

Judicial Factors (Scotland) Bill:

Islands Communities Impact Assessment

December 2023

Judicial Factors (Scotland) Bill - Islands Communities Impact Assessment (ICIA)

What are the objectives of the policy, strategy or service?

The Bill will implement the Scottish Law Commission's recommendations in its Report on Judicial Factors, published in 2013.

A judicial factor is a person appointed by the court to gather, hold, safeguard and administer property which is not being properly managed. Although the volume of appointments of judicial factors is low they have an important role to play. As at 2022 there were 64 active judicial factories supervised by the Accountant, and there have been an annual average of 7 applications for appointment of a judicial factor for the years 2018 to 2022.

The office of judicial factor has a long history in Scots law and there is a continuing need for capable administrators to be appointed to manage the property of those who cannot, should not or will not manage it properly themselves. Although there is a continuing need, the current law on judicial factors is now regarded by those who use it as outdated with a cumbersome procedure which is no longer fit for purpose. This is principally due to the fact that since the Judicial Factors Acts of the 19th century there has been no new primary legislation pertaining specifically to the details of the procedure. Moreover, there seems to be a lack of clarity as to the extent of judicial factors' powers which often results in judicial factors being reluctant to take certain actions, despite them being deemed to be desirable, without applying to court for additional powers first. Some powers of judicial factors are also to be found in other legislation, which makes it difficult for third parties dealing with judicial factors, and even the judicial factors themselves, to know what they are or are not entitled to do.

The existing legislation on judicial factors dates back to the 19th century. It is archaic, complex, and no longer fit for purpose with the result that the usefulness, and potential, of the institution are being diminished by the outmoded way in which it has to operate. The Scottish Law Commission examined these issues in detail and made a number of recommendations in its 2013 Report. The provisions contained in this Bill will put in place an updated and comprehensive regime which will bring clarity, accessibility, and efficiency to this vital but outmoded area of the law. Furthermore, the flexibility introduced by the regime would mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. Overall, the Bill introduces a statutory framework which sets out clearly the essential features of the office of judicial factor, and the broad parameters within which it should operate and will be of benefit to all those involved, in any capacity, in judicial factories.

Part 1 of the Bill provides for appointments of a judicial factor, or interim judicial factor, to be sought by application to the Court of Session or sheriff court. It makes clear that it is open to the Court of Session or the sheriff court to appoint a judicial factor in the course of other proceedings, sets out the grounds for appointing a judicial factor, and lays out the necessary qualifications for a judicial factor. It makes

provision for the factory estate to vest in a judicial factor and for a judicial factor to intromit with the estate, and for the remuneration of judicial factors.

Part 2 of the Bill deals with the functions a judicial factor has by virtue of appointment. It confers a general function of holding, managing, administering and protecting the factory estate for the benefit of those with an interest in the estate. It provides that a judicial factor has all the powers of a natural person beneficially entitled to the estate, with an illustrative list of such powers provided in schedule 1. It includes provision enabling a judicial factor to request relevant information as to the affairs of the estate from bodies and individuals. The Bill preserves the existing duty to prepare an inventory of the estate and introduces a new duty to prepare a plan as to how the judicial factor proposes to hold, manage, administer and protect the estate which must be approved by the Accountant of Court. It requires the judicial factor to regularly report to the Accountant of Court, including by the submission of accounts, the factor's dealings with the factory estate.

Part 3 contains provisions in relation to dealings with third parties. This includes provision giving protection to third parties acquiring title from a judicial factor and provision making it clear that the judicial factor stands in place of the factory estate in any dealings with a third party.

Part 4 sets out simplified administrative processes for the distribution, termination, recall and discharge of a judicial factor. It provides for the approval by the Accountant of Court of a scheme for distribution of the factory estate, avoiding the need to refer the matter to the court where there is no dispute. Where there is an objection the Accountant must refer the matter to the court. It sets out processes for distribution of the factory estate on application by interested parties, the appointment of replacement judicial factors in the case of death or ceasing to perform duties, and for the resignation of judicial factors.

Part 5 updates the current provision in relation to the requirements of the office of the Accountant of Court, particularly the function of supervising judicial factors. The Accountant of Court currently has the power to direct a judicial factor as to how the duties of the office should be performed and a power to require certain information from banks. These powers have been preserved and updated in the Bill, with the Accountant of Court being able to request any information relevant to their functions from any person or body, and the recipient of such a request, subject to certain exceptions, being under a duty to comply. The Bill also imposes a duty on the Accountant of Court to investigate any misconduct or failure by a judicial factor and report serious misconduct or material failure to the court.

The policy objectives of the Bill will contribute to the realisation of the Scottish Government's purpose by contributing to the National Outcome on fair work and business, by providing the necessary legislative framework to help make our economy more stable, productive and efficient. The recommendations relating to the Accountant of Court in the role of supervisor of judicial factors would contribute to National Outcome that we have high quality, affordable and accessible public services that positively enhance our lives.

Do you need to consult?

