

# Social Security (Scotland) Bill

[As amended at Stage 2]

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## Revised Explanatory Notes

### Introduction

1. As required under Rule 9.7.8A of the Parliament's Standing Orders, these revised Explanatory Notes are published to accompany the Social Security (Scotland) Bill (which was introduced in the Scottish Parliament on 20 June 2017) as amended at Stage 2. Text has been added or amended as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### Background

4. The Social Security (Scotland) Bill is brought forward following changes to the devolution settlement effected by the Scotland Act 2016

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(“the 2016 Act”).<sup>1</sup> The changes give the Scottish Parliament legislative competence over various aspects of social security (which was previously reserved almost entirely to the UK Parliament).<sup>2</sup> The Scottish Parliament has also been empowered to top up benefits which remain reserved to the UK Parliament, and can create new benefits in any area except old age pensions or where there is a connection to a matter which remains reserved (such as child support maintenance or reserved aspects of employment support).

5. As a result of the changes in the devolution settlement, eleven existing social security benefits will become a devolved responsibility. The Bill transposes them onto a Scottish legislative platform. The benefits in question are:

- Disability Living Allowance;
- Personal Independence Payment;
- Attendance Allowance;
- Severe Disablement Allowance;
- the Industrial Injuries Scheme;
- Carer’s Allowance;
- Sure Start Maternity Grants;
- Funeral Payments;
- Cold Weather Payments;
- Winter Fuel Payments; and
- Discretionary Housing Payments.

6. The Bill also gives powers to create new benefits for early years, to assist with housing costs and to provide for top up of reserved benefits. It also provides for a supplementary payment to persons receiving Carer’s

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<sup>1</sup> [See the Scotland Act 2016, Part 3.](#)

<sup>2</sup> [See the Scotland Act 1998, Schedule 5, Part 2, Section F1.](#)

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Allowance, pending the transposition of that benefit onto a Scottish legislative platform.

7. The principal purpose of the Bill is to put in place a legislative framework that will underpin a process by which people will be given assistance, once a determination is made that they are entitled to that assistance. People will either apply for the types of assistance for which they are eligible or, in some circumstances, a determination will be made without an application being required. The criteria and the rules for each type of assistance will vary.

8. The Bill sets out an over-arching legislative framework for the administration of social security in Scotland, making provision for operational functions such as determination of entitlement, re-determinations, appeals, overpayments, fraud and error. Secondary legislation will be required once the Bill enters into law to provide details on each type of assistance and on the operation of the social security system.

## Overview

9. The Bill is arranged in five six Parts as follows:

- Part 1 sets out the Scottish social security principles, places a duty on the Scottish Ministers to take steps to promote take-up of assistance, provides for a Scottish social security charter, and requires annual reporting on the performance of the Scottish social security system and establishes a Scottish Commission on Social Security.
- Part 2 places a duty on the Scottish Ministers to give assistance to persons who are entitled to it, sets out eight types of assistance that are to be created, and provides for applications, determination of entitlement and appeals. It also provides for recovery of assistance given in error and offences.
- Part 3 provides the Scottish Ministers with the ability to provide for top up of benefits that are reserved to the UK Parliament. It also

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makes provision for a supplement to be paid to persons in receipt of Carer's Allowance.

- Part 3A deals with technical matters in relation to the giving of assistance by the Scottish Ministers under Parts 2 and 3, which are one step removed from the assistance-giving process itself. Specifically, it contains provisions to make the right to assistance inalienable (which means, for example, that a right to social security cannot be transferred to the trustee in bankruptcy appointed to manage an individual's estate), it allows for the sharing of social security information between the Scottish Ministers and others (such as local authorities), and it provides a mechanism for the Ministers' functions in relation to housing assistance to be performed on their behalf by local authorities.
- Part 4 empowers local authorities to make payments to persons to assist with their housing costs, provides some restrictions on how that power is to be used and requires local authorities to publicise their rules for assistance.
- Part 5 deals with the technical matters normally dealt with at the end of Bills: it allows ancillary provision to be made by regulations, sets out the parliamentary procedures that are to apply to the regulation-making powers in the Bill, makes provision about when the Act resulting from the Bill will come into force and establishes its short title (i.e. the Act's official legal name).

