

# Final Business and Regulatory Impact Assessment

## Title of Proposal

The Judicial Factors (Scotland) Bill ("the Bill")

## Purpose and intended effect

- **Background**

A judicial factor is an officer appointed by the court, and supervised by the Accountant of Court, for the purpose of holding, managing, administering and protecting the property of another wherever the need arises. A judicial factor can be appointed in many different situations. A common example today is those appointed at the instance of the Law Society of Scotland to firms of solicitors where there has been a breach of professional practice and the firm's liabilities exceed, or appear likely to exceed, its assets. Other examples include those appointed where a partnership is in dispute or where those running a charity appear to have been managing it inappropriately.

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 such a continuing need, judicial factor is now regarded by those who use it as a cumbersome procedure, sometimes involving disproportionate expense, which is no longer fit for purpose. This is principally due to the fact that since the Judicial Factors Acts of the 19<sup>th</sup> century there has been no new primary legislation pertaining specifically to the details of the procedure. Furthermore, some powers of judicial factors are to be found in legislation relating to trusts, which makes it difficult for third parties dealing with judicial factors, and the judicial factors themselves, to know what such officers are or are not entitled to do.

- **Objective**

The passage and implementation of the Bill would implement the recommendations contained in the Report by the Scottish Law Commission on Judicial Factors (Scot Law Com No 233, 2013).

The objective is to update, simplify and clarify the law of Scotland relating to judicial factors so that it is fit for purpose and will be of benefit to all those involved, in any capacity, in judicial factories. This objective has unanimous support from all key stakeholders.

- **Rationale for Government intervention**

This proposal is being put forward as the objective can be achieved only by legislation in the Scottish Parliament.

The law relating to judicial factories often provides a solution where no other exists in Scots law. It is therefore essential that clarity, accessibility and efficiency should be brought to this vital but outmoded area of the law.

The law reform projects that the Scottish Law Commission undertakes are designed to contribute to the Scottish Government's National Outcomes, by recommending reforms that will help to provide an improved and modernised legal framework within which

these National Outcomes can be pursued. The recommendations on judicial factors would contribute to the National Outcome of making Scotland a fairer place, through civil law reform. The recommendations relating to the Accountant of Court in the role of supervisor of judicial factors would contribute to the National Outcome that our public services are high quality, continually improving, efficient and responsive to local people's needs.

### **Consultation**

Prior to developing policy to take forward a consultation on this subject, the Commission met interested parties in order to obtain the benefit of their expertise in this area of the law. Meetings took place with various judicial factors, the Accountant of Court, the Law Society of Scotland, the Chief Executive of the Scottish Courts Service, Head of the Justice Directorate, the Accountant in Bankruptcy, representatives of the Crown Office, the Civil Recovery Unit and the Office of the Scottish Charity Regulator, an advocate and a solicitor. At the stage of the publication of the Discussion Paper, consultation was carried out in accordance with that Commission's established practice in conducting law reform projects. Consultation is vital to the work of the Commission as it enables them to draw upon the experience and expertise of those involved and interested in the particular area of law under review.

In December 2010, when the Scottish Law Commission published the Discussion Paper on Judicial Factors ("the Discussion Paper"), it was circulated to individuals and bodies which the Commission had identified as having an interest in the project. The Discussion Paper was also available on the Commission's website as publicised by a news release issued on the day of publication. Furthermore, letters were sent by the Depute Accountant of Court to the judicial factors (approximately 60) acting in the cases open at the time, drawing their attention to the consultation. The consultation was featured in Scottish Legal News and in the online version of the Journal of the Law Society of Scotland. The Discussion Paper sought views on 60 proposals and questions over a consultation period of just over sixteen weeks. Fourteen responses were received.

