

JUDICIAL FACTORS (SCOTLAND) BILL

POLICY MEMORANDUM

INTRODUCTION

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Judicial Factors (Scotland) Bill introduced in the Scottish Parliament on 5 December 2023.
2. The following other accompanying documents are published separately:
 - Explanatory Notes (SP Bill 40–EN);
 - a Financial Memorandum (SP Bill 40–FM);
 - a Delegated Powers Memorandum (SP Bill 40–DPM);
 - statements on legislative competence by the Presiding Officer and the Scottish Government (SP Bill 40–LC).
3. This Policy Memorandum has been prepared by the Scottish Government to set out the Government's policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

TERMINOLOGY

4. A number of legal terms are used in this Policy Memorandum and a glossary of these terms can be found at the end of this document.

POLICY OBJECTIVES OF THE BILL

5. A judicial factor is a person appointed by the court to gather, hold, safeguard and administer property which is not being properly managed. A common example of a judicial factory today is those appointed at the instance of the Law Society of Scotland to firms of solicitors where there has been a breach of accounts rules and the firm's liabilities exceed, or appear likely to exceed, its assets. The judicial factor will normally be appointed to investigate the position of the firm and deal with client claims. In 2022, almost one third of all active judicial factors were involved in managing this type of factory estate. Other examples of appointment involve the estate of a deceased person where the person nominated to be the executor of the estate is unable or unwilling to act, or where the executor has failed to carry out their duties. A judicial factor in these cases will ingather anything that may be due to the deceased's estate, settling any lawful debts and thereafter distributing the estate to anyone deemed to be a beneficiary.

6. Although the volume of appointments of judicial factors is low they have an important role to play. As at 2022, there were 64 active judicial factories supervised by the Accountant of Court (“the Accountant”),¹ and there have been an annual average of 7 applications for appointment of a judicial factor for the years 2018 to 2022.

7. The office of judicial factor has a long history in Scots law and there is a continuing need for capable administrators to be appointed to manage the property of those who cannot, should not or will not manage it properly themselves. Although there is a continuing need, the current law on judicial factors is now regarded by those who use it as outdated with a cumbersome procedure which is no longer fit for purpose. This is principally due to the fact that since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to the details of the procedure. Moreover, there seems to be a lack of clarity as to the extent of judicial factors’ powers which often results 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.

8. The provisions contained in the Bill will put in place an updated and comprehensive regime which will bring clarity, accessibility, and efficiency to this vital but outmoded area of the law. Furthermore, 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.

9. There are a number of aspects of the law of judicial factors which the Scottish Government considers should apply in the remainder of the United Kingdom as well as in Scotland. These include provisions as to the ingathering of property by the judicial factor, provisions as to the vesting of property in the factor, and the ability of the factor, and of the Accountant, to require bodies of various sorts to provide information, and are in line with the recommendations made by the Scottish Law Commission (“the SLC”).

10. Most of the Bill provisions need apply only in Scotland, but it is necessary to ensure that provisions which require to have a wider effect will do so. The Scottish Government has concluded that in order to achieve this effect it is appropriate that these provisions should be applied by an Order under section 104 of the Scotland Act 1998 and, accordingly, will discuss this matter with the UK Government.

National Performance Framework

11. The policy objectives of the Bill will contribute to the National Outcome on fair work and business, by providing the necessary legislative framework to help make Scotland’s economy more stable, productive and efficient.² The recommendations relating to the Accountant of Court

¹ The office of the Accountant of Court (which was set up by the Judicial Factors Act 1849) is tasked with supervising the way in which a judicial factor carries out their responsibilities.

² See <https://nationalperformance.gov.scot/national-outcomes/fair-work-and-business>.

as supervisor of judicial factors will contribute to the National Outcome that Scotland has high quality, affordable and accessible public services that positively enhances the lives of its citizens.³

CONSULTATION

12. 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.⁴ There were 14 responses to the consultation and a list of respondents is available in its report. In 2013, the SLC published recommendations for reform of the law in its Report on Judicial Factors.⁵ The Bill takes forward without amendment the majority of the SLC's recommendations for reform.⁶

13. 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.⁷ There were nine responses which may be unsurprising given the specialist nature of the consultation. However, the Scottish Government received responses from key bodies and organisations who have direct experience of the current regime and who have been able to provide insightful responses based on their own practical experience, including Missing People, the Law Society of Scotland, the Scottish Courts and Tribunals Service ("the SCTS"), and from academics at the Centre for Scots Law. 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.⁸

14. The responses to these consultations will be discussed at the appropriate points throughout this Memorandum.

OVERVIEW OF THE BILL

15. Judicial factors are persons appointed by the court and currently operate under statutory legislation, including the Judicial Factors Acts of 1849 and 1889, and the common law. Judicial factors are appointed to manage property of those unable or unwilling to do so, subject to other specific legislation. For example, a judicial factor would not currently be appointed to manage the property of an adult determined to be incapable under the Adults with Incapacity (Scotland) Act 2000.

16. Although the number of applications for appointment has, over the years, decreased, the Scottish Government agrees with the SLC that there is a continuing requirement for judicial factors in modern times. Accordingly, the Bill sets out in a clear framework the essential features of the office of judicial factor and the broad parameters within which it should operate. It sets out a comprehensive set of provisions governing various aspects of judicial factories, including

³ See <https://nationalperformance.gov.scot/national-outcomes/communities>.

⁴ The discussion paper is available at <https://www.scotlawcom.gov.uk/files/4512/9744/4722/dp146.pdf>.

⁵ The report is available at https://www.scotlawcom.gov.uk/files/2913/7776/7158/Report_233.pdf.

⁶ Where there has been made amendment to a recommendation this is referenced at the relevant point in this Memorandum.

⁷ The consultation is available at <https://www.gov.scot/publications/judicial-factors-consultation>.

⁸ The Scottish Government's response to its consultation is available at <https://www.gov.scot/publications/judicial-factors-analysis-responses-scottish-government-consultation>.

appointment (Part 1), functions (Part 2), dealings with third parties (Part 3), distribution of the estate and termination of the judicial factory (Part 4) and the role of the Accountant of Court (Part 5).

Part 1: Appointment of judicial factors

17. Part 1 of the Bill is concerned with general considerations which inform the process for appointing a judicial factor, making changes to the way that judicial factors can be appointed currently. Appointments can be sought by application to the Court of Session or sheriff court, or they can be made in the course of other types of court proceedings. This Part also sets out the grounds for appointing a judicial factor, the qualifications necessary for a person to be appointed, the court's discretion as to whether or not to require a judicial factor to find caution, and the duties of the clerk of court upon appointment of a judicial factor. Finally, Part 1 places the Accountant of Court ("the Accountant") under a duty to introduce a fixed remuneration rate for judicial factors.

