

# **SOCIAL SECURITY (SCOTLAND) ACT 2018**

---

## **EXPLANATORY NOTES**

### **OVERVIEW**

3. The Act:
  - creates the legal framework under which 9 types of social security assistance will be given to people by the Scottish Government (see Part 2),
  - gives the Scottish Government the power to make regulations establishing schemes to top-up social security assistance paid to people by the UK Government (see sections 79 and 80 in Part 3),
  - provides directly (i.e. without the need for regulations) for the Scottish Government to top-up Carer's Allowance, which is a form of social security paid by the UK Government (see sections 81 and 82 in Part 3), and
  - creates the legal framework under which local authorities (i.e. Scotland's 32 local councils) can make payments, known as discretionary housing payments, to help people meet housing costs (see Part 5).
4. The following paragraphs give an overview of the Act's other features not covered above.
5. [Part 1](#) of the Act enshrines in law cardinal features of the Scottish social security system which, at the time of writing, means the system constituted by Parts 2 and 3 of the Act. (The legal definition of "Scottish social security system" is given in section 23, and discussed further under that heading in these Notes.) In summary, Part 1:
  - sets out the Scottish social security principles (see section 1),
  - requires the creation of a Scottish social security charter, which is to lay down standards for the provision of social security in Scotland that are aligned with the Scottish social security principles (see sections 15 to 19),
  - establishes a Scottish Commission on Social Security which, amongst other things, is to be involved in the oversight of the Scottish social security system and evaluating whether proposals for social security regulations are consistent with the Scottish social security principles as well as international human rights standards (see sections 21 and 22),
  - places duties on the Scottish Government to promote the take-up of Scottish social security (see sections 3 to 9),
  - requires the Scottish Government to ensure that suitable advocacy help is available for those who, due to a disability, need that help to navigate the Scottish social security system (see sections 10 and 11),
  - requires the Scottish Government to report annually to the Scottish Parliament on the performance of the Scottish social security system, including on what has been done in the past year to meet the service standards set in the charter (see section 20).

6. [Part 4](#) of the Act makes technical provision connected to the giving of assistance through the Scottish social security system.
7. [Part 6](#) of the Act requires the Scottish Ministers to bring forward regulations altering the way that the UK Government pays universal credit to joint claimants. Specifically, the regulations are to require that couples in Scotland be paid separately unless they choose to receive a single household payment.
8. [Part 7](#) of the Act deals with the technical matters that are typically dealt with at the end of an Act. It confers a power to make ancillary provision by regulations (see section 95), lays down the scrutiny processes that regulations under the Act are to go through (see sections 96 to 98), makes provision about when the Act's provisions are to take effect in law (see section 99), and gives the Act its official legal name (see section 100).
9. The Act's provisions fall to be read in accordance with the interpretation rules in Part 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.

## **Part 1 (Tenets and Oversight)**

### **Scottish social security principles ([sections 1 and 2](#))**

10. [Section 1](#) sets out the Scottish social security principles. These eight principles are to inform the Scottish social security charter (which is provided for by sections 15 to 19) and the work of the Scottish Commission on Social Security in scrutinising regulations (see discussion of section 97).
11. [Section 2](#) makes those purposes clear, and provides that courts and tribunals can take cognisance of the principles, but also makes clear that breach of them is not, of itself, legally actionable.

### **Scottish Ministers' duty to promote take-up ([sections 3 to 7](#))**

12. [Section 3](#) places the Scottish Ministers under a duty to keep under consideration what they can do to provide people with the assistance they are entitled to receive from the Scottish social security system (as defined by section 23) and to take steps to achieve that aim. This duty is connected to the requirement created by section 8 for the Scottish Ministers to have a strategy to promote the take-up of assistance.
13. [Sections 4 to 7](#) are directly connected to the duty section 3 creates. Each requires the Scottish Ministers to keep a particular consideration in mind when fulfilling their section 3 duty to consider how to ensure take-up of assistance.
14. [Section 4](#) requires that particular consideration be given to the importance of communicating in an inclusive way, recognising that for some individuals communication difficulties may present a barrier to the take-up of assistance.
15. [Section 5](#) requires that particular consideration be given to the importance of accessible communications, recognising that some individuals will need to be given information in special formats (for example blind people may need information in braille). Furthermore, section 5 directs the Scottish Ministers to take steps to ensure that:
  - where the Act requires that information be given to a particular individual, the information must be given in a format that suits the individual's needs. An example of such a requirement to give an individual would be the duty created by section 53 to advise about eligibility for other assistance that it appears the individual may be eligible to receive.
  - where the Act requires that information be given to the public at large, Ministers must provide the information in a range of formats.
16. [Section 6](#) requires the Scottish Ministers to consider how information, advice and advocacy, provided by persons other than Ministers themselves, can contribute to

ensuring take up of assistance under the Scottish social security system. Section 6 describes steps Ministers must take, such as to provide information about these matters to persons seeking or receiving assistance and to provide for independent information and advice to be available.

17. Information that the Scottish Ministers obtain for the purpose of one type of assistance may be relevant for another type of assistance. For example, a person applying for early years assistance (see section 32) might mention that they have difficulty communicating which might entitle the person to disability assistance (see section 31). Section 7 directs Ministers to have regard to this possibility in relation to their duty under section 3 to promote take-up of assistance.

### **Strategy to promote take-up (sections 8 and 9)**

18. [Section 8](#) obliges the Scottish Ministers to have a strategy to promote the take-up of assistance. The strategy must estimate the extent of take-up of the assistance provided for by the Scottish social security system and explain what steps Ministers will take to ensure individuals receive what they are eligible to receive. The strategy must be published. Section 9 sets timescales for preparation and review of the strategy. That section also requires consultation with specific persons as part of its preparation and review, in addition to other persons whom Ministers consider it appropriate to consult.

### **Right to advocacy and service standards (sections 10 and 11)**

19. [Section 10](#) creates a right to advocacy for individuals who, due to a disability, require an advocate to help them when their entitlement to assistance is being determined. Subsection (2) places a duty on the Scottish Ministers to ensure that independent advocacy services are sufficiently available to allow everyone who has that right to make use of it. In this context, advocacy services are independent if they are provided by someone other than the Scottish Ministers. This right to advocacy is separate from, and additional to, the right all individuals will have to be accompanied by a supporter that is provided for in section 59 during any discussion or assessment of the individual's entitlement to assistance under Part 2.
20. [Section 11](#) requires the Scottish Ministers to set standards that advocacy service providers must adhere to, as part of any agreements for provision of independent advocacy services. The standards will be set out in regulations and may, for example, provide for independent advocates to have undergone training and for the quality of the service provided to be assessed.

### **Restriction on private-sector involvement in assessments (section 12)**

21. In order to access assistance under the Scottish social security system a person may have to undergo an assessment. Section 12 prevents someone being required to undergo such an assessment by a person who is not working in the public sector (as defined by subsections (2) and (3)).
22. While section 12 prevents a person from being required to undergo an assessment by a person not working in the public sector, it does not preclude the Scottish Government from taking an assessment report prepared by a private-sector body into consideration in determining someone's entitlement to assistance should they wish the government to do so.
23. It may be an eligibility condition for receiving Scottish social security assistance that a person is eligible for assistance through other schemes. For example, being in receipt of a UK Government disability benefit may be an eligibility criterion for receiving winter heating assistance (see section 30). Subsections (4) and (5) of section 12 clarify that the restriction on the use of non-public sector assessments established by subsection (1) does not preclude eligibility for Scottish social security assistance being made to depend

on eligibility for other forms of assistance which may have required assessment by a person not working in the public sector.

### **Assessors to be suitably qualified (section 13)**

24. [Section 13](#) places a duty on the Scottish Ministers, when arranging assessments of an individual's physical condition or mental health, to ensure that the assessor is appropriately qualified. Regulations may set out how the assessor's suitability is to be determined, which might (for example) include requirements relating to the training or experience that an assessor must have to be regarded as qualified to assess the effects of particular disabilities.

### **Assessments only to be required where necessary (section 14)**

25. One of the Scottish social security principles places respect for the dignity of individuals at the heart of the system (see section 1(d)). Some persons may consider that if the need for an assessment is not appropriately considered it may impact adversely on their dignity. Other persons may wish to have the effects of their condition assessed. Section 14 provides that an individual should only be required to undergo an assessment if it is the only practicable way to get information that is needed to make a decision about the assistance they are eligible for. If an individual states any wishes about where and how they would like an assessment to be undertaken, the Scottish Ministers must consider them.

