

## Stage 1 Briefing

# Judicial Factors (Scotland) Bill

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

In fulfilment of our statutory function in terms of the Solicitors (Scotland) Act 1980 (“the 1980 Act”), the Law Society has a duty to promote the interest of the public in relation to the solicitors’ profession. In circumstances where solicitors have been found to have a shortfall on their client account, or the firm’s books and records are in such a state that it is impossible to tell if a shortfall on the client account has arisen, the Law Society can petition the court for the appointment of a judicial factor as laid down in section 41 of the 1980 Act. The petition will seek the appointment of a judicial factor to take charge of the solicitor’s estate (or that of the incorporated practice) and, after due consideration of the circumstances which gave rise to the appointment, deal with the assets and liabilities of the solicitor/firm all according to law. Additionally, where appropriate, the judicial factor appointed will assist clients in recovering the sums which should have been held on their behalf in the solicitor’s/firm’s client account.

Whilst we therefore have a particular interest in the judicial factor regime as it relates to appointments under section 41 of the 1980 Act, we note that a judicial factor may also be appointed in a range of other circumstances which may interact with charity law, trust law, the law of succession, child and family law or bankruptcy law.

The Judicial Factors (Scotland) Bill<sup>1</sup> (“the Bill”) was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 5 December 2023. We submitted written evidence<sup>2</sup> to the Delegated Powers and Law Reform Committee of the Scottish Parliament (“the lead Committee”) in March 2024. Our then Director of Interventions, Morna Grandison, gave oral evidence to the lead committee on 23 April 2024<sup>3</sup> and we subsequently provided supplementary written evidence regarding complaints.<sup>4</sup> We also previously responded to the 2011 Scottish Law Commission (SLC) discussion paper on judicial factors (Discussion

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<sup>1</sup> [Judicial Factors \(Scotland\) Bill \(parliament.scot\)](https://www.parliament.scot/bills/2023-24/judicial-factors-scotland-bill)

<sup>2</sup> [Written Evidence: Judicial Factors \(Scotland\) Bill \(lawsocot.org.uk\)](https://www.lawsocot.org.uk/written-evidence-judicial-factors-scotland-bill)

<sup>3</sup> [Meeting of the Parliament: DPLR/23/04/2024 | Scottish Parliament Website](https://www.parliament.scot/parliamentary-business/2024-04-23-meeting-of-the-parliament)

<sup>4</sup> <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/response-from-morna-grandison.pdf>



Paper No.146)<sup>5</sup> and the 2019 Scottish Government consultation on the SLC's proposal.<sup>6 7</sup>

The lead Committee's Stage 1 Report on the Judicial Factors (Scotland) Bill<sup>8</sup> ("the Stage 1 Report") was published on 14 June 2024.

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 19 September 2024.

## Executive Summary

### General comments

We agree that the law relating to judicial factors is in need of modernisation and, subject to our comments below, we are supportive of the Bill.

We comment on specific sections of the Bill in Part A of our briefing. We also highlight a number of areas which we consider are missing from the Bill at Part B of our briefing.

We support the lead committee's conclusion that a complaints process for judicial factors does not need to be included on the face of the Bill. We are, however, supportive of steps to improve the accessibility of and signposting to existing complaints mechanisms, and welcome the Scottish Government's commitment to taking this recommendation forward.

We highlight a number of drafting points within our response, and welcome the Scottish Government's confirmation that it is considering a number of drafting issues raised in written evidence ahead of Stage 2.

### Part A- Comments on sections of the Bill

Whilst we are broadly supportive of the Bill's provisions, we have commented on most sections of the Bill and our key points include:

- Section 1- we are pleased to note that the Bill preserves the jurisdiction of the Court of Session for applications to appoint a judicial factor. Whilst we believe that applications under section 41 of the Solicitors (Scotland) Act 1980 should be retained in the jurisdiction of the Court of Session, we accept that retaining them as the preserve of the Inner House is unnecessary.
- Section 3- we seek clarification as to the proposed interaction between the Bill and the Adults with Incapacity (Scotland) Act 2000. We also suggest that a power to appoint a substitute judicial factor should be added to the Bill.