No. In 2010, the Scottish Law Commission (“the SLC”) published a Discussion Paper on Judicial Factors (DP 146)¹ in which it analysed the existing law, including ambiguities thrown up by some of the decided cases, and suggested that there was a continuing need for the office of judicial factor.

In 2013, the SLC published its recommendations in its Report on Judicial Factors.² Together, the recommendations lay out a statutory framework which sets out clearly the essential features of the office of judicial factor, and the broad parameters within which it should operate. The SLC did not intend to be overly prescriptive as to how this institution should work in practice. It did so for two reasons. The first is that the broad framework will leave scope for the further development of the office in the light of changing circumstances, and under the guidance of the courts. The second is that details of the processes and procedures involved should ideally be in rules of court, which can be more readily adjusted in the light of experience.

The Scottish Government agreed with many of the recommendations contained in the Report and, in 2019, consulted on these recommendations as well as the current procedure for the appointment of judicial factors in the case of missing persons.³ Overall, the majority of respondents supported the recommendations, confirming that there is a necessity for the existing legislation to be updated and modernised. The Scottish Government committed to implementing the SLC’s recommendations and to consider the suggestions and alternative proposals raised in the consultation.⁴

How are islands identified for the purpose of the policy, strategy or service?

The islands have not been specifically identified for the policy and we do not anticipate that the Bill provisions will differentially affect those who live on the islands compared to those who live on the mainland.

What are the intended impacts/outcomes and how do these potentially differ in the islands?

The Bill introduces a statutory framework which sets out clearly the essential features of the office of judicial factor, and the broad parameters within which it should operate.

A judicial factor is a person appointed to gather, hold, safeguard and administer property which is not being properly managed. A common example today is those appointed at the instance of the Law Society of Scotland to firms of solicitors where

¹ The discussion paper is available by clicking on the following link <https://www.scotlawcom.gov.uk/files/4512/9744/4722/dp146.pdf>.

² The report is available at the following link https://www.scotlawcom.gov.uk/files/2913/7776/7158/Report_233.pdf.

³ The consultation is available at the following link <https://www.gov.scot/publications/judicial-factors-consultation>.

⁴ The Scottish Government’s response to its consultation is available at the following link <https://www.gov.scot/publications/judicial-factors-analysis-responses-scottish-government-consultation>.

there has been a breach of accounts rules and the firm's liabilities exceed, or appear likely to exceed, its assets.

It is considered that the property of those residing on an island is equally capable of being administered by a judicial factor as the property of someone who resides on the mainland. Therefore, the Scottish Government does not expect the Bill to differentially impact persons residing in the islands.

Is the policy, strategy or service new?

No. The Scots law of judicial factors is well-established and there were, in 2022, 64 active judicial factories supervised by the Accountant of Court, although the Bill will reform the law relating to them.

Step two – Gather your data and identify your stakeholders

What data is available about the current situation in the islands?

Judicial factors are appointed by the court and supervised by the Accountant of Court, an employee of the Scottish Courts and Tribunals Service (SCTS). As at 2022, there were 64 active judicial factories supervised by the Accountant, and there have been an annual average of 7 applications for appointment of a judicial factor for the years 2018 to 2022.

While the Accountant provides a high-level list of the number and types of judicial factories information about the type of property and its location is not publicly available. It is considered that it would be disproportionate to interrogate the inventories of existing judicial factories to ascertain property that might be held on an island, particularly given the nature of the reforms proposed.

Do you need to consult?

No. Given the nature of the reforms and the fact that these would apply to property held anywhere in Scotland in the same way, it is considered that there is no need to consult further.

How does any existing data differ between islands?

N/A

Are there any existing design features or mitigations in place?

The policy impact will be no different between the island community and mainland Scotland and, as a consequence, there is no need for mitigations.

Step three - Consultation

Who do you need to consult with?

N/A

How will you carry out your consultation and in what timescales?

N/A

What questions will you ask when considering how to address island realities?

N/A

What information has already been gathered through consultations?

N/A

What concerns have been raised previously by island communities?

N/A

Is your consultation robust and meaningful and sufficient to comply with the Section 7 duty?

N/A

Step four - Assessment

Does your assessment identify any unique impacts on island communities?

No. It is not anticipated that the impact of the Bill on island communities will be different from that of communities on the mainland.

Does your assessment identify any potential barriers or wider impacts?

The Scottish Government does not consider there to be any potential barriers.

How will you address these?

N/A

Given the foregoing, it is considered that this Bill will not have an effect on an island community which is significantly different from its effect on other communities (including other island communities).

In preparing the ICIA, I have formed an opinion that our policy, strategy or service is **NOT** likely to have an effect on an island community which is significantly different from its effect on other communities (including other island communities).

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This publication is available at www.gov.scot

Any enquiries regarding this publication should be sent to us at

The Scottish Government
St Andrew's House
Edinburgh
EH1 3DG

ISBN: 978-1-83521-767-2 (web only)

Published by The Scottish Government, December 2023

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA
PPDAS1395614 (12/23)

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