



The Scottish Parliament
Pàrlamaid na h-Alba

Published 14 June 2024
SP Paper 620
43rd Report, 2024 (Session 6)

Delegated Powers and Law Reform Committee

Stage 1 Report on the Judicial Factors (Scotland) Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:
<http://www.parliament.scot/abouttheparliament/91279.aspx>

For information on the Scottish Parliament contact Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Membership changes	1
Introduction	2
Overview, key terminology and background to the Bill	4
General issues arising in the Bill	8
Applicability to missing people	8
Applicability to charities	15
Complaints process	16
Section 104 order (covering power to gather information for both judicial factors (section 12) and the Accountant of Court (section 39))	18
Data protection issues	19
Part 1 of the Bill – appointment as a judicial factor	22
Section 4 of the Bill: discretion of the court in appointing judicial factors (and whether any qualifications should be considered necessary)	22
General views on discretion of the court	22
The Law Society’s in-house judicial factor	23
Section 5 of the Bill: Caution	24
Register for the appointment of judicial factors	26
Part 2 of the Bill – functions of a judicial factor	29
Section 17 of the Bill: Power to invest	29
Fiduciary nature of the judicial factor	30
Power to seek directions from the court	31
Part 3 of the Bill – judicial factors’ legal relationships with third parties	34
Liability for legal costs	34
Part 4 of the Bill – end of the judicial factoring arrangement and a judicial factor's role in the estate	36
Sections 34 and 38	36
Part 5 of the Bill – role of the Accountant of Court	38
Qualifications	38
Complaints referred by the Accountant of Court to professional bodies (SLCC’s role)	39
Drafting points raised by stakeholders	42
Delegated Powers Memorandum	43
Financial Memorandum	44
Conclusions on the general principles of the Bill	45
Annexe A: Extracts from minutes	46

Delegated Powers and Law Reform Committee

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;

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

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



DPLR.Committee@parliament.scot



0131 348 5974

Committee Membership



Convener
Stuart McMillan
Scottish National Party



Deputy Convener
Bill Kidd
Scottish National Party



Jeremy Balfour
Scottish Conservative
and Unionist Party



Foyso Choudhury
Scottish Labour



Tim Eagle
Scottish Conservative
and Unionist Party

Membership changes

1. The following changes to Committee membership occurred during the course of the Committee's scrutiny of the Judicial Factors (Scotland) Bill:
 - on 31 January 2024, Foysoi Choudhury MSP replaced Colin Smyth MSP,
 - on 21 March 2024, Tim Eagle MSP replaced Jeremy Balfour MSP,
 - on 29 May 2024, Jeremy Balfour MSP replaced Oliver Mundell MSP.

Introduction

2. The Judicial Factors (Scotland) Bill (“the Bill”) was introduced in the Scottish Parliament on 5 December 2023 by Angela Constance MSP, the Cabinet Secretary for Justice and Home Affairs. The Minister in charge of the Bill is Siobhian Brown MSP, the Minister for Victims and Community Safety.
3. The Bill is based on a law reform project ¹ on judicial factors by the Scottish Law Commission (“the SLC”), which published its final report ² in August 2013.
4. The Bill was determined as a 'Scottish Law Commission Bill' under Rule 9.17A of the Scottish Parliament's Standing Orders. The Delegated Powers and Law Reform Committee was subsequently designated as lead committee for Stage 1 consideration of the Bill.
5. In addition to carrying out the role of lead committee, under Rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill that confer power to make subordinate legislation. The Committee considered the delegated powers in the Bill at its meeting on 6 February 2024; the Committee's report is covered later in this report.
6. The Finance and Public Administration Committee (“FPAC”) considered the Financial Memorandum ³ to the Bill. Its call for views on the memorandum received no responses. Consequently, it took no further action on the financial memorandum.
7. A full Scottish Parliament Information Centre (“SPICe”) briefing on the Bill ⁴ was also published.
8. The Committee issued a wide call for views, which ran from 20 December 2023 to 15 March 2024. This was emailed to 223 recipients on 21 December 2023, and followed up on 10 January, 13 February and 7 March 2024.
9. The Committee received 11 responses ⁵. SPICe also produced an analysis of these ⁶.
10. The Committee held oral evidence sessions on 16, 23 and 30 April, and on 7 May 2024. It heard from:
 - the Scottish Law Commission,
 - legal practitioners and academics,
 - current judicial factors,
 - the organisation Missing People,
 - the Scottish Courts and Tribunals Service, including the Accountant of Court, and
 - the Minister for Victims and Community Safety, Siobhian Brown MSP, and

supporting officials.

Full details of the Committee's meetings, and those who gave oral evidence, are set out at Annexes A and B.

11. The Committee is grateful to all those who helped inform its consideration of the Bill.

Overview, key terminology and background to the Bill

What is a judicial factor?

12. A judicial factor is a person appointed by the court to gather in, hold, safeguard, and administer property (the estate), which is not being, or would not otherwise be, properly managed. Most judicial factors currently appointed are solicitors or accountants.
13. Currently, a range of 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; a partnership; a company; a charity; a trust; a child or young person and a missing person.
14. However, there are also circumstances where legislation says it is **not** possible to appoint a judicial factor. For example, there are separate legal interventions for incapable adults ⁷ (over 16s) under the Adults with Incapacity (Scotland) Act 2000 ⁸.

Why is a Bill necessary?

15. According to the policy memorandum, “the provisions contained in this Bill aim to put in place an updated and comprehensive regime which will bring clarity, accessibility and efficiency to this vital but outmoded area of the law.” ⁹
16. The policy memorandum goes on to state that the Scottish Government's key policy objectives for the reforms include:
 - 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 range 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. ¹⁰
17. In relation to the second bullet point, 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 ¹¹.

How the Bill is broken down

18. The Bill is divided 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 (the Accountant of Court ("the Accountant") supervises judicial factors – this is both the situation at present and what the Bill proposes should continue. The Accountant is appointed and employed by the Scottish Courts and Tribunals Service ('SCTS'). The Accountant also sets judicial factors' rates of pay.)
- **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.

History to the Bill

19. The SLC told the Committee that it has looked at the area of Judicial Factors intermittently throughout the 1970s, 80s and 90s.¹²
20. Currently, the substantive laws in this area are Victorian: the Judicial Factors Act 1849¹³ and the Judicial Factors (Scotland) Act 1889¹⁴. However, the Bill also repeals Acts of Sederunt from as far back as 1690 and the early 18th century. When giving evidence to the Committee, Morna Grandison, Director of Interventions at the Law Society of Scotland ("the Law Society") explained that as a practicing judicial factor:

” I have had to go back to an Act of Sederunt of 1700 or so, and it is not really clear to any of us from that what the powers are. However, the bill clarifies those and you can ask for the suite of powers that you think may be needed in the course of events.¹⁵
21. Therefore, there was a desire for the law in this area to be updated. Again, according to the Policy Memorandum, the Bill “sets out in a clear framework the essential features of the office of judicial factor and the broad parameters within which it should operate”.¹⁶
22. In terms of more recent work leading to the current Bill, the SLC published its discussion paper (that is, its initial consultation paper) on the topic of judicial factors in 2010¹⁷.
23. The SLC published its final report¹⁸ in August 2013, recommending a range of improvements to the existing system.

24. The Scottish Government also published a consultation paper¹⁹ on the topic of judicial factors in 2019. It also published an analysis of this consultation²⁰ in 2020.
25. The SLC, in its evidence to the Committee, confirmed that it considers that “the general thrust and content of the legislation are as recommended by the commission.”²¹

Scottish Law Commission Bills

26. The SLC has the statutory role of making recommendations to government to simplify, modernise and improve the law. It has a rolling programme of projects looking at reforms to the law in particular areas.
27. The SLC can be requested to look into particular areas of law by the Scottish and UK governments. It can also identify priorities from consultation and feedback from stakeholders. It is up to the Scottish or UK governments to decide whether to take proposals made by the SLC forward. They may carry out further consultation before deciding what to do. This is what has happened in the case of this Bill, which is brought forward by the Scottish Government, based on the Scottish Law Commission’s work.
28. Scottish Law Commission Bills fall to the Delegated Powers and Law Reform Committee to consider. This is set out in the Committee’s remit at rule 6.11(g) of the Standing Orders: to consider any Scottish Law Commission Bill as defined in rule 9.17A.1.
29. The Scottish Parliament’s Standing Orders,²² rule 9.17A defines which Bills are considered ‘Scottish Law Commission Bills’. In addition to this, the Presiding Officer’s Determination of 24 March 2021²³ help identify such Bills. Broadly, such Bills must implement in part or in full a report of the Scottish Law Commission and not generate substantial controversy among stakeholders.
30. This Bill was determined to be a suitable Bill for consideration by the Committee, and it was duly designated as lead committee by the Parliament on 13 December 2023.

Overall impact of the reforms proposed in the Bill

31. In general terms, those who have shared their views with the Committee have supported the reforms in the Bill. Issues raised focused on suggestions to improve or clarify the operation of the law on judicial factors, rather than from individuals objecting to the general principles of the proposals. In fact, when expressing a view, most stakeholders have been very positive about the Bill, and the opportunities it presents.
32. A common theme of those supporting the Bill was the clarity and modernisation of very old legislation that this Bill brings.
33. Others, such as the charity Missing People, viewed the legislation as a vehicle which provided an opportunity to improve the legal framework in particular areas, such as for the families and friends of missing people.

34. The detail of the most significant suggestions to improve or clarify the Bill are discussed in the coming sections of this report.

35. The Committee welcomes the Bill and the proposed reform of the law of judicial factors.

36. The Committee is grateful for the suggestions of those who have commented on the Bill, which aim to improve and clarify the Bill, made in response to the Committee's call for views. These have been considered carefully by the Committee, and have been helpful in formulating the recommendations contained in this report.

37. Unless otherwise stated, the Committee seeks a response from the Scottish Government to all of its recommendations by the earlier of either Friday 6 September 2024 or a week ahead of the Stage 1 debate, in line with the protocol between the Parliament and the Scottish Government on the handling of committee business.