In drafting the Bill and the Report, the Commission carried out a process of further consultation and engagement with the key stakeholders, namely the Accountant of Court, who has the responsibility of supervising judicial factors, and the Law Society of Scotland for its interests in seeking the appointment of judicial factors to firms of solicitors in terms of the Solicitors (Scotland) Act 1980. Equally importantly, others with an interest in the project, and some of whom had also responded to the Discussion Paper, were consulted too, namely: Ewen Alexander, Bill Cleghorn and Tom Hughes, all of whom are professionals with experience of acting as judicial factors; Derek Francis, Advocate and John McArthur, Solicitor, representing the Scotland Branch of the Society of Trust and Estate Practitioners; the Scottish Court Service; and the Keeper of the Registers of Scotland.

#### **• Within Government**

The Accountant of Court is included here as the Accountant is a court appointed officer. As the official with responsibility for supervising judicial factors, the Accountant of Court has been consulted at all stages of the project. In addition to consultation by correspondence and at meetings, the Accountant submitted a written response to the Discussion Paper. The Accountant's views have been taken into account in the

formulation of the policy underlying the Bill.

We have consulted the Registers of Scotland, a Non-Ministerial Department and part of the Scottish Administration. The Keeper submitted a response to the Discussion Paper and subsequent correspondence was entered into about the interface of the recommendations with land registration and the recommendations about registration in the Register of Inhibitions.

A meeting with the Office of the Scottish Charity Regulator, a Non-Ministerial Department and part of the Scottish Administration, was held to discuss existing arrangements for the appointment of judicial factors to charities as well as the proposed arrangements for such appointments under the then Charities and Trustee Investment (Scotland) Bill (now the Charities and Trustee Investment (Scotland) Act 2005). The views expressed assisted the development of general policy.

Meetings with the Head of the Justice Directorate, the Accountant of Bankruptcy and the Chief Executive of the Scottish Court Service were held to float the idea of a new public Official Judicial Factor (in terms of the alternative approach rejected by the Commission as unsupported on consultation). The Scottish Court Service was subsequently consulted about the recommendations on jurisdiction.

Meetings were held with representatives of the National Casework Division of the Crown Office and with representatives of the Civil Recovery Unit. The purpose of those meetings was to explore whether any public Official Judicial Factor (in terms of the alternative approach rejected by the Commission as unsupported on consultation) could take on the analogous administrative functions undertaken by these units.

• **Public Consultation**

The Discussion Paper was open for general public consultation and was available on the website of the Scottish Law Commission as well as being available for purchase from the Stationery Office. Only one response to the consultation was received from a member of the general public. This may reflect the technical nature of the topic. Furthermore, having been intimated, again with the assistance of the Depute Accountant of Court, to those professionals acting in the then current judicial factories, and also announced in "Scottish Legal News", a draft of the Bill, and a series of questions on the possible costs and benefits of the recommendations, were made available for comment on the Commission's website. A consultant to a firm of solicitors submitted two comments on the draft Bill. An insolvency practitioner appointed to the panel of judicial factors available to the Law Society of Scotland provided some feedback on costs and benefits.

• **Business**

The following business interests were engaged with: Ewen Alexander, Johnston Carmichael; Bill Cleghorn, AVER; Derek Francis, Advocate; Tom Hughes, Gerber, Landa & Gee; the Law Society of Scotland; and John McArthur, Gillespie Macandrew. The input of these interests, whose businesses had a variety of experience in dealing with the existing regime governing judicial factors, greatly assisted the formulation of policy in relation to the practical aspects of judicial factories. All supported a modernisation of the current regime.

## **Options**

### **Option 1 – Do nothing**

Under this option the Bill would not be introduced. The existing outmoded and cumbersome law on judicial factors, sometimes involving disproportionate expense, would continue. The benefits discussed under Option 2 would not be realised.

### **Option 2 – Introduce the Bill**

Under this option the recommendations outlined in the Report and implemented through the Bill would be introduced, resulting in an efficient, clear, fit for purpose regime governing judicial factors.

#### **• Sectors and groups affected**

The Bill would impact upon the following:

- Those people or bodies in Scotland over whose property a judicial factor is appointed;
- Those who apply to the courts for the appointment of a judicial factor;
- Those appointed as a judicial factor (who tend to be accountants or solicitors); and
- The Accountant of Court as supervisor of judicial factors.

