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SPICe Briefing

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# Judicial Factors (Scotland) Bill

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This briefing covers the Judicial Factors (Scotland) Bill. A judicial factor is a person appointed by the court to gather in, hold, safeguard and administer property belonging to someone else. The Bill aims to reform the existing law associated with judicial factors.



10 April 2024  
SB 24-16

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# Executive Summary

The [Judicial Factors \(Scotland\) Bill](#) is a Scottish Government Bill. It is based on a [law reform project](#) by the [Scottish Law Commission](#) ('the Commission'), the independent body that makes recommendations for law reform to Scottish Ministers.

A judicial factor is a person the court can appoint to manage property which is not being appropriately managed, or otherwise would not be appropriately managed. At present, the majority of individuals appointed are legal and financial professionals.<sup>1</sup>

Depending on the circumstances, a judicial factor's role can include gathering in, holding, administering, protecting, and selling (or otherwise disposing of) the property.

For convenience, the property in question is referred to in this briefing as **the estate**.

Currently, **individual statutes set out specific circumstances in which judicial factors can be appointed**. For example, in certain situations, a judicial factor can be appointed to manage the estate of

- [a solicitor or a solicitors' firm](#)
- [a deceased person, including where their estate is insolvent](#)
- [a partnership](#)
- [a company](#)
- [a charity](#)
- [a trust](#)
- [a child or young person](#)
- [a missing person](#).

However, there are also circumstances where legislation says it is not possible to appoint a judicial factor. For example, there are [separate legal interventions](#), such as **guardianship**, for [incapable adults](#) (over 16s) under the [Adults with Incapacity \(Scotland\) Act 2000](#).<sup>2</sup>

[Appointments of judicial factors are currently relatively rare in practice](#).<sup>3</sup> One [Scottish Government policy aim](#) is to make appointment of a judicial factor more attractive as an option in a wider range of circumstances.<sup>4</sup>

Under the Bill, it would be possible for the court to appoint a judicial factor in [two alternative or coexisting sets of circumstances](#): a) it is not “possible, practicable or sensible” for the person who would otherwise do it to undertake that role; and b) it would be “to the advantage of” the estate.

In addition, [most of the existing pieces of legislation will remain in force which allow for the](#)

## appointment of judicial factors in certain specific circumstances.

Judicial factors are supervised by a public official called [the Accountant of Court](#), who also sets [judicial factors' rates of pay](#). With some changes to the detail, [the Bill proposes both these arrangements will continue](#).

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

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

# Introduction and overview

The [Judicial Factors \(Scotland\) Bill](#), a Scottish Government Bill, was introduced in the Scottish Parliament on **5 December 2023**. It was introduced by [Angela Constance](#), [Cabinet Secretary for Justice and Home Affairs](#). The Bill originated in work carried out by the [Scottish Law Commission](#) ('the Commission').

Documents relating to the Bill are available on [the Judicial Factors \(Scotland\) Bill page](#) on the Scottish Parliament website. They include:

- the [Judicial Factors \(Scotland\) Bill](#),<sup>5</sup> as introduced in Parliament
- the [Policy Memorandum to the Bill](#),<sup>6</sup> ('the Policy Memorandum') which explains the overarching objectives which the Scottish Government aims to meet
- the [Explanatory Notes to the Bill](#),<sup>7</sup> ('the Explanatory Notes') which explain the proposed purpose and effect of the individual provisions of the Bill.

The Bill is being considered under the Scottish Parliament's [special procedure for dealing with certain Scottish Law Commission bills which have been classified as non-controversial](#).

Accordingly, the [Delegated Powers and Law Reform Committee](#) ('DPLR Committee') is the lead committee for Stage 1 parliamentary scrutiny of the Bill. Stage 1 scrutiny looks at the general principles of a bill. The DPLR Committee issued a [call for views on the Bill](#), which closed on **15 March 2024**.

Previously, the Commission published a [discussion paper](#)<sup>8</sup> **in 2010** (usually referred to as its **consultation** in this briefing) and then its [final report](#)<sup>9</sup> **in 2013**.

The responses to the Commission's consultation are not publicly available. SPICe would like to thank the Commission and the Scottish Government for making the submissions the Commission received (and had consent to pass on) available to SPICe.

The Scottish Government published [its initial response](#)<sup>10</sup> to [the Commission's report](#)<sup>9</sup> in 2015 and later [consulted on the proposals itself in 2019](#).<sup>11 12</sup>

The two consultations, and the Committee's [call for views on the Bill](#), had **low response rates**. The consultations, and the call for views, are one of a range of topics [considered in more detail later in the briefing](#).

**Most of the Bill's provisions will apply only in Scotland.** However, there are certain provisions that the Commission and the Scottish Government consider should apply in the rest of the UK as well. The Scottish Government intends to discuss a **section 104 order** with the UK Government, with the aim of achieving this ([Policy Memorandum](#), paras 9 and 10).<sup>13</sup>

# The structure of the rest of the briefing

The remainder of this briefing is divided into the **two main sections**:

1. a section setting out [the background to the Bill](#), including, among other things, a description of [the current law and practice relating to judicial factors](#)
2. a section [discussing the substantive parts of the Bill in detail](#), which refers to individual responses to both the earlier consultations <sup>8 11</sup> and the Committee's recent [call for views](#).



# Background to the Bill

This section provides **an initial introduction to the Bill**. It covers the following topics:

- [the policy objectives of the Bill](#)
- [a summary of the current law and practice relating to judicial factors](#)
- [a brief overview of the consultations and Committee's call for views on the proposals in the Bill](#)
- [an explanation of some policy changes which did not make it into the Bill](#).

## The policy objectives of the Bill

The Government's **key policy objectives** for the reforms include: <sup>14</sup>

- **clarifying the law**, [including the extent of a judicial factor's powers](#), an area where there appears to be particular uncertainty
- **creating a comprehensive regime in one piece of legislation**, resolving the difficulties associated with having the relevant law spread over a number of different pieces of legislation
- **introducing a more efficient and flexible regime**, which might make the solution of appointing a judicial factor an attractive one in a wider range of circumstances.

In relation to the second bullet point, note that, the Bill (if it becomes law) would consolidate much of the law relating to judicial factors. However, [a number of existing pieces of legislation would remain in force allowing the appointment of judicial factors in specific circumstances](#).

In addition, it is anticipated that **rules of court**, made by [the Court of Session](#), will be updated to flesh out the more detailed aspects of the procedure relating to the appointment of judicial factors.

## The current law and practice relating to judicial factors

This sub-section of the briefing considers various aspects of **the current law and practice** relating to judicial factors. It covers the following topics:

- [the various sources of law relating to judicial factors](#)
- [the key terms associated with, and the main features of, the current system](#)
- [the circumstances in which a judicial factor can be appointed and are currently appointed in practice](#).

## Sources of law

The law applying to judicial factors comes from both **legislation** and the **common law or case law**, that is to say, the branch of law developed by judges reaching decisions in individual cases. There are also relevant powers in various **Acts of Sederunt**, also known as **rules of court**.

Judicial factors have a long history in Scots law, with mention of them in legislation pre-dating the Union of the Parliaments of Scotland and England in 1707.<sup>15</sup> Legislation on judicial factors today includes legislation from the 19th Century.<sup>i</sup> This legislation, and a range of **other relevant pieces of legislation**, [are discussed later in the briefing](#).

## Key terms and features of the system

It is helpful to be aware of some key terms associated with, and the main features of, the existing system.

[As already mentioned](#), the property for which the judicial factor is responsible is referred to in this briefing as **the estate**, although it is referred to in the Bill under a longer name, **the factory estate**.

The (slightly odd sounding) term, **judicial factory**, is the arrangement whereby a judicial factor has been appointed over an estate.

An **estate** can include **heritable property**, that is, land and buildings (including, for example, parts of buildings, such as flats). It can also include **moveable property**, as in, all property **other than** land and buildings. Examples of moveable property include:

- physical objects (such as vehicles, furniture, artwork, jewellery)
- money in a bank account
- shares and other investments
- rights to collect debts or other sums due.

[As noted earlier](#), a judicial factor is **appointed by the court**. The **general rule** is this can either be (the Outer House of) the [Court of Session](#) in Edinburgh, or [the local sheriff courts](#), with [Edinburgh Sheriff Court playing a key role in some circumstances](#).<sup>ii</sup> There are also some exceptions to that general rule [discussed later in the briefing](#).<sup>iii</sup>

At present, all judicial factors must **find caution** (*cay-shun*, pronounced to rhyme with 'station'). A **bond of caution** is usually arranged via an insurance company to satisfy this

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i [Judicial Factors \(Scotland\) Act 1849](#); [Judicial Factors \(Scotland\) Act 1889](#).

ii [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1980](#), section 14, which amended section 4(1) of the [Judicial Factors \(Scotland\) Act 1880](#).

iii [Solicitors \(Scotland\) Act 1980](#), section 41; [Court of Session rules](#), rules 14.3(b) and 68.2; [Charities and Trustee Investment \(Scotland\) Act 2005](#), section 34.

requirement. In accordance with the terms of the bond, the insurance company will then make good any financial loss caused to the estate as a result of the judicial factor's mismanagement or other wrongdoing.

Note that section 5 of the Bill proposes a policy change to this part of the law. Caution would no longer be required, save in exceptional circumstances.

As alluded to earlier, the judicial factor may be appointed to do various things with the estate. It depends on the purpose of their appointment, and the person to whom the estate belongs.

For example, in the context of businesses and other organisations [sometimes a judicial factor can be brought in to 'steady the ship'](#). The aim is that business or organisation can continue to operate as a going concern. On the other hand, there may be no prospect of that and the aim is to wind the business up and pay creditors.

Depending on the circumstances, the judicial factor may have to **realise the estate**, a process which (almost always) involves selling all the assets of the estate (or at least those which are worth selling).

Under the common law, judicial factors must comply with various **fiduciary duties**. These duties include the duty on the judicial factor (as **the fiduciary**) to put first the interests of another person (**the beneficiary**) over their own interests.<sup>16</sup> Note that the term **fiduciary** is pronounced '*fuh-do-shuh-ree*'.

