

*These notes relate to the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (asp 18) which received Royal Assent on 10 November 2020*

# **SOCIAL SECURITY ADMINISTRATION AND TRIBUNAL MEMBERSHIP (SCOTLAND) ACT 2020**

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## **EXPLANATORY NOTES**

### **OVERVIEW**

3. The overarching policy objectives of the Act are:
  - To allow for the appointment of persons to act on behalf of a child where there is no person with legal authority who is willing and able to so act;
  - To allow for the appointment of a person to act on behalf of an adult who does not lack capacity but due to difficult circumstances wishes for an appointee to act on their behalf;
  - To introduce provisions in relation to all appointments of persons to act on behalf of a child or individual by Scottish Ministers, and to extend those appointments to include assistance under top up regulations made under section 79 of the Social Security (Scotland) Act 2018 ('the 2018 Act');
  - To enable the Scottish Ministers to withhold health information where its disclosure would cause serious harm to an individual;
  - To confer powers on the Scottish Ministers to make provision in regulations about the investigation of offences in relation to top up assistance created under section 79 of the the 2018 Act;
  - To create statutory fraud offences in relation to the types of top up assistance created under section 79 of the 2018 Act;
  - To extend the duty on the Scottish Ministers to inform about possible eligibility under section 53 of the 2018 Act to include assistance under top up regulations made under section 79 of the 2018 Act;
  - To modify the power to make regulations under schedule 5 of the 2018 Act, to widen the category of qualified persons whose clinical judgment, based on the appropriate guidance, will be accepted in relation to a diagnosis of terminal illness for the purpose of entitlement to disability assistance;
  - To introduce powers for the Scottish Ministers to make provision in regulations about circumstances in which Ministers may suspend payment of ongoing types of assistance under the 2018 Act;
  - To introduce powers for the Scottish Ministers to prescribe circumstances in which an individual who has an ongoing entitlement to assistance may be paid a nil amount of that assistance;

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- To enable the Scottish Ministers, by regulations, to transfer to the First-Tier Tribunal (FTT) for Scotland some or all of the competence and jurisdiction of the sheriff courts in relation to the recovery of top up assistance created under section 79 of the 2018 Act;
  - To extend the duty upon the Scottish Ministers to report annually to the Scottish Parliament on the inflation-adjusted levels of assistance to include top up assistance created under section 79 of the 2018 Act, and to extend the duty to uprate under the 2018 Act to include the Scottish Child Payment; and
  - To enable other types of judges to be temporarily authorised to sit in the FTT and the Upper Tribunal.
4. The Act contains 19 sections in relation to the policy objectives identified above. Explanatory Notes on the various sections of the Act are provided below. A detailed explanation of the policy intentions underpinning the Act can be found in the Policy Memorandum published alongside the Bill for the Act.

## **Part 1: Social Security Administration**

### ***Section 1: Appointment of person to act on behalf of child***

5. Section 1 modifies the 2018 Act in relation to the appointment of persons to act on behalf of an individual in connection with the determination of the individual's entitlement to assistance. Subsection (2) inserts new section 85A which provides for the appointment of a person to act on behalf of a child.
6. Subsections (1) and (2) of new section 85A allow the Scottish Ministers to appoint a person to act on behalf of a child, in connection with the determination of their entitlement to assistance under section 24 or regulations made under section 79 of the 2018 Act, and where appropriate to receive that assistance on the child's behalf.
7. New subsections (3) and (4) of section 85A provide that a person, aged 16 or over, may be appointed on behalf of a child in circumstances where it appears to the Scottish Ministers that there is no person with authority to act on the child's behalf who resides with, and has the care of, the child and is willing and practicably able to do so.
8. New section 85A(5) provides that the appointee effectively stands in the shoes of a person with authority to act on behalf of that child (for example a parent or guardian), and can do anything they could do in connection with the determination of the child's entitlement to assistance. The Scottish Ministers may ask the appointee for information, and must give the appointee the same information that would otherwise be given to the child.
9. New section 85A(6) gives the Scottish Ministers the power to terminate an appointment made in respect of a child at any time.
10. New section 85A(7) defines a child for the purposes of section 85A as an individual who is under the age of 16 years.

