

Stage 3 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) Bill¹ (“the Bill”) was introduced by the Cabinet Secretary for Justice and Home Affairs, Angela Constance MSP, on 5 December 2023. We submitted written evidence² 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 2024³ and we subsequently provided supplementary written evidence regarding complaints.⁴ We also previously responded to the 2011 Scottish Law Commission (SLC) discussion paper on judicial factors (Discussion

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

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

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

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



Paper No.146)⁵ and the 2019 Scottish Government consultation on the SLC's proposal.^{6 7} The lead Committee's Stage 1 Report on the Judicial Factors (Scotland) Bill⁸ ("the Stage 1 Report") was published on 14 June 2024. We issued a briefing ahead of the Stage 1 debate on the Bill.⁹ On 19 September 2024, Parliament agreed the general principles of the Bill.

The lead Committee considered the Bill at Stage 2 on 19 November and the Bill as amended at Stage 2 was published on the same date.¹⁰

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 3 proceedings scheduled for 10 December 2024. We have focused our comments on those sections of the Bill which have been amended during parliamentary scrutiny. We have also commented on the amendments tabled ahead of Stage 3.¹¹

Executive Summary

We agree that the law relating to the judicial factor regime is in need of modernisation and we are supportive of the Bill.

We welcome the amendments made to the Bill at Stage 2, which address many of the principle concerns we raised during our engagement with the Bill at Stage 1. We particularly welcome those changes relating to data protection legislation; the definition of financial assets in section 13; vesting of the estate where caution is required; and the interaction with the complaints process for solicitors. We further welcome the changes which have been made to the Bill to better cater for cases of judicial factors appointed to charities and to impose a duty on the Scottish Ministers to issue guidance about the appointment of judicial factors to the estates of missing persons. We consider that this will be of assistance to the families of missing persons accessing and navigating the judicial factor procedure.

We welcome the amendments proposed ahead of Stage 3, particularly those to section 31 of the Bill. We consider that these will ensure that the recall and discharge process operates smoothly with no gap in the administration of the estate.

We would welcome clarification on the proposed operation of the Bill alongside other legislation, particularly the Adults with Incapacity (Scotland) Act 2000. We would also welcome any update on the progress of discussions with the UK Government regarding an order under section 104 of the Scotland Act 1998.

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

⁶ <https://www.lawscot.org.uk/media/3impog2l/judicial-factors-consultation-law-society-of-scotland-response.pdf>

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

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

⁹ <https://www.lawscot.org.uk/media/o5rfqog/24-09-19-judicial-factors-s-bill-stage-1-briefing.pdf>

¹⁰ [Judicial Factors \(Scotland\) Bill as amended at Stage 2](#)

¹¹ [Marshaled List of Amendments for Stage 3](#)



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.

We welcome the amendments made to the Bill at Stage 2, which address many of the principal concerns raised in our engagement with the Bill at Stage 1. We also welcome the amendments brought forward ahead of Stage 3, and have commented further on these below.

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 particularly welcome the changes which have been made to the Bill at Stage 2 to better cater for cases of judicial factors appointed to charities. We also welcome the amendments made at Stage 2 imposing a duty on the Scottish Ministers to issue guidance about the appointment of judicial factors to the estates of missing persons under the Bill. We consider that this will be of assistance to the families of missing persons accessing and navigating the judicial factor procedure.

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 the specific legislation will now be required to meet the requirements of section 4 and be subject to the regime set out in the remainder of the Bill.

We would also 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 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.

We note the amendments made to this section at Stage 2 regarding intimation, and the court’s power to dispense with intimation where it considers this appropriate. We welcome these amendments.

We also welcome the amendment to section 1(5)(b)(iii), which provides that jurisdiction can be established on the basis of the location of a non-natural person’s registered office.

Appointment of judicial factors: charities (section 1A)

We welcome the addition of this section to the Bill at Stage 2, just as, more generally, we welcome the possibility of an appointment to the estate of a charity under sections 1-3 of the Bill as well as under section 34 of the 2005 Act. We had previously called for clarity on the intimation requirements in relation to charities. We therefore consider the requirement in this section to intimate to OSCR and to give notice to the general public by way of an advertisement sensible. We also consider that the dispensing power in section 1A(4) provides helpful flexibility where this is appropriate.

