 3.12 This Order is brought forward in line with the recommendations of the Crerar Review and Sinclair Report, and those of the short-life working group of 2013. The Order will enable the SPSO to undertake the stage three review process for social work complaints, and enable the SPSO to set out a Model Complaints Handling Process for social work complaints, in line with those for other areas of public services.
- 3.13 In order for the SPSO to be able to undertake the stage three review process, it needs to have the power to consider the merits of certain social work decisions, rather than just the process by which those decisions are reached. The Order extends the ability of the SPSO to consider the merits of a decision taken in the exercise of certain social work functions, to the extent that decision was taken in consequence of the exercise of professional judgment. In this respect, the SPSO will have the power to consider the merits of decisions made, in the same way that it currently has the power to consider clinical judgment in complaints concerning health services. This provision brings the SPSO's role in investigating complaints about social work decisions into line with that for complaints about health services.
- 3.14 The Order will also allow the sharing of information between SPSO and the Care Inspectorate, and between SPSO and the Scottish Social Services Council (SSSC). This is in line with the recommendations of the Sinclair Report, in that the SPSO and complaints handling bodies should be able to share information. The intention is that should, for instance, SPSO become aware of failings within a care provider, it would be able to highlight this to the Care Inspectorate, or if there were failings raised in connection with a social worker, it might raise these with the SSSC who regulate the social work workforce.
- 3.15 SPSO is currently only able to disclose information with other bodies (including the Care Inspectorate and SSSC) under Section 19(3) of its Act, where the information is to the effect that any person is likely to constitute a threat to the health and safety of an individual or persons in general. However, that provision does not allow the SPSO to share information which would assist the Care Inspectorate or SSSC in the exercise of their regulatory functions. This Order is intended to facilitate that disclosure, subject to necessary safeguards, such as the requirements to comply with the data processing principles set out in the Data Protection Act 1998.

4 Provision contained in the draft Order

- 4.1 The draft Order contained in Annex A makes the legislative changes necessary to allow the SPSO to consider the merits of social work decisions taken in the exercise of professional judgment. It also repeals the provisions which create the framework for the existing complaints procedures.
- 4.2 Until the Order is enacted, it will remain a requirement for local authorities to continue to hold Complaints Review Committees. The saving provision means that the existing local authority complaints procedures (including Complaints Review Committees) will continue to apply to any complaints which have been made before the changes come into force.
- 4.3 The draft Order contains provisions for:
- Extending the remit of the SPSO to enable them to consider complaints made about social work which are not solely about maladministration, but enable the SPSO to consider the professional judgment of social work staff.
 - Repealing the existing power for Scottish Ministers to require local authorities to create a social work complaints procedure. One effect of this repeal is that the SPSO will be able to use its existing functions to create a model complaints handling procedure for social work complaints, and that local authorities will be obliged to adopt a procedure which complies with that model. This brings SPSO functions in relation to social work into line for those for health, where the SPSO sets out its model complaints handling procedures which it expects local authorities to follow.
 - Allowing the sharing of information between SPSO, Care Inspectorate and the Scottish Social Service Council (SSSC) where relevant to their regulatory functions.
- 4.4 The amendments made by Article 3 of the draft Order are intended to confer on the SPSO the function of considering the merits of certain social work decisions taken in the exercise of professional judgment. Section 7(1) of the SPSO Act generally precludes the SPSO from questioning the merits of discretionary decisions. However, that provision is already subject to an exception for certain health decisions taken in the exercise of clinical judgment. The new section 7(2C) is intended to provide an equivalent exception for social work decisions.
- 4.5 The reference to professional judgment is intended to reflect the reference in 7(1) to 'clinical judgment' in the context of health decisions, and to prevent the SPSO from considering the merits of wholly political decisions. Some high level political

decisions in relation to strategic or resourcing issues may be taken in reliance on professional advice from within the Local Authority. The Order will allow the SPSO to consider the merits of such decisions but only insofar as they were taken in the exercise of professional judgment.

- 4.6 The new section 7(2D) and (2E), together, describe the functions in relation to which the SPSO's enhanced investigation role will apply.
- 4.7 Section 7(2E) sets out those functions in relation to social work which will be subject to the new enhanced investigation role of the SPSO. The list of statutory functions conferred on Local Authorities by the Social Work (Scotland) Act 1968, and the enactments in Section 5(1B) of that Act do not cover all of the current social work functions of Local Authorities, such as the functions under the Adult Support and Protection Act (Scotland) 2007. Therefore the section also sets out those additional social work functions identified during the preparation and passage of the Public Bodies (Joint Working) (Scotland) Act 2014.
- 4.8 The list of persons in section 7(2D) is included because not all social work functions are conferred directly on local authorities. Some are conferred on office holders appointed under an enactment by a local authority: e.g. functions of mental health officers under the Mental Health (Care and Treatment) (Scotland) Act 2003; functions of chief social work officers in relation to guardianship under the Adults with Incapacity (Scotland) Act 2001. Such office holders are themselves liable to investigation by the SPSO by virtue of paragraph 56 of schedule 2 to the 2002 Act.
- 4.9 The draft Order, if approved and made, will come into force on 1st April 2017, to allow time for the preparations for the change to be undertaken.