At present, [and under the proposals in the Bill](#), judicial factors are **supervised by a public official** called [the Accountant of Court](#) ('the Accountant').

As well as judicial factors, the Accountant also supervises other types of official who are similar in function to judicial factors. For example, the Accountant supervises **administrators** who deal with property confiscated under [the Proceeds of Crime \(Scotland\) Act 1995](#).<sup>iv</sup>

An interesting feature of the supervisory arrangements (both existing and proposed) for judicial factors is that the same person who is the Accountant is also the [Public Guardian \(Scotland\)](#).<sup>v</sup>

The Public Guardian's responsibilities, in turn, include supervising separate legal interventions for [incapable adults](#) under the 2000 Act.

**No formal merger of the offices is proposed in the Bill.**

## The statistics on judicial factors in practice

At present, appointments of judicial factors are **relatively rare in practice**. There have

iv [Proceeds of Crime \(Scotland\) Act 1995](#), section 34 and schedule 1.

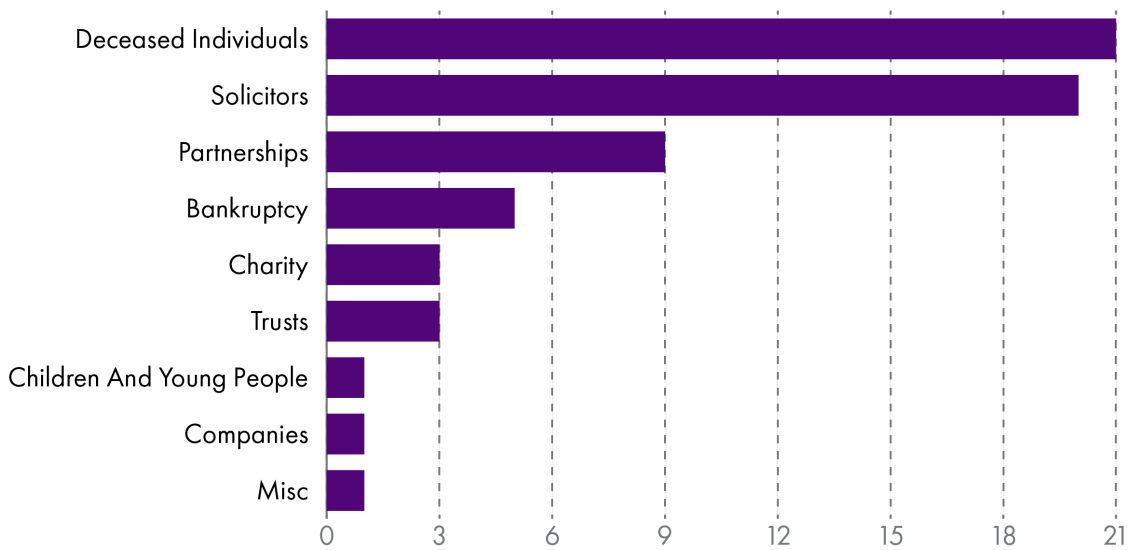
v [Adults with Incapacity \(Scotland\) Act 2000](#), section 6(1).

been an **annual average of eight applications** for such an appointment [for the years 2019 to 2023](#).

[As of 2022](#), there were **64 open cases** where judicial factors were being supervised by the [Accountant of Court](#). [By 2023](#), the equivalent figure was **42 open cases**.

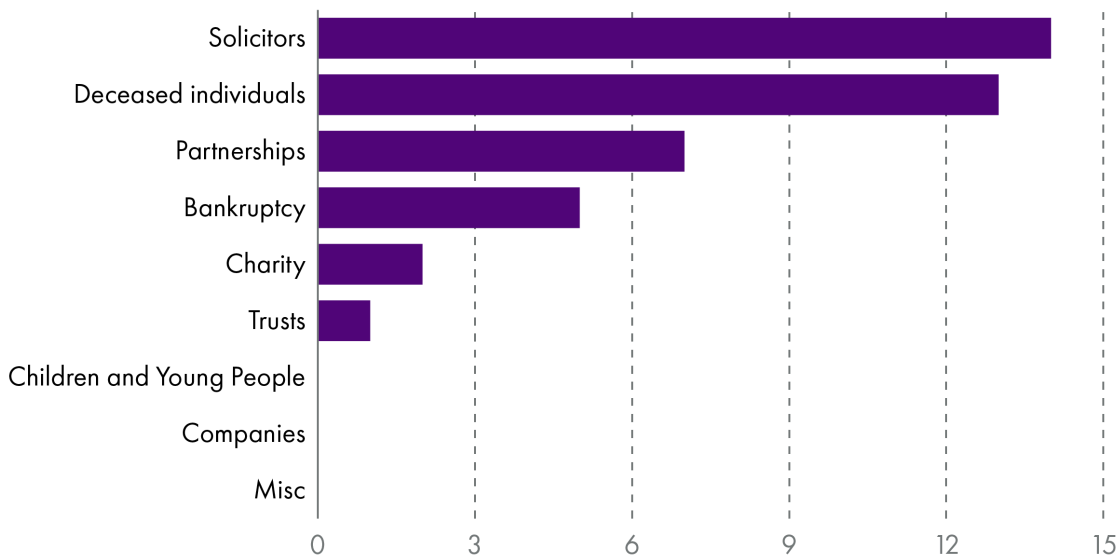
**Figures 1 and 2** below shows the distribution of the caseload across different subject areas for the years **2022** and **2023**, using [statistics from the Scottish Courts and Tribunals Service](#). Note its classification of the different categories is similar to, but not identical to, the one used by SPICe [in the next section of this briefing](#). References to **solicitors** below include **solicitors' firms**.

**Figure 1: Numbers of judicial factor case by category in 2022**



[Scottish Courts and Tribunal Service website](#)

**Figure 2: Numbers of judicial factor case by category in 2023**



[Scottish Courts and Tribunal Service/Centre for Scots Law, University of Aberdeen](#)

## When can a judicial factor be appointed?

As alluded to previously, factors can be appointed in a range of circumstances. These, in turn, are determined by **specific pieces of legislation**, and **the common law**.

The circumstances in which an appointment is possible are in more detail in this section of the briefing, under the following categories:

- [solicitors](#)
- [trusts](#)
- [charities](#)
- [deceased individuals, including where their estate is bankrupt](#)
- [partnerships](#)
- [companies](#)
- [children and young people](#)
- [missing persons](#)
- [pending litigation](#)
- [at the discretion of the court.](#)

Note that, [with a couple of exceptions, discussed in more detail later](#), the Bill proposes that the legislation discussed in this section of the briefing will remain in force.

### Solicitors: section 41 of the Solicitors (Scotland) Act 1980

The [Law Society of Scotland](#) ('the Law Society') is the professional body for Scottish solicitors. Its Council (its principal decision-making body) may apply to the Inner House of the [Court of Session](#) for the appointment of a judicial factor under **section 41 of the Solicitors (Scotland) Act 1980**.<sup>vi</sup>

The Law Society has an **in-house judicial factor** who also heads up its [interventions team](#). This team has a key role where a solicitors' firm closes down or is otherwise in trouble. In practice, [the interventions team appear to have an important role in the exercise of the statutory powers covered in this section of the briefing](#).

An appointment of a judicial factor under the 1980 Act can either relate to the estate of a solicitor or an incorporated practice. An **incorporated practice** includes a solicitors' firm taking the form of a **company** or a [limited liability partnership](#).<sup>vii</sup>

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vi [Court of Session rules](#), rules 14.3(b) and 68.2.

vii [Solicitors \(Scotland\) Act 1980](#), section 31(1A)(c).

The statutory power in the 1980 Act may be exercised where, under the Law Society's **accounts rules** or **rules relating to money laundering compliance**, the Council has carried out an investigation. If, after that investigation, it is satisfied that:

- there has been a breach of those rules **and**
- the solicitor or practice's liabilities exceed their assets **or**
- the condition of their accounting records make it not possible to reasonably ascertain whether liabilities exceed assets **or**
- it is likely there will be a claim on the [Guarantee Fund](#) <sup>viii</sup>

the Council may apply to (the **Inner House** of) [the Court of Session](#) for the appointment of a judicial factor.<sup>ix x</sup>

The [Guarantee Fund](#), also known as the **Client Protection Fund** is paid for collectively by Scottish solicitors. It exists to protect a solicitor or firm's clients from the dishonesty of a solicitor or a member of their staff.

[As noted earlier](#), appointments under the 1980 Act are a relatively common form of appointment in practice.

The [Commission's report](#) says that, under the 1980 Act, the judicial factor is traditionally tasked with the management and preservation of the property. It is carrying out that function primarily in order to protect the clients of the firm, and the [Guarantee Fund](#), from the consequences of faulty administration (actual or anticipated) on the part of the solicitor or the firm. <sup>17</sup>

Note that the Law Society has said that it would like additional powers under the 1980 Act to address what [it described in 2019](#) as a "serious problem" associated with its current powers under the 1980 Act in relation to **incorporated practices**. [See later in the briefing on this issue](#).

## **Trusts: the common law**

The court may appoint a judicial factor (instead of **a trustee**) over the estate of **a trust** under the **common law**.

A **trust** is a legal device for managing assets. A trust enables assets to be **legally owned** by one person or entity (**the trustee**) while a different individual, entity or section of the general public **benefits** from those assets in practice.

viii [Solicitors \(Scotland\) Act 1980](#), sections 34(1D), 35 and 41.

ix [Solicitors \(Scotland\) Act 1980](#), sections 34(1D), 35 and 41.

x [Court of Session rules](#), rules 14.3(b) and 68.2.

The purpose of the appointment may be to administer the estate, or [to realise the estate and distribute it](#), depending on the purposes of the trust.<sup>18</sup>

The [SCTS website](#) reports that these normally represent the longest running types of Judicial Factory, [with the oldest active case relating to a trust drawn up in 1826](#).