### ***Section 2: Appointment of person to act on behalf of individual***

11. Section 2(1) to (3) modifies the 2018 Act, repealing section 58 and inserting new subsections (5A), (5B) and (5C) after section 85A(5).
12. New section 85(5A) provides that the Scottish Ministers must consider whether to make or terminate an appointment in respect of a child, if asked to by: the child; anyone who has authority to act for the child; anyone who lives with and has care of the child; or anyone who has an interest in the child's welfare or financial affairs.

13. Subsections (5B) and (5C) of new section 85A provide that, in deciding whether to make or terminate an appointment in respect of a child, the Scottish Ministers must, in so far as practicable, take into account the views of: the child; anyone who is a relevant person in relation to the child within the meaning of section 200 of the Children's Hearings (Scotland) Act 2011; and anyone else who appears to have an interest in the welfare or financial affairs of the child.
14. Section 2(4) inserts new section 85B (Appointment of person to act on behalf of the individual) after section 85A.
15. New section 85B restates the circumstances in which the Scottish Ministers could already make an appointment under section 58 of the 2018 Act in respect of adults regarded as incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000 and in respect of deceased individuals, and sets out a new circumstance in which they can make an appointment in respect of an adult. It also makes provision in relation to termination of appointments under that section, and introduces new powers for certain persons to request that Ministers consider whether to make or terminate an appointment in respect of an adult.
16. Subsections (1) and (2) of new section 85B give Scottish Ministers the power in certain circumstances to appoint a person over the age of 16 years to act on behalf of an individual in connection with the determination of the individual's entitlement to assistance under section 24 or regulations made under section 79 of the 2018 Act and, where appropriate, to receive that assistance on the individual's behalf.
17. New section 85B(3) sets out the circumstances in which an appointment may be made under subsection (1) of that section. Those are where the individual is an adult and the conditions in subsection (4) are met, or where it appears to Ministers that subsection (6) or (7) applies.
18. The conditions in subsection (4) allow an appointment to be made in respect of an adult where the adult agrees to the appointment, and an appropriate person certifies that, in their opinion:
  - the adult is not incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000;
  - the adult understands the effect of the appointment;
  - the adult has not been subject to any undue influence in agreeing to the appointment;
  - the proposed appointee is suitable to act on the adult's behalf.
19. New section 85B(5) requires the Scottish Ministers to define who is an 'appropriate person' to certify an appointment for an adult with capacity in regulations.
20. New section 85B(6) restates section 58(3)(a) and (b) of the 2018 Act to allow for the Scottish Ministers to make an appointment where the individual is deceased and there is no executor.
21. Subsections (7) and (8) of new section 85B restate section 58(4) of the 2018 Act to allow for the Scottish Ministers to appoint someone over the age of 16 to act on an individual's behalf where the individual is incapable within the meaning of the Adults with Incapacity (Scotland) Act 2000. It specifies that this can only happen where there is no other guardian acting or appointed under that Act, the individual's estate is not being administered by a judicial factor, and there is no other person who has authority to act on the individual's behalf that is willing to do so.
22. Subsections (9) and (10) of new section 85B provide that an appointee acting for an adult or deceased individual can do anything the individual or other person with authority to act on the individual's behalf could do in relation to the determination of the individual's entitlement to assistance. The Scottish Ministers may ask the appointee for

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information, and must give the appointee the same information they would otherwise be required to give the individual, had the individual been acting for themselves.

