

Judicial Factors (Scotland) Bill: analysis of responses to the call for views

Introduction and overview

The [Judicial Factors \(Scotland\) Bill](#) ('the Bill'), a Scottish Government Bill, is based on [a law reform project](#) by the [Scottish Law Commission](#) ('the Commission').

The Delegated Powers and Law Reform Committee's [call for views](#) on the Bill ran from **20 December 2023** to **15 March 2024**. [The eleven individual responses received were published online](#).

Purpose of the briefing

The purpose of this briefing is to provide a brief introduction to the Bill and then provide a summary of the policy issues raised in the Committee's [call for views](#).

Note that a three-and-a-half-page summary of responses begins on p 3. For those wishing to explore responses in more detail, a longer summary begins on p 6.

[A separate SPICe Briefing on the Bill](#), dated 10 April 2024, has also been published online.

What the Bill does

A judicial factor is a person appointed by the court to manage property (**the estate**) which is not being properly managed, or would not otherwise be properly managed. At present, most individuals appointed are legal and financial professionals.

The Bill aims to reform the existing law associated with judicial factors.

Currently, individual statutes set out specific circumstances in which judicial factors can be appointed. For example, in certain situations, a judicial factor can be appointed to manage the estate of a solicitor or a solicitors' firm; a deceased person; a partnership; a company; a charity; a trust; a child or young person and a missing person.

One policy objective of the Scottish Government is to make the appointment of a judicial factor more attractive in a wider range of circumstances.

To this end, under the Bill, it would be possible for the court to appoint a judicial factor where general conditions are satisfied (**sections 1 and 3**).

In addition, most of the existing legislation will remain in force which allows for the appointment of judicial factors in certain specific circumstances.

The Bill is divided into **six parts**, as follows:

- **Part 1** covers a range of topics associated with the appointment of a judicial factors
- **Part 2**, to be read in conjunction with **schedule 1**, covers the functions of a judicial factors, with the term 'functions' covering both powers and duties
- **Part 3** covers some issues associated with the judicial factor's legal relationships with third parties, that is individuals and organisations not otherwise directly connected with the estate
- **Part 4** makes provision on topics associated with the end of the judicial factoring arrangement and a judicial factor's role in the estate
- **Part 5** covers the supervisory role in respect of judicial factors of a public official called the [Accountant of Court](#)
- **Part 6** is a miscellaneous and general part of the Bill, which includes section 50, where some (but not all) of the legal terms used in the Bill are defined.

Responses to the call for views

As noted earlier, there were [eleven responses to the call for views on the Bill](#). Predominantly from a legal background, respondents can be divided into the following categories:

- **the judiciary:** [Senators of the College of Justice](#); [The Sheriffs and Summary Sheriffs Association](#)
- **the legal profession:** [the Law Society of Scotland](#); [the Faculty of Advocates](#); [the Charity Law Association](#); [the Faculty of Procurators of Caithness](#)
- **academic lawyers:** [Professor Nicholas Grier \(Abertay University\)](#); [Dr Alisdair MacPherson](#), [Professor Donna McKenzie Skene](#), [Dr Euan West \(Centre for Scots Law, University of Aberdeen\)](#)

- **interest groups:** [Missing People](#) (a charity supporting the families and friends of missing people); [Propertymark](#) (a trade association for the property sector); [R3](#) (a trade association for insolvency professionals).

In addition, [OSCR](#), the Scottish charity regulator, confirmed to the Committee that it has considered the Bill and the consultation. It said that the Bill is largely what was consulted on in 2019, to which it provided a supportive response. It stated that OSCR remains supportive of this Bill, though has not lodged a response to the consultation.

As noted earlier, the first part of (the remainder of) this briefing provides a short summary of the responses. The second part (beginning on **p 6**) looks at what respondents said in more detail.

Key points from the call for views

Respondents to the call for views were generally supportive of the Bill (p 6), with relatively few areas of concern.

Those responding, including the [Faculty of Advocates](#) and [the Law Society of Scotland](#) ('the Law Society'), sometimes raised detailed drafting points, rather than policy issues.

Part 1 of the Bill probably attracted the most policy commentary, with Parts 2 and 5 receiving the most comment after that.

Time limits

The [Sheriffs and Summary Sheriffs Association](#) ('the Sheriffs' Association') pointed out that various provisions in the Bill required things to be done within certain times. However, it commented that nothing is said about what happens if these things are not done (p 6).

Missing People

The organisation, [Missing People](#), and [the Law Society](#), both thought that the Bill, in various respects, could have done more to address the needs of families where people go missing (pp 7, 9-10, 12 and 22).

Charities and solicitors/solicitors' firms

A range of specific points were also made about the Bill as it applies to the charitable sector (by the [Charity Law Association](#) and [the Law Society](#)) (pp 7-8, 11, 15 and 22), and to appointments of judicial factors to solicitors and solicitors' firms (by [the Law Society](#) and [the Faculty of Procurators of Caithness](#)) (pp 8, 12 and 17-18).

Terminology

There was virtually no support for changing key terms in the Bill ('judicial factor'; 'Accountant of Court') among the various respondents, although [Missing People](#) said the terms were not particularly accessible to laypeople (p 9).

Part 1 of the Bill: Appointment of a judicial factor

Broadly, **section 1(5) of the Bill** says that authority to appoint a judicial factor should (continue to) be shared between [the local sheriff courts](#) and [the Court of Session](#). **Sections 1 and 3** set out general conditions for the appointment of a judicial factor.

In relation to sections 1 and 3, a number of respondents commented, with a particular focus on which court can appoint a judicial factor. However, comments were on areas of policy detail, rather than the overarching principle in section 1(5) (p 10-11).

Respondents also commented on who should be eligible to be a judicial factor, covered by **section 4 of the Bill**. Some respondents broadly supported the Government's approach here, which is not particularly prescriptive in its requirements (e.g., [Missing People](#)). A couple of other respondents wanted to add extra requirements or restrictions to the eligibility criteria (e.g. [Propertymark](#); [Faculty of Procurators of Caithness](#)) (pp 12-13).