## Part 1 (Principles, charter and accountability – tenets and oversight)

### Scottish social security principles

10. Section 1 sets out the Scottish social security principles. These eightseven principles are to inform the Scottish social security charter (which is provided for by sections 2 to 5) and the work of the Scottish Commission on Social Security in scrutinising regulations (see discussion of section 55A). Section 1A states that the principles may be taken into

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account by courts and tribunals, but that breach of the principles is not itself a ground for legal action.

## Scottish Ministers' duty to promote take-up

11. Section 1B places the Scottish Ministers under a duty to keep under consideration what they can do to encourage people to take-up assistance under the Scottish social security system (as defined by section 7) and to take steps to achieve that aim. Sections 1C and 1E are directly connected to the duty section 1B creates.

12. Section 1C builds on the duty created by section 1B by requiring that the Scottish Ministers, when considering what they can do to promote take-up of assistance, give particular consideration to communicating in an inclusive way. This is to ensure that proper consideration is given to the fact that for some individuals communication difficulties may present a barrier to the take-up of assistance. Section 1C(2) defines what it means to communicate in an inclusive way.

13. Section 1D gives all individuals a right to request and to be given certain documents relating to the application process (?) (listed in subsection (2)) in a form which is accessible to, and proportionate to the needs of, the individual making the request.

14. Section 1E builds on the duty to promote the take-up of assistance that section 1B places on the Scottish Ministers. Subsection (1) requires that the Scottish Ministers, when considering what they can do to promote take-up of assistance, give particular consideration to the role that can be played by independent advice and advocacy. This is to ensure that, when thinking about how to promote take-up of assistance, Ministers consider the need to work alongside other bodies who provide those services. In this context, "independent" is defined in subsection (3) and means separate from the Scottish Ministers. Subsection (2) provides that in addition to whatever else the Scottish Ministers may do to fulfil their duty to promote the take-up of assistance, they must take steps to ensure that individuals are aware of the independent advice and advocacy services that are available in relation to the Scottish social security system.

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14.15. Section 1F makes further provision about what advice an individual is entitled to receive, when applying or considering applying for assistance, the nature of the advice and that steps must be taken by the Scottish Ministers to ensure its availability.

15.16. Section 1G(1) creates a right for individuals who have a mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003) to have someone advocate on their behalf in relation to social security matters. Subsection (2) places a correlative 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 said to be independent if they are provided by someone other than the Scottish Ministers. This right to advocacy for persons with a mental disorder is separate from, and additional to, the right all individuals will have to be accompanied by a supporter that is provided for in section 32B.

16.17. Section 1H requires the Scottish Ministers to publish a strategy which is to encourage people to apply for social security assistance. The first strategy is to be published within one year of section 1H coming into force (which is to happen on a date appointed by regulations under section 56). Within two years of the first strategy being published, section 1I requires the Scottish Ministers to review it. A review is followed by a report on progress towards achieving the take-up targets set out in the strategy and deciding whether the strategy should be revised. Section 1I also requires further reviews to be undertaken no later than every five years. The social security assistance that the strategy relates to is defined (in section 1H(6)) to include not only assistance under the Scottish social security system (as defined by section 7) but also assistance provided through schemes other than those mentioned in exceptions 1 to 10 in section F1 of the Scotland Act 1998. Section F1 sets out the restriction on the Scottish Parliament's powers to legislate in relation to social security matters (so exceptions 1 to 10 are the basis for the Scottish social security system).

## Restriction on private-sector involvement

17.18. In order to access assistance under the Scottish social security system a person may have to undergo an assessment. Section 1J prevents someone being required to undergo such an assessment by a person who is not working in the public sector (as defined by subsection (2)). [require thatbe ]as for an award of Section 1J would not, however, prevent a report prepared by a private-sector body being taken into consideration in determining someone's entitlement to disability assistance.

18.19. However, a person may qualify for Scottish social security assistance by being eligible for other assistance, such as that provided by the UK Government. Section 1J(3) and (4) provides an exception, should that other assistance require an assessment that involves the private sector. For example, it would not be contrary to the prohibition in subsection (1) for entitlement to winter heating assistance to be made to depend on receipt of a UK Government disability benefit, to receive which a person might require to undergo a private-sector assessment.

