

# Regulations relating to the establishment of SCSWIS & HIS RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately

## 1. Name/Organisation

Organisation Name

Community Care Providers Scotland

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## 3. Permissions - I am responding as...

Individual

/ Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate  Yes  No

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate  Yes  No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

 Yes No

## CONSULTATION QUESTIONS

Please use this section to record any comments you have about the named regulation (please note the box will expand as you type). If completing by hand please ensure any additional sheets are clearly marked with the regulation you are commenting on.

### HIS Reports:

### HIS Inspections:

### HIS Fees:

### HIS Requirements:

### HIS Registrations:

### SCSWIS Reports:

### SCSWIS Inspections:

Sections 5, 6, 7 and 8 relating to information sharing etc: Care service providers have experienced significant difficulties as a result of the operational contradictions between existing regulations under the RoC Act and data protection obligations, in respect of the power of inspectors to have access to and retain personal data including material from personnel files. The Assistant Information Commissioner for Scotland became involved, at our invitation, in discussions aimed at resolving these contradictions, but problems still remain. We are extremely concerned that the new regulations should not perpetuate the situation: we have alerted the Information Commissioner's office to the draft regulations, and understand that it is his intention to contact the Bill team in this regard. In discussions with the Assistant Information Commissioner for Scotland, he suggested that further detail on what information might reasonably be required as part of an inspection might be included in a code of practice; where this is the case, we would hope that the code of practice will be consulted upon, and would welcome the opportunity to be involved in this.

### SCSWIS Fees:

We note from the introductory material that the position set out in the draft regulations in relation to fees is temporary ("the proposed approach...leaves the current fee regime unchanged at least in the first year of SCSWIS operation," p.9, our emphasis). We accept that because of the delays that have occurred in establishing SCSWIS, there is a certain element of

'keeping the show on the road' here. We would however want to make a number of points in relation both to the position as set out in the draft regulations, and to future alterations to the fees system.

o The executive summary says (at 2.2, p.8) says that 'care providers will be required to continue to pay regulatory fees to the new scrutiny body for registration and licence to operate' (our emphasis). The regulations themselves refer only to registration fees: there is no reference to a 'licence to operate' and indeed this would be an entirely new concept for the regulator. In our evidence to parliamentary committees during the passage of the primary legislation, we raised the possibility of such a licence and we would be very interested to discuss it further: however we cannot find any reference to licencing arrangements in the draft regulations, and we would welcome clarification on this point.

o Notwithstanding the point above, we have consistently objected to the payment of fees to the regulator by service providers on the basis that it represents an unacceptable 'recycling' of public money, with providers spending considerable time and effort attempting to secure the necessary resources from one public body in order to hand it straight over to another. In our view, the wisdom of continuing with this system is thrown into even greater doubt by the changing nature of regulation, as set out in the introduction to the regulations.

First, SCSWIS will be moving towards more proportionate regulation where 'services which are performing well will receive fewer inspections...[and] SCSWIS will be able to focus its inspection efforts on those services which are performing less well' (p.8). Given that fees remain uniform across all providers, we are now clearly entering a new era in which good quality providers will in effect be subsidising increased regulatory activity in respect of poor quality providers. In our view, this is not a tenable position in the context of current government policy with regard to the existence of a competitive market for care services.

Second, Scottish Government policy in relation to regulatory fees has hitherto been based explicitly on the principles of full cost recovery, transparency and value for money (see consultation papers on fees under the RoC Act from 2001 onwards). Given that the remit of SCSWIS now extends beyond the regulation of care services, this policy and indeed these principles are no longer sustainable as a rationale for the current system, which will therefore require substantial revision and reform.

o We note that fees continue to be payable in accordance with the service definitions set out in the RoC Act. As noted above, we appreciate that this may be temporary but we would want to urge the Scottish Government and SCSWIS to take early steps to modernise the regulations in line with developing models of self-directed support and more integrated service delivery (see also our 'general points' below).

## SCSWIS Requirements:

- Welfare of users (Section 4, p. 60). We note that there is no longer a requirement on care home service providers to “make such arrangements as are necessary for the provision to service users of adequate services from any health care professional.” This seems to be a significant departure from existing regulations yet it is not referred to in the introduction, which states that these new regulations are ‘broadly similar’ to existing requirements. We would be keen to understand the rationale for this omission.

We also note that the draft regulations, in addition to placing a duty on providers to make proper provision for the health and welfare of service users, place a further (and new) duty in relation to their safety (Section 4(1)a). Scottish Government, and SCSWIS, should be aware of the relevance to this to some of the developments currently being taken forward by local authorities in relation to personalisation and self-directed support. In one local authority in particular, providers, rather than social workers or care managers, are being given the task of preparing personalised, outcome-focused support plans, including associated risk assessments. Providers are therefore being expected to take responsibility not only for the safety of individuals whilst they are using the specific service provided by that organisation, but for the safety of the individual more generally, in relation to the whole support plan. The authority, however, is required to ‘sign off’ that support plan before it is implemented. It seems to us, then, that placing a regulatory duty in respect of service user safety on providers alone is wholly inadequate in the context of the new models of self-directed support and personalisation that are already being implemented by some Scottish local authorities. In our view, this matter requires urgent attention.