General issues arising in the Bill

Applicability to missing people

38. A theme running through the Committee’s scrutiny has been the Bill’s applicability to cases of missing people.
39. As mentioned above, while many of the responses from stakeholder organisations provided welcome suggestions of ways to clarify or improve the system proposed in the Bill, the charity Missing People provided evidence which laid down a perhaps more fundamental challenge – that of ensuring that the legislation works well in the very difficult situations of those who find that a loved one has gone missing.
40. In oral evidence on 30 April, Josie Allan from the charity Missing People put it to the Committee:
- ” I think that it [the Bill] could be the right vehicle [for families of missing people], as long as there is a willingness to step back from seeing the role of judicial factors as one that is primarily for legal experts...
- everything about the purpose of judicial factors makes sense for families of missing people—the fact that you can step into the shoes of someone whose affairs you are looking after, and the fact that it gives you quite a lot of powers on their behalf. However, ... if there is not a willingness to make it appropriate for families of missing people, it probably will not work.²⁴
41. The Committee found the evidence it heard from Josie Allan from Missing People on 30 April to be compelling.
42. While judicial factors can already (and will be able to) be appointed in cases where a person is missing, there were a number of practical considerations and concerns raised by Missing People in both its written and oral evidence. These were explored both with the organisation directly, and also with other witnesses who spoke to the Committee. This report will go on to cover (in relation to missing people):
- Adding a reference to the group on the face of the Bill
 - How to consider ‘best interests’ in the case of a missing person
 - Accessibility of the law and the system
 - Return of a missing person and interaction with the Presumption of Death (Scotland) Act 1977, and
 - Evidence for a missing person.
43. Josie Allan was clear in her evidence that while the Bill was a welcome opportunity, as introduced it did not go far enough in surmounting the challenges faced by families of missing people.²⁵
44. In addition to Missing People, the Law Society also suggested in its written

submission that it was “disappointing that reforms in this area [making specific provisions for the estates of missing persons] are not being taken forward.”²⁶

45. Patrick Layden from the SLC said that the concerns of Missing People:

” cannot be addressed in the primary legislation but it could be addressed by the way in which the act is advertised. It could also be addressed in guidance given to citizens advice bureaux so that information about how to get to the court and appoint a judicial factor could be disseminated. It could also be addressed by providing for a court procedure that would enable folk who are not legally qualified to make the appropriate application.²⁷

46. The Law Society’s evidence to the Committee on this issue also broadly agreed with this comment.²⁸

47. Also in general terms, the Minister told the Committee that she has “agreed to work with the charity Missing People on the preparation of guidance for those who are considering applying to appoint a judicial factor.”²⁹ Her views on more specific points raised by the Committee are set out in greater detail below.

48. The Committee considers that the opportunity presented by this Bill must be used to ensure that judicial factors work for the loved ones of people who go missing, where their appointment is considered desirable.

Adding a reference to missing people to the face of the Bill, or relying on guidance

49. The Committee explored whether there was merit in amending the Bill to include an explicit reference to missing people to make clear that the legislation covered such cases, or whether this clarity could be achieved through guidance and advertising.

50. Josie Allan from Missing People told the Committee:

” We would prefer that the bill specifically made provision for the families of missing people. As I said, that does not necessarily need to be at every stage throughout, but it is a specific enough experience that it could be excluded from some considerations if it is not explicitly included.³⁰

51. However, Ms Allan also accepted that guidance, including from the Accountant of Court, had an important role to play in making clear how the legislation would apply to cases of missing people.³¹

52. As outlined above, when questioned about the issue of missing people and the Bill in general terms, the SLC suggested, with some support from the Law Society, that the concerns of Missing People would be best addressed through guidance and advertisement, rather than in primary legislation.

53. On adding a reference to the face of the Bill, the Minister initially said that she did “not think that the bill needs any particular statement with regard to missing persons, because we want judicial factors to cover all aspects and not just one

specific aspect”.³²

54. However, when pressed on this issue, and being presented with the evidence from Missing People the Committee had heard, the Minister said “if there is anything that we can bring in to give some comfort to Missing People in particular, we will consider it.”³³
55. As mentioned, the Minister also has committed to working on guidance specific to missing persons in relation to judicial factors.

56. A reference to missing people could be added to the Bill in such a way that makes it clear that this piece of legislation may be used by those seeking to manage the estate of a missing person. While the Committee does not have a strong preference for how such a reference be added, it considers this would improve the legislation’s accessibility.

57. As such, the Committee supports the inclusion of an explicit statement in the Bill that it is competent to appoint a judicial factor to the estate of a missing person. The Committee calls on the Scottish Government to bring forward an amendment at Stage 2 to give effect to this.

58. The Committee also supports work by the Scottish Government to improve advertising, guidance and advice to make the Bill more accessible for cases of missing people. The Committee welcomes the Minister’s commitment to develop missing people-specific guidance with the organisation Missing People, which it believes will help in this regard.

‘Best interests’

59. Another issue raised by Josie Allan from Missing People was whether an appointed judicial factor should act in the best interests of the estate (i.e. preserving or investing assets), or in line with the wishes of the missing person (for example, providing financially for the missing person’s dependants), if these aims do not fully align.
60. Josie Allan made the point that it could be argued that a judicial factor should prioritise the interests of the missing person. However, she said that if a person’s reasonably assumed preference would be to spend their assets on dependants, perhaps based on their habitual behaviour, then that should also be allowed. It was not clear to Ms Allan that the Bill would allow for this.³⁴
61. On this point, the Minister referred to section 10 of the Bill which says the judicial factor must “hold, manage, administer and protect the ... estate for the benefit of persons with an interest in the estate.” Based on this she said that “most judicial factors will be expected to manage the estate in the interests of the missing person.”³⁵

62. However, the Minister also referred to the effect of section 11 of the Bill, which relates to the court’s powers to confer specific functions on the judicial factor in an individual case. In this regard, she went on to say:

” The considerations that a judicial factor will take into account when making decisions—for example, whether they can take into account assumed preferences of the missing person—will depend on the purpose of the appointment and the specific circumstances of each individual case.

The bill is flexible, and the person who is seeking the appointment of a judicial factor may ask for additional powers to be conferred on them, such as the power to make gifts. It would be possible for a judicial factor to manage the estate in the interests of the missing person and to make payments to or take actions to benefit family members of the missing person, such as their children.

36

63. The Minister was clear that while the default would be to give primary consideration to the interests of the missing person, for situations in which this may not be the most appropriate course of action, there is a potential solution already in the Bill.

64. The Committee acknowledges existing provision in the Bill at section 11 that might provide a solution in cases where the judicial factor wanted to act in the interests of others where that would be in line with the missing person’s wishes, rather than the (more narrowly interpreted) interests of the missing person.

65. However, the Committee believes that the option of using this provision may not be immediately evident and that this could be a particular issue for laypeople such as family members of a missing person.

66. The Committee calls on the Scottish Government to ensure that the guidance on the Bill for missing people covers the situation where the best interests of the estate (requiring preservation or investment of assets) may not align with the wishes of the missing person (for example, to support specific family members). In particular, the Committee considers that the guidance should highlight the opportunity to request specific powers under section 11 of the Bill to help address this issue.

Accessibility – financial and practical issues

67. A further concern from Missing People was that having a judicial factor appointed could prove to be prohibitively expensive. This is particularly in cases where families may need to manage a few thousand pounds, rather than large estates. Furthermore, it was concerned that the processes may be too complicated for families of missing people who want to “look after the moderate affairs of the average person while they are away”³⁷.

68. Key questions raised in the organisation’s written submission included:

” - How much will an application actually cost, including estimated legal fees?
Will it be an accessible process for most people?

- If a missing person has relatively few assets, and even perhaps some debts that need managing, will an applicant be able to get legal aid, or any other financial support, to make the application as they’re unlikely to be able to recoup the money from the estate?

- Do you expect members of the public to be able to apply to become a judicial factor, even if they don’t have legal expertise? Could they hold the position? And will the process be accessible enough for a member of the public to get through?³⁸

69. The Law Society of Scotland agreed with the need to “debunk the process in this area and ensure that it is not terrifying for families.”³⁹ It again identified good advertising of the system as key, including through citizens advice bureaux and law clinics.

70. In relation to issues of accessibility, the Accountant of Court mooted that the Bill would make the system more accessible for cases of missing people as applications could be made through sheriff courts. This, the Accountant said, would reduce the cost and be more geographically accessible. While the Accountant accepted it would still require a solicitor for an application for a judicial factor “costs would be vastly reduced”⁴⁰.

71. In relation to the administrative accessibility of the system, the Accountant was very open to adapting this to the circumstances of a lay appointee. The Accountant said that she and her team could adapt documents, processes and their supervisory role to accommodate laypeople acting as judicial factors. The Accountant also said “provisions around remuneration and commission in the role are suitably open in the bill, which would allow me and my office to make changes to reflect the circumstances of the case.”⁴¹

72. The Minister confirmed legal aid would be available for those seeking appointment as a judicial factor for a missing person, such as family members, if eligible. The Minister told the Committee:

” The assessment would be based on the applicant, and not on the missing person. The applicant would be able to get legal aid for advice and guidance from the solicitor initially, to work out whether they should go for a judicial factor or not and whether doing so would be relevant for them. If a person is on benefits, they would have their court fees paid by legal aid.”⁴²

73. The Committee accepts that in any system where a person has gone missing and arrangements must be put in place to manage their affairs there is inevitably going to be a degree of administration, some of which may entail some cost and inconvenience. The Committee recognises that the system at hand here – that of appointing a judicial factor – will not be

without any burdens for someone seeking to do so. However, the Committee fully supports any efforts to minimise cost and bureaucracy in such situations in order to make the system more accessible.

74. The Committee supports the availability of legal aid for eligible people in cases where a judicial factor is appointed in connection with a missing person's estate.

75. The Committee welcomes the current Accountant of Court's stated willingness to adapt processes, for example in relation to annual accounting requirements, for lay appointees. The Committee asks what more the Scottish Courts and Tribunals Service can do to embed this positive and supportive approach to lay appointees, and what practical steps can be taken by SCTS at this time.

76. The Committee calls on the Scottish Government to consider what else could be done to improve the accessibility of the system as it develops its guidance in this area, and to work with the courts, legal and advice sectors to ensure that a judicial factor is a viable option for the family of a missing person.

Other issues in relation to missing people (return of a missing person and Presumption of Death (Scotland) Act 1977)

77. Missing People also raised questions in relation to what would happen with a judicial factory should the missing person return.⁴³ The policy issue was whether recall (cancellation) of the judicial factory should be automatic in those circumstances, or require to be authorised by the Accountant or the Court.

78. While Missing People's written submission stated that "It would not be appropriate for a person to have to make an application for recall to be able to look after their own affairs",⁴⁴ its position softened by the time they appeared at the Committee – acknowledging the likely complexities of cases of missing people, and the need for flexibility. It did however still advocate for wording to be added to the Bill which supported "as close to an immediate ceasing of that factory as possible".⁴⁵

79. In relation to the return of a missing person, the Minister stated:

” A judicial factor is a person who is appointed by the court, and I consider that there must be a formal process for bringing the office to an end. That would protect both the missing person who has returned and the judicial factor, who may be a family member. It is important that the formerly missing person can take over the management of their estate as quickly as possible, but it is also important that the actings of the judicial factor can be scrutinised and that they can be discharged of liability.