In relation to **section 5 of the Bill**, there is an existing requirement in the current law on judicial factors to **find caution** ('cay-shun', rhyming with 'station'). This is usually satisfied by taking out a **bond of caution** from an insurance company. The aim is to protect the estate from any financial risk associated with any mismanagement or wrongdoing by the judicial factor. **Section 5** abolishes the requirement to "find caution" save in "exceptional circumstances".

Two respondents, the [Centre for Scots Law, University of Aberdeen](#) ('the Centre for Scots Law') and [R3](#), thought the threshold for requiring caution (that is, in exceptional circumstances) was now set too high (p 13).

Section 6 of the Bill creates a new requirement that the notice of appointment of a judicial factor must be registered in an existing public register called the [Register of Inhibitions](#). An **inhibition** is a legal debt recovery tool. It affects a person's ability to enter transactions relating to their property. A key function of this register is to notify the public of individuals who are affected by an inhibition.

[The Faculty of Advocates](#) thought that this register was not easily searchable by members of the public. It would have preferred a specialist register of judicial factors.

The [Centre for Scots Law, with R3 in agreement](#), said there was a policy choice to be made between registering in the proposed register for advertising and information purposes, and registering to create an inhibition (which has a specific legal effect). Furthermore, they said if the intention was to do the latter, this needed to be stated explicitly in the Bill (pp 13-14).

Part 2 of the Bill: Functions of a judicial factor

Section 12 of the Bill gives a judicial factor a new power to require information from relevant bodies and individuals about an estate. Both [the Law Society](#) and [the Sheriffs Association](#) noted an exception to the requirement to comply, not appearing in [the Commission's draft Bill](#). This is for UK government ministers/departments and bodies exercising reserved functions. Both respondents queried the rationale for this (pp 16-17).

Some respondents in the consultation process suggested **additional powers or duties** for the judicial factor in Part 2, or **restrictions to proposed powers**. For example, [the Faculty of Advocates said](#) it would be appropriate to give the judicial factor the power to seek **directions** from the appointing court. Several respondents ([Professor Nicholas Grier; the Centre for Scots Law and R3](#)) thought there should be a specific reference to a type of duty called a **fiduciary duty** (pp 17-18).

[The Law Society](#) commented to some degree on most of the existing duties proposed in Part 2. For example, in relation to **section 15** (the duty to make a **management plan**) and **section 16** (the duty to **submit accounts** to the [Accountant of Court](#)) it noted that the requirements in the Bill were more prescriptive than in relation to [the Commission's draft Bill](#) (p 20).

Part 3: relationships with third parties

The [Charity Law Association](#) thought Part 3 of the Bill was “clear and sensible” and [the Senators of the College of Justice](#) (‘the Senators’) also described it as “sensible”.

Several respondents ([Professor Grier; the Senators; Centre for Scots Law](#)) made drafting suggestions in relation to this technical part of the Bill (pp 20-21).

[The Law Society](#) flagged a couple of areas where the Bill as introduced differed from [the Commission's draft Bill](#) and sought clarification of the policy rationale for this.

[The Faculty of Advocates](#) and [the Sheriffs Association](#) both thought **section 23 of the Bill**, which sets out the rule that legal costs of court action associated with the estate should be borne from the estate, could be modified. This would be to deal with exceptional circumstances when a judicial factor acted unreasonably and so, in these organisations’ view, should be found liable out of the factor’s own pocket (p 23).

Part 4: Distributing an estate and ending the judicial factor arrangement

[Professor Grier](#) thought that Part 4 was “pretty sensible” and had no further comments and likewise [the Senators](#) described it as “sensible”.

Section 34 of the Bill sets out the main rule that, from the point of **discharge**, the judicial factor is freed from liability under civil law (for example, under the law of contract or the law of negligence). The [Centre for Scots Law](#) wanted the

interrelationship between **section 34** and **section 38** (in Part 5, on the misconduct or failure of a judicial factor) to be spelt out a little more (p 22).

Part 5: the Accountant of Court

All those responding to the call for views were content for [the Accountant of Court](#) to remain in a supervisory role over judicial factors, [apart from Missing People](#), which had some concerns. It said it would depend on the skillset of the person appointed, and the guidance they received, as to whether they could cater to the needs of the families of missing people (p 23).

[The Law Society commented](#) on what it regards as "a significant departure" from [the Commission's draft Bill](#). It considered there was a 'watering down' of the level of legal and accountancy knowledge required for the roles of the Accountant and the Depute Accountant. It thought this shouldn't happen because of the potential impact on the oversight of complex cases (p 23).

[The Law Society also commented on](#) various aspects of the Accountant's power to carry out investigations and, in certain circumstances, to report to the court and a judicial factor's professional body. For example, it was concerned that the effect of this part of the Bill would be to deter people from taking on the role of a judicial factor in complex cases (p 24).

Section 39 of the Bill gives the Accountant the power to require information relating to the Accountant's functions from bodies, such as banks, and individuals. Again, certain individuals and bodies, such as bodies exercising reserved functions, like HRMC, or UK Government department or ministers, can choose whether to comply. [The Sheriffs Association](#) and [the Law Society](#) again both commented on the limits of the Accountant's information-gathering power here, querying the rationale for this (pp 24-25).

In more detail: what the responses said

This section of the briefing now considers the responses to [the Committee's call for views](#) in more detail.

The general approach in the Bill

Respondents to the call for views were generally supportive of the Bill.

There was strong support for the Bill among the judiciary, the legal profession, and legal academics. [Professor Grier said that](#) "[t]his is a useful and timely bill." [The Senators commented](#):

"The proposal to update the law in relation to judicial factors appears to us to be both timely and appropriate."

[The Sheriffs Association thought that](#) some important details about the new system would require to be developed by **rules of court**. It was important these were ready at the time of commencement of the legislation (should it be passed by Parliament).

The Sheriffs Association also pointed out that various provisions in the Bill **required things to be done within certain times**. However, it argued nothing is said about what happens if these things are not done. There is also not a power for the court or [the Accountant of Court](#) to either waive the time limit, or retrospectively authorise those acts.

The Bill and the estates of missing people

[The Scottish Government's 2019 consultation considered whether there needed to be a specific regime for missing persons](#). The Government ultimately decided that policy concerns raised by stakeholders could be addressed in the Bill under the main regime.