Intimation and registration of notice of appointment (section 6)

We note the amendment made to this section at Stage 2 to remove the specific seven-day timescale for intimation and registration, and the explanation given by the Minister at Stage 2 that this is intended to remove uncertainty regarding the ability to intimate or register notices or certificates outwith the seven day window.¹² Whilst we consider this sensible to avoid uncertainty and potential litigation, we do consider that it is imperative that intimation and registration take place as soon as possible to allow the judicial factor to act quickly to safeguard the factory estate.

We also note the amendments made to this section, and to section 7 and 10 below, at Stage 2 which have the effect of postponing the appointment of the judicial factor and the vesting of the estate until after caution is found, where a

¹² [Meeting of the Parliament: DPLR/19/11/2024 | Scottish Parliament Website](#)

requirement to find caution is imposed by the court. We welcome these amendments. Whilst it is our experience that caution can generally be found quickly, these provisions will avoid a situation where the factor is liable for intromissions with the estate but unable to act to safeguard the estate as caution is not yet in place.

We note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

Review of appropriateness of registration in the Register of Inhibitions (section 6A)

We welcome the addition of this section at Stage 2, which gives effect to the lead Committee's recommendation that the registration of judicial factories in the Register of Inhibitions should be periodically reviewed¹³ and the Scottish Government's commitment to bring forward an amendment to give effect to this recommendation.¹⁴

We note that regulations made under this provision may modify any enactment and are subject to the affirmative procedure. Whilst we consider that this is generally appropriate, we do consider that the creation of any new register in the future should be achieved by way of primary legislation to ensure effective parliamentary scrutiny.

We also note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

Vesting of estate in judicial factor (section 7)

See our comments above at section 6 regarding the amendments made to this section at Stage 2.

Remuneration and reimbursement of judicial factor (section 9)

We note the amendment to this section at Stage 2 which extends the discretion to fix a different rate of remuneration to permanent judicial factors as well as interim judicial factors. We consider this appropriate.

Guidance about the appointment of judicial factors on the estates of missing persons (section 9A)

As noted above, we welcome the addition of this section to the Bill at Stage 2 which imposes a duty on the Scottish Ministers to issue guidance about the appointment of judicial factors to the estates of missing persons under the Bill. We consider that such guidance will be of assistance to the families of missing persons accessing and navigating the judicial factor procedure.

¹³ Stage 1 Report, para 170-171

¹⁴ Scottish Government response to the Stage 1 Report, at page 6



Part 2 of the Bill- Functions of Judicial Factors

Functions of the judicial factor (section 10)

See our comments above at section 6 regarding the amendments made to this section at Stage 2 postponing vesting where the court imposes a requirement to find caution.

We note that the other amendments made to this section at Stage 2 are technical amendments, which we consider sensible.

Power of judicial factor to require information (section 12)

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

In our previous comments, we noted that 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 welcomed 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."¹⁵ 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."¹⁶ We consider that an order extending the application of the Bill in this manner would be extremely helpful and would welcome any update on the progress of discussions with the UK Government.

In our previous comments on the Bill, we noted 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 were concerned that these provisions of the Bill as introduced might exacerbate these difficulties and limit the ability of

¹⁵ Stage 1 Report, para 113

¹⁶ Ibid

the factor to investigate potential fraud and malfeasance. We therefore welcome the amendment made to this section at Stage 2 which requires the holder of information to take into account the provisions of the Judicial Factors legislation in determining whether a disclosure would contravene data protection legislation.

Ingathering (section 13)

We note that this section was amended at Stage 2 to remove the definition of 'financial assets'. We consider this a very helpful amendment which will remove uncertainty and ensure that the legislation is future-proofed in as far as is possible.

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

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

We note the amendment to this section at Stage 2, which would provide flexibility at the discretion of the Accountant in relation to the requirement to notify each person or class of person specified in rules of court of the judicial factor's intention to exercise the function. We consider this appropriate.

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 our previous comments on the Bill, we called for a special intimation arrangement for charities. We therefore welcome the amendment to section 27(4)(a) at Stage 2 which provides that, where the factory estate is that of a charity, the Accountant must intimate the approved scheme to OSCR. We also welcome the addition of sections 27(4A) and 27(4B).