5 Why the conditions in section 16 of the Public Services Reform Act are satisfied

- 5.1 With reference to provision contained in the draft Order, paragraphs 5.2 to 5.5 explain why the conditions in section 16(2) (where relevant) of the Public Services Reform (Scotland) Act are considered to be satisfied.
- 5.2 The Scottish Ministers consider that the provisions of this Order are proportionate to the policy objective. The policy objective is to ensure an improved, transparent and independent system for social work complaints, and the Order does not contain any provisions which are disproportionate to that objective.
- 5.3 The SPSO's new function of considering the merits of social work decisions is broadly consistent with its general objects, noting in particular its existing function of considering the merits of certain health decisions taken in the exercise of clinical judgment (section 7(2) of the SPSO Act).

- 5.4 The provisions do not remove any necessary protection: the social work representations procedure which will be removed by the repeal of Section 5B of the Social Work (Scotland) Act (1968) will be replaced with an improved procedure.
- 5.5 Where the provisions of this Order allow the sharing of information between the SPSO and Care Inspectorate, and between the SPSO and the SSSC, that will be done in accordance with the data protection principles set out in the Data Protection Act 1998 and subject to the SPSO, Care Inspectorate and SSSC's obligations under the Human Rights Act 1998 not to act inconsistently with rights under Article 8 of the European Convention on Human Rights (ECHR).

6 Why the conditions in section 18 of the Public Services Reform Act are satisfied

- 6.1 With reference to provision contained in the draft Order, paragraphs 6.2 to 6.4 explain why the conditions in section 18(2) (where relevant) of the Public Services Reform (Scotland) Act are considered to be satisfied.
- 6.2 The Scottish Ministers consider that the provisions of this Order are proportionate to the policy objective, and that it is not possible to confer the wider functions on the SPSO by non-legislative means. Section 7(1) of the Scottish Public Services Ombudsman Act 2002 states that the Ombudsman may not investigate the merits of a decision taken without maladministration by a listed authority in the exercise of a discretion vested in that authority. The SPSO is not able to consider the merits of decisions made where there is not maladministration without legislative change to this provision. Section 5B of the Social Work (Scotland) Act 1968 requires Local Authorities to follow complaints procedures set out by the Scottish Ministers. In order to remove that requirement, it is necessary to repeal section 5B of the 1968 Act, which may only be done via legislative change. The policy objective is to ensure an improved, transparent and independent system for social work complaints, and the Order does not contain any provisions which are disproportionate to that objective.
- 6.3 The provisions do not remove any necessary protection or prevent any person from continuing to exercise any right or freedom which that person might reasonably expect to continue to exercise: the social work representations procedure which will be removed by the repeal of Section 5B of the Social Work (Scotland) Act (1968) will be replaced with an improved procedure.
- 6.4 Where the provisions of this Order allow the sharing of information between the SPSO and Care Inspectorate, and between the SPSO and the SSSC, that will be done in accordance with the data protection principles set out in the Data Protection Act 1998 and subject to the SPSO, Care Inspectorate and SSSC's obligations under the Human Rights Act 1998 not to act inconsistently with rights under Article 8 of the European Convention on Human Rights (ECHR).

7 Consultation

- 7.1 A consultation on this draft Order was undertaken from 29th September 2015 to 14th December 2015 in accordance with section 26 of the Public Services Reform (Scotland) Act 2010.
- 7.2 A total of 53 responses were received, from a range of local authorities, organisations and individuals.
- 7.3 The overall response to the consultation showed clear support for the proposed amendments to the functions of the SPSO. The majority of the issues raised in the consultation (such as defining professional judgment, the roles of the SPSO and SSSC and the SPSO's ability to seek professional social work advice) will be addressed by the model Complaints Handling Procedure which will be prepared by the SPSO before the implementation date.
- 7.4 The consultation elicited responses about the ability of an individual to seek an appeal against a decision. The Scottish Ministers consider that the changes proposed will be robust and enable people to seek full and independent consideration of their complaint. The Scottish Ministers have, however, made the commitment to undertake a light touch review of the operation of the social work complaints handling by SPSO after a full year of operation.
- 7.5 The SPSO, in their response to the consultation, cited difficulties in making progress towards the original planned implementation date of 1st October 2016. As a result, this draft Order now contains a revised implementation date of 1st April 2017.