### **Scottish social security charter (sections 15 to 19)**

26. [Section 15](#) defines what the Scottish social security charter is to be. The charter is to set out what can be expected from the Scottish Ministers in designing and delivering social security, and from persons who apply for, and receive, assistance from the Scottish social security system (see section 15(2) and, for the meaning of "Scottish social security system", see section 23). The charter is to do so in a way which reflects the principles articulated in section 1 (see section 15(3)). For example, the charter will provide for how respect for the dignity of individuals will be placed at the heart of the system (the principle articulated in section 1(d)) when Ministers are exercising functions such as determining a person's entitlement to assistance.
27. [Section 16](#) requires the charter to be published for the first time within 6 months of that section coming into force (section 16 is to come into force on a date appointed by regulations under section 99). Section 16 also provides for consultation in development of the charter, which must include consultation with the persons listed in subsection (4). These are persons who are receiving from the UK Government the types of assistance that correspond to those which will in future be provided to people in Scotland by the Scottish Government under Part 2 of the Act. Subsection (3) requires that in consulting certain categories of people described in subsection (4), the Scottish Ministers must consult them in representative proportions based on whether they have physical or mental impairments. Subsection (5) makes clear that consultation undertaken before the Bill for the Act was passed, or section 16 was brought into force, can be taken into account in determining whether the statutory consultation duty created by section 16 has been complied with.
28. [Section 17](#) requires the Scottish Ministers to make the charter available to the public. This is an ongoing duty placed on Ministers. As the charter may change from time to time in accordance with section 18, the Ministers will have to ensure that the version of the charter made available to the public as required by section 17 is the current version.
29. [Section 18](#) requires the charter to be reviewed every five years. It requires the Scottish Ministers to include as part of the review process consultation with the Scottish Commission on Social Security (established by section 21), persons who have received assistance through the Scottish social security system (as defined by

section 23) and bodies who work with, or represent, people whose finances are adversely affected by a person in the household having a protected characteristic listed in section 4 of the Equality Act 2010 (for example age, disability). After each review the Scottish Ministers must provide a report to the Parliament explaining the consultation undertaken and what changes to the charter (if any) have been made, with reasons why changes have been made, or not made.

30. [Section 19](#) allows courts and tribunals to take the charter into account where it is relevant, and makes clear that breach of any of the expectations set in the charter is not, of itself, a ground for legal action.

### **Annual report ([section 20](#))**

31. [Section 20](#) places a statutory duty on the Scottish Ministers to report annually to the Scottish Parliament on the performance of the Scottish social security system (as defined by section 23) during the previous financial year. As well as information about the system's performance, the report is to describe what the Scottish Ministers have done in that year to meet the expectations on them set out in the charter. The report is also to contain an assessment of how the Scottish social security system has affected the circumstances of people whose finances are affected by a person in the household having a protected characteristic listed in section 4 of the Equality Act 2010 (for example age, disability).

### **Scottish Commission on Social Security ([sections 21 and 22](#))**

32. [Section 21](#) establishes the Scottish Commission on Social Security. It also introduces schedule 1, which makes provision about how the Commission is to operate, its financing and its membership. Paragraph 1 of the schedule provides that the Commission is to be independent of the Scottish Government. Paragraph 4 gives it rights of access to information.
33. [Section 22\(1\)](#) sets out the Commission's core functions. These include scrutiny of proposals for legislation, reporting on any social security matters that it is asked to report on by the Scottish Ministers or the Scottish Parliament, and reporting on the extent to which expectations in the Scottish social security charter are being met. Subsection (2) enables the Commission, when exercising any of the core functions listed in subsection (1), to have regard to any international human rights instruments that may be relevant to its work. When scrutinising proposals for legislation the Commission must have regard to such instruments and must also have regard to the Scottish social security principles articulated in section 1 (see section 97(6)). Subsection (3) requires that when the Commission produces a report on performance of one of the functions listed in subsection (1), it has to make that report available to the public.

### **Meaning of "Scottish social security system" ([section 23](#))**

34. [Section 23](#) defines the "Scottish social security system" as meaning, at the time of writing, the system constituted by Parts 2 and 3 of the Act. Subsection (c) provides an automatic extension to the definition, should in future the Scottish Parliament make legislation that provides for a new form of social security assistance, so that such assistance would also form part of the system. For the extension to apply, it would have to be a form of assistance that the Parliament only had competence to create through the power to create new social security benefits that is contained, with limits, in the Scotland Act 1998.



## **Part 2 (Giving of Assistance by Scottish Ministers)**

### ***Chapter 1 (Assistance to be given according to determination of entitlement)***

#### **The duty to give assistance**

35. A duty is placed on the Scottish Ministers, by section 24, to give a person whatever assistance of a kind described in Chapter 2 of Part 2 the person is entitled to. Entitlement to assistance under section 24 flows from a determination of entitlement. The ways in which a determination of entitlement may be made are set out in section 25.
36. **Section 26** allows an individual to request that a determination of their entitlement be cancelled. There may be situations where it is to an individual's disadvantage to receive assistance, for example because entitlement to one form of assistance prevents the person from receiving another form.

#### **Who determines entitlement?**

37. In summary, a determination of entitlement will be made in the first instance by the Scottish Ministers under section 37. If the individual whose entitlement has been determined is dissatisfied with that determination, section 41 allows the individual to request the Scottish Ministers to reconsider it under section 43. If the individual remains dissatisfied with the Scottish Ministers' determination, or if the Scottish Ministers fail to make the determination within the period permitted, the individual can appeal to the First-tier Tribunal for Scotland under section 46. At the end of such an appeal, the First-tier Tribunal may make a determination of the individual's entitlement. These parts of the process are set out in Chapter 3 of Part 2 and are discussed in more detail below.
38. By conferring jurisdiction on the First-tier Tribunal to deal with entitlement to assistance under Part 2, the Act attracts the review and appeal provisions contained in Part 6 of the Tribunals (Scotland) Act 2014 ("the Tribunals Act"). Part 6 of the Tribunals Act empowers the First-tier Tribunal to review its own decisions and provides for onward appeals from the First-tier Tribunal to the Upper Tribunal for Scotland and from the Upper Tribunal to the Court of Session. It provides that at each appeal stage, the appellate body (be it the Upper Tribunal or the Court of Session) has the same powers to dispose of the appeal as the body whose decision is under appeal. Which, in this context, means that on appeal a determination of entitlement may be made by the Upper Tribunal or the Court of Session or, ultimately, by the UK Supreme Court (which has the power to hear appeals against decisions of the Court of Session and can also consider references from that Court). Section 25 of the Act confirms that this is the position.

#### **How is entitlement determined?**

39. Whoever makes a determination of entitlement, the component parts of it are set out in section 50. In all cases, determining an individual's entitlement to a given type of assistance will entail a decision about whether or not the individual has met the relevant eligibility criteria for that type of assistance (see subsection (1)(a)). The relevant eligibility criteria for each type of assistance will be set out in regulations (see the discussion of Chapter 2 of Part 2 below).
40. If the individual meets the eligibility criteria for the type of assistance in question, the next step in determining the individual's entitlement is a decision about what assistance the individual is entitled to be given (see subsection (1)(b)). Again, this decision is to be taken in accordance with the regulations relevant to the type of assistance in question.
41. The decision to be taken under section 50(1)(b) described in the preceding paragraph is a decision about what assistance of the type in question the individual is entitled to be given at the time the decision is made. Section 50(1)(c) requires that, in certain circumstances, the person determining entitlement is to make a decision about the

individual's future, as well as present, entitlement to assistance. Those circumstances are to be set out in regulations under section 51. Where a determination of entitlement includes a decision about the individual's future entitlement to assistance it is referred to in the Act as having been made on the basis that the individual has an ongoing entitlement to assistance (see paragraphs 42 to 45).

42. Where a determination is being made of an individual's entitlement to assistance in respect of an event, section 50(1)(d) requires that as part of making the determination a decision is made about whether the individual has possibly applied for the assistance prematurely. A decision that an individual has possibly applied prematurely leaves the door open to the individual making a further application for assistance in respect of the same event. For further explanation of this point see paragraph 57 below.