Appointment of judicial factor

18. Section 1 of the Bill sets out how an application to appoint a judicial factor is made and who may make it. An application can be made by a person with an interest in the appointment of a judicial factor, either to the Court of Session or the appropriate sheriff court, and must be intimated to those who appear to the applicant to have an interest in the estate. If the conditions for appointment as set out in section 3 are met, then the court may appoint a judicial factor.

19. The Bill widens the scope of who can competently raise court proceedings. There is always a question, in relation to any proceedings in court, as to whether the person seeking a remedy has a sufficient interest in the matter to justify raising proceedings. Under the current legal framework, the usual rule is that the applicant must have an interest in the property over which the appointment is sought.

20. It is possible, however, that there will be cases where a party might have an interest not in the property but in its maintenance. For example, where the disrepair of one half of a semi-detached property begins to have an effect on the other half, the owner of that other half might be concerned about prospective damage to their property. The Bill seeks to give the court sufficient flexibility to allow for a judicial factor to be appointed in such cases where appropriate. As such, section 1 requires the applicant to have an interest in the appointing of a judicial factor on the relevant estate rather than an interest in the estate itself.

21. Currently, the Court of Session may appoint a judicial factor in the course of other proceedings. For example, legal proceedings may be raised solely to recover damages but as the case progresses the circumstances are enough to convince the court that it is appropriate to appoint a judicial factor to manage some property pending a final decision. This, however, is not possible currently if the proceedings are raised in the sheriff court. The ability to exercise this useful discretion should not depend upon the court in which the other proceedings are being heard. Accordingly, section 1(4) ensures that a judicial factor can be appointed in the course of both Court of Session and sheriff court proceedings.

Consultation and alternative approach

22. The SLC consulted on the issue of interest to raise court proceedings. The question provoked a range of responses, but no responses against the idea of widening the definition of interest in this context were received and there were no alternatives suggested. In particular, two consultees each responded with an example from experience illustrating the difficulties of the current law.⁹ One of the two also responded that, “Widening the definition of “interest” may encourage increased use of the procedure [for appointing a judicial factor] and provide innovative solutions for problem cases.”

Jurisdiction

23. In addition, the SLC asked consultees about the present concurrent jurisdiction of the Court of Session and the sheriff court in relation to applications for the appointment of judicial factors. The question was whether this should continue or whether it should be limited to one or other court.¹⁰

24. Some respondents suggested that the required degree of specialism pointed towards the Court of Session having sole jurisdiction while others pointed out that the sheriff court having sole jurisdiction would be in line with previous reforms to the civil justice system. Overall, having considered all the responses to its consultation, the SLC were persuaded to recommend that the current system of concurrent jurisdiction be maintained. As was pointed out in one response to the SLC, “... the present concurrent jurisdiction should continue as it allows flexibility and the possibility of minimising costs.”¹¹

25. The Scottish Government consulted on this matter in 2019, asking a series of questions on jurisdiction.¹² The views received by the Scottish Government mirrored the division exhibited in the responses received by the SLC. The SCTS indicated its support for sheriff courts holding exclusive jurisdiction while the Law Society of Scotland favoured maintaining the Court of Session jurisdiction for applications under section 41 of the Solicitors (Scotland) Act 1980. The Office of the Scottish Charity Regulator (“OSCR”) responded: “Currently in terms of the [Charities and Trustee Investment (Scotland) Act 2005] OSCR has the power to seek various protective and enforcement orders from the Court of Session including the appointment of a judicial factor. We share a number of the concerns raised by the Law Society of Scotland [...]. For these reasons, OSCR would prefer to continue to seek the appointment of Judicial Factors in the Court of Session, which would negate the need for any change to the 2005 Act.”

26. Having considered the responses, the Scottish Government has, on balance, decided to proceed with the recommendation of the SLC. This will maximise flexibility for those seeking to appoint a judicial factor, allowing them to consider their individual circumstances before deciding which court to apply to. Accordingly, the Bill maintains the *status quo* whereby applications to appoint a judicial factor can be heard in either the Court of Session or the sheriff court.

⁹ See paragraphs 3.16 and 3.17 of the Discussion Paper on Judicial Factors.

¹⁰ See paragraphs 3.7 to 3.11 of the Discussion Paper on Judicial Factors.

¹¹ Response to question 2 asked by the SLC in its Discussion Paper on Judicial Factors. See paragraphs 3.7 to 3.11.

¹² See paragraphs 4.1 to 4.10 of the Judicial Factors Consultation.

Interim judicial factor

27. There are circumstances where speed of action will be important in securing the appointment of a judicial factor. For example, there may be cases where a relationship between business partners deteriorates to such an extent that no effective decision can be taken, thereby putting the business owned by the partnership at risk. In such circumstances, an interim appointment of a judicial factor may be desirable as a means to manage the business until a ‘permanent’ judicial factor can be appointed. Currently, the court can appoint an interim judicial factor, and section 2 of the Bill will maintain this position.

28. An interim judicial factor would have all the powers and duties of a permanent appointment, but it would be open to the appointing court to specify the functions which it considers should not be conferred on that interim factor. For example, there might be situations where the estate in question consists primarily of a house with sentimental value for one, but not the other, of a married couple. In such a case it might be appropriate to provide that the interim judicial factor should not have the power to sell the property.

29. Interim appointments should not go on longer than is necessary and, if matters cannot be brought to a conclusion quickly, the appointment should be made permanent. Section 2(3) requires the Accountant to keep interim appointments under review and this will ensure that parties move quickly to a permanent appointment where that is necessary.

Consultation and alternative approach

30. The SLC asked whether, rather than an open-ended interim appointment, there should be a statutory time limit with an option for the interim judicial factor to apply for an extension to that limit.¹³ While the overwhelming majority of consultees were in favour of a time limit, one dissenting consultee pointed out that there can be so much to do at the outset of an interim appointment, often in difficult circumstances, that imposing a time limit might result in no useful purpose and potentially add costs to the factory estate where there is a need for a further petition to court. The Scottish Government considers that the requirement of the Accountant to keep interim appointments under review will ensure that the parties move quickly to a permanent appointment where that is necessary.

31. Responding to the Scottish Government’s consultation, OSCR said: “We agree that the process to appoint an interim factor should remain and this is how OSCR generally approaches the cases that we have where a Judicial Factor is appropriate. Having an interim factor allows the appointment to be made swiftly and ensures that charitable assets can be secured promptly where we have concerns.”

