

REGULATION AND INSPECTION OF SOCIAL CARE (WALES) ACT 2016

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 6 –Social Care Workers: Fitness to Practise

Chapter 1 – Grounds of impairment

Section 117 - Fitness to practise

168. This Part sets out the framework for the investigation of allegations of impaired fitness to practise of registered persons and the framework governing fitness to practise hearings. Section 164 sets out the meaning of registered person and confirms that it means a person who is registered in the social worker part, an added part or the visiting European part of the registers. Part 6 of the Act therefore applies only to social care workers who are required to register, for example social workers. It does not apply to unregistered social care workers.
169. Fitness to practise panels will make decisions about whether a registered person's fitness to practise is impaired. These panels also decide what sanctions are appropriate following consideration of a case (see section 174 for provision requiring SCW to establish fitness to practise panels and the explanatory note which accompanies sections 174 and 175 for an explanation of the constitution and procedures of panels).
170. [Section 117](#) provides that a person's fitness to practise is to be regarded as impaired by reason only of one or more of the grounds specified in subsection (1).
171. In subsection (1)(a), evidence of "deficient performance as a social care worker" is likely to include failures to comply with the standards of conduct and practice expected of social care workers set out in the codes of practice issued by SCW under section 112, although persons evaluating a social care worker's performance will not be limited to just considering compliance with codes. This ground is intended to capture serious or persistent failures to follow the standards of conduct expected of practising social care workers. Therefore a single instance of negligent treatment could constitute deficient performance, as could persistent technical failings or other repeated departures from good practice.
172. In subsection (1)(b), serious misconduct refers to conduct which may or may not be related to the exercise of professional skills, but which brings disgrace upon the registered person and thereby prejudices that person's ability to practise safely and the reputation of the profession. Therefore behaviour that takes place outside a social care worker's professional practice may lead to action where public confidence in social care workers might be undermined if action was not taken.
173. In subsection (1)(c), "barred list" refers to a list of individuals who have been deemed unsuitable to work with children or vulnerable adults. In England, Wales and Northern Ireland this list is maintained by the Disclosure and Barring Service under

the Safeguarding Vulnerable Groups Act 2006. In Scotland the list is maintained by Disclosure Scotland under the Protection of Vulnerable Groups (Scotland) Act 2007. Typically persons are barred because they have committed criminal offences which relate to the ill-treatment or abuse of children or vulnerable adults.

174. Determinations by a relevant body are determinations made by equivalent regulators of social care workers and the nursing and midwifery regulator for the United Kingdom: the NMC. If for example the regulator for social workers in England, the Health and Care Professions Council, made a decision that a social worker is not fit to practise, the registrar could rely on that decision to refuse that social worker's application to register with SCW. This will prevent persons from circumventing the decision of one regulator by registering with another. Similarly, findings made in the Welsh context about a registered person's fitness to practise may inform decisions in relation to registers maintained by other regulators in the United Kingdom and further afield.
175. In respect of subsection (1)(e), SCW will not ordinarily need to be involved merely because a social care worker suffers from an illness. This ground should be relied upon only if a social care worker has a medical condition (including an addiction to drugs and alcohol) that is affecting his or her ability to practise to an acceptable standard.
176. Not every finding of impairment under subsection (1) will automatically mean the registered person's fitness to practise is impaired. Other relevant factors will be taken into account, including for example in a case involving deficient performance, whether the issues in question are easily remediable or whether action has been taken to address the problem.

Chapter 2 - Preliminary procedures

Sections 118 – 124 - Preliminary consideration of allegations etc.