8 Impacts

- 8.1 The amendments to schedule 5 of the Scottish Public Services Ombudsman Act will not remove any necessary protection from individuals, but will enable the Scottish Public Services Ombudsman to share information with SSSC and Social Care and Social Work Improvement Scotland (SCSWIS – known as the Care Inspectorate) around cases where complaints are made about social work.
- 8.2 An Equality Impact Assessment has been undertaken for this instrument.
- 8.3 A Children's Rights Impact Assessment has been undertaken for this instrument.
- 8.4 A Privacy Impact Assessment has been undertaken for this instrument.
- 8.5 A Business and Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on the costs of business.

8.6 An Environmental Impact Assessment has not been prepared for this instrument as there will be no significant environmental effects from implementing it.

Scottish Government
January 2016

Annex A

Draft Order laid before the Scottish Parliament under section 25(2)(b) of the Public Services Reform (Scotland) Act 2010, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2016 No.

REGULATORY REFORM

SOCIAL CARE

**The Public Services Reform (Social Work Complaints
Procedure) (Scotland) Order 2016**

Made - - - -

Coming into force - -

1st April 2017

The Scottish Ministers make the following Order in exercise of the powers conferred by sections 14(1) and (7) and 17(1) and (9) of the Public Services Reform (Scotland) Act 2010⁽¹⁾ (“the Act”) and all other powers enabling them to do so.

The Scottish Ministers consider that the relevant conditions in sections 16(2) and 18(2) of the Act are satisfied.

The Scottish Ministers have consulted in accordance with section 26 of the Act.

In accordance with section 19(2) of the Act, the Scottish Parliamentary Corporate Body has consented to the laying of a draft of this Order.

The Scottish Ministers have laid a draft of this Order and an explanatory document before the Scottish Parliament in accordance with section 25(2)(b) of the Act.

In accordance with section 25(2)(c) of the Act, the draft of this Order has been approved by resolution of the Scottish Parliament.

(1) 2010 asp 8. The effect of sections 14 to 30 and schedules 5 to 7 of the Act has been extended by virtue of section 134(4) and S.S.I. 2015/234. Section 25 was modified by paragraph 5 of schedule 3 to the Interpretation and Legislative Reform (Scotland) Act 2010 (asp 10).

Citation and commencement

1. This Order may be cited as the Public Services Reform (Social Work Complaints Procedure) (Scotland) Order 2016 and comes into force on 1st April 2017.

Amendment of the Scottish Public Services Ombudsman Act 2002

2. The Scottish Public Services Ombudsman Act 2002(2) is amended in accordance with articles 3 and 4.

3. In section 7 (matters which may be investigated: restrictions), before subsection (3) insert—

“(2C) Subsection (1) does not apply to the merits of a decision taken by or on behalf of a person mentioned in subsection (2D) in pursuance of a social work function to the extent that the decision was taken in consequence of the exercise of the professional judgment of the social worker or other person discharging the function.

(2D) The persons are—

- (a) a local authority, or
- (b) the holder of an office established by or under any enactment to which appointments are made by a local authority.

(2E) In subsection (2C), “social work function” means a function conferred by or under—

- (a) the Social Work (Scotland) Act 1968(3),
- (b) an enactment mentioned in section 5(1B) of that Act, or
- (c) an enactment listed in the schedule to the Public Bodies (Joint Working) (Scotland) Act 2014(4).”.

4. At the end of schedule 5 (disclosure of information by the Ombudsman) insert—

“The Scottish Social Services Council	A matter in respect of which the Scottish Social Services Council could exercise any power conferred by— <ul style="list-style-type: none">(a) section 46 (grant or refusal of registration),(b) section 47 (variation etc. of conditions in relation to registration),(c) section 49 (removal etc. from the register), of the Regulation of Care (Scotland) Act 2001(5)
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(2) 2002 asp 11.

(3) 1968 c.49. Section 5(1B) was inserted by the Local Government etc. (Scotland) Act 1994 (c.39), Schedule 13, paragraph 76(3)(b) and amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40), Schedule 4, paragraph 6(2); the Children (Scotland) Act 1995 (c.36), Schedule 4, paragraph 15(4)(b); the Regulation of Care (Scotland) Act 2001 (asp 8), schedule 4, paragraph 1; the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13), schedule 4, paragraph 1(3); the Adoption and Children (Scotland) Act 2007 (asp 4), schedule 2 paragraph 2(2)(a) and schedule 3, paragraph 1; the Social Care (Self-directed Support) (Scotland) Act 2013 (asp 1), section 21(b); the Children and Young People (Scotland) Act 2014 (asp 8), schedule 5, paragraph 1(b) and S.S.I. 2013/211.