### **Ongoing entitlement**

43. The purpose of allowing regulations under section 51 to provide for entitlement to be determined on an ongoing basis in certain circumstances is to remove the need for someone to apply repeatedly for the same type of assistance every few weeks or months. If, for example, it is clear that there is going to be no short to medium-term improvement in the physical condition of someone who is entitled to disability assistance in respect of the previous month, it is sensible to decide that that person will continue to be entitled to disability assistance for at least a certain number of months or years into the future.
44. Regulations under section 51 will set out the types of assistance in relation to which entitlement will be determined on an ongoing basis; while ongoing entitlement makes sense for disability assistance, it would not make sense for funeral expense assistance, for example, as that will be provided one funeral at a time. The regulations may also set out exceptions to the circumstances in which a determination of entitlement to a particular type of assistance will be made on an ongoing basis; for example, if someone applies for disability assistance for a past period and indicates in the application form that their mental condition has since improved so that they no longer have a disability, it would make no sense to nevertheless determine their entitlement to disability assistance on an ongoing basis.
45. Subsection (2)(a) of section 51 provides for regulations under that section to make provision about when someone is to become entitled to be given assistance under section 24 in respect of what is a future period at the time the determination of entitlement is made. The point is that if it is decided that a person is likely to continue to be entitled to a given type of assistance for the next 6 months, the person will not necessarily be given the value of 6 months' worth of assistance immediately as a lump sum. If the type of assistance in question is normally payable on a monthly basis, for example, the regulations under section 51 may provide for the individual to be given one month's worth of assistance at the end of each month over the 6 month period. Of course the frequency with which different types of assistance will be given may vary from one type of assistance to another and may also vary over time and in relation to different circumstances. Accordingly, these are matters left to regulations.
46. Subsection (2)(b) of section 51 allows regulations under that section to specify assumptions on the basis of which future eligibility is to be decided. One can of course only speculate about whether someone will remain eligible for a given type of assistance into the future. Therefore, a decision about ongoing entitlement will necessarily be made on the basis of certain assumptions (for example, in the case of carer's assistance, that the person will continue to provide care to someone else and that someone else will continue to be entitled to a disability benefit). In relation to what happens if those assumptions prove wrong, see below the discussion of Chapter 5 of Part 2.

### **Later determination supersedes earlier**

47. [Section 27](#) states that the assistance an individual is to receive in respect of any period, or as a result of any event, is established by the latest determination of entitlement.

Therefore if a determination is made under section 37 by the Scottish Ministers, and the person exercises the right under section 41 to request a re-determination, the re-determination will supersede the original one.

48. A further example of where a later determination may supersede an earlier one is where a determination has been made that an individual is entitled to a particular type of assistance on an ongoing basis for, say, the next 6 months (see discussion of ongoing entitlement above). Three months after that determination is made, the individual's circumstances change prompting a new determination of the individual's entitlement to be made. That new determination will replace the original one, with the result that the original determination will not entitle the individual to any assistance for the 3 months it would otherwise have had left to run. The individual may, however, be entitled to assistance for those 3 months under the new determination depending on how the change in circumstances has affected the individual's eligibility for the type of assistance in question.
49. [Section 27](#) only causes a later determination to supersede an earlier one to the extent that they overlap. A later determination of entitlement to funeral expense assistance will therefore not affect an earlier determination of entitlement to funeral expense assistance in relation to a different funeral. The two determinations concern different events. Similarly, a later determination of entitlement to disability assistance for September to December will not affect entitlement to disability assistance under an earlier determination for June to August of the same year. The two determinations relate to different periods.

## ***Chapter 2 (Types of assistance to be given)***

50. [Chapter 2](#) sets out the nine types of assistance that are to be given by the Scottish Ministers under section 24. Each assistance type is described at a high level by a section of Chapter 2, setting out the characteristics of the assistance. Regulations will set out the eligibility rules that will determine entitlement to assistance and what assistance is to be provided. In all sections introducing an assistance type there is a link to a schedule which makes further provision about the content of regulations.
51. The assistance types provided for are as follows:
- Carer's assistance (section 28), which is to be provided to an individual who cares for another individual with a disability. Schedule 2 requires that eligibility for this type of assistance is to depend on a person providing, or having provided, regular and substantial care to a person with a disability that normally entitles a person to a disability benefit. The schedule provides for these terms to be further defined, and defines "disability benefit". It describes other sorts of criteria that may be included in regulations, such as provision for situations where more than one person provides care to a disabled person.
  - Cold-spell heating assistance (section 29), which is to be provided to an individual to help meet heating costs in periods of cold weather. Schedule 3 requires that eligibility for this type of assistance is to depend on a person's home being situated in an area that experiences a spell of cold weather, or is expected to experience such a spell. Amongst other criteria, eligibility may be made to depend on a person's means or on the individual being in receipt of other types of social security assistance. That could include benefits such as income support or universal credit, and is not limited to the types of assistance provided for by the Act.
  - Winter heating assistance (section 30), which is to be provided to an individual to help meet heating costs in winter. Schedule 4 says that eligibility for this type of assistance may contain eligibility criteria related, amongst other things, to a person's age and their receipt of other types of social security assistance. But, eligibility may not be made to depend on a direct assessment of the individual's



financial means, and nor may the amount of assistance given be made to turn on that factor.

- Disability assistance (section 31), which is to be provided to a disabled individual on account of their disability (which can be physical or mental). It also provides for assistance to persons who are terminally ill. Schedule 5 requires that, for disability, eligibility for this type of assistance is to depend on the disability having a significant adverse effect on the person's daily activities, that is not a short-term effect. For terminal illness the day-to-day impact of the condition is immaterial, and Chapter 3 of the schedule provides four special rules that apply. In terminal illness cases an appropriate diagnosis by a registered medical practitioner, based on guidance produced by the Chief Medical Officer, will be sufficient evidence that a person qualifies for assistance. Section 31 will enable the Scottish Government to provide for disability assistance such as is currently provided for through Disability Living Allowance, Personal Independence Payment, Attendance Allowance and Severe Disablement Allowance. Schedule 5 provides that eligibility for disability assistance cannot be means-tested. Paragraph 18 of the schedule describes types of assistance that cannot be given as lump-sum payments, because such assistance remains a reserved matter (see paragraph (c) in the definition of "excluded benefit" in Section F1 of schedule 5 of the Scotland Act 1998). This includes assistance as a result of pneumoconiosis and byssinosis.
- Early years assistance (section 32), which is assistance to an individual who has costs related to having a child in their family. This includes persons who are expecting to have a child, such as due to pregnancy or an adoption arrangement. Schedule 6 requires that eligibility for this type of assistance be restricted to four broad situations (described as "primary eligibility criteria"). These are: pregnancy; a relationship to a pregnant person (such as a partner); responsibility for a child after that child's birth; and responsibility for a child at or after a specified event in the child's life. The sorts of events likely to be so specified, in practice, are a child reaching the age of 2 or 3 (to align with progression to early learning and the start of nursery) and starting primary education, though the Act leaves open what these events may be. It is for the regulations to define what being responsible for a child means for the purposes of determining entitlement to the assistance.
- Employment-injury assistance (section 33), which is to be provided to an individual who has had an injury or contracted a disease through employment. Schedule 7 makes further provision, and requires regulations to define "employment" for these purposes, as well as what are relevant personal injuries and diseases. Any definition of "employment" cannot include within it the matters described in paragraph 3(2) of schedule 7, due to the limits of devolved competence set out in the legislation there described. In practice this type of assistance would be used to create Scottish industrial injuries benefits, within the limits of devolved competence. Paragraph 7 of the schedule provides that eligibility for employment-injury assistance cannot be means-tested. Paragraph 14 of the schedule describes types of assistance that cannot be given as lump-sum payments, because such assistance remains a reserved matter (see above in relation to disability assistance).
- Funeral expense assistance (section 34), which is assistance to an individual to help meet funeral costs that the individual has met or is responsible for meeting. Schedule 8 requires that regulations for this type of assistance define "funeral" for this purpose, and that eligibility criteria can be based, amongst other things, on where the funeral takes place, the relationship of the individual to the deceased person, and the means of either person.
- Housing assistance (section 35), which is assistance to an individual to meet, or help towards meeting, housing costs. Schedule 9 requires that housing assistance be made available in two situations, while allowing for it to be made available in others. The first situation is where the Scottish Ministers have made regulations

to prevent a reduction in a universal credit award due to a rented property in the social sector having more bedrooms than a household is regarded as needing. The increased amount of universal credit an individual receives as a result of those regulations may be reduced by the benefit cap. Assistance would be made available to pay the amount of that reduction. The second situation is where a person awarded universal credit is aged 18 to 21 and their age prevents them being awarded assistance with housing costs in the universal credit award. Paragraph 1(2) removes the requirement to make provision for either situation, if there is no one who could be assisted by it, for example because the universal credit age rules no longer prevent persons aged 18 to 21 from receiving assistance with housing costs.