177. This chapter sets out the framework for the investigation of allegations of impaired fitness to practise made to SCW in respect of a registered person; the chapter also applies where SCW has other grounds for believing that a person's fitness may be impaired (for example, if SCW became aware through a report in the media that a social worker had been arrested or sacked).
178. Preliminary consideration refers to the process of considering allegations or information to determine whether or not a case should proceed to be given further consideration. It will be SCW's process for screening such allegations and information; and this process could be carried out by a member or members of SCW's staff or by other persons appointed for that purpose. SCW can treat any information which comes to its attention as a potential allegation and there are no particular requirements as to the form of allegations (section 118).
179. The purpose of preliminary consideration is to decide whether the matter merits further investigation or, because of its severity, a direct referral to a fitness to practise panel. Section 120 sets out the criteria for eligibility for onward referral for investigation or immediate panel consideration.
180. If a matter is eligible for onward referral it must be referred for investigation or directly to a fitness to practise panel. SCW must refer allegations concerning convictions for offences in respect of which a custodial sentence was, or could have been, imposed directly to a fitness to practise panel and will have powers to specify in rules any other categories of cases that must be referred directly. This is because there is no need to investigate the facts giving rise to convictions of this nature and SCW will need to be able to act quickly to deal with registered persons convicted of serious offences.
181. At any stage in the fitness to practise process, including preliminary consideration, a registered person's case can be referred to an interim orders panel. Interim order panels consider if any immediate measures are needed to protect the public or the registered

person while matters are being considered and investigated. These measures could include restricting the range of activities the registered person is permitted to carry out, or suspending the registered person's registration; the detailed provisions dealing with interim measures appear in Chapter 4 of this Part and are explained below.

Sections 125 – 130 – Investigation

182. **Sections 125-130** provide for allegations of impaired fitness to practise to be investigated by SCW, or investigated by persons acting on SCW's behalf. SCW could for example provide that all or particular kinds of investigations are to be carried out by staff members or by other individuals appointed for that purpose. Alternatively, it could establish an investigation committee for conducting investigations. SCW will also be able to appoint advisors such as health advisors. This might be necessary when investigating allegations that a registered person's fitness to practise may be impaired due to a health condition and an understanding of the condition is required or an assessment of their capacity.
183. Upon the conclusion of the investigation, SCW must refer the matter to a fitness to practise panel if the matter satisfies the realistic prospect test in section 126(2)(a) and it is in the public interest to refer the matter.
184. Where a case is not referred to a fitness to practise panel, SCW will have a range of options available to it to dispose of the case; these are set out in section 126. Where SCW decides that warning the registered person about their behaviour may be appropriate, the registered person has a right to request an oral hearing. This is to provide the person with an opportunity to make representations if they feel that a warning is not appropriate: a warning that has been issued can be recorded on the entry in the register relating to that person. SCW can also agree undertakings with registered persons. This could be, for example, an agreement that the registered person must complete a training course where the investigation has revealed that he or she may benefit from additional training.
185. There is provision in section 130 for introducing mediation as a means of disposing of cases referred for investigation. Mediation can be introduced only if provision is made by regulations made by the Welsh Ministers. Mediation could, for example, be beneficial in cases where allegations do not amount to impaired fitness to practise but there is a need to resolve issues between the registered person and the complainant which are likely to have an ongoing and detrimental effect to an ongoing relationship. If mediation were to be introduced a draft of the regulations would need to be approved by the National Assembly before being made (see section 187(2)).

Sections 131 – 133 - Review

186. **Section 131** provides a mechanism for reviewing certain decisions made upon conclusion of preliminary consideration and investigation. This enables SCW to reconsider decisions to ensure they are properly made or to reconsider decisions in light of new information which was not available at the time the original decision was made. Anyone SCW considers to have an interest in the decision can apply for a review. The review power does not include decisions to refer cases to an interim orders or fitness to practise panel. SCW has a separate power to cancel such referrals in section 134.
187. **Section 131** requires SCW to review a decision mentioned in subsection (2) if it appears to SCW that the decision is materially flawed. This might be because of an error made by SCW in the administrative handling of the case which undermines the decision, such as the loss of relevant evidence, or an error of judgement or reasoning by the decision-maker. SCW has a broad rule-making power to determine the process that will apply to reviews under section 131. SCW could for example provide that the registrar makes the final decision.
188. Upon conclusion of an investigation or following consideration by a fitness to practise panel, sanctions can be imposed on a registered person. These include imposing

conditions on a registered person's registration, for example restricting the areas in which they can practise, suspending the registered person for a period of time or requiring the registered person to agree to an undertaking (see explanatory note accompanying section 126 and sections 135-155). There is a significant public interest in reviewing sanctions to ensure compliance with sanctions and to assess a registered person's fitness to practise in light of sanctions imposed. Chapter 5 sets out the system for reviewing conditional registration orders, suspension orders and undertakings. Review hearings are undertaken by fitness to practise panels and there are two ways in which a review can be initiated.