Conditions for appointment of judicial factor

32. The range of circumstances which may give rise to the requirement for the appointment of a judicial factor is wide. In general, the essential rationale for the appointment of a judicial factor is that there is property which requires to be managed, and which, by reason of some inability or failure of the person who would otherwise be responsible for that management, is not being managed properly. The aim of the appointment, therefore, is to make sure that the property is

¹³ See paragraphs 5.33 to 5.38 of the Discussion Paper on Judicial Factors.

administered appropriately until the situation which has given rise to the requirement for the appointment is resolved.

33. Section 3 of the Bill sets out broad conditions for the appointment of a judicial factor. These are (i) that it would not be possible, practicable, or sensible, for the management of the property in question to be carried out by those who would otherwise be responsible for doing so or (ii) that it would be to the advantage of the estate for a judicial factor to be appointed. What follows are some examples of how each of these grounds in (i) might be met. The intention behind (ii) is not to limit the conditions to circumstances where an appointment is necessary but to also allow for a judicial factor to be appointed where this is otherwise deemed beneficial to the estate.

Not possible

34. This might arise, for example, where there is property belonging to a child who is not legally competent to take binding decisions as to the management of the property. Accordingly, someone has to be able to take those decisions until the child reaches the age of legal capacity.

Not practicable

35. This might arise where the person responsible for the management of the property is out of the country, and unable, for whatever reason, to administer it from abroad. While it might be possible for the property to be managed despite the person responsible being abroad, this does not always mean that it is practicable. This could be for the lack of a modern communication infrastructure, or a significant time difference affecting the responsible person's ability to make the necessary management decisions in good time.

Not sensible

36. An example of a necessary appointment in these circumstances might be where a business owned by a partnership is not being run properly as a consequence of a fundamental disagreement amongst the partners. In these circumstances, the requirement will be two-fold: first, to continue the business as a going concern and, second, to seek a resolution of the dispute between the partners with a view to ending the judicial factory. In such a case it would be possible for the property to be managed by those responsible, and it would, in theory, be practicable. But it would not be sensible, particularly if relations between the partners had reached the stage where they were simply unable to agree about anything.

Qualifications for appointment as judicial factor

37. Most judicial factors are individuals appointed because of their professional qualifications. The majority of judicial factors appointed are either legal or financial professionals. Notwithstanding this, holding a professional qualification should not be a necessary condition for appointment as a judicial factor. Instead, it is important that the person appointed must be suitable for the appointment.

38. It is rare for someone domiciled outside Scotland to be appointed as a judicial factor but where this has happened the factor appointed has been required to prorogate the jurisdiction of the Scottish courts, meaning that the judicial factor has agreed to be subject to the jurisdiction of the Scottish courts. Jurisdiction is a power of the court to deal with a particular case. Where a person

residing outwith Scotland is appointed as a judicial factor this can raise questions as to which court should deal with any future cases in relation to that judicial factory. By agreeing to prorogate jurisdiction the judicial factor agrees that any future proceedings in relation to the judicial factory will be dealt with by the Scottish courts even though they may continue to reside outwith Scotland. Section 4 of the Bill makes this more routine by deeming such a person to have accepted the jurisdiction of the Scottish courts by accepting the appointment. It also sets out qualifications for appointment of a judicial factor, namely that they must be a natural person of full legal capacity who, in the view of the court, is a suitable person to hold the office.

Consultation and alternative approach

39. In the 2019 consultation, the Scottish Government asked whether sections 4 and 6 of the draft SLC Bill¹⁴ should be followed in relation to who may be appointed as a judicial factor. Of the respondents who answered the question, all were in favour of implementing the SLC's recommendations. Respondents felt that this approach provided the necessary flexibility for appointments, allowing for the appointment of, for instance, family members.

Finding of caution

40. Caution is an insurance bond designed to protect the factory estate against the risk of financial loss as a result of the factor's mismanagement. At present, by virtue of section 2 of the Judicial Factors Act 1849, a factor has to find caution before a certified copy of the interlocutor of appointment can be issued. The factor cannot undertake their duties until this has been done. Criticisms of the present system are that the need to obtain caution causes delay in the appointment procedure and gives rise to considerable expense. Caution is normally fixed by reference to the whole value of the estate and the cost of finding caution, on an annual basis, is a substantial outlay for an estate.

41. It is impossible to say that there will never be circumstances where it will be appropriate to require even a professional judicial factor to find caution, but the expense involved in doing so is significant. Accordingly, the Scottish Government's view is that the court should have a discretion to require caution but only in exceptional circumstances. As most factors nowadays are professional people with professional indemnity insurance (which should be sufficient to protect the estate), the courts are likely to exercise the discretion conferred upon them by section 5 so as not to require caution in most cases. Where a court, however, is considering appointing a non-professional and concludes that there might be an unacceptable risk to the factory estate of doing so, then it can require caution to be obtained. The Scottish Government considers this a sensible and proportionate response to the potential risks of appointment against the costs of obtaining caution.

Consultation and alternative approach

42. One alternative approach to giving the court discretion to require caution when appointing a judicial factor would be to restrict who can be appointed as a factor. As already mentioned, most judicial factors are professionals, such as solicitors or accountants, and therefore will have professional indemnity insurance which should provide sufficient protection to the factory estate

¹⁴ Regarding the grounds on which a judicial factor may be appointed and qualifications for the appointment of a judicial factor, respectively.

in most cases. As such, the appointments could be restricted to professional persons only. However, a judicial factor appointed, for example, to the estate of a missing person can currently be a relative such as a spouse, partner or parent of the missing person. If the alternative approach described here is adopted in the Bill then such persons could only be appointed in their professional capacity, assuming they are a qualified solicitor, etc. The Scottish Government's view is that there should be no such restriction on who may be appointed judicial factor and the preferred approach is to confer a discretion on the courts to take into account the circumstances of individual cases.

Intimation and registration of notice of appointment

43. At present, only the appointment of a judicial factor upon the estate of a deceased person requires to be advertised, and that is to be done in the Edinburgh Gazette and other appropriate newspapers within 14 days of the appointment. Consultees were of the view that publication of appointments is desirable as it increases the protection afforded to creditors, and it would help to limit circumstances in which a third party unknowingly purchases property which has vested in a judicial factor. As one consultee said, “[t]he mischief is that some individuals who were subject to a judicial factor continued to obtain bank loans and borrow property.”

44. The approach taken in the Bill would see the clerk of court registering the appointment of a judicial factor in the Register of Inhibitions.¹⁵ Under the current Fee Order, there would be a £25 registration fee on each occasion. As inhibitions automatically expire after five years, where an appointment continues for as long as this the judicial factor must then re-register the notice of appointment (section 6). The fee for registration and any re-registration is to be paid from the factory estate.

