

# **Child Rights and Wellbeing Impact Assessment (CRWIA) for The First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland (Rules of Procedure)(Miscellaneous Amendment) Regulations 2022**

May 2022

## 1. Which articles of the UNCRC does this policy/measure impact on?

**Article 2 - Non-discrimination.** Children should not be discriminated against in the enjoyment of their rights. No child should be discriminated against because of the situation or status of their parent/carer(s).

**Article 3 - Best interests of the child.** Every decision and action taken relating to a child must be in their best interests. Governments must take all appropriate legislative and administrative measures to ensure that children have the protection and care necessary for their wellbeing – and that the institutions, services and facilities responsible for their care and protection conform with established standards.

**Article 5 - Parental guidance and a child's evolving capacities.** Governments must respect the rights, responsibilities and duties of parents and carers, as well as members of the extended family, to direct and guide the child in the exercise of their rights.

**Article 12 – Respect for the views of the child.** Every child has a right to express their views and have them given due weight in accordance with their age and maturity. Children should be provided with the opportunity to be heard, either directly or through a representative or appropriate body.

**Article 18 – Parents or legal guardians to have primary responsibility for the upbringing of the child.** Parents, or legal guardians, have the primary responsibility for the upbringing and development of the child, and should always consider what is best for the child. Governments must provide appropriate assistance to parents and carers to help them.

**Article 23 – Children with disabilities.** A disabled child has the right to enjoy a full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. Governments must recognise the right of the disabled child to special care, and ensure the disabled child has effective access to education, training, health care, rehabilitation, preparation for employment, and recreational opportunities.

**Article 26 – Social security.** Every child has a right to benefit from social security, taking into account the resources and circumstances of those who have responsibility for the child.

## 2. What impact will your policy/measure have on children's rights?

**Positive:** The proposed amendments are anticipated to have a broadly positive impact on children's rights and welfare. The introduction of a discretionary power for the Tribunal to give a direction prohibiting the disclosure of a document or information to withhold information from a person if it could cause serious harm to their physical or mental health, is likely to benefit disabled people and their families.

Our assessment of the impact of the changes we are proposing on the relevant articles of the UNCRC is as follows. The relevant articles include (but are not limited to):

**Article 2 - Non-discrimination.** Social Security Scotland is committed to treating all applicants equally. The principle of non-discrimination is enshrined in the Social Security Scotland Act (2018) under section 1(g) of that Act.

The Scottish Courts and Tribunal Service (SCTS) provides administrative support to the Scottish Tribunals. SCTS has published a Tribunals Users Charter which sets out what Tribunal Users can expect from them. SCTS has also published an Equality and Diversity policy, which sets out its commitments: [Equality and Diversity](https://www.scotcourts.gov.uk/equality-and-diversity) ([scotcourts.gov.uk](https://www.scotcourts.gov.uk))

### **Article 3 - Best interests of the child**

This policy will mitigate the risk of young people being exposed to information that could cause serious harm to their physical or mental health. This policy will allow the First-tier Tribunal for Scotland Social Security Chamber and Upper Tribunal for Scotland, respectively, to issue 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 physical or mental health of the recipient or some other person. The General Medical Council's Guidance on Consent sets out that "in very exceptional circumstances" it may be appropriate to prohibit disclosure of harmful information to the patient if it would cause them serious harm. The guidance goes on to say that 'serious harm' means more than the patient might become upset, decide to refuse treatment, or choose an alternative. In the context of individuals who are applying for disability assistance under Special Rules for Terminal Illness, the Chief Medical Officer's guidance for doctors and nurses completing the Benefits Assessment for Special Rules in Scotland (BASRiS) form for terminal illness also notes the limited exception of "serious harm" where it may be appropriate to withhold the information from the patient. The guidance states that harmful information is anything that would be considered to cause serious harm to an individual's mental or physical health if they were to become aware of it (e.g. a diagnosis of malignancy).

