

SOCIAL SECURITY (SCOTLAND) ACT 2018

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.

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.