Consultation and alternative approach

45. The Scottish Government has discussed with the SCTS an alternative approach that would see the judicial factor placed under a duty to register the appointment in the Register of Inhibitions. This would be in addition to the judicial factor being responsible for any re-registrations (should the appointment last long enough). This would avoid the expense of unpaid registration fees being met from the public purse in the first instance. There would, however, be a gap in terms of publicity between a factor being appointed and the Register of Inhibitions being updated were this approach adopted. It is crucial for creditors, or anyone else dealing with property which forms part of the factory estate, that the factor's appointment is publicised as quickly as possible. It is considered that requiring the clerk of court to register the appointment would minimise any such gap.

46. On balance, given the current low volume of applications for appointment of a judicial factor, the cost of registration, the risk to creditors and third parties and the fact that any fee will be recoverable from the factory estate (section 6(4)), the Scottish Government considers it appropriate to place the duty to register the appointment in the Register of Inhibitions on the clerk of court.

¹⁵ An inhibition is a block on someone being able to sell property, take out further loans on it, or make changes to the maintenance responsibilities linked to the property. The Register of Inhibitions is a means to notify the public about individuals who cannot competently enter into property transactions.

Effect of appointment in relation to control of property

47. Where a judicial factor is appointed to deal with another person's property, a fundamental question is what they are entitled to do with that property by virtue of the appointment. Currently, the factor's position in relation to the property will depend on the purpose for which the factor has been appointed, which can lead to uncertainty as to the effect of the appointment. In some cases the factory estate will vest in (i.e. transfer to) the factor whilst in others the factor may only have a power of administration with the property not transferring to them. There is also some uncertainty as to whether both heritable and moveable property is transferred to the factor.

48. It is considered crucial to have a clear position which will apply in all cases. The approach taken in section 7 is to provide that the whole factory estate vests in the judicial factor. This would give the judicial factor the most complete suite of powers and there would be no requirement to go back to the court to ascertain whether it was competent, in relation to any particular piece of property, to act.

Consultation and alternative approaches

49. The current lack of clarity is a reflection of the age of the statutory provision and the common law development of the practice of the courts. One option is to maintain the status quo by providing that the functions of a judicial factor depend upon the reason for the appointment, however, this would result in continuing uncertainty.

50. Another possibility would be to provide that the judicial factor has a simple power of administration, but this raises many questions as to the factor's relationship with other parties, and what may properly be done in relation to the estate. In the past, this approach seems to have required frequent requests from factors for further powers, or at least for clarification of what powers the factor has.

Remuneration and reimbursement of judicial factors

51. At present, a judicial factor is paid a commission on production of the annual accounts. Judicial factors who commented on the matter indicated that this was not a satisfactory system.

52. While most of the duties of the judicial factor are administrative in nature (and therefore do not necessarily require to be carried out by professional persons such as solicitors or accountants), it is equally recognised that if professionals are appointed then they should be entitled to appropriate professional remuneration. The fixing of rates should also be sufficiently flexible to allow for variations in particular circumstances, or where unusual duties are imposed upon a particular judicial factor.

53. Section 9 provides that, before fixing any general rates, the Accountant must consult as appropriate, which would give existing and potential judicial factors an opportunity to make representations. Further, the Accountant would be able to adjust the general rates where individual cases so required.

54. Respondents to the Scottish Government’s 2019 consultation were agreed that commission should still feature as a method of payment for work undertaken and that it was appropriate to have the Accountant of Court involved in the fixing of judicial factors’ remuneration.

Part 2: Functions of judicial factors

55. The functions, i.e. the powers and duties, that a judicial factor has by virtue of their appointment are laid out in Part 2 (and Schedule 1) of the Bill. Part 2 provides much needed clarity on this issue and gives the court discretion to disapply any of the functions or confer additional ones in order to cater for the circumstances of each individual case while also setting out how a judicial factor can, if necessary apply for additional powers after their appointment.

General and standard functions of judicial factor

56. Some duties affect the factor from the beginning of the appointment, others stem from the nature of the appointment, and others arise from what may be required to be done in relation to the particular judicial factory.

57. Section 10 of Bill confers a general function on judicial factors to hold, manage, administer and protect the estate for the benefit of those who have an interest in it. The intention is to leave some flexibility for the judicial factor to exercise a sensible discretion and what is required by this general duty will depend upon the circumstances of the individual judicial factory.

58. Section 10(3) sets out the required standard of care of a judicial factor, who must exercise care, prudence and diligence in the performance of their functions. As the circumstances of each appointment and the functions conferred upon a particular judicial factor will vary, the Scottish Government’s view is that the standard of care should be expressed in general terms, against which the performance of the individual judicial factor can be measured.

59. Section 10(5) sets out clearly that a judicial factor is generally not permitted to delegate any functions. For reasons of flexibility, however, provision is made to allow for exceptions to this general rule and so delegation is possible where the court expressly allows it when appointing the judicial factor, where the Accountant authorises it or where this is permitted under another enactment.

Consultation and alternative approach

60. The SLC asked whether the judicial factor should be under a general duty to manage the estate proactively. The responses to that question were, on balance, against a duty of “proactive management”. The prevailing view among consultees was that it would depend on the circumstances of the particular judicial factory, but that a judicial factor should not be taking risks with the estate. As one respondent pointed out, “The desire to proactively manage may be a distraction for the factor from the main purpose of appointment.”¹⁶

61. The SLC considered these differing views with some care. On the one hand, a judicial factor should not be taking risks with the estate while on the other, a statutory re-statement that a

¹⁶ Responding to question 14 of the SLC’s Discussion Paper on Judicial Factors.

factor's duty is simply to “preserve” an estate might lead to a passive attitude to financial management. Ultimately, the Scottish Government agrees with the SLC’s conclusion that it would be appropriate to impose a duty on a factor to manage the estate for the benefit of those with an interest in it, but that that duty should not be qualified by requiring the factor to manage the estate “proactively”. The Scottish Government’s view is that the judicial factor should not always be under a duty to increase the value of the estate, particularly as a judicial factor can be appointed in a wide range of circumstances where such an approach might not be appropriate. Ultimately, the Scottish Government’s view is that this is a matter best left to the appointing court, having considered the circumstances of the case.

62. This approach will enable a conscientious judicial factor to steer a sensible middle course between, on the one hand, an over-enthusiastic programme of investment and, on the other, a tendency towards inactivity whereby the value of the estate declines because the factor fails to take prudent steps to manage it.