This will also impact positively on families where the adult receiving Child Disability Payment on behalf of the child could themselves be at risk of serious harm to their

physical or mental health and that information may not be disclosed to them for their own safety.

People already in receipt of Child Disability Payment before the age of sixteen will continue to receive it until their eighteenth birthday. Young people aged 16 and 17 can also choose to apply for Adult Disability Payment. Young people aged 16 and 17 in receipt of Child Disability Payment or Adult Disability Payment will be covered by this policy and may benefit from the ability of the Tribunal to issue a direction prohibiting the disclosure of a document or information to a person 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.

This policy is likely to most affect young people aged 16 and above who are responsible for managing their entitlement to disability assistance. The impact of this policy will be on those individuals' rights to access information held about them at an appeal in either the First-tier Tribunal or Upper Tribunal. However, the potential negative effect of this policy on those young people aged 16 and above is mitigated by the inclusion of clear rules about when the Tribunal can give a direction. These rules create a high threshold to be met which is informed by clinical advice.

#### **Article 5 - Parental guidance and a child's evolving capacities and Article 12 - Respect for the views of the child.**

Under section 62A of the Social Security (Scotland) Act 2018, Scottish Ministers have powers for the non-disclosure of information to a recipient if it relates to the physical or mental health of an individual and if a registered medical practitioner or a registered nurse has advised Scottish Ministers that the information is likely to cause serious mental or physical harm to the recipient if disclosed. Section 62A is intended to address the needs of adults, including people aged 16 and 17, in relation to whom a doctor or nurse has advised that the disclosure of information relating to their entitlement to assistance would be likely to cause serious harm to the individual's physical or mental health. In such circumstances, the Scottish Ministers' duties to inform individuals at various stages of their social security claim will not apply. However, section 62A of the 2018 Act only applies to certain duties of the Scottish Ministers under the 2018 Act. Section 62A will not apply if the individual's case is appealed to the First-tier Tribunal or Upper Tribunal.

Once a child reaches the age of 16, they are considered a young person with legal capacity. Young people are generally expected to manage their own entitlement to Child Disability Payment and Adult Disability Payment including receiving payments and communicating with Social Security Scotland, and with the Tribunal during an appeal. If the young person cannot manage their own entitlement after they become 16, Social Security Scotland must consider whether an appointee is required to receive disability assistance on behalf of the young person.

## **Article 18 – Parents or legal guardians to have primary responsibility for the upbringing of the child.**

Young people aged 16 and 17 in receipt of disability assistance are generally expected to manage their own application for assistance and manage their own payments. If the young person cannot manage their own entitlement after they become 16, Social Security Scotland must consider whether an appointee is required to receive disability assistance on behalf of the young person.

## **Article 23 – Children with disabilities.**

As this policy will give the First-tier Tribunal and the Upper Tribunal a discretionary power to issue a direction prohibiting the disclosure of a document or information to a person if it will cause serious harm to the physical or mental health of the recipient or some other person, it is expected that people in receipt of disability assistance will be the most likely to be affected. This is because applications for disability assistance generally include consideration of a person's physical or mental health, while applications for some other devolved benefits such as the Five Family Payments do not include consideration of a person's physical or mental health.

This policy will mitigate the risk of young people in receipt of disability assistance being exposed to information during an appeal that could cause serious harm to their physical or mental health.

## **Article 26 – Social security**

This policy does not prevent children or young people from receiving any social security payment due to them or from challenging a decision made by Social Security Scotland on their entitlement to assistance. The policy is instead intended to mitigate the risks of vulnerable clients being exposed to information during an appeal that may cause serious harm to their physical or mental health.

## **3. Will there be different impacts on different groups of children and young people?**

Under the UNCRC, 'children' can refer to: individual children, groups of children, or children in general. Some groups of children will relate to the groups with protected characteristics under the Equality Act 2010: disability, race, religion or belief, sex, sexual orientation. 'Groups' can also refer to children by age band or setting, or those who are eligible for special protection or assistance.