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<sup>5</sup> <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/completed-projects/judicial-factors/>

<sup>6</sup> <https://www.lawscot.org.uk/media/31mpog2l/judicial-factors-consultation-law-society-of-scotland-response.pdf>

<sup>7</sup> <https://www.gov.scot/publications/judicial-factors-consultation/>

<sup>8</sup> [Stage 1 Report on the Judicial Factors \(Scotland\) Bill | Scottish Parliament](#)



- Section 4- we welcome the lead Committee's support for our continued ability to petition to appoint our in-house judicial factor.
- Section 8- we highlight that modern mechanisms allow for the transfer of funds or the destruction of records to take place very quickly and that it is of the utmost importance that judicial factors can act quickly. We call for clarification on this section.
- Section 9- we agree with the Scottish Government's view that an amendment to make the fiduciary nature of the judicial factor role clear on the face of the Bill is unnecessary.
- Sections 12 and 39- we consider that the exclusion of certain UK bodies from the duty to comply with a notice issued by a judicial factor or the Accountant of Court will adversely impact on the ability to obtain relevant information. We welcome the Scottish Government's intention to explore extending this. We also welcome the Scottish Government's commitment to clarify or remove references to data protection legislation in these sections of the Bill.
- Section 31- we suggest that there appears to be a gap in the administration of the estate under this section and seek clarity on this this will operate in practice.
- Section 38- we have a number of concerns regarding how this section will operate, particularly regarding the route for referring a solicitor acting as a judicial factor to their professional body. We are concerned that this section of the Bill as introduced may dissuade individuals from accepting appointment as factor, and welcome the Scottish Government's commitment to considering how the Bill can be amended at Stage 2.

#### Part B: Areas missing from the Bill

We highlight the absence from the Bill of provisions relating to the estates of missing persons and Safeguarding of Property: Children (Scotland) Act 1995, which were subject to consultation in 2019.

We welcome the Minister's confirmation that legal aid would be available to those seeking appointment as a judicial factor for a missing person, such as family members, if the applicant was eligible.



## General Comments

We note that the Policy Memorandum indicates that the policy intention of the Bill is to “put in place an updated and comprehensive regime which will bring clarity, accessibility, and efficiency to this vital but outmoded area of the law.” We agree that the law is in need of modernisation.

We are pleased to note that the Bill takes forward, without amendment, the majority of the SLC’s recommendations for reform. We worked closely with the SLC in developing the recommendations, and are further pleased that the Bill addresses many of the concerns that we raised with the SLC in relation to the current legislative framework. Subject to our comments below, we are supportive of the Bill.

Whilst we have a particular interest in the judicial factor regime as it relates to appointments under section 41 of the 1980 Act (see our introductory comments, above), we note that a judicial factor may also be appointed in a range of other circumstances which may interact with charity law, trust law, the law of succession, child and family law or bankruptcy law. Where relevant, we have commented further on these interactions below. We note that the lead Committee has asked the Scottish Government to consider the suggestions made during stage 1 scrutiny as to how the Bill could better cater for cases of judicial factors appointed to charities and to report on any changes needed in advance of the Stage 1 debate.<sup>9</sup> We welcome this request for clarity, and the Scottish Government’s indication that they have commenced consultations with stakeholders on the suggested changes ahead of stage 2.<sup>10</sup>

We have commented on specific sections of the Bill below in Part A of this briefing. We have also highlighted a number of areas which we consider are missing from the Bill at Part B, below.

We note the discussion in the Stage 1 Report regarding complaints processes in respect of judicial factors. We are supportive of the lead Committee’s conclusion that the current system of complaints is a sensible approach and that a complaints process does not need to be included on the face of the Bill.<sup>11</sup> In our view, there is no evidence that the existing system of raising concerns is not working, and any additional legislative process on the face of the Bill is likely to simply deter people from taking on the appointment and therefore reduce the legislation’s effectiveness. We do note the lead Committee’s recommendation that “the Scottish Government, the Scottish Courts and Tribunals Service and the Accountant of Court [to] ensure that information about the process to be followed is clearly accessible to those who need it.”<sup>12</sup> We are supportive of steps to

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<sup>9</sup> Stage 1 Report, para 98

<sup>10</sup> Scottish Government response to the Stage 1 Report: <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/sq-response-to-judicial-factors-bill-stage-1-report.pdf>, at page 4

<sup>11</sup> Stage 1 Report, para 106

<sup>12</sup> Stage 1 Report, para 107



improve the accessibility of and signposting to existing complaints mechanisms, and welcome the Scottish Government's commitment to taking this recommendation forward.<sup>13</sup>

We highlight below a number of sections of the Bill has introduced where the terms of the Bill differ from those of the SLC's draft Bill. Whilst we understand that drafting styles have moved on since the SLC's draft Bill was published, we would welcome further clarification as to the extent- if any- to which these changes represent policy departures from the SLC's recommendations. We welcome the lead committee's request that Scottish Government consider the drafting points raised in the submissions in response to the Committee's call for views on the Bill<sup>14</sup> and confirm whether it plans on bringing forward any amendments to the Bill to address these points, and whether any clarifications or reassurances have otherwise been given.<sup>15</sup> We further welcome the Scottish Government's confirmation that it is considering a number of drafting issues raised in written evidence and will update the Committee ahead of Stage 2.<sup>16</sup>

## Part A: Comments on sections of the Bill

### Part 1 of the Bill- Appointment of Judicial Factor

#### Appointment of a Judicial Factor (section 1)

We would welcome clarification on the interaction between the Bill and other legislation which addresses specific situations in which a judicial factor may be appointed- for example section 41 of the 1980 Act or section 34 of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"). It is our understanding that such appointments will continue to be made in terms of the relevant specific legislation, rather than under sections 1-3 of the Bill, but that judicial factors appointed under specific legislation will still be required to meet the requirements of section 4 and be subject to the regime set out in the remainder of the Bill.

