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Dear Collette

Social Security (Amendment) (Scotland) Bill

I am pleased to note that the Committee has recommended in its stage one report on the Bill that the Parliament should agree to its general principles, and that the Committee has recognised that the Bill takes account of the ethos of the unanimously-endorsed Social Security (Scotland) Act 2018.

I have set out the Government's response to each substantive point in the report in the table at Annex A. As you know, we have already agreed to make a number of amendments in light of the constructive contributions of witnesses, members, and other stakeholders, and I look forward to continuing to work with Members to take those forward during Stage two.

Yours sincerely

SHIRLEY-ANNE SOMERVILLE

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Social Security (Amendment) (Scotland) Bill	
Recommendation	Scottish Government response
Part 1: Types of social security assistance – Scottish Child Payment	
<p>Several witnesses were very keen to see the Scottish Government use the powers under this part of the Bill to change the statutory footing of the Scottish Child Payment to widen the eligibility criteria - for example, to include those in receipt of carers benefits, children older than 16 years, or certain families with No Recourse to Public Funds. They also highlighted the scope to streamline the application process and ensure it stays as simple as possible to encourage uptake.</p> <p>The Committee acknowledges the list of changes sought by witnesses and asks the Scottish Government to set out its clear priorities for early use of these powers for further development of the Scottish Child Payment.</p>	<p>Consideration is being given to the detail of how the childhood assistance powers will be used. Our key priority will be ensuring the powers gained through this Bill can allow closer alignment of the five family payments. While Scottish Ministers do not have any plans at this stage to radically alter the eligibility criteria for Scottish Child Payment (SCP), the intention is to use the powers in the Bill in due course to modify the legislative footing on which SCP is based. This will allow more flexibility to make changes than is currently possible, however any proposed changes would need to be carefully considered.</p> <p>It is envisaged that SCP will maintain a close link to reserved benefits, but this new approach using childhood assistance powers will allow Scottish Ministers additional flexibility and will protect against changes the UK Government makes to reserved benefits. SCP would move from being a top-up benefit to a stand-alone benefit, similar to the way the Best Start Grants operate. Any specific changes to the payment are likely to require extensive changes to the systems which deliver the payment and may have wider budgetary implications, which need to be considered in the constrained financial environment in which we now operate. My officials will of course continue to engage with stakeholders and listen to their views.</p> <p>We would note that we are unable to pay SCP specifically to those with No Recourse to Public Funds (NRPF), as the Home Office includes SCP as a public fund that is not available to people who meet that condition. The Scottish Government is strongly opposed to the UK Government's NRPF policy. It is wrong that people who are lawfully living in the UK are prevented from accessing our social security system.</p>

Social Security (Amendment) (Scotland) Bill

Recommendation

Scottish Government response

Part 1: Types of social security assistance – Care Experience Assistance

The Committee draws to the Scottish Government's attention the suggestion to amend the terminology in the Bill to 'Care Leaver' rather than 'Care Experience' as well as the suggestion to put on the face of the Bill the entitlement to independent advocacy support for 'Care Experience Assistance'. The Committee asks the Scottish Government for its views on these suggestions and, in particular, whether changing the terminology in the Bill could have any unintended consequences. The Committee also asks the Scottish Government for further detail on what Care Experience Assistance could potentially cover.

The provision in the Bill takes a regulation-making power to create one or more schemes to provide financial assistance for people with care experience. In the first instance, the intention is to use the powers to provide financial assistance to those who are care leavers. However, the provisions, as drafted, allow assistance to be given to different groups of people with care experience.

Given the commitment to Keep the Promise and the work that is underway to fulfil this commitment by 2030, the provision, as drafted, allows for the potential to create schemes to provide assistance for all people with care experience, rather than solely for care leavers. Therefore, the Scottish Government is not minded to change the terminology used within the provision as this would narrow the scope of the power, and therefore, who it can be used to assist in the future.

A public consultation closed on 26 January 2024 and views were sought on what other assistance those with care experience would benefit from in the future. The responses to this question were mixed. However the most common answers were transport, debt management, secure housing and mental health support. The responses are currently being independently analysed and will be used to inform further policy development

Young people with care experience are able to access advocacy support where this would be beneficial to them. The Scottish Government currently fund Who Cares? Scotland to provide independent advocacy support for care experienced young people in Scotland through a helpline.