We expect that it will be more likely that young people aged 16 and 17 will be impacted by this policy. This is because children who are under 16 and eligible for disability assistance are generally not responsible for communicating directly with the Tribunal during an appeal. Instead it is generally a parent, guardian or appointee who makes the application on behalf of the child, who receives communications about the child's disability benefit, and who communicates with the Tribunal during an appeal on the child's behalf. They can therefore ensure that any information that

could cause the child serious physical or mental harm is not shared with the child during an appeal.

As this policy will give the First-tier Tribunal and Upper Tribunal a discretionary power to issue a direction prohibiting the disclosure of a document or information to a person if it will cause serious harm to the physical or mental health of the recipient or some other person, it is expected that people in receipt of disability assistance will be the most likely to be affected. It is also more likely to impact on children and young people whose parent/individual with legal parental responsibilities are in receipt of Disability Assistance. This is because applications for disability assistance generally include consideration of a person's physical or mental health, while applications for other devolved benefits such as the Five Family Payments do not include consideration of a person's physical or mental health.

It is possible that this policy could impact more on male children under 16 than on female children under 16. As of August 2021, there was 30,246 male clients and 13,204 female clients under the age of 16 on Disability Living Allowance, corresponding to 69.6% of the caseload being male.

It is possible that this policy will impact more on young people who have a terminal diagnosis. This is because a registered medical practitioner or registered nurse may consider that information about, for example, a malignant diagnosis should not be disclosed to the young person or to the recipient, if the recipient is their parent or person with legal parental responsibilities. In January 2022, there were 305,279 people entitled to Personal Independence Payment in Scotland<sup>1</sup>; including 2,176 16 and 17 year olds. 3,236 of the 305,279 claims were processed under DWP special rules for terminally ill people.

**4. If a negative impact is assessed for any area of rights or any group of children and young people, can you explain why this is necessary and proportionate? What options have you considered to modify the proposal, or mitigate the impact?**

Once a child reaches the age of 16, they are considered a young person. Young people are generally expected to manage their own entitlement to Child Disability Payment and Adult Disability Payment including receiving payments and communicating with Social Security Scotland, and with the Tribunal during an appeal. If the young person cannot manage their own entitlement after they become 16, Social Security Scotland must consider whether an appointee is required to receive disability assistance on behalf of the young person.

The UNCRC sets out that children have the right to participate in decisions which affect them. Prohibiting disclosure of harmful information from children and young people without their consent could be seen as going against this principle. However, the overarching aim of this policy is to protect people from serious harm to their physical or mental health. It is acknowledged there is a potential negative impact of this policy on those individuals' rights to access information held about them. However, this will be mitigated by the inclusion of clear rules about when the

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<sup>1</sup> [Personal Independence Payment at October 2021: summary statistics - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/personal-independence-payment-at-october-2021/summary-statistics/pages/10)

Tribunal can give a direction prohibiting disclosure of a document or information to an individual if it would cause them serious harm. These rules create a high threshold to be met, which is informed by clinical advice, before the Tribunal can decide whether to exercise its discretionary power to issue a direction.

While it is difficult to estimate the number of young people that may be impacted by this policy, in the context of individuals who are applying for disability assistance under Special Rules for Terminal Illness, the Chief Medical Officer's guidance for doctors and nurses completing the BASRiS form for terminal illness<sup>2</sup> notes the limited exception of "serious harm" where it may be appropriate to withhold the information from the patient. The guidance states that harmful information is anything that would be considered to cause serious harm to an individual's mental or physical health if they were to become aware of it (e.g. a diagnosis of malignancy).

## 5. How will the policy/measure give better or further effect to the implementation of the UNCRC in Scotland?

These policies fulfil the UNCRC Article 3 - Best interests of the child.

This policy will mitigate the risk of young people seeing or hearing information during an appeal that could cause serious harm to their physical or mental health. This policy will give the First-tier Tribunal and Upper Tribunal a discretionary power to issue a direction prohibiting the disclosure of a document or information to a person if it will cause serious harm to the physical or mental health of the recipient or some other person.