The bill provides an administrative process, overseen by the Accountant of Court, for the termination of the judicial factory. In most cases, that process would be used. Alternatively, the bill also provides persons “with an interest”⁴⁶ with a route to “apply to the court for distribution” of the factory estate.

80. A further specific concern was the Bill’s interaction with the Presumption of Death (Scotland) Act 1977⁴⁷. Broadly, the 1977 Act allows the court, on the application of an interested person, to declare that a missing person has died. There is a presumption of death if the person has not been known to be alive for the last seven years. Separately, a court can declare a person to have died sooner if the circumstances of the case suggest that a person may have died. After a declarator of death is granted by the court, an executor can be appointed to wind up the deceased person’s estate. They can then administer the estate according to the normal rules of succession law (inheritance law).
81. In relation to the Presumption of Death (Scotland) Act 1977, the written response from Missing People questioned whether having a judicial factor in place would pose any barrier to a declarator of death being granted, and whether a judicial factor could distribute the estate in a way that conflicts with a will⁴⁸.
82. The Minister confirmed that the two pieces of legislation would “work alongside each other”. She continued:

” The bill allows for the appointment of a judicial factor to manage the estate of a missing person. If the missing person is subsequently declared dead by way of an application under the 1977 act, the purpose for which the judicial factor was appointed would no longer exist and the judicial factory would be terminated. As the committee heard, families of missing people may not want to apply immediately for a declarator, and the appointment of a judicial factor to manage the missing person’s estate is an alternative.⁴⁹

83. The Committee considers that the Minister’s explanations in relation to both what would and should happen if a missing person returns and the Presumption of Death (Scotland) Act 1977 are cogent and convincing. These are however areas which the Committee considers to be worthwhile clarifying in guidance.

84. The Committee recommends that the guidance the Minister has committed to working with Missing People to create should cover both what happens

if a missing person returns, and the legislation’s interaction with the Presumption of Death (Scotland) Act 1977.

- 85. The Committee calls on the Scottish Government to ensure other stakeholders, such as Police Scotland, are also involved in the creation of this guidance, particularly in relation to both of these points.**

Evidence for a missing person

86. One further issue raised by Missing People was in relation to what evidence would be accepted by a court to consider a person missing (and therefore that the circumstances were suitable for a judicial factor appointment). Josie Allan told the Committee that it was important to ensure that judges, solicitors and sheriffs were “incredibly clear” about what families must provide.⁵⁰
87. This concern was raised in the context of a case Missing People had worked on using similar legislation in England and Wales. In that instance, Missing People reported that the application was “turned away” as a result of not meeting the requirements and the judge apparently not considering that the applicants had “shown enough evidence that the person was genuinely missing”.⁵¹

- 88. The Committee seeks an update from the Scottish Government on what would be considered to be suitable proof of a person being missing ahead of the Stage 1 debate.**

- 89. The Committee also calls on the Scottish Government to ensure that the guidance which the Minister has committed to working with Missing People on should specifically cover the issue of how to demonstrate a person is missing.**

Applicability to charities

90. Another theme running through the Committee’s consideration of the Bill has been the Bill’s application to situations where a judicial factor is appointed, or might be appointed, to manage the estate of a charity.
91. On application of the Office of the Scottish Charity Regulator (“OSCR”), the Scottish charities regulator, the Court of Session may appoint a judicial factor to a charity under section 34 of the Charities and Trustee Investment (Scotland) Act 2005.
92. For its part, OSCR stated that it considered the Bill to be largely what was consulted on in 2019 to which it had provided a supportive response. OSCR stated that it remains supportive of this Bill, although it did not lodge a formal response to the Committee’s call for views.

93. While it broadly welcomed the Bill, the Charity Law Association (“CLA”) made a number of suggestions aiming to improve the legislation in so far as it relates to judicial factors and charities. For example, one suggested improvement made by CLA was that OSCR should be able to apply to the sheriff court in order to appoint a judicial factor, as the Bill proposes in other cases.^{52 53} This was instead of having to rely on the (more expensive) Court of Session to make an application for a judicial factor appointment⁵⁴ .
94. Following its appearance at the Committee, the CLA provided the Committee with a “wish list” of suggested changes⁵⁵ , including adding a new section in the Bill specifically relating to charities.
95. The SLC was sympathetic to the concern that the Bill could better cater for situations where judicial factors are appointed to charities, and also suggested that this issue might be addressed by amendments in four places⁵⁶ .
96. On this issue, the Minister said:
- ” The SLC has suggested some specific areas for possible amendment and it is important that we take time to explore those further, as well as the suggestions of other interested stakeholders including the Office of the Scottish Charity Regulator. I will write to the committee ahead of the stage 1 debate to set out my thoughts on the matter.⁵⁷

97. The Committee wishes to ensure that the Bill effectively meets the needs of judicial factors appointed to charities .

98. The Committee therefore asks the Scottish Government to consider the suggestions as set out in the ‘wish list’ provided to the Committee by the Charity Law Association and the suggestions made by the SLC so that the Bill better caters for cases of judicial factors appointed to charities, and report back to the Committee on its view in relation to any changes needed to the Bill in advance of the Stage 1 debate.

Complaints process

99. The Committee explored whether the Bill was clear enough as to how a complaint should be made in relation to a judicial factor. This followed a suggestion from the Faculty of Procurators of Caithness that:
- ” There should be a specific provision for an interested party to raise concerns about the Judicial Factors administration of the estate. We would suggest that in the first instance this should be with the Accountant of Court and if unsatisfied with the outcome, with the court who has appointed the Judicial Factor.⁵⁸

100. Oral and supplementary written evidence to the Committee from legal stakeholders, including the Law Society of Scotland stated that the complaints processes currently in place work, and in practice already incorporate much of the suggestion from the Faculty of Procurators of Caithness, with routes to complain about both a judicial factor, and the Accountant of Court⁵⁹.
101. Missing People agreed that it might be helpful to clearly set out, in some way, what the complaints procedure should be for an interested person. However, Josie Allan agreed that such a process does not necessarily need to be included in the Bill itself, and that guidance would be a suitable alternative.⁶⁰
102. When asked about the issue, Patrick Layden from the SLC conceded it was a matter of policy as to whether it was added to the face of the Bill, but stated “you can do that, but I would want to see evidence that the present system was not working”.⁶¹
103. Mr Layden concluded his remarks on this issue saying “Do not go down that road—that would be my instinct.”⁶²
104. The Minister confirmed that a complaint against a judicial factor can be raised directly with the judicial factor or Accountant of Court. Furthermore, if the Accountant concludes that there has been “serious misconduct or material failure” by the judicial factor, they must refer the matter to the court to be dealt with, and judicial factors’ regulatory bodies would also be engaged (if they are a member of one) at this point. The Minister said she “consider[s] the current approach to be a practical and sensible way to deal with complaints”.⁶³
105. Michael Papparakis, Policy and Bill Programme Manager from the Scottish Government, accompanying the Minister noted that the Accountant of Court and the SCTS have their own web pages and suggested that “it could be explored with them whether they can use those web pages to set out the complaints procedure with the accountant. It might already be on the web pages and could be flagged in a better way, but that is one option that we could explore with them.”⁶⁴

106. The Committee generally considers that the current system of complaints (which is not dissimilar to that suggested by the Faculty of Procurators of Caithness) appears to be a sensible approach. The Committee is not persuaded that a complaints processes need to be added to the face of the Bill.

107. Nonetheless, the Committee considers that a clear, accessible complaints handling route is vital. As such, it calls on the Scottish Government, the Scottish Courts and Tribunals Service and the Accountant of Court to ensure that information about the process to be followed is clearly accessible to those who need it.

Section 104 order (covering power to gather information for both judicial factors (section 12) and the Accountant of Court (section 39))

108. The Bill gives judicial factors (in section 12) and the Accountant of Court (in section 39) powers to request or require information from relevant bodies (such as banks) and individuals in relation to the exercise of their functions under the Bill.
109. There is an explicit exemption to the requirement to comply with such requests for UK Government Ministers and Departments and bodies exercising reserved functions (such as HMRC).
110. To address this issue, the Scottish Government states in its policy memorandum accompanying the Bill:
- ” Most of the Bill provisions need apply only in Scotland, but it is necessary to ensure that provisions which require to have a wider effect will do so. The Scottish Government has concluded that in order to achieve this effect it is appropriate that these provisions should be applied by an Order under section 104 of the Scotland Act 1998 and, accordingly, will discuss this matter with the UK Government.⁶⁵
111. The Minister stated that a section 104 order would “allow the judicial factor to exercise their functions in relation to the whole estate, regardless of where in the United Kingdom the property is situated, and [an order would include] provisions with regard to a judicial factor’s powers to obtain information from UK bodies.”⁶⁶
112. The consensus from the practising judicial factors who gave a view on this issue⁶⁷, was that a section 104 order would be valuable and assist their work if these powers extended across the whole UK.
113. The Minister further stated:
- ” it is intended that the section 104 order will extend some of the provisions in the bill to the whole of the United Kingdom, including provisions on the vesting of property in a judicial factor, the ingathering of property, a judicial factor’s functions and information sharing.
- The intention is also to explore the application of the requirement to comply with the information requests to bodies that are excluded under the bill, such as UK Government departments and bodies with other reserved functions. Officials have made initial contact with relevant UK Government departments about seeking a section 104 order. Those discussions have been positive thus far, and we will continue to have them as the bill progresses.⁶⁸
114. The Minister also committed to keeping the Committee up to date with the progress of discussions with the UK Government.
115. Both previous SLC Bills the Committee has considered this session have also required section 104 orders to allow their successful implementation, and so the

Committee's recommendations below are informed, in part, by its scrutiny of all three Bills it has considered to date in session six.

116. **Despite the Minister's evidence, the Committee seeks clarification from the Scottish Government ahead of the Stage 1 debate as to the aspects of the Bill (in the form of a list) that the Scottish Government is seeking a section 104 order for.**

117. **The Committee recommends that the Scottish and UK Governments pursue the timely implementation of an effective section 104 order in relation to this Bill, to allow judicial factors the powers needed to carry out their duties.**

118. **In general, the Committee asks the Scottish Government to consider whether a more formal arrangement for section 104 orders is needed, including ensuring that dialogue (at least at official level) has started before a Bill, which it considers will need a section 104 order to give it full effect, is introduced to the Scottish Parliament.**

119. **The Committee also asks the Scottish Law Commission to indicate its view of where and when a section 104 order may be necessary for one of its draft Bills at the point of publishing its reports.**

Data protection issues

120. Related to the information-gathering powers discussed above, stakeholders also raised concerns about provisions in the Bill which state that powers do not authorise the making of a disclosure which contravenes data protection legislation. This is set out in relation to judicial factors at sections 12(7) and (8) and in relation to the Accountant of Court at sections 39(6) and (7).