## Scottish social security charter

19.20. Section 2 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 2(2) and, for the meaning of "Scottish social security system", see section 7). The charter is to do so in a way which reflects the principles articulated in section 1 (see section 2(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(c)) when Ministers are exercising functions such as determining a person's entitlement to assistance.

20.21. Section 3 requires the charter to be published for the first time within 6 months of that section coming into force (section 3 is to come into force on a date appointed by regulations under section 56). Section 3 also provides for consultation in development of the charter, which must include

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consultation with the persons listed in subsection (3). 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 Bill. Subsection (2A) requires that in consulting certain categories of people described in subsection (3), the Scottish Ministers must consult them in representative proportions based on whether they have physical or mental impairments. Subsection (4) makes clear that consultation undertaken before the Bill is passed, and section 3 is brought into force, can be consultation undertaken for the purposes of section 3.

21.22. Section 4 requires the Scottish Ministers to make the charter available to the public. This is an ongoing duty placed on Ministers, and therefore goes beyond their duty to first publish the charter under section 3(1). As the charter may change from time to time in accordance with section 5, Ministers will have to ensure that the version of the charter made available to the public as required by section 4 is the current version.

22.23. Section 5 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 6A), persons who have received assistance through the Scottish social security system (as defined by section 7) and bodies who work with, or represent, people whose finances are adversely affected by a person in the household? having a protected characteristics listed in section 4 of the Equality Act 2010 (e.g. 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.

23.24. Section 5A 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.

## Accountability



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24.25. Section 6 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 7) 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 (e.g. age, disability).

25.26. Section 6A establishes the Scottish Commission on Social Security. It also introduces schedule A1, 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.

26.27. Section 6B(1) sets out the Commission's core functions. These include scrutiny of proposals for legislation reporting on social security matters 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) requires 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. Subsection (3) requires that when the Commission produces a report in performance of one of the functions listed in subsection (1), it has to make that report available to the public.

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## Part 2 (Giving of assistance by Scottish Ministers)

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

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

27.28. A duty is placed on the Scottish Ministers, by section 8, to give a person whatever assistance of a kind described in Chapter 2 of Part 2 the person is entitled to.

28.29. Entitlement to assistance under section 8 flows from a determination of entitlement. The ways in which a determination of entitlement may be made are set out in section 9.

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

29.30. In summary, a determination of entitlement will be made in the first instance by the Scottish Ministers under section 19. If the individual whose entitlement has been determined is dissatisfied with that determination, he or she may request the Scottish Ministers to reconsider it under section 23. 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 27. 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 as such are discussed in more detail below.

30.31. By conferring jurisdiction on the First-tier Tribunal to deal with entitlement to assistance under Part 2, the Bill attracts the review and appeal provisions contained in Part 6 of the Tribunals (Scotland) Act 2014 ("the Tribunals Act") (section 9 of the Bill draws the reader's attention to the significance of that). 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

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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, ultimately, by 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).

## **How is entitlement determined?**

31.32. Whoever makes a determination of entitlement, the component parts of it are set out in section 33. 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).

32.33. 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.

33.34. The decision to be taken under section 33(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 33(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 34. Where a determination of entitlement includes a decision about the individual's future entitlement to assistance it is referred to in the Bill as having been made on the basis that the individual has an ongoing entitlement to assistance (see paragraphs 36 to 39).

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34.35. Where a determination is being made of an individual's entitlement to assistance in respect of an event, section 33(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 51.

## **Ongoing entitlement**

35.36. The purpose of allowing regulations under section 34 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 in arrears 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 into the future.

36.37. Regulations under section 34 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.

37.38. Subsection (2)(a) of section 34 provides for regulations under that section to make provision about when someone is to become entitled to be given assistance under section 8 in respect of what is a future period at the time the determination of entitlement is made. The point is that if it is

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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 34 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.

38.39. Subsection (2)(b) of section 34 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**

39.40. Section 10 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 19 by the Scottish Ministers, and the person exercises his or her right under section 23 to request a re-determination, the re-determination will supersede the original one.

40.41. 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

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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 three 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.

