

SOCIAL SECURITY (SCOTLAND) ACT 2018

EXPLANATORY NOTES

OVERVIEW

Part 2 (Giving of Assistance by Scottish Ministers)

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.