Views were sought in the consultation on what support a young person might require in applying for and managing the payment and careful consideration is being given as to how this support should look and feel for young people. Details on the support surrounding the payment will be provided for in regulations where appropriate.

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Recommendation	Scottish Government response
<p>The Committee also looks forward to the results of the analysis of the Care Leaver Payment consultation and would welcome an update on progress on the development of the Payment and current timescales the Scottish Government is working to for its introduction.</p>	<p>An independent analysis of consultation responses is currently underway and the Scottish Government will write to the Committee with an update on progress following the publication of the report. The analysis will be used to inform further policy development. Work is currently ongoing to continue to develop the policy of the payment and to determine the most appropriate delivery mechanism.</p> <p>Timelines for delivery of the payment are dependent on the progress of the Bill and subsequent legislative timescales for regulations.</p>
<p>Notwithstanding the Scottish Government's outstanding decisions on the delivery mechanism for Care Experience Assistance, the Committee emphasises the importance of following the general scheme of social security as set out in the Act. This would have the advantage of ensuring that the take-up strategy, the social security principles and provisions for re-determination and appeal apply to the new benefit.</p>	<p>The provision in the Bill takes a regulation-making power to create one or more schemes to provide financial assistance for people with care experience. In the first instance, the intention is to use the powers to provide financial assistance to those who are care leavers.</p> <p>A decision has not yet been taken in regards to the most appropriate delivery mechanism for the payment. If Social Security Scotland is deemed to be the most appropriate delivery mechanism for the Care Leaver Payment then the general scheme of social security will be followed, as set out in the Act, including take-up strategy, social security principles and provisions for re-determinations and appeals.</p> <p>If it is deemed that the payment is best delivered by a different mechanism, the Scottish Government will take learning and good practice from the social security scheme where it is beneficial and appropriate to do so. For example, this could include a take-up strategy and a review process for applications.</p> <p>Details of the scheme to provide the Care Leaver Payment will be detailed in regulations and scrutinised by Parliament. Regardless of the delivery mechanism, it is critical that the Care Leaver Payment is delivered in a trauma-informed way which considers the support required by the young person.</p>

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Recommendation	Scottish Government response
<p>The Committee intends to monitor progress of these new benefits and the rules they will be subject to. We ask the Scottish Government to justify any departures it makes from the social security scheme and to set out what mitigation action it will take to uphold the principles of the scheme.</p>	<p>The Scottish Government notes the intention of the Committee to monitor progress of Care Experience Assistance. Regulations created under the regulation-making power will be subject to parliamentary scrutiny and a Stage 2 Government amendment will also bring the regulations within the scope of SCoSS scrutiny.</p>
Part 2: Applications for assistance	
<p>The Committee welcomes the Cabinet Secretary's plans to 'take forward investigations at stage 2' to extend the flexibility of the provision to accommodate late applications for claimants facing challenging situations. We urge the Cabinet Secretary to consider whether further provision for backdating could also be looked into to keep applications for assistance internally consistent as well as consistent with the social security principles.</p>	<p>The Scottish Government considers that social security should be as accessible and accommodating as possible. If facing exceptionally challenging personal circumstances, upheaval or vulnerability, clients may struggle to apply for assistance in a timely manner. We therefore consider that extending the flexibility available through this provision is worthwhile, even if it helps in only a handful of cases.</p> <p>Unlike the timescales for re-determinations or appeals, the timescales or requirements for applications to be made are all set out in regulations and expressed in different ways - such as by age, life events or a time period. As such, my officials are considering how best to approach a broad cross-cutting provision for the Bill which will apply across secondary legislation where deadlines for applications are contained.</p> <p>Existing rules allow backdating of certain types of assistance where appropriate, including Adult Disability Payment, Carers Support Payment, and in some circumstances, Scottish Child Payment. Any changes to backdating rules would have to be considered carefully in the context of existing system design; significant changes could impact on the wider program of delivery within Social Security Scotland. In any case these backdating rules are contained in the regulations for each respective form of assistance. As such, we consider those regulations would be the best place to make any future changes, rather than broad provision on the face of the Bill.</p>

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Part 3: Determinations and re-determinations of entitlement to assistance

The Committee asks the Scottish Government to consider the various suggestions made by witnesses for creating consistent deadlines for re-determinations, removing the need for an error to be identified before an appeal can be lapsed, providing a 'cooling off' period for withdrawing requests for re-determinations and appeals, removing the need for a re-determination stage after an appeal has lapsed and avoiding an 'endless loop' occurring in process appeals. It should also consider whether providing a further right of appeal to the Upper Tribunal would be of benefit.