63. In its 2019 consultation, the Scottish Government asked whether interlocutors should contain provisions on how proactively an estate should be managed. Some respondents noted that such provisions would not be required in every case and to attempt to include such provision would be too prescriptive given circumstances can change and the full extent of the estate may not be known at the start of the process. It is considered that the approach recommended by the SLC was sufficient.

The standard powers

64. The question of what powers a factor has by virtue of their appointment is an area of uncertainty which has given rise to litigation, frequently in the form of requests to the court to grant additional powers.

65. Currently, when a judicial factor is appointed the court will often provide in its decision that they are appointed “with the usual powers”. What the usual powers are in a particular case will depend on the purpose for which the factor has been appointed. For example, a factor appointed to preserve an estate might not be thought to require power to sell a house. This can lead to uncertainty for both judicial factors and third parties dealing with judicial factors and has resulted in some factors being reluctant to carry out certain actions, even where the Accountant agrees that the action in question is desirable. Instead, judicial factors often opt to apply to the court for additional powers and this is an expense taken from the factory estate.

66. Section 10(6) of the Bill, read alongside the definition in section 10(7), has the effect that a factor will have all the powers of a natural person beneficially entitled to the property, and this would be readily understood as empowering the factor to do everything which an owner of an estate could do personally. Those powers include, but are not limited to, the specific powers listed in Schedule 1. In most circumstances this will avoid any doubt arising about the extent of a factor’s powers when dealing with relevant factory estate.

67. A judicial factor will also be able to apply to the court for additional functions if later events make this expedient. Equally, there may be circumstances in which the court may wish specifically to prevent the judicial factor from doing particular things (section 11(1)).

Consultation and alternative approach

68. It is possible to approach the matter of conferring powers in a number of ways. For instance, the SLC asked consultees whether the powers which any judicial factor could exercise should be laid out in an exhaustive list, and if that list should be set out in legislation. The strong feeling among consultees was that it would be useful – all those consulted agreed. This approach, however, would not provide sufficient flexibility given that it would be difficult to list every power a factor is likely to ever need.

69. Another approach would be to simply provide that a factor should have “all the powers of a natural person beneficially entitled to the property”. This approach might be difficult to understand for those who are not legally qualified, particularly perhaps by those working for institutions holding funds on behalf of the estate. Frequently those institutions prefer a provision which makes clear that the power in question is conferred unequivocally upon the factor.

70. When responding to the Scottish Government’s 2019 consultation, OSCR stated: “[...] we agree that it is helpful that the Bill addresses the issue of uncertainty in respect of Judicial Factors powers by providing that on appointment ‘all the powers of a natural person beneficially entitled to the estate’ shall vest in the judicial factor and by providing a list of powers which are expressly included. It is helpful that in addition, where necessary, at the time of appointment or at a later date the Court can grant additional powers to the Judicial Factor.”

Power of judicial factor to require information

71. In the course of the judicial factory, it may be necessary for the factor to seek information about the estate from others, for example companies, banks or other financial institutions etc. While some of this information may be readily available (whether for a fee or otherwise), the Scottish Government considers that it would be useful to provide judicial factors with a specific power to request information from persons and bodies provided that such information is relevant to the judicial factor’s functions.

72. Section 12 of the Bill confers this power on a judicial factor. Any person receiving a request under this section (with the exception of Ministers of the Crown, departments of the Government of the United Kingdom or public bodies with only reserved functions) would be under a duty to comply. It is not intended that this power should operate instead of any existing statutory method of requiring bodies to provide information. (This mirrors the power conferred on the Accountant by section 39.)

73. 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.

Consultation and alternative approach

74. An alternative approach would be to maintain the *status quo* which would see the Accountant hold a power to require information but no such power would be conferred upon a judicial factor. As mentioned above, a judicial factor is under a duty to ingather all the property

comprised in the judicial factor estate and the proper administration of factor estate might require information to be provided timeously. Reliance on the Accountant to request information could result in unnecessary delay and increased work for the Accountant.

Specific duties of judicial factor

Ingathering of the estate, inventory and management plans

75. One of the factor's first duties has always been to secure control over the whole of the judicial factor estate and the Bill preserves this duty (section 13). Once control of the estate has been secured, the factor has traditionally been under a duty to prepare an inventory of the estate to send to the Accountant. Again, the Bill preserves this duty (section 14). The first inventory is the baseline from which the factor's actions in relation to the estate are measured.

76. Section 15 lays out that, in addition to preparing an inventory, the judicial factor must prepare a plan as to how the estate is to be managed. This management plan must be approved by the Accountant, whose role is, ultimately, to supervise judicial factors on behalf of the court. If the factor and the Accountant cannot agree as to how the estate should be managed, it is the Accountant's views which will govern the matter.

Submission of accounts

77. After the preparation of an initial inventory, the factor must prepare accounts at intervals as specified by the Accountant (section 16). This will normally not be less than once a year or more than once every two years. These accounts will be considered by the Accountant as part of the Accountant's supervisory role. The accounts prepared by the judicial factor are the year-on-year demonstration that they have carried out the functions of the office satisfactorily.

Investment

78. If the estate has funds which could be invested, then there is a question as to whether the factor should be obliged to invest, or at least to consider whether to invest, those funds. On one view, the duty to manage the estate could be met, at least in a narrow sense, by simply keeping the funds in an appropriate bank account. But that would be unlikely to maintain their value in cash terms.

79. A judicial factor's general function is to manage the factor estate and what is expedient in terms of investment will depend on the circumstances of the individual case. The Scottish Government's view however, is that a factor should be under a specific duty to consider whether and how to invest the funds of the estate and, if the factor considers this would be appropriate, to invest the funds accordingly (section 17). Importantly, this duty is counterbalanced by requiring the factor to take professional advice when appropriate (section 10 (3)(b)).

Part 3: Dealings etc. with third parties

80. Part 3 is concerned with a judicial factor's dealings with third parties, including where they, in good faith and for value, acquire title from a judicial factor. For example, a judicial factor appointed to administer the estate of a missing person might need to consider selling heritable property in order to fund the purchase of more suitable accommodation. Such a transaction would

involve the judicial factor dealing with a third party who would acquire the property. Another example might involve a judicial factor appointed to an estate involving a business, such as a shop, which might involve the constant selling of inventory. This Part also makes clear that a judicial factor stands in place of the factory estate in any dealings with third parties, and is not generally personally liable for the costs of litigation raised on behalf of the factory estate.

Protection of person acquiring title

81. Section 10 and Schedule 1 to the Bill make clear what a judicial factor's powers are, but some third parties might require reassurance that titles transferred to them by a factor are valid. This might particularly be the case where the transfer is made by a judicial factor whose appointment is subsequently recalled. Section 20 clarifies the position. For example, a factory estate may comprise a number of shares which the judicial factor considers should be sold and the money obtained invested elsewhere, which might be particularly important where the value is decreasing rapidly. The title to such shares, however, might not be in the name of the judicial factor and this could be an issue when it comes to selling. Section 20 gives assurance to prospective buyers that their title to the property will be protected.