[In its response to the Committee's call for views](#), the organisation, Missing People, said it did not feel the Bill catered well for the needs of relatives in this situation:

“Updating the Judicial Factors legislation provides an opportunity to improve the legal framework for the families and loved ones of long-term missing people to look after their person’s affairs...we think the current draft of the bill will not ensure a more straightforward, accessible process for the families of missing people who may desperately need this legal framework.”

To this end, it made a range of points on different parts of the Bill, considered in more detail later (pp 9-10, 12 and 22).

[The Law Society also expressed concern in relation to missing people](#):

“In our response to the 2019 consultation we indicated...‘that the current procedure is too cumbersome, prescriptive and restrictive.’ It is disappointing that reforms in this area are not being taken forward.”

The Bill and the charitable sector

On application of [OSCR](#), the Scottish charities regulator, the [Court of Session](#) may appoint a judicial factor to a charity under section 34 of the [Charities and Trustee Investment \(Scotland\) Act 2005](#) (‘the 2005 Act’). The Government’s policy intention is that section 34 will remain in force.

In response to the call for views, the [Charity Law Association commented](#):

“We support the proposal to update the law relating to judicial factors and we broadly support the approach which has been taken. We welcome that this is a Consolidation Bill, so that in future the law on judicial factors will be clearly stated in one place.”

However, the Association did say that the Bill pays “little regard” to the role of judicial factors in the charity sector, as set out in the 2005 Act. The Association suggested several amendments in this regard (in respect of which, see later in the briefing at pp 11, 15 and 22).

[The Law Society](#) said that its assumption was that appointments to the estates of charities would still be in the circumstances described in the 2005 Act (rather than under sections 1-3 of the Bill). However, it also thought that judicial factors appointed would then be subject to other parts of the Bill. The Society said it would welcome clarification on the interaction between the Bill and the 2005 Act.

The Bill and the estates of solicitors and solicitors’ firms

Under section 41 of the [Solicitors \(Scotland\) Act 1980](#) (‘the 1980 Act’), in certain circumstances, the Law Society can apply to the Court of Session for the appointment of a judicial factor in respect of a solicitor or solicitors’ firm. The Government’s policy intention of the Bill is that section 41 will remain in force.

[The Faculty of Procurators of Caithness](#) made specific recommendations (considered later at pp 12, 17-18), to address issues it had identified with this part of the law.

[The Law Society](#) said its assumption was that appointments to the estates of solicitors/solicitors’ firms would still be in the circumstances described in the 1980 Act (rather than under sections 1-3 of the Bill). However, it thought judicial factors appointed would then be subject to other parts of the Bill. The Law Society said it would welcome clarification on the interaction between the Bill and the 1980 Act.

In addition, and referring to [a fuller response on this point to the Scottish Government’s 2019 consultation](#), the Law Society said that it thought there was a need for wider powers in the 1980 Act to deal with issues associated with **incorporated practices** (that is a firm constituted as a company or limited partnership). This issue is considered in more detail later.

The Bill and adults with incapacity

It is not possible to appoint a judicial factor over the estate of [an incapable adult](#) (an individual over 16). Legal interventions for incapable adults (including over their property) are dealt with separately under the [Adults with Incapacity \(Scotland\) Act 2000](#) (‘the 2000 Act’).

[In its response to the call for views](#), the Law Society pointed out that legislation referred to in the 2000 Act would be repealed by the Bill. It sought reassurance that the interaction with the 2000 Act and the Bill had been fully thought through.

Terminology in the Bill

The Bill retains two existing legal terms, namely, **judicial factor** and **Accountant of Court**.

There was **no support** from changing the terms among the legal respondents, [although Missing People commented](#):

“Neither term gives a clear picture of the role it describes. They are both very legal or corporate terms and not particularly helpful to the layman.”

Part 1 of the Bill: Appointment of judicial factors

The circumstances in which a judicial factor can be appointed (sections 1(3) and 3)

Under **sections 1 and 3 of the Bill**, the court would be able to appoint a judicial factor in two, alternative or coexisting, sets of circumstances:

- it is not, “possible, practicable or sensible” for the person who would otherwise do it to undertake that role
- it would be “to the advantage of” the estate.

The [Centre for Scots Law](#) and [R3](#) commented on this aspect of the Bill, saying that the term ‘sensible’ is “ambiguous and implies a value judgement.” They would prefer ‘reasonable’ or ‘appropriate’.

[Missing People queried](#) what evidence the courts will require to satisfy the proposed statutory test:

“Will the applicant just need to show that the person is unable to look after their own affairs? Or will they need to show that attempts have been made to find the missing person? Will there be a minimum period that someone has to have been missing before an application can be made on their estate? Will there need to be an open police investigation? How will the system safeguard against taking advantage of becoming a judicial factor for someone who is not really missing?”

More generally, it commented:

“the bill currently doesn’t specifically mention anything about missing people or the use of the legislation for the purpose of managing a missing person’s affairs. We understand that there may be an intention to keep the application of factors broad to ensure it’s useful in a range of circumstances. However, we think a complete omission will mean that people do not realise the legislation can be used for that purpose, and will mean some necessary clarification about how this process can work in the case of a missing person.”

Missing People also asked how much an application for the appointment of a judicial factor will cost, including estimated legal fees. It wondered if it would be an accessible process for most people.

It also considered the situation where a missing person has relatively few assets, and perhaps some debts that need managing. It asked whether the applicant will be able to get legal aid, or any other financial support, to make the application, as they are unlikely to be able to recoup money from the estate. It commented:

“We have supported many families of missing people who have applied for Guardianship...in England and Wales.¹ In most cases people have hired a solicitor to support them through the process, but a sizeable number of families have decided to do this alone, often because of a lack of funds. We think it’s important that the process is made suitably accessible to allow for this.”

Which court (section 1(5))

Section 1(5) of the Bill covers **which court** has authority to appoint a judicial factor.

The current law

The current law says that, with some exceptions, either the Outer House of the [Court of Session in Edinburgh](#), or [the local sheriff courts](#), can appoint a judicial factor.

Whether these courts should continue to share their role in appointment of a judicial factor (or whether one or other court should have sole responsibility) was an issue considered carefully during the Bill’s policy development.