- Short-term assistance (section 36), which is assistance to help individuals in the short term. Schedule 10 requires that the Scottish Ministers make regulations providing for such assistance to be given to persons who have a change in their entitlement to assistance as described in sections 28 to 35 (i.e. any of the other assistance types under Part 2, Chapter 2), and who have asked for a review or appeal of that determination. In this way, short-term assistance will be used to continue giving assistance, for a while, to persons who have been entitled to assistance on an ongoing basis (see paragraphs 42 to 45 above), but whose entitlement has reduced or ceased by a later determination of their entitlement that is being revisited. An example would be where a person has been entitled to regular payments of disability assistance, but it is decided that their entitlement should be less. Regulations can provide for such a person to be eligible for short-term assistance while the determination is being re-determined or appealed so that during that period the person suffers no loss of income. Schedule 10 leaves scope for the Scottish Ministers to prescribe other eligibility rules for short-term assistance.

### **Chapter 3 (Determining entitlement)**

#### **Determination by the Scottish Ministers**

52. Section 37 places a duty on the Scottish Ministers to decide whether or not a person is entitled to assistance as provided for in Chapter 2. This may be as the result of an application or, where regulations under section 52 so provide, without application.
53. One example of when Ministers may determine entitlement without an application is in circumstances where they already hold sufficient information to determine an individual's entitlement. An example could be where a person was entitled to winter heating assistance in the previous year and Ministers have no reason to believe the person's circumstances have changed since. Regulations under section 52 could, in that case, provide for Ministers to determine such a person's entitlement and make a payment without any application for winter heating assistance having been made.
54. Another example of when Ministers may make a determination of entitlement unprompted by an application is where it has been determined that an individual is entitled to assistance on an ongoing basis (see paragraphs 42 to 45 above) and before the end of the period covered by that forward-looking determination of entitlement Ministers learn that there has been a change in the individual's circumstances. In that event, Ministers would determine again the individual's entitlement to the type of assistance in question in light of the change in circumstances. As explained in paragraph 47 above, the resulting determination may (to some extent) supersede the earlier one.
55. As all the information required to make a determination of entitlement may not be available where there has been no application, section 52(2) allows for regulations to specify the information and assumptions that are to be used in making a determination in such circumstances. For instance, in the winter heating example given in paragraph 52 above, a determination of entitlement to that type of assistance in succeeding years

would necessarily rest on an assumption that the individual's circumstances have not materially changed between times.

56. [Section 38\(1\)](#) allows Ministers to specify how applications for assistance are to be made and to require evidence to be provided along with applications. For example, an application for early years assistance might require to be accompanied by evidence of pregnancy. A purported application for assistance will not trigger Ministers' duty to make a determination under section 37 if it is not made in the form, or not accompanied by the evidence, required by Ministers. If Ministers do not accept that something is a valid application, they have to advise an individual of their reasons and that there is a right of appeal (provided for by section 61(1)(a)). Section 38(2) places Ministers under a duty to make the public aware of the requirements for applications set under subsection (1).
57. [Section 38\(3\)](#) provides that, ordinarily, once a person has applied for assistance in respect of a particular period or event and a determination of entitlement has been made as a result, the person cannot apply again for the same type of assistance in respect of the same period or event. This means that if someone applies for early years assistance in relation to the birth of a child, and Ministers make a determination of whether or not the individual is entitled to early years assistance as a result of the child's birth, the individual cannot apply again for early years assistance in respect of the birth of the same child. (This rule is, however, qualified by subsection (4), as explained in the next paragraph.) If the individual is aggrieved by the Scottish Ministers' determination, he or she can request a re-determination under section 41 and, if still dissatisfied, can appeal under section 46 (see paragraphs [36](#) and [37](#) for a fuller summary of the various ways in which a determination of entitlement can be made). To be clear, section 38(3) would not prevent a different individual applying for early years assistance in respect of the birth of the same child. Nor would it prevent the same individual applying for early years assistance in respect of a different event in the life of the same child.
58. Subsection (4) of section 38 qualifies the effect of subsection (3). It allows another application for assistance to be made in respect of an event despite the rejection of an earlier application where the last determination made in respect of the event says it can. Section 50(2) requires that a determination state that a further application can be made if the application being determined is found to be possibly premature. An application is possibly premature where the applicant does not qualify for assistance in respect of the event at the time the determination is made but may qualify in future should circumstances change (see section 50(3)). For example, someone may apply for early years assistance while pregnant but not be eligible as a result of applying too early in the pregnancy. In that case, the application is possibly premature and the applicant will be able to re-apply later. By contrast, if an application is rejected on account of being made after the deadline for applying, the application is not possibly premature (i.e. there is no possibility that a subsequent application can be made before the deadline). In that case, section 38(4) will not apply, with the result that the individual cannot subsequently apply for assistance in respect of the event.
59. [Section 39](#) allows an applicant to withdraw an application prior to its determination. Where this is requested, the duty imposed on the Scottish Ministers by section 37 to determine the application ceases and no determination must be made. Ministers may require that such requests are made in a particular form, for example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). As section 38(3) only prevents a further application being made in respect of a period or event if the preceding application results in the Scottish Ministers making a determination under section 37, it follows that if an individual withdraws an application before a determination is made, the individual can apply again for the same type of assistance in respect of the same period or event.
60. [Section 40](#) requires that all persons who have applied for assistance, or whose entitlement to assistance has been determined without an application, must be notified

of the Scottish Ministers' determination under section 37 and the reasons for it. The person must also be told that they have the right to have their entitlement considered again by the Scottish Ministers (see section 41), and that they will have the right to appeal to the First-tier Tribunal if the Scottish Ministers do not complete their re-determination within a certain period (see section 46). This must be done in a way that gives the person a record of the information that can be shared with others. That would prevent, for example, the information being given solely by a telephone call. Where an assessment report was used in making the determination, the person must be advised that he or she has a right to request a copy of it (that right is provided for by section 60).

### **Re-determination by the Scottish Ministers**

61. [Section 41](#) enables an individual to ask that their entitlement be looked at again by the Scottish Ministers if they are not content with a determination by the Ministers under section 37.
62. A request for a re-determination will be considered only if it satisfies the requirements set out in subsections (3) and (4) of section 41. Subsection (3) enables the Scottish Ministers to set requirements for how a request for a re-determination must be made. For example a written and signed request might be required (though in practice most applications are likely to be capable of being made electronically). Subsection (5) requires Ministers to publicise requirements as to the form in which requests for a re-determination should be made. If Ministers do not accept that something is a valid request, they have to advise an individual of their reasons and that there is a right of appeal (provided for by section 61(1)(b)).
63. Subsection (4) of section 41 deals with the period within which a request for a re-determination must be made. Subsection (4)(a) empowers the Scottish Ministers to make regulations setting a deadline for re-determination requests (section 96 provides for such regulations to be subject to the negative procedure). Subsection (4)(b) allows for a request for a re-determination to be considered after the deadline specified in regulations if the individual can show that he or she has a good reason for not requesting the re-determination sooner. Section 42 provides that it is for the Scottish Ministers to decide whether an individual has a good reason, with an appeal against the Ministers' decision being possible, to the First-tier Tribunal for Scotland. In no case can a request for a re-determination be considered more than one year after the individual was told of the original determination under section 37 (see section 41(4)(b)(ii)).
64. [Section 43](#) places a duty on the Scottish Ministers to re-determine of new the person's entitlement to assistance, where a request is made under section 41. (As section 43(6) makes clear, the Ministers' duty to consider a re-determination request only triggers if the request complies with the requirements of section 41(3) and (4).) Subsections (2) and (5) provide that Ministers must aim to make the re-determination within a timescale to be set by regulations. If Ministers fail to do this, subsection (3) and section 46(1)(b) provide that the person who made the request has the immediate right of appeal to the First-tier Tribunal for Scotland. Subsection (3)(a) also makes clear, however, that the Scottish Ministers may still make the re-determination out of time. An individual may wish to wait for the Ministers to do so before deciding whether or not to take a case to the Tribunal.
65. [Section 44](#) sets out what the Scottish Ministers must do when they have re-determined a person's entitlement to assistance. The person must be informed of the determination, the reasons for that determination, and that they have the right to appeal the determination if they so wish. The Scottish Ministers must also provide the individual with an appeal form, which the individual can return to the Scottish Ministers in order to initiate an appeal. This must be done in a way that gives the person a record of the information that can be shared with others. That would prevent, for example, the information being given by a telephone call. Where an assessment report was used in

making the determination, the person must be advised that he or she has a right to request a copy of it (that right is provided for by section 60).