Expenses of litigation on behalf of factory estate

82. Some of the early case law on judicial factors seemed to produce a situation, in relation to litigation expenses, where the factor was considered to be personally liable for the expenses of an unsuccessful action, but with (in most cases) a right of relief against the judicial factory estate. It is considered, however, that where a judicial factor reasonably pursues or defends a court action then the costs of that litigation should fall upon the judicial factory estate rather than personally on the factor (section 23). Safeguards are provided elsewhere in the Bill as the judicial factor must enforce or defend any claim provided this is reasonable and prudent in all the circumstances (section 18).

Claims arising from acts or omissions of judicial factor

83. Section 24 sets out that, where a person suffers loss as a result of some act or omission of the judicial factor in the course of carrying out their duties as factor, damages should generally be payable from the estate. The estate would have a right of relief against the judicial factor to the extent that the factor was personally at fault.

84. The same also would apply in circumstances where a person suffers loss as a result of some act or omission of anyone for whom the factor is responsible. An example of this would be where the factor is running a business as part of the factory estate and an employee of that business causes harm to a third party in the course of the employment.

Consultation and alternative approaches

85. The SLC consulted on whether damages resulting from some act or omission of the judicial factor should generally be payable from the estate. All those who responded to this question were clearly in favour of such an approach.

Prescription of obligations

86. The matter of whether a claim against an estate over which a judicial factor is appointed is subject to five-year negative prescription is presently unresolved. Negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished. Where an obligation is extinguished no claims to enforce it can competently be raised. It was previously assumed that claims against the factory estate did not prescribe. Doubt, however, has been cast over that assumption by the case *Bank of Scotland v Laverock*¹⁷ leading to uncertainty.

87. The Scottish Government has taken the view that there is no reason why the ordinary law on prescription of obligations owed by and to the estate should cease to operate simply because a judicial factor has been appointed. The judicial factor should take over the estate as it is when the appointment is made, and the debts owed to and by the estate are part of the inherited situation.

88. Section 25 of the Bill resolves this issue by making clear that debts of the estate are subject to the ordinary rules in relation to prescription. As was mentioned by one respondent to the SLC's question on this matter, "We see no reason why a different rule should operate simply by virtue of the appointment of a judicial factor."¹⁸ The Law Society gave a qualified answer, agreeing to the general proposal put forward by the SLC but arguing that in some specific types of cases it may be useful to afford protection to the factor from creditors in order to realise the estate.

Consultation and alternative approaches

89. The SLC asked a series of questions on these matters in Part 3 of the Bill (identified above).¹⁹ All those who responded to the series of questions on these matters were clearly in favour of the approach taken in the Bill.

Part 4: Distribution, termination, recall and discharge

90. Part 4 sets out simplified processes for the distribution, termination, recall and discharge of judicial factors as well as appointment of a replacement factor where appropriate. A judicial factor should subsist only as long as necessary. There is clearly no point in continuing the judicial factor, with its associated expense, when the purpose for which the factor was appointed no longer exists. Nor can it sensibly be carried on if there are insufficient funds in the estate to meet that expense.

91. In many cases the date for termination will be clear, and the process will be routine. For example, a judicial factor on the estate of a child can terminate when the child reaches the age of sixteen years. That date is predictable, and the business of handing over the estate can be organised in advance. There are, on the other hand, cases where the appointment of the judicial factor, and the way in which the estate is managed, are not welcomed by some or all of those with an interest in the estate. The most obvious example is perhaps a partnership where the members are a couple who are involved in a protracted dispute. The procedures for termination of the factor must be flexible enough to cover all circumstances.

¹⁷ 1992 SLT 73.

¹⁸ See response to question 43 of the SLC's Discussion Paper on Judicial Factors.

¹⁹ See questions 37 to 44 of the Discussion Paper.

Termination, recall and discharge after distribution of factory estate

92. Currently, a judicial factor may be terminated by way of a formal procedure of judicial discharge and in limited circumstances by way of a less formal procedure of an administrative discharge. A judicial discharge requires an application to be lodged with the court and once it is lodged, the Accountant must put together a report, which will deal with the disposal of the estate, and the accounts produced by the factor. If these matters are in order, the court will formally recall the appointment and discharge the factor. If any of the parties' objects to the discharge, the court will make such inquiries as it considers necessary.

93. The administrative discharge involves the Accountant, on an application by the judicial factor, granting discharge where the purpose of the appointment has come to an end, or the estate is or will soon be exhausted. The existence of this administrative procedure enables matters to be brought to a conclusion more economically than where an application is lodged with the court. Its use is limited, however, because it applies only in certain circumstances.²⁰ The majority of consultees to the SLC's project agreed that the procedure for administrative discharge should be extended to all judicial factories and this is set out in section 29 of the Bill.

Consultation and alternative approaches

94. The SLC asked consultees whether the administrative discharge should be extended to cover all types of judicial factory, rather than only being available in the limited circumstances identified above. With the exception of the SCTS, all those who answered were in agreement. The SCTS took the view that because opposed cases would have to go to the court for determination judicial discharge should be the process for all cases.

Distribution of factory estate

95. Where more than one party is entitled to a share in the estate, the judicial factor prepares a plan to divide the estate. If the parties agree then matters proceed accordingly. If they do not agree, then the factor can apply to the court for discharge on the basis of the planned division of the estate. It will then be for the court, after hearing from parties, to determine how the estate is to be distributed. The court may amend the proposed division prior to approval.

96. Under section 27 of the Bill, a judicial factor who considers that the purpose of the appointment has been fulfilled, or that there are insufficient funds for the factory to continue, is to prepare a scheme for distribution of the estate and seek the Accountant's approval of the scheme. Where the Accountant approves the scheme and there are no objections from persons with an interest in the estate the factor must distribute the estate in accordance with the scheme. Where an objection is lodged, the Accountant must refer the matter to the court to be decided on.

97. It is possible, however, that a judicial factor who considers that the purpose of their appointment has come to an end may not be able to persuade the Accountant that that is the case. Or it may prove to be impossible to secure the Accountant's agreement to a proposed distribution of the estate. It may also be possible that there is someone with an interest in seeking the distribution of the estate who considers that the purpose of the appointment of the judicial factor

²⁰ These are where the judicial factory is terminated because of the recovery, death or attainment of the age of legal capacity of the beneficiary, or due to the exhaustion of the estate.

has been fulfilled, but who is unable to persuade the judicial factor, or the Accountant, to that view. Where this is the case, section 28 of the Bill sets out the procedure to be followed.