121. In its written response, the Law Society⁶⁹ suggested that these provisions might be used as an unjustified block on legitimate information requests. It pointed out that this, in turn, would delay processes when time is often of the essence, and add additional costs onto judicial factory estates.

122. Morna Grandison, speaking in her capacity as a practising judicial factor as the Head of Interventions at the Law Society of Scotland, illustrated this point:

” I go back to the point that I made about speed being of the essence in information gathering and about the fact that judicial factors, who they are, their powers and their duties are widely misunderstood. If you are dealing with, say, an English bank, it might be extremely difficult to get to the right department to get funds frozen. Many times, we have encountered people using the Data Protection Act 1998 as their default position—they say that they cannot tell you anything or give you any information. Eventually, however, we get through to the legal team. The actual position is that I am standing in the shoes of the firm or the individual, and I am entitled to receive the same information that they would have been entitled to. The issue is in including in the bill a piece of legislation for people to hide behind in the first instance so that they refuse to give information, because they misunderstand the law. That might make it more difficult for us to operate.⁷⁰

123. The two other practising judicial factors who appeared alongside Ms Grandison, Sandy Lamb and Ken Pattullo agreed that a restatement of the law as it stands is, “unhelpful”⁷¹.

124. On section 39(6) and (7), the Accountant of Court said these provisions could be “used as a get-out clause for some organisations to not provide the information that I have requested.” In relation to all the data protection subsections, she voiced concerns that they may lead to inefficiencies, in particular delays and costs mounting up.⁷²

125. In relation to this issue, the Minister said:

” Provisions that make it clear that data protection is not overridden are not unusual. ... It is considered that such provisions can be useful in clarifying the interplay with data protection legislation.⁷³

126. However, when pressed further, she added: “I am happy to take that point away and consider it.” Michael Paparakis, Policy and Bill Programme Manager from the Scottish Government, also suggested that explanatory notes to the bill could be used to clarify the “interplay”.⁷⁴

127. While the Committee recognises the importance of data protection, it questions the necessity of including in the Bill what may simply amount to a restatement of the current law.

128. The Committee asks the Scottish Government to reflect on the evidence it heard from practising judicial factors and the Accountant of Court on the inclusion of subsections 12(7) and (8) and 39(6) and (7) as being potentially problematic. It asks the Scottish Government consider whether they should be either clarified further on the face of the Bill or removed altogether.

129. **If the Scottish Government should it decide to retain the statements on data protection as set out in subsections 12(7) and (8), and 39(6) and (7), the Committee asks it to consider whether it could clarify the interplay in some way, perhaps with guidance, through the Accountant of Court's website.**

Part 1 of the Bill – appointment as a judicial factor

Section 4 of the Bill: discretion of the court in appointing judicial factors (and whether any qualifications should be considered necessary)

General views on discretion of the court

130. The court has wide discretion in appointing an individual a judicial factor. Under section 4 of the Bill, it may appoint anyone it considers “suitable” for the role. However, in practice, the role is generally filled by professionals, such as accountants or lawyers.
131. The main area of discussion among witnesses in relation to this point was around whether any qualifications should be considered necessary.
132. In written evidence, one respondent, Propertymark, which is a professional body for property agents, suggested that qualifications should be required in certain types of cases ⁷⁵. It stated that it “is important to provide clarity as to who can become a judicial factor, beyond that the court believes they are suitable for holding office.” They went on to argue for estate agents in Scotland to be considered “optimal judicial factors”.
133. However, in oral evidence, there was widespread support from witnesses for the court continuing to have general discretion.
134. The point was also put by Missing People in both their written and oral evidence that continuing with the flexible approach as set out in the Bill would also allow, for example, a family member to be appointed in the case of a missing person ⁷⁶.
135. The SLC also suggested that the approach taken would allow “horses for courses” ⁷⁷. Patrick Layden suggested allowing discretion meant that practical solutions could be found in each situation, with tailored expertise, such as finding a farmer to be appointed to run a farming business in need of a judicial factor.
136. There was also some discussion with the Accountant of Court over what extra background checks may be appropriate to carry out in relation to the appointment of laypeople to allow the court to deem a person “suitable” for the role – for example checking if they were bankrupt ⁷⁸.
137. The Accountant of Court told the Committee:

- ” the accountant could have additional powers to carry out additional checks on an individual’s financial suitability, but obviously that would feed into the court process or would be something for the court to do...

There is definitely some work that we could do, but the bill is open to the AOC process being adapted to ask for that sort of information. The issue, then, is how that fits in with the court process, which technically comes first; we could work on that, and it is absolutely doable in the current draft, with perhaps some changes to the guidance.⁷⁹

138. In relation to qualifications, the Minister supported the approach taken in the Bill giving discretion to the court, and did not think requiring a qualification was necessary⁸⁰.

139. In relation to any background checks for laypeople, the Minister said:

- ” The process for appointment is such that the accountant is not involved at the initial stages of an application. At that stage, it is a matter for the court alone. It would be open to the court to make inquiries that it considers appropriate to assist in deciding whether the person seeking appointment is suitable, and that might include whether they are currently bankrupt.

The accountant acts as a supervisor to factory estates, and such checks might be helpful in making sure that the function is carried out appropriately. It seems that the accountant already carries those checks out, so I do not think that anything further is needed.⁸¹

- 140. The Committee agrees with the views expressed by the vast majority of witnesses and the Minister in relation to allowing the court full discretion to appoint those it considers suitable to the office of judicial factor, and not limiting this discretion by introducing qualification requirements.**

- 141. The Committee therefore supports the flexible approach taken in section 4 of the Bill as introduced. It considers that the court is best placed to decide upon suitability for appointment of a judicial factor in each individual set of circumstances.**

- 142. The Committee considers that the Bill is flexible enough to allow for background checks to be carried out by the court, and as such, does not consider that the Bill needs to be more prescriptive in this area.**

The Law Society’s in-house judicial factor

143. Under section 41 (“s41”) of the Solicitors (Scotland) Act 1980, the Law Society can apply to (the Inner House of) the Court of Session for the appointment of a judicial

factor in respect of the estate of a solicitor, or firm of solicitors, in certain circumstances⁸². In practice, the Law Society usually asks the court to appoint its in-house judicial factor in this context. In the Faculty of Procurators of Caithness' written submission, it argued against the Law Society having an in-house judicial factor, stating "there should be explicit prohibition of any current officer or employee of the Law Society of Scotland being appointed as the judicial factor under s41".⁸³

144. All other stakeholders who expressed views on this issue, including the SLC, the Law Society and the Faculty of Advocates disagreed with this proposition. The Law Society said:

” Those appointments are one of the most important public protections available to the Law Society as it fulfils its regulatory role. The petition is served on the parties with an interest, and those individuals are at liberty to object to the appointment or nominate another officer to take the appointment on. Ultimately, as I said, the court will decide on those matters, so the proper checks and balances are in place. The presence of the in-house team at the Law Society allows for the building of a team of experts who can deal with the public who are affected by the circumstances that brought about the appointment.⁸⁴

145. On this issue, the Minister said:

” I consider that a matter for the Law Society and the persons involved in an application for an appointment. I can see the benefit of the Law Society having a knowledgeable in-house factor with considerable practical experience, and I can also see how that might help and protect clients.

The bill provides a way for persons opposed to the appointment of an in-house factor to make their views known. That could be done at the stage when the court is asked to appoint a factor. Any objections could be made to the court, which would have to make the decision. If there are any concerns about the actings or the appointment of the in-house factor appointment, they can be brought to the attention of the accountant or the Law Society.⁸⁵

146. The Committee considers that the Minister's response in relation to whether the Law Society should be able to petition to appoint its in-house judicial factor is a persuasive argument – with opportunities available for anyone opposed to such an appointment to do so in court, and, in relation to any on-going concerns, for a complaint to be made through the available processes.

147. The Committee supports the Law Society's ability to petition to appoint its in-house judicial factor.

Section 5 of the Bill: Caution

148. Under the current law, all judicial factors must find 'caution', a form of security.

A bond of caution is usually arranged via an insurance company to satisfy this requirement. In accordance with the terms of the bond, the insurance company will then make good financial loss caused to the estate as a result of the judicial factor's wrongdoing. In a proposed change to the current approach, section 5 of the Bill proposes that caution should only be required in “exceptional circumstances”.

149. The Scottish Government’s policy memorandum states:

” As most factors nowadays are professional people with professional indemnity insurance (which should be sufficient to protect the estate), the courts are likely to exercise the discretion conferred upon them by section 5 so as not to require caution in most cases. Where a court, however, is considering appointing a nonprofessional and concludes that there might be an unacceptable risk to the factory estate of doing so, then it can require caution to be obtained.⁸⁶

150. A previous Accountant of Court, in responding to a SLC consultation, questioned whether in practice all professional indemnity (PI) policies would provide the same level of cover⁸⁷. The current Accountant of Court confirmed that this type of insurance can still “vary widely”.⁸⁸

151. While acknowledging potential benefits from moving away from the current system, the Centre for Scots Law at the University of Aberdeen suggested that “exceptional circumstances” meant that “the threshold has been set at a rather high level.”⁸⁹

152. Gavin MacColl from the Faculty of Advocates discussed the meaning of “exceptional circumstances” and told the Committee “courts are likely to be very reluctant to see it as applying to anything other than very much an outwith-the-norm situation. The policy decision that is taken may well be that that is appropriate, but it should be taken on an eyes-open basis.”⁹⁰

153. Practising judicial factors felt that the currently available bonds of caution can be very expensive, and hard to come by. Practising judicial factor, Ken Pattullo stated that for the most recent case he had, only one or two insurance companies were prepared to find a bond of caution.⁹¹

154. Missing People supported the Bill as introduced, stating caution requirements should “remain in the same framework as has been drafted under the Bill.”⁹² The organisation was concerned that any move to make caution a more standard requirement could add more cost and barriers for families of missing people seeking to appoint a judicial factor.

155. Both practising judicial factors and Missing People also accepted that it was sensible to allow for case-by-case consideration by the court, which will have discretion to order caution.

