

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

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## **EXPLANATORY NOTES**

### **THE ACT**

#### **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 is 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.