We note that the Bill refers to an application for appointment, whereas the equivalent provisions of the SLC's draft Bill referred to a petition for appointment. We would welcome clarification as to whether it is intended that the rules of court will specify a particular style of application.

#### Jurisdiction (section 1)

We note that the Bill proceeds with the recommendation of the SLC by maintaining the position whereby applications to appoint a judicial factor can be heard in

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<sup>13</sup> Scottish Government response to the Stage 1 Report, at page 4

<sup>14</sup> Stage 1 Report, para 244

<sup>15</sup> Stage 1 Report, para 245

<sup>16</sup> Scottish Government response to the Stage 1 Report, at page 8



either the Court of Session or the sheriff court. In general terms, we consider this appropriate.

We consider that there are certain situations where the complexity and urgency of the circumstances and how infrequently they arise justifies applications being heard in the Court of Session. We are therefore pleased to note that the Bill as introduced preserves this jurisdiction.

Applications for appointment of a judicial factor under section 41 of the 1980 Act are currently heard in the Inner House of the Court of Session. This is provided for in the Rules of the Court of Session. The SLC has recommended “That petitions for the appointment of a judicial factor made under section 41 of the Solicitors (Scotland) Act 1980 should no longer be made in the Inner House of the Court of Session.”<sup>17</sup> Whilst we believe that applications under the 1980 Act should be retained in the jurisdiction of the Court of Session, we accept that retaining them as the preserve of the Inner House is unnecessary and therefore we would be happy for such appointments to be made in the Outer House, subject to there being a suitably swift mechanism to petition the *nobile officium* of the Inner House where this is necessary to address complex or novel cases. We would welcome clarification as to whether the intention is to seek amendment to the court rules following passage of the Bill.

By way of comparison, we note that section 34 of the 2005 Act provides that the Court of Session (specifically) may appoint a judicial factor to manage the affairs of a charity (or other body). In terms of the court rules, these petitions are heard in the Outer House.

### **Interim Judicial Factor (section 2)**

This provision preserves the current position and is in line with SLC’s recommendations. We have no further comments.

### **Conditions for appointment of judicial factor (section 3)**

We are generally supportive of the approach set out in section 3, which is largely in line with the SLC’s recommendations. However, we do note that there are some differences in drafting as compared to the SLC’s draft Bill, and we would welcome clarification as to the policy intention behind these changes.

We would also query whether the definition of “actings” for the purposes of section 3(2) should include distribution, notwithstanding that this is covered later in the Bill.

We would welcome clarification as to the proposed interaction between the Bill and the Adults with Incapacity (Scotland) Act 2000 (“the 2000 Act”). Part 1 of Schedule 3 to the Bill repeals in their entirety the Judicial Factors Acts of 1849, 1880 and 1889. It also repeals the references to the 1849 and 1889 Acts in the 2000 Act. In light of these repeals, we would welcome clarification as to what

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<sup>17</sup> SLC report, recommendation 7



provision ensures that guardians appointed under the 2000 Act remain outside the judicial factors regime, and that judicial factor appointments are not used to circumvent the safeguards for incapable adults set out in the 2000 Act. We would also welcome clarification as to the procedural safeguards which ensure the right to be heard for all persons to whom appointment of a judicial factor is proposed, particularly people with possible impairments of relevant capabilities, or with vulnerabilities, or with support needs in terms of the UN Convention on the Rights of Persons with Disabilities.

In our 2019 response, we suggested there may also be merit in a power to appoint a substitute factor where considered appropriate, simplifying procedural aspects if for any reason the factor first appointed were to cease to act while the factory was still current. This could apply in situations where the factor is for example ill or otherwise unavailable. These situations do not appear to be provided for in Schedule 1. Whilst the Bill as introduced does not make provision for substitute appointments, we would still suggest that such a power may merit further consideration.