156. On this point, in written evidence, the Senators of the College of Justice said:

” we note the proposed replacement of the statutory duty to find caution in all cases as a condition of appointment with a new judicial discretion to require caution only in exceptional circumstances. The introduction of a discretion to require caution seems to us appropriate given that section 4 does not require that a judicial factor holds any specific qualification.⁹³

157. In relation to the issue of the “exceptional circumstances” threshold, the Minister said

” I believe that it strikes the right balance between the [avoiding of] incurring of unnecessary costs and protecting an estate from the improper actings of a judicial factor.⁹⁴

158. The Committee has carefully considered the issues in relation to caution. Specifically, it has reflected on whether caution should be a mandatory or discretionary requirement, and, if discretionary, what statutory test a court should be required to apply when exercising its discretion.

159. The Committee is persuaded that a discretionary approach is preferable and, furthermore, that the relevant threshold for the court to require caution should be “exceptional circumstances”, as proposed in the Bill. This reflects the fact that, in many situations, caution can be very expensive and unnecessary. However, the Bill, as drafted, still has the safeguard that the court can require caution in circumstances that the court thinks justify it.

160. As such, the Committee supports the proposals as drafted for caution in section 5 of the Bill, and is recommending no change.

Register for the appointment of judicial factors

161. Under proposals in the Bill, the notice of appointment of the judicial factor must be registered in the Register of Inhibitions, maintained by the public body, Registers of Scotland. This is an existing public register which affects a person’s ability to enter into transactions relating to property.

162. Stakeholders questioned how public and searchable information contained in the register of inhibitions actually is, given it is not free to access. There was also a suggestion that it is also not well known, with one witness, Professor Morgan from the Charity Law Association, telling the Committee “I must confess that I had never heard of the register of inhibitions until I read this bill.”⁹⁵

163. It was suggested by the Faculty of Advocates in written evidence that a specialist register of judicial factors could be created by the Bill. It stated:

” While we can understand the choice of the Register of Inhibitions from the perspective of a conveyancer seeking to purchase heritable property it is not a register that is easily searched by members of the public. They have to do so by making a request to Registers of Scotland and paying a fee. If the principal purposes of maintaining a register are to allow the public to see what judicial factories exist and to what they pertain, and to identify the appropriate service address, then it would seem sensible to have a dedicated Register of Judicial Factories which is easily searchable.⁹⁶

164. SCTS confirmed that it (via the Accountant of Court) could run a new register, though associated IT costs would have to be met. It put these at “hundreds of thousands of pounds” when it appeared before the Committee.⁹⁷ In supplementary written evidence, however, Tim Barraclough from SCTS revised this downwards to “£80-100K”, if any new requirements from the Bill (if passed) can be identified before a next IT development phase starts in February 2025. If not identified in this timescale, development costs (including other updates to IT systems) were estimated to be in the region of “£350-380K” as this would involve a standalone project.⁹⁸
165. Michael Paparakis, Policy and Bill Programme Manager from the Scottish Government accepted in oral evidence to the Committee that using the register of inhibitions was a “compromise”, but noted the possible costs of setting up a new register, and the risk that people may not search it regularly.⁹⁹
166. Mr Paparakis also stated that if a person searching the register of inhibitions was able to access it through a business (such as a firm of solicitors), it was about £1 a search. For a private individual, a search would cost £30 each time. He suggested it would be likely many of those with a need to search the Register of Inhibitions would be going through a solicitor in any case.¹⁰⁰

167. The Committee sees the value for money issue associated with creating a standalone register for judicial factors. However, it can also see that using the existing Register of Inhibitions for this purpose is a compromise.

168. It considers that this is a reasonable compromise in the context of how most judicial factories currently operate and a cost-benefit analysis of the current options.

169. As such, the Committee supports the proposal in the Bill to register judicial factories in the Register of Inhibitions. However, the Committee also considers that the Bill should be flexible enough to allow for this to change in the future if circumstances then lead to a different conclusion from a cost-benefit analysis.

170. **The Committee considers that the registration of judicial factories in the Register of Inhibitions should be periodically reviewed. Such reviews should consider any other possible ways in which judicial factories could be registered and searched by the public, and also include consideration of the creation of a standalone register. This may be particularly necessary if changes mean that there are more judicial factors being appointed, or judicial factories are increasingly used in other ways.**

171. **The Committee considers that the requirement to carry out a periodic review, and the ability for Ministers to give effect to their findings, if they wish to, should be explicitly provided for in the Bill. It therefore calls on the Scottish Government to consider how best to amend the Bill at Stage 2 to make these changes.**

172. **In the meantime, the Committee also asks the Scottish Government what it can do to raise awareness that the Register of Inhibitions can be searched by those seeking further information in relation to judicial factories.**

173. **The Committee asks for an update on its recommendations in relation to this section ahead of the Stage 1 debate.**

Part 2 of the Bill – functions of a judicial factor

Section 17 of the Bill: Power to invest

174. Under section 17 of the Bill, a judicial factor has 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.
175. There is a similar power in the Trusts and Succession (Scotland) Act 2024 which the Committee previously considered¹⁰¹. During Stage 1 scrutiny of that Bill, the Committee questioned whether the legislation should be amended to say, for the avoidance of doubt, that a trustee could choose environmental, social and governance (“ESG”) investments. This was indeed recommended by the Committee at Stage 1, and reflected in the legislation as passed at section 20.
176. The Committee sought views on whether the addition of a similar clause, which would state explicitly that ESG investments can be made by a judicial factor, even if this does not maximise financial return, would enhance this legislation.
177. Evidence from stakeholders was more mixed in relation to this proposed power than when it was suggested in relation to Trustees.
178. The Centre for Scots Law at the University of Aberdeen was supportive of an explicit legislative statement that ESG investments were permitted (but not mandatory)¹⁰². The Law Society noted that it had supported a similar provision in relation the trusts legislation.¹⁰³
179. Practising judicial factor Ken Patullo thought it needed to be stated explicitly on the face of the legislation, otherwise he would always be seeking to maximise financial returns on the estate¹⁰⁴. However, one of the other judicial factors appearing alongside him, Sandy Lamb, noted that the Bill already contained a power permitting the factor to do anything a natural person could do as owner of the estate, which would allow this. He thought the issue of which investments to choose was best dealt with when the factor sought professional investment advice¹⁰⁵.
180. The Accountant of Court broadly felt that the current Bill would allow for ESG investments, but that “something could easily be added to schedule 1 to make that clear and take away the potential for future criticisms of the factor were they to go down that [ESG] route”¹⁰⁶.
181. Patrick Layden from the SLC stated:

” The duty of the factor is not to give effect to the Government’s views on appropriate investment; it is to maintain the estate for the ultimate benefit of those who are entitled to it. If I were a factor, I would be cautious about taking into account considerations other than the general financial parameters within which investment takes place...

At the moment, the object of appointing a factor is for them to maintain the estate and generally manage it properly, in the interests of the ultimate beneficiary. If the policy were to require a factor to do something other than that, it would have to be clearly stated in the legislation.¹⁰⁷

182. Charles Garland, the interim chief executive of the SLC, also questioned whether judicial factories last long enough to make this sort of investment option worthwhile, when compared with trusts¹⁰⁸. The Committee has, however, since ascertained that there are a number of longer-term judicial factories in existence. Currently 10 have been in place for more than 10 years, and the average lasts for 3 years and 1 month¹⁰⁹.

183. The Minister said:

” I do not agree that there is a need expressly to confer such a power on a judicial factor...

The bill is not prescriptive as to how to invest, and it leaves it up to the judicial factor to decide on that, taking professional advice where appropriate. I am willing to look into the matter further, however, and I have asked my officials to write to stakeholders in the coming months, asking them for their views on whether an express power similar to those available to trustees would be welcome. I am happy to write to the committee ahead of the next stage with my thoughts on that.¹¹⁰

184. The Committee agrees with the views expressed by witnesses that the Bill as drafted already permits ESG investments.

185. Nonetheless, the Committee welcomes the Minister’s offer to write to the Committee setting out her views in relation to the ESG investments power and whether further clarification in the Bill is required. It requests this update ahead of the Stage 1 debate.

Fiduciary nature of the judicial factor

186. At common law, the law developed by the decisions of judges in previously decided cases, a judicial factor is subject to various fiduciary duties. These fiduciary duties include, for example, the duty on the judicial factor to put first the interests of another person (the beneficiary) over their own interests. This is in contrast to

normal transactions, in which each party considers their own interests.

187. Some stakeholders (Professor Nicholas Grier, Centre for Scots Law at the University of Aberdeen, R3) called for these duties to be spelled out explicitly in the legislation¹¹¹.
188. Giving oral evidence, Dr MacPherson from the Centre for Scots Law at the University of Aberdeen said:
- ” Given how the bill is at the moment, I would not expect lots of different duties to be inserted, but having something as simple as stating that the factor was acting as a fiduciary would at least help by making reference to some of the existing law on the matter.¹¹²
189. The SLC stated, however, that the fiduciary nature of the judicial factor’s role is self-evident and didn’t need to be stated in the Bill. The SLC also warned that, if it were to be stated, there should be no specific cases given and it is “better to leave it as a general, understood principle”.¹¹³ The Faculty of Advocates’ view appeared closely aligned to that of the SLC, from their oral evidence, though Gavin MacColl stressed that the Faculty had no strong view on the matter.¹¹⁴
190. The Minister said: “From reading the bill as a whole, I think that it is clear that the nature of the judicial factor’s role is fiduciary. While the term “fiduciary duty” is not used in the bill, the Government considers that the bill will achieve the same effect.”¹¹⁵
191. The Minister further stated that she was wary of unintended consequences of adding something to the face of the Bill (though did not elaborate on what these might be), but that she was willing to consider adding something to the explanatory notes to make the point clearer for users of the legislation.

192. While the fiduciary nature of the role of a judicial factor may be self-evident to those reading the Bill with a legal background, the Committee considers that it may help make the law more accessible, particularly to any layperson appointed as a judicial factor, if this was spelled out as a high-level general principle on the face of the legislation.

193. The Committee calls on the Scottish Government to bring forward an amendment to the Bill to this effect at Stage 2.

Power to seek directions from the court

194. In written evidence, the Faculty of Advocates suggested that judicial factors should be given an additional power to seek directions from the appointing court (as, for example, is available to insolvency practitioners)¹¹⁶. In oral evidence, Gavin

MacColl from the Faculty of Advocates argued that such a provision in the Bill would help to “future proof” it, as “unknowns crop up”.¹¹⁷

195. The response from witnesses to this proposal was mixed. Practising judicial factors Sandy Lamb and Ken Pattullo thought there would be no harm, and potential benefit, in having the additional power to seek direction from the court.¹¹⁸ This view was broadly shared by the Centre for Scots Law at the University of Aberdeen.¹¹⁹

196. However, the Law Society of Scotland, the Accountant of Court and the SLC put forward a case that adding the power is potentially redundant given the powers currently available.

