

Judicial Factors

Analysis of responses to Scottish Government Consultation

August 2020



Scottish Government
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Judicial Factors Consultation - Summary and Analysis of Consultation Responses

Background

1. The Scottish Government undertook a consultation to seek views on a proposed draft Bill on Judicial Factors which was contained in the Report of Judicial Factors published by the Scottish Law Commission (SLC).
2. A judicial factor is a person appointed by the court to gather, supervised by the Accountant of Court, for the purpose of holding, managing, administering and protecting the property of another where the need arises.
3. The consultation sought views on the draft Bill and some of the recommendations made by the Commission. It also sought views in relation to the current procedure for the appointment of judicial factors in the case of missing persons and procedural issues in safeguarding children's property under the Children Scotland Act 1995.
4. The report contains recommendations, which would provide for a new regime to bring clarity, accessibility and efficiency to an important but outmoded area of the law.

The proposed Bill

5. The draft Bill sets out a comprehensive set of provisions governing all aspects of judicial factors, including appointment, powers, duties, remuneration, termination and the role of the Accountant of Court in relation to judicial factors.
6. The Scottish Government agreed with many of the recommendations contained in the Report.

Summary

7. We issued the consultation on 28 August 2019 and invited responses to the proposed draft Bill. The closing date was 20 November 2019. There were nine responses to the consultation and all but one of the respondents have agreed to their responses being made public. In addition, one of the respondents asked for additional information provided as an annex or supplementary paper not to be published.
8. This paper summarises key points raised by respondents to the consultation. The consultation paper, as well as responses to the consultation, can be accessed via the Scottish Government consultation webpages <https://consult.gov.scot/justice/consultation-on-judicial-factors/>
9. To protect the reputation of Scottish Ministers, named individuals, organisations or companies, all responses are screened for potentially defamatory statements before they are made available to the public.

10. The questions in this consultation were framed to elicit a broad range of responses ranging from simple "yes", "no" type responses to open comments. Furthermore, respondents might have responded to one, several or all questions in the consultation paper. Therefore, due to the wide range of comments within the responses received we have opted to provide an analysis of each question as detailed below. This also includes two questions which asked for comments or suggestions.

11. Detailed below are the questions asked in the consultation and the number of responses received. As stated above not all respondents answered every question. We have counted some answers as either "yes" or "no" when the respondent had not used the format of the response form but it was clear from comments given that they either agreed or disagreed with a question. In addition, two of the questions no. 2 and 13a asked for comments and suggestions.

Conclusion

12. Overall, the majority of respondents supported the draft Bill confirming that there is a necessity for the existing legislation to be updated and modernised.

13. Although, the number of responses were low at nine it may not be unsurprising given the specialist nature of the consultation. The number is nevertheless low and for that reason we have not opted to illustrate responses by way of percentage figures as this may be misleading. However, we are pleased that, in mitigation, we received responses from key bodies and organisations who have direct experience of the current regime and who have been able to provide insightful responses based on their own practical experience.

14. Such key bodies included;

- the Missing People charity who provide specialised support for families and friends of missing loved ones. This can include the administration or protection of their estates;
- the Law Society for Scotland seek appointments of judicial factors for firms of solicitors where there has been a breach of professional practice and they appear to be in financial difficulty;
- the Scottish Courts and Tribunals Service (SCTS) which incorporates the Accountant of Court (AoC). The AoC has a supervisory role in the appointment of judicial factors. This is relevant in all aspects of the administrations. Including managing and safeguarding the estates of children in Scotland and missing people estates;
- the Centre for Scots Law at the University of Aberdeen are academics supporting the study of Scots law, past, present and future, including as a practical, functioning reality; and
- the Faculty of Procurators of Caithness are a professional body of legal practitioners providing services to lawyers and have practical experience of the appointment of judicial factors.

Scottish Government response

15. There was a clear and strong message from the majority of respondents that the draft Bill was welcomed.

16. Of the nine responses received, four of the responses answered the majority of the questions. Another two responses responded to the relevant sections in the consultation in relation to their interests. A further three expressed their general view supporting the proposed legislation in this area.

17. The consultation has provided some clarity on which specific areas/issues need to be considered further when taking forward work on this draft Bill particularly where we asked for specific comments.