Section 7 of the Bill sets out that a new determination can be made if the original determination under appeal was made in error. This includes if the original determination was made wrongly, which includes scenarios where there was an error in the decision-making process or an error in the detail of the determination. This includes the scenario raised by witnesses where a decision maker reaches a different conclusion on the same facts. Section 7 of the Bill also sets out that a new determination can be made where the original determination under appeal was made correctly, but on the basis of incorrect information, or an assumption that proves to be wrong. An example would be where new information becomes available which was not previously available. This definition of "error" is therefore quite broad and we do not believe this will be a barrier for decision-makers or clients.

Our client-centred emphasis on flexibility will ensure that clients can engage with the challenge process on their terms. As part of our approach, clients will be able to withdraw their re-determination request if they change their mind or receive different advice. Similarly, clients will also be able to resubmit a re-determination request if they reconsider or are given new advice after withdrawing a challenge. As such, we do not consider it necessary to impose a cool-off period on clients as choice and flexibility will be embedded as part of the re-determination process.

The committee also recommends removing the re-determination stage once an appeal has been lapsed for people who wish to challenge this new determination. Giving people re-determination and appeal rights on the new determination gives them the same range of challenge rights that are given to people challenging all other determinations. If a client disagrees with a decision, a re-determination provides the opportunity to correct any mistakes through independent re-run. Another team will consider the case afresh within clear timeframes, and can support clients with gathering further information to strengthen decision-making, thereby reducing the likelihood of the need to go on to appeal.

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Scottish Government response

In addition, not everyone who has lodged an appeal will have had a previous re-determination outcome. Some people may have appealed because their re-determination was not concluded by Social Security Scotland within the timescales set out in regulations.

Process appeals are already provided for in the 2018 Act and they are happening in practice. The intention of the provisions in section 8 of the Bill is to provide some legislative clarity on what Scottish Ministers should do if the Tribunal sets aside a decision by Social Security Scotland to reject an application or re-determination request.

In a process appeal, the Tribunal can set aside the decision of Scottish Ministers if it considers that an application or re-determination request is valid, or should have been accepted. The Tribunal may also set aside the Scottish Ministers' decision if they consider that more information is needed to make the application or re-determination request meet the requirements of being in the proper form as required in the 2018 Act.

When the Tribunal set aside the Scottish Ministers decision, the Scottish Ministers will go on to go on to make the determination or re-determination, or, if necessary seek the information needed for a valid application or re-determination request. If, however, they cannot obtain that information, they can again decide that the application or re-determination request has not been validly made.

If the Scottish Ministers were to instead make a determination in any of those scenarios, this would essentially be ignoring the requirements for applications and re-determination requests to be validly made.

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Recommendation	Scottish Government response
	<p>This approach could disadvantage anyone who had similarly not made a valid application or re-determination request , but who did not make a process appeal. It could also disadvantage anyone who received a decision from the Tribunal that it was correct not to accept their application or re-determination request. In practical terms, if Social Security Scotland or the Tribunal do not have the required information as set out in the 2018 Act, they may not be in a position to make a determination. An example of this might be if a client does not submit part 2 of an application for a disability benefit.</p> <p>I am currently considering the point about process appeals and the Upper Tribunal.</p>
<p>In relation to deadlines for re-determinations, the Committee notes the Cabinet Secretary’s explanation as to why Social Security Scotland has different deadlines to complete its processes according to the benefit involved. However, the Committee asks the Scottish Government for its justification for having different deadlines for claimants to request a re-determination.</p>	<p>These deadlines were set for a variety of reasons, including consultation with clients. In particular, disability benefits have a longer deadline in order to provide additional time to collect further information that clients may need which could potentially alter an original determination.</p> <p>This decision was informed by stakeholder feedback and allows for greater flexibility and these deadlines are clearly communicated to clients when they receive their initial determination letter which includes the re-determination form.</p> <p>It is important to note that if a client wants to request a re-determination but has missed the deadline to do so, Social Security Scotland will consider a late request within a one year period, provided there is a good reason why a client was not able to request one sooner. The Bill will also introduce additional flexibility to allow clients to request a re-determination or an appeal beyond a year in exceptional circumstances, embedding flexibility for clients who may be experiencing challenging personal circumstances that prevented them from making a request earlier.</p>