197. The Accountant of Court argued that the judicial factor is really meant to be in a position to be a decision-maker. She reiterated that a judicial factor is able to seek her advice or other professional advice, and that going to court would have a financial impact. The Accountant also highlighted section 45, which gives the judicial factor a power to appeal a decision of the Accountant of Court to the court.¹²⁰

198. The SLC stated that it thought the powers in section 11 “to withdraw, retain or keep back from a particular appointment some of the functions that are set out in the legislation, and ... for the factor concerned to go to the court and ask for additional powers”, coupled with the power for the Accountant to give instructions to the judicial factor (as set out at in section 37(2)) would suffice.¹²¹

199. The Minister said that she did not consider adding such a power necessary, given the nature of the office (which requires judgement and decision-making) and the fact that there are other options available. She also cited costs which would be associated with seeking directions.¹²²

200. The Minister also suggested “Before the committee reaches any conclusion on the issue, however, I urge you to seek the views of the Lord President in that regard”¹²³

201. The Committee wrote to the Lord President who responded that:

” We have some reservations about allowing judicial factors to seek directions from the court. We are not sure that the power in section 69 of the 2024 Act [The Trusts and Succession (Scotland) Act 2024] and the power proposed here would be wholly analogous. The scheme of the Bill envisages that the Accountant will supervise and direct judicial factors (Part 5, and in particular s 37). Judicial factors have a right to apply to the court regarding any decision of the Accountant (s 45).

Introducing a right to apply to the court for directions could undermine the Accountant’s supervision and direction.¹²⁴

202. The Committee considers that the Bill as drafted contains sufficient options

for a judicial factor to seek advice and direction; it agrees that the role is ultimately meant to be one of decision maker, and believes that adding such a power could result in additional, potentially unnecessary, costs for judicial factories.

Part 3 of the Bill – judicial factors’ legal relationships with third parties

Liability for legal costs

203. In relation to Part 3 of the Bill, the Committee considered whether a judicial factor should ever be personally liable for the legal costs of litigation, or whether the estate should always bear those costs. The key sections in the Bill are:

- section 23, which sets out a general rule that, if a judicial factor is involved in court proceedings on behalf of the estate, any legal costs incurred by the other party to the litigation, which the court decides the judicial factor must pay, will come out of the estate.
- section 24, which covers the situation where a court decides that a judicial factor must pay financial damages (compensation). Section 24 sets out a further rule that the damages (and legal costs associated with the proceedings) will come out of the estate, but with some discretion for the court to decide otherwise in a particular case, for example, if the judicial factor’s breach of duty has caused the loss.

204. In response to the Committee’s call for views, the Faculty of Advocates¹²⁵ and the Sheriffs and Summary Sheriffs Association¹²⁶ suggested that section 23 of the Bill, setting out the rule that legal costs in court proceedings should be borne from the estate, could be modified.

205. The Faculty of Advocates’ point was:

” Although section 23 is subject to section 24, that section only provides for personal awards of expenses against the judicial factor in relation to damages claims brought against him in respect of his acts or omissions. It would not apply where the factor had conducted other litigation in a way that breached his duties or was otherwise wholly unreasonable, and would leave the other party to the litigation with a remedy against the estate alone for whatever it might be worth. We would suggest that the court does require a discretion to find a judicial factor personally liable for expenses beyond the circumstances that are envisioned in section 24.¹²⁷

206. The Sheriffs and Summary Sheriffs Association summed up their position as follows:

” It is possible to conceive of a case where it is alleged that the Judicial Factor has acted unreasonably (but not negligently) in the conduct of a litigation, and the question might then arise whether the Judicial Factor should be entitled to indemnity. Such cases are likely to be few in number, but it is a matter for consideration whether the Judicial Factor should in all circumstances be entitled to indemnity from the estate; it may be that a qualification “unless the court otherwise orders” would meet the rare cases where that might not be appropriate.¹²⁸

207. Only the SLC and Law Society of Scotland gave substantive views on the proposals by the Sheriffs and Summary Sheriffs Association and Faculty of Advocates. Neither seemed convinced it was necessary.

208. The Law Society essentially said that it couldn’t see why actions of someone acting properly and following procedures could then later be found to be unreasonable.¹²⁹

209. The SLC was concerned that making such a change could make a judicial factor “too concerned – albeit legitimately concerned – about his personal liabilities if the litigation turns out badly”.¹³⁰

210. The Minister said:

” We need to strike the right balance to allow a judicial factor reasonable space to manage an estate in good faith. I do not think that a judicial factor should be found personally liable if, with the benefit of hindsight, their actions are found to have been unreasonable but there has been no breach of duty.

Given the continuing need for competent judicial factors, we must be careful, and we do not necessarily want to put blocks in the way of people wanting to be appointed. Allowing for judicial factors to be held personally liable for taking actions that do not amount to a breach of duty would, in my view, be likely to discourage judicial factors from pursuing litigation that is in the interests of the estate, and perhaps even discourage individuals from acting as judicial factors altogether.¹³¹

211. The Committee broadly agrees with the position put forward by the Minister in relation to judicial factor’s personal liability under section 23. It also agrees with the view of the Law Society, that it is difficult to conceive of the circumstances in which there is no breach of duty, and a judicial factor’s actions can be held to be unreasonable at the time of taking them.

Part 4 of the Bill – end of the judicial factoring arrangement and a judicial factor's role in the estate

Sections 34 and 38

212. Section 34 of the Bill sets out the principal rule that discharge of a judicial factor frees them from liability as a factor under civil law. However, the judicial factor is not freed from liability under criminal law, or (according to the explanatory notes) any civil law liability associated with criminal liability¹³².
213. Section 38 of the Bill makes provision for the Accountant of Court's investigatory power. Where "serious misconduct or other material failures" are found, the Accountant of Court must report them to the court. Furthermore, if the judicial factor is a member of a professional body, the Accountant of Court must report the factor to that body (section 38(4)). The court can dispose of the matter "in whatever manner it considers appropriate" (section 38(5)(b)).
214. In response to the Committee's call for views¹³³, and in oral evidence on 23 April¹³⁴, Dr MacPherson from the Centre for Scots Law at the University of Aberdeen questioned the interrelationship between sections 34 and 38.
215. The Centre for Scots Law at the University of Aberdeen's concern is summed up in its written submission as:
- ” 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, with e.g. a statement that section 38 can apply (at least in some instances) irrespective of whether a judicial factor's accountability has been discharged under section 34 ...¹³⁵
216. The Accountant of Court expressed concern that if this were the case, there could be a deterrent effect on people coming forward to undertake judicial factor roles if discharge did not really mean discharge in practice (i.e. if section 34 was made "without prejudice" to section 38). However, she conceded that this was a policy choice for Members to make.¹³⁶
217. The SLC suggested in its evidence that if there were any suspected wrongdoing, a judicial factor would not be discharged by the Accountant of Court (though the question relates primarily to wrongdoing that does not emerge until after discharge). After discharge, however, the SLC considered that people should be able to "carry on with life".¹³⁷

218. In relation to this issue, the Minister said:

” Section 34 of the bill and the accompanying explanatory notes make it clear that the effect of the discharge is that “the judicial factor is no longer ... accountable” for what has taken place during the course of the judicial factory. As such, once the judicial factor is discharged, the Accountant of Court would not be able to investigate or report any misconduct under section 38.¹³⁸

219. She also went on to discuss the importance of not deterring people from becoming judicial factors (if discharge does not really mean discharge), and stating that any criminal acts would still be captured.¹³⁹

220. The Committee calls on the Scottish Government to consider whether it needs to clarify further the interrelationship between sections 34 and 38, given the apparent confusion of some stakeholders.

Part 5 of the Bill – role of the Accountant of Court

Qualifications

221. According to the Bill’s explanatory notes and policy memorandum, the power to appoint the Accountant of Court is already vested in the SCTS under section 25 of the Administration of Justice (Scotland) Act 1933¹⁴⁰, and at present this person must be “versant in law and accounts”¹⁴¹. The Bill at section 35(1) requires that the person appointed to the office of Accountant by SCTS must be, in its view, “appropriately qualified or experienced in law and accounting”. However, the policy memorandum also confirmed that the Scottish Government does not consider it necessary for the Accountant “to be formally qualified in both, or either, discipline”¹⁴².
222. The Law Society raised concerns that there was a “watering down” of the qualifications necessary for the role of Accountant of Court and Depute Accountant of Court between the SLC’s draft Bill, which stated that the Accountant “must be an individual knowledgeable in matters of law and accounting”¹⁴³ and the Scottish Government’s draft Bill. The Law Society was against this perceived watering down because of what it saw as the potential impact on the oversight of complex cases¹⁴⁴.
223. Evidence from the SCTS and Accountant of Court suggested that given the Accountant of Court is also Scotland’s Public Guardian (performing certain functions under the Adults with Incapacity (Scotland) Act 2000¹⁴⁵) and that the public guardian was the larger of the two parts of the role, it was necessary to “look at the overall requirements of the role”¹⁴⁶.
224. SCTS also stated that it didn’t consider there was any evidence to support that there are deficiencies in the way the Accountant of Court has been run that would be addressed by requiring formal qualifications. Therefore, “if it ain’t broke, don’t fix it”¹⁴⁷.
225. Missing People added that softer skills, such as empathy, and understanding the needs of people, were important aspects of the Accountant of Court’s role.¹⁴⁸
226. When it appeared before the Committee, the SLC appeared to agree that there was a difference between its recommendation and what appears in the Bill – and suggested that the Scottish Government would need to account for why it had made this change. It told the Committee:

” The provision that we produced required the accountant to be qualified, as you say. The position in the bill is a lower qualification in formal terms. You would have to ask the Government why it has changed that and what its thinking is.
149

227. The Minister disputed that there had been any watering down. She also said that Patrick Layden from the SLC had, subsequent to his appearance at the Committee, agreed with her in correspondence that the drafting of the bill is consistent with the SLC’s policy recommendations on this point¹⁵⁰.

228. The Committee considers that the Bill’s requirement for the Accountant of Court to be, in the opinion of the SCTS “appropriately qualified or experienced in law and accounting” reflects current practice, and is sufficient.

229. However, given the evidence the Committee has heard, it Committee considers that there may be benefit in the Accountant’s qualifications being subject to review and that the Scottish Ministers should have the flexibility to amend the qualification requirement by way of secondary legislation at a future point should the outcome of such a view mean it were considered necessary.

