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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Delegated powers in the Judicial Factors (Scotland) Bill at Stage 1



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Contents

Introduction	1
Overview of the Bill	2
Delegated powers	4
Review of relevant powers	5

Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 6 February 2024, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the [Judicial Factors \(Scotland\) Bill](#) ("the Bill") at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This Bill was introduced by the Scottish Government on 5 December 2023.
4. This Committee, the Delegated Powers and Law Reform Committee, has also been designated as lead committee for the Bill, given its remit includes looking at certain Bills which are based on reports from the Scottish Law Commission (“the SLC”).
5. The Bill implements the SLC's recommendations on the law of judicial factors, contained in the [Report on Judicial Factors \(Scot Law Com No 233\)](#) .
6. The stated purpose of the Bill is to consolidate and update the law relating to the office of judicial factor in Scotland, and to put in place a comprehensive and modern regime in this area of law.
7. A Judicial Factor is an officer appointed by the court, supervised by the Accountant of Court, to hold, manage, administer and protect the property of another in cases where it is not possible, practicable or sensible for those responsible for the property to do so. A Judicial Factor is independent to the case, and is normally a professionally qualified individual, such as a Solicitor or Accountant. The Accountant of Court is a court appointed officer who supervises judicial factors to ensure that all funds and property is invested prudently and administered properly.
8. A Judicial Factor can be appointed in different situations. Examples include: where there has been a breach of professional practice by a firm of solicitors or where a sole practitioner dies, over a deceased person’s estate where there is no executor, the winding up of a partnership where there is a dispute, running a trust where all trustees are deceased or where they are in dispute, and where those running a charity appear to have been managing it inappropriately.
9. A so-called “judicial factory” has been regarded by those who use it as a cumbersome procedure, sometimes involving disproportionate expense, and in need of modernisation. Since the Judicial Factors Acts of the 19th century there has been no new primary legislation relating specifically to the details of the procedure. Further, some powers of judicial factors are to be found in legislation relating to trusts. Therefore, in practice, it can be difficult for third parties dealing with Judicial Factors, and the Judicial Factors themselves, to know what such officers are or are not entitled to do.
10. The Bill sets out a comprehensive set of provisions governing all aspects of judicial factories, including appointment, powers, duties, remuneration, termination and the role of the Accountant of Court in relation to Judicial Factors. It also repeals the 19th century legislation.
11. The Bill comprises 52 sections in 6 parts together with 3 schedules:
 - **Part 1** of the Bill provides for appointments of a judicial factor, or interim judicial factor. It sets out the grounds for appointing a judicial factor and lays out the necessary qualifications for a judicial factor.
 - **Part 2** of the Bill deals with functions of a judicial factor including allowing a judicial factor to seek relevant information as to the affairs of the estate from

bodies and individuals. The Bill preserves the judicial factor's duty to prepare an inventory of the estate and introduces a new duty to prepare a plan as to how the judicial factor proposes to administer the estate which is agreed with the Accountant of Court. The judicial factor must, report to the Accountant of Court on their dealings with the factory estate and submit accounts.

- **Part 3** contains provisions in relation to dealings with third parties, including providing protection to third parties acquiring title from judicial factors and making it clear that the judicial factor stands in place of the factory estate in any dealings with a third party.
- **Part 4** deals with procedures to bring a judicial factory to an end as well as the process of appointment of a replacement judicial factor. It sets out an administrative process for the distribution of the factory estate, termination, recall and discharge of a judicial factor. It provides for the approval by the Accountant of Court of a scheme for distribution of the factory estate, avoiding the need to refer the matter to the court where there is no dispute. Where there is an objection, the Accountant must refer the matter to the court.
- **Part 5** updates the general provisions in relation to the appointment and functions of the office of the Accountant of Court, particularly the function of supervising judicial factors. The Accountant of Court has the power to direct a judicial factor as to how the duties of the office should be performed and to hold the judicial factor accountable for any misdeeds or failures.
- **Part 6** contains miscellaneous, ancillary and commencement provisions.

Delegated powers

12. The Bill confers three delegated powers to make subordinate legislation upon the Scottish Ministers.
13. The Scottish Government has prepared a [Delegated Powers Memorandum](#) (“DPM”) which sets out the reasons for taking the delegated powers in the Bill and the procedure chosen.

