

Minister for Victims and Community Safety
Ministear airson Luchd-fulaing is Sàbhailteachd
Chòimhearsnachd
Siobhian Brown MSP/BPA



Lady Paton
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By email: Ann.Paton@scotlawcom.gov.uk

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Dear Lady Paton

SCOTTISH LAW COMMISSION REPORT ON JUDICIAL FACTORS

Further to my letter of 05 September 2023 setting out the Government's intention to introduce a Judicial Factors Bill this year, I am pleased to be able to let you know that the Bill was introduced yesterday and is now available on the Scottish Parliament website.

The Parliamentary Bureau will shortly determine the committee to which the Bill is allocated. It is my view that this Bill is a suitable candidate for consideration by the Delegated Powers and Law Reform Committee (DPLRC) under Rule 9.17A of the Parliament's Standing Orders and the Presiding Officer's determination under that Rule.

I have set out in the annex to this letter more detail on why I consider that the Bill meets these criteria and I am copying this letter to the convener of the DPLRC, Maggie Chapman MSP and Liam McArthur MSP.

I welcome any comments you may wish to make.

SIOBHIAN BROWN

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ASSESSMENT OF THE BILL AGAINST STANDING ORDERS RULE 9.17A AND THE CRITERIA AS DETERMINED BY THE PRESIDING OFFICER FOR QUALIFICATION AS A “SCOTTISH LAW COMMISSION BILL”

(a) The Bill must implement all or part of a report of the Scottish Law Commission

1. While the Bill implements the overwhelming majority of the SLC’s recommendations it also makes some minor changes and additions (either in respect of the SLC recommendations or the text of the draft Bill appended to the SLC Report). The purpose of this Annex is to set out the most significant of these.¹

2. The section numbers referenced in the following discussion are references to the section of the draft Bill prepared by the SLC and appended to its 2013 Report on Judicial Factors.

3. While the drafting of the Bill as introduced is somewhat different to the SLC’s draft Bill (“the draft SLC Bill”) the Scottish Government’s view is that these do not alter the substance of the SLC’s recommendations.

Changes to the draft SLC Bill

Section 46 - Misconduct or failure of judicial factor

4. The Accountant was empowered by the draft SLC Bill to investigate misconduct and was under a duty to report cases of appreciable misconduct to the court under section 46. “Misconduct” in this context was left deliberately broad by the SLC in order to enable the Accountant to exercise a broad discretion as to the judicial factor’s conduct. It could therefore range from undue delay in carrying out functions to fraudulent actings.

5. Recommendation 105 in the SLC’s report is that the Accountant *may* report serious misconduct or material failure, whereas the draft SLC Bill provided that the Accountant *must* report the misconduct (provided the Accountant has concluded there is some appreciable misconduct or failure). The policy approach taken in the Bill is that the Accountant is obliged to report to the court where satisfied that there has been serious misconduct or material failure.

Section 50 - Annual review

6. At present, by virtue of section 18 of the Judicial Factors (Scotland) Act 1849, the Accountant is required to produce an annual report of all judicial factories in Scotland. The SLC took the view that the institution of judicial factory is an important one, which enables society, through the courts, to administer the property of private citizens who are, for whatever reason, unable or unwilling to do it themselves. It recommended that the obligation to produce an annual review as to how many factories, and of what nature, are in operation together with other information as to the cost of the institution, should continue, with the detail of what might be included left to rules of court, and to be supplemented as the Accountant sees fit.

7. Following engagement with the Scottish Courts and Tribunals Service and the Lord President’s Private Office, the Bill provides that the form, content and timeframe of the Accountant’s annual review will be prescribed by regulations made by the Scottish Ministers, rather than by rules of court. Such regulations would be subject to the negative procedure.

¹ Minor stylistic/drafting changes made to the draft Bill appended to the SLC Report for reasons of consistency and clarity are not listed here.