#### **Qualification for appointment as judicial factor (section 4)**

We note the discussion in the Stage 1 Report regarding the role of the Law Society of Scotland's in-house judicial factor.<sup>18</sup> In our oral evidence, we highlighted that our ability to apply for the appointment of a judicial factor under the 1980 Act is an important element of our regulatory work to protect the public and that the presence of an in-house team allows us to build and develop expertise.<sup>19</sup> We therefore welcome the lead Committee's support for our continued ability to petition to appoint our in-house judicial factor.<sup>20</sup>

#### **Finding of caution (section 5)**

We believe that this is a risk-based approach. Allowing the discretion for caution provides flexibility to the Accountant of Court to take appropriate steps and to set a level of caution where risk is identified and will not unduly burden those estates with costs, where risk is minimal. We are pleased to note that the lead Committee is supportive of the proposals as drafted for caution in section 5 of the Bill, and recommends no change.<sup>21</sup>

#### **Intimation and registration of notice of appointment (section 6)**

We would welcome clarification as to whether consideration has been given to any consequent legislative or practical changes which may be required to allow the appointment of a judicial factor to be registered in the Register of Inhibitions.

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<sup>18</sup> Stage 1 Report, paras 143-147

<sup>19</sup> Stage 1 Report, para 144

<sup>20</sup> Stage 1 Report, para 147

<sup>21</sup> Stage 1 Report, para 160



We note that the lead Committee is supportive of the proposal in the Bill to register judicial factories in the Register of Inhibitions, but that the lead Committee also considers that the Bill should be flexible enough to allow for this to change in the future.<sup>22</sup> We also note the lead Committee's recommendation that the registration of judicial factories in the Register of Inhibitions should be periodically reviewed<sup>23</sup> and the Scottish Government's commitment to bring forward an amendment at Stage 2 to give effect to this recommendation.<sup>24</sup>

### **Vesting of estate in judicial factor (section 7)**

Whilst we welcome the clarification this provision will provide in respect of vesting of the estate in the judicial factor, particularly as it relates to appointments under section 41 of the 1980 Act, we do note that the scope of the provision is wider than the current position in that it will extend to property held other than in the solicitor's professional capacity.

### **Warrant to intromit with estate (section 8)**

This provision appears to be in line with the SLC's recommendations.

We would, however, welcome clarity on the intended meaning of the phrase 'without delay'. Modern mechanisms allow for the transfer of funds or the destruction of records to take place very quickly, and as a result the factor requires the certified copy interlocutor almost instantaneously in order to intimate to the appropriate people. We understand that it may currently take up to 3 days for the certified copy interlocutor to be available. We would welcome clarification as to liability for any transactions which may take place between the date of the interlocutor and the date on which the certified copy interlocutor is made available to the factor. It is of the utmost importance that factors can act quickly to safeguard the estate.

### **Remuneration and reimbursement of judicial factor (section 9)**

These provisions appear to be in line with the SLC's recommendations and we are generally supportive of the approach adopted in the Bill, including the requirement for the Accountant to undertake an annual review of fixed rates. We would note that there may be cases where the estate is insolvent.

## **Part 2 of the Bill- Functions of Judicial Factors**

### **Functions of the judicial factor (section 10 and schedule 1)**

We note that in drafting terms, these provisions do differ from the equivalent provisions of the SLC's draft Bill, for example:

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<sup>22</sup> Stage 1 Report, para 169

<sup>23</sup> Stage 1 Report, para 170-171

<sup>24</sup> Scottish Government response to the Stage 1 Report, at page 6



- The title of this Part of the Bill and of section 10 refers to ‘functions’ rather than ‘powers’- we would suggest that ‘powers and duties’ is generally a more accurate description of the provisions in this Part of the Bill.
- Section 11(2) of the SLC draft Bill (“Subsection (1) is without prejudice to any other enactment conferring powers on, or by virtue of which powers vest in, a judicial factor”) is omitted from the section 10 of the Bill.

We would welcome clarification as to the drafting and policy intention behind these changes.

We would also suggest that section 10(1) should refer to distribution, subject to specific provisions elsewhere in the Bill.

We note that section 10(5) provides that a judicial factor must not delegate the general function or any factory function except as provided for in this section. We would query how these provisions and in particular the authorisation of the Accountant will operate in practice, for example where a judicial factor is ill or otherwise unavailable.

Presumably in the case of a charity ‘persons with an interest in the estate’ are primarily the members of the public who would benefit from the proper application of the estate for the charitable purposes of the charity, but might also include OSCR (see further under section 27 below). This might be usefully clarified in the Explanatory Notes.

We note the discussion at Stage 1 regarding the fiduciary nature of the judicial factor, and the lead committee’s recommendation that the Scottish Government bring forward an amendment to the Bill at Stage 2 to make the fiduciary nature of the role clear on the face of the Bill.<sup>25</sup> Whilst we acknowledge that this may provide additional clarity in the small number of cases where a lay person is appointed as a judicial factor, we are in agreement with the SLC’s view that the fiduciary nature of the judicial factor’s role is self-evident and does not need to be stated in the Bill.<sup>26</sup> We note that the Scottish Government has indicated that it does not intend to bring forward amendments in this area.<sup>27</sup>

Section 10(7) introduces Schedule 1 of the Bill, which sets out the standard powers which vest in the judicial factors on the date of appointment.