Social Security (Amendment) (Scotland) Bill	
Recommendation	Scottish Government response
Part 4: Assistance give in error	
<p>The Committee recognises that the Bill has a difficult balance to manage between protecting public money and ensuring individuals are appropriately liable for mistakes. Many witnesses raised concerns about individuals being liable for the mistakes of their representatives. The Committee would like to be sure that Social Security Scotland's processes are capable of ensuring that those individuals who may be liable for their representative's mistakes are treated fairly, so they are not pushed into hardship, which could exacerbate their vulnerabilities.</p>	<p>The Scottish Government has a responsibility to steward public funds responsibly, and a key part of discharging this responsibility is recovering overpayments of social security assistance wherever it is economic and reasonable to do so.</p> <p>With regard to the specific point the committee makes in relation to individuals being held accountable for the mistakes of representatives, the Scottish Government considers that in the overwhelming majority of cases where an overpayment arises, the representative will have tried to act in the best interests of an individual, and the individual will have still benefited from the error. In these cases, it seems unfair to apply liability to the representative. We are also keen that no-one should be discouraged from acting as a representative and providing support to an individual who may require it, and consider that applying liability to representatives when they act for the benefit of an individual would be a barrier.</p> <p>Unfortunately there may well be some rare cases where this does not happen, and where Social Security Scotland is made aware of this the provisions within the Bill will allow the representative to be held liable.</p> <p>In those cases where a representative has made an error for which the individual is to be held liable (which the Scottish Government expects to be the majority of cases), the agency would apply existing overpayment policies and processes. These processes have been developed in conjunction with various stakeholders, and are carefully calibrated to ensure that Social Security Scotland has a range of tools at its disposal to ensure no-one is placed into hardship as a result of recovery.</p>

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Recommendation	Scottish Government response
<p>The Committee asks the Scottish Government for an explanation as to how these recovery and appeal provisions reflect the social security principles. The Committee also seeks to understand how they would work in practice, for instance with the use of discretion in recovering overpayments and in providing support for those who wish to appeal, recognising the importance of a compassionate approach and that many recipients of disability and carers benefits are very vulnerable.</p>	<p>Any appeal or overpayment recovery is always undertaken in line with the principles of the 2018 Act and the underpinning ethos of fairness, dignity and respect. We consider the following principles particularly apposite in relation to the areas of overpayments and appeals: Respect for the dignity of individuals is to be at the heart of the Scottish social security system; Opportunities are to be sought to continuously improve the Scottish social security system in ways which—(i) put the needs of those who require assistance first, and (ii) advance equality and non-discrimination; and, the Scottish social security system is to be efficient and deliver value for money.</p> <p>Our existing overpayment policies, developed in conjunction with stakeholders, are carefully calibrated to ensure that no-one is placed into hardship as a result of recovery. Social Security Scotland has a range of tools at its disposal and individual circumstances are taken into account so far as they are known before any recovery of an overpayment is attempted.</p> <p>The agency is able to be flexible with individuals when setting up payment plans and people have time to seek advice from outside organisations should they wish to do so before committing to a repayment schedule. There may be circumstances where the recovery is suspended for a period of time or even written off. Any deductions from ongoing assistance must be set at a reasonable level and people have the ability to seek a re-determination and appeal to the First Tier Tribunal (FTT) if they feel any deductions are set at inappropriate levels. When the provisions within the Bill are implemented, individuals will also have the ability to challenge liability for an overpayment up to and including the FTT.</p> <p>While the detailed service design for appealing liability for an overpayment has yet to take place, it is expected that it will be analogous to existing re-determination and appeal processes, which have of course been designed with the principles in mind. Individuals or their representatives are able to access a range of support, including advocacy, from organisations such as Citizens Advice Scotland or Voiceability.</p>