23. New section 85B(11) allows for the Scottish Ministers to terminate an appointment for an adult or deceased individual any time.
24. New section 85B(12) to (16) makes provision in relation to termination of appointments, and to allow for certain persons to, in effect, request that Scottish Ministers review an appointment decision.
25. New section 85B(12) requires that, where an appointment has been made with the agreement of an adult with capacity, the Scottish Ministers must terminate it if that agreement is withdrawn. They must also consider whether to terminate such an appointment if they are asked to do so by anyone who appears to have an interest in the adult's welfare or financial affairs.
26. New section 85B(13) requires that the Scottish Ministers consider whether to terminate an appointment in respect of a deceased individual when asked to do so by anyone with an interest in the individual's financial affairs.
27. New section 85B(14) requires the Scottish Ministers to consider whether to make or terminate an appointment for an adult regarded as lacking capacity when asked to by the individual themselves, by anyone who has authority to act for the individual or by anyone who has an interest in the individual's welfare or financial affairs.
28. Subsections (15) and (16) of section 85B require that, when deciding whether to make or terminate an appointment in respect of an adult who is regarded as lacking capacity, the Scottish Ministers must, in so far as practicable, have regard to the wishes and feelings of that individual, and anyone else with an interest in the individual's welfare or financial affairs.
29. Section 2(5) inserts new section 85C (Guidelines for decisions about appointees) after section 85B.
30. New section 85C(1) provides that the Scottish Ministers must prepare guidelines governing their decisions in connection with appointments under sections 85A and 85B, may revise the guidelines, and must make them publicly available.
31. New section 85C(2) specifies what must be set out in those guidelines:
  - how the Scottish Ministers will determine that a person is suitable for appointment;
  - how a request for an appointment or termination of an appointment may be made and how it will be handled;
  - the process by which those with an interest in the making or termination of an appointment will be involved in those decisions;
  - how the Scottish Ministers will review appointments periodically, at least every five years, and the process for that;
  - how concerns about way an appointee is performing that role may be raised and how they will be handled.
32. New section 85C(3) places a duty on the Scottish Ministers to have regard to a number of considerations when drafting the guidelines referred to in subsection (1).
33. Those considerations are:
  - that an appointment for a living individual should be made only if it appears to be of benefit to the individual, and that benefit cannot reasonably be achieved in another way;
  - an appointment should last for only as long as it continues to secure that benefit;

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- that, where reasonably practicable, before decisions are made, those that may be affected by them should be consulted, and their views taken into account. Where the individual is regarded as lacking capacity, their wishes and feelings must be also be considered;
  - that decisions should be made on the basis of good information;
  - that decision-making processes should, so far as reasonably practicable, take account of the circumstances of individual cases;
  - that persons who may be affected by decisions are given adequate information and support in relation to their involvement in the decision-making process.
34. New section 85C(4) requires the Scottish Ministers to consult with specified persons and bodies in preparing or revising the guidelines.
35. Section 2(6) inserts new section 85D (Right to apply to First-tier Tribunal for review of certain decisions) after section 85C.
36. Subsections (1) to (4) of new section 85D provide that any person who is entitled to request that the Scottish Ministers make, or consider termination of, an appointment under section 85A(5A) or 85B(12)(b), (13) or (14) may make an application to the First-tier Tribunal to review a decision about an appointment that the Scottish Ministers have made in pursuance of such a request. The application to the First-tier Tribunal must be made within 31 days of the date of the decision. This includes decisions not to make or terminate an appointment, as well as decisions to make or terminate an appointment. A late application may be made with good reason and with the First-tier Tribunal's permission, but not later than one year from the date of the decision.
37. Subsections (5) to (7) of new section 85D provide that, on reviewing a decision of the Scottish Ministers in respect of an appointment, the First-tier Tribunal can uphold or set aside the decision. If it sets it aside it may reach its own decision or order the Scottish Ministers to make the decision afresh. The Tribunal may make its own findings in fact and give such directions as it considers appropriate.
38. Subsections (9) and (10) of new section 85D provide that the First-tier Tribunal's decision is final and may not be reviewed under section 43 of the Tribunals (Scotland) Act 2014 or appealed against under section 46 of that Act.
39. Section 2(7) inserts new section 85E (Guidance for appointees) after section 85D.
40. New section 85E(1) places a duty on any person appointed to act for a child under section 85A, or for an adult or deceased individual under section 85B, to have regard to any guidance that the Scottish Ministers issue about how the person should carry out that role. The Scottish Ministers are required by new section 85E(2) to make any guidance issued publicly available.
41. Section 2(8) provides that regulations under section 85B(5) that define who is an 'appropriate person' to certify an appointment for an adult with capacity will be subject to the negative procedure.