18. Responses to the proposals to make the process to appoint a judicial factor in the case of missing persons more accessible for family members was supportive, but some further work will be required to consider issues raised.

19. The questions on seeking views on procedural issues in safeguarding children's property under the Children (Scotland) Act 1995 were positive. Consideration of further suggestions or alternatives have been noted.

Next Steps

20. Although a low response rate was received as discussed above, key bodies did respond which has provided us with insightful responses. The suggestions and alternative proposals raised will need to be looked at and given consideration.

21. With a positive response to the Scottish Law Commission recommendations and draft Bill, the overall intention is to take forward work to implement the proposals. However, this will be dependent on the pressures on future legislative activity.

Table of all Responses to the Consultation

	QUESTION	YES	NO	NOT ANSWERED/DON'T KNOW
Q1	Should the Scottish Government implement the Report by the Scottish Law Commission?	9		
Q3	Should there be a qualifying period during which a factor in loco absentis cannot be appointed? If so, what should that period be?	3	2	4
Q4	Should the duty of a judicial factor appointed in the case of a missing person be limited to acting in their best interests only?	2	3	4
Q5	Should the Scottish Courts only have jurisdiction to appoint a judicial factor to an estate of a missing person if?.....	4		5
Q6	Are there any other provisions in the Guardianship (Missing Persons) Act 2017, which could be usefully replicated in any Scottish Legislation?	2	2	5
Q7	Should there be a change of name of "loco absentis" cases?	3	2	4
Q8	If so, what are your views on "judicial factor over a missing person's estate?"	5		4
Q9	Should the Accountant of Court be able to draw matters of concern to the attention of the relevant sheriff court?	5		4
Q10	Should the Accountant of Court be able to vary or recall directions?	5		4
Q11	Do we need to specify the procedure where no joint minute or subsequent decree has taken place?	5		4
Q12	Do you agree that the views of the child should be taken into account (where practicable and taking account of their age and maturity) where a parent is appointed as the child's legal representative?	4		5
Q13b	Would it require legislative change?	2		7
Q14	Should applications to appoint a judicial factor be heard in the sheriff court rather than the Court of Session?	5	1	3
Q15	If applications to appoint a judicial factor are to be heard in the sheriff court rather than the Court of Session, should it be the same rule for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980?	2	3	4

	QUESTION	YES	NO	NOT ANSWERED/DON'T KNOW
Q16	The Scottish Government proposes that the “appropriate sheriff court” for an application would be:.....Does this seem a reasonable approach?	4		5
Q17	Should sections 4 and 6 of the draft Commission Bill be followed in relation to who may be appointed as a judicial factor?	4		5
Q18	Do you agree that the wording at section 7 of the draft Bill reflects that caution is only required in exceptional circumstances?	3		6
Q19	Do you consider that that interlocutors should contain provisions on how proactively an estimate should be managed?	2	1	6
Q20	Should judicial factors continue to be paid a commission?	3		6
Q21.	Do you have any other comments on how judicial factors should be paid in the future?	2		7
Q22.	Do you have any comments on the Impact Assessments?	0		9

Table of all questions were comments and suggestions were sought

	COMMENTS PROVIDED TO	Comments	No comments
Q2	Please provide any comments on the current procedure for appointment of Judicial Factors in Missing Persons	5	4
Q13a	What would be the most proportionate way of ensuring that a child’s views are taken into account?	4	5

Summary of responses to each question in the consultation paper

Part 1 - Introduction

Q1: Should the Scottish Government implement the Report by the Scottish Law Commission? (all of the respondents answered this question)

22. All respondents welcomed a review of the legislation on Judicial Factors and the bringing forward of a Bill to update and modernise the law in this area. They were generally supportive of the recommendations in the report subject to a couple of specific points. which were picked up in the response to the following questions in the [consultation paper](#)

- whether interlocutors should contain provisions on how proactively an estate should be managed, Question 19, paragraphs 4.29 to 4.31;
- should applications to appointment a judicial factor be heard in the Sheriff rather than the Court of session and whether it should be the same rule for applications under the Solicitors (Scotland) Act 1978 (Question 14 and 15, paragraph 4.1 to 4.10; and
- whether the duty of a judicial factor appointed in the case of a missing person be limited in their best interests only Question 4, paragraph 2,19.

