

JUDICIAL FACTORS (SCOTLAND) BILL

[AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Judicial Factors (Scotland) Bill ("the Bill"). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 6A(1) – Review of appropriateness of registration in the Register of Inhibitions

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: new power

Provision

4. This section confers a power on the Scottish Ministers, by regulations, to make changes to the registration arrangements for notices of appointment of judicial factors.

Reason for taking power

5. The Delegated Powers and Law Reform Committee in its Stage 1 consideration of the Bill supported the proposal in the Bill to register judicial factories in the Register of Inhibitions. However, it took the view that the Bill should be flexible enough to allow for this to be changed in the future if circumstances lead to a different conclusion from a cost-benefit analysis.

6. The Committee recommended that the registration of judicial factories in the Register of Inhibitions should be periodically reviewed and that the Scottish Ministers should consider any other possible ways in which appointments could be registered and searched by the public, including by the creation of a standalone register. The Scottish Government agreed and brought forward a Stage 2 amendment to that effect which is now section 6A.

Choice of procedure

7. As the power is capable of amending the effect of primary legislation which specifies the register used to publicise the fact of a judicial factor's appointment, and includes the possibility of creating a new register, the Scottish Government considers the affirmative procedure provides a suitable level of parliamentary scrutiny.

Section 9A(1) – Guidance about the appointment of judicial factors on the estates of missing persons

Power conferred on: the Scottish Ministers
Power exercisable by: guidance
Parliamentary procedure: none
Revised or new power: new power

Provision

8. This section confers on the Scottish Ministers a duty to issue guidance about the appointment of judicial factors on the estate of missing persons.

Reason for taking power

9. The Delegated Powers and Law Reform Committee in its Stage 1 consideration of the Bill recommended that consideration be given to including a reference to missing people in the Bill in such a way that makes it clear that the legislation may be used by those seeking to manage the estate of a missing person. The power for the Scottish Ministers to issue guidance is to assist families of missing persons decide whether they wish to seek an appointment of a judicial factor and what such an appointment might entail.

10. Any such guidance can be reviewed and revised by the Scottish Ministers and will cover issues specific to a judicial factor appointed over the estate of a missing person. These might include how to evidence a person as missing when making an application for appointment under section 1, the ability of a judicial factor to request specific powers under section 11, situations where the interests of the estate may not align with the wishes of the missing person, what happens if a missing person returns, and any interaction with the Presumption of Death (Scotland) Act 1977.

Choice of procedure

11. Guidance is considered to be an appropriate method for addressing the specific issues associated with seeking the appointment of a judicial factor over the estate of a missing person and for signposting to other relevant resources. None of the information envisaged for setting out in guidance would be suitable for a regulation-making power or for further detailing on the face of the Bill. It is not considered appropriate to provide for Parliamentary process for guidance in relation to this function.

Section 35(1A) – Accountant of Court: appointment, remuneration and fees

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: new power

Provision

12. This section enables the Scottish Ministers, by regulations, to alter the criteria a person must satisfy to be appointed as the Accountant of Court by the Scottish Courts and Tribunals Service (“SCTS”).

Reason for taking power

13. Section 35(1) of the Bill requires that the person appointed to the office of Accountant of Court must be, in the view of the SCTS, appropriately qualified or experienced in law and accounting. While the Committee considered this requirement to reflect current practice and to be sufficient, it also took the view that there may be benefit in the Accountant’s qualification being subject to review, and that the Scottish Ministers should have the flexibility to amend the qualification requirement at some point in the future should the outcome of such a review indicate that it were necessary or expedient to do so. The Scottish Government agreed and brought forward a Stage 2 amendment to that effect which is now section 35(1A).

Choice of procedure

14. As this is a power which allows textual modification of primary legislation, it is considered appropriate that it be made subject to the affirmative procedure.

Section 36(1A) – Depute Accountant

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative
Revised or new power: new power

Provision

15. This section enables the Scottish Ministers, by regulations, to alter the criteria a person must satisfy to be appointed as the Depute Accountant of Court by the SCTS.

Reason for taking power

16. Section 36(2) of the Bill requires that the person appointed to the office of Depute Accountant must be, in the view of SCTS, appropriately qualified or experienced in law and accounting. The qualification criteria imposed on the person appointed as the Depute Accountant is the same as that imposed on the Accountant of Court by virtue of section 35(1). Given that the qualifications of the Accountant require to be periodically reviewed by the Scottish Ministers, the Scottish Government considers that the Depute Accountant's qualifications should also be subject to review, and able to be amended if needed.

Choice of procedure

17. As this is a power which allows textual modification of primary legislation, it is considered appropriate that it be made subject to the affirmative procedure.

*This document relates to the Judicial Factors (Scotland) Bill (SP Bill 40A) as amended at
Stage 2*

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