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Other changes

8. What follows are the more notable changes made by the Scottish Government to the draft SLC Bill:

- References in the draft SLC Bill to petitions in the court have been replaced in the Bill with references to applications, to ensure that the drafting remains accurate following any reform of the procedure. This same approach was taken with the Trusts and Succession Bill when it was introduced in 2022.
- Section 3 of the draft SLC Bill provided a route for appointment of a judicial factor on an estate in the course of other proceedings. We have provided that the proceedings must be “connected to that estate” in order for a judicial factor to be appointed. This change is made to ensure that motions for appointment are not made in proceedings with no connection to the estate in question.
- We have made clear that a party who lodges a motion for the appointment of a judicial factor in the course of other proceedings must have an interest in the appointment of a judicial factor on the relevant estate, which maintains consistency with section 1 of the Bill.
- We have included provision to allow for the appointment of an interim judicial factor pending the determination of a motion made in the course of other proceedings, in addition to pending the determination of an application made otherwise than in the course of proceedings. We considered that this might be useful in some circumstances where it is thought that urgency might require action to be taken before a permanent judicial factor can be appointed, such as where the persons who would otherwise be responsible for management of the estate are unable to agree as to how the estate should be managed.
- We have updated section 8(4) of the draft SLC Bill to provide that any fee for re-registration of notice of appointment is to be met from the factory estate. This ensures that the notice of appointment and re-registration of appointment are treated in the same way – the draft SLC Bill was silent on the cost of re-registration. Similarly, a provision making it clear that any registration fees in relation to termination of a judicial factory are to be met from the factory estate, has also been added to sections 36 and 41 of the draft SLC Bill for consistency reasons.
- Where the draft SLC Bill treated a judicial factor’s powers and duties separately, we think the division between the two creates an overlap. Instead, it is considered that this could, overall, be expressed better using the term “function” which, under the Interpretation and Legislative Reform (Scotland) Act 2010, includes both duties and powers. This is the approach that has been adopted in the Bill.
- For sections 12 and 47 of the draft SLC Bill, we have included standard wording in relation to the sharing of information to make it clear that these sections do not authorise disclosure that contravenes data protection legislation. In addition, certain exceptions have been added to the requirement placed by sections 12 and 47 on persons receiving notice under these sections to comply with the notice. Reserved bodies (by virtue of paragraph 3 of Part III of schedule 5 of the Scotland Act 1998), Ministers of the Crown, departments of the Government of the United Kingdom and public bodies operating wholly in relation to a reserved matter (within the meaning of the Scotland Act 1998) may choose to supply the information requested, but are not required to do so under the Bill.
- Section 20 of the draft SLC Bill required the judicial factor to consider whether and how to invest funds of the factory estate. We have expanded the obligation such that the consideration is not just “whether and how”, but whether it would be “appropriate”, as

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described in the SLC report. If the judicial factor considers that it would be appropriate, they are placed under an obligation to invest accordingly. This is in line with the SLC's Report where it is stated that if "it is appropriate to do so, a factor should be under a duty to invest the funds of the estate (see paragraph 4.31).

- Section 21 of the draft SLC Bill referred to the judicial factor being satisfied that enforcing or defending the claim is sensible in all the circumstances. We have amended the drafting to instead refer to the enforcement or defence as "reasonable and prudent". In the Scottish Government's view, this is less ambiguous than "sensible" while achieving a similar effect.

Miscellaneous changes

9. In addition, modifications to other enactments have been updated to reflect the changed statutory position since the SLC published its draft Bill in 2013.

(b) complies with such criteria as shall be determined by the Presiding Officer

10. The current determination of the Presiding Officer was published in the Scottish Parliament's Business Bulletin on 24 March 2021. The key elements of this are addressed in turn below.

A Bill, the primary purpose of which is to (a) simplify, modernise or improve the law to— (i) ensure it is fit for purpose, (ii) respond to developments, or address deficiencies, in the common law, or (iii) respond to other developments in the law.

11. The primary purpose of the Bill is clearly to modernise and improve the law relating to judicial factors to ensure that it is clear and fit for purpose. As set out in more detail in the SLC Report and in the Policy Memorandum which will be published alongside the Bill, the current law in this area is antiquated. Since the Judicial Factors Acts of the 19th century, there has been no new primary legislation pertaining specifically to the details of the procedure. In practice, there has appeared to be a lack of clarity as to the extent of judicial factors' powers, which has resulted in judicial factors being reluctant to take certain actions, despite them being deemed to be desirable, without applying to court for additional powers first. Some powers of judicial factors are also to be found in other legislation, which makes it difficult for third parties dealing with judicial factors, and even the judicial factors themselves, to know what they are or are not entitled to do.

12. The provisions contained in the Bill will put in place an updated and comprehensive regime which will bring clarity, accessibility, and efficiency to this area of the law. The flexibility introduced by the regime would mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. Overall, the Bill introduces a statutory framework which sets out clearly the essential features of the office of judicial factor and the broad parameters within which it should operate and will be of benefit to all those involved, in any capacity.

(b) make provision which is not likely to generate substantial controversy among stakeholders.

13. The provision made by the Bill is not expected to generate substantial controversy among stakeholders.

14. In 2010, the SLC published a Discussion Paper on Judicial Factors in which it analysed the existing law, including ambiguities thrown up by some of the decided cases, and suggested that there was a continuing need for the office of judicial factor.² In 2013, it

² The discussion paper is available at <https://www.scotlawcom.gov.uk/files/4512/9744/4722/dp146.pdf>
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published recommendations for reform of the law in its Report on Judicial Factors.³ In 2019, the Scottish Government consulted on the SLC's recommendations and the current procedure for the appointment of judicial factors in the case of missing persons.⁴ Overall, the majority of respondents supported the SLC's recommendations, confirming that there is a necessity for the existing legislation to be updated and modernised. The Scottish Government committed to implementing these recommendations.

Whether there are any wider legislative proposals expected within two years beginning with the date of introduction of the Bill (or by the end of the same session if sooner), which relate closely to the same particular aspect of law.

15. The Scottish Government is not expecting to bring forward any wider legislative proposals on this topic within two years (or by the end of this session).

(c) The Bill must not be a Consolidation, Codification, Statute Law Repeals or Statute Law Revision Bill

16. The Bill is not any of the Bill types listed above.

³ The report is available at https://www.scotlawcom.gov.uk/files/2913/7776/7158/Report_233.pdf

⁴ The consultation is available at <https://www.gov.scot/publications/judicial-factors-consultation>

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