Part two – Missing Persons

Q2: Please provide any comments on current procedure for the appointment of judicial factors in the case of a missing person? (5 of the respondents offered comments)

23. Five of the respondents provided comments on the current procedure for the process of appointing a judicial factor for missing persons.

24. The overall view was that the procedure was not widely known to the public or to those within the professional sector and therefore not used. The process is viewed as complex, overly legalistic and costly.

25. It was suggested that the current system of judicial factors usually works to protect the interests of creditors, rather than protecting a missing persons estate and ensuring that their dependants are looked after.

26. The Law Society of Scotland also pointed out in their response that *“Jurisdiction on the basis of habitual residence is appropriate and would correspond, for example, with the general trend in private international law as exemplified by various Hague Conventions. The qualification “for one year” appears to be unnecessary and impractical and may give rise to considerable practical difficulties of proof in many situations, as well as effectively removing this ground of jurisdiction for some individuals. “Habitual residence” is a clear concept, reasonably well established by UK cases concerning adults with incapacity. It indicates a degree of permanence and an individual can only have one habitual residence.*

Q3: Should there be a qualifying period during which a factor in loco absentis cannot be appointed? If so, what should that period be? (5 of the respondents answered this question)

27. The majority of responders agreed that there should be a qualifying period where a factor cannot be appointed.

28. The suggestions ranged as follows

- four weeks minimum period, on the basis of figures contained in the Police Scotland annual report 2017/18; and
- 60 days on the basis that individuals can travel extensively and more widely, whilst remaining in contact through email and other digital channels.

29. However, it was identified that there can be a wide variety of circumstances to be taken into account and any time limit should be capable of being waived accordingly.

30. One respondent proposed that an application for an interim appointment of a factor can be made at any time. If the interim appointment is for less than six months, reasons would be required and no disposal of any assets would be permitted during this period. After six months has passed and if the person remains missing, then a permanent appointment may be applied for.

Q4: Should the duty of a judicial factor appointed in the case of a missing person be limited to acting in their best interests only? (5 of the respondents answered this question)

31. Just over half of those who responded were in favour of this proposal.

32. It was suggested that acting in the missing person's "best interest" may, however, be to the detriment of the person's dependents. Consideration of the individual circumstances of each case needs to be made. Suggestions were made that similar provisions are included under the Adults with Incapacity (Scotland) Act 2000 regarding one-off gifts.

33. It was highlighted that in light of the Scottish Law Commission's 1995 Report on Adults with Incapacity, reinforced by General Comment No1 by the UN Committee on the Rights of Persons with Disabilities, the requirement should be to act as the adult would have wished.

34. Of those who agreed with the proposal, this was on the basis that this would be in line with the Adults with Incapacity (Scotland) Act 2000 where a person is acting under Power of Attorney, or acting as a guardian. However, it was noted that it was vital that express provision is included for the support of the missing persons dependents on the basis that taking care of a loved one is in the missing person's best interest.

Q5: Should the Scottish Courts only have jurisdiction to appoint a judicial factor to an estate of a missing person if:

- The missing person was domiciled in Scotland on the day before the person was first known to be missing; or
- The missing person had been habitually resident in Scotland for at least one year;
- The application is made by the person's spouse or civil partner or cohabitee (i.e. living together as if married) and the applicant is domiciled in Scotland or has been habitually resident in Scotland for at least one year?

(4 of the respondents answered this question).

35. All of the respondents who answered this question agreed with the listed criteria.

36. It was generally agreed that the basis of habitual residence was appropriate and corresponded with the general trend in private international law, but the qualification of one year could be problematic to some.

37. Although in agreement, views were expressed on the third bullet criterion (the application is made by the person's spouse or civil partner or cohabitee and is domiciled in Scotland or habitually resident in Scotland for at least one year). It was proposed that the ability to make an application should be extended to include a sibling/parent/child or any other relation who is domiciled in Scotland or habitually resident for one year.

38. In addition, a further criterion was suggested of jurisdiction of the court where the missing person owned land or buildings.