### ***Section 3: Determination of entitlement to assistance: non-disclosure of information***

42. Section 3 modifies the 2018 Act, to insert a new section 62A in relation to non-disclosure of harmful health information about an individual's health.
43. New section 62A(1) provides that the section applies in relation to certain duties of the Scottish Ministers under the 2018 Act, to inform an individual of certain things in relation to the determination of the individual's entitlement to assistance. The duties are those under the following sections of the 2018 Act:

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- section 38(5) (duty to inform an individual of matters relating to a decision to reject something purporting to be an application for assistance);
  - sections 40(1) (duty to inform an individual of matters relating to a determination of the individual's entitlement to assistance) and 41(6) (duty to inform an individual of matters relating to a decision to reject something purporting to be a request for a re-determination);
  - section 42(2) (duty to inform an individual of matters relating to a decision as to whether an individual has good reason for not requesting a re-determination sooner); and
  - sections 44(1) (duty to inform an individual of matters relating to a re-determination of the individual's entitlement to assistance) and 53(2) (duty to inform about possible eligibility for other assistance).
44. New section 62A(2) and (3) provide that nothing in these duties requires the Scottish Ministers to disclose information relating to an individual's physical or mental health where a registered medical practitioner or registered nurse has informed the Scottish Ministers that disclosure of the information would be likely to cause serious harm to the physical or mental health of the recipient.

#### ***Section 4: Offences - Top up assistance***

45. Sections 71 to 73 of the 2018 Act contain statutory offences in relation to social security assistance given under Part 2 of that Act. These are:
- offence of trying to obtain assistance by deceit;
  - offence of failing to notify Social Security Scotland of a change of circumstances relevant to their own receipt of benefit; and
  - offence of causing a failure to notify Social Security Scotland of a change of circumstances relevant to another individual's receipt of benefit
46. Section 75 of the 2018 Act allows the Scottish Ministers, by regulations, to make provision about the investigation of these offences. Section 76 places a duty upon the Scottish Ministers to publish a code of practice on investigations carried out by virtue of section 75.
47. The offences outlined in sections 71 to 73 of the 2018 Act are not applicable to top-up assistance given in accordance with regulations made under section 79 of that Act. Similarly, the power to make provision about investigations in regulations under section 75 of the 2018 Act does not apply to investigation of offences in connection with top-up assistance.
48. Section 4 of the Act modifies the 2018 Act to make provision about offences in connection with top-up assistance.
49. Section 4(2) modifies section 79(2) of the 2018 Act to insert a new paragraph (g) which expressly provides that the Scottish Ministers' power under section 79(1), to make provision by regulations for top-up assistance, includes the power to make provision about offences.
50. Section 4(3) inserts a new subsection (4) into section 80 of the 2018 Act, which sets out restrictions on the powers in section 79. This new subsection specifies the maximum penalties that can be provided for in regulations under section 79 in respect of an offence under those regulations. These are: on summary conviction, imprisonment for a term not exceeding 12 months, a fine not exceeding the statutory maximum or both; and, on conviction on indictment, imprisonment for a term not exceeding five years, a fine or both.

51. Section 4(4) inserts a new section 80A into the 2018 Act which provides a new default position in respect of offences in connection with top-up assistance. That is, that the offences set out in sections 71 to 73 of that Act apply in connection with any form of ‘top-up’ assistance created under section 79, just as they also apply in connection with the various forms of assistance under Part 2 of that Act (section 80A(1)). This is subject to any contrary provision in regulations for specific forms of ‘top-up’ assistance that may be made under new section 79(2)(g) (section 80A(2)).
52. New section 80A(3) makes various modifications to sections 71 to 73 of the 2018 Act where they apply by virtue of section 80A(1), so that they operate effectively in the context of top-up assistance. In particular, the modifications make clear that:
  - “assistance” refers to financial assistance provided for under ‘top-up’ regulations,
  - a reference to giving notice in accordance with section 56 of the 2018 Act is referring to giving notice in accordance with regulations about top-up assistance, and
  - subsections 72(3) and 73(3) (which relate to how individuals inform Scottish Ministers of any relevant changes of circumstances) do not apply unless, in accordance with top-up assistance regulations, the Scottish Ministers have informed the person about the way in which notification of a change of circumstances is to be given.
53. New section 80A(4) makes provision to put beyond doubt the application of section 74 of the 2018 Act to both the commission of offences under sections 71 to 73 of that Act as applied by new section 80A(1), and the commission of offences created under the new power in section 79(2)(g). Section 74 makes provision about individual culpability where an offence under the 2018 Act or any regulations made under it is committed by an organisation. New section 80A(4) therefore provides, for the avoidance of any doubt, that the reference in section 74 to an offence under the Act or any regulations made under it includes any offence under any of sections 71 to 73 of the 2018 Act as applied by section 80A, and to any offence under the top-up assistance regulations.
54. New section 80A(5) specifies that ‘top-up assistance regulations’ refers to regulations made under section 79 of the 2018 Act.