66. Where a decision following a request for re-determination is not made within the period allowed by regulations, section 45 provides that the Scottish Ministers must inform the individual of their right immediately to appeal to the First-tier Tribunal for Scotland and provide the individual with an appeal form, which the individual can return to the Scottish Ministers in order to initiate an appeal. The information must be provided in a way that gives the person a record of the information that can be shared with others. As mentioned above, the individual could choose to wait for the Scottish Ministers' re-determination before deciding whether or not to go to the Tribunal.

### **Appeal against the Scottish Ministers' determination**

67. [Sections 46 to 49](#) provide rights of appeal to the First-tier Tribunal for Scotland against a determination by the Scottish Ministers of an individual's entitlement to assistance under section 24.
68. [Section 46\(1\)](#) provides that an appeal can only be taken to the Tribunal if either the initial determination required by section 37 has been re-determined as provided for by section 43 or if the duty to make such a re-determination has not been completed within the timescale set by regulations.
69. [Section 47](#) sets out the process for initiating an appeal. It provides that an appeal is initiated by the individual returning to the Scottish Ministers the appeal form given to the individual under section 44 or 45. On receipt of a form, the Scottish Ministers must send it, together with the information they hold and used in making the determination being appealed against, to the First-tier Tribunal for Scotland.
70. Ordinarily it is for Tribunal Rules under the Tribunals (Scotland) Act 2014 to specify what is required in order to initiate an appeal to the First-tier Tribunal. Section 47(6) makes clear that Tribunal Rules can make further provision about the form and manner of initiating appeals, but they cannot contradict subsection (1) (for example they may not say that an appeal cannot competently be made by returning an appeal form to the Scottish Ministers).
71. [Section 48](#) provides the timescales within which appeals to the First-tier Tribunal can be made. An appeal can be made within 31 days of the relevant event without having to get the Tribunal's permission to bring it. Beyond 31 days from the relevant event, an appeal can only be brought with the Tribunal's permission (subsection (3) sets the test by which the Tribunal will decide whether to give permission). And in no event can an appeal be taken more than a year after the relevant event. What constitutes the relevant period depends on what type of determination by the Scottish Ministers the appeal is brought against. If it is brought against a re-determination by the Scottish Ministers under section 44, the relevant event is Ministers notifying the individual of the re-determination. If it is brought against a determination under section 37 (i.e. it is brought following a failure by Ministers to make a re-determination within the period allowed by regulations under section 43(5)), the relevant event is Ministers notifying the individual that they have failed to make a re-determination within the period allowed. (Section 62, which is discussed in paragraphs [88](#) and [89](#) below, creates a presumption about when information is received, which is relevant for calculating timescales under section 48.) An appeal is brought, for the purposes of section 48, when a duly completed appeal form is returned to the Scottish Ministers. Any period between the Ministers receiving the appeal form and sending it to the Tribunal as required by section 47(2) is therefore not counted in relation to the timescales referred to in section 48.
72. The period of 31 days is allowed for an appeal without the Tribunal's permission on the basis that it represents a month, but specifying the period in days rather than as one calendar month ensures nobody is disadvantaged by the fact of a relevant event occurring in a short calendar month (such as February).



73. The powers of the First-tier Tribunal in appeals are set out in section 49. The Tribunal can uphold the determination (in effect, refuse the appeal), or it can make a different determination of its own as to the person's entitlement to assistance.
74. As mentioned in paragraph 37 above, it follows from giving the First-tier Tribunal jurisdiction that the further rights of appeal and review set out in Part 6 of the Tribunals (Scotland) Act 2014 apply.

### **The determination of entitlement**

75. For discussion of section 50 (decisions comprising determination) see paragraphs 38 to 41 above.
76. For discussion of section 51 (determination on basis of ongoing entitlement) see paragraphs 42 to 45 above.
77. For discussion of section 52 (determination without application) see paragraphs 52 to 54 above.

## ***Chapter 4 (Further provision about determining entitlement)***

### **Identifying possible eligibility**

78. [Section 53](#) places a duty on the Scottish Ministers, when making a determination of entitlement to assistance under section 37 or 43, to alert an individual if, in the process of making the determination, they identify that the individual may be eligible for other assistance under Part 2. For example, a person applying for early years assistance might mention that they have a difficulty communicating, which might suggest the person may also be eligible for disability assistance. Or the application for early years assistance in respect of one event (e.g. the birth of a child) may disclose that the applicant is, or is about to become, eligible for further early years assistance in respect of another event (e.g. the applicant's eldest child has recently reached school age). In such situations, Ministers must either:
- tell the person about the other assistance that may be available to the person and how to apply for it, or
  - if regulations allow the Ministers to determine the person's entitlement to the other type of assistance without an application (see paragraphs 52 to 54 above), Ministers may ask the person if they wish Ministers to proceed to make a determination of entitlement to that other type of assistance without an application.

### **Obtaining information to make determination**

79. [Section 54](#) provides that where Ministers are determining an individual's entitlement, they can request that the individual provide further information that they need to reach a decision. This might include results from an assessment, an example might be a medical examination to ascertain the extent of a person's injury where an application has been made for employment-injury assistance. Subsection (2) states that if information Ministers request is not provided, they may determine that the person is not entitled to assistance. Subsection (2) does not, however, preclude Ministers from making a determination of entitlement based on the information they do hold.
80. [Section 55](#) enables the Scottish Ministers to place a duty to notify them of a change of circumstances on:
- an individual receiving ongoing assistance,
  - anyone acting on behalf of such an individual (such as an appointee under section 58), or

- anyone to whom the ongoing assistance that someone else is entitled to is being paid (for example, where a parent is receiving disability assistance on behalf of a child).
81. This power to impose a duty to notify a change of circumstances is to be used where a determination is made that a person is entitled to assistance on an ongoing basis (see paragraphs 42 to 45 above). As discussed above (see paragraph 45) a decision that an individual will be entitled to a given type of assistance in the future can only be speculative at the time the decision is taken. It is therefore important for Ministers to find out as soon as possible if any of the assumptions on which the decision is premised prove false so that the person's ongoing entitlement to the type of assistance in question can be looked at again (the original decision may have been an under-estimate or an over-estimate of the true position). An example might be where an award of carer's assistance was made to a person on the basis that they would continue to care for a disabled person and therefore would receive future payments of carer's assistance. The carer might be placed under a duty to notify the fact that they have stopped providing care, since that would cause their entitlement to assistance to come to an end. As explained in paragraph 47, being notified of a change in that circumstance will cause Ministers to make another determination of the individual's entitlement to carer's assistance.
82. The significance of being placed under a duty to notify a change of circumstances is that section 72 makes it a criminal offence to fail to do so if, as a result, an individual obtains more assistance than they are entitled to (see discussion of Chapter 6 of Part 2 below). Whether or not a failure to notify a change of circumstances amounts to an offence, if an individual receives more assistance than he or she is entitled to, the excess may be recoverable by the Scottish Ministers under Chapter 5 of Part 2 (see discussion of that Chapter below).
83. [Section 57](#) enables the Scottish Ministers to remove a duty to notify that they have placed on an individual, in whole or in part. An example might be if Ministers had determined that a person was entitled to disability assistance, had imposed a duty to notify them of a change in the person's medical condition, but in consequence of a change in the person's condition Ministers considered that the requirement was no longer necessary.

## **Appointees**

84. [Section 58](#) allows the Scottish Ministers to appoint a body or individual (who must be over 16 years of age if an individual) to act on behalf of an individual in relation to that individual's entitlement to assistance under Part 2. The appointee effectively stands in the shoes of the individual that the appointee has been appointed to represent (see subsection (6)).
85. The power to appoint someone can be used in two situations:
- where the individual in question is dead and there is not an executor acting for the individual's estate who could deal with issues around the individual's social security entitlement (see subsection (3)),
  - where the individual does not have capacity to deal with issues surrounding social security entitlement and there is no-one else, such as an appointed guardian or someone with a power of attorney, available to act on the individual's behalf (see subsection (4)).

## **Support during discussions and assessments**

86. [Section 59](#) gives an individual the right to be accompanied by someone else to provide support during any discussion or assessment of the individual's entitlement to assistance under Part 2. This includes any discussion with Scottish Government staff about what assistance will be available to the individual, and any sort of functional assessment the individual may be required to undertake in order to establish entitlement. Subsection

(2) places the Scottish Ministers under a duty to ensure that anyone who may be discharging functions on their behalf (such as a health professional who is carrying out a functional assessment on their behalf) has to respect the individual's right to have a supporter present. Subsection (3) makes clear that the supporter's role extends to making representations on the supported individual's behalf. The right to have a supporter present is qualified in cases where it would be unreasonable to accommodate the individual's wishes. Whether someone's wishes are unreasonable will depend on the facts and circumstances of the particular case, but it may, for example, be considered unreasonable to allow an individual to continue to attend as a supporter if that individual is behaving aggressively.