Ultimately, the Bill retains a shared role for both the Court of Session and the sheriff courts, as the Commission recommended. However, there are some proposed modifications to the existing law. These for example, remove the special role for [Edinburgh Sheriff Court](#) (which currently exists in some circumstances).

Support for the approach in the Bill

The issue of which court should be able to appoint a judicial factor attracted some comment in response to the Committee’s call for views.

[The Law Society](#) and [the Centre for Scots Law](#) both indicated their support for the approach in the Bill.

At present, as one possible ground for a particular sheriff court to consider an application under section 1(5), a business must have its **place of business** in the area the court serves (which may or may not be the location of its registered office).

¹ This is the equivalent process to the appointment of a judicial factor in Scotland but it is specific to the estates of missing people.

[The Centre for Scots Law and R3](#) thought that a business having **its registered office** the area the court serves should be an additional ground. Alternatively, it should at least be clarified in the Bill that a ‘place of business’ could include a ‘registered office’ in this context.

[The Centre for Scots Law and R3](#) also thought that the Bill should make provision for transfer of by one court of a matter to a court in a different location “on cause shown” (in other words, where it was demonstrated there was a good reason for doing this).

[The Sheriffs Association pointed out](#) that the specific approach in the Bill already means more than one local sheriff court may sometimes have authority to hear and determine a case. The Association said this was acceptable, provided there was an approach in the associated rules of court to resolve this in an individual case.

Appointment of judicial factors to charities under the 2005 Act

At present, as an exception to the general position, appointments of judicial factors in relation to charities under the 2005 Act can be made by [the Court of Session](#) only. The Bill does not propose to change this.

This policy approach for charities previously found favour with OSCR in [its response to the Scottish Government’s 2019 consultation](#). However, in [its response to the call for views](#), the Charity Law Association said that an application to the sheriff court, “may well be less expensive and a simpler process.” Accordingly, it did not agree with OSCR in this regard. The Association proposed an extension of the power of appointment here to the sheriff court as well.

Appointment of judicial factors to solicitors/solicitors’ firms under the 1980 Act

At present, under the court rules, and in an exception to the general position, appointments under the 1980 Act must be to the **Inner House** of the Court of Session. Both the [Faculty of Procurators of Caithness](#) and the [Law Society](#) thought they should, in future, be made in the **Outer House**.

Note that, while there is nothing in the Bill on this, [the Commission has also recommended](#) that the rules of court be later changed to this effect.

Intimation (sections 1 and 2)

[The Faculty of Advocates](#) commented on section 1's requirements to intimate (notify) interested individuals or entities in relation to an application to appoint a judicial factor.

The Faculty thought that it was not desirable that the proposed requirement to notify is currently restricted to circumstances where a stand-alone application is made to the court (section 1(2)). It does not apply where a factor is appointed as part of other court proceedings (section 1(3)).

A related point was made by [the Faculty of Procurators of Caithness](#). It wanted to ensure there are distinct notification requirements associated with the appointment, or proposed appointment, of: a) an interim judicial factor (a temporary one) (section 2); and b) the appointment of a permanent judicial factor (section 1). The Faculty considered that someone might not object to a temporary appointment but may have a different view or interest associated with the appointment of a permanent one.

Who can be a judicial factor (section 4)

Section 4 of the Bill sets out who can be appointed by the court as a judicial factor. The main qualification required is that the court considers the person 'suitable' for that role.

[In its response](#), Missing People approved in principle the approach in this part of the Bill. It said it would allow the appointment of a broad range of applicants, including the families and friends of missing people.

However, the organisation also raised some practical concerns, as follows:

- It questioned whether, in practice, the court would continue to expect a legal professional to be appointed to the role.
- It thought there was a need for guidance accompanying the legislation to help laypeople navigate the role and, specifically, to help advertise the possibility of a factor in the case of a missing person.
- It sought clarification on how consistency between courts in their approaches would be ensured.
- It believed additional resources are required to make the policy approach in the Bill work in practice.

The [Faculty of Procurators of Caithness](#) commented specifically on the appointment of judicial factors to solicitors or solicitors' firms under the 1980 Act. It said:

“We are firmly of the view that whatever other provisions may be made, the Judicial Factor should be wholly independent of the Law Society of Scotland, and there should be explicit prohibition of any current officer or employee of the Law Society of Scotland being appointed as the Judicial Factor.”

Note that the Law Society has an **in-house judicial factor**, [usually appointed in cases under the 1980 Act](#).

[Propertymark](#) wanted the Bill to be more prescriptive in its requirements. It thought professional qualifications should be an explicit requirement. It wanted to encourage the appointment of estate agents (who have achieved a certain level of qualification) as interim judicial factors. It thought estate agents, who are often also qualified solicitors in Scotland, should be regarded as the ideal (permanent) judicial factors.

Where the ownership of property in the estate is in dispute, Propertymark would add a further requirement. In other words, a judicial factor would only be eligible for appointment where they have no professional relationship with any party involved in the dispute.

Caution – for when things go wrong (section 5)

As noted earlier (at p 4), **section 5 of the Bill** abolishes the requirement on the judicial factor to find caution unless there are **exceptional circumstances** which justify this.

Several respondents to the Committee’s call for views commented on this part of the Bill.

[The Senators](#) and [the Law Society](#) expressed support for the general policy approach.

On the other hand, academics from [the Centre for Scots Law](#) repeated their view, [expressed at the stage of the Government's consultation](#), that the proposed threshold for the courts to grant caution (exceptional circumstances) is too high. [R3 agreed](#).

[The Centre for Scots Law and R3](#) also noted that in different parts of the law, and in practice, “caution” was a concept which could be interpreted narrowly, or more broadly. For example, [R3 noted that](#) it was aware of one case where [the Accountant of Court](#) had accepted someone’s professional indemnity cover as satisfying the requirement for caution. Both respondents suggested the intended scope of caution in the context of the Bill should be made more explicit on the face of the Bill.

[The Sheriffs Association](#) noted that:

- in section 5, [the Accountant of Court](#) had certain powers associated with caution that might be better signed off by the court
- section 5 is silent about allowing a court to set timeframe for finding caution in an individual case. The Association thought this issue needed to be considered further, perhaps in rules of court
- there is an absence from section 5 of a power to vary or revoke (cancel) an order for caution. The Association thought this power should be set out expressly in the Bill.