Review of relevant powers

Section 42 – Annual Review

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

14. Section 42 places the Accountant of Court under an obligation to publish an annual review detailing the Accountant's activities in relation to the relevant judicial factories. This section gives the Scottish Ministers a power to make regulations setting out further detail about the reporting requirement and that such detail must include how the review must be published, the information it must contain, and the timing of the reporting year.

Committee consideration

15. The Scottish Government explains in the DPM that the reasons for taking the power are that, as this relates to a matter of detail, this is most appropriately dealt with in regulations rather than in primary legislation. Further, this is for reasons of flexibility and ease of adjusting the details to respond to changing circumstances.
16. The Scottish Government further explains in the DPM that the reasons for making this power subject to the negative procedure are that, as the manner and timeframe of publication and particulars to be contained in an annual review are procedural matters, it is considered appropriate that the regulations are subject to the negative procedure. Further, it considers this will achieve the best balance between use of parliamentary time and resource and the nature of the content of the regulations.
17. The Committee finds the power acceptable. It considers that there is sufficient detail in section 42 and in the DPM as to how this power is likely to be exercised, that this power is limited but allows for an element of flexibility and can be updated more easily than by primary legislation. It also agrees that the negative procedure will ensure the appropriate level of parliamentary scrutiny of a relatively limited procedural matter as to how the annual review is carried out.

18. **The Committee finds the power acceptable in principle and is content that its exercise is subject to the negative procedure.**

Section 48 – Ancillary Provisions

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative procedure if to add to, replace or omit any part of the text of an Act, otherwise subject to the negative procedure

Provision

19. Section 48 enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or savings provision for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it; and may modify any enactment (including this Bill).
20. Regulations made under this power which amend primary legislation will be subject to the affirmative procedure, and otherwise the negative procedure will apply.

Committee consideration

21. The Scottish Government explains in the DPM that the reasons for taking the power are that this is necessary to allow flexibility when commencing provisions in the Bill or otherwise to address unforeseen circumstances which may arise. That, while it has given careful consideration to the provisions of the Bill, it considers this power is necessary to ensure that any unexpected issues which require further changes are able to be dealt with effectively so that the purpose of the Bill is not inadvertently obstructed.
22. The Scottish Government further explains in the DPM that the reasons for making this power subject to a combined procedure are that this approach is typical for ancillary powers of this type and provides the necessary safeguards with regard to the type of legislation which can be made.
23. The Committee finds the power acceptable. It considers that there is sufficient detail in section 48 and in the DPM as to how this power is likely to be exercised. The power to make standalone ancillary provision by regulations is common in modern primary legislation. The power is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate for the purposes of, in connection with, or for giving full effect to the Bill or any provision made under it. Without such a power, any changes would require to be made by primary legislation.
24. The Committee also agrees that the combined procedure is appropriate and strikes the right balance between allowing scrutiny and ensuring Parliament's time is not unduly hindered. The approach taken is typical for ancillary powers and recognises the particular interest Parliament has in provisions which modify primary legislation. Whereas ancillary changes to subordinate legislation are likely to be more technical, operational or implementation matters within the scope and policy intention of the Bill and so merit a lesser degree of parliamentary scrutiny. This is standard for an ancillary provision.

25. **The Committee finds the power acceptable in principle and is content with the specified parliamentary procedures which are dependent on whether or not the power is exercised to amend primary legislation.**

Section 51 – Commencement

Power conferred on: Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

26. Section 51 provides that sections 48, 51 and 52 comes into force on the day after Royal Assent; and that the other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.
27. These commencement regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. This allows different sections of the Bill to be commenced on different days.

Committee consideration

28. The Scottish Government explains in the DPM that the reasons for taking the power are that the Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such a date as Ministers appoint to be suitable. It is usual procedure for such commencement provisions to be dealt with by subordinate legislation.
29. The Scottish Government further explains that the coming into force of the Bill's substantive provisions will have implications for Judicial Factors already appointed to manage property and those to whom the property belongs. To allow Judicial Factors and other interested persons (such as the Accountant of Court) time to manage their affairs, it is important for Scottish Ministers to have the power to allow for the planning of orderly implementation and to commence the substantive changes when it considers it appropriate to do so. This is preferable to ensure there is flexibility in the commencement power in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice, the regulations should be capable of making different provision for different purposes.
30. The Scottish Government also explains in the DPM that the reasons for making this power subject to the laid only procedure is that is standard procedure for commencement regulations. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.

31. **The Committee finds the power acceptable in principle and is content that its exercise is not subject to any parliamentary procedure.**