### ***Section 5: Investigations - Top up assistance***

55. Section 5 makes provision, in subsection (6), to extend the power for Ministers to make provision in regulations, under what was previously section 75 of the 2018 Act about investigation of offences under that Act, so that provision may also be made about the investigation of offences under any regulations made under the Act. This ensures that investigations regulations can cover the investigation of any new offences created under section 79(2)(g) (inserted by section 3). Since section 75 of the 2018 Act was located in Part 2 of that Act, and the powers to make provision about top-up assistance are located in Part 3, the substantive provision described above necessitated some re-structuring of the 2018 Act.
56. Subsections (2) to (5) of section 5 therefore move the investigations provision previously found in section 75 of the 2018 Act to Part 4 of that Act, which contains provisions relevant to both Parts 2 and 3. Section 76, which makes provision for a code of practice on investigations under section 75 is similarly moved to Part 4. The title of Part 2, Chapter 6 of the 2018 Act is therefore modified to remove the wording ‘and investigations’, and the italic heading of ‘Offences’ which immediately precedes section 71 is also removed. Sections 75 and 76 are re-numbered as sections 84A and 84B.
57. Subsections (7) and (8) of section 5 of the Act make changes to sections 84B and 96(2) of the 2018 Act that are required in consequence of the amendments made by

subsections (2) to (6). References to sections 75 and 76 are removed and replaced with references to those sections as re-numbered.

***Section 6: Transitional provision in consequence of section 5***

58. Section 6 of the Act makes transitional provision which is required as a consequence of the changes made by section 5. Subsection (1) sets out that anything done under section 75 or 76 of the 2018 Act is now to be treated as having been done under section 84A or 84B respectively (as those sections have been re-numbered by section 5). Subsection (2) provides that references to section 75 or 76 of the 2018 Act in any enactment or other document are to be read as referring instead to section 84A or 84B respectively.
59. Section 6(3) allows Scottish Ministers to publish a new code of practice (formerly done under section 76 of the 2018 Act but now done under section 84B) without the need to meet the consultation requirements set out at section 84B(3), as long as the only amendments to the new code of practice are to reflect the re-numbering changes made by section 5 of the Act. This will allow any code of practice already published when these changes come into force to be revised, if considered appropriate, to refer to the provisions as re-numbered by section 5 without there being a requirement for the Scottish Ministers to carry out a public consultation on those changes.

***Section 7: Uprating for inflation***

60. Section 7(3) of the Act modifies the 2018 Act to move section 77 (which requires the Scottish Ministers by the end of each financial year to lay a report in the Scottish Parliament which lays out the inflation adjusted level of each relevant figure, explain how the figures were calculated and what the Scottish Ministers have done or intend to do in light of the calculations) to after section 86 and re-numbers it as section 86A.
61. Section 7(4) of the Act moves section 78 of the 2018 Act (which requires the Scottish Ministers to uprate specified forms of social security assistance) to after section 86A and it is re-numbered as section 86B. Section 86B is now entitled 'Duty to uprate certain types of assistance' and specifically makes reference to uprating the Scottish Child Payment.

***Section 8: Transitional provision in consequence of section 7***

62. Sections 8(1) and (2) of the Act state that anything done under section 77 or 78 of the 2018 Act is to be treated as having been done under section 86A or 86B, respectively, of that Act. Any reference to section 77 or 78 of the 2018 Act in any other enactment or other document is to be read accordingly.

***Section 9: Duty to inform about possible eligibility***

63. Section 9 places the Scottish Ministers under a new duty to inform individuals about possible eligibility for the Scottish Child Payment, and any other top-up payments under regulations made under section 79 of the 2018 Act, when determining entitlement to assistance under Part 2 of the 2018 Act. The duty would also apply in the other direction – so that in making a determination of entitlement for a form of top-up assistance under section 79 of the 2018 Act, the Scottish Ministers must inform an individual of their possible eligibility for other forms of assistance under section 79 of the 2018 Act, as well as forms of assistance under Part 2 of the 2018 Act.