98. It would be up to the court, after hearing the parties, to decide whether the estate should in fact be distributed, in accordance with the applicant's proposals or otherwise, and would direct the judicial factor to proceed accordingly.

Other applications for recall and discharge

99. There will be occasions where a judicial factor may wish to seek recall of their appointment and discharge before the judicial factory comes to an end. In such cases, at present, the factor must proceed by way of application to the court and this same procedure is restated in the Bill. The judicial factor is an officer of the court, and is responsible to the court. The Scottish Government's view is that it is appropriate, therefore, that a factor who wishes to leave office before completing their responsibilities should seek the approval of the court, as laid out in section 31.

100. Under this provision it would also be possible for a person with an interest to apply to the court for the recall of the appointment of a judicial factor. The basis for such an application might be a lack of confidence in the particular judicial factor. It will be for the court to decide, on the basis of the representations made by the various parties, whether to appoint a replacement judicial factor, whether to grant recall of the appointment of the present judicial factor, and whether to grant the present judicial factor discharge.

Ending of judicial factor's accountability on discharge

101. Discharge is a recognition that the judicial factor has properly fulfilled the duties imposed by the appointment, and is entitled to be relieved of all future responsibilities and liabilities to the estate. A judicial factor who has carried out the duties of the office conscientiously, as demonstrated by the Accountant's approval of the audited accounts, should not be at risk of further challenge by those now responsible for managing the judicial factory estate. Section 34 of the Bill sets out that a factor, once discharged, has no further responsibility to account to the estate.

Consultation and alternative approaches

102. The SLC consulted on this matter and all those who responded agreed with the proposal. No alternative approach was suggested.

Part 5: Accountant

103. Since the coming into force of the Judicial Factors Act 1849 ("the 1849 Act"), the Accountant has been the officer responsible for supervising all aspects of the work of judicial factors. This Part deals with the functions of the Accountant, including power to instruct a judicial factor, to require information, and holding the factor accountable for any misdeeds or failures.

104. Under section 10 of the 1849 Act the Accountant has a general duty to "superintend generally the conduct of all judicial factors [...] and shall see that they duly observe all rules and regulations affecting them for the time." In order to carry out this function the Accountant has the powers to order judicial factors to do or not to do something where this is considered necessary. If

such order is not complied with, the Accountant must report this to the court. The Accountant must also provide advice and assistance to judicial factors.²¹

Accountant of Court: appointment, remuneration and fees

105. The Accountant is appointed and employed by the SCTS. The existing statutory provisions relating to the qualifications of a person holding that appointment require the Accountant to be a person “versant in law and accounts”. The Scottish Government considers that this should remain a necessary qualification for fulfilling the role, although it should not be necessary for the Accountant to be formally qualified in both, or either, discipline, as laid out in section 35. The SLC did not consult on the qualifications of the Accountant although the alternative of a new public official was consulted on but found no favour amongst consultees.

106. Given that any Depute Accountant of Court appointed would require to carry out the Accountant's functions in any circumstances in which the Accountant is unable to do so, the same criteria should apply to them (section 36).

General function of Accountant of Court

107. When a judicial factor is appointed by the court they are given wide powers in relation to the property of someone else, who may be in no position to scrutinise or monitor its management. It is essential that the conduct of a judicial factor is properly supervised. Since the persons with an interest in the property might be unable to carry out that function, it falls to the Accountant to see that the court's instructions to the factor are implemented as required.

108. The SLC consulted on the idea of an “Official Judicial Factor”, but consultees were uniformly of the view that the current system should continue. Accordingly, the Bill sets out that the Accountant remains an essential part of the institution of judicial factors. By virtue of section 37 supervision of the conduct of judicial factors continues to be the general function of the Accountant. The Accountant is also required to seek to ensure that judicial factors observe the terms of the relevant legislation and guidance.

Power of Accountant to instruct judicial factor

109. As well as monitoring what the factor is doing, the Accountant will have the power, where required, to advise and assist the factor. The Accountant has an unrivalled experience of the operation of judicial factories and will frequently be called upon to advise factors who are in doubt as to how they should proceed. In most cases the Accountant and the judicial factor will be able to cooperate well but, where this is not the case, under the present law, the Accountant has the power to direct the judicial factor as to how the duties of the office should be performed. This power is retained in section 37(2). A judicial factor who is aggrieved by a decision of the Accountant is able to have that decision reviewed by the court (section 45).

²¹ The Accountant of Courts functions were set out in detail in Appendix A of the Scottish Law Commission's Discussion Paper.

Misconduct or failure of judicial factor

110. It is necessary to have in place a mechanism for holding the judicial factor accountable for any misconduct. Under the existing legislative framework, there are various penalties which can be imposed in the event of misconduct on the part of the factor. Section 38 sets out that the Accountant is the channel through which these matters are dealt, and, where they are significantly serious, the Accountant must report them to the court. The court has wide powers to deal with any such misconduct. For example, a judicial factor who has invested money contrary to advice, and unwisely, might be required by the court to repay any loss to the estate. Since most judicial factors will be members of professional bodies, the Accountant must, where a matter is reported to the court, also report it to the relevant professional body.

Audit by Accountant

111. Under section 16 of the Bill, the judicial factor must periodically report to the Accountant with regard to the management of the estate. The Accountant's corresponding duty, under section 40, is to audit the accounts, either personally or by employing outside accountants. This is an important function as it is vital that the audit of the judicial factor's accounts should be meticulously carried out. Any auditing fees incurred in carrying out this exercise will be met from the factory estate.

Annual review

112. At present, by virtue of section 18 of the 1849 Act, the Accountant is required to produce an annual report of all judicial factories in Scotland. 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. An annual review provides a valuable means for public scrutiny of this important office and so this requirement is retained in the Bill. The detail of what is to be included in any report is left to regulations to be made by the Scottish Ministers (section 42).

ALTERNATIVE APPROACHES

Abolition of the office

113. From information gathered from the Accountant, as at 2022, there were 64 active judicial factories supervised by the Accountant, and there have been an annual average of 7 applications for appointment of a judicial factor for the years 2018 to 2022. The length of judicial factories varies greatly with some lasting for several years. The majority of applications concern trusts, executries, partnerships, or are brought under the Solicitors (Scotland) Act 1980. In spite of the relatively small number of cases, the SLC concluded that it was not appropriate to abolish the office. It is apparent that there will always be a need for an official to step into one of the many situations which arise for which there is no other suitable remedy. There will always be cases where assets need to be safeguarded and administered by an independent and accountable person.

