

Malcolm McMillan
Chief Executive
Scottish Law Commission
140 Causewayside
EDINBURGH
EH9 1PR



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Dear Malcolm

INITIAL RESPONSE BY THE SCOTTISH GOVERNMENT TO THE SCOTTISH LAW COMMISSION REPORT ON JUDICIAL FACTORS

Introduction

1. This letter provides the initial response by the Scottish Government to the Commission's report 233 on Judicial Factors. I apologise for our delay in providing this response.

The two options in the Discussion Paper

2. In preparing this initial response, the Government has noted the comments made in paragraph 1.4 of the report on the two options considered by the Commission in the Discussion Paper. The first option was to reform and update the current structure of the office and the second was to replace the current system with a new, public office. Paragraph 1.4 notes that the second option was not favoured by any of the Commission's consultees and, as a consequence, it has been pursued no further.

Timing of future work by Government

3. The Scottish Government intends that detailed work by the Government on the Commission's report will begin towards the end of 2015. As indicated in this letter, the Government has some initial queries on some detailed points in the Report and it would be helpful for us to meet the Commission to discuss these.

4. In relation to future work, there are some specific issues where it would be useful to obtain further views from key stakeholders. These issues are highlighted in this letter. On a general point, the draft Bill generally preserves enactments which make provision on the appointment of judicial factors (section 5 of the draft Bill refers). As a result, the Government expects that any material it produces on the proposals would need to outline

when judicial factors may be appointed, building on material already published by the Commission.

Stakeholders

5. As the report indicates, there are a number of key stakeholders. The Government will need to discuss the report with these stakeholders once our detailed work begins. Key stakeholders include:

- The Law Society of Scotland. (The Government notes that the Business and Regulatory Impact Assessment indicates that “we do not anticipate... any marked difference to the annual average of 12 applications [for appointments as judicial factors], a majority of which will be applications by the Law Society of Scotland under the Solicitors (Scotland) Act 1980”).
- The Scottish Courts and Tribunals Service (“the SCTS”). (On a minor point, the recent merger of the courts and tribunals services means that references in the draft Bill to the Scottish Court Service would need to be updated).
- The Accountant of Court.

6. Other bodies will also have an interest, including the Office of the Scottish Charity Regulator (OSCR); the Keeper of the Registers and the Queen’s and Lord Treasurer’s Remembrancer (QLTR). There will also be a need to ensure that the voice of the consumer is heard.

Links with other areas

7. When considering the Commission’s report, the Government will need to consider links with other areas, including:

- As the report indicates, courts reform.
- The regulation of the legal profession.
- Relevant provisions in Part I of the Children (Scotland) Act 1995. (For example, section 9 of the 1995 Act, referred to in paragraph 3.37 of the report, contains a regulation making power at section 9(8) which allows Ministers to vary the sums contained in sections 9(2) and (3), on the value of the property owned by or due to a child).

Rules of court

8. The report would have implications for rules of court and the Government would need to raise these with the SCTS given that rules of court are made by the Lord President, rather than the Scottish Ministers.

9. On one specific point, paragraph 3.11 of the Report notes that petitions for the appointment of judicial factors under the Solicitors (Scotland) Act 1980 are currently made to the Inner House of the Court of Session. The report goes on to note that this is because the Court of Session rules so provide and recommendation 7 says that such petitions should no longer be made to the Inner House. As this is a recommendation for changes to rules of court, the Government has drawn this recommendation to the attention of the SCTS.

Detailed comments on the report

10 Detailed comments on aspects of the report are below.

Transitional arrangements

11. Paragraph 1.16 to 1.20 discusses transitional arrangements in respect of existing judicial factors as a consequence of any Bill to implement the Commission's recommendations. This is likely to be a particularly challenging area and further discussion would be required with bodies such as the Accountant of Court and with the SCTS (given, for example, the possible impact on rules of court). It would be helpful for us to discuss with the Commission exactly what transitional arrangements the Commission are proposing as a matter of policy.

12. The Government would also note that if the name "judicial factor" should be changed (discussed in paragraph 1.6 of the Commission's report with a recommendation, on balance, against any change), this might impact on references to "judicial factor" in other pieces of legislation. Some of this other legislation is reserved (eg paragraph 3.47 of the report refers to section 1154 of the Companies Act 2006, which is reserved, and paragraph 5.7 refers to paragraph 20 of Schedule 3 of the Local Government (Scotland) Act 1975, which is devolved).

Legislative competence

13. Paragraph 1.21 to 1.32 discusses legislative competence issues and the Commission has prepared a draft Order under section 104 of the Scotland Act 1998. The Scottish Government would need to check that all of the proposed modifications of enactments in schedule 2 to the draft Commission Bill and all of the proposed repeals and revocations (in schedule 3 would be within devolved competence.

Section 6 of the Judicial Factors (Scotland) Act 1889: supervision of offices similar to judicial factors and legislation applying

14. Paragraph 1.26 notes that section 6 of the 1889 Act essentially provides that anyone who is appointed to carry out a function similar to or the same as that of a judicial factor comes under the supervision of the Accountant of Court and that all of the judicial factors legislation applies. Paragraph 1.27 goes on to note that the Commission's policy is that the current draft Bill should apply only to judicial factors so called and that section 6 of the 1889 should be repealed. As a consequence, the draft section 104 Order removes disapplications of section 6 from proceeds of crime legislation.