41.42. Section 10 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)

42.43. Chapter 2 sets out the eight nine types of assistance that are to be given by the Scottish Ministers under section 8. Each assistance type is described at a high level by a section of Chapter 2, setting out the characteristics of the assistance, for example an activity that qualifies for assistance (such as caring for a disabled person), a purpose of assistance (such as to help with heating costs) or an event that qualifies for assistance (such as an employment-related injury). Regulations will set out the eligibility rules that will determine entitlement to assistance and what assistance is to be provided. For all sections, apart from section 18 (short term assistance), there is a link to a schedule which makes further provision about the content of regulations.

43.44. The assistance types are provided for are as follows:

- Section 11 provides for Carer's assistance, to be provided to an individual who cares for another individual with a disability. Schedule 1 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.

- Section 12 provides for Cold-spell heating assistance, to be provided to an individual to help meet heating costs in periods of cold weather. Schedule 2 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 Bill.
- Section 13 provides for Winter heating assistance, to be provided to an individual to help meet heating costs in winter. Schedule 3 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.
- Section 14 provides for Disability assistance, 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 4 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. This section 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. Paragraph 5A of the schedule provides that eligibility for disability assistance cannot be means-tested. Paragraph 12 of the schedule describes types of assistance that cannot be given as lump-sum payments, because such assistance remains a reserved matter. This includes assistance as a result of pneumoconiosis and byssinosis.

- Section 15 provides for Early years assistance, 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 5 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 starting nursery education and primary education, though the Bill leaves open what these may be. Regulations must define what being responsible for a child is to mean.
- Section 16 provides for Employment-injury assistance, to be provided to an individual who has had an injury or contracted a disease through employment. Schedule 6 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), 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 5A of the schedule provides that eligibility for employment-injury assistance cannot be means-tested. Paragraph 13 of the schedule describes types of assistance that



cannot be given as lump-sum payments, because such assistance remains a reserved matter.

- Section 17 provides for Funeral expense assistance, which is assistance to an individual to help meet funeral costs that the individual has met or is responsible for meeting. Schedule 7 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.
- Section 17A provides for Housing assistance, which is assistance to an individual to meet, or help towards meeting, housing costs. Schedule 8 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.
- Section 18 provides for Short-term assistance to individuals. Schedule 9 requires that tThe Scottish Ministers must make regulations providing for such assistance to be given to persons who have a change in their entitlement to assistance as described in sections 11 to 17A, 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 particularly paragraphs 34 and 36 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

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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. Section 18 also provides Schedule 9 leaves scope for the Scottish Ministers to prescribe other eligibility rules for short-term assistance.

## Chapter 3 (Determining entitlement)

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

44.45. Section 19 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 35 so provide, without application.

45.46. 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 35 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.

46.47. 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 particularly paragraphs 34 and 36 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 41 above, the resulting determination may (to some extent) supersede the earlier one.

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47.48. As all the information required to make a determination of entitlement may not be available where there has been no application, section 35(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 46 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.

48.49. Section 20(1) allows Ministers to specify by regulations 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 19 if it is not made in the form, or not accompanied by the evidence, required by Ministers. Section 20(2) places Ministers under a duty to make the public aware of the requirements for applications prescribed set under subsection (1).

49.50. Section 20(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 23 and, if still dissatisfied, can appeal under section 27 (see paragraphs 30 to 31 for a fuller summary of the various ways in which a determination of entitlement can be made). To be clear, section 20(3) would not prevent a different individual applying for early years assistance in respect of the birth of the same child. Nor would it

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prevent the same individual applying for early years assistance in respect of a different event in the life of the same child.

50.51. Subsection (4) of section 20 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 33(1A) 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 33(1B)). 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 first 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 20(4) will not apply, with the result that the individual cannot apply for assistance again in respect of the event.

51.52. Section 21 allows an applicant to withdraw an application prior to its determination. Where this is requested, the duty imposed on the Scottish Ministers by section 19 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 20(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 19, 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.

52.53. Section 22 requires that all persons who have applied for assistance, or whose entitlement to assistance has been determined

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without an application, must be notified of the Scottish Ministers' determination under section 19 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 23), and that they will have the right to appeal to the First-tier Tribunal if the Scottish Ministers do not complete their reconsideration within a certain period (see section 26).