Registration of an appointment (section 6)

As noted earlier, **section 6 of the Bill** creates a new requirement that the notice of appointment of a judicial factor must be registered in an existing public register, [the Register of Inhibitions](#).

[The Faculty of Advocates commented](#) that [the Register of Inhibitions](#) was not a register easily searchable by members of the public. They have to do so by making a request to RoS and paying a fee. The Faculty thought that a dedicated, and easily searchable, register of judicial factors was better.

The [Centre for Scots Law, with R3 in agreement](#), said there was a policy choice to be made between registering in the proposed register for advertising and information

purposes, and registering to create an inhibition (which has a specific legal effect). Furthermore, they said if the intention was to do the latter, this needed to be stated explicitly in the Bill.

More generally, [the Law Society sought clarification](#) on whether the necessary legislative and practical changes associated the new requirement (to register in the Register of Inhibitions) had been explored.

Vesting of the estate (section 7)

Section 7 of the Bill says that the whole of the estate is to vest in the judicial factor on appointment. This means that the judicial factor has full legal rights in relation to the estate as though they were the owner of the estate.

[The Faculty of Advocates](#) commented that section 7(3) currently appears to catch (as part of the estate) everything a solicitor might hold in a fiduciary capacity including family trusts, charities etc. The court is given power to specify otherwise, but only at the time of appointment.

However, the Faculty said that the court may not have a full picture of the solicitor's affairs at the time of appointment. It suggested that there should be some mechanism for removing items subsequently.

[The Law Society](#) said (without further comment) that the scope of section 7 is wider than the current position in that it will extend to property held other than in the solicitor's professional capacity.

The [Faculty of the Procurators of Caithness](#) made a related policy point on the extent of a solicitor's estate vesting in the factor, explored in more detail in the context of the judicial factor's powers at pp 17-18.

Payment of a judicial factor (section 9)

Section 9 of the Bill covers how judicial factors are to be paid. This is to be out of the estate and at the rates are to be fixed by the [Accountant of Court](#), who also supervises judicial factors.

This important provision attracted relatively little commentary, [although the Law Society did say that it was supportive of the approach proposed](#).

The [Faculty of Advocates](#) noted that section 9(5) allows the Accountant to authorise a departure from the prescribed rates of pay for a particular interim judicial factor. It thought the same discretion to be available for permanent judicial factors too.

[The Faculty also thought that](#), in some circumstances (not further specified), it may be appropriate to set (or set a mechanism for adjusting) the judicial factor's pay by reference to their "success". For example, it said this could be by reference to the size of the estate (a) gathered in; or (b) at the time of final distribution.

Part 2 of the Bill: Functions of judicial factors

The standard powers (sections 10 and 11, schedule 1)

The Bill says that, when appointed by the court, the judicial factor acquires the **standard powers** (as set out in schedule 1). Broadly speaking, the standard powers are all the powers someone who owns the estate would have.

[The Charity Law Association said](#) that they thought that the standard powers needed to be explicitly linked to the situation when a judicial factor is appointed in respect of a charity. They should:

“include all of the powers necessary to control and manage the administration of the charity. This would help to create a clear link to the charity legislation, the lack of which we find odd, and would remind judicial factors acting in relation to a charitable entity that their powers are to be found and exercised in compliance with charity law and not merely the law as it relates to judicial factors.”

[Missing People thought](#) that the actions a judicial factor might be expected to take under Part 2 are currently more related to the management of a business than the management of a single person’s affairs. It commented:

“we are unsure whether the legislation would allow families of missing people to take actions like: supporting a dependent (for example paying for care, healthcare or education), or giving a gift to a loved one (for example giving an expected sum to a dependent on their 18th birthday). Will more information about what a judicial factor can and can’t do be included in further guidance? It may be useful to review the Code of Practice for the Guardianship (Missing Persons) Act 2017 [*applicable in England and Wales*] which considers many of the possible circumstances that families of missing people might experience.”

[The Faculty of Advocates](#) noted that section 11(2) gives the court power to vary the judicial factor’s functions. At present it is only the judicial factor who can apply. The Faculty suggested that anyone with an interest in the estate should have the power to make an application.

Information-gathering power (section 12)

With some exceptions, **section 12 of the Bill** gives the judicial factor the power to get information relating to the estate from both organisations and individuals. For example, financial information could be requested from banks.

Certain organisations and individuals, such as bodies exercising reserved functions, like HRMC, or UK Government department or ministers, are **exempt from the obligation to comply** and can choose whether to do so (section 12(4)).

In response to the Committee's call for views, [the Sheriffs Association](#) and [the Law Society](#) both referred to the exemption in section 12(4) from the general requirement.

Both organisations commented that the policy effect of the exemption would be to weaken the information-gathering powers and sought clarification from the Scottish Government as to the rationale for the exclusion.

The Law Society queried how information was to be gathered about funds held outside Scotland.

The Law Society also commented on subsections 7 and 8, which say that nothing in section 12 authorises the making of a disclosure that contravenes the 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.”

[The Faculty of Advocates](#) thought that section 12 is, “somewhat draconian” as currently drafted. It said there should be provision for the situation in which a person who is required to provide information can appeal to the appointed court. This would be against the requirement on the basis that the provision of the information requested, would, for example, breach confidentiality; or where the cost of providing the information would be onerous.

Furthermore, the Faculty felt it was not clear what should happen if a person maintains they do not have the information sought.

Both [the Law Society](#) and [the Faculty \(of Advocates\)](#) commented that section 12 also currently lacks any sanction for non-compliance. The Law Society also recognised that the Scottish Government had explained its policy thinking here in the [Policy Memorandum](#).²

[The Centre for Scots Law](#) thought that consideration should be given to have an additional exception, or exceptions, to the requirement to comply with the information request. It gave the example of an exception based on professional privilege. For background, professional privilege protects certain confidential communications from disclosure without a client’s permission. The Centre wondered about general, ‘catch-all’ wording here for a possible exclusion where:

“any other statutory provision or rule of law...prevents or excuses its disclosure”

² “There is no sanction in a case of failure to comply with such a request as there is no reason to suppose that institutions holding funds or other materials on behalf of others will be reluctant or slow to comply with formal requests for information. Should there be a failure to comply with any such request, it would be open to the judicial factor to seek an order from the court.” (Policy Memorandum, para 73)

Additional powers/restricting powers

Some respondents in the consultation process suggested additional powers for the judicial factor, or restrictions to proposed powers.