We note the inclusion of new sub-section 27(9)(c) at Stage 2, which allows the court to make such other order as it considers appropriate when considering an objection to the scheme prepared by the judicial factor. We consider this a helpful addition to the Bill which allows additional flexibility where this is appropriate.

We also note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

Application for distribution of factory estate (section 28)

We note the amendment to this section at Stage 2, which would allow the court to dispense with intimation, in whole or in part, on cause shown. We have no specific comments.

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

We note the amendment made to this section of the Bill at Stage 2 to remove the specific seven-day timescale for intimation and registration, and the explanation given by the Minister at Stage 2 that this is intended to remove uncertainty regarding the ability to intimate or register notices or certificates outwith the seven day window.¹⁷ Whilst we consider this sensible to avoid uncertainty and potential litigation, we do consider that it is imperative that registration take place as soon as possible to ensure certainty.

We also note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

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

We note the amendments to this section at Stage 2 which insert new sub-section 30(3A). This section makes provision for situations where the original factor dies or ceases to perform their duties and the purpose for which they were appointed no longer exists, but some actions are still required to bring the judicial factory to an end. We consider that this is a helpful addition to the Bill.

We also note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

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

In our previous engagement with the Bill, we called for further clarity on how this provision of the Bill as introduced would work in practice and highlighted a potential gap in the administration of the estate between the submission of final accounts and their audit and the recall being granted.

We therefore strongly welcome the amendments to this section lodged ahead of Stage 3 in the name of the Minister for Victims and Community Safety, Siobhian Brown MSP. We consider that these amendments will address the potential difficulties we had identified and ensure that the recall and discharge process operates smoothly with no gap in the administration of the estate.

We also note the amendment to this section at Stage 2, which would allow the court to dispense with intimation, in whole or in part, on cause shown. We have no specific comments.

¹⁷ [Meeting of the Parliament: DPLR/19/11/2024 | Scottish Parliament Website](#)

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

We note the small consequential amendment to this section at Stage 2 and the further amendments proposed at Stage 3. We have no further comments.

Termination of judicial factory where insufficient funds (section 33)

We note the minor technical amendment made to this section at Stage 2. We consider this a helpful amendment which provides greater flexibility in cases where there are insufficient funds.

We also note the further amendments proposed to this section at Stage 3. We consider these to be technical amendments and have no specific comments.

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

We have no specific comments on this section as amended at Stage 2.

Part 5 of the Bill- Accountant of court

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

In our previous comments on the Bill, we noted 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 and welcomed the Scottish Government's commitment to bringing forward such amendments at Stage 2.¹⁸ We therefore welcome the addition of new sub-sections 35(1A) and (1B) to the Bill. We note that delegated powers under this section are subject to the affirmative procedure. We consider this appropriate.

Depute Accountant (section 36)

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

Misconduct or failure of judicial factor (section 38)

In our previous comments on the Bill, we highlighted some concern as to how this section would operate in practice regarding the role of the Scottish Legal Complaints Commission (SLCC) as the single gatekeeper for complaints about solicitors in Scotland. We therefore welcome the amendments made to section 38(4) of the Bill at Stage 2 to better reflect how complaints against solicitors are handled. This will avoid unnecessary steps in process and potential additional delay.

¹⁸ Scottish Government response to the Stage 1 Report, at page 7



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.

Inspection of records held by Accountant (section 43)

We welcome the amendment to this section at Stage 2 which adds the inventory and balance sheet to the documents which must be provided for inspection under section 43. This addresses concerns we raised during earlier engagement with the Bill.

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

We have no comments on this section as amended at Stage 2.

Schedule 2- amendments made at Stage 2

We welcome the inclusion of new paragraph 8A, which amends the Court Reform (Scotland) Act 2014 to clarify that the exclusive jurisdiction of the sheriff court does not apply to applications for the appointment of a judicial factor and preserves the concurrent jurisdiction of the Sheriff Court and the Court of Session. 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 preserves this jurisdiction.

We have no comments on the other amendments made to Schedule 2 at Stage 2.



For further information, please contact:

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