Q6: Are there any other provisions in the Guardianship (Missing Persons) Act 2017, which could be usefully replicated in any Scottish Legislation? (4 of the respondents answered this question)

39. Respondents were split on whether aspects of the 2017 Act would be helpful. Some considered that the existing law on Judicial Factors could be relied on. However, suggestions were made that an application could be made by Summary Application in the sheriff court as with applications made under the provisions of the Adults with Incapacity (Scotland) Act 2000. It was also highlighted that a power to give directions similar to that contained in the 2000 Act at section 3(3) of the 2000 Act would be helpful. A further suggestion was that appointments should be made open-ended unless there are compelling reasons to the contrary.

40. Of those who thought the 2017 Act contained helpful provisions the Missing People response suggested three provisions of the Act may be useful. The provisions were;

- gifts should be capable of being made to individuals,
- an option for a friend or partner to be appointed as judicial factor; and

- flexibility for the appointment of different judicial factor during the course of the appointment where particular knowledge of skills are required, such as a business partner if the missing person ran a business.

41. The Scottish Courts and Tribunal Service (SCTS) considered that certain provisions in the 2017 Act could be replicated which would assist with the efficient disposal of business.

Q7: Should there be a change of name of “loco absentis” cases? (4 of the respondents answered this question)

42. The term “loco absentis” is recognised in the context of legal work and those in the profession felt it was important to preserve this.

43. It was, however, also recognised that there was a need to use terminology that is more accessible.

Q8: If so, what are your views on “judicial factor over a missing person’s estate?” (5 of the respondents answered this question).

44. All those who responded agreed subject to slight amendments. One suggestion was to include the word “guardian” within the name to ensure consistency in understanding across the UK and to reflect the powers that are available to look after the affairs of someone who is missing.

Part 3 Safeguarding of property: Children (Scotland) Act 1995

Q9: Should the Accountant of Court be able to draw matters of concern to the attention of the relevant sheriff court? (5 of the respondents answered this question)

45. The general consensus from respondents was that the Accountant of Court should be able to draw matters of concern to the sheriff court and this was an important issue, although, further consideration of the practicalities on how this will be achieved needs to be developed.

Q10: Should the Accountant of Court be able to vary or recall directions? (5 of the respondents answered this question)

46. There was agreement that the Accountant of Court should be allowed to vary or recall directions.

47. This would put any current informal practices being carried out onto a statutory footing. One response highlighted that there needs to be a balance so that the administration of a case is dealt with as promptly as possible but without prejudicing any interested party.

Q11: Do we need to specify the procedure where no joint minute or subsequent decree has taken place? (5 of the respondents answered this question)

48. Of the respondents who answered all agreed that a procedure is required to make it consistent in situations where there is a formal settlement.

49. Any procedure must be flexible to reflect the sum to be managed. Larger amounts will require more management than smaller amounts which are more likely to cover daily living costs.

50. It was suggested that a procedure in line with section 13 of the Children (Scotland) Act 1995 would provide a certainty of a course of action in the best interests of a child.

Q12: Do you agree that the views of the child should be taken into account (where practicable and taking account of their age and maturity) where a parent is appointed as the child's legal representative? (4 of the respondents answered this question)

51. There was agreement that a child's view must be obtained. This approach fits in with the wider child and family law in Scotland and elsewhere.

52. It was highlighted by a couple of respondents that section 6 of the Children (Scotland) Act 1995 already provides for a child's view to be taken into account in such circumstances. It would be helpful to have guidance to ensure that when a child's view is obtained that they are not under any undue influence.

53. Another suggestion was that it should not be limited to just the child's view. The person with parental responsibility views should also be considered where the estate may be large and/or complex. In addition, there is a requirement for the child's view to be obtained by a person appointed by court, such as a reporter or curator ad litem.

Q13a: What would be the most proportionate way of ensuring that a child's views are taken into account? (4 of the respondents provided suggestions)

54. It is felt that the proportionate way to take the views of a child would depend on the various circumstances. However, it was stressed that the child's views need to be obtained for an accurate record.

55. A suggestion that the person holding the property which is owned or due to a child should ascertain their views prior to transferring to a parent/guardian.

Q13b: Would it require legislative change? (2 of the respondents answered this question)

56. Legislation would be beneficial for providing clarity.

57. It was suggested that existing legislation under section 6 of the Children (Scotland) Act 1995 could be amended so that the definition of “major decision” is non-exhaustive.