### **Power of court to specify functions of judicial factor (section 11)**

Again, we note that these provisions do differ from the equivalent provisions of the SLC draft Bill, and we would welcome clarification as to any specific drafting and policy intention behind these changes.

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<sup>25</sup> Stage 1 Report, para 193

<sup>26</sup> As quoted in the Stage 1 Report at para 189

<sup>27</sup> Scottish Government response to the stage 1 report, at page 7.



## Power of judicial factor to require information (section 12)

We welcome clarification as to the powers of the judicial factor to require information.

We note, however, that the Bill as introduced would exclude the following from the duty to comply with a notice issued by a judicial factor:

- (a) a body to which paragraph 3 (reserved bodies) of Part III of schedule 5 of the Scotland Act 1998 applies,
- (b) a Minister of the Crown,
- (c) a department of the Government of the United Kingdom, or
- (d) a public body operating wholly in relation to a reserved matter within the meaning of the Scotland Act 1998.

Whilst we understand that there may be issues of legislative competence at play here, we do consider that these exclusions will adversely impact on the ability of the factor to obtain information from organisations outside Scotland, for example HMRC. We therefore welcome the indication by the Minister that it is the Scottish Government's intention to seek an order under section 104 of the Scotland Act 1998 to extend "some of the provisions in the bill to the whole of the United Kingdom, including provisions on the vesting of property in a judicial factor, the ingathering of property, a judicial factor's functions and information sharing."<sup>28</sup> We also note the Minister's indication that the "intention is also to explore the application of the requirement to comply with the information requests to bodies that are excluded under the bill, such as UK Government departments and bodies with other reserved functions."<sup>29</sup> We consider that an order extending the application of the Bill in this manner would be extremely helpful.

We also note the inclusion of subsections 7 and 8, which relate to data protection legislation. We understand that organisations may currently place reliance on data protection considerations as a reason not to comply with requests from a factor, and we are concerned that these provisions may exacerbate these difficulties and limit the ability of the factor to investigate potential fraud and malfeasance. We therefore welcome the lead Committee's recommendation that the Scottish Government consider whether these provisions, and the equivalent provisions relating to the powers of the Accountant of Court, should be either clarified further on the face of the Bill or removed altogether.<sup>30</sup> We further welcome the Scottish Government's commitment to tabling relevant Stage 2 amendments to address these issues.<sup>31</sup>

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<sup>28</sup> Stage 1 Report, para 113

<sup>29</sup> Ibid

<sup>30</sup> Stage 1 Report, para 128

<sup>31</sup> Scottish Government response to the Stage 1 Report, at page 5

We would also suggest that ‘without undue delay’ may be more appropriate than ‘without delay’ for the purposes of this section.

We note that there is no sanction for failure to comply with a notice issued under section 12. We note the justification for this provided at paragraph 73 of the Policy Memorandum.

### **Ingathering (section 13)**

We consider that this section may benefit from some further modernisation to reflect the current practices of institutions. Individual institutions and online providers may have specific rules or practices in respect of naming accounts, and errors in naming can be made. Assets may also now include cryptocurrency and NFTs, and it is unclear whether these would be covered by this section.

We would also query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

### **Inventory of estate (section 14)**

We would welcome clarification as to what documents it is envisaged will be required by the rules of court and how these will be specified.

We would also query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

### **Management Plan (section 15)**

We note that this provision does differ from the equivalent provisions of the SLC draft Bill, and in our view the Bill as introduced has the potential to be more proscriptive than the SLC’s proposal. We do not consider this consistent with the policy aim of delivering agile modernising legislation. We would welcome clarification as to the policy intention.

We would also welcome clarification as to what documents it is envisaged will be required by the rules of court and how these will be specified.

In respect of charities, we note that a key question for the factor of a charity’s estate must be whether the aim is to manage the affairs of the charity (1) on a wind-up basis with a view to distributing its net assets to another charity or charities or (2) on a ‘steady the ship’ basis with a view to the charity’s operating again as a going concern. See further under section 27 below.

We note that this provision is subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 15(10)). We consider this appropriate.



### **Submission of accounts, etc (section 16)**

We note that the Bill as introduced does appear to afford less flexibility in respect of reporting periods than the equivalent provisions of the SLC's draft Bill. A flexible approach is an advantage where the legislation is used for a variety of purposes.