A new public official

114. The SLC considered a further option based around a new public official, which it envisaged would significantly improve many aspects of the office of judicial factor. Such an official could

provide the required service more economically and efficiently than is the case under the current arrangements, and it might be possible to confer upon such an official wider general functions than might be appropriate in the case of ad hoc appointments. This option was not favoured by any of the consultees who responded to the SLC's discussion paper. Consultees were uniformly of the view that the current system of judicial factors should continue. The Scottish Government did not consult further on this matter.

Estates of missing persons

115. Judicial factors can be appointed to manage an estate when a person goes missing (factors *in loco absentis*). The Scottish Government consultation on judicial factors in 2019 considered, amongst other things, how judicial factors are used to handle a missing person's estate. Consultees raised a number of points and the Scottish Government committed to consider options for reform and the specific issues raised in relation to some of the SLC's recommendations.

116. The Scottish Government's view is that the general modernisation of the office recommended by the SLC is sufficient to address the points raised by stakeholders in relation to judicial factors managing estates of missing persons. For instance, with regard to concerns about the factor not possessing the requisite powers to, for example, rent out the missing person's property to cover mortgage payments, these will be addressed by the reformulation of the factor's general functions and the default powers conferred on a judicial factor (in particular the powers to grant a lease or tenancy in Schedule 1 of the Bill).

117. With regard to jurisdiction of the Scottish courts to appoint a judicial factor on the estate of a missing person, stakeholders were in favour of a similar approach being adopted to that in England and Wales in section 2(2) of the Guardianship (Missing Persons) Act 2017. However, the Scottish Government has concluded that it would not be desirable to make provision governing jurisdiction of the Scottish courts specifically in relation to estates of missing persons. While the Bill makes provision as to the eligibility criteria for a person to be appointed as a judicial factor, the general rules as to a court's jurisdiction to appoint a judicial factor are found in the common law. Generally, this will mean that where there is sufficient connection to Scotland in the overall circumstances of the case a factor may be appointed. Having a specific provision in relation to estates of missing people might create uncertainty as to the grounds of jurisdiction upon which the Scottish courts may appoint a judicial factor in other types of cases.

EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.

Equal opportunities

118. An Equality Impact Assessment (EQIA) has been carried out and has been published on the Scottish Government's website at <http://www.scotland.gov.uk/Publications/Recent>. The EQIA concluded that, overall, the Bill will have some positive impacts on identified groups. The Bill introduces a statutory framework which sets out clearly the essential features of the office of judicial factor. This will be beneficial for all individuals and bodies coming into contact with the office. In the case of children under the age of 16, where a judicial factor is appointed to hold and

manage their property, the Bill will bring clarity as to the appropriate processes to be followed and to which powers and duties the judicial factor has while being more user-friendly, resulting in those coming into contact with it being better informed about it.

Human rights

119. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR). In particular, the Government has considered the effect of the provisions of the Bill in relation to Article 1 of Protocol 1 and Article 6 ECHR, specifically the provisions in relation to vesting of the estate in the factor and the factor being given all powers of a beneficial owner of the estate.

120. It is the necessary consequence of the appointment of a judicial factor that the responsibility for holding, administering and managing the property concerned is removed from the person legally entitled to it. However, it is considered that the provisions are justified as representing a proportionate means of pursuing a legitimate aim in the public interest. Any such removal has to be justified in court proceedings in which the person concerned has a right to be represented, and the process is regulated throughout by a public official under the general supervision of the court.

Island communities

121. The Scottish Government does not anticipate any significant impact on island or rural communities as a consequence of this Bill. The provisions will apply equally to all communities in Scotland. The Bill will affect those who have an interest in the property concerned and who might choose to apply to the court for the appointment of a judicial factor. It will apply equally to property, heritable or moveable, located on an island or on the mainland. An impact assessment has been carried out and has been published on the Scottish Government website at <http://www.scotland.gov.uk/Publications/Recent>.

Local government

122. The Scottish Government does not expect any significant impact on Local Government, except insofar as local authorities might choose to apply to the court to appoint a judicial factor or any officer of local government chooses to accept the office of judicial factor.

Sustainable development

123. Given that the Bill is concerned with the office of judicial factor (how they are appointed by the court to gather, hold, safeguard and administer property which is not being properly managed, their functions and the supervisory function of the Accountant of Court, etc.), the Scottish Government does not anticipate any significant impact sustainable development goals.

CROWN CONSENT

124. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during a Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or

interests of the Sovereign, the Prince and Great Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of those things.

125. For the source of the requirement for Crown consent, see [paragraph 7 of schedule 3 of the Scotland Act 1998](#), and [rule 9.11 of the Parliament's Standing Orders](#). For further information about the considerations that go into determining whether Crown consent is required for a Bill see [Erskine May](#), the guide to procedure in the UK Parliament.

GLOSSARY

126. In this Memorandum, the following terms are intended to be read by reference to the descriptions of those terms set out below.

Accountant of Court	The officer of the Court of Session who supervises the conduct of judicial factors.
Case law	Judicial decisions as a source of law.
Caution	Security by which one party guarantees the payment of another's debt or the due performance of another's obligation or some other legal act such as the administration of a trust estate.
Common law	Law which does not stem from a statute book but is laid down in judicial decisions.
Estate	All the property that a person owns, both heritable (land) and moveable (non-land).
Ex proprio motu	Describes a decision made by a judge without being requested by a party to take that course.
Fiduciary duties	A duty in Scots Law under which a party (the fiduciary) is bound to prefer the interests of another (the beneficiary) over their own interests. This is in contrast to normal transactions, in which each party considers their own interests.
Interlocutor	The official document embodying an order or judgement pronounced by the court in the course of a civil action.

Intimation	Formal notification of proceedings to interested parties.
Intromit	To have access to and use property belonging to another.
Inventory	A list of a person's estate or property, heritable and moveable.
Judicial factor	A person appointed by a court to hold or administer property in Scotland where it is in dispute or where there is no one who could properly control or administer it. A judicial factor must find caution, and his or her work is supervised by the Accountant of Court.
Negative prescription	Negative prescription sets time-limits for when obligations (and rights), such as obligations under a contract, are extinguished.
Prorogate jurisdiction	Parties agree that jurisdiction is conferred on a particular court. Without the consent of parties, that court may not otherwise have jurisdiction to hear proceedings.
Vesting (of property)	A person is seised or vested in property when it becomes that person's property by legal right or authority.

This document relates to the Judicial Factors (Scotland) Bill (SP Bill 40) as introduced in the Scottish Parliament on 5 December 2023

JUDICIAL FACTORS (SCOTLAND) BILL

POLICY MEMORANDUM

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