***Section 10: Transitional provision in consequence of section 9***

64. Section 10 makes transitional provision which is required as a consequence of section 9. Subsection (1) sets out that anything done under section 53 is now to be treated as having been done under section 84C. Subsection (2) provides that references to section 53 of the 2018 Act are to be read as referring instead to section 84C.



***Section 11: Persons who can give diagnosis - Diagnosing terminal illness for disability assistance purposes***

65. Section 11 of the Act modifies schedule 5 of the 2018 Act which makes provision about regulations under section 31 of that Act in relation to disability assistance to enable diagnosis of terminal illness given by appropriate healthcare professionals (including but not limited to registered medical practitioners) to be accepted as evidence of terminal illness for the purposes of disability assistance.
66. Paragraph 1(2) of schedule 5 sets out that regulations under section 31 of the 2018 Act must provide that an individual is to be regarded as terminally ill for the purposes of entitlement to disability assistance if that is the clinical judgement of a registered medical practitioner, having had regard to guidance issued by the Chief Medical Officer of the Scottish Administration. Section 11 (2)(a)(i) allows the classes of healthcare professionals whose diagnosis will be accepted as evidence of terminal illness to be extended, by amending paragraph 1(2) of schedule 5 to replace the reference to a ‘registered medical practitioner’ with a reference to an ‘appropriate healthcare professional’.
67. Section 11(2)(a)(ii) inserts new sub-paragraphs (2A), (2B), (2C), (2D) and (4) into paragraph 1 of schedule 5 to the 2018 Act and replaces sub-paragraph (3). New sub-paragraph (2C) provides that regulations are to define what ‘appropriate healthcare professional’ means for the purpose of determining entitlement to disability assistance on the basis of an individual having a terminal illness, and new sub-paragraph (2D) makes provision about the exercise of that power.
68. New sub-paragraph (2A) provides that the Scottish Ministers may provide in regulations that, in the situation in sub-paragraph (2B), an individual who is not resident in the UK is to be regarded as having a terminal illness despite the appropriate healthcare professional not having regard to the CMO guidance before diagnosing the individual as having a terminal illness. The situation in sub-paragraph (2B) is that it would not be reasonable in the circumstances to insist on a clinical judgement being provided that has been formed with regard to the CMO guidance.
69. New sub-paragraph (2D)(a) provides that the regulations defining ‘appropriate healthcare professional’ must include both registered medical practitioners and registered nurses as appropriate healthcare professionals.
70. New sub-paragraph (2D)(b) provides that registered members of other healthcare professions may be included in the definition, and new sub-paragraph (2D)(c) allows the introduction of additional requirements that an individual must satisfy in order to be an appropriate healthcare professional.
71. In particular, the regulations may: specify any requirements relating to qualifications, skills, experience and training that the appropriate healthcare professional must have in order to exercise the function; include requirements about the person’s professional relationship with the individual; specify that the appropriate healthcare professional is authorised to act as such by a Health Board, Special Health Board or the Scottish Ministers.
72. New sub-paragraph (2D)(d) provides that Ministers can make different provision in regulations about the requirements for being an appropriate healthcare professional depending on whether the individual whose entitlement to assistance is being determined is resident outside of the UK or not. Section 11(2)(a)(iii) substitutes sub-paragraph (3) of paragraph 1 of schedule 5 and inserts a new sub-paragraph (4) into that paragraph, so that the Chief Medical Officer is required to prepare, revise and publish guidance that sets out when a progressive disease can be reasonably expected to cause an individual’s death for the purpose of determining entitlement to assistance, and to consult appropriate healthcare professionals who are registered in the United Kingdom before preparing or revising that guidance.

73. Subsection (2)(b) makes a consequential amendment to schedule 5 of the 2018 Act, to replace a reference to a “registered medical practitioner” with a reference to an “appropriate healthcare professional”.