### Charities: Charities and Trustee Investment (Scotland) Act 2005

On application of [OSCR](#), the Scottish charities regulator, the [Court of Session](#) may appoint a judicial factor under **section 34** of the [Charities and Trustee Investment \(Scotland\) Act 2005](#).

This can happen where it appears that there has been misconduct in the management of a charity or where there have been unwarranted representations that an organisation is a charity.

### Deceased individuals: section 11A of the Judicial Factors (Scotland) Act 1889 and the common law

A judicial factor can be appointed to **the estate of a deceased person**. Their role can be divided into three broad categories, discussed further in this sub-section of the briefing.

[As mentioned earlier](#), judicial factors acting over the estate of a deceased person is a relatively common form of appointment in practice.

*No executor or executor not carrying out their role: section 11A of the Judicial Factors (Scotland) Act 1889*

**An executor** is someone appointed to wind up a deceased person's estate. Here the deceased person's preferred candidate can be named in the will, or an executor can be appointed by the court. Sometimes no-one eligible is willing to act in this role.

**Creditors** of a deceased person's estate, or others with **an interest in the estate** (such as those who stand to inherit from it), can apply to the court for the appointment of a judicial factor under section 11A of the [Judicial Factors \(Scotland\) Act 1889](#). The judicial factor would then act in place of an executor.

Such individuals can apply to the court if the deceased person did not name an executor in the will, or any such person is not willing to be appointed, or is not carrying out the role in practice.

Section 11A (inserted into the 1889 Act by legislation on bankruptcy)<sup>xi</sup> is often used where

xi Bankruptcy (Scotland) Act 1985, section 75(1) and schedule 7 para. 4 (now both repealed); words in section 11A

it is thought **the estate may be insolvent**.<sup>19 20</sup> If the estate is insolvent, then the judicial factor will ultimately arrange to pay all creditors a proportionate share of the available estate in settlement of the total debt due to them.<sup>xii</sup> The judicial factor appointed here is sometimes referred to as **the bankruptcy factor**.<sup>19</sup>

**Note that schedule 3 of the Bill proposes the repeal of section 11A of the 1889 Act.**<sup>xiii</sup> However, the general provisions of the Bill (**sections 1 and 3**) **enabling the appointment of a judicial factor** would, in effect, replace the function of this provision of the 1889 Act.

#### *The appointment of an executor is expedient: the common law*

At **common law**, a court may appoint a judicial factor to a deceased person's estate where this is seen to be **expedient**, that is convenient and practical to do. For instance, one could be appointed where the executors have been removed from office.<sup>21</sup>

#### *Child or young person entitled to be appointed as an executor: the common law*

Under common law, and as one of several legal options, a judicial factor can also be appointed where a child or young person (**under 16**) is the person entitled to be appointed as an executor to a deceased person's estate.

Such a person is known as a **commissary factor** and they act as an executor in place of the child.<sup>22</sup>

#### **Partnerships: the Partnerships Act 1890, sections 35 and 39, and the common law**

A judicial factor may be appointed over a partnership estate **under statute**<sup>xiv</sup> and **under common law**.<sup>19</sup>

In practice, a judicial factor might be appointed where the partners cannot agree on how the business should be run, or how the business should be wound up.<sup>23</sup> A judicial factor could, for example, **realise and distribute** the assets of the partnership.<sup>23 24</sup>

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substituted by the [Bankruptcy and Diligence etc. \(Scotland\) Act 2007](#), schedule 5, para 5; [Bankruptcy \(Scotland\) Act 2016](#), schedule 8, para 1.

xii [Judicial Factors \(Scotland\) Act 1889](#), section 11A(2) which cross-refers to the [Bankruptcy \(Scotland\) Act 2016](#), section 129 and schedule 1.

xiii [Judicial Factors \(Scotland\) Bill](#), schedule 3. Schedule 2, paragraph 9(3) of the Bill would insert section 129ZA after section 129 in the [Bankruptcy \(Scotland\) Act 2016](#). Here a technical part of section 11A of the 1889 Act would be repealed and re-enacted.

xiv [Partnership Act 1890](#), sections 35 and 39.



## Companies: the Companies Act 2006, sections 994-999, and the common law

A court may appoint a judicial factor to [a limited company](#) under **statute** (to protect members of the company from unfair prejudice)<sup>xv</sup> and also under **the common law**.<sup>25</sup>

An appointment is normally sought by one of the directors, where the relationship between directors is detrimentally affecting the running of the company. It can also be sought by an aggrieved shareholder where there has been misconduct by the directors.<sup>26</sup>

A judicial factor is usually appointed in this instance to carry on the business of the company.<sup>27 28</sup>

## Children and young people: the Children (Scotland) Act 1995

The [Children \(Scotland\) Act 1995](#) ('the 1995 Act') sets out **parental responsibilities and rights** (PRRs) in respect of children and young people (**under 16s**) in Scotland.

In ordinary circumstances, a child or young person's parent or guardian will be responsible for the child or young person's money and property. However, a judicial factor can be appointed over the estate of a child or young person **under three statutory provisions of 1995 Act**, discussed in more detail in this sub-section of the briefing.

*Children and young people in receipt of large sums of money: section 9 of the 1995 Act*

**Section 9 of the 1995 Act** covers the situation where a child or young person is entitled to a sum of money or property, for example, by way of inheritance.

Here individuals, including [executors](#) and [trustees](#), **may** and, in some circumstances, **must** apply to the [Accountant of Court](#) for a **direction** as to how the money or property should be administered. On receipt of such an application, the Accountant may, **as one option**, apply to the court in order to appoint a judicial factor.<sup>xvi</sup>

*Disputes relating to PRRs: section 11 of the 1995 Act*

**Section 11 of the 1995 Act** allows the courts to make a range of court orders to resolve disputes relating to [parental responsibilities and rights \(PRRs\)](#). For example, there might be disputes between two parents, or between parents and grandparents.

**Section 11 of the 1995 Act** contains a general power for the court to appoint a judicial factor over the child's property, or to refer the issue to the [Accountant of Court](#) to report on suitable arrangements for that property.<sup>xvii</sup>

xv Companies Act 2006, sections 994-999.

xvi [Children \(Scotland\) Act 1995](#), section 9(5)(a).

## *Children and young people in receipt of money through a court process: section 13 of the 1995 Act*

**Section 13 of the 1995 Act** covers the specific situation where a sum of money becomes due to a child as a result of court proceedings. For example, they might receive financial compensation for an injury suffered.

Under **section 13**, the court may, as one option, appoint a judicial factor to, "invest, apply or otherwise deal with the money for the benefit of the child concerned."<sup>xviii</sup>

## **Missing persons: Presumption of Death (Scotland) Act 1977 and rules of court**

Where a person goes missing for a long time, as well as the significant emotional impact, there can be practical implications for family members, such as having to deal with the person's property and financial affairs while they are missing.

A judicial factor can be appointed to manage the estate of a missing person. Such appointments are usually referred to as a **judicial factor 'in loco absentis'**.

Under **statute** this is after a person is declared dead by the court<sup>xix</sup> and, separately, under **rules of court**, it can happen in a wider set of circumstances.<sup>xx</sup>

**Note that schedule 3 of the Bill proposes revoking (that is, cancelling) the relevant Act of Sederunt.**<sup>xxi</sup> However, the general provisions of the Bill (**sections 1 and 3**) [enabling the appointment of a judicial factor](#) would, in effect, replace the function of this part of the rules of court.

On the use of judicial factors in relation to missing persons, the Scottish Government commented as follows in its [2019 consultation paper](#):<sup>29</sup>

“ It would seem that the powers are ... rarely used. Since 1985 the Accountant of Court has had to supervise only 12 in loco absentis cases. The last 2 cases were in 2007 and 2011 ... It is not clear why there have been so few applications for this type of factory given that there are around 700 open cases of persons in Scotland classified as long-term missing.”

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xvii [Children Scotland Act 1995](#), section 11(2)(g).

xviii [Children Scotland Act 1995](#), section 13(1).

xix [Presumption of Death \(Scotland\) Act 1977](#), section 2(2)(c).

xx Act of Sederunt (Factors Appointed by the Lords on the Estates of Pupils not having Tutors and Others) February 13th, 1730.

xxi Act of Sederunt (Factors Appointed by the Lords on the Estates of Pupils not having Tutors and Others) February 13th, 1730.

## Pending litigation: the common law

Under the **common law**, the court may appoint a judicial factor over property **pending litigation**. The principal duty of the factor under such an appointment is to preserve the property.<sup>30</sup>

## At the discretion of the court

Finally, the [Court of Session](#) can appoint a judicial factor under the **nobile officium**, that is, [this court's special fallback power](#).<sup>31</sup> This power exists where this is necessary to afford protection against loss or injustice. It is designed to cover the situation where no other part of the law can assist.

Note that the term, **nobile officium**, is pronounced '*noh-billy-offick-ay-um*.'

# The consultation process on the Bill

As noted earlier, both [the Commission](#)<sup>8</sup> and [the Scottish Government](#)<sup>11</sup> consulted on the Bill. The (DPLR) Committee also issued [a call for views](#). Key points about the consultations and the call for views are summarised in this section of the briefing.

Responses to the consultations and the call for views are also referred to throughout this briefing in relation to [the individual parts and sections of the Bill](#).

## The Commission's consultation (2010)

As noted earlier, the Commission published its consultation, a [Discussion Paper](#)<sup>8</sup>, in **2010**. The Commission received **fourteen responses** to that paper, broken down as follows:

- **accountants** (four responses)
- **legal bodies/lawyers** (three responses)
- **public bodies** (four responses), including the [Accountant of Court](#)
- **private individuals** (one response).

A majority of those responding to [the Discussion Paper](#) supported (many of) the Commission's recommendations. A couple of the Commission's original policy ideas, [discussed in more detail later](#), did not make it past this initial consultation stage.