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

53.54. Section 23 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 19.

54.55. A request for a re-determination will be considered only if it satisfies the requirements set out in subsections (2B) and (2C). Subsection (2A) (2)(a) enables the Scottish Ministers to set requirements for how a requests for a re-determination mustare to 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). A purported request that does not comply with any requirements set will not trigger Ministers duty to make a re-determination. Subsection (3) requires Ministers to publicise requirements as to the form in which requests for a re-determination should be made.

55.56. Subsection (2C) deals with the period within which a request for a re-determination must be made. (2)(b) Subsection (2C)(a) empowers the Scottish Ministers to make regulations setting a deadline by which a request for a re-determination requests must be made (section 55 provides for such regulations to be subject to the negative procedure). Subsection (2C)(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 23A 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

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after the individual was told of the original determination under section 19 (see section 23(2C)(b)(ii)).

56.57. Section 24 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 23. (As section 24(6) makes clear, the Ministers' duty to consider a re-determination request only triggers if the request complies with the requirements of section 23(2B) and (2C).) 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 26 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 Scottish Ministers to do so before deciding whether or not to take a case to the Tribunal.

57.58. Section 25 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.

58.59. Where a decision following a request for re-determination is not made within the period allowed by regulations, section 26 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. 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**

59.60. Sections 27 to 29 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 8.

60.61. Section 27(1) provides that an appeal can only be taken to the Tribunal if either the initial determination required by section 19 has been re-determined as provided for by section 24 or if the duty to make such a re-determination has not been completed within the timescale set by regulations.

61.62. Section 27A 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 25 or 26. 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. 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 27A(6) makes clear that Tribunal Rules can make further provision about the form and manner of initiating appeals, but they cannot contradict subsection (1) (e.g. by saying that an appeal cannot competently be made by returning an appeal form to the Scottish Ministers).

62.63. Section 28 provides the timescales within which appeals to the 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 24, the relevant event is Ministers notifying the individual of the re-determination. If it is brought against a determination under section 19 (i.e. it is brought following a

failure by Ministers to make a re-determination within the period allowed by regulations under section 24(5)), the relevant event is Ministers notifying the individual that they have failed to make a re-determination within the period allowed. (Section 29A, which is discussed in paragraph 67, creates a presumption about when information is received, which is relevant for calculating timescales under section 28.) An appeal is brought, for the purposes of section 28, 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 27A(2) is therefore not counted in relation to the timescales referred to in section 28.

63.64. 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).

64.65. The powers of the First-tier Tribunal in appeals are set out in section 29. It 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.

65.66. As mentioned in paragraph 31 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 Act apply.

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

67. Section 29A 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 under section 23 after being informed of the Scottish Ministers' first determination of entitlement,
- how long an individual has to make an appeal to the First-tier Tribunal under section 23A against a decision by the Ministers not to entertain a late request for a re-determination, and



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- how long an individual has to make an appeal to the First-tier Tribunal under section 27 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.

66.68. In each of these cases, section 29A 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. 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.

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

67.69. Section 30 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.

68.70. Section 31 enables the Scottish Ministers to place a duty on an individual to notify them if their of a change of circumstances changeon:

- an individual receiving ongoing assistance,
- anyone acting on behalf of such an individual (such as an appointee under section 32A), or
- anyone to whom the ongoing assistance that someone else is entitled to is being paid, or if the circumstances of a person being assisted change (for example, where a parent is receiving disability assistance on behalf of a child).

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69.71. This power to impose a duty to notify a change of circumstances is intended to be used where a determination is made that a person is entitled to assistance on an ongoing basis (see particularly paragraphs 34 and 36 above). As subsections (3) and (4) set out, a duty to notify a change of circumstances can be imposed on the individual entitled to assistance or another person to whom payments are made for the entitled individual's benefit. As discussed above (see paragraph 39) 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 ceased to provide care, since that would cause their entitlement to assistance to come to an end. As explained in paragraph 47 above, being notified of a change in that circumstance will cause Ministers to make another determination of the individual's entitlement to carer's assistance.

70.72. The significance of being placed under a duty to notify a change of circumstances is that section 40 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 5 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 4 of Part 2 (see discussion of that Chapter below).