189. The first is a review must take place if this has been directed in the original order or undertaking. For example an undertaking agreed between a registered person and fitness to practise panel to complete a training course requires a review to take place after 6 months to assess compliance with the undertaking. Section 151, subsections (1)-(6), requires fitness to practise panels to carry out reviews where it is a requirement of the undertaking, conditional registration order or suspension order. See the explanatory note which accompanies Chapter 5.
190. **Section 133** sets out the second method of initiating a review. SCW is responsible for monitoring compliance with conditions, suspensions and undertakings. Section 132(3) places a duty on SCW to refer cases to a fitness to practise panel to carry out a review if it has reason to believe that a registered person has breached an undertaking or condition. If, for example, SCW became aware that a registered person was failing to comply with a conditional registration order and was practising in an area he or she was prohibited from practising, SCW would be required to refer the matter for review. This information would not be treated as a new allegation and investigated accordingly. It would be referred immediately to a fitness to practise panel to review.
191. SCW is also able to refer matters for review proceedings at any time if it considers that a review is desirable (section 133(2)). This might be because SCW has received an allegation that a registered person subject to a conditional registration order is acting in a way which calls into question their fitness to practise. Once again, this allegation would not be treated as a new allegation rather it would be referred immediately to a fitness to practise panel to review.

Chapter 3: Sections 134 – 142 - Disposal of fitness to practise cases

192. Fitness to practise panels consider allegations that a registered person's fitness to practise is impaired. This Chapter sets out the various powers the panels have to dispose of cases.
193. Fitness to practise panels must determine whether a person's fitness to practise is impaired on any of the grounds listed in section 117. The panel has the power to impose sanctions following a finding of impairment (see section 138). The main purpose of a sanction is not punitive but to protect the public, although it may also have a punitive effect. Where a panel's finding is that a registered person's fitness to practise is not impaired, the panel has a range of options as to how to dispose of the case; these including warning the registered person about their behaviour or giving advice about changing their conduct in future (see sections 135 and 137). SCW can publish guidance which fitness to practise panels will be required to take into account when imposing sanctions or disposing of cases (see section 162). The guidance could set out for example, the factors the panel should take into account when considering whether to issue a warning.
194. Any conditions imposed on a registered person by a fitness to practise panel can only be imposed for a period of 3 years in the first instance and a registered person's registration can only be suspended by a suspension order for 12 months in the first instance. The review process for reviewing conditions and suspensions is set out in Chapter 5 and is explained below. Conditions and suspensions can be extended beyond time limits imposed by a fitness to practise panel on review. A social worker could, for example,

be suspended from practising as a social worker for 12 months by a fitness to practise panel; in making the relevant suspension order the panel could specify that a review of the suspension order would be conducted by another fitness to practise panel a month before the expiry of the order. If the panel conducting the review considered that the person's fitness to practise remained impaired, it could use section 154 to extend the suspension order for another year. It could not, however use section 154 to extend the suspension for a period exceeding 12 months. In the same way it could not extend a conditional registration order for a further period exceeding 3 years. Extensions cannot exceed the time limits imposed in section 139.

195. There are however circumstances when suspension orders can be extended for longer than 12 months. Registered persons whose fitness to practise is impaired on health grounds can be suspended indefinitely following a two year period of suspension. See explanatory notes for Chapter 5 for further explanation.
196. Registered persons can appeal any sanction imposed by a fitness to practise panel following a finding of impairment to the First-Tier Tribunal (section 158). Section 140 gives fitness to practise panels the power to issue immediate conditional registration and suspension orders pending the outcome of any appeal to the Tribunal. Whilst the purpose of such orders is the same as interim orders, the ways in which they operate are different. Immediate orders are not reviewed periodically like interim orders and their duration is linked to the appeal process. (See the explanatory note for Chapter 4 of this Part for further details about interim orders.) Therefore an immediate suspension order might be imposed if a fitness to practise panel has ordered that an entry relating to a registered person be removed from the register. This removal will not come into effect until the period for appealing has passed or an appeal is concluded; therefore the immediate order would be a measure taken to protect the public in the intervening period.