## The Scottish Government's consultation (2019)

In the latter half of **2019**, the Scottish Government [consulted separately](#) on the recommendations in [the Commission's final report](#):

- [In Part 1](#), the Scottish Government consulted on those Commission recommendations where the Government's desire was **to implement them without changes**.
- [Part 2](#) and [Part 3](#) contained new policy ideas relating to **missing persons** and **children and young people** respectively.
- [Part 4 of its consultation](#) focused on several areas where the Government wanted to test the Commission's recommendations further, including, for example, **which court should be able to appoint judicial factors** ([now covered by section 1\(5\) of the Bill.](#))

The Scottish Government received **nine responses**, [eight of which are available online](#). These can be broken down as follows:

- **legal bodies/lawyers** (three responses)
- **public bodies** (three responses), namely [OSCR](#), the Scottish charity regulator, [HMRC](#), and a joint response from [the Accountant of Court/ the Scottish Courts and Tribunal Service \(SCTS\)](#)
- **interest groups** (one response), specifically, the charity, [Missing People](#)
- **private individuals** (one response).

In **August 2020**, the Government also published an [analysis of those consultation responses](#).

Subject to some specific policy points, all of those responding to the Scottish Government's consultation thought the recommendations in [the Commission's report](#) should be implemented. <sup>32</sup>

## The Committee's call for views (2023-2024)

There were [eleven responses](#) to the Committee's recent [call for views](#) on the Bill, predominantly **from those with a legal background**. Responses can be divided into the following categories:

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

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

Respondents to the call for views were generally supportive of the Bill. Some specific policy points, as well as detailed drafting points, were raised by respondents.

For example, on the policy side, the organisation, [Missing People](#), and [the Law Society](#), both thought that the Bill could have done more to address **the needs of families where people go missing**. The [Charity Law Association](#) was keen that there is further consideration of the Bill as it applies to **the charitable sector**.

Some specific policy points were also made by [the Law Society](#) and [the Faculty of Procurators of Caithness](#) about **the appointments of judicial factors to solicitors and solicitors' firms**. [The Law Society](#) also provided a detailed response on most of the provisions in the Bill.

## What did not make it into the Bill

Some policy ideas which **proposed by either the Commission or the Scottish Government on consultation did not make it into the Bill as introduced**. Some examples of these are highlighted in this section of the briefing.

### The Commission's ideas

A key policy idea which the Commission consulted on was that **a new public office of judicial factor** should be created, probably by expanding the role of an existing public office.<sup>33</sup>

The aim was to provide the required judicial factor service more efficiently and economically than under current arrangements ([Policy Memorandum to the Bill](#), at para 114).<sup>34</sup> If there was such a public office, the Commission thought there may then be no need for supervision of judicial factors by the [Accountant of Court](#).<sup>35</sup>

The idea of a public office of judicial factor did not attract support on consultation, and so it was abandoned.<sup>36</sup>

The Commission also considered whether the existing term, **judicial factor**, was descriptive enough of its function and proposed alternative names.<sup>37</sup> **Mixed views** were expressed on this issue on consultation<sup>38</sup> and ultimately, as is evident from the Bill, the existing name was retained.

Separately, the Committee also sought views on the terms **judicial factor** and **Accountant of Court** in [its recent call for views](#), but there was virtually no support for change.

## The Scottish Government's ideas

The Scottish Government's proposals which did not make it into the Bill included:

- an alternative proposal to the Commission's on **which court** should have authority appoint judicial factors ([discussed in more detail later in the briefing in relation to the relevant provision of the Bill](#))
- the specific proposals relating to [the safeguarding of children and young people's property the Children \(Scotland\) Act 1995](#), including how to take **the views of those children and young people** into account as part of the process
- various proposals relating to **missing persons**, [discussed in more detail in the next sub-section of the briefing](#).

### Missing persons

In **England and Wales**, there is **specific legislation** allowing the appointment of **guardians** in respect of the estates of missing persons.<sup>xxii</sup>

In its [consultation paper](#), the Scottish Government consulted on certain issues relating to missing persons which might have led to the creation of a specific regime in Scotland in this policy area.<sup>39</sup>

The respondents to this part of the Scottish Government's consultation expressed **mixed views** on the issues raised.<sup>40</sup> However, [the analysis of consultation responses](#) summarises their collective view of the current system of judicial factors (as it applies to missing persons) as follows:

“ ... the procedure was not widely known to the public or those within the professional sector and therefore not used. The process is viewed as complex, overly legalistic and costly. It was suggested that the current system of judicial factors usually works to protect the interests of creditors, rather than protecting a missing person's estate and ensuring that their dependents are looked after.”

Scottish Government, 2020<sup>41</sup>

Ultimately, **the Scottish Government has decided not to create a special regime for missing persons in the Bill**. It is relying on the proposed general reforms to the law of judicial factors to resolve outstanding issues ([Policy Memorandum](#), paras 116-117).

[As noted earlier in the briefing, in response to the Committee's recent call for views](#), the organisation, [Missing People](#), has expressed some concerns about the suitability of the Bill's provisions for the needs of families of missing persons.

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xxii [Guardianship \(Missing Persons\) Act 2017](#).

# The Bill in more detail

The **first five substantive parts of the Bill** are considered in more detail in this section of the briefing, along with relevant responses to the consultations and the Committee's [call for views](#).

## Points to note about this section:

- This section covers all the main proposals in the Bill, however, it does not include a description of every section of the Bill (for that purpose, see the [Explanatory Notes](#))
- This section mostly describes key provisions in chronological order, except in a few places where an alternative grouping is thought to make more sense.
- Not all proposals in the Bill were the subject of a specific question in the consultations, or otherwise attracted comment on consultation or in response to the Committee's [call for views](#).

## Part 1: The appointment of a judicial factor

This section of the briefing considers **Part 1 of the Bill**, which cover a range of issues relating to the appointment of a judicial factor.

Proposals of particular policy significance in Part 1 are as follows:

- [which court can appoint a judicial factor \(section 1\(5\)\)](#)
- [the circumstances in which a judicial factor can be appointed \(section 3\)](#)
- [who can be a judicial factor \(section 4\)](#)
- [caution \('cay-shun'\), broadly, a form of insurance for when things go wrong \(section 5\)](#)
- [the payment of a judicial factor \(section 9\)](#).

### The court's power of appointment (section 1)

Under the current law, to make an application for the appointment of a judicial factor, the applicant must have a **direct interest** in the estate.

A neighbour of a missing person's semi-detached property, who is concerned about the state of a shared roof, is an example of a person who the Commission thought might fall outside the scope of direct interest.<sup>42</sup>

**Section 1 of the Bill**, [in conjunction with section 3](#), would give a discretion to the court to appoint a judicial factor in respect of an estate.



The court would be able to make this appointment after an application to it by **an interested person**. This application may be made as a **stand-alone application** (section 1(1)) or **during other court proceedings** relating to the estate (section 1(3)(a)(ii)).

The Bill says an **interested person** is someone the court is satisfied has an interest in the appointment (section 1(4)). This would permit a broader group of people to apply than under the current law.

The court would also be able to appoint a judicial factor **on its own initiative** during other court proceedings relating to the estate (section 1(3)(a)(i)).

### What was said on consultation

[When it consulted](#), the Commission asked for views on **widening the class of potential applicants for the appointment of a judicial factor**.<sup>43</sup> Those responding to the relevant consultation questions, were generally supportive of such an expansion.<sup>44</sup>

In its response to the Committee's [recent call for views](#), [the Faculty of Advocates commented](#) on section 1's requirements to **intimate** (notify) interested individuals or entities in relation to an application to appoint a judicial factor.

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

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

## The general conditions for appointment (section 3)

Under the Bill, the court's power of appointment would be available in two, alternative or coexisting, sets of circumstances (section 3(1)(b)):

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

The key policy idea here is the introduction of a **general set of conditions** where a judicial factor can be appointed. [This relates to the Scottish Government's objective of making the option of a judicial factor an attractive one in a wider set of circumstances.](#)



The **general conditions** would sit alongside the remaining legislation allowing for the appointment of a judicial factor in specific sets of circumstances.

## What was said on consultation

In response to the Committee's call for views, the Centre for Scots Law (University of Aberdeen) and R3 commented on the **general conditions for appointment of a judicial factor**. They said that the term 'sensible' is "ambiguous and implies a value judgement." They would prefer 'reasonable' or 'appropriate'.

## Which court? (section 1(5))

**Section 1(5) of the Bill** covers the issue of **which court** can consider an application for the appointment of a judicial factor.

### The current law and practice

As a reminder, the current law says, **with some exceptions**, either the **Outer House** of the **Court of Session** in Edinburgh or a **sheriff court** can appoint a judicial factor.<sup>xxiii</sup>

**Appointments of judicial factors to solicitors/solicitors' firms, and to charities**, are two of the relevant exceptions. Only an application to the Court of Session (and, **in the case of solicitor/solicitor's firm**, to the **Inner House** of the Court of Session) is competent.<sup>xxiv</sup>

**Edinburgh Sheriff Court** is also the only competent sheriff court where the appointment relates to an estate held **other than** by an individual or **by a trust**.<sup>xxv</sup>

This rule gives this court a significant role in relation to **the estates of businesses**, and where **the person whose estate is to be managed lives overseas**.

In practice though, most judicial factors are currently appointed by the Court of Session.<sup>45</sup>

## What section 1(5) would do

**Section 1(5) of the Bill** proposes that it should still be possible for **either the local sheriff court** or **the Court of Session** to appoint a judicial factor (in most circumstances).

xxiii [Law Reform \(Miscellaneous Provisions\) \(Scotland\) Act 1980](#), section 14, which amended section 4(1) of the [Judicial Factors \(Scotland\) Act 1880](#).

xxiv [Charities and Trustee Investment \(Scotland\) Act 2005](#), section 34. [Solicitors \(Scotland\) Act 1980](#), section 41; [Court of Session rules](#), rules 14.3(b) and 68.2.

xxv [Judicial Factors \(Scotland\) Act 1880](#), section 4.

Section 1(5) also removes the special position of [Edinburgh Sheriff Court](#) in respect of applications over the estates of businesses. They would be able to be made instead in the sheriff court local to the business.