In response to the Committee's call for views, [the Faculty of Advocates said](#) it would be appropriate to give the judicial factor the power to seek **directions** from the appointing court (as, for example, is available to insolvency practitioners).

[The Faculty of the Procurators of Caithness](#) had some specific proposals on judicial factors' powers where a judicial factor is appointed in respect of a solicitor/solicitors' firm (under the 1980 Act). For example, in the case of a partnership or a "corporate practice" (a term not directly appearing in the 1980 Act), it proposed that the powers over the estate would only relate to the estate of the firm or company, not the personal estate of the individual partners. Here it commented:

"We would...note that in terms of Law Society of Scotland regulations, every Solicitor business requires to have a Designated Cashroom Partner, who is automatically held responsible for any breaches of the Accounts Rules... it is therefore entirely possible, in any business other than a sole trader, that one or more of the Solicitors may have absolutely no knowledge of how the cashroom is operating or be aware of any issues, let alone have an opportunity to deal with them, prior to the Judicial Factor being appointed.

It is also mandatory for all Solicitor businesses in Scotland to maintain Professional Indemnity insurance to pay compensation for anyone suffering loss by negligence within the business, and there is the statutory Guarantee Fund...funded by 2 contributions from practitioners, which is in terms of the legislation to pay out for losses in cases of dishonesty (but not any other cause) by anyone within a Solicitor business. Therefore there is already adequate alternative remedies to prevent third parties suffering loss from errors or fraud within a Solicitor's office without the need of pre-emptive confiscation of personal property."

[The Faculty \(of Procurators of Caithness\)](#) also proposed that, where a judicial factor is appointed on a personal estate, they shall have an equal duty to the creditors of the personal estate, as to the creditors of the firm or company. Furthermore, this should include reasonable maintenance for the individual and their dependents from the personal estate. Here it commented:

"In terms of the law as presently in effect, any partner of a firm of Solicitors can have their entire personal property confiscated without prior warning, without any right to challenge it being seized or what is done with it thereafter, and still be left with their whole debts. Further the Judicial Factor has no obligation to pay any of the individuals debts from their assets, meaning the individual solicitor will most likely at some point become bankrupt...If this were more widely known, it would be impossible for any Solicitor to obtain credit from anyone, because no matter what their personal financial circumstances may be, all the assets may disappear in an instant."

Separately, [the Law Society said](#) that it would like additional powers under the 1980 Act to address an issue it thought was associated with its current powers and solicitors' firms which were incorporated practices (that is, companies or limited liability partnerships).

It said, for such practices, only one person might be authorised to manage client funds. If that person drops out of the picture, for certain reasons, the Law Society said it cannot step in to manage these funds. This, it also said, contrasts with the Law Society's powers for solicitors who are either sole practitioners, or in a firm which is not incorporated.

Here the Law Society would like **options additional to the appointment of a judicial factor**. It thought this could be achieved by way of amendment to the Bill.

The duties on a factor (sections 14-17)

Sections 14 to 17 of the Bill set out various duties of the judicial factor. These include:

- a duty to **gather in the assets of the estate** and make an **inventory** of them (**section 14**)
- a new duty to prepare a **management plan** relating to the estate, which must be approved by the Accountant of Court (**section 15**)
- a duty to regularly report to **the Accountant of Court**, including by **submitting accounts** to that official **at least once every two years** (but not less than once a year, unless exceptional circumstances apply) (**section 16**)
- a duty to consider whether it would be appropriate to invest the funds which form part of the estate and a duty then to make any such appropriate investments (**section 17**).

[Professor Nicholas Grier](#) thought these proposed duties could do with being “spelt out a bit more.” He, along with [the Centre for Scots Law and R3](#)), thought that the judicial factor's **fiduciary duties** (*'fuh-do-shuh-ree'*) needed to appear explicitly in the legislation.

By way of background, under common law, that is the law developed by the decisions of judges in previously decided cases, a judicial factor is subject to various fiduciary duties. These duties include, for example, the duty on the judicial factor to put first the interests of another person over their own interests.

Professor Grier also thought there needed to be a clear legislative statement as to the legal remedies if there is a breach of fiduciary duties. He thought it was to put too much responsibility on [the Accountant of Court](#) to supervise this aspect of the law.

The [Faculty of Procurators of Caithness](#) had two suggestions for additional duties it thought should appear in the Bill:

- a specific duty on judicial factors to **not unduly delay** in dealing with the estate under their control
- in relation to appointments relating to solicitors/solicitors' firms under the 1980 Act, **a duty to report suspected criminal activity** and **to co-operate with the police/the Law Society** in any associated investigations.

[Propertymark said that](#), where ownership of property in the estate is disputed, a judicial factor should be under **a duty to act impartially**. It thought that appointing a judicial factor where they have an existing relationship with one party in a dispute could lead to biased decision-making (or accusations of that bias) and the specific duty might help address this issue.

Gathering in the estate (section 13)

As noted earlier, **section 13 of the Bill** places a duty on the judicial factor to **ingather** (gather in) the estate.

[The Law Society](#) thought this provision would benefit from further modernisation. For example, it mentioned that it ideally needed to include specific provision for cryptocurrency and NFTs.³

Inventory of the estate (section 14)

As discussed earlier, **section 14 of the Bill** places an obligation on judicial factors to compile and send to [the Accountant of Court](#) an inventory of the property comprising the factory estate (within six months of appointment).

[The Sheriffs Association](#) noted that both the Accountant and the judicial factor needed to sign the inventory as a definitive statement of the contents of the estate. It thought this needed a clear form of procedure and wondered if this might be provided in rules of court.

[The Faculty of Advocates](#) also wondered about the basis on which the Accountant of Court would have the knowledge to allow them to approve the inventory and create a "definitive statement", and the consequences of that approval.

