

Stuart McMillan, MSP  
Convener  
Delegated Powers and Law Reform Committee

By email to:  
[DPLR.Committee@parliament.scot](mailto:DPLR.Committee@parliament.scot)

---

13 November 2024

Dear Convener

### **JUDICIAL FACTORS (SCOTLAND) BILL**

I am writing to you to set out some detail on the amendments lodged in my name for consideration of the Judicial Factors (Scotland) Bill at Stage 2 and to provide you with information that was requested.

I have included in the Annex below a table of the Committee's recommendations from its Stage 1 Report and set out where I think the Scottish Government amendments meet these or where I intend to take no action.

I hope the Committee finds this letter of assistance.

Yours sincerely,

**SIOBHIAN BROWN**

For ease of reference, the Committee's points or recommendations are numbered in line with the report, with the Scottish Government's response below.

COMMITTEE RECOMMENDATIONS	RECOMMENDATION STATUS
<b>APPLICABILITY TO MISSING PEOPLE</b>	
<p>56. A reference to missing people could be added to the Bill in such a way that makes it clear that this piece of legislation may be used by those seeking to manage the estate of a missing person. While the Committee does not have a strong preference for how such a reference be added, it considers this would improve the legislation's accessibility.</p> <p>57. As such, the Committee supports the inclusion of an explicit statement in the Bill that it is competent to appoint a judicial factor to the estate of a missing person. The Committee calls on the Scottish Government to bring forward an amendment at Stage 2 to give effect to this.</p>	<p>Met.</p> <p>The amendment in my name makes clear that the Bill can be used in cases involving estates of missing persons.</p>
<b>APPLICABILITY TO CHARITIES</b>	
<p>97. The Committee wishes to ensure that the Bill effectively meets the needs of judicial factors appointed to charities.</p> <p>98. The Committee therefore asks the Scottish Government to consider the suggestions as set out in the 'wish list' provided to the Committee by the Charity Law Association and the suggestions made by the SLC so that the Bill better caters for cases of judicial factors appointed to charities, and report back to the Committee on its view in relation to any changes needed to the Bill in advance of the Stage 1 debate.</p>	<p>Met.</p> <p>The Scottish Government have considered the suggestions made during Stage 1 and lodged amendments so that the Bill better caters for cases of judicial factors appointed to charities.</p>
<b>COMPLAINTS PROCESS</b>	
<p>106. Nonetheless, the Committee considers that a clear, accessible complaints handling route is vital. As such, it calls on the Scottish Government, the Scottish Courts and Tribunals Service and the Accountant of Court to ensure that information about the process to be</p>	<p>Met.</p> <p>The Scottish Government will work with the SCTS and the Accountant of Court to make sure that information on how to make</p>

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

followed is clearly accessible to those who need it.	a complaint about a judicial factor is clearly accessible.
<b>DATA PROTECTION ISSUES</b>	
<p>127. While the Committee recognises the importance of data protection, it questions the necessity of including in the Bill what may simply amount to a restatement of the current law.</p> <p>128. The Committee asks the Scottish Government to reflect on the evidence it heard from practising judicial factors and the Accountant of Court on the inclusion of subsections 12(7) and (8) and 39(6) and (7) as being potentially problematic. It asks the Scottish Government to consider whether they should be either clarified further on the face of the Bill or removed altogether.</p>	<p>Met.</p> <p>My amendment adjusts the data protection provision to provide further clarification as to the interaction with data protection legislation.</p>
<b>REGISTER FOR THE APPOINTMENT OF JUDICIAL FACTORS</b>	
<p>167. The Committee considers that the registration of judicial factories in the Register of Inhibitions should be periodically reviewed. Such reviews should consider any other possible ways in which judicial factories could be registered and searched by the public, and also include consideration of the creation of a standalone register. This may be particularly necessary if changes mean that there are more judicial factors being appointed, or judicial factories are increasingly used in other ways.</p> <p>168. The Committee considers that the requirement to carry out a periodic review, and the ability for Ministers to give effect to their findings, if they wish to, should be explicitly provided for in the Bill. It therefore calls on the Scottish Government to consider how best to amend the Bill at Stage 2 to make these changes.</p> <p>169. In the meantime, the Committee also asks the Scottish Government what it can</p>	<p>Met.</p> <p>My amendment imposes a requirement on the Scottish Ministers to periodically carry out a review as to whether the appointment of judicial factors should continue to be registered in the Register of Inhibitions.</p>