***Section 12: Suspension of assistance***

74. Section 51 of the 2018 Act confers powers on the Scottish Ministers to make regulations providing for entitlement to specified types of assistance to be determined on an ongoing basis. Such regulations may provide for any exceptions to this, and are to prescribe the time, or times, at which an individual is to become entitled to be given assistance under a determination made on the basis that the individual has ongoing entitlement.
75. Section 12(2) of the Act inserts new paragraph (aa) after section 51(2)(a) of the 2018 Act, which (in accordance with new schedule 11, inserted by section 12(4)) enables the Scottish Ministers to make provision in regulations about:
- the circumstances in which an individual who has an entitlement to assistance in respect of a period under a determination made on the basis that an individual has ongoing entitlement to assistance in respect of a period is not to become entitled to be given some or all of that assistance at the time at which the individual otherwise would in accordance with provision under paragraph (a), and
  - in that event, how and when the individual is to become entitled to be given that assistance.
76. Section 54 of the 2018 Act provides that when the Scottish Ministers are determining an individual’s entitlement to assistance (whether under section 37 or 43), and they require further information in order to satisfy themselves about any matter material to making that determination, they may request the individual to provide that information within a specified time period. If the individual fails to provide the information by the end of that period, the Scottish Ministers may (without further consideration) proceed to make a determination on the basis that the individual does not satisfy the eligibility rules.
77. Section 12(3)(a) of the Act substitutes section 54(1)(a) and (b) of the 2018 Act, so that it also applies in circumstances in which the Scottish Ministers are considering whether regulations under section 52 require them to make a determination of an individual’s entitlement to assistance without receiving an application. In these circumstances, Ministers will be entitled to request from the individual information which they require in order to satisfy themselves about any matter material to their consideration of whether they are required to make a determination without application in the individual’s case.
78. Section 12(3)(b) inserts new subsection (1A) into section 54 after subsection (1), that provides that where the Scottish Ministers are either determining the individual’s entitlement to a type of ongoing assistance, or are considering whether to make a determination of the individual’s entitlement without receiving an application, and individual fails to supply the information requested under subsection (1) by the end of the period specified by Ministers, they may issue a decision to suspend assistance in accordance with regulations made under section 51(2)(aa) (provided it is the first time in connection with the process that the individual has failed to supply the information).
79. Section 12(3)(b) also inserts new subsection (1B) that provides that, where the Scottish Ministers issue such a decision, they must also request that the individual provide them with the information within such further period as they specify.
80. Section 12(4) introduces new schedule 11 (Suspension of assistance) into the 2018 Act and makes provision about matters that must or may be included in regulations under section 51 in relation to:
- circumstances in which assistance may be suspended (paragraph 1);

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- the requirement to consider the financial circumstances of the individual before suspending (paragraph 2);
- the right of the individual to require Ministers to review a decision to suspend assistance (paragraph 3);
- information to be given to the individual following a suspension decision (paragraph 4); and
- the effect of suspension ending (paragraph 5).

***Section 13: Power to set value of assistance as nil in certain circumstances***

81. Section 13 of the Act inserts the following paragraphs into the schedules of the 2018 Act:
- paragraph 11A after paragraph 11 of schedule 2 (carer’s assistance);
  - paragraph 14A after paragraph 14 of schedule 5 (disability assistance);
  - paragraph 11A after paragraph 11 of schedule 7 (employment-injury assistance); and
  - paragraph 10A after paragraph 10 of schedule 9 (housing assistance).
82. In each new paragraph, sub-paragraph (1) provides that in making provision in regulations about the value of the forms of assistance to which these schedules relate, the Scottish Ministers may provide that the value of assistance to be given to an individual in respect of a period is £0. Such provision must be framed by reference to:
- the individual being resident and present in a particular place during the period, or
  - the individual being in receipt of another type of assistance (whether under the 2018 Act or another enactment) during the period.
83. Sub-paragraph (2) of each new paragraph provides that the provision may be framed so as to apply by reference to further matters in addition to those mentioned in sub-paragraph (1)(b).
84. In accordance with sub-paragraph (1)(b) of each new paragraph, such provision may only be made where the Scottish Ministers consider that it is in the interests of the individuals to whom it applies to be entitled to assistance with a value of £0 in respect of a period, rather than not being entitled to that form of assistance at all.