Part 4 – Further testing of recommendations

Q14: Should applications to appoint a judicial factor be heard in the sheriff court rather than the Court of Session? (5 of the respondents answered this question)

58. There was a mixed response to this question, although most of those who responded were in favour.

59. Where the appointment of a judicial factor is sought for individuals and the estate was straightforward then it was felt that there was merit in these being dealt with in the sheriff court. It would keep the costs down and create a simpler process.

60. However, it was felt that judicial factors appointed: (1) under the section 41 of the Solicitor (Scotland) Act 1980 over a solicitors firm; and (2) where The Office of the Scottish Charity Regulator (OSCR) make an application over a charity, should still be dealt with by the Court of Session, though before the Outer House rather than the Inner House. Any change would require amendment to the existing powers under the Charities and Trustee Investment (Scotland) Act 2005 for OSCR to seek appointment of a judicial factor from the Court of Session.

61. The main points offered against the use of the Sheriff Court in these two scenarios was the lack of expertise in a sheriff court. This is due to the infrequency of such appointments. There can be a need for the appointment of judicial factor to be made quickly. If such appointments were made at the sheriff court this will be in the locality of the solicitor’s place of business which may not be appropriate.

Q15: If applications to appoint a judicial factor are to be heard in the sheriff court rather than the Court of Session, should it be the same rule for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980? (2 of the respondents answered this question)

62. The Law Society did not consider that this question was clear. They are of the view that the current process for applications under section 41 of the 1980 Act must remain in the Court of Session and the processes must be consistent and reflective of this route.

63. Another respondent was of the view that the process under section 41 of the 1980 Act required amendment but if this was not forthcoming then a number of significant alterations to the present appointment system needs to be made. In addition, all cases should be heard in the sheriff court.

Q16: The Scottish Government proposes that the “appropriate sheriff court” for an application would be:

Estates of missing persons

- Where the missing person was domiciled the day before the person was first known to be missing; or
- Where the missing person had been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent); or
- Where the person’s spouse or civil partner or cohabitee is domiciled or has been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent).

Estates of other natural persons

- In the Sheriffdom where the applicant, or any person with an interest in the estate is domiciled or has been habitually resident.

Non-natural persons

- In the Sheriffdom where the person who has the estate has a place of business.

None of the above applies

If none of the above applies, the “appropriate sheriff court” would be the sheriff court in Edinburgh.

(4 of the respondents answered to this question)

64. All respondents were generally supportive of the approach proposed by the Scottish Government to remove section 1(4)(a) of the draft Commission Bill and rely on the other provisions of section 1(4) to determine jurisdiction. They were also supportive of an additional provision to include estates of missing persons.

65. One respondent suggested that the location of where the person owned heritable property might be used. This might prove useful where there are issues around domicile, such as where the person did not live there for more than a year prior to going missing. This is consistent with existing rules of jurisdiction that heritable property forms part of the issue in a court action.

66. Another response suggested other categories adding, for non-natural persons, a registered office and, for natural persons as well as non-natural persons, the location of assets.

67. It was suggested that further clarity was required on jurisdiction and qualification of one year may give rise to considerable practical difficulties.

68. SCTS highlighted that an express power may be required to enable the sheriff to remit applications to the Court of Session. This would allow for a consistent approach within the civil courts. Although there were currently low numbers of such cases, the proposed changes of the draft Bill may give rise to higher volumes. This would result in a potential impact on the Accountant of Court and SCTS.

Q17: Should sections 4 and 6 of the draft Commission Bill be followed in relation to who may be appointed as a judicial factor? (4 of the respondents answered this question)

69. Respondents agreed with sections 4 and 6 in the draft bill on who should be appointed judicial factor.

70. It was felt that this approach provided flexibility for appointments as well as including setting out the qualifications for appointment including family members.

71. It was suggested that power to substitute a factor should be included, for example where the first appointee ceases to act whilst the process was still ongoing.

Q18: Do you agree that the wording at section 7 of the draft Bill reflects that caution is only required in exceptional circumstances? (3 of the respondents answered this question)

72. Generally it was agreed that caution is required only in exceptional circumstances as at section 7 of the draft Bill.

73. It was also considered that the proposed approach was a risk based approach which provided flexibility for the Accountant of Court to set a level of caution where a risk is identified and therefore not unduly burden estates where the risk is low.