We would also query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

### **Investment (section 17)**

We would query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

### **Enforcing and defending claims (section 18)**

We would query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

### **Duty where estate object of dispute (section 19)**

We note that this provision differs from the equivalent provision of the SLC draft Bill in that it excludes subsection 4(a):

“(4) Without prejudice to the generality of subsection (3), the scheme may comprise—

(a) the appointment of a manager by the persons mentioned in subsection (1)(a)...”

We would welcome clarification as to why this provision has been excluded from the Bill as introduced.

We would also query whether this section should be subject to any exceptions or additional duties specified in the interlocutor or obtained post-appointment by application to the court (see section 11).

## **Part 3 of the Bill- Dealings etc with third parties and validity of certain transactions**

### **Protection of person acquiring title (section 20)**

We have no specific comments on this section at this stage.

### **Entitlements and liabilities of judicial factors (section 21)**

We have no specific comments on this section at this stage.

### **Contracts entered into by judicial factor (section 22)**

We have no specific comments on this section at this stage.

### **Expenses of legal proceedings on behalf of factory estate (section 23)**

We have no specific comments on this section at this stage.

### **Claims arising from acts or omissions of judicial factor (section 24)**

We note that these provisions do differ from the equivalent provisions of the SLC draft Bill. In particular, we note that the Bill as introduced does not include specific provisions relating to unjustified enrichment (section 30 of the SLC draft Bill). We would welcome clarification as to any specific drafting or policy intention behind these changes.

### **Prescription of obligations (section 25)**

We note that this provision of the Bill does differ from equivalent provisions in the SLC draft Bill. We would welcome clarification as to any specific drafting or policy intention behind these changes.

### **Validity of certain transactions by judicial factor appointed in trust estate (section 26)**

Again, we note that these provisions do differ from the equivalent provisions of the SLC draft Bill and we would welcome clarification as to any specific drafting or policy intention behind these changes.

In particular, we would welcome clarity on:

- the proposed approach to specifying persons or classes of persons in the rules of court (section 26(2)(b)).
- whether the reference to ‘every person’ in section 26(3)(a) is considered wider than the reference to ‘all parties’ in the equivalent provision of the SLC draft Bill, and- if so- whether this is considered achievable for the Accountant.
- Whether ‘parties’ and ‘persons’ are interchangeable terms- we consider that they may not be in this context.
- How an “interest” in the trust estate will be defined.

### **Part 4 of the Bill- Distribution of factory estate, termination, recall and discharge of judicial factor**

#### **Approval of judicial factor’s scheme for distribution of factory estate (section 27)**

In relation to charities, as suggested at section 15, the factor for a charity may be operating on wind-up basis or a ‘steady the ship’ basis. The type of distribution scheme envisaged here seems to fit the wind-up alternative better, with the factory estate going to another charity or charities, but we note that the ‘distribution’ could also be, in appropriate circumstances, a transfer of the factory estate back to the original charity so it could resume its activities as a charity.

Either way, the requirement in section 27(4) for the Accountant to intimate the approved scheme ‘to each person who ... has an interest in the estate’ looks to be

unworkable where the persons involved are the public or the members of a section of the public. There should perhaps be special intimation arrangements for charities, possibly modelled on the intimation arrangements for charity reorganisations.

### **Application for distribution of factory estate (section 28)**

We would welcome further clarity on how it is envisaged that these provisions will work in practice. It is not clear on the face of the Bill who is required to prepare and submit the proposed scheme for distribution to the court, although the Policy Memorandum indicates that distribution will be “in accordance with the applicant’s proposals or otherwise” (para 98).

### **Termination, recall and discharge after distribution of factory estate (section 29)**

Again, we would welcome further clarity on how it is envisaged that these provisions will work in practice. In particular, we would suggest that any fee payable as a result of the requirement in subsection 6 for the Accountant to register the certificate in the Register of Inhibitions should be included in the Accountant’s audit fee, on the basis that the estate bank accounts will be closed by the point this fee is due and therefore recovery from the factory estate may not be possible.

### **Duty of Accountant to apply for appointment of replacement where judicial factor has died or ceases to perform duties (section 30)**

For clarity, it may be helpful to specify within this section the requirements to register the out-going judicial factor’s discharge and the new judicial factor’s appointment in the Register of Inhibitions.

### **Resignation and application for recall and discharge in other circumstances (section 31)**

We would welcome further clarity on how it is envisaged that these provisions will work in practice. It appears that there may be a gap in the administration of the estate between the submission of final accounts and their audit (section 31(5) and (6)(b)(iii) and section 31(7)) and the recall being granted. It is not clear who is it envisaged will be managing the estate during this period. Under the existing process, recall is pronounced and a new factor is appointed and thereafter the out-going factor produces accounts up to the date of recall. Once audited, the out-going factor is discharged. This avoids any gap in the administration of the estate. It may be helpful to clarify section 31(5) of the Bill to make clear that the application for recall and the application for discharge can be made separately, if the intention is to preserve the current process.