### **Access to reports**

87. Where an assessment report was used in making a determination of a person's entitlement, section 60 gives the person a right to request a copy of it. The Scottish Ministers must comply with a request, except where it would breach data protection rules to provide the report (an example would be where it contains personal information about another individual that the person assessed has no right to see).

### **Right to appeal Scottish Ministers' process decisions**

88. [Section 61](#) gives an individual the right to appeal a decision by the Scottish Ministers to refuse to accept that the individual has made a valid application for assistance or for a redetermination of their entitlement. It also enables an individual to appeal a decision by Ministers that the individual has not got a good reason for seeking a re-determination after the expiry of the timescale prescribed by regulations (under section 41(4)(a)). These appeals are made to the First-tier Tribunal for Scotland, with that Tribunal's permission being required if the appeal is brought more than 31 days after the day the individual was informed of the decision. No appeal can be considered after a year has passed from the day the individual was informed of the decision. The decision of the First-tier Tribunal on an appeal, or on a request for permission to appeal, is final, meaning it cannot be appealed further.

### **Presumption about when information is received**

89. [Section 62](#) creates a legal presumption about how long it takes for information to be received after it is sent for the purposes of calculating:
- how long an individual has to request a re-determination by the Scottish Ministers under section 41 after being informed of Ministers' first determination of the individual's entitlement,
  - how long an individual has to make an appeal to the First-tier Tribunal under section 46 against a determination of entitlement by the Ministers after being informed, either, of the Ministers' decision on re-determination or that Ministers have not made a re-determination decision within the period allowed, and
  - how long an individual has to make an appeal to the First-tier Tribunal under section 61 against a decision by the Ministers to reject as invalid an application for assistance or a request for a re-determination, or against a decision by Ministers not to entertain a late request for a re-determination.
90. In each of these cases, section 62 provides that it is to be presumed that the information is received 48 hours after it is sent whether it is sent by post or email to the most up-to-date address the Scottish Ministers hold for the individual. This is, however, only a presumption which can be rebutted if it can be proved that the information was received sooner or later than that.

## **Chapter 5 (Recovery of value of assistance)**

### **Assistance given in error**

91. Sections 63 to 69 deal with the recovery of overpaid assistance as a result of an error.
92. Section 63(1) makes an individual liable to repay where an error has been made resulting in an overpayment (but this basic rule is qualified by section 64). Subsection (4) of section 63 defines what constitutes an error that will give rise to a liability for an overpayment. An example might be where the Scottish Ministers were unaware that a person's circumstances had changed such as to make them no longer entitled to ongoing assistance which it had been assumed the person would be entitled to (see paragraph 80 above).
93. Section 63(2) clarifies that the liability is limited to the difference between the assistance given and the assistance that should have been given. So if, in error, Ministers have given someone £200 instead of £150, the person will only be liable for the £50 difference not the full £200.
94. Subsection (3) provides for how the value of assistance is to be calculated if it is not provided in money. For example, if a disabled person agreed that Ministers should provide a mobility aid rather than cash, its value for the purposes of calculating any liability for overpayment would be what it cost Ministers to provide the aid, not what it might have cost the individual to buy it.
95. Section 64 limits the circumstances in which an individual can be held liable to repay an overpayment. It provides that the individual has no liability unless either:
- the individual has some responsibility for the overpayment being made, or
  - the error resulting in the overpayment is the sort of error that someone can reasonably be expected to have noticed.
96. Section 64(2) sets out when an individual is to be treated as having some responsibility for an overpayment being made. In essence, it is where the individual provided false or misleading information, causing Ministers to determine entitlement on an erroneous basis, or where the individual failed to disclose a change of circumstances which the individual had a duty to tell Ministers about because, had they known about it, Ministers would have looked again at a determination of the individual's ongoing entitlement to assistance.
97. Section 64(3) sets out two things that may be considered when deciding whether an overpayment has resulted from the sort of error that someone could reasonably be expected to notice. One factor is the size of the overpayment; it would, for example, be more reasonable to expect someone who had been routinely receiving £200 a month to notice an error resulting in a payment of £2,000 one month than an error resulting in a payment of £201. The other factor is whether information given to the individual by the Scottish Ministers before, or immediately after, the assistance was given should have made the error apparent. Section 64(3) is not exhaustive of the matters that can be considered in deciding whether someone can reasonably be expected to have noticed that an error was made. Where there is dispute, it will be for the court or tribunal dealing with the case to decide, on the strength of all the evidence presented, whether a reasonable person would have noticed the mistake.
98. Where the Scottish Ministers are aware of a person's financial circumstances, section 65 provides that they must consider those circumstances in deciding whether to pursue recovery of a liability and also in considering how that money is to be recovered, for example in considering whether to make deductions from other assistance that is to be provided to the individual. Only the schedules dealing with those types of assistance that may be given on an ongoing basis provide for deductions from assistance and in each case, in addition to the protection afforded by section 65, they provide that deductions

can only be made if the individual has agreed to that, or has unreasonably refused to agree a repayment plan (see schedule 2, paragraph 11(3); schedule 5, paragraph 17(3); schedule 7, paragraph 13(3); and schedule 9, paragraph 12(3)).

99. As a decision to make deductions will form part of a determination of entitlement, it will be open to challenge through the processes for challenging any aspect of a determination of entitlement set out in Chapter 3 of Part 2.
100. [Section 66](#) provides that a prescriptive period of 5 years is to apply to any liability to repay money to the Scottish Ministers. The basic effect is that if Ministers are aware that a liability to repay exists, but take no steps to recover the debt, after 5 years Ministers may lose the ability then to pursue the debt. This basic rule is subject to the other provisions of the Prescription and Limitation (Scotland) Act 1973.
101. [Section 67](#) prevents the Scottish Ministers from seeking to recover assistance under Part 2 of the Act that was given in error by using common-law remedies for unjustified enrichment. This means that the Scottish Ministers cannot bypass the protections that sections 64, 65 and 66 give to individuals by invoking a common-law basis for liability instead of section 63.
102. [Section 68](#) would allow the Scottish Ministers, by regulations, to provide for the First-tier Tribunal for Scotland to deal with actions to recover assistance given in error that otherwise fall to be pursued in the Sheriff Court.
103. [Section 69](#) provides that where assistance is given to an individual, but the individual has died, any payment for the period after the individual died is recoverable from the individual's estate. The effect is to enable (but not require) the Scottish Ministers to seek to recover overpayments where, for example, Ministers continued to pay assistance under a determination of ongoing entitlement, being unaware that the individual had died. Section 64 would prevent an overpayment in those circumstances being recovered under section 63 because the error resulting in the overpayment could not sensibly be described as the deceased's fault nor something that the deceased could reasonably be expected to notice.

### **Liability of deceased's estate for funeral expense assistance**

104. Funeral expense assistance is assistance to help someone pay for the costs of another's funeral (see section 34). The assistance is given on the basis that the individual meeting the funeral costs would struggle to meet them. It may be, however, that the deceased's estate is large enough to meet some or all of the costs, but that money is not in the hands of the person paying the costs when they fall due (and indeed may never be in that person's hands if the person has no claim on any part of the deceased's estate). Section 70 allows the Scottish Ministers to recover some or all of the value of the assistance given from the deceased's estate once it has been in-gathered.

### ***Chapter 6 (Offences and investigations)***

105. [Section 71](#) creates an offence of, and penalties for, providing false or misleading information to the Scottish Ministers, with the intention of causing an individual to be given assistance that they would not otherwise be given. Subsection (2) clarifies that making a statement is a form of providing information. Subsection (3) provides penalties, which vary according to whether the offence is prosecuted under summary procedure or solemn procedure. Solemn procedure involves a jury and is used for more serious offences. The maximum penalties for trial by solemn procedure are therefore set at a higher level, by subsection (3)(b), than those for summary procedure, set by subsection (3)(a).
106. [Sections 72](#) and [73](#) create offences of, and penalties for, failing to notify a change in circumstances. Again, the maximum penalties vary according to the manner in which any offence is prosecuted.



