

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

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## **EXPLANATORY NOTES**

### **OVERVIEW**

#### **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.