Where the application is made by someone other than the judicial factor, it is not clear what process exists to allow the court to hear submissions on why the recall may be inappropriate.





For clarity, it may be helpful to specify within this section the requirement to register the out-going judicial factor's discharge and the new judicial factor's appointment in the Register of Inhibitions.

### **Inventory and balance sheet where replacement judicial factor appointed (section 32)**

We consider that this section is confusing and we would welcome clarity on the policy intention and how it is envisaged this provision will work in practice.

### **Termination of judicial factory where insufficient funds (section 33)**

We note that in the SLC draft Bill, the equivalent provision (section 41) was titled 'Writing off'. The change in title in the Bill as introduced may lead to some loss of emphasis as to the intended application of these provisions and the basis on which they can be distinguished from other circumstances for termination above.

Further clarity as to the process to be followed under section 33(2) would be helpful.

As above at section 29 we would suggest that any fee payable as a result of the requirement for the Accountant to register the certificate in the Register of Inhibitions should be included in the Accountant's audit fee, on the basis that the estate bank accounts will be closed by the point this fee is due and therefore recovery from the factory estate may not be possible.

### **Ending of judicial factor's accountability on discharge (section 34)**

We have no specific comments on this section at this stage.

## **Part 5 of the Bill- Accountant of court**

### **Accountant of Court: appointment, remuneration and fees (section 35)**

We note that there is a departure from the SLC's draft Bill in respect of the qualifications required for the Accountant and any Deputy. The SLC draft Bill provided that "the Accountant must be an individual knowledgeable in matters of law and accounting as must any Depute Accountant" (section 43(1)). The Bill as introduced provides that "The Scottish Courts and Tribunals Service ("the SCTS") may appoint a person to the office of Accountant of Court only if the person is, in the opinion of the SCTS, appropriately qualified **or** experienced in law and accounting" (our emphasis added).

We would be concerned by any move towards reducing the qualifications of the Accountant and Depute due to the potential impact on the ability of these post-holders to perform the oversight functions for the complex cases which give rise to the appointment of judicial factors. Whilst there may not have been an intention to weaken the requirements for the Accountant's qualification for office, we would welcome clarification from the Scottish Government and SCTS as to how they will ensure that the Accountant of Court and any deputy will in practice have the level of specialist knowledge that is required to oversee complex judicial factories.

We note the lead committee's recommendation that the Scottish Government bring forward an amendment to provide for review of the qualification requirements and delegated powers to allow the Scottish ministers to amend the qualifications requirements if necessary. We consider that these would be sensible additions to the Bill, and welcome the Scottish Government's commitment to bringing forward such amendments at Stage 2.<sup>32</sup>

### **Depute Accountant (section 36)**

See our comments above regarding the qualifications of the Depute Accountant. We have no further comments on this section.

### **General function of Accountant of Court (section 37)**

We note that the proposal that the Accountant of Court should continue to supervise judicial factors is in line with the SLC's recommendations.

We have no specific comments on this section at this stage.

### **Misconduct or failure of judicial factor (section 38)**

We note that the Bill as introduced refers to the Accountant being satisfied that "there is, or has been, serious misconduct or material failure on the part of the judicial factor" whereas the SLC's draft Bill would appear to set a lower threshold (section 46(5)).

We do have some concern as to how this section will operate in practice.

We note the discussion at stage 1 regarding the application of this provision of the Bill as introduced to solicitors acting as judicial factors, and the potential lack of clarity highlighted regarding the role of the Scottish Legal Complaints Commission (SLCC) as the single gatekeeper for complaints about solicitors in Scotland. We welcome the lead Committee's request that Scottish Government clarify the route the Accountant of Court should take when referring a solicitor to their professional body as set out under their powers at section 38(4) of the Bill. At present, and as noted in the Scottish Government's response to the Stage 1 Report,<sup>33</sup> any complaint made directly to the Law Society of Scotland as the professional body for solicitors would have to be reported by the Society to the SLCC, creating an unnecessarily protracted process.

We note that the report to the professional body must be made before the court has heard representations from the judicial factor or disposed of the matter. We would question how this will work where the factor is subsequently exonerated by the court.

We also consider that there is a need for clarity as to how the process set out in section 38 is intended to operate alongside section 3 of the Legal Profession and Legal Aid (Scotland) Act 2007, which precludes the SLCC dealing with complaints

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<sup>32</sup> Scottish Government response to the Stage 1 Report, at page 7

<sup>33</sup> Scottish Government response to the Stage 1 Report, at page 8

which can be dealt with under a ‘specified regulatory scheme’, to avoid multiple processes running concurrently.