107. **Section 72** covers a situation where an individual has been notified, under section 56, that they have a duty to tell the Scottish Ministers if their circumstances, or the circumstances of another person, change in a way that will reduce, or remove, that person's entitlement to assistance. If the person fails to tell Ministers of such a change, and knew or ought to have known that the change would affect that entitlement, and the person does not have a reasonable excuse for failing to tell Ministers about the change, then an offence is committed.
108. **Section 73** creates a similar offence where a person causes another person to fail to tell the Scottish Ministers about a change in circumstances. This reflects existing social security offences, where it can be that another person is under a duty to tell Ministers that a person's circumstances have changed, but is prevented from doing so in some way, for example by the person whose circumstances have changed concealing the change from the person who has the duty to tell Ministers about it. In that example, the person whose circumstances have changed may commit an offence under this section. As with the section 72 offence, whether an offence is committed depends on the person's knowledge, or what they might reasonably be expected to know, and the effect on entitlement.
109. **Section 74** provides that individuals within an organisation can be held responsible for an offence committed by the organisation, where there is active involvement or neglect by a "responsible official" of the organisation. Subsection (3) describes the types of organisations this applies to, and subsection (4) describes what "responsible official" means in each case.
110. **Section 75** empowers the Scottish Ministers to make regulations about the investigation of the offences that the Act creates. Regulations under section 75 can give power for persons to enter and search premises, such as workplaces, but any use of this power cannot enable entry and search of places used only as a person's home. They can also give powers to seize documents, for example. Offences can be created by the regulations to sanction failures to provide information or obstruct investigations.
111. In relation to such investigations, section 76 places a duty on the Scottish Ministers to publish and maintain a code of practice on investigations. This is intended to provide transparency on how investigations will be conducted, and must be publicly consulted upon before it is published. It must also be kept under review, to ensure it remains up to date. Courts and tribunals are required, by subsection (5), to take the code into account where they are considering any question to which the terms of the code is relevant.
112. References in Chapter 6 to the "statutory maximum" and the "standard scale" in relation to levels of fines are to be construed in accordance with schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010. The 2010 Act defines the statutory maximum as the figure specified in section 225(8) of the Criminal Procedure (Scotland) Act 1995. At the time of writing it is £10,000. The standard scale of fines is set out in section 225(2) of that Act. Section 75(3) of the Act sets a level 3 fine as the maximum penalty that can be imposed for an offence created by regulations under that section. A level 3 fine is £1,000 at the time of writing.

### **Chapter 7 (Uprating for inflation)**

113. **Section 77** provides that each financial year (as defined in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010), the Scottish Ministers must calculate the inflation-adjusted level of the rates of assistance created by Part 2. Subsection (4) sets out how the inflation-adjusted level of a figure is to be calculated; it essentially entails increasing (or decreasing) the figure by a percentage which reflects, in the Scottish Ministers' opinion, the general percentage change in prices over a period. Once the inflation-adjusted levels of the assistance rates have been calculated, subsection (1) requires the Ministers to lay before the Scottish Parliament, and make publicly available, a report setting out their calculations and stating what they have

done, or intend to do, in light of the exercise. Those actions and intentions will have to take account of the duty that section 78 imposes for particular types of assistance.

114. [Section 78\(1\)](#) places the Scottish Ministers under a duty to bring forward legislation to increase carer's assistance, disability assistance, employment-injury assistance and funeral expense assistance rates where, and to whatever extent that, the exercise of calculating the inflation-adjusted levels for those assistance types under section 77 reveals that the prevailing rates are materially below their inflation-adjusted levels. The duty to bring forward legislation means laying before the Scottish Parliament for its approval draft regulations that would increase the assistance rates (see subsection (2)). Because the regulations are subject to the affirmative procedure (see section 96), the Scottish Ministers can make them only if the Parliament approves them in draft. If the Parliament does approve the draft regulations, subsection (3) requires that the Ministers make the regulations so that the rate changes take effect.

### **Part 3 (Supplementing Assistance under Other Enactments)**

#### **Top up of reserved benefits**

115. [Sections 79](#) and [80](#) enable regulations to provide for top up payments to a person who is entitled to any reserved benefit. The definition of "reserved benefit" matches that in exception 10 in Section F1 of Part 2 of schedule 5 of the Scotland Act 1998. Loosely, it means a benefit provided by the UK Government for which the Scottish Parliament does not have competence to legislate. The recipient of any top-up payment must appear to the Scottish Ministers to need the additional assistance for a purpose for which the reserved benefit is provided.
116. The detail of any top-up payments would be set out in regulations under section 79. The section further provides for regulations to set out how entitlement to top-up assistance is to be determined, the amount of assistance, the process by which assistance is sought and determined, and what happens if assistance is given incorrectly.
117. These sections (i.e. 79 and 80) reflect the legislative competence given to the Scottish Parliament by section 24 of the Scotland Act 2016 to legislate for top-up payments. Section 80 states restrictions on what regulations can do, which repeat restrictions on the Parliament's competence. These include that top-up assistance cannot be given to help meet housing costs, nor can a top-up payment be provided where, for example, the need arises solely as a result of a sanction because of non-compliance with a work-related requirement in a reserved benefit.

#### **Carer's Allowance: temporary provision**

118. [Section 81](#) places a statutory duty on the Scottish Ministers to pay a supplement on a twice-yearly basis to persons who receive Carer's Allowance in Scotland. Ministers are to determine a "qualifying date" in each half of the financial year, and persons who are receiving a Carer's Allowance on that date, and who are resident in Scotland, will receive the supplement. Ministers are given the power to modify these two criteria. The section provides for calculation of the supplement, which is designed to reflect the difference between the rate at which Carer's Allowance is paid and the rate of Jobseeker's Allowance, adjusted for inflation as described in subsection (5). At the time of writing the rate of Jobseeker's Allowance is not being uprated annually for inflation by the UK Government. Subsection (5) requires the Scottish Ministers to publish an uprated figure before the start of each tax year (defined by subsection (7)). Each payment will be the equivalent of 26 times the difference between the two figures (Carer's Allowance and uprated Jobseeker's Allowance) on the qualifying date. The intention is to provide that carers will receive a supplement so that the amount of Carer's Allowance that a person receives on an annual basis will effectively be the same as the person would receive had they been in receipt of uprated Jobseeker's Allowance.

119. The supplement is being provided because the Scottish Ministers cannot immediately increase the rate at which Carer's Allowance is paid to match the rate of Jobseeker's Allowance. It is envisaged that the supplement will cease to be needed once regulations under section 28 have been made to provide a scheme for carer's assistance, as that can provide for payments at the increased rate.
120. [Section 82](#) allows the Scottish Ministers to repeal the duty to pay the supplement and revoke any regulations made under it. This is to allow the statute book to be tidied up by removing the carer's allowance supplement provisions when the supplement is no longer needed as a result of the Scottish carer's assistance going live.

#### **Part 4 (Further Provision in Connection With Parts 2 and 3)**

##### **Inalienability of assistance**

121. An individual's entitlement to social security assistance is a personal right based on the individual's needs. Section 83 prevents someone agreeing to transfer that personal right to assistance to someone else. Section 84 prevents involuntary transfers of the right so that if, for example, an individual were to become bankrupt the individual would retain his or her personal entitlement to assistance rather than it becoming part of the person's estate that transfers into the hands of the trustee in bankruptcy.
122. [Section 83\(2\)](#) makes clear that while a person cannot agree to transfer their right to assistance, the section does not prevent the Scottish Ministers operating arrangements where an individual requests that payments should be made (in whole or in part) to someone else. For example, a young person may prefer to have payments made to a parent, or some people may find it easier to have some of their assistance given directly to their landlord. That is not the same as the right to the assistance being transferred to a third party. Because the individual's entitlement is personal, the individual can at any time change the payment arrangements.

##### **Information-sharing**

123. [Section 85](#) facilitates information sharing in connection with social security functions (as defined in subsection (10)). Subsection (1) allows the Scottish Ministers to require the bodies listed in subsection (2) to provide them with information for the purpose of a social security function. Subsection (5) allows the Scottish Ministers to give information which they hold for the purpose of a social security function to one of the bodies listed in subsection (2), provided it is given for a purpose specified in regulations under subsection (5). However, the information-sharing permitted by section 85 does not extend to sharing information in circumstances where it is unlawful to do so (see subsection (9)).
124. The list of bodies from whom the Scottish Ministers can require information, and to whom they can give information, in subsection (2) can be extended by regulations under paragraph (g) of that subsection.
125. Regulations under subsection (2)(g), extending the list of bodies with whom information can be shared, and (5), specifying the purposes for which the Scottish Ministers can share information with a listed body, are subject to the negative procedure (see section 96).

