

Minister for Victims and Community Safety  
Ministear airson Luchd-fulaing is Sàbhailteachd  
Chòimhearsnachd  
Siobhian Brown MSP/BPA



Stuart McMillan MSP  
Convener  
Delegated Powers and Law Reform Committee

By email to:  
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5 September 2024

Dear Convener

### **Judicial Factors (Scotland) Bill**

I would like to thank the Committee for its constructive Stage One Report on the Judicial Factors (Scotland) Bill. I am pleased to note the Committee's recommendation that the general principles of the Bill be agreed to and the positive nature of the report.

Please find below my response to the Committee's recommendations.

I hope that this information is of assistance to the Committee.

Yours sincerely,

**SIOBHIAN BROWN**

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## Judicial Factors (Scotland) Bill

### The Scottish Government's response to the Delegated Powers and Law Reform Committee's stage 1 report

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

#### APPLICABILITY TO MISSING PEOPLE

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.

The Scottish Government has noted the Committee's recommendations and considers that, rather than amending the Bill, the Committee's views would be more appropriately addressed through the Explanatory Notes to the Bill, for example, by expanding on the detail in the Notes through inclusion of examples and by making clear that a judicial factor can be appointed to manage the estate of a missing person.

Section 3 of the Bill is deliberately widely drafted and already allows a judicial factor to be appointed over the estate of a missing person so we believe this would address the concern raised by the Committee without undermining the wider policy regarding the circumstances in which a judicial factor may be appointed.

64. 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.

The Scottish Government has committed to working with the charity Missing People to prepare guidance for persons who are considering appointing a judicial factor to manage the estate of a missing person. We will ensure that the guidance covers the point raised by the Committee.

73. 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.

In preparing the guidance, the Scottish Government will work with all interested stakeholders to ensure that the process for appointing a judicial factor over the estate of a missing person is a practical option for managing their property.

83. 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.

84. 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.

The Scottish Government can confirm the guidance will cover the points raised and the Scottish Government will work with all relevant stakeholders on this matter.

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.

As the charity Missing People told the Committee there are a wide range of circumstances in which persons go missing, some more complicated than others. Depending on the circumstances, and as highlighted by Missing People, the evidence of the person being missing may include confirmation from the police that the person has been reported as missing and that after investigation could not be found, evidence of usual activities that have been missed, statements from family, friends and/or employer and bank statements or phone records showing lack of activity.

That is why the Bill does not make provision about what evidence is required to satisfy a court that an appointment should be made, as rightly this will depend on the circumstances of each case with the court hearing the case being best placed to decide, taking into account all of the facts and evidence presented, whether to make the appointment.

I can confirm the Scottish Government will make sure that the guidance covers the point of what evidence might be used to demonstrate that a person has gone missing.

## **APPLICABILITY TO CHARITIES**

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.

We have noted this recommendation and have started consultations with stakeholders about the proposed changes sought by the Charity Law Association and the Scottish Law Commission ahead of bringing forward any Stage 2 amendments that may be needed in this area. I will write to the Committee ahead of Stage 2 to confirm my intentions when this engagement is complete.

## **COMPLAINTS PROCESS**

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

I can confirm the Scottish Government will work with the SCTS and the Accountant of Court to make sure that information on how to make a complaint about a judicial factor is clearly accessible.

## **SECTION 104 ORDER**

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.

The Scottish Government has been in discussions with the UK Government regarding a section 104 order that would make sure that in the Bill, sections 7, 8, 10, 11, 12, 13, 39, 49, 51 and 52 extend to the rest of the United Kingdom.

We have also discussed whether anything can be included in the order in relation to the bodies excluded from the requirement to comply with information requests in sections 12 and 29 of the Bill, that is, UK Government departments, Ministers of the Crown, reserved bodies in terms of the Scotland Act 1998, and public bodies operating wholly in relation to

a reserved matter. I will keep the Committee updated on progress as the matter develops.

Inter-governmental arrangements are already in place to manage the delivery of orders that require to be made under section 104 of the Scotland Act 1998. The delivery of such orders depends on the agreement of both the UK and Scottish Governments and is influenced by a wide range of factors, for example, subject matter, complexity of drafting and the UKG securing time in the UK Parliament.