The Bill itself does not propose any specific alterations to the other exceptions to the general rule existing [in the current law, and in rules of court](#),<sup>xxvi</sup> **meaning that these exceptions would remain.**

## What was said on consultation

Both the Commission's<sup>46</sup> and the Scottish Government's consultations<sup>47</sup> consider the issue of **which court** should be responsible for judicial factor appointments. The issue also attracted comment in [the responses to the Committee's call for views](#).

### *The Commission's consultation*

The Commission sought views on whether both [the local sheriff courts](#) and [the Court of Session](#) should continue to be able to consider applications for the appointment of a judicial factor, or whether this should be restricted to one or other type of court.<sup>46</sup>

Of the seven responses received on this topic, a **majority** (four, including the judiciary) thought the current approach should remain, or mostly remain, for reasons including flexibility. As an example of a dissenting view, [the Accountant of Court](#) wanted [the sheriff courts](#) to be the only competent courts, on the basis she thought this was cheaper for applicants.<sup>44</sup>

### *The Government's consultation*

The Scottish Government later consulted on making [the sheriff courts](#), for the most part, the relevant court.<sup>47</sup>

There was a mixed response. Similar themes appeared as in response to the Commission's consultation, **although most of those responding were in favour of the Government's idea.**<sup>48</sup>

[The Accountant/SCTS](#) was more cautious this time about the advantages of moving judicial factor appointments to [the sheriff courts](#). They flagged various **potential resource implications** for the courts if numbers of appointments of judicial factors significantly increased as a result of the new legislation.

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xxvi [Solicitors \(Scotland\) Act 1980](#), section 41; [Charities and Trustee Investment \(Scotland\) Act 2005](#), section 34; [Court of Session rules](#), rules 14.3(b) and 68.2.

## Special cases

The Law Society was strongly in favour of [judicial factors appointments under the Solicitors \(Scotland\) Act 1980](#) ('the 1980 Act') continuing to only be heard in the [Court of Session](#).

OSCR, the Scottish charity regulator, was likewise in favour of appointments [in respect of charities](#) under [the Charity and Trustee Investment \(Scotland\) Act 2005](#) ('the 2005 Act') still only being heard in the [Court of Session](#).

### *The Committee's call for views*

In responses to [the Committee's call for views](#), there were also comments on what was [proposed as the general rule in the Bill](#) and on **possible exceptions** to that general rule.

### *The general position*

Both [the Law Society](#) and [the Centre for Scots Law \(University of Aberdeen\)](#) supported the approach in the Bill of [the sheriff courts](#) and [the Court of Session](#) continuing to share responsibility for (most) judicial factor appointments.

[The Centre for Scots Law](#) and [R3](#) thought that, as an additional possibility in the Bill, a business having **its registered office** in the geographical area of a local sheriff court should give that court authority to consider the appointment of a judicial factor (over the estate of that business). At present, the business has to have its **place of business** in that area, before an application to that court is possible.

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

### *Special cases*

For appointments relating to charities under the 2005 Act, [the Charity Law Association](#) said that **an application to the sheriff court** "may well be less expensive and a simpler process." It proposed an extension of the power of appointment to the sheriff court, [disagreeing with the approach of OSCR in response to the Government's earlier consultation](#).

[The Law Society](#) and [the Faculty of Procurators of Caithness](#) said that, in future, [the appointment of judicial factors to the estate of solicitors/solicitors' firms](#) should be made to the **Outer House** of the Court of Session. The Faculty thought this would "significantly reduce the cost."

Note that [the Commission recommended in its report](#) that the **rules of court**<sup>xxvii</sup> be later changed to allow appointments in respect of solicitors/solicitors' firms to be heard in the **Outer House**.<sup>49</sup>

## Who can be a judicial factor (section 4)

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

Section 4 largely restates the existing law, however, it also represents **a policy choice not to be more prescriptive in the requirements**. One motivation for this appears to be the desire on the part of the Scottish Government to allow family members to be appointed as judicial factors to the estates of missing persons.<sup>50</sup>

The Commission had also earlier noted that many tasks carried out by a judicial factor were administrative in nature and it was not clear they needed a legal or financial background to undertake them.<sup>51 52</sup>

There is a policy connection, explored later, between the decision to (continue to) permit a wide range of people to become judicial factors and provision in the Bill on:

- [any insurance requirements associated with the role \(section 5\)](#)
- [provision on what judicial factors are to be paid \(section 9\)](#).

### What was said on consultation

[The Commission consulted](#) on the possible qualifications which should be required for a judicial factor role. However, this was only in the context of [its \(now abandoned\) proposal to create a new public office](#).<sup>53</sup>

[The Government's consultation](#), and [the Committee's call for views](#), attracted wider commentary on the issue of who should be considered suitable for the role of a judicial factor.

#### *The Government's consultation*

[The Scottish Government consulted](#)<sup>54</sup> on [the Commission's approach in its report](#)<sup>9</sup>, to permit someone the court considers suitable to be appointed [\(also now in the Bill as introduced\)](#).

Four consultees responded on this point and were supportive of what was proposed. Flexibility in who could be appointed was identified as a benefit of the proposed approach by a couple of those responding.<sup>55</sup>

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xxvii [Court of Session rules](#), rules 14.3(b) and 68.2.

*The Committee's call for views*

In its response to the Committee's call for views, the organisation, [Missing People](#), supported in principle this part of the Bill. However, **the organisation also raised some practical concerns**, as follows:

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

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

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

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

Propertymark, the trade organisation for the property sector, [wanted the Bill to be more prescriptive in its requirements](#), including explicitly permitting **estate agents** to be appointed to the role.

## Interim judicial factors (temporary appointments) (section 2)

[As mentioned earlier](#), **section 2 of the Bill** says that it would be possible to appoint an **interim judicial factor**, that is, a temporary one. For the duration of their appointment, they would usually have **the same powers and duties as a permanent judicial factor**, unless the court to any extent restricted their powers (section 2(2)).

The [Accountant of Court](#) would be required to keep "under review" the progress of any interim arrangements (section 2(3)). No further details are provided on this point, such as, for example, a maximum permitted time period between reviews. Accordingly, the relevant time period would appear to fall within the discretion of the Accountant.

At present, such **reviews are required monthly** by the Accountant.<sup>44</sup>

**Interim judicial factors might be suitable in circumstances where speed of action in appointing a judicial factor is important.** For example, there may be cases where a relationship between business partners deteriorates to such an extent that no effective decision can be taken, putting the business owned by the partnership at risk ([Policy Memorandum](#), para 27).

## What was said on consultation

[When it consulted](#), the Commission asked a number of questions relating to interim judicial factors.

The Commission asked for views on whether interim judicial factors should have the same **powers and duties** as a permanent judicial factor.<sup>56</sup>

On the duties, **responses were mixed**. However, there was **majority support** from those responding on this point for the interim factor having the same powers. Two respondents in favour here thought the court should have a discretion to limit powers in a particular case.<sup>44</sup>

The [Accountant of Court](#) was an example of a dissenting view on both powers and duties. She thought powers and duties should be more limited (compared to a permanent appointment). This is because, she said, interested parties don't have the opportunity to be heard by the court prior to the appointment.<sup>44</sup>

The Commission also asked **whether the appointment of an interim judicial factor should have a time limit**, with the possibility of the court approving an extension.<sup>57</sup> There was **strong support** for this from among those responding on this point. [STEP Scotland](#) (a representative body for various professionals advising families), for example, thought a time limit of **six months** was appropriate. The [Accountant of Court](#) thought **nine months**, with the possibility of a further extension of **three months**.<sup>44</sup>

Finally, the Commission asked whether the Accountant should still be required to **review** the appointment, and whether the court should have **a discretion to fix the time period between reviews**.<sup>58</sup>

There was **unanimous support** for the first point, from those responding on this issue. A **majority of those respondents** also thought the current one month reporting requirement was excessive. They either made alternative **suggestions for alternative time periods**, or agreed that the court (or, for one respondent, the Accountant) should have **discretion to fix time period for further reviews**.<sup>44</sup>

## Caution ('cay-shun'): insurance against risk (section 5)

[Earlier in the briefing](#), the existing requirement on judicial factors to find caution ('cay-shun') was discussed. This is usually satisfied by taking out a **bond of caution** from an insurance company. The aim is to protect the estate from any financial risk associated with any mismanagement or wrongdoing by the judicial factor.

In a shift from the current position, **section 5 of the Bill** does not require caution to be routinely sought. Instead, it gives any court a discretion to require the judicial factor to find caution where there are **exceptional circumstances** which justify this.

### What was said on consultation

The Commission's <sup>59</sup> and the Scottish Government's consultations, <sup>60</sup> and responses to the Committee's call for views, considered the proposal now contained in **section 5 of the Bill**.

#### *The Commission's consultation*

The Commission asked for views on whether the requirement to find caution should be abolished. <sup>59</sup>

Of the **six respondents** who answered this question, there was **an even split** between those who this a good idea, and those who were against it. <sup>44</sup>

The policy support for abolition (three responses) was based on considerations of **expense** and **delay caused**. However, for **two consultees** supporting abolition, this support was qualified. For example, **STEP Scotland** wanted abolition only in situations where a **professional was being appointed**. <sup>44</sup>

The policy support for retaining the requirement to find caution (three responses) was based on **the need to protect the estate**. For example, Thomas Hughes (an accountant and judicial factor) commented: <sup>44</sup>

“ There would have to be very good reason for abolishing caution. It is there to protect all interested parties and the very requirement for caution is a protection and control over who can be appointed.”

The response from **the Accountant of Court** (in support of the courts having discretion relating to caution) thought there were potential misunderstandings among professionals about the scope of professional indemnity insurance. Her concern was that, at least at the time of the consultation, the risk of embezzlement might not be covered under such insurance for accountants. <sup>44</sup> **Note that SPICe does not have information on the up-to-date position on this issue.**

#### *The Scottish Government's consultation*

The Scottish Government's **consultation paper** asked a specific question as to whether the court should have the discretion to require caution only **in exceptional circumstances** (**the wording now in section 5 of the Bill**). <sup>60</sup>

**Only three of the nine respondents** to the consultation addressed this issue. **The Law Society was supportive**. It described it as "a risk-based approach" allowing flexibility to ask for caution where a risk is identified, but avoiding an undue burden on estates where the



risk is minimal.