***Section 14: Assistance given in error: First-tier Tribunal’s jurisdiction***

85. Section 14 of the Act repeals section 68 of the 2018 Act and inserts a new section 87A (First-tier Tribunal’s jurisdiction). That new section provides that the Scottish Ministers may, by regulations, transfer to the First-tier Tribunal for Scotland some or all of the competence and jurisdiction that a sheriff has in relation to the recovery of money owed under section 63 of the 2018 Act (re-stating the effect of the repealed provision), as well as in relation to the recovery of money owed under regulations made under Part 3 of the 2018 Act in relation to top-up assistance.
86. New section 87A(2) requires the Scottish Ministers to consult with the Lord President of the Court of Session, the President of the Scottish Tribunals and sheriffs principal before laying draft regulations under section 87A(1) before the Parliament for approval.
87. New section 87A(3) requires the Scottish Ministers to exercise the power under section 87A(1) on at least one occasion, and to undertake the consultation required by subsection (2) before 1 April 2021.

## **Part 2: Tribunal Membership**

### ***Section 15: Authorisation of judiciary to sit in Scottish Tribunals***

88. Part 2 of the Act modifies the Tribunals (Scotland) Act 2014 (“the 2014 Act”).
89. The 2014 Act created a new structure for devolved tribunals in Scotland and established the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland, known collectively as the Scottish Tribunals. The Scottish Tribunals are responsible for hearing appeals against determinations made by Social Security Scotland.
90. The roll-out of new and newly devolved social security benefits will significantly increase the business of the Social Security Chamber of the First-tier Tribunal and, in turn, the Upper Tribunal (to which there is a further right of appeal). The amendments to section 18 (Authorisation of others) of the 2014 Act enable the resource and expertise of a wider group of existing judicial office holders, sitting in other courts or tribunals, to be quickly accessed in order to increase the capacity of both of the Scottish Tribunals. This will assist in ensuring the efficient and effective disposal of this increased business.
91. Section 15 of the Act modifies section 18 of the 2014 Act. Section 18 enables the Scottish Ministers, on receiving a request from the President of Tribunals, to authorise certain current and former judges of other courts and tribunals to assist in the disposal of the business of the Upper Tribunal. The judicial offices eligible for temporary authorisation include: a former judge of the Court of Session, a former Chairman of the Land Court, a former sheriff (excluding a part-time sheriff) or a current judge of a court or tribunal in a country or territory outwith Scotland.
92. Section 15(2) substitutes section 18(1) of the 2014 Act so as to enable persons to be temporarily authorised to act as a member of the First-tier Tribunal, as well as the Upper Tribunal. The mechanism mirrors that in place for the Upper Tribunal.
93. Section 15(3) inserts a new section 18(1A) which provides that the judicial offices eligible to sit in the First-tier Tribunal are a former or current judge of a court or tribunal in another part or parts of the UK, a current judge of an overseas court or tribunal and a current judge of an international court or tribunal.
94. Section 15(4) modifies section 18 by broadening out the list of those judicial offices eligible for temporary authorisation to sit in the Upper Tribunal so that it includes a former or current judge of a court or tribunal in another part or parts of the UK, a current judge of an overseas court or tribunal and a current judge of an international court or tribunal.
95. Section 15(6) replaces section 18(8) to enable the Scottish Ministers to make further arrangements as necessary when authorising certain judges. It also inserts a new subsection (8A) which ensures that there is a duty upon judges to take the judicial oath if they have not already done so.
96. Section 15(7) updates section 18(10) to provide relevant definitions.

### ***Section 16: Consequential modifications***

97. Section 16 of the Act sets out further consequential amendments to the 2014 Act.
98. These are minor amendments, consequential on changes made to section 18 of the 2014 Act. They revise references throughout the 2014 Act to an “extra judge”, which currently indicate that this position exists in the Upper Tribunal only. The amendments reflect that, under the new and amended provisions, the position of “extra judge” will now exist in both the First-tier Tribunal and Upper Tribunal. These changes are required to allow for the improved flexibility to use judiciary from outside Scotland provided for in section 15.

*These notes relate to the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (asp 18) which received Royal Assent on 10 November 2020*

### **Part 3: Final Provisions**

99. Section 17 (Ancillary provision) allows the Scottish Ministers to make any incidental, supplementary, consequential, transitional, transitory or saving provision appropriate for the purposes of, or in connection with, or for giving full effect to this Act. Section 18 (Commencement) confirms that the provisions within sections 1, 4, 5, 6, 14, 17 and 19 within the Act will come into force on the day after Royal Assent. Section 19 provides that the short title of the Act is ‘The Social Security Administration and Tribunal Membership (Scotland) Act 2020’.