[The Law Society](#) said that it would welcome clarification as to what documents it is envisaged will be required by any associated rules of court.

Management plan (section 15)

As noted earlier, **under section 15 of the Bill**, a judicial factor is required to produce a **management plan** in respect of the estate.

³ An NFT, a **non-fungible token**, is a unique digital identifier that is recorded on a blockchain (a digital ledger) and is used to certify ownership and authenticity. The ownership of an NFT is recorded in the blockchain and can be transferred by the owner, allowing NFTs to be sold and traded.

[The Law Society](#) felt that the version of this provision as introduced was more prescriptive than the Commission's version and queried what the rationale was for this.

Submission of accounts, etc (section 16)

[The Law Society](#) noted that the Bill as introduced does appear to afford less flexibility in respect of reporting periods than the equivalent provisions of the Commission's draft Bill. It said flexible approach is an advantage where the legislation is used for a variety of purposes.

Solving disagreements (section 19)

Section 19 of the Bill applies if the judicial factor was appointed because people were unable to agree how an estate should be managed.

A judicial factor appointed against the backdrop of a dispute must, by whatever methods they think appropriate, "promote agreement" between the people concerned. The judicial factor may act as a [mediator or arbitrator](#) or appoint a person to act in this capacity.

[The Faculty of Advocates argued that](#) the current drafting (in section 19(3)) means that the judicial factor can compel those involved in the dispute to go mediation or arbitration. The Faculty commented that the intention instead was presumably to make it clear that, if those people did wish to go, then it is the factor's role to either conduct the process or appoint a mediator or arbitrator.

Part 3 of the Bill: relationships with third parties

The [Charity Law Association](#) thought this part of the Bill was "clear and sensible" and [the Senators](#) also described it as "sensible".

Drafting points

Some specific points were raised relating to drafting in the responses. For example, [Professor Grier](#) and [the Senators](#) did not favour the phrase, "in the judicial factor's capacity as such," appearing in several places in Part 3. Professor Grier said he thought it would be better to say simply that the factor is not personally liable for their actions towards third parties, proving they are acting in their capacity as judicial factor.

The [Centre for Scots Law](#) thought that the reference to the judicial factor "standing in place of the factory estate" (section 21) did not seem to be appropriate, as the factor does not stand in place of the estate. Its reasoning was that an estate, of itself, has no 'legal personality' (the term used to describe a person or thing that can do the things a human person is usually able to do in law). Instead, the Centre argued the factor stands in place of any person or body who previously owned or controlled the estate.

Policy points

[The Law Society](#) flagged a couple of areas where the Bill as introduced differed from [the Commission's draft bill](#) and sought clarification of the policy rationale for this. For example, it noted that [the Commission's draft Bill](#) made specific provision on judicial factors and **unjustified enrichment**, whereas the Bill as introduced does not.

Unjustified enrichment is the principle (enforceable by court action) that a person should not suffer a loss by giving another person a benefit which is unjustified and unfair.

The Scottish Government's position is that compensation payable for unjustified enrichment is covered as part of the general rule on damages under section 24 ([Explanatory Notes](#), para 46).

[The Faculty of Advocates](#) and [the Sheriffs Association](#) both thought **section 23 of the Bill**, which sets out the rule that legal costs should be borne from the estate, could be modified. This would be to deal with exceptional circumstances when a judicial factor acted unreasonably and so should be found personally liable (out of their own pocket).

Section 26 of the Bill applies where the estate forms part of a trust, and the judicial factor wishes to exercise a function which a trustee would ordinarily be entitled to exercise in relation to the estate. However, the judicial factor considers that the terms or purposes of the trust do not allow for it. Section 26 sets out a procedure for the judicial factor to get consent to exercise the function in question from [the Accountant of Court](#).

[The Sheriffs Association](#) noted that there was no express power for an objector to appeal the Accountant's decision and wondered if one should be added.

[The Law Society](#) said that the details of section 26 differed in a number of respects from the Commission's draft Bill and sought clarification of the underlying rationale for this.

Part 4: Distributing an estate and ending the judicial factor arrangement

[Professor Grier](#) thought that this part of the Bill was "pretty sensible" and had no further comments and likewise [the Senators](#) described it as "sensible".

For two provisions (sections 27(5) and section 29(6)), [the Sheriffs Association](#) argued that, where certain legal steps had to be taken within a specified time period, the court needed discretion to extend that time period. This, it said, was to cater for when the deadline was missed for a good reason.

In Part 4 there are obligations to notify those with an interest in the estate when certain things happen. For example, this is the case when [the Accountant of Court](#) approves a scheme for distribution of the assets in the estate. The [Charity Law](#)

[Association](#) and [the Law Society](#) argued this obligation needed to better reflect the wider public interest associated with certain charities. The Charity Law Association suggested a requirement to notify OSCR, the charities regulator, might satisfy that aim.

The Law Society also thought the type of scheme for distribution of the estate proposed in section 27 worked better for when a charity is being wound up, rather than when the factor is being brought in to 'steady the ship'.

For a range of provisions in Part 4 (sections 28 & 29, 30 & 31, 33), [the Law Society](#) sought clarification on how they would work in practice.

[Missing People](#), queried how Part 4 would work with the statutory powers under the [Presumption of Death \(Scotland\) Act 1977](#), specifically, the power of the court under that Act to declare that someone is dead.

For example, the organisation asked whether a judicial factor would be able to distribute an estate in a way that conflicts with a missing person's will. Separately, it wanted a judicial factor appointment to be immediately terminated if a missing person returns, rather than them having to apply to the court to achieve this aim.

Section 34 of the Bill sets out the main rule that, from the point of **discharge** the judicial factor is freed from liability under civil law (for example, under the law of contract or the law of negligence). However, under section 34, the judicial factor is not freed from liability under criminal law, or any civil law liability associated with that criminal liability.

The [Centre for Scots Law](#) wanted the interrelationship between **section 34** and **section 38** (in Part 5, on the misconduct or failure of a judicial factor) to be spelt out a bit more:

"Presumably it is intended that if a judicial factor is discharged but certain forms of misconduct later come to light and are reported to the court, then the court 'may dispose of the matter in whatever manner it considers appropriate' and thereby hold the discharged judicial factor accountable/liable, perhaps most likely on an individual basis. If this is the intention, it should be made more express..."