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

do to raise awareness that the Register of Inhibitions can be searched by those seeking further information in relation to judicial factories.	
<b>POWER TO INVEST</b>	
<p>184. The Committee agrees with the views expressed by witnesses that the Bill as drafted already permits ESG investments.</p> <p>185. Nonetheless, the Committee welcomes the Minister's offer to write to the Committee setting out her views in relation to the ESG investments power and whether further clarification in the Bill is required. It requests this update ahead of the Stage 1 debate.</p>	I agree with the Committee that the Bill already permits ESG investments. After further consultation and consideration, I am of the view that further clarification in the Bill is not required.
<b>FIDUCIARY NATURE OF THE JUDICIAL FACTOR</b>	
<p>192. While the fiduciary nature of the role of a judicial factor may be self-evident to those reading the Bill with a legal background, the Committee considers that it may help make the law more accessible, particularly to any layperson appointed as a judicial factor, if this was spelled out as a high-level general principle on the face of the legislation.</p> <p>193. The Committee calls on the Scottish Government to bring forward an amendment to the Bill to this effect at Stage 2.</p>	<p>While the term "fiduciary duty" is not used in the Bill, the Bill achieves the same effect by requiring judicial factors to hold, manage, administer and protect the factory estate for the benefit of persons with an interest in the estate and to exercise care, prudence and diligence and take professional advice when appropriate.</p> <p>An amendment of this nature runs the risk that a court interprets it in such a way as to narrow a judicial factor's powers, or that it could lead to a judicial factor's functions, or their exercising of any of their functions, being challenged by disgruntled persons or lead to satellite litigation.</p> <p>I will, however, ensure that the detail in the Explanatory Notes is expanded to make the fiduciary nature of the judicial factor's role clearer to users of legislation.</p>
<b>SECTIONS 34 AND 38</b>	
220. The Committee calls on the Scottish Government to consider whether it needs to clarify further the interrelationship	Met.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

between sections 34 and 38, given the apparent confusion of some stakeholders.	My amendment to section 34 makes provision as to the legal effect of the discharge of a judicial factor clearer.
<b>QUALIFICATIONS</b>	
<p>228. The Committee considers that the Bill's requirement for the Accountant of Court to be, in the opinion of the SCTS "appropriately qualified or experienced in law and accounting" reflects current practice, and is sufficient.</p> <p>229. However, given the evidence the Committee has heard, the Committee considers that there may be benefit in the Accountant's qualifications being subject to review and that the Scottish Ministers should have the flexibility to amend the qualification requirement by way of secondary legislation at a future point should the outcome of such a view mean it were considered necessary.</p> <p>230. The Committee calls on the Scottish Government to bring forward an amendment at Stage 2 to give effect to this.</p>	<p>Met.</p> <p>My amendment imposes a requirement on the Scottish Ministers to periodically review the criteria which a person must satisfy to be appointed as the Accountant of Court by the SCTS.</p>
<b>COMPLAINTS REFERRED BY THE ACCOUNTANT OF COURT TO PROFESSIONAL BODIES</b>	
<p>238. The Committee asks the Scottish Government how it can clarify the route the Accountant of Court should take when referring a solicitor to their professional body as set out under their powers at section 38(4) of the Bill.</p> <p>239. The Committee also asks the Scottish Government what consideration it has given to there being a different threshold for referral to the Law Society of Scotland depending on which 'gatekeeper' (i.e. the Accountant of Court or the SLCC) is used, particularly in light of the fact that the Accountant of Court does not need to have formal legal qualifications.</p> <p>240. The Committee asks the Scottish Government to set out on what basis it is satisfied that the current proposals provide</p>	<p>Met.</p> <p>The effect of my amendment is that where the professional body is not tasked with dealing with complaints, the Accountant must report the serious misconduct or material failure to the person that is.</p>

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

the most appropriate and correct route for the Accountant of Court to follow where they are satisfied there is, or has been “serious misconduct or material failure on the part of the judicial factor”.	
<b>DRAFTING POINTS RAISED BY STAKEHOLDERS</b>	
<p>244. The Committee asks the Scottish Government to consider the drafting points raised in the submissions in response to the Committee’s call for views on the Bill.</p> <p>245. The Committee asks the Scottish Government to confirm whether it plans on bringing forward any amendments to the Bill to address these points, and whether any clarifications or reassurances have otherwise been given.</p>	I have lodged a number of amendments in response to drafting points raised in written evidence.

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See [www.lobbying.scot](http://www.lobbying.scot)

St Andrew’s House, Regent Road, Edinburgh EH1 3DG  
www.gov.scot

**INVESTORS IN PEOPLE™**  
We invest in people Silver

