Executive Summary note of issues arising from current legislation

1. **Applications for registration by poorly performing providers**

   The existing legislation does not explicitly provide that poorly performing providers of care services may be refused further registrations for that reason and two recommendations are proposed on page 3 of this document.

2. **Appeals against decisions of the Care Inspectorate**

   The Public Services Reform (Scotland) Act 2010 (“the Act”) does not specify on what grounds an appeal may be made to the sheriff against a decision of the Care Inspectorate, nor what criteria the sheriff should apply in considering such appeals. The same issue arises in relation to further appeals to the sheriff principal. The Care Inspectorate has already made recommendations to the Committee to improve this situation.

3. **Applications to the court under s65 of the Act – “Emergency cancellation of registration”**

   Where the statutory test (“serious risk to life, health or wellbeing”) is satisfied, the sheriff has discretion as to whether to cancel registration. The Act does not specify what matters are to be taken into account in exercising that discretion. The fact that a provider’s livelihood may be adversely affected may be argued in support of maintaining registration where “serious risk” has been established, but may perpetuate serious risk to vulnerable people. The Care Inspectorate’s recommendations to improve this situation are set out on page 4 of this document.

**Supplement to the evidence of Jacquie Roberts, Interim Chief Executive**

When giving evidence to the Scottish Parliament Health & Sport Committee Inquiry into the Care of Older People on 4th October 2011, Jacquie Roberts, Interim Chief Executive of the Care Inspectorate was asked (Col 326/327) by Dr Richard Simpson MSP:-

“…I am concerned about homes that have a rating of 1 or 2. If a company or an individual owns a home that has a rating of 1 or 2, can they still register to run a new home? Can you block the registration process because performance has not been satisfactory in one or more of their homes? If they close a home in their group, can they automatically just expand or take over other homes, as happened in the Southern Cross situation, or can you block that?”
Ms Roberts undertook to come back to the Committee on the question as to whether the Care Inspectorate has the legal powers to prevent new registrations being granted to providers whose performance record is poor.

- **Care Inspectorate Response**

Section 60(3) of the Public Services Reform (Scotland) Act 2010 (“the Act”) provides that “If SCSWIS is satisfied, in relation to an application, that the requirements of –

(a) such regulations as are applicable under s78 to the care service, and
(b) any other enactment which appears to SCSWIS to be relevant will be complied with in relation to that service, it must give notice under section 71(1), or as the case may be section 73(1); otherwise it must give notice under section 71(2).

Therefore if the Care Inspectorate was not satisfied, based on the applicant provider’s performance while providing another registered care service that the requirements of regulations would be complied with, that may be a basis for refusal of registration. It is anticipated, however, based on the experience of the Care Commission, that lengthy argument and frequent appeal against refusal of registration could result, based on the assertion that whatever the deficiencies in the existing registered care service, the question for the Care Inspectorate is whether adequate measures are in place in relation to the proposed new registration, to ensure that they would not be repeated.

The Care Inspectorate proposes that in order to overcome such problems specific provision could be made in legislation to the effect that in considering whether a proposed care service will comply with the regulations / other relevant enactments, the Care Inspectorate shall have regard to the extent to which other care services provided by the applicant (or, in the case of a company, an associated company) are compliant with obligations placed on them by regulations / other enactments in the jurisdiction in which they operate, as demonstrated by the grades (or equivalent) they have achieved and by any enforcement action taken against them by the Care Inspectorate or other regulators of care quality. This is entirely consistent with the Care Inspectorate’s intelligence-led approach to regulation.

The Care Inspectorate also proposes that to ensure that new companies cannot be incorporated with the purpose of defeating such a provision, that “associated company” should be broadly defined to include wholly-owned subsidiaries, “parent” companies, companies which have the same “parent” company, and companies which have one or more directors in common.

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1. *i.e. grant registration either unconditionally or subject to proposed conditions*
2. *i.e. propose to refuse registration*
Ms Roberts was also asked (Col 327) by Jim Eadie, MSP:

“To follow up Dr Simpson’s point, would you welcome further enforcement powers in that area? Do you want to reflect on that and come back to us on it?”

Ms Roberts indicated that she would wish to reflect on this and revert to the Committee.

- Care Inspectorate Response

In relation to the question of enforcement powers generally, we have already made recommendations about how the existing appeal provisions might be improved. In particular, we have suggested setting out in specific terms on what grounds an appeal may be made under s75 of the Act, and what criteria the court should apply in determining appeals under that section. In addition, we have suggested that s65 of the Act should make clear on what grounds there may be an appeal to the Sheriff Principal, and what criteria the Sheriff Principal must apply in determining such an appeal. To do so may lead to fewer, and less protracted, appeals against decisions of the Care Inspectorate than might otherwise be the case.

We note that s65(8) of the Act provides for appeal to the sheriff principal only against the making of an order under s65 (i.e. an order cancelling registration, or “such interim order as the sheriff thinks fit”). In effect that provision confers a right of appeal upon the care service provider which is not available to the Care Inspectorate (which will always be seeking the making of an order). The Committee and the Parliament may wish to consider whether that result is appropriate and whether the provisions as they stand fail to ensure that the same rights are available to the Care Inspectorate as are available to its opponent in these proceedings.

Further, where the court is asked to consider making an order cancelling registration of a care service under s65 of the Act, s65(2) provides that “The application may be granted if it appears to the sheriff that unless the order is made, there will be serious risk to the life, health or wellbeing of persons.”. The use of the term “may” indicates that even where the statutory test is satisfied, the sheriff has a discretion as to whether or not the order sought is made. The position is the same in relation to an order suspending ad interim the registration of a care service, which would invariably be sought in an “emergency” application under s65. We propose that the Care Inspectorate’s enforcement powers would be improved in these exceptional circumstances if the matters to be taken into account by the sheriff in considering the statutory test and in exercising his or her discretion in the event that the test is met, were prescribed by statute. As a minimum, we would recommend that in considering an application for an interim order in terms of s65(3), that the sheriff should be specifically directed to take account of the professional opinion expressed in any affidavit sworn by an appropriately qualified member of the Care
Inspectorate’s staff and lodged in support of the application – so that there could be rapid but informed response by the court to an emergency, in a manner similar to that for Child Protection Orders under the Children (Scotland) Act 1995.

Care Inspectorate
21 October 2011