[The Centre for Scots Law \(University of Aberdeen\)](#) suggested the proposed threshold was very high, and alternative wording could be where "prudent" to do so.

The [Accountant of Court/SCTS](#) did not offer a definitive view. However, it queried whether the proposed approach would offer sufficient protection in circumstances where, for example, a **family member** is appointed as a judicial factor. [The Accountant/SCTS commented:](#)

“ With the introduction of the judicial factor for missing persons, who are likely to be non-professionals in a high percentage of cases, it is our view that caution should be a mandatory consideration by the court, with caution only being dispensed with on (special) cause shown.”

### *The Committee's call for views*

In response to [the Committee's call for views](#), [the Senators of the College of Justice](#) and [the Law Society](#) expressed support for the general policy approach in this part of the Bill.

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

[The Sheriffs and Summary Sheriffs Association](#) made several specific points. For instance, it noted (without providing specific examples) that [the Accountant of Court](#) had certain powers associated with caution in section 5 that might be better signed off by the court.

## **Some consequences of the appointment (sections 6-8)**

**Sections 6-8 of the Bill** set out some immediate consequences associated with the appointment of a judicial factor.

**Section 7 of the Bill** says that the estate **vests** in the judicial factor. In other words, they acquire legal rights to it, in their capacity as a judicial factor, as if they were owner of it.

**Section 8 of the Bill** gives the factor **warrant to intromit**. This is, very broadly, the capacity to access and use property in the estate.

**Section 6 of the Bill** creates a new requirement that the notice of appointment of a judicial factor must be registered in an existing public register. This register is called the [Register of Inhibitions](#). It is overseen by the public body [Registers of Scotland](#).

### **What was said on consultation**

The issues covered by **sections 6-8 of the Bill** were considered at two main stages of the consultation process.



*The Commission's consultation*

The Commission asked if the appointment of a judicial factor should be publicised, and, if so, how.<sup>61</sup>

Of the **seven respondents** who commented on this, there was support for some form of publication, with some doubt as to whether a newspaper advertisement would suffice. Both [Registers of Scotland \(RoS\)](#) and [the Law Society](#) offered support for the specific idea of registration in the [Register of Inhibitions](#).<sup>44</sup>

*The Committee's call for views*

The issue of publicising an appointment also attracted some commentary in response to [the Committee's call for views](#).

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

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

## The payment of judicial factors (section 9)

**Section 9 of the Bill** covers the payment of judicial factors.

### The current approach

[In addition to their role in supervising judicial factors](#), the [Accountant of Court](#) currently sets **the commission** paid to judicial factors.

[The Scottish Courts and Tribunals Service website](#) says:

“ The hourly rate for the commission paid to a judicial factor takes account of their professional qualifications, experience and the hourly rate which would routinely be paid to them in the exercise of their normal duties (for example, as a solicitor or accountant). Annual increases will reflect increases to this amount, as well as current rates of inflation.”

The hourly rates payable (**from 1 April 2022**) are:

- **Partner - £252.50**
- **Manager - £181.80**
- **Support Staff - £90.90**

## What section 9 would do

**Section 9 of the Bill** says that:

- judicial factors are to be paid for their work out of the estate
- the rates are to be fixed by [the Accountant of Court](#)
- there is a right of appeal for the judicial factor to the court in relation to a decision of [the Accountant of Court](#), both on rate of pay and frequency of payment.

On the last bullet point, note that there is no equivalent right of appeal for a person or organisation with an interest in the estate.

## What was said on consultation

Both [the Commission's](#)<sup>62</sup> and [the Scottish Government's consultations](#)<sup>63</sup> considered the issue of judicial factors' pay.

### *The Commission's consultation*

One of the questions the Commission asked on consultation was the basis on which judicial factors should be paid.<sup>62</sup>

It received **five responses** on this topic, **four of which** were from **accountancy/legal professionals** or **associated professional bodies**.<sup>44</sup>

Comments included that the appointment of professionals to the role of judicial factor was the norm and they should be paid at their **normal commercial rates** for the work. One person responding thought that the commercial rate should reflect the size and complexity of the estate.<sup>44</sup>

The [Accountant of Court](#) commented as follows:

“ It is noted that, on the one hand, the Discussion Paper suggests that as a judicial factor is a professional, appointed because of his/her professional expertise, remuneration should reflect this expertise. Yet on the other hand, submits that most judicial factory work is administrative in nature, requiring no particular expertise (paragraph 9.9). Why is it necessary therefore for remuneration to be commensurate with the professional expert rate of a given factor?”

Scottish Law Commission, 2023<sup>44</sup>

[STEP Scotland](#) thought that there shouldn't be a single scale of fees but, rather, an approach that reflected the fact that different types of judicial factory work may need different levels of experience and seniority in a firm. It thought the fees should **encourage delegation**, where appropriate. <sup>44</sup>

### *The Scottish Government's consultation paper*

The Scottish Government's consultation paper also had questions associated with a judicial factor's pay. <sup>63</sup> It received **three responses** on this topic.

In terms of rates of pay, two responses ([from the Scottish Courts and Tribunal Service](#) and [the Centre for Scots Law, University of Aberdeen](#)) suggested that there was a need to distinguish between situations where a professional was acting and where someone else had been appointed.

The [Law Society's response](#) welcomed the flexibility of [the Accountant](#) setting rates of pay, to enable them to reflect the particular circumstances, although it did seem to assume professional appointments would be the norm.

### *The Committee's call for views*

**Section 9 of the Bill** attracted relatively little commentary in response to the Committee's [call for views](#).

[The Law Society did say that it was supportive of the approach proposed.](#)

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

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

## **Part 2 and schedule 1: functions of the judicial factor**

This section of the briefing considers **Part 2** and **schedule 1** of the Bill which cover the

proposed functions of a judicial factor.

The term **functions** refers to both the powers and duties of a judicial factor.

## The 'general function' (sections 10 and 11)

**Section 10(1) of the Bill** sets out the **general function** of a judicial factor. The general function is to hold, manage, administer, and protect the estate for the benefit of those with an interest in it.

The general function:

- can be **varied by the court**, either at the time of the appointment or later (**sections 10(2), 11(1) and (2)**)
- is **subject to any other legislation** relating to a judicial factor's functions (**sections 10(2)**)
- must be exercised with "care, prudence and diligence" and, in its exercise, the judicial factor must take **professional advice** when appropriate (**section 10(3)**).

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

When appointed, the judicial factor acquires the **standard powers**.

Broadly speaking, the **standard powers** are all the powers someone who owns the estate would have.

A (non-exhaustive) list of the standard powers is set out in **schedule 1**.

It is possible for the court to **vary the standard powers**, either at the time of the appointment or later (section 10(6),(7) and 11(1), (2)).

A key policy aim is to provide a more comprehensive list of standard powers than exists under the current law. The intention is to reduce the circumstances in which extra powers will be needed from the court.

### What was said on consultation

The **proposed powers of a judicial factor** attracted commentary at the stage of [the Commission's consultation](#),<sup>64 44</sup> and also in response to [the Committee's call for views](#).

*The Commission's consultation*

[The Commission asked for views](#) on its general approach to the **standard powers**<sup>65</sup> and

received supportive responses.<sup>44</sup>

### *The Committee's call for views*

In response to [the Committee's call for views](#), [the Charity Law Association](#) said it thought that [the standard powers](#) needed to be explicitly linked to the situation **when a judicial factor is appointed in respect of a charity**. They should:

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

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

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

## **The power to request information (section 12)**

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

The information requested must be that which the judicial factor **reasonably considers relevant to the judicial factor's functions**.

The general rule is that the body or individual receiving the information notice is required to comply with it **without delay** (although what constitutes delay is not further specified) (section 12(3)).

Certain organisations and individuals, such as bodies exercising reserved functions, like [HRMC](#), or UK Government department or ministers, are **exempt from the obligation to comply** and **can choose whether to do so** (section 12(4)). This differs from the approach in [the Commission's draft Bill](#) (also section 12).

### **What was said on consultation**

In response to the Committee's [call for views](#), [the Sheriffs and Summary Sheriffs](#)

[Association](#) and [the Law Society](#) both referred to **the exemption** in section 12(4) from the general requirement.

Both organisations commented that **the policy effect of the exemption would be to weaken the information-gathering powers** and sought clarification from the Scottish Government as to the rationale for the exclusion. The Law Society also queried **how information was to be gathered about funds held outside Scotland**.

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

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

The Faculty also commented that the section also currently **lacks any sanction for non-compliance**.

## Duties of the judicial factor (sections 14-17)

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

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

### What was said on consultation

Various aspects of these proposals were explored [when the Commission consulted](#), and in response to [the Committee's call for views](#).

#### *Management plan (section 15)*

The Commission consulted on whether the judicial factor should be under **a duty to prepare a management plan**.<sup>66</sup> It received six responses on this point, with **a majority** (four responses) in favour. Two respondents offering support ([the Law Society](#); [STEP Scotland](#)) said the requirements must not be too prescriptive.<sup>44</sup>

### Accounts (section 16)

The Commission asked for views in general terms about whether the approach to the accounts for judicial factors should be updated.<sup>67</sup> Six responded on this point with **four agreeing**, or largely agreeing, and two opposed.<sup>44</sup>

The Commission also sought views on **the frequency with which accounts must be lodged**.<sup>68</sup>

Currently, **the requirement is the accounts are lodged annually**.

**As noted earlier, section 16 of the Bill** would give increased flexibility relating to the accounts. With some discretion for **the Accountant of Court**, the accounts must be lodged **not less than once a year** (save in exceptional circumstances) and **not more than once every two years**.