That such a report can be made on the basis of a failure to comply with a direction from the Accountant under section 37(2) further emphasises the importance of the Accountant being suitably qualified and experienced in law and accounting (see our comments above at section 35). We would also query how these provisions will interact with the right of the judicial factor to require a determination as regards a decision of Accountant under section 45.

We note the discussion at Stage 1 regarding the interaction between sections 34 and 38 of the Bill and the lead Committee’s call for the Scottish Government to consider whether it needs to clarify further the interrelationship between sections 34 and 38, given the apparent confusion of some stakeholders.<sup>34</sup>

There is a risk that section 38 of the Bill as introduced may dissuade individuals from accepting appointment as factor, given the often-contentious nature of the cases involved. We therefore welcome the Scottish Government’s commitment to considering how the Bill can be amended at Stage 2 to capture the way that complaints to a professional body are made in the context of solicitors and any regulated profession.<sup>35</sup>

### **Power of Accountant to require information (section 39)**

We refer to our comments on section 12, above, regarding the exclusion of various bodies including potentially HMRC, and the potential for inappropriate reliance on data protection legislation. These also apply to this section of the Bill.

We would also suggest that ‘without undue delay’ may be more appropriate than ‘without delay’ for the purposes of this section.

### **Audit by Accountant (section 40)**

We would query how the provisions passing the cost of external audit to the factory estate (section 40(6)) would work in practice, where the estate is unable to bear the costs.

### **Audit by Accountant: objection and appeal (section 41)**

We have no specific comments on this section at this stage.

### **Annual review (section 42)**

We note that the Bill as introduced differs from the terms of the SLC draft Bill in that arrangement for the review are to be set out in regulations rather than by the rules of court. We would welcome clarification as to the policy intention behind this change in approach.

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<sup>34</sup> Stage 1 Report, para 220

<sup>35</sup> Scottish Government response to the Stage 1 Report, at page 8



### **Inspection of records held by Accountant (section 43)**

We note that the Bill as introduced differs from the terms of the SLC draft Bill in that the inventory is omitted from the documents which must be made available for inspection.

We would query whether there may be specific circumstances in which it may be appropriate for information, for example a detailed schedule submitted to assist the Accountant's audit, to be redacted.

### **Inconsistency in judgement or practice (section 44)**

We have no specific comments on this section at this stage.

### **Right of judicial factor to require determination as regards decision of Accountant (section 45)**

See our comments above regarding the interaction with section 38.

### **Part 6 of the Bill- Miscellaneous and general**

We have no specific comments on this Part of the Bill.

## **Part B: Areas missing from the Bill**

### **Estates of Missing Persons**

We note that the Policy Memorandum highlights that the Scottish Government has decided not to make specific provisions for the estates of missing persons (para 117 of the Policy Memorandum). In our response to the 2019 consultation we indicated that "We believe that the current procedure is too cumbersome, prescriptive and restrictive." It is disappointing that reforms in this area are not taken forward in the Bill as introduced.

In our oral evidence, we agreed with the SLC's view that additional guidance and promotion could assist the families of missing persons. We note that the lead Committee "considers that the opportunity presented by this Bill must be used to ensure that judicial factors work for the loved ones of people who go missing, where their appointment is considered desirable."<sup>36</sup> We further note that the lead Committee supports the inclusion of an explicit statement in the Bill that it is competent to appoint a judicial factor to the estate of a missing person,<sup>37</sup> and work by the Scottish Government to improve advertising, guidance and advice to make the Bill more accessible for cases of missing people.<sup>38</sup> We welcome these recommendations, and the Accountant of Court's willingness to engaged with us on "what could be done in relation to the sharing of information/promotion of the

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<sup>36</sup> Stage 1 Report, para 48

<sup>37</sup> Stage 1 Report, para 57

<sup>38</sup> Stage 1 Report, para 58



JF procedure.”<sup>39</sup> We also welcome the Minister’s confirmation that legal aid would be available to those seeking appointment as a judicial factor for a missing person, such as family members, if the applicant was eligible.<sup>40</sup> We note the Scottish Government’s view that clarification in the Explanatory Notes would be more appropriate than an amendment to the Bill.<sup>41</sup>

### **Safeguarding of Property: Children (Scotland) Act 1995**

We note that the Bill does not appear to take forward these proposals from the 2019 consultation.

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<sup>39</sup> <https://www.parliament.scot/-/media/files/committees/delegated-powers-and-law-reform-committee/correspondence/2024/judicial-factors-bill-stage-1-report--scts-response.pdf>

<sup>40</sup> Stage 1 Report, para 72

<sup>41</sup> Scottish Government response to the Stage 1 Report, at page 2



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