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Recommendation	Scottish Government response
Part 5: Appointees	
<p>The Committee welcomes the Bill's requirements under section 14 and asks the Scottish Government to ensure that Social Security Scotland checks are carried out 'as soon as reasonably practicable'.</p> <p>To underpin this, the Committee recommends that the Scottish Government monitors and reports on the timescales taken for Social Security Scotland to approve appointees under the devolved social security system.</p>	<p>Social Security Scotland have advised they do not currently hold this information. Social Security Scotland analysts publish a number of regular statistical publications that are produced in line with the code of practice for official statistics. The publication scheme covers all the main benefits and additional information on Social Security Scotland workforce and clients including diversity and equalities analysis.</p> <p>Social Security Scotland are still developing their Official Statistics publications for disability benefits. Being mindful of the agile approach, Social Security Scotland have made improvements to methodology, and have added new tables to most of the quarterly publications to improve our commitment to transparency and accountability. The decision on which new statistics are included is mainly based on the requirements of the Scottish Fiscal Commission, who use Social Security Scotland data to inform their forecasts, and needs of stakeholders.</p> <p>This recommendation will be borne in mind as the agency continues to develop and refine future statistical analysis.</p>
Part 6: Information for audit	
<p>Organisations that support people to access the benefits system and provide support to claimants navigating the system during their benefits journey, clearly feel that the Scottish Government must do more to explain why the Part 6 provisions need to be linked to the power to suspend benefit.</p>	<p>To ensure that we are having the least possible impact on individuals, we have decided that rather than move directly to a Determination without Application (DWA) where someone is not responding, payments should be suspended for a period to give the individual the chance to get in touch and provide the required information. If this happens, when the information is provided and the suspension comes to an end any assistance will be backdated to the date of suspension.</p> <p>The powers to suspend an award of assistance will only be exercised as a last resort. An award will only ever be suspended where multiple attempts to obtain the information, through a variety of communication channels, have been unsuccessful.</p>

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Recommendation	Scottish Government response
	<p>Mindful that the social security principles require the improvements made to be in the interests of those using the system, we intend to work collaboratively with stakeholders to develop both the processes which will implement the provisions at Part 6 of the Bill, and any accompanying guidance, in order to ensure the experience of being selected at random is as person-centred a process as possible.</p> <p>As the committee has noted, the Scottish Government must balance competing principles and priorities and if the agency has repeatedly tried to ascertain that an individual's entitlement remains correct and been unable to do so, it is inconsistent with our wider ethos to ignore the accrual of potentially significant overpayments.</p> <p>An additional consequence of linking the provisions to the power to suspend benefits is that it also helps to ensure the sample will be representative of the wider caseload.</p> <p>If there is no such power to suspend, there is no incentive for anyone who is claiming assistance fraudulently, or whose circumstances have changed and they have not reported it, to participate in the process. Such self-selection of participants would undermine the validity and robustness of the data gathered and negatively impact the outputs of the entire audit exercise.</p>
<p>Uppermost in the Committee's mind is the importance of the social security principles. The ethos of 'dignity and respect' needs to be evident across all rules, processes and procedures. Recognising, however, that sometimes different principles will need to be weighed against each other, the Committee is not convinced the right balance has been struck.</p>	<p>The Scottish Government's key objective in developing these provisions is to gather the necessary information to undertake audit activity and we are acutely aware of the need to balance any rules, processes and procedures for the information for audit provisions in a way that is consistent with our ethos of fairness, dignity and respect.</p> <p>We considered how other organisations, such as the Department for Work and Pensions and the Department for Communities in Northern Ireland undertake similar audit activity.</p>