In response to the Commission's consultation, the respondents were supportive of the current arrangements. A couple argued for some increased flexibility. One respondent favoured a requirement to lodge accounts every six months.<sup>44</sup>

**In response to the Committee's call for views**, the Faculty of Procurators of Caithness said there should be a legal duty to send copies of the accounts to interested parties. They should have to provide evidence that they have done this **when lodging the accounts with the Accountant**.

### Investments (section 17)

The Commission consulted on a stronger duty compared to **what now appears in section 17**.

Specifically, the Commission consulted on creating a statutory duty on the judicial factor to proactively manage the estate, including to invest it (**not just to consider doing so**).<sup>69</sup>

**These proposals did not attract support on consultation.**<sup>44</sup> For example, one accountant commented:

“ To make it a duty of a Judicial Factor to manage the estate pro-actively leaves that open to interpretation and care needs to be taken to avoid a situation whereby a Judicial Factor who pro-actively manages an estate is accused by some disgruntled beneficiary of having speculated with the estate's assets because the value of, say, a portfolio of stocks and shares has declined in value.”

Scottish Law Commission, 2023<sup>44</sup>

## Solving disagreements (section 19)

**Section 19 of the Bill** applies if the judicial factor was appointed because people were



unable to agree how an estate should be managed. For example, it might apply if partners in a partnership were unable to agree how the business should be run and this, of itself, was jeopardising the business.

A judicial factor appointed against the backdrop of a dispute must, by whatever methods they think appropriate “promote agreement” between the people concerned. The judicial factor may act as a **mediator** or **arbitrator** or appoint a person to act in this capacity (**section 19**).

**Mediation:** Mediation involves an independent and impartial person (**the mediator**) helping two or more individuals to negotiate a potential solution to a problem in a confidential setting. The people involved in the dispute must be willing to participate voluntarily. They, not the mediator, decide the terms of any subsequent agreement. The outcome is not legally binding, without further steps being taken by the people concerned.

**Arbitration:** In arbitration, a third party (**the arbitrator**), who often has specialist expertise or knowledge, will decide how the dispute should be resolved. The outcome is legally binding. The law relating to arbitration in Scotland was significantly reformed by the [Arbitration \(Scotland\) Act 2010](#).

## What was said on consultation

The Commission asked for views on whether a judicial factor should be under a duty to encourage and assist parties in settling a dispute.<sup>70</sup>

It received six responses on this point, with **an even split of views** on whether this was desirable.<sup>44</sup> For example, in favour, [the Accountant of Court](#) thought it could save on court time to require this.<sup>44</sup> Against such a move, for example, one accountant commented:

“ No – you can take a horse to water etc etc – generally a partner/shareholder seeks the appointment of a Judicial factor as a last resort – often after years of failing to reach a consensus with his fellow partners/shareholders.”

Scottish Law Commission, 2023<sup>44</sup>

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

## Other issues raised on consultation in relation to Part 2

Those participating in the consultation process made some wider points about the powers and duties of judicial factors found in **Part 2 of the Bill**.



## Powers of a judicial factor

Some respondents in the consultation process suggested **additional powers** for the judicial factor.

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

Also in response to the [call for views](#), the Faculty of the Procurators of Caithness had some specific proposals on judicial factors' powers [where a judicial factor is appointed in respect of a solicitor/solicitors' firm](#). For example, in the case of a partnership or a "corporate practice", it proposed that the powers over the estate would only relate to the estate of the firm or company, **not** the personal estate of the individual partners.

### The 1980 Act: additional powers relating to incorporated practices

In [its response to the Scottish Government's 2019 consultation](#) on the proposals in the Bill, the Law Society said that it would like additional powers [under the 1980 Act](#) to address a "serious problem" associated with its current powers and **incorporated practices**.

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

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

The point was also repeated (albeit more briefly) [in the Law Society's response to the Committee's call for views](#).

## Duties of a judicial factor

In response to [the Committee's call for views](#), some respondents mentioned **additional duties** they thought could be expressly stated in the Bill. These included:

- an explicit reference to [the fiduciary nature of the judicial factor's duties](#) ([Professor Nicholas Grier \(Abertay University\)](#); [Centre for Scots Law \(University of Aberdeen\)](#); [R3](#))
- a specific duty on judicial factors to **not unduly delay** in dealing with the estate under their control ([The Faculty of the Procurators of Caithness](#))
- [in relation to appointments relating to solicitors/solicitors' firms under the 1980 Act](#), a duty **to report suspected criminal activity** and **to co-operate with the police/the Law Society** in any associated investigations ([The Faculty of the Procurators of Caithness](#)).

## Part 3: the judicial factor's legal relationships with other individuals or organisations

This section of the briefing considers **Part 3 of the Bill**.

**Part 3** covers a range of specific issues associated with the judicial factor's **legal relationships with third parties**, that is individuals and organisations not otherwise directly connected with the estate.

### Buyers of property from the estate (section 20)

**Section 20 of the Bill** contains certain protections for a **buyer of property** who buys that property from an estate managed by a judicial factor.

### Debts and other obligations (section 21)

**Section 21 of the Bill** says that a judicial factor is liable (in their capacity as factor) for **any debt or other obligation** due to a third party.

### Contracts (section 22)

**Section 22 of the Bill** sets out two rules relating to **contracts entered into by a judicial factor** in their capacity as factor.

These rules would apply as long as the other person or organisation who has entered into a contract ought to have been aware that the judicial factor was entering into their contract in their capacity as judicial factor.

**Section 22 of the Bill** says any contractual obligations (such as an obligation to pay money) will be enforceable out of the estate.

It also says that any court proceedings associated with the contract should be raised against the judicial factor (in their capacity as factor).

### Legal costs (section 23)

During litigation, both sides will likely incur legal costs. At the end of litigation, a court typically makes an **award of expenses**, in other words, it stipulates who should pay the legal costs incurred. The rule it usually applies is that **expenses follow success**. In other words, the losing side pays the winning side's legal costs (as well as their own).

**Section 23 of the Bill** says that where the judicial factor is involved in court proceedings on behalf of the estate, there is a proposed rule that **any legal costs** (which the court

orders the judicial factor must pay) would come out of the estate.

## Financial damages (section 24)

**Section 24 of the Bill** covers the situation where a court decides a judicial factor must pay **damages** to someone (that is, financial compensation), for example, under the law of negligence.

Here the proposed general rule is that the damages ([and any legal costs the court says the judicial factor must pay](#)) will come out of the estate. However, there is discretion for the court to decide otherwise if a breach of duty by a judicial factor caused the loss (**section 24**).

## Time limits on obligations (section 25)

**Section 25 of the Bill** covers the interaction between **the law of prescription** and the appointment of a judicial factor.

The **law of prescription** provides for the extinction of rights and obligations (such as an obligation to pay a debt) **after the passage of a period of time**.

Subject to one exception, **section 25** sets out the rule that the appointment of a judicial factor does not affect the ticking of the clock on any prescriptive time period in respect of legal obligations due to, or by, the estate. It will continue as if no judicial factor had been appointed.

## Judicial factors and trusts (section 26)

**Section 26 of the Bill** applies [where the estate forms part of a trust](#). Furthermore, the judicial factor wishes to exercise a function which [a trustee](#) would ordinarily be entitled to exercise in relation to the estate, but the judicial factor considers that the terms or purposes of the trust do not allow for it.

Section 26 sets out a procedure for the judicial factor to get consent to exercise the function in question from [the Accountant of Court](#).

## What was said on consultation

**Part 3 of the Bill** attracted commentary at the stage of the Commission's consultation and in the [the Committee's call for views](#).

## The Commission's consultation

The Commission consulted on most of the proposals now contained in Part 3.

**Commentary was relatively limited** but those that responded were generally supportive, with some minor points made.<sup>44</sup>

The Commission consulted on **a slightly different proposal**<sup>71</sup> than the one in **section 23 of the Bill** as introduced. To recap, **section 23 says legal costs should always come out of the estate**. The Commission's proposal, which was well-received on consultation,<sup>44</sup> would have retained the basic rule. However, it would subsequently allow the estate to recover costs incurred from the judicial factor **when the judicial factor had engaged in unnecessary litigation**.<sup>71</sup>

## The Committee's call for views

**Part 3 of the Bill** was generally well received by those who commented on it in response to **the Committee's call for views**. For example, both **the Senators of the College of Justice** ('the Senators') and **the Charity Law Association** described it as "sensible."

Several respondents (including **the Senators; Centre for Scots Law (University of Aberdeen); Professor Grier, Abertay University**) made suggestions relating to the drafting of this part of the Bill.

Separately, **the Law Society flagged a couple of areas** where the Bill as introduced differed from the Commission's draft bill and sought clarification of the policy rationale for this. For example, it noted that that **the Commission's draft Bill (at section 30)** made specific provision on judicial factors and **unjustified enrichment**, whereas the Bill as introduced does not.

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

The Scottish Government's position is that **compensation payable for unjustified enrichment** is now covered as part of **the general rule on damages under section 24 (Explanatory Notes, para 46)** rather than by a specific provision in the Bill.

Another legal remedy for unjustified enrichment is **the return of the property concerned**, which is not covered by section 24.

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

In relation to **section 26 of the Bill**, on trusts, **where the Accountant must reach a**

decision, the Sheriffs and Summary Sheriffs Association noted that there was no express power for an objector to appeal the Accountant's decision and wondered if one should be added.

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

This section of the briefing covers **Part 4 of the Bill**. It makes provision on topics associated with **the end of the judicial factoring arrangement** and ending **a judicial factor's role** in the estate.

### A general overview

Currently, a judicial factor arrangement may be terminated by way of **a formal procedure involving the court**. In addition, in limited circumstances, it can be terminated by way of a less formal **administrative procedure**, involving [the Accountant of Court](#).

**Part 4 of the Bill** contains both [administrative procedures](#) and [court-based procedures](#).

A key policy approach is expanding the circumstances in which use of an administrative procedure is possible.