##### **Agency arrangements for housing assistance**

126. [Section 86](#) allows the Scottish Ministers, by regulations, to give local authorities the task of exercising Ministers' functions in relation to the delivery of housing assistance (see section 35) and also short-term assistance (see section 36) that is related to review of housing assistance. Subsection (3) of section 86 makes clear that, despite any delegation of the Ministers' functions in this regard, the Ministers will remain, ultimately, legally

responsible for the exercise of those functions. Regulations under section 86 are subject to the affirmative procedure (see section 96).

### **Monitoring of appeal process**

127. [Section 87](#) requires the Scottish Ministers to prepare an annual report on how many people had the right to appeal to the First-tier Tribunal for Scotland under section 46 and how many did so. (Section 46 is the right to appeal to the Tribunal against a determination by Ministers of an individual's entitlement to assistance under Part 2.) A report under section 87 is also to state whether Ministers think it would be appropriate to change the process for determining entitlement to assistance. Reports under section 87 are to be published and laid before the Scottish Parliament.

### **Part 5 (Discretionary Housing Payments)**

128. Local authorities are empowered by section 88 to assist individuals who appear to them to need help towards their housing costs. It is for local authorities to determine what assistance to give, though persons assisted must be entitled to housing benefit, or universal credit that includes an amount of assistance with rent. These are limits to the legislative competence given to the Scottish Parliament by virtue of section 25 of the Scotland Act 2016 and limits taken from the pre-existing Discretionary Housing Payments scheme which devolved as a result of the 2016 Act. Section 88(3) defines terms that are part of the limits derived from section 25 of the 2016 Act.
129. [Section 89](#) imposes further restrictions on the use of the power. Subsection (1) prevents assistance being provided as a loan, reflecting a restriction in how current schemes are operated. Subsections (2) to (4) reflect limits on competence derived from section 25 of the 2016 Act.
130. Local authorities must publicise their schemes of assistance. Such publicity must include the details listed in section 90. The duty to publicise the scheme of assistance is subject to section 92(4) which is discussed below.
131. [Section 91](#) requires local authorities to have regard to any guidance issued by the Scottish Ministers about their exercise of the power to make discretionary housing payments. The Scottish Ministers must consult local authorities, through a representative body, before issuing any guidance. Subsection (2) describes some of the matters that guidance may deal with. Different guidance can be addressed to different local authorities, which might (for example) be used to issue different guidance to local authorities that are housing authorities and to those that are not. Subsections (5) and (6) require the Scottish Ministers to lay a copy of any guidance before the Scottish Parliament and to make it publicly available. Subsection (7) enables guidance to be updated and revoked.
132. [Section 92](#) allows the Scottish Ministers to give grants to local authorities for the purpose of running discretionary housing payments schemes, and ring-fences those grant monies so that they can only be spent for that purpose. Subsection (3) provides that a local authority only has a legal obligation to operate a discretionary housing payments scheme for so long as it retains monies granted to it for that purpose, although as subsection (5) makes clear the fact that money specifically granted for the purpose has run out does not prevent a local authority from continuing to operate a scheme using other funds available to it should the authority wish to do so. If a local authority is not running a payments scheme because it has spent all the monies granted to it by the Scottish Ministers, subsection (4) absolves the authority from the duty to publicise the scheme under section 90.
133. [Section 93](#) empowers the Scottish Ministers to amend section 88, to allow for changes to the legislation relating to housing benefit or universal credit, or should other reserved benefits be created to assist persons with their housing costs.

## **Part 6 (Universal Credit: Payment to Joint Claimants)**

134. The regulations described in section 94(6) allow the Secretary of State to make payments of universal credit into one bank account, for persons who are a couple (as defined by section 39 of the Welfare Reform Act 2012). That bank account may be chosen by the couple, but if they do not do so, the Secretary of State may choose it. Section 94 seeks to require the Scottish Ministers to bring forward regulations that would split universal credit payments between couples in Scotland, unless a couple choose to have payment into a single bank account. Those regulations would use the power that section 30 of the Scotland Act 2016 gives the Scottish Ministers, after consultation with the Secretary of State, to make regulations relating to the persons to whom universal credit is paid.

## **Part 7 (Final Provisions)**

### **Ancillary provision**

135. **Section 95** allows the Scottish Ministers to make incidental, supplementary, consequential, transitional, transitory or saving provision that they consider it appropriate to make. Any use of this power has to be for the purposes of the Act or any provision made within it, or in connection with, or for giving full effect to, the Act or any provision made within it. Such provision is made by regulations, which are subject to the affirmative procedure if they amend any Act, but otherwise are subject to the negative procedure (see the next paragraph for an explanation of these procedures).

### **Parliamentary scrutiny of subordinate legislation**

136. **Section 96** sets out the parliamentary scrutiny procedures which are to apply to regulations made under the powers set out in the Act. For example, regulations to create types of assistance are to be subject to the affirmative procedure. The negative procedure will apply to regulations setting the period within which a request for re-determination must be made, and the period within which the Scottish Ministers must aim to make that determination. The negative procedure will also apply to regulations that alter the number of members of the Scottish Commission on Social Security. The negative and affirmative procedures are defined by sections 28 and 29 (respectively) of the Interpretation and Legislative Reform (Scotland) Act 2010. Put briefly, regulations subject to the negative procedure can be made by Ministers without prior parliamentary approval but Parliament can vote to annul them after they are made. Regulations subject to the affirmative procedure cannot be made by Ministers unless and until Parliament approves them in draft.
137. **Section 97** sets out further procedural requirements for the making of regulations that deal with eligibility for, and rates of, assistance (i.e. regulations under any of the sections in Chapter 2 of Part 2 and regulations under the power to provide for top-ups to reserved benefits under section 79). The regulations in question are all subject to the affirmative procedure (see section 96), meaning that they cannot be made unless and until they are approved in draft by a resolution of the Scottish Parliament.
138. **Section 97** provides that, before the Scottish Ministers can lay draft regulations before the Parliament for approval, they must first inform the Scottish Commission on Social Security (established by section 21) of their proposals for the regulations, tell the Parliament that they have done so, and make the proposals public. Those proposals must be in the form of draft regulations. This provides an opportunity for the Parliament and the public, as well as the Commission, to consider the proposals.
139. The Commission must then prepare a report commenting on the proposals, having regard to the Scottish social security principles and any relevant international human rights instruments. In the ordinary course of events, the Scottish Ministers will lay the draft regulations before the Parliament for approval only after the Commission has reported on the proposals. The Commission's report must be made public. When laying



the draft regulations before the Parliament for approval, the Scottish Ministers must also lay before the Parliament a response to the Commission's report.

140. It is then for the Parliament to decide whether or not to approve the draft regulations in the usual way. Section 97(9)(b) allows for the possibility of the Scottish Ministers laying draft regulations before the Parliament for approval ahead of the Commission reporting. In that event, the Ministers will be required to lay before the Parliament a statement explaining why they consider it appropriate to proceed without waiting for the Commission's report. It is then up to the Parliament to decide whether to approve the draft regulations in the usual way.
141. [Section 97\(10\)](#) provides that the process described in the preceding paragraphs does not apply to regulations which simply consolidate earlier regulations. Once regulations have been significantly amended a number of times, they can become hard to follow. A consolidation does not change the legal effect of the regulations as amended, but rather restates the current law for the sake of making it clearer and easier for users to follow. As the purpose of involving the Commission in scrutinising regulations is to have the benefit of expert insight into the effects of proposed changes to social security law, there is nothing for the Commission to report on for consolidation regulations (because the current law is not being changed). Nonetheless, if the Ministers or the Parliament particularly wished the Commission to report on a proposal to consolidate regulations, a report could be requested under section 22(1)(b) or (c).
142. [Section 98](#) disapplies the procedural requirements set by section 97 for an initial period in relation to regulations providing for early years assistance (under section 32) and funeral expense assistance (under section 34). The timetable to which the Scottish Ministers intend to start delivering those assistance types means that regulations may need to be made before the Commission is established. Accordingly, regulations dealing with those assistance types are excepted from the section 97 process until the Commission has intimated to the Scottish Ministers and the Parliament that it is ready to begin its scrutiny work. At that point the need for the section 98 exception ceases, and subsection (4) provides for its repeal, to tidy up the statute book by clearing away the spent provision.

## **Commencement**

143. [Section 99](#) provides that, apart from Part 7, the Act's provisions will come into force as provided for in commencement regulations, and that such regulations may include transitional, transitory or saving provision. Part 7 comes into force on the day after the Bill for the Act received Royal Assent (i.e. 1 June 2018, meaning Part 7 came into force on 2 June 2018).

## **Short title**

144. The short title of the Act (i.e. the Social Security (Scotland) Act 2018) is provided by section 100.