230. The Committee calls on the Scottish Government to bring forward an amendment at Stage 2 to give effect to this.

Complaints referred by the Accountant of Court to professional bodies (SLCC’s role)

231. Another policy issue which the Committee considered in respect of Part 5 of the Bill relates to section 38(3) and (4). These sections require the Accountant of Court, where a judicial factor is a member of a professional body, to refer a judicial factor to their professional body in cases where the Accountant “is satisfied that there is, or has been, serious misconduct or material failure on the part of the judicial factor”. The term ‘professional body’ is not defined in the Bill.

232. The Legal Profession and Legal Aid (Scotland) Act 2007 (“the 2007 Act”) is a key part of the current regulatory framework for solicitors in Scotland. It established the Scottish Legal Complaints Commission (“the SLCC”) as the single gatekeeper for complaints about solicitors in Scotland (which cannot be resolved by the solicitor or solicitors’ firm in question). After assessing the eligibility of the complaint (for example, that it is not frivolous or vexatious¹⁵¹), the SLCC categorises it as either relating to a) inadequate professional services (a ‘services complaint’); b) professional misconduct or unsatisfactory professional conduct (a ‘conduct

complaint'). The 2007 Act provides that service complaints must be investigated by the SLCC itself, whereas conduct complaints must be referred to the Law Society.

233. If instead the Law Society receives a complaint about a solicitor directly, then, under section 33 of the 2007 Act, it must send it without delay to the SLCC (as the single gatekeeper of complaints).

234. The Committee questioned whether the normal gatekeeper for complaints in relation to solicitors in Scotland – the SLCC – is potentially bypassed by the provision in section 38, if the Accountant were to refer complaints directly to the Law Society. Furthermore, with its focus on “serious misconduct” and “material failures”, the Bill also appears to apply a different threshold to that of the SLCC as to when a solicitor is referred to their professional body.

235. The Accountant of Court did not give a view on the policy merits of the route. She simply told the Committee that section 38 contained a “clear route” with which she was comfortable.¹⁵²

236. Patrick Layden, giving evidence for the SLC, said “If the judicial factor is a solicitor, the professional body is the Law Society. I do not think that we had any intention of bypassing any other disciplinary or investigative body.”¹⁵³

237. In relation to the issue of the potential bypassing of the SLCC, the Minister said:

” I do not see any difficulties with the report on serious misconduct by a solicitor acting as a judicial factor being sent to the Law Society, because my understanding is that, if there was a complaint, it would be sent to the Law Society in the first instance and then to the SLCC.

...

However, I will consider the matter further to see whether what would happen in practice could be more accurately reflected in the bill.¹⁵⁴

238. The Committee asks the Scottish Government how it can clarify the route the Accountant of Court should take when referring a solicitor to their professional body as set out under their powers at section 38(4) of the Bill.

239. The Committee also asks the Scottish Government what consideration it has given to there being a different threshold for referral to the Law Society of Scotland depending on which ‘gatekeeper’ (i.e. the Accountant of Court or the SLCC) is used, particularly in light of the fact that the Accountant of Court does not need to have formal legal qualifications.

240. The Committee asks the Scottish Government to set out on what basis it is satisfied that the current proposals provide the most appropriate and correct route for the Accountant of Court to follow where they are satisfied

there is, or has been “serious misconduct or material failure on the part of the judicial factor”.

Drafting points raised by stakeholders

241. Stakeholders responding to the Committee’s call for views suggested a range of minor drafting changes or queries which, in their view, could improve the Bill.

242. Examples of such points include:

From the Faculty of Advocates:

” Section 1(5) does not address the question of the privative jurisdiction of Sheriff Court under the Courts Reform (Scotland) Act 2014. To clarify matters it may be that it should be specified that in relation to the appointment of judicial factors the Court of Session retains jurisdiction regardless of value of the estate.¹⁵⁵

From the Law Society of Scotland:

” “Warrant to intromit with estate (section 8)

This provision appears to be in line with the SLC’s recommendations.

We would, however, welcome clarity on the intended meaning of the phrase ‘without delay’. Modern mechanisms allow for the transfer of funds or the destruction of records to take place very quickly, and as a result the factor requires the certified copy interlocutor almost instantaneously in order to intimate to the appropriate people. We understand that it may currently take up to 3 days for the certified copy interlocutor to be available. We would welcome clarification as to liability for any transactions which may take place between the date of the interlocutor and the date on which the certified copy interlocutor is made available to the factor.¹⁵⁶

243. The Committee has not explored these issues in depth, but recognises that they may have merit.

244. The Committee asks the Scottish Government to consider the drafting points raised in the submissions in response to the Committee’s call for views on the Bill.

245. The Committee asks the Scottish Government to confirm whether it plans on bringing forward any amendments to the Bill to address these points, and whether any clarifications or reassurances have otherwise been given.

Delegated Powers Memorandum

246. Under Rule 9.6.2 of Standing Orders the Committee is required to consider and report upon any provisions in the Bill that confer power to make subordinate legislation. The Committee considered the delegated powers in the Bill at its meeting on 6 February 2024.
247. The Bill confers three powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a Delegated Powers Memorandum ¹⁵⁷ which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.
248. The Committee was content with the delegated powers provisions in the Bill.
- 249. The Committee is therefore content with the delegated powers contained in sections 42, 48 and 51, and with the Parliamentary scrutiny procedures which are applied to these powers.**

Financial Memorandum

250. As noted earlier in this report, the Finance and Public Administration Committee (FPAC) issued a call for evidence on the Bill and received no responses. FPAC consequently agreed to take no further action on the Bill.

251. The Committee separately noted that the Financial Memorandum to the Bill contained the following paragraphs:

” The SCTS, in its Corporate Plan 2023-26, announced that work to transform the services provided by the Office of the Public Guardian and the Accountant of Court is under way. This work includes the development of a new case management system, which will allow faster processing of cases, and more user-friendly access to services via a secure and efficient digital system.

The SCTS has indicated that the provisions of the Bill and any rules of court required to support these might require amendments to the new case management system. However, at the time of the Bill being laid in Parliament it has not been possible to quantify any potential costs associated with this.¹⁵⁸

252. The Committee interrogated costs associated with the Bill further with the Scottish Courts and Tribunals Service when it appeared before the Committee on 30 April¹⁵⁹, as well as in correspondence with the organisations following the meeting¹⁶⁰, as narrated in the section on a register for judicial factors above.

253. While SCTS’s response emphasised the difficulties of putting precise figures on costs for its IT project, and the variables which could influence those costs, their answers to the Committee’s questions nonetheless gave the Committee a clearer understanding of the potential costs associated with the IT development costs of SCTS’s new case management system. While there may be no costs associated directly from this Bill to that work, if the Bill does not get Royal Assent in time for any changes to be incorporated, costs were estimated to be potentially as high as “£380K”.¹⁶¹

254. It would have been helpful to the Committee to have been given figures such as these, even as estimates, within the financial memorandum.

Conclusions on the general principles of the Bill

255. The Committee recommends to the Parliament that the general principles of the Bill be agreed to.

Annexe A: Extracts from minutes

[35th Meeting, 2023, Tuesday, 19 December 2023](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered and agreed its approach to the scrutiny of the Bill at Stage 1.

[4th Meeting, 2024, Tuesday, 30 January 2024](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered and agreed an update on its approach to the scrutiny of the Bill at Stage 1.

[5th Meeting, 2023, Tuesday, 6 February 2024](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered the delegated powers provisions in this Bill at Stage 1. It agreed to report to the lead Committee on the Bill, the Delegated Powers and Law Reform Committee.

[11th Meeting, 2023, Tuesday, 26 March 2024](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered its approach to scrutiny of the Bill at Stage 1.

[12th Meeting, 2023, Tuesday, 16 April 2024](#)

Judicial Factors (Scotland) Bill: The Committee took evidence from—

Charles Garland, Interim Chief Executive and Patrick Layden KC TD, former lead Commissioner, Scottish Law Commission.

Judicial Factors (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting and agreed to write to the Scottish Courts and Tribunal Service.

[13th Meeting, 2023, Tuesday, 23 April 2024](#)

Judicial Factors (Scotland) Bill: The Committee took evidence from—

Morna Grandison, Director of Interventions, Law Society of Scotland;

Gavin MacColl KC, Faculty of Advocates;

Dr Alisdair MacPherson, Senior Lecturer in Commercial Law, University of Aberdeen;

Professor Gareth Morgan, Charity Law Association;

and then from—

Morna Grandison, Director of Interventions, Law Society of Scotland;

Sandy Lamb, Partner, Lindsays;

Ken Pattullo, Partner, Begbies Traynor.

Judicial Factors (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

[14th Meeting, 2024, Tuesday, 30 April 2024](#)

Judicial Factors (Scotland) Bill: The Committee took evidence from—

Josie Allan, Head of Policy and Partnerships, Missing People;

and then from—

Raish Allan, Judicial Factories Manager, Tim Barraclough, Executive Director, Tribunals and Office of the Public Guardian and Fiona Brown, Public Guardian and Accountant of Court, Scottish Courts and Tribunals Service.

Judicial Factors (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

[15th Meeting, 2024, Tuesday, 7 May 2024](#)

Judicial Factors (Scotland) Bill: The Committee took evidence from—

Siobhian Brown, Minister for Victims and Community Safety, Michael Papparakis, Policy and Bill Programme Manager accompanied by Megan Stefaniak, Solicitor, Scottish Government.

Judicial Factors (Scotland) Bill (in private): The Committee considered the evidence it heard earlier in the meeting.

[16th Meeting, 2024, Tuesday, 14 May 2024](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered the themes arising from evidence received during its scrutiny of the Bill at Stage 1.

[20th Meeting 2024, Tuesday 11 June 2024](#)

Judicial Factors (Scotland) Bill (in private): The Committee considered and agreed the draft Stage 1 report.

Annexe B: Evidence

Oral Evidence

Meeting on Tuesday, 16 April 2024

- Charles Garland, Interim Chief Executive, Scottish Law Commission
- Patrick Layden KC TD, former lead Commissioner, Scottish Law Commission

Meeting on Tuesday, 23 April 2024

- Morna Grandison, Director of Interventions, Law Society of Scotland
- Gavin MacColl KC, Faculty of Advocates
- Dr Alisdair MacPherson, Senior Lecturer in Commercial Law, University of Aberdeen
- Professor Gareth Morgan, Charity Law Association
- Sandy Lamb, Partner, Lindsays
- Ken Pattullo, Partner, Begbies Traynor.