Scottish Government officials will always seek to identify the need for any such orders as early as possible in the Bill process, as has happened with this Bill. It can take around 12 to 18 months from inception to an order being made, and both Governments work on the basis of planning and programming the orders together. It is standard practice for dialogue about a section 104 Order to have started prior to the Bill's introduction, again as was the case with this Bill.

Section 104 orders make provision considered necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. As an order made in consequence of Scottish legislation, progress can be made in parallel with a Bill to a certain extent but can only go so far before the primary legislative process concludes.

As happened with recommendations for reform of judicial factors, the Scottish Law Commission recognised the need for a section 104 order and published a draft order with its report of 2013.

## **DATA PROTECTION ISSUES**

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 to consider whether they should be either clarified further on the face of the Bill or removed altogether.

I have listened carefully to the views of stakeholders and the Committee regarding data protection and will table relevant Stage 2 amendments to address the issues raised.

## **REGISTER FOR THE APPOINTMENT OF JUDICIAL FACTORS**

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

are more judicial factors being appointed, or judicial factories are increasingly used in other ways.

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

169. 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.

Registration of the appointment of a judicial factor in the Register of Inhibitions is a balance between protecting the factory estate and publicising the appointment. I welcome the Committee's recognition of the importance of registration and will bring forward an amendment at Stage 2 that gives effect to the Committee's recommendation on this issue.

The Scottish Government will discuss with the Registers of Scotland and the Law Society of Scotland to consider what actions can be taken to raise awareness of the use of the Register to record appointments of judicial factors.

## **POWER TO INVEST**

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.

I welcome the Committee's view that the investment powers set out in the Bill are sufficient. Not all judicial factors will need to make investment decisions. The Bill requires judicial factors to consider whether it would be appropriate to invest, and this is not likely to be the case for all judicial factories. The Bill is not prescriptive as to how to invest and leaves it up to the judicial factor to decide, taking professional advice where appropriate.

I am continuing to engage with stakeholders to consider this matter and I will update the Committee ahead of Stage 2.

## **FIDUCIARY NATURE OF THE JUDICIAL FACTOR**

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.

While the term “fiduciary duty” is not used in the Bill, the Bill achieves the same effect by requiring judicial factors to hold, manage, administer and protect the factory estate for the benefit of persons with an interest in the estate and to exercise care, prudence and diligence and take professional advice when appropriate.

I do not want there to be any adverse consequences of such an amendment, which could risk that a court interprets this in the final Act in such a way as to narrow a judicial factor’s powers. Another risk is that it could also lead to a judicial factor’s functions, or their exercising of any of their functions, being challenged by disgruntled persons or lead to satellite litigation.

As such, I will not bring forward any amendment in this area, but noting the Committee’s views, I will ensure that the detail in the Explanatory Notes are expanded.

### **SECTIONS 34 AND 38**

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.

I have listened carefully to the evidence given and we will ensure that the detail in the Explanatory Notes is expanded to clarify the relationship between sections 34 and 38.

### **QUALIFICATIONS**

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

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

I can confirm I will table relevant amendments at Stage 2 to give effect to the Committee’s recommendation on this issue.

### **COMPLAINTS REFERRED BY THE ACCOUNTANT OF COURT TO PROFESSIONAL BODIES**

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".

We do not consider there would be different thresholds for referral. What would happen in practice, is that where the Law Society receives a referral from the Accountant under the Bill, it would pass this to the SLCC who would then assess the complaint as usual. This is because under the Legal Profession and Legal Aid (Scotland) Act 2007, the Law Society is under a legal duty to forward any complaints it receives to the SLCC and as such, the SLCC would not be bypassed.

Nevertheless, I have noted the Committee's views and so am considering how the Bill can be amended at Stage 2 to capture the way that complaints to a professional body are made in the context of solicitors and any regulated profession.

#### **DRAFTING POINTS RAISED BY STAKEHOLDERS**

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.

I can confirm the Scottish Government is considering a number of drafting issues raised in written evidence and will update the Committee ahead of Stage 2 on this issue.