74. In appointments for missing persons where a non-professional is acting, it was suggested that caution be mandatory in these cases with caution only dispensed with on special cause shown. Professionals have the default provision of having personal indemnity cover.

75. However, one view was that the threshold of “exceptional circumstances” is too high. It was suggested that caution should be provided where the particular appointment so specifies but discretion should be left to the court.

Q19: Do you consider that interlocutors should contain provisions on how proactively an estate should be managed? (2 of the respondents answered this question)

76. It was noted that the courts can determine whether a management plan is required, but it was also suggested that petitioners should be addressing this issue in their petition.

77. Others suggested, however, that this would be too prescriptive. Circumstances can change and the full extent of the estate may not be known at the start of the process. It was felt that the approach of the draft Bill which allows the court to specify particular powers in cases was sufficient, without attempting to prescribe in an interlocutor how proactively an estate should be managed.

78. It was also highlighted that such provisions would not be required in every case. The point was also made that when a judicial factor is appointed, they are deemed capable of deciding on the best way to administer the estate.

Q20: Should judicial factors continue to be paid a commission? (3 of the respondents answered this question)

79. Generally, it was felt that commission should still feature as a method of payment for work undertaken with other ways to reflect remuneration for work undertaken.

80. A suggestion was made for a fixed table to be set to reflect the various elements of work undertaken over an estate. Another suggestion was a different rate of commission to be paid to reflect the different appointments, professional vs non-professional.

81. It was deemed appropriate to have the Accountant of Court involved in the fixing of judicial factors remuneration.

82. Overall it was felt that it was important for parties to be paid for the work undertaken.

Q21: Do you have any other comments on how judicial factors should be paid in the future? (2 of the respondents answered this question)

83. It was suggested that family members appointed as judicial factor be reimbursed vouched expenses but remunerated only in exceptional circumstances.

84. Where professional judicial factors are appointed and disputes arise between parties on the issue of who should be appointed, then remuneration rates and expertise should be considered as a basis in making a decision on who to appoint.

Q22: Do you have any comments on the Impact Assessments?

85. No comments received.

Additional comments

SCTS

86. SCTS raised practical issues on 8(1) of the draft Bill on the duty placed on the clerk of court to register notice of appointments of Judicial Factors in the Register of Inhibitions including fees. The proposed provisions of the Children (Scotland) Act 1995 where seeking mandatory direction(s) from the Accountant of Court (AoC) and the increase of the AoC's involvement in such cases.

Missing People

87. This group emphasised the need for simple guidance to be produced to assist friends or family who may become judicial factors. Individuals who have experience of the situation and the legal process may also be able to assist.

88. The importance of making the legislation accessible to everyone not just for wealthy individual's estates but also to meet a variety of situations was highlighted along with ensuring that costs are reasonable.

Working Group of the Centre for Scots law at the University of Aberdeen

89. The working group commented on technical aspects of certain provisions of the Bill. These will be considered when the Bill is being taken forward.

The Law Society of Scotland

90. The Law Society reiterated their strong disagreement with the proposal that sheriff court rather than Court of Session should deal with the appointments of judicial factors. They also highlighted a problem relating to incorporated practices which is a body corporate recognised by the Law Society of section 34(1A) of the Solicitors (Scotland) Act 1980. Although this is a route to have a judicial factor appointed under section 41 of the 1980 Act this is costly and amendments to the 1980 Act were suggested.

OSCR Scottish Charity Regulator

91. OSCR agreed that the Bill addressed the issue of uncertainty in respect of Judicial Factors powers by providing that on appointment "all the powers of a natural person beneficially entitled to the estate" shall vest in the judicial factor and by providing a list of powers which are expressly included. OSCR also thought that it would be helpful where necessary if the Court could grant additional powers to the judicial factor.

ANNEX– List of Respondents to the Consultation

Individuals - 1

Anonymous

Organisations - 8

Faculty of Procurators of Caithness
Association of Personal Injury Lawyers (APIL)
The Scottish Charity Regulator (OSCR)
Scottish Courts and Tribunals Service (SCTS)
Missing People
HM Revenue and Customs
Centre for Scots Law University of Aberdeen
Law Society of Scotland



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