71.73. Section 32 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

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condition Ministers considered that the requirement was no longer necessary.

## **Appointees**

74. Section 32A allows the Scottish Ministers to appoint someone (who must be over 16 years of age) to act on behalf of another individual in relation to that individual's Scottish social security entitlement. The appointee effectively stands in the shoes of the individual that the appointee has been appointed to represent (see subsection (6)).

72.75. 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 his or her own 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

73.76. Section 32B 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 Scottish social security assistance. 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

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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.

### **Further provision about determining entitlement**

74.77. For discussion of section 33 (decisions comprising determination) see paragraphs 32 to 34 above.

75.78. For discussion of section 34 (determination on basis of ongoing entitlement) see paragraphs 36 to 39 above.

76.79. For discussion of section 35 (determination without application) see paragraphs 45 to 48 above.

## **Chapter 4 (Recovery of assistance given in error)**

### **Assistance given in error**

77.80. Sections 36 to 38A deal with the recovery of overpaid assistance as a result of an error. state that an individual who is advantaged by any assistance paid in error is liable to repay the cost of that assistance.

78.81. Section 36(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 36A). Subsection (4) describes what is a mistaken decision 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 70 above).

79.82. Section 36(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.

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80.83. Subsection (3) provides for how the value of assistance is to be calculated if it is not provided in money. For example, if Ministers were to provide a disabled person with a mobility aid, 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.

84. Section 36A 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.

81.85. Section 36A(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 (see paragraph 71).

82.86. Section 36A(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 36A(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

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the case to decide, on the strength of all the evidence presented, whether a reasonable person would have noticed the mistake.

83.87. Where the Scottish Ministers are aware of a person's financial circumstances, section 37 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 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 37, 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 1, paragraph 10(A)(3); schedule 4, paragraph 11A(3); schedule 6, paragraph 12A(3); and schedule 8, paragraph 12(3)).

84.88. 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.

85.89. Section 38 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.

86.90. Section 38A prevents the Scottish Ministers from seeking to recover assistance given in error through common-law remedies for unjustified enrichment. This means that the Scottish Ministers cannot bypass the protections that sections 36A, 37 and 38 give to individuals, if seeking to recover the debt through a court action, as that action can only be based on the duty in section 36.

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

87.91. Funeral expense assistance is assistance to help someone pay for the costs of another's funeral (see section 17). 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 38B 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 5 (Offences and investigations)**

88.92. Section 39 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).

89.93. Sections 40 and 41 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.

90.94. Section 40 covers a situation where an individual has been notified, under section 31, 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.

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91.95. Section 41 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 a person is under a duty to tell Ministers that another person's circumstances have changed, but is prevented from doing so in some way, for example by concealment of the change.

92.96. Section 42 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.

93.97. Section 43 empowers the Scottish Ministers to make regulations about investigation of the offences resulting from the Bill. These 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 where people live. They can also give powers to seize documents, for example. Offences can be created, to address the possibilities that persons will fail to provide information or obstruct an investigation.

94.98. In relation to such investigations, section 44 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 will be relevant.

95.99. References in Chapter 5 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



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1995. It is presently £10,000. The standard scale of fines is set out in section 225(2) of the 1995 Criminal Procedure Act. Section 43(3) of the Bill 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 presently £1,000.

## Chapter 6 (Uprating for inflation)

100. Section 44A 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 and for the duty that section 44B imposes for particular types of assistance.

96.101. Section 44B(1) places the Scottish Ministers under a duty to bring forward regulations seeking to increase carer's assistance, disability assistance and employment-injury assistance rates where, and to whatever extent that, the exercise of calculating the inflation-adjusted levels for those assistance types under section 44A 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 those regulations are subject to the affirmative procedure (see section 55), 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

97.102. Sections 45 and 46 enable regulations to provide for top up payments to a person who is entitled to any reserved benefit, which means a benefit provided by the UK Government for which the Scottish Parliament does not have competence to legislate. The person must appear to need the additional assistance for a purpose for which the reserved benefit is provided.

98.103. The detail of any top-up payments would be set out in regulations and section 45 sets out that provision can be made for how entitlement 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.

