

# **JUDICIAL FACTORS (SCOTLAND) BILL**

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## **DELEGATED POWERS MEMORANDUM**

### **INTRODUCTION**

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament’s Standing Orders in relation to the Judicial Factors (Scotland) Bill (“the Bill”). It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 40–EN);
  - a Financial Memorandum (SP Bill 40–FM);
  - a Policy Memorandum (SP Bill 40–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 40–LC).
3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

### **OUTLINE OF BILL PROVISIONS**

4. The Judicial Factors (Scotland) Bill implements the Scottish Law Commission’s *Report on Judicial Factors* which was published in 2013. The Bill updates the statutory framework, setting out clearly the essential features of the office of judicial factor, and the broad parameters within which it should operate. The Bill is comprised of six parts and three schedules.
  - 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.
  - Part 2 of the Bill deals with functions of a judicial factor. The question of what powers a judicial factor has by virtue of appointment is an area of uncertainty. The Bill will provide clarity to help facilitate the efficient carrying out of the duties of the office, including provision allowing a judicial factor to seek relevant information as to the affairs of the estate from bodies and individuals. The Bill preserves the judicial factor’s

duty to prepare an inventory of the estate, but also introduces a new duty, namely to prepare a plan as to how the judicial factor proposes to administer the estate which is agreed with the Accountant of Court. The judicial factor must, at appropriate intervals, report to the Accountant of Court, including by the submission of accounts, the factor's intrusions with the factory estate.

- Part 3 contains provisions in relation to dealings with third parties, including providing protection to third parties acquiring title from judicial factors and making it clear that the judicial factor stands in place of the factory estate in any dealings with a third party.
- Part 4 deals with procedures to bring a judicial factory to an end as well as the process of appointment of a replacement judicial factor. It sets out an administrative process for the distribution of the factory estate, 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.
- Part 5 updates the current general provisions 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 to hold the judicial factor accountable for any appreciable misdeeds or failures. These powers will remain as part of the Bill.
- Part 6 contains miscellaneous, ancillary and commencement provisions.

## **RATIONALE FOR SUBORDINATE LEGISLATION**

5. The Scottish Government has had regard, when deciding where and how provisions should be set out in subordinate legislation rather than on the face of the Bill, to the need to:

- strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- make proper use of valuable parliamentary time;
- take account of the likely frequency of amendment;
- allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- anticipate unexpected issues arising which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

6. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power was taken in the Bill and, where relevant, why the selected form of parliamentary procedure has been considered appropriate.

## **DELEGATED POWERS**

### **Section 42(2) – Annual review**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative

#### *Provision*

7. Section 42(1) of the Bill imposes an obligation on the Accountant of Court to publish a review of the Accountant’s activities in relation to judicial factories in the reporting year. Section 42(2) enables the Scottish Ministers, by regulations, to prescribe the manner of publication of, the information which must be contained in and the timeframe of such reviews.

#### *Reason for taking power*

8. The power in section 42(2) relates to a matter of detail most appropriately dealt with in regulations rather than in primary legislation. This is desirable for reasons of flexibility and ease of adjusting the details to respond to changing circumstances. The institution of judicial factory is an important one which enables society, through the courts, to administer the property of private citizens who are, for whatever reason, unable or unwilling to do it themselves. An annual review provides a valuable means for public scrutiny of this important office.

#### *Choice of procedure*

9. As the manner and timeframe of publication and particulars to be contained in an annual review are procedural matters, it is considered appropriate that the regulations are subject to the negative procedure. This will achieve the best balance between use of parliamentary time and resource on one hand and the nature of the content of the regulations on the other.

### **Section 48(1) – Ancillary provision**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** negative (unless adding to, replacing or omitting any part of the text of an Act, in which case affirmative)

#### *Provision*

10. Section 48(1) enables the Scottish Ministers, by regulations, to make incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to the Bill.

#### *Reason for taking power*

11. This power is necessary to allow flexibility when commencing provisions in the Bill or otherwise to address unforeseen circumstances which may arise. While the Scottish Government has given careful consideration to the provisions of the Bill, this power is considered necessary to ensure that any unexpected issues which require further changes are able to be dealt with

effectively so that the purpose of the Bill is not inadvertently obstructed. The power is restricted in that it can only be used for the purposes of, or in connection with, the Bill, or for the purposes of giving full effect to, any provision of the Bill.

*Choice of procedure*

12. Regulations made under this section which contain a provision which adds to, replaces or omits any part of primary legislation are subject to the affirmative procedure. Otherwise, regulations made under this section are subject to the negative procedure. This approach is typical for ancillary powers of this type and provides the necessary safeguards with regard to the type of legislation which can be made.

**Section 51(2) – Commencement**

**Power conferred on:** the Scottish Ministers  
**Power exercisable by:** regulations made by Scottish statutory instrument  
**Parliamentary procedure:** laid, no further procedure

*Provision*

13. Section 51(2) enables Scottish Ministers, by regulations, to appoint the day or days on which the provisions of the Act (other than this section and sections 48 and 52) come into force.

*Reason for taking power*

14. The Scottish Government considers it appropriate for the substantive provisions of the Bill to be commenced at such a date as Ministers appoint to be suitable. It is usual procedure for such commencement provisions to be dealt with by subordinate legislation.

15. The coming into force of the Bill's substantive provisions will have implications for judicial factors already appointed to manage property and those to whom the property belongs. In order to allow judicial factors and other interested persons (such as the Accountant of Court) time to manage their affairs, it is important for the Scottish Ministers to have power to allow for the planning of orderly implementation and to commence the substantive changes when they consider it appropriate to do so. It is preferable to ensure there is flexibility in the commencement power in case it transpires that there is a need for staged commencement of the Bill's provisions. The Scottish Government therefore considers that, in accordance with usual practice, the regulations should be capable of making different provision for different purposes.

*Choice of procedure*

16. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the Parliament during the passage of the Bill. Any regulations under this section will be laid before the Parliament as soon as practicable after being made.



*This document relates to the Judicial Factors (Scotland) Bill (SP Bill 40) as introduced in the Scottish Parliament on 5 December 2023*

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