Chapter 4: Sections 143 – 149 – Interim orders and review of interim orders

197. The purpose of interim orders is to enable temporary restrictions to be imposed in respect of a registered person while investigations are undertaken into allegations made against the person.
198. SCW is required by section 174 to make rules for the establishment of interim order panels; broadly, the role of these panels will be to impose and review interim orders. There are two types of interim orders: an order for interim conditional registration which allows the registered person to continue practising but in a limited capacity; and an interim suspension order which prevents the registered person from practising at all until there is a final determination of his or her case.
199. The panel imposing or reviewing an interim order is not charged with making a final determination about whether allegations concerning a person's unfitness to practise are true. The test for imposing or, on review, confirming an order is whether it is necessary for the protection of the public or it is otherwise in the public interest or the interests of the registered person.
200. Interim orders take effect immediately and can be imposed for up to 18 months; a person in respect of whom an order is made does have a right of appeal under section 145; any appeal would be considered by the First-tier tribunal. Orders which are in force must be reviewed by an interim orders panel in accordance with the requirements of section 146; orders can be extended if SCW considers that necessary on application to the First-tier Tribunal.

Chapter 5: Sections 150 – 157 – Review proceedings

201. This Chapter sets out the system for reviewing conditions of practise, suspension orders and undertakings. All review hearings under this Chapter will be carried out by fitness to practise panels. Hearings must take place if this has been directed by the original panel,

or agreed in the case of an undertaking. Therefore a conditional registration order to complete a training course within 6 months could provide that a review must take place before expiry of the order to ensure that the registered person has completed the course. Hearings should also take place if SCW becomes aware of new evidence suggesting that a sanction imposed on a person should be reviewed. For example if SCW was made aware of an allegation that a suspended social worker was practising, a review hearing should take place. See explanatory note to sections 131-133 for further detail.

202. Panels are able to take a number of decisions in relation to the original order; (whether that be a conditional registration order, a suspension order, or an undertaking). A panel may confirm or revoke the order; it may extend or reduce the period of the order; or it may adjust or remove any of the conditions. The panel can also impose any sanction or other form of disposal it considers more appropriate. For example, a persistent and serious breach of conditions may mean that a removal order is necessary.
203. Upon review of a suspension order, panels can extend the order indefinitely if a registered person has been suspended for at least two years for reason only of adverse health. Those subject to indefinite suspension orders can request that a fitness to practise panel review the order. A first application for review cannot be made until 2 years have passed since the order was made; and subsequent applications for review are subject to similar restrictions: once an unsuccessful application has been made, a person must wait for a period of 2 years before making another application. This would be relevant to workers who might be suffering from a long-term illness and cannot practise for a considerable period of time and therefore for whom regular reviews are not appropriate.

Chapter 6: Appeals and referrals to the tribunal

Section 158 - Appeals against decisions of a fitness to practise panel

204. **Section 158** provides for appeals against decisions of a fitness to practise panel to the First-Tier Tribunal. Therefore registered persons who are dissatisfied with a condition that had been imposed or with the fact that they had been removed from the register for example could ask the Tribunal to look at this decision.

Chapter 7: Sections 159 – 164 - General and supplementary

205. The timely supply of relevant information is essential for the efficient and effective functioning of the fitness to practise process. Delays or refusal from registered persons or their employers to supply information could result in difficulty progressing and concluding cases. Section 160 enables SCW to require persons to produce information and, in the event of non-compliance, apply to the Tribunal for it to require disclosure of the information being withheld. Persons cannot, however, be required to produce information that is protected from disclosure by other legislation or rule of law. A request for information could not override anything barring disclosure contained in the Data Protection Act 1998, for example.
206. **Section 161** requires SCW to publish all decisions made by fitness to practise panels and interim order panels, except decisions to take no further action. This also applies to decisions made on review. This is to ensure that the process is transparent and that the information is available to the public.
207. **Section 163** provides that subject to the exceptions in subsection (3), a person is not to be treated as a registered person if he or she is subject to a suspension order despite the fact that his or her name still appears on the register. This will ensure that social workers subject to a suspension order cannot call themselves registered social workers or hold themselves out as being registered.