- Personal plans (Section 5, p. 60). Related to the above, we note that the requirement for personal plans is to be extended beyond care home service providers. We are concerned, first, that no link is made in these regulations between service-related personal plans and the broader personalised support plans referred to above; we are further concerned that the model of a personal plan outlined in the regulations relates only to ‘how the service user’s health, welfare and safety needs are to be met’. We believe that such plans should give expression to the principles of the primary legislation by also setting out how the service will support the user to maintain (or achieve) independence; how it will offer the user choice and control over the way in which the support is provided; how it will help them to move forward in their lives, and how it will deliver positive outcomes for them. This would bring regulatory activity much more into alignment with current and developing thinking in relation to the objectives of care and support services, with positive implications for the ability of regulatory information to guide purchasing and commissioning both by authorities, and increasingly by individuals.

- We note that the new draft regulations do not refer to any role on the part of SCSWIS in examining the financial position of care providers (Section 16 in existing regulations under the RoC Act). Again, this seems to us to be a significant departure from existing regulations, yet it is not referenced in any

way in the introductory material to the consultation document. On balance we would welcome this as a positive development, since it will help to address the current situation in which providers have to submit the same (or similar) financial information and documentation to a variety of different organisations, including SCSWIS, OSCR and commissioning authorities: we would, however, be very keen to receive clarification from the Scottish Government as to its own reasons why this provision has been dropped.

#### **SCSWIS Registrations:**

Records, notifications and returns (Section 5, p.47): We note that the draft regulations, unlike the existing secondary legislation, do not prescribe the records that providers must keep, the notifications they must make to the regulator in relation to changes in personnel, serious incidents, and so on. Rather, SCSWIS will be obliged to advise care services of their requirements in this regard. Whilst we can see potential advantages in greater flexibility, we would have some concerns about the implications for clarity and consistency of requirements between different services and perhaps also between individual inspectors.

#### **Joint Inspections Regulations:**

#### **Joint Inspections Draft Code of Practice:**

#### **General comments on the regulation:**

Many thanks for the opportunity to comment on these draft regulations. CCPS is the coalition of care and support providers in Scotland: our membership comprises all the most substantial providers of care services in the third sector. A significant proportion of services registered with the Care Commission are provided by the third sector and our members will be directly impacted by these regulations.

May we point out, in that regard, that CCPS does not appear on the list of organisations to be consulted: we are sure that this is an oversight, but it would be helpful if records could be amended for future consultations.

- National care standards. The Executive Summary (p.8) states that SCSWIS will inspect 'with reference to the National Care Standards'. However we can find no reference to the NCS in these regulations. The primary legislation certainly places a duty on Scottish Ministers to publish care standards, and a further duty on SCSWIS to take them into account in making decisions, however it is not clear to us whether these standards are to be the same as the NCS, particularly since we have recently received an invitation from the Mental Welfare Commission to be consulted about the development of new standards for dementia care, which will be 'the basis for scrutiny by the new health and social care scrutiny bodies.' We are unaware of any process having been initiated to revise (or replace) the national care standards and we would welcome clarification on this point. A further point about standards relates to the new provision in the primary legislation that allows SCSWIS to conduct 'corporate' inspections of

providers. At present there are no published standards or outcomes against which SCSWIS can assess the corporate performance of a provider. Given the provisions of the primary legislation relating to standards and outcomes, and the need for SCSWIS to take these into account in making decisions, we would not expect to see any such inspections carried out by SCSWIS until such time as appropriate standards or outcomes have been prepared and consulted on.

- Inspection timetable. The Executive Summary also states that 'the timing and frequency of...inspections will be as set out in a timetable prepared each year by SCSWIS and agreed with Scottish Ministers' (p.8). We understand that preparation of this timetable is a duty under Section 54 of the primary legislation:

"SCSWIS must prepare a plan for carrying out inspections in accordance with best regulatory practice.

(2) The plan—

(a) must set out arrangements for inspections to be so carried out...

SCSWIS must, in preparing a plan (or any revision), consult such persons as it considers appropriate."

Given that SCSWIS is to begin operations on 1 April 2011, there is very little time to consult on this plan and we would welcome further information about timing and format of the consultation process.

- Personalisation. The Scottish Government and SCSWIS need to be aware that a number of local authorities are implementing major systems changes in order to personalise care and support provision, with significant implications for regulation and inspection. The role of registered care services in particular is changing rapidly – and radically – in line with these developments. As noted above, many service providers are now being tasked with personalised support planning for individuals: further, the support that is being identified for those individuals is increasingly likely to be provided not by registered services but by a whole range of more informal (and unregistered) arrangements. The likelihood of major anomalies arising, in regulatory terms, between support that must be registered and support that does not have to be registered is very significant. We cannot find any reference to these matters either in the regulations or in the Executive Summary. We feel strongly that any system for the regulation, inspection and scrutiny of care and support must keep pace with what is actually happening on the ground in order for it to retain the confidence of the bodies that are subject to its provisions: we are growing increasingly concerned that these matters are not being adequately addressed and would ask the Scottish Government and SCSWIS to develop appropriate proposals for debate and consultation as a matter of urgency.