Part 5: The Accountant of Court

Whether the Accountant of Court should continue in their supervisory role

The [Committee's call for views](#) asked whether [the Accountant of Court](#) should remain in their supervisory role over judicial factors, as proposed in the Part 5.

All those responding were content [apart from Missing People](#). It said it would depend on the skill set of the person appointed, and the guidance they received, as to whether they could cater to the needs of the families of missing people.

Following the approach in England and Wales ([where the Public Guardian supervises the equivalents to judicial factors for missing people](#)), Missing People suggested that [the Office of the Public Guardian \(Scotland\)](#) could supervise appointments of judicial factors over missing people instead.

Note that, at present, although this is not well known, the same public official holds the offices of both [the Accountant of Court](#) and [the Public Guardian \(Scotland\)](#).⁴ The Bill does not propose to change this, although a formal merger of the offices is not proposed in the Bill either.

Appointment, remuneration and fees (sections 35 and 36)

Section 35 of the Bill retains the power of [Scottish Courts and Tribunal Service](#) (SCTS) to appoint the Accountant. The person appointed must be, in the opinion of SCTS, "appropriately qualified or experienced" in law and accounting (section 35(1)).

The [Policy Memorandum to the Bill](#) (at para 105) says that **formal qualifications** in these disciplines are not necessarily required.

Section 36 of the Bill says that SCTS may also appoint a **Depute Accountant**, to carry out the functions of the Accountant during any period the Accountant is unable to do so. This is on such terms and conditions as SCTS may determine.

[The Sheriffs Association](#) thought the appointment of the Accountant should be made not by SCTS directly but by the **Lord President**, as Head of the Judiciary, who is also the judicial head of SCTS.

[The Law Society commented](#) on what it regarded as "a significant departure" from [the Commission's draft Bill](#). It considered there was a 'watering down' of the level of legal and accountancy knowledge required for the roles of the Accountant and the Depute Accountant. It thought this shouldn't happen because of the potential impact on the oversight of complex cases.

[Professor Grier thought that](#) section 35 was intended to be the statutory provision under which all future Accountants of Court were to be appointed. He questioned the wisdom of this, as the judicial factor has functions beyond the appointment of judicial factors. For example, they supervise administrators under the proceeds of crime legislation.

Supervision and investigations (sections 37 and 28)

The Bill says that the Accountant must supervise the performance of judicial factors. This is described as **the general function** of the Accountant (section 37(1)).

The Accountant also would have **an investigatory power**. Specifically, if the Accountant has reason to believe that the judicial factor is engaging in misconduct or failing in certain other ways they can make such enquiries, "as the Accountant

⁴ Adults with Incapacity (Scotland) Act 2000, section 6(1).

considers appropriate" (section 38(1)(2)(a))). Here, the Accountant must give the judicial factor opportunity to **make representations** on the matter (section 38(2)(b)).

Where "serious misconduct or other material failures" are found, the Accountant must report them to the court. Furthermore, if the judicial factor is **a member of a professional body**, the Accountant must report the factor to that body (section 38(4)).

On oversight of judicial factors, [the Faculty of Procurators of Caithness](#) said it thought there should be a specific provision for an interested person or organisation to raise concerns about the judicial factor's management of the estate. This, it proposed, would first be to the Accountant. If unsatisfied with the outcome, there would then be a role for the court.

[The Commission's draft Bill](#) required the Accountant to refer to the court or professional body where there had been "some appreciable" misconduct or failure (section 46(5)). [The Law Society's response noted](#) that this was lower than the threshold for referral now appearing in the Bill, as introduced.

[The Law Society](#) also highlighted that the report to the professional body must be made **before** the court had considered the issue. It questioned what would happen if the judicial factor was subsequently exonerated by the court.

[The Law Society also queried](#) how section 38 (including the duty to report to a professional body) would interact with the right of the judicial factor to require from the court a **determination** relating to a decision of the Accountant (Part 5, section 45).

More generally, [the Law Society thought](#) that this part of the Bill may dissuade individuals from accepting appointment as factor, given the often-contentious nature of the cases involved.

Information-gathering power (section 39)

As noted earlier, **section 39 of the Bill** gives the Accountant the power to require information relating to the Accountant's functions from bodies, such as banks, and individuals.

As with section 12, certain individuals and bodies, such as bodies exercising reserved functions, like HRMC, or UK Government department or ministers, are exempt from the obligation to comply and can choose whether to do so (section 39(3)).

In response to [the Committee's call for views](#), [the Sheriffs Association](#) and [the Law Society](#) both commented on the limits of the Accountant's information-gathering power (in relation to bodies exercising reserved functions, or UK Government departments/ministers). These respondents' concerns were the same as those expressed in relation to the judicial factor's equivalent power. In other words, they thought that the relevant exceptions weakened the strength of the power.

Auditing the accounts (section 40)

Section 40(1) of the Bill sets out a duty on the Accountant to audit the accounts received from judicial factors.

Section 40(2) gives the Accountant the power to examine further information, and to send the accounts to an external accountant for auditing if the Accountant considers that it is necessary, or would be beneficial, to do so.

In response to the Committee's call for views, [the Law Society queried](#) how the provisions passing the cost of external audit to the estate (section 40(6)) would work in practice, where the estate is unable to bear the costs (for example, because it is insolvent).

[The Faculty of Procurators of Caithness said](#) noted that, while there is a requirement to produce accounts for the Accountant of Court, if there is a legal duty to send them to interested parties, there appears to be no sanction for failing to do so. Accordingly, the Faculty said the judicial factor should also specifically be obliged to serve copies of these in advance to the relevant parties. They should also provide evidence of this service when lodging the accounts with the Accountant of Court.

Documents available for inspection (section 43)

Section 43 of the Bill places the Accountant under an obligation to make certain documents relating to an estate available for inspection, or to provide copies of the documents.

In response to the Committee's call for views, [the Law Society commented that](#) the Bill as introduced differs from the terms of the Commission's draft Bill (section 51(1)) in that **the inventory of the estate** is omitted from the documents which must be made available for inspection.

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