99.104. These sections reflect the devolved competence given to the Scottish Parliament by section 24 of the 2016 Act to legislate for such payments. Section 46 states restrictions on what regulations can do, which repeat restrictions on devolved competence in that Act. 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

100.105. Section 47 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

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and the rate of Jobseeker's Allowance. Each payment will be the equivalent of 26 times the difference between the two allowances 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 Jobseeker's Allowance.

101.106. 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 at which Jobseeker's Allowance is paid. It is envisaged that the supplement will cease to be needed once regulations under section 11 have been made to provide a scheme for carer's assistance, as that can provide for payments at the increased rate. Section 48 allows the Scottish Ministers to repeal the duty to pay the supplement and revoke any regulations made under it.

## Part 3A (Further provision in connection with parts 2 and 3)

### Inalienability of assistance

107. An individual's entitlement to social security assistance is a personal right based on the individual's needs. Section 48A prevents someone agreeing to transfer that personal right to assistance to someone else. Section 48B 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 its becoming part of the person's estate that transfers into the hands of the trustee in bankruptcy.

102.108. Section 48A(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 one of his or her parents, 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

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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

109. Section 48C 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 48C does not extend to sharing information in circumstances where it is unlawful to do so (see subsection (9)).

110. 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.

103.111. 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 55(3)).

## Agency arrangements

104.112. Section 48D 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 17A). Subsection (3) 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 48D are subject to the affirmative procedure (see section 55(2)).

## Part 4 (Discretionary housing payments)

105.113. Local authorities are empowered by sections 49 to 53 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 contained in the devolved competence given to the Scottish Parliament by section 25 of the 2016 Act and the pre-existing Discretionary Housing Payments scheme which devolved as a result of it. Section 49(3) defines terms that are part of the limits contained in section 25 of the 2016 Act.

106.114. Section 50 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 contained in section 25 of the 2016 Act.

107.115. Local authorities must publicise their schemes of assistance. Such publicity must include the details listed in section 51. Section 52 requires local authorities to have regard to any guidance issued by the Scottish Ministers about their exercise of this power. 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.

108.116. Section 52A 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

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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.

109.117. Section 53 empowers the Scottish Ministers to amend section 49, 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 5 (Final provisions)

110.118. Section 54 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.

111.119. Section 55 sets out the parliamentary scrutiny procedures which are to apply to regulations made under the powers set out in the Bill. For example, regulations to create types of assistance are to be subject to the affirmative procedure. Whereas 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 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.

120. Section 55A 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 45). The regulations in question are all subject to the affirmative procedure

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(see section 55), meaning that they cannot be made unless and until they are approved in draft by a resolution of the Scottish Parliament.

112.121. Section 55A 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 6A) of their proposals for the regulations, tell the Parliament that they have done so, and make the proposals public. This provides an opportunity for the Parliament and the public, as well as the Commission, to consider the proposals. 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 underlying them. 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. It is then for the Parliament to decide whether or not to approve the draft regulations in the usual way. Section 55A(7)(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.

122. Section 55A(9) describes two situations in which the process described in the preceding paragraph will not apply to regulations. The first is where the regulations proposed would 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).

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The second exception is where the proposals fall within a class which the Commission itself has said it does not wish to scrutinise in advance of draft regulations being laid before the Parliament. In either case, if the Ministers or the Parliament wished the Commission to report on the proposals, a requirement for a report could be made, under section 6B(1)(b) or (c).

113.123. Section 55B disapplies the procedural requirements set by section 55A for an initial period in relation to regulations providing for early years assistance (i.e. regulations under section 15) and funeral expense assistance (i.e. regulations under section 17). The timetable on 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 55A 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 55B exception ceases, and subsection (4) of the section therefore provides for its repeal in order to tidy up the statute book by clearing away the spent provision.

114.124. Section 56 provides that, apart from Part 5, provisions of the Bill will come into force as provided for in commencement regulations, and that such regulations may include transitional, transitory or saving provision. Part 5 comes into force on the day after the Bill receives Royal Assent.

115.125. The short title of the Act the Bill will become (if passed) is provided by section 57.



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# Social Security (Scotland) Bill

[as amended at stage 2]

## Revised explanatory notes

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