15. There may be a policy debate on the supervision of offices which are similar to judicial factors but are not actually called that **and** on the application of the relevant legislation. Paragraph 7.32 of the report notes that administrators appointed under the Proceeds of Crime (Scotland) Act 1995 are subject to the supervision of the Accountant of Court by virtue of paragraph 5 of the Schedule to the 1995 Act. Similarly, paragraph 7.33 of the report notes that administrators appointed under the Terrorism Act 2000 are supervised by the Accountant of Court and adds that "no doubt the legislation relating to judicial factors is applied to such administrators, in addition to any specific provision made in the Terrorism Act itself.

16. It would be useful for the Government to discuss with the Commission the policy approach the Commission is recommending in this area.

The Acts of Sederunt of 1690; 1708; 1711; 1717 and 1730

17. Paragraphs 2.12 to 2.14 discuss these Acts of Sederunt and recommend their express revocation. The Government's understanding from the Commission's report is these Acts of Sederunt are obsolete now given the Judicial Factors (Scotland) Act 1849 and the Judicial Factors (Scotland) Act 1889. Given this, the Commission may wish to consider if these Acts of Sederunt could be included in the Commission's Statute Law Repeals work.

Jurisdiction

18. The Government notes the discussion on jurisdiction of the courts in relation to the appointment of a judicial factor in paragraphs 3.4 to 3.7 and would need to discuss further with the SCTS. On section 1(4)(a) of the draft Bill, it may not always be clear what one fifth of the value of the estate is. As indicated in paragraph 9 above, the Government has drawn the attention of the SCTS to recommendation 7 at paragraph 3.11

Qualifications for appointment as a judicial factor (paragraphs 3.25 to 3.27)

19. This is likely to be one of the key discussion points when the Government considers the report further. It does appear clear that, as the Commission indicates, it should be possible to appoint as a factor a person who is not domiciled in Scotland.

Requirement for caution (paragraphs 3.28 to 3.36)

20. This is likely to be another of the key discussion points when the Government considers the report further. There may be an argument that section 7 of the draft Bill may need further provision to clarify "the exceptional circumstances peculiar to the particular appointment" which require the appointee to find caution.

Registration of appointment (paragraphs 3.84 to 3.86)

21. The Government would need to consider further, with the SCTS, if registration in the Register of Inhibitions should be by the Clerk of the Court or by the appointee.

Proactive management of the estate.

22. This is likely to be another of the key discussion points when the Government considers the report further. As the report notes:

- Most responses to the Discussion Paper were against a duty of "proactive management". (Paragraph 4.10).
- A judicial factor should not take risks with the estate. (Paragraph 4.11).
- There is a need to avoid a supine attitude to financial management. (Paragraph 4.11)

23. Further consideration may be needed on whether interlocutors would lay down any provision in this type of area. It may be difficult for interlocutors to contain provision on how proactively an estate should be managed.

Management plan (paragraphs 4.20 to 4.25 and recommendation 37).

24. The Government notes that the Commission recommends that judicial factors should have a management plan.

Duty to promote resolution of disputes (paragraphs 4.34 to 4.37)

25. The Government sees the logic in promoting Alternative Dispute Resolution to resolve disputes. The main body of the report refers to mediation but section 22 of the draft Bill refers to arbitration as well, which seems right. The reference in section 22(2) of the draft Bill to “by whatever method the judicial factor considers appropriate in the circumstances” appears to allow a wide variety of ADR methods to be used depending on the individual circumstances which, again, seems right.

Powers of judicial factor

26. The Government notes the summary in paragraph 5.1 of the powers often currently granted to judicial factors. The Government’s initial view is that it seems helpful to have a (non-exclusive) list of powers, as contained in schedule 1 to the draft Bill. It is particularly important to be clear on the duties and powers of court appointees. The Government has recently been chairing a working group on child welfare (bar) reporters, where issues on duties have been raised¹.

Administrative discharge (paragraphs 6.12 to 6.18)

27. The Government’s initial view is that extending administrative discharge, as recommended by the Commission, looks helpful.

Remuneration of judicial factor (paragraphs 7.2 to 7.11).

28. This is likely to be another of the key discussion points when the Government considers the report further.

Appointment of Accountant and Depute Accountant of Court (paragraphs 8.7 and 8.8)

29. The Government would need to discuss details in this area with the SCTS.

Fees charged by the Accountant of Court (paragraphs 8.15 to 8.17)

30. The Government would need to discuss with the SCTS whether a table of fees should be laid down.

Diversity of judgment or practice (paragraphs 8.27 and 8.28)

31. The Government notes that section 54 of the draft Bill is derived from section 4(7) of the Judicial Factors (Scotland) Act 1880. The Government would need to discuss with the SCTS whether a provision of this nature remains appropriate in the context of the changes being made generally to implement courts reform

¹ More information on the work on child welfare reporters is at <http://www.gov.scot/Topics/Justice/law/17867/reporters>

Annual report by the Accountant of Court (paragraph 8.29)

32. The Government would need to discuss details in this area with the SCTS. The Government's initial view is that it may be convenient to make provision so that a report by the Accountant could be part of a wider report. The Government would also need to consider with the SCTS if it would be appropriate for rules of court to make provision on the Accountant of Court's annual report.

Conclusion

33. I hope this letter is helpful in summarising the initial consideration of the report by the Scottish Government.

Yours sincerely

SIMON STOCKWELL
Family and Property Law