(4) 2014 asp 9.

(5) 2001 asp 8.

Social Care and Social Work Improvement Scotland	<p>A matter in respect of which Social Care and Social Work Improvement Scotland could exercise any power conferred by—</p> <p>(a) chapter 2 (social services: inspections),</p> <p>(b) chapter 3 (care services; registration etc.),</p> <p>(c) chapter 4 (local authority adoption and fostering services etc.),</p> <p>of Part 5 of the Public Services Reform (Scotland) Act 2010(6)”.</p>
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Amendment of the Public Services Reform (Scotland) Act 2010

5. In section 56 of the Public Services Reform (Scotland) Act 2010 (inspections: authorised persons), in subsection (4)—

- (a) at the end of paragraph (c) omit “or”;
- (b) after “offenders” in paragraph (d) insert—
 - “, or
 - (e) to the extent considered necessary by the authorised person for the purpose of assisting the Scottish Public Services Ombudsman in connection with the Ombudsman’s investigatory functions under the Scottish Public Services Ombudsman Act 2002(7)”.

Repeal, revocation and saving

6.—(1) Section 5B of the Social Work (Scotland) Act 1968(8) (complaints procedure) is repealed subject to the saving in paragraph (3).

(2) The Social Work (Representations Procedure) (Scotland) Order 1990 (“the 1990 Order”)(9) is revoked subject to the saving in paragraph (3).

(3) Where paragraph (4) applies, section 5B of the Social Work (Scotland) Act 1968 and the 1990 Order continue to have effect on and after 1st April 2017 as they had effect immediately before that date.

(4) This paragraph applies in the case of any representations (including complaints) made before 1st April 2017 through a procedure established in accordance with the 1990 Order.

St Andrew’s House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

(6) 2010 asp 8.
 (7) 2002 asp 11.
 (8) Section 5B was inserted by the National Health Service and Community Care Act 1990 (c.19), section 52, and amended by the Local Government etc. (Scotland) Act 1994 (c.39), Schedule 13, paragraph 76(5) and the Children (Scotland) Act 1995 (c.36), Schedule 4, paragraph 15(5)(a) and Schedule 5, paragraph 1.
 (9) S.I. 1990/2519.

EXPLANATORY NOTE

(This note is not part of the Order)

This Order amends the Scottish Public Services Ombudsman Act 2002 (“the 2002 Act”) to allow the Ombudsman to consider the merits of certain social work decisions taken in the exercise of professional judgment in the course of an investigation under section 2 of the 2002 Act.

Section 7(1) of the 2002 Act generally precludes the Ombudsman from questioning the merits of discretionary decisions when carrying out investigations. New section 7(2C) of the 2002 Act, inserted by article 3 of this Order, creates an exception to this rule. The exception applies to decisions taken in pursuance of functions conferred by the enactments referred to in new section 7(2E) of the 2002 Act, to the extent that those decisions are taken in consequence of the exercise of professional judgment. The functions in question may be conferred on the local authority itself or on particular office holders appointed by the local authority. The latter group would cover, in particular, chief social work officers, mental health officers and council officers acting under the Adult Support and Protection (Scotland) Act 2007 (asp 10).

Article 4 amends schedule 5 to the 2002 Act. Schedule 5 sets out the bodies with whom, and the matters relating to which, the Ombudsman is permitted under section 20 of the 2002 Act to disclose certain information. The amendment permits the Ombudsman to disclose to the Scottish Social Services Council information which appears to the Ombudsman to relate to the Council’s professional regulatory functions. It also permits the Ombudsman to disclose to Social Care and Social Work Improvement Scotland (“the Care Inspectorate”) information which appears to the Ombudsman to relate to the Care Inspectorate’s inspection and registration functions.

Article 5 amends section 56 of the Public Services Reform (Scotland) Act 2010. The effect of this amendment is to authorise a Care Inspectorate inspector to disclose confidential information obtained in the course of an inspection to the Ombudsman where the inspector considers this necessary to assist the Ombudsman in connection with its investigatory functions.

Article 6 repeals section 5B of the Social Work (Scotland) Act 1968 and revokes the Social Work (Representations Procedure) (Scotland) Order 1990 (“the 1990 Order”). This repeal and revocation are subject to saving provision such that any representations (including complaints) made under the 1990 Order before 1st April 2017 are unaffected by the repeal and revocation.