Meeting on Tuesday, 30 April 2024

- Josie Allan, Head of Policy and Partnerships, Missing People
- Raish Allan, Judicial Factories Manager
- Tim Barraclough, Executive Director, Tribunals and Office of the Public Guardian
- Fiona Brown, Public Guardian and Accountant of Court, Scottish Courts and Tribunals Service

Meeting on Tuesday, 7 May 2024

- Siobhian Brown, Minister for Victims and Community Safety
- Michael Papparakis, Policy and Bill Programme Manager
- Megan Stefaniak, Solicitor, Scottish Government

Written Evidence

- Centre for Scots Law at the University of Aberdeen
- Charity Law Association
- Faculty of Advocates
- Faculty of Procurators of Caithness
- Law Society of Scotland

- Missing People
- Nicholas Grier
- Propertymark
- R3
- Senators of the College of Justice
- The Sheriffs and Summary Sheriffs Association

Correspondence

- Letter from the Lord President of the Court of Session to the Convener, 28 May 2024
- Letter from the Convener to the Lord President of the Court of Session, 15 May 2024
- Letter from the Executive Director, Tribunals and Office of the Public Guardian Scottish Courts and Tribunals Service to the Convener, 8 May 2024
- Letter from the Convener to the Scottish Courts and Tribunals Service, 2 May 2024
- Letter from Morna Grandison to the Convener, 2 May 2024
- Letter from Professor Gareth Morgan to the Convener, 29 April 2024
- Letter from the Convener to Morna Grandison, 25 April 2024
- Letter from the Convener to Professor Gareth Morgan, 24 April 2024
- Letter from the Chief Executive of the Scottish Courts and Tribunal Service to the Convener, 22 April 2024
- Letter from the Convener to the Scottish Courts and Tribunals Service, 17 April 2024
- Letter from the Scottish Government to the Finance and Public Administration Committee of 29 February 2024
- Letter from the Minister for Victims and Community Safety to the Convener, 6 December 2023

- 1 Scottish Law Commission [Judicial factors project page](#).
- 2 Scottish Law Commission (2013) [Report on Judicial Factors](#) (Scot Law Com 233)
- 3 Judicial Factors (Scotland) Bill. [Financial Memorandum](#) _ SP Bill 40-FM, Session 6 (2023))
- 4 Scottish Parliament Information Centre (2024). [Judicial Factors \(Scotland\) Bill](#). SPICe Briefing SB 24/16
- 5 Delegated Powers and Law Reform Committee. [Judicial Factors \(Scotland\) Bill published responses](#)
- 6 Scottish Parliament Information Centre (2024). [Judicial Factors \(Scotland\) Bill: analysis of responses to the call for views](#).
- 7 Scottish Parliament Information Centre (2024). [Judicial Factors \(Scotland\) Bill](#). SPICe Briefing SB 24/16
- 8 [Adults with Incapacity \(Scotland\) Act 2000](#) (asp 4)
- 9 [Judicial Factors \(Scotland\) Bill. Policy Memorandum](#)(SP Bill 40-PM, Session 6 (2024)), paragraph 8
- 10 Policy Memorandum, paragraph 8
- 11 Scottish Parliament Information Centre (2024). [Judicial Factors \(Scotland\) Bill](#). SPICe Briefing SB 24/16
- 12 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col. 4
- 13 [Judicial Factors Act 1849](#)
- 14 [Judicial Factors \(Scotland\) Act 1889](#)
- 15 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col. 17
- 16 Policy Memorandum, paragraph 8
- 17 Scottish Law Commission (2010) [Discussion Paper on Judicial Factors](#)
- 18 Scottish Law Commission (2013) [Report on Judicial Factors](#) (Scot Law Com 233)
- 19 Scottish Government (2019) [Judicial factors: consultation](#)
- 20 Scottish Government (2020) [Judicial factors: consultation analysis](#)
- 21 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col. 4
- 22 Scottish Parliament. [Standing Orders](#) (6th Edition, 9th Revision, 22 December 2023).
- 23 Scottish Parliament. of 24 March 2021 (Scottish Law Commission Bills)
- 24 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col. 25
- 25 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col. 8

- 26 Written evidence. [Law Society of Scotland](#).
- 27 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col. 5
- 28 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 3
- 29 Delegated Powers and Law Reform Committee. *Official Report*. 47 May 2024. Col 5
- 30 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 11
- 31 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 11
- 32 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 7
- 33 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 7
- 34 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 10 and 11
- 35 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 7
- 36 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 7
- 37 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 12
- 38 Written evidence. [Missing People](#).
- 39 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 3
- 40 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 31
- 41 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 31
- 42 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 13
- 43 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 16 - 18 and Written Evidence. [Missing People](#).
- 44 Written Evidence. [Missing People](#).
- 45 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 17 and 18
- 46 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 21
- 47 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 16 and 17; and Written Evidence, [Missing People](#).
- 48 Written Evidence, [Missing People](#).
- 49 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 8 and 9
- 50 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 9
- 51 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 9

- 52 Written evidence. [Charity Law Association](#) .
- 53 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 25
- 54 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 25
- 55 Correspondence from [Professor Gareth Morgan of the Charity Law Association to Convener](#). 29 April 2024.
- 56 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 6
- 57 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 8
- 58 Written evidence. [Faculty of Procurators of Caithness](#).
- 59 Correspondence from [Morna Grandison, Law Society of Scotland to the Convener](#). 2 May 2024. and Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 43.
- 60 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 22
- 61 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 21
- 62 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 22
- 63 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 28
- 64 [7] Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 28
- 65 Policy Memorandum, paragraph 10.
- 66 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 6
- 67 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Cols 30 - 32
- 68 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 9
- 69 Written Submission. [Law Society of Scotland](#).
- 70 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 32
- 71 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Cols 32 and 33
- 72 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 41 and 42
- 73 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 10
- 74 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 11
- 75 Written Submission. [Propertymark](#) .

- 76 Written submission. [Missing People](#). And Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 11 and 12
- 77 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 7
- 78 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 35 and 36
- 79 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 35 and 36
- 80 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 11 and 12
- 81 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 13 and 14
- 82 Scottish Parliament Information Centre. (2024) [Judicial Factors \(Scotland\) Bill](#). SPICe Briefing SB 24/16.
- 83 Written submission. [Faculty of Procurators of Caithness](#).
- 84 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 7
- 85 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 12
- 86 Policy memorandum, paragraph 41.
- 87 Scottish Law Commission. (2023). Consolidated responses to: Discussion Paper No 146 on Judicial Factors.
- 88 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 33
- 89 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 10
- 90 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 10
- 91 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 37
- 92 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 14
- 93 Written submission. [Senators of the College of Justice](#).
- 94 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 15
- 95 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 13
- 96 Written submission. [Faculty of Advocates](#).
- 97 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 37
- 98 Correspondence from [the Scottish Courts and Tribunals Service to the Convener](#). 8 May 2024.
- 99 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 15 and 16

Delegated Powers and Law Reform Committee

Stage 1 Report on the Judicial Factors (Scotland) Bill, 43rd Report, 2024 (Session 6)

- 100 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 15 and 16
- 101 Delegated Powers and Law Reform Committee. 52nd Report, 2023 (Session 6). [Stage 1 Report on the Trusts and Succession \(Scotland\) Bill](#) (SP Paper 434)
- 102 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 18
- 103 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 18
- 104 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 38
- 105 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Cols 38 and 39
- 106 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 38
- 107 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 14
- 108 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 15
- 109 Correspondence from [the Scottish Courts and Tribunals Service to the Convener](#). 22 April 2024.
- 110 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 17
- 111 Written evidence. [The Centre for Scots Law at the University of Aberdeen](#). Written Evidence. [Professor Nicholas Grier](#). Written evidence. [R3](#).
- 112 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 19
- 113 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 16
- 114 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 20
- 115 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 18
- 116 Written evidence. [Faculty of Advocates](#).
- 117 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 16
- 118 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 38
- 119 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Cols 16 and 17
- 120 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 45
- 121 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Cols 12 and 13
- 122 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 19 and 20
- 123 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 19 and 20

- 124 Correspondence [from the Lord President to the Convener](#). 28 May 2024
- 125 Written evidence. [Faculty of Advocates](#).
- 126 Written evidence. [The Sheriffs and Summary Sheriffs Association](#).
- 127 Written evidence. [Faculty of Advocates](#).
- 128 Written evidence. [The Sheriffs and Summary Sheriffs Association](#).
- 129 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 21
- 130 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 17
- 131 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 20
- 132 [Judicial Factors \(Scotland\) Bill. Explanatory Notes](#). (SP Bill 40-EN, Session 6 (2023)).
- 133 Written evidence. [The Centre for Scots Law at the University of Aberdeen](#).
- 134 Delegated Powers and Law Reform Committee. *Official Report*. 23 April 2024. Col 22
- 135 Written evidence. [The Centre for Scots Law at the University of Aberdeen](#).
- 136 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 39 and 40
- 137 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 18
- 138 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 22
- 139 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 22
- 140 [Judicial Factors \(Scotland\) Bill. Explanatory Notes](#). (SP Bill 40-EN, Session 6 (2023)).
- 141 Policy memorandum, paragraph 105.
- 142 Policy memorandum, paragraph 105.
- 143 Scottish Law Commission (2013) [Report on Judicial Factors](#) (Scot Law Com 233) (section 43(1) of the draft Bill)
- 144 Written evidence. [The Law Society of Scotland](#).
- 145 Section 6(1) of the [Adults with Incapacity \(Scotland\) Act 2000](#) (asp 4)
- 146 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 29
- 147 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 29
- 148 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 24
- 149 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 19
- 150 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Cols 23 and 24

Delegated Powers and Law Reform Committee

Stage 1 Report on the Judicial Factors (Scotland) Bill, 43rd Report, 2024 (Session 6)

- 151 Section 2(4)(a) of the [Legal Profession and Legal Aid \(Scotland\) Act 2007](#) (asp 5)
- 152 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Col 40
- 153 Delegated Powers and Law Reform Committee. *Official Report*. 16 April 2024. Col 20
- 154 Delegated Powers and Law Reform Committee. *Official Report*. 7 May 2024. Col 25 and 26
- 155 Written evidence. [Faculty of Advocates](#).
- 156 Written evidence. [The Law Society of Scotland](#).
- 157 Judicial Factors (Scotland) Bill. [Delegated Powers Memorandum](#) _ SP Bill 40-DPM, Session 6 (2023)).
- 158 Judicial Factors (Scotland) Bill. [Financial Memorandum](#). SP Bill 40-FM, Session 6 (2023)).
- 159 Delegated Powers and Law Reform Committee. *Official Report*. 30 April 2024. Cols 37 and 44
- 160 Correspondence from [the Scottish Courts and Tribunals Service to the Convener](#) . 8 May 2024.
- 161 Correspondence from [the Scottish Courts and Tribunals Service to the Convener](#) . 8 May 2024.