This will also impact positively on families where the adult receiving Child Disability Payment on behalf of the child may themselves be at risk of serious harm to their physical or mental health and the Tribunal giving a direction to prohibit disclosure of the harmful information to that individual will reduce the possibility of it causing serious harm to their physical or mental health.

## 6. How have you consulted with relevant stakeholders, including involving children and young people in the development of the policy/measure?

A consultation was carried out by the Scottish Government's Chief Medical Officer on the statutory guidance that registered medical practitioners and registered nurses must follow when diagnosing an individual as terminally ill for social security purposes. Clinicians who will use the guidance and organisations who will support terminally ill clients took part in the managed (non-public) consultation. The version of the guidance that was consulted on included the section on withholding harmful information. There were no specific questions asked on the issue of withholding harmful information, but the issue drew little comment.

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<sup>2</sup> [Disability-Benefits-Terminal-Illness-CMO-guidance-V1.0.pdf \(socialsecurity.gov.scot\)](#)

Scottish Ministers have consulted the President of the Scottish Tribunals in the making of the regulations that will give the First-tier Tribunal and Upper Tribunal a discretionary power to issue a direction prohibiting the disclosure of a document or information to a person if it will cause serious harm to the physical or mental health of the recipient or some other person. Members of the National Implementation Group on Terminal Illness were also consulted on this policy and they supported the introduction of measures to ensure that harmful information is not disclosed during an appeal.

## 7. What evidence have you used to inform your assessment?

In conducting this Child Rights and Wellbeing Impact Assessment, we considered UK Government data on the number of young people in receipt of Disability Living Allowance and PIP in Scotland.

We also considered the Chief Medical Officer's guidance for doctors and nurses completing the BASRiS form for terminal illness and considered the analysis of the managed consultation of the CMO Guidance.

## 8. How will the impact of the policy/measure be monitored?

The Social Security (Scotland) Act 2018 places a duty on the Scottish Ministers to report annually to the Scottish Parliament on the performance of the Scottish Social Security System during the previous financial year. The report must include what Scottish Ministers have done in that year to meet the expectations on them set out in the Charter.

Under section 62A of the Social Security (Scotland) Act 2018, Scottish Ministers have powers for the non-disclosure of information to a recipient if it relates to the physical or mental health of an individual and if a registered medical practitioner or a registered nurse has advised Scottish Ministers that the information is likely to cause serious mental or physical harm to the recipient if disclosed. Scottish Ministers have committed to reporting annually on how often the provisions in section 62A of the Social Security (Scotland) Act 2018 have been used both for applications for standard disability assistance, and for applications for disability assistance on grounds of terminal illness. This is provided the numbers are not so low that it could lead to identifying clients.

### **Wellbeing indicators**

With regard to section 96(2) of the Children and Young People (Scotland) Act 2014<sup>3</sup>, these provisions are considered to measure positively against the following wellbeing indicators:

- Safe – young people will be protected from the risk of serious harm to their physical or mental health during an social security appeal.

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<sup>3</sup> [section 96\(2\) of the Children and Young People \(Scotland\) Act 2014](#)



- Healthy – young people will be protected from information that a registered medical practitioner or registered nurse has advised is likely to cause the young person serious harm to their physical or mental health.

## 9. How will you communicate to children and young people the impact of the policy/measure on their rights?

We will inform stakeholders about the changes through our stakeholder newsletter which is issued to a variety of organisations including organisations that represent young people. We will also engage with the Ill Health and Disability Benefits Stakeholder Reference Group.

## 10. Sign & Date

Policy Lead Signature & Date of Sign Off: Nathalie Leger, 12 April 2022

Unit Head Signature & Date of Sign Off: Lynn Forsyth, Head of Unit, Five Family Payments, Funeral Support and Challenge Rights Unit, 13 April 2022



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