

POLICY NOTE

THE FIRST-TIER TRIBUNAL FOR SCOTLAND SOCIAL SECURITY CHAMBER AND UPPER TRIBUNAL FOR SCOTLAND (RULES OF PROCEDURE) (MISCELLANEOUS AMENDMENT) REGULATIONS 2022

SSI 2022/162

The above instrument was made in exercise of the powers conferred by paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 ('the 2014 Act'). The instrument is subject to the negative procedure. In accordance with paragraph 4(3) of schedule 9 of the 2014 Act, the President of the Scottish Tribunals has been consulted on these Regulations. Where, in this note, reference is made to the 'First-tier Tribunal', this refers to the Social Security Chamber of the First-tier Tribunal for Scotland. Where reference is made to the 'Upper Tribunal', this refers to the Upper-Tribunal for Scotland.

These Regulations will amend the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018. These Regulations provide the First-tier Tribunal and Upper Tribunal, respectively, with a discretionary power to give a direction prohibiting disclosure of a document or information to a person ("the recipient") if a registered medical practitioner or a registered nurse has advised that the information is likely to cause serious harm to the physical or mental health of the recipient or some other person.

Policy Objectives

The First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 allow the First-tier Tribunal and the Upper Tribunal to make an order with a view to prohibiting or restricting the public disclosure of any aspect of appeal proceedings if they consider that it is necessary in the interests of justice or in order to protect the rights of a person under the European Convention on Human Rights. However, at present, the First-tier Tribunal and Upper Tribunal do not have the power to issue a direction to prohibit the disclosure of a document or information to a specific person if it could cause that person serious harm to their physical or mental health.

These Regulations give the First-tier Tribunal and Upper Tribunal a discretionary power to give a direction prohibiting the disclosure of a document or information to a person ("the recipient") if a registered medical practitioner or a registered nurse has advised that the information is likely to cause serious harm to the recipient's, or some other person's, physical or mental health. An example could be information about a diagnosis of malignancy. Linking this discretionary power to give a direction to prohibit disclosure of information only where a medical practitioner or registered nurse has confirmed that it would be harmful, ensures both the First-tier Tribunal and Upper Tribunal will exercise this power only if satisfied that it is

necessary to protect the person at risk of harm. The aim is to mitigate the risk of a person suffering serious harm to their physical or mental health because a document or information is disclosed to them during the appeal process. The repercussions of disclosing information that would cause serious harm to a person could be devastating for individuals and their families. If the First-tier Tribunal or Upper Tribunal give a direction then the appeal proceedings must be conducted as appropriate in order to give effect to the direction.

These Regulations allow the First-tier Tribunal and Upper Tribunal to issue a direction to prohibit the disclosure of a document or information to a person on its own initiative if a registered medical practitioner or a registered nurse has informed the Tribunal that disclosure would be likely to cause serious harm. In addition, if either party to an appeal considers that the First-tier Tribunal or Upper Tribunal should withhold information from a person because it is likely to cause serious harm to their physical or mental health, the party can make a request for the Tribunal to withhold the information. The party who makes that request must provide the information to the Tribunal, request that it is not disclosed, and set out the reasons why the party thinks the information should be withheld. Where a party to the appeal makes a request, it will be a judicial decision on whether or not to withhold the information from the person at risk of harm.

Where the First-tier Tribunal issues a direction prohibiting the disclosure of a harmful document or information from a person during an appeal to the First-tier Tribunal, the direction applies to proceedings in the First-tier Tribunal. If the First-tier Tribunal's decision is appealed to the Upper Tribunal, the Upper Tribunal must consider whether a new direction should be issued to prohibit the disclosure of a harmful document or information to a person during the Upper Tribunal appeal proceedings. This also means that a party to the Upper Tribunal appeal must make a new request to the Upper Tribunal to issue a direction, even if they previously made a request to the First-tier Tribunal.

Where the Tribunal decides that information should not be disclosed to a party to the appeal who has a representative, or any other person acting on their behalf, the Tribunal can disclose the information to the representative or person acting on behalf of the party. This could be the party's appointee for example. The Tribunal must be satisfied that disclosing the information is in the interests of the party and their representative, or person acting on their behalf, won't disclose it to the party at risk of harm. The representative should not disclose the information to anyone else unless the Tribunal consents.

Consultation

To comply with Schedule 9, Part 1, para 4(3) of the Tribunals (Scotland) Act 2014, Scottish Ministers have consulted the President of the Tribunals in the making of these regulations and have consulted such other persons as they consider appropriate. Those persons include members of the National Implementation Group on Terminal Illness who supported the introduction of measures to ensure that harmful information is not disclosed during an appeal. To comply with Article 36(4) of the GDPR, Scottish Ministers have consulted with the

Information Commissioner's Office in the making of these regulations as they relate to data processing by the First-tier Tribunal and Upper Tribunal for Scotland.

Impact Assessments

The following impact assessments were completed in respect of the package of instruments of which the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the The Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 formed part:

- Equality impact assessment
- Islands Communities Screening Assessment
- Child Rights and Wellbeing Impact Assessment.

A further Equalities Impact Assessment, Children's Rights and Wellbeing Impact Assessment, Island Communities Screening Assessment, Data Protection Impact Assessment and a Fairer Scotland Duty Assessment Not Required Declaration are provided with this instrument.

Financial Effects

A partial Business and Regulatory Impact Assessment (BRIA) was prepared in respect of the package of instruments of which the First-tier Tribunal for Scotland Social Security Chamber (Procedure) Regulations 2018 and the Upper Tribunal for Scotland (Social Security Rules of Procedure) Regulations 2018 formed part. These Regulations do not alter the outcome of that assessment and no further assessment is required.

Scottish Government

Social Security Directorate

May 2022