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Recommendation	Scottish Government response
	<p>The Bill as laid represents a more person-centred approach than those comparators, where failure to participate in the exercise can lead to straightforward termination of a benefit award without any further investigation into a person's circumstances.</p> <p>Where Social Security Scotland cannot be certain a person remains entitled because of failure to respond, it will instead undertake a determination without application to check if the person is still entitled. As such, and differently from other parts of the UK, nobody will ever have their assistance stopped purely for not engaging with the process introduced by the Bill.</p> <p>In addition, we have actively sought to include a number of safeguards in the Bill, which are aimed at ensuring nobody feels unduly pressured by the process. Individuals will have the right to seek withdrawal from the process with good reason. The Bill also contains a regulation-making power which will be used to define particular groups of people who should be exempt from the process entirely, and we have committed to a public consultation in advance of making those regulations.</p> <p>We do not wish to prejudge the outcome of that consultation, but we anticipate that the regulations are likely to exempt individuals with particular vulnerabilities, who will as a result never be asked to participate. People outwith these groups who are randomly selected will also be supported to participate in the process with a right to an advocate, or a supporter. Reasonable timeframes will be in place for the provision of information, through multiple methods of communication.</p>
<p>The Committee considers that the Scottish Government could have done more to consult with stakeholders on information for audit, and that this could have addressed, at an earlier stage, the issues that have been raised with us. We understand a targeted consultation was undertaken, but a wider consultation would also have been a more inclusive approach. We note the Scottish</p>	<p>Although the need for the information for audit provisions wasn't fully established until after the public consultation on the Bill had launched, we have been keen to engage with various stakeholders to seek their views on the proposals. And while it is neither possible, nor desirable to set out all of the processes on the face of the Bill, as we do with the benefits themselves, we will continue to engage as those processes are developed.</p>

Social Security (Amendment) (Scotland) Bill	
Recommendation	Scottish Government response
<p>Government's intention to amend the Bill to specify that regulations on the categories of people who would be exempt from the information for audit requirement will be subject to a form of "super-affirmative" procedure which requires consultation on the regulations.</p>	<p>The provisions were included within the Social Justice and Social Security Committee's public call for views and a number of helpful and detailed submissions were received that continue to inform the development of policy around these provisions. In addition to this, Scottish Government officials sought the views of more than 40 different organisations across a range of sectors.</p> <p>As the committee has noted, we have undertaken to make an amendment to the Bill at Stage 2 requiring a public consultation prior to the exercise of the regulation-making power to provide for groups exempted from the requirements. These will be subject to the scrutiny of the Social Security and Social Justice committee.</p>
<p>This Part of the Bill caused a good deal of confusion for stakeholders with many considering that 'error' had been conflated with 'fraud', and hence that the task of 'audit' had been conflated with 'tackling fraud'. The Committee is, in part, reassured by the Cabinet Secretary's evidence. We still have some reservations about the provisions and, as such, the Committee asks the Scottish Government for a more expansive explanation as to why the provisions do not, in its view, conflate audit and tackling fraud.</p>	<p>To meet Ministers' and Accountable Officers' duties under Part 2, Section 15 of the Public Finance and Accountability (Scotland) Act 2000, and to understand the prevalence of fraud and error within Scottish Social Security system, there is a requirement for the Social Security Scotland to produce robust fraud and error estimates. These provisions will allow gathering of the necessary data to do so.</p> <p>In its written response to the committee, Audit Scotland defined 'audit' as including 'a broad range of activities involving an official examination of the quality or condition of something' and we think that the provisions within the Bill fall within this definition. The Scottish Government agrees with their assessment that what is contained within the Bill can be categorised a tool for internal auditing rather than 'tackling fraud'. The purpose of an inventory audit in a retail environment is not to catch shoplifters. It is about verifying stock levels and estimating any potential losses. In the same way the proposed audit of the social security system is not intended to tackle specific cases of fraud. It intends to verify the accuracy of the payments issued and identify any trends within the overall caseload.</p> <p>The Bill contains no new or strengthened statutory powers to tackle fraud. Any cases of possible fraud identified as a result of the audit process will be addressed using existing statutory powers and processes.</p>

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In addition, we ask the Government to advise in its response to this Report whether it will adopt a 'test and learn' approach to implementation to further support its approach to safeguarding.

Scottish Government response

The Scottish Government is clear that any processes and procedures will be implemented in a way that is consistent with the ethos of fairness, dignity and respect and with the principles in the 2018 Act. We will be happy to engage with a wide range of stakeholders as the processes and safeguarding measures in relation to these provisions are developed, and to continue that engagement once they are in place.