### The administrative procedure (sections 27, 29 and 34)

**Part 4 of the Bill** contains **administrative procedures** which allow [the Accountant of Court](#), on **application by the judicial factor**, to:

- authorise the distribution of the estate (**section 27**)
- end the situation where the estate is subject to a judicial factor arrangement (**termination**) (**section 29(2)(a)**)
- cancel (**recall**) the current judicial factor's appointment (**section 29(2)(b)**)
- free the judicial factor from legal liability (that is, **discharge** them) in respect of their acts or omissions associated with the estate from that point onwards (**sections 29(2)(c)**).

Section 34 of the Bill sets out the main rule that **discharge** frees the judicial factor from liability as factor under civil law (for example, under the law of contract or the law of negligence).

However, under section 34, the judicial factor is not freed from liability under criminal law, or any civil law liability associated with such criminal law liability.

The **administrative procedure for distribution** can be used in any of the following circumstances:

- the purpose of the judicial factor appointment has been fulfilled, or no longer exists
- there are insufficient funds for the judicial factor arrangement to continue
- a judicial factor was appointed in the event of a disagreement that then cannot be resolved (**sections 19(4) and 27(1)**).

In any of these circumstances, if someone objects to the scheme for distribution proposed by the judicial factor as part of the application, **the issue must be referred to the court to determine** (section 27 (6)(7)(8) and (9)).

## The court-based procedures (sections 28, 30 and 31)

Part 4 also contains **court-based procedures**.

For example, there is a procedure for someone with **an interest in the distribution of the estate** to apply to the court for distribution of it. If the court application is successful, **the administrative procedure** can then be used to carry out the remaining legal steps of **termination, recall and discharge (sections 28 and 29)**.

There is also a procedure for a **judicial factor**, or **someone with an interest in distribution**, to apply to the court to end the judicial factor's role in an estate (that is **recall and discharge**). This is in a broader set of circumstances than those covered by the administrative procedure (**section 31**).

There is also a duty on **the Accountant of Court** to apply to court in order that it can appoint a new judicial factor. This duty exists where the original factor has **either died or is not performing their functions** (and no application for a new appointment has otherwise been made) (**section 30**).

## What was said on consultation

**Part 4 of the Bill** was mainly considered at the stage of **the Commission's consultation** and **the Committee's call for views**.

### The Commission's consultation

**The Commission's consultation** contained some high-level questions on the approach now contained in Part 4 of the Bill.

Significantly, the Commission sought views on whether the procedure for **administrative discharge** should be extended to cover **all circumstances**.<sup>72</sup> There was support for this from **five out of the six respondents** commenting on this issue. However, **the Accountant of Court**, who would be responsible for the administrative discharges, was opposed.<sup>44</sup>

## The Committee's call for views

Those responding to [the Committee's call for views](#) were **generally supportive** of **Part 4 of the Bill**, with some specific points being made. For example, [Professor Grier](#) and [the Senators](#) both described Part 4 as "sensible."

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

In Part 4 there are obligations to notify those with **an interest in the estate** when certain things happen. For example, this is the case when [the Accountant of Court](#) approves a scheme for distribution of the estate. [The Charity Law Association](#) argued this obligation needed to better **reflect the wider public interest** associated with certain charities. It suggested a requirement to notify [OSCR, the charities regulator](#), might satisfy that aim.

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

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

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

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

## Part 5: the Accountant of Court

This section of the briefing considers **Part 5 of the Bill**. Part 5 covers **the supervisory role** of [the Accountant of Court](#) ('the Accountant') over judicial factors.

The Accountant's role in relation to a judicial factor's pay [is covered earlier in the briefing \(section 9 of the Bill\)](#).

## Background

[The Accountant's](#) supervisory role over judicial factors exists as part of her current role.

On the underlying policy here, the Commission commented in [its report](#):



“ The importance of such a function is obvious. The judicial factor is given – by the court – sweeping powers in relation to the property of someone else, who may in many cases be in no position to scrutinise or monitor its management. It is essential that the conduct of such a factor should be properly supervised.”

Scottish Law Commission , 2013<sup>73</sup>

The Accountant is currently appointed and employed by [the Scottish Courts and Tribunals Service \(SCTS\)](#).

As noted earlier, the same person who holds the office of the Accountant also acts as the [Public Guardian \(Scotland\)](#) in respect of supervision of the (separate) legal interventions under the [Adults with Incapacity \(Scotland\) Act 2000](#). The Scottish Government’s policy intention is that this overlap of roles will continue.<sup>74</sup>

## The general approach in Part 5

As alluded to in earlier sections, the general approach in **Part 5 of the Bill** is that [the Accountant](#) should **continue to perform a supervisory role in respect of judicial factors**.

In the Committee's [call for views](#), it sought opinions on this general principle. The organisation, [Missing People](#), was the only respondent who was unsure.

They said it would depend on the skill set of the person appointed, and the guidance they received, as to whether they could cater to the needs of the families of missing people.

There are also **various specific proposals** relating to the Accountant in **Part 5**. The briefing now considers the details of the arrangements proposed for the Accountant under Part 5.

Note that, in response to [the Committee's recent call for views](#), while some policy points were raised, [mainly by the Law Society](#), there was a good level of support for the details of the approach in Part 5.

## Appointment, remuneration and fees (sections 35 and 36)

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

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



The Accountant is to be paid for their role. The SCTS is to (continue to) determine their pay (section 35(3)). However, the Accountant must also **charge fees** relating to their work, to cover their reasonably incurred costs. These **fees are to be met out of the estate** managed by the judicial factor (section 35(4)(5)).

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

The **Explanatory Notes** (at para 78) note that in practice, a **Depute Accountant** is already appointed by **SCTS**. They say this provision gives the appointment a statutory underpinning.

### What was said on consultation

The **Sheriffs and Summary Sheriffs Association** thought the appointment of the Accountant should be made not by **SCTS** directly but by **the Lord President, as Head of the Judiciary**, who is also the judicial head of **SCTS**.<sup>xxviii</sup>

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

## Supervision and investigations (sections 37-38)

The Bill says that **the Accountant** must **supervise the performance of judicial factors**, both those appointed under the proposed legislation, and any appointed under existing legislation or the common law. This function is described as the **general function** of the Accountant (section 37(1)).

The Accountant can issue **instructions** to judicial factors as to how they carry out their functions (section 37(2)).

The Accountant also would have **an investigatory power**. Specifically, if the Accountant has reason to believe that the judicial factor is engaging in misconduct or failing in certain other ways they can make such inquiries "as the Accountant considers appropriate" (section 38(1)(2)(a)). Here, the Accountant must give the judicial factor opportunity to **make representations** on the matter (section 38(2)(b)).

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

xxviii **Judiciary and Courts (Scotland) Act 2008**, schedule 3.

## What was said on consultation

The Accountant's role in supervision and investigations attracted comment at the stage of [the Committee's call for views](#).

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

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

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

[The Law Society](#) also queried how **section 38 (including the reporting duty)** would interact with the right of the judicial factor to require from the court a **determination** relating to a decision of the Accountant (**section 45**). Section 45 is [considered later in the briefing](#).

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

## Power of the Accountant to require information (section 39)

[Equivalent to the information-gathering power for a judicial factor under section 12 of the Bill](#), **section 39 of the Bill** gives [the Accountant](#) the power to **require information** relating to the estate from bodies, such as banks, and individuals. The information must be that which the Accountant reasonably considers relevant to the Accountant's functions.

[As with section 12](#), certain individuals and bodies, such as bodies exercising reserved functions, like [HRMC](#), or UK Government department or ministers, are **exempt from the obligation to comply** and **can choose whether to do so** (section 39(3)). Again, [this differs from the approach in the Commission's draft Bill](#) (section 47).

## What was said on consultation

In response to [the Committee's call for views](#), [the Sheriffs and Summary Sheriffs Association](#) and [the Law Society](#) both commented on the limits of [the Accountant's](#) information-gathering power ([in relation to bodies exercising reserved functions, or UK Government departments/ministers](#)).

The respondents' concerns were the same as those expressed in relation to the judicial factor's equivalent power. In other words, they thought that **the relevant exceptions**

weakened the strength of the power.

## Audit of accounts by the Accountant (sections 40-41)

Earlier in the briefing, it was explained that, [under the Bill's proposals](#), a judicial factor must submit accounts to [the Accountant](#) periodically, at the Accountant's discretion, and at least **once every two years (section 16)**. **Section 40(1) of the Bill sets out a corresponding duty** on the Accountant to **audit the accounts** received from judicial factors.

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

**Section 41** sets out the process which will apply when any objection or appeal is made by the judicial factor in relation to an audit carried out in accordance with section 40. As a final step of the process, the judicial factor can require the Accountant to **ask the court to reach a decision**.

### What was said on consultation

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

## Annual review (section 42)

**Section 42 of the Bill** places [the Accountant](#) under an obligation to publish an **annual review** detailing the Accountant's activities in relation to the relevant judicial factories, for the reporting year to which the report relates.

## Inspection of records held by the Accountant (section 43)

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

This obligation applies to a person with **an interest in the estate** who requests such copies or inspection. The documents are defined as being [the management plan](#), [the annual accounts](#), and [the audit report](#) in relation to the relevant estate.

### What was said on consultation

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

## Inconsistency in judgement or practice (section 44)

**Section 44 of the Bill** requires [the Accountant](#) to submit a report to the **Lord President of the Court of Session** (the Head of the Judiciary in Scotland). This section applies if the Accountant is of the view that [the local sheriff courts](#) in Scotland **are not consistent** in their dealings in relation to judicial factors or estates where a judicial factors have been appointed.

The Accountant must propose a **rule of practice** in relation to the inconsistency identified. The Lord President may take such action as the Lord President considers appropriate – which may include **adopting the rule** proposed by the Accountant.

## Right of judicial factor to require a determination (section 45)

**Section 45 of the Bill** gives a judicial factor a right to apply to the court which appointed them for a **determination** in relation to any decision that [the Accountant](#) has made about the judicial factory. In effect, this gives a judicial factor a **right of appeal** to the court.

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