We have concluded that the Bill would not impact upon any person by virtue of their particular religion, belief, age, sexual orientation, gender, race or ethnicity.

#### **• Benefits**

##### **Option 1**

Option 1 would bring no benefits. Those affected would continue to have to deal with the existing law which dates from 19<sup>th</sup> century. The law is cumbersome and often unclear and the related processes can involve disproportionate expense. Those involved in judicial factories, including the judicial factors themselves, would continue to have difficulty in finding out the exact extent of a judicial factor's powers and duties.

##### **Option 2**

For those over whose property a judicial factor is appointed and those who apply to the courts for such an appointment, the Bill would bring clarity as to the appropriate processes to be followed and to which powers and duties the judicial factor has; the new regime would be more user-friendly, resulting in all those coming into contact with it being better informed about it. The flexibility introduced by the Bill would also mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. In the words of the Law Society of Scotland: the "recommendations will in general simplify the cases, produce a far greater degree of certainty for all those involved, potentially encourage the use of the appointments because they provide sensible solutions and give confidence to those involved." We do not anticipate, however, any marked difference to the annual average of 12 applications, a majority of which will be applications by the Law Society of Scotland under the Solicitors (Scotland) Act 1980.

It is hoped that in the majority of cases there would be a reduction in the duration of a judicial factory; although it is the case that on occasions a certain amount of time is required for particular events to occur, the clarity as to powers and duties, the simplified processes, the encouragement of settlement in cases of dispute and the greater use of procedures for distribution, termination, recall and discharge by the Accountant of Court,

as opposed to by the courts, would speed up the process. The emphasis on procedures for distribution, termination, recall and discharge by the Accountant of Court as the norm rather than requiring a petition to the court would also bring cost savings. For more on the potential savings in costs which Option 2 would bring, please see below.

For those acting as judicial factors, the Bill would bring a simplified and clearer process with clear duties and powers largely set out in the one statute rather than being interspersed with the trusts legislation. In place of the current scheme for commission which is regarded as outmoded and unreasonable by most judicial factors, the Bill would also introduce a more structured system of remuneration which may encourage practitioners to take on this kind of work. In the words of an experienced judicial factor: "A major benefit should be accessibility and an understanding of the law of judicial factors to both professionals involved and the subjects of the judicial factory."

An experienced judicial factor said: "I would have thought that most of the recommendations should see a simplified process and hence a reduction in cost." Another such factor commented: "In my view updating the law can only be beneficial and there should be a cost saving in almost every case. The exact cost saving will depend on the type of case but an updated Act should lead to a substantial saving in professional time and relevant costs even where a case does not proceed." Examples of such cost saving are:

- **Clarity:** clarity regarding powers and duties would mean that the need for a judicial factor to petition the court for other powers should virtually disappear, resulting in a saving to the estates concerned of the relative court costs. Similarly, there should no longer be any need for judicial factors to spend time consulting the Accountant of Court about whether or not they have a particular power. Clarity would also enable cases to proceed without delay as third parties would have easy access to a statement of the powers of a judicial factor. Judicial factors would also be clear as to their role and responsibilities. A speedier process would result in savings as the period for which the factor could potentially be remunerated would be reduced.
- **Bonds of caution:** We are recommending a move from the current system where caution must be found in all cases to a system where the court has a discretion, where it considers that exceptional circumstances peculiar to that appointment make it prudent to do so, to require caution to be found. This would produce substantial savings. The usual percentage of premium to assets ranges from 0.25 – 0.75% of the estate value; these charges are costs which currently fall on the estate subject to the judicial factory. In a sample of six cases in terms of the Solicitors (Scotland) Act 1980, costs of the bond of caution varied from £330 to £3000.
- **Accounts:** the current requirement for a detailed account of charge and discharge in a reasonably sized case would cost in the region of £2150 - £2500 to prepare. Preparation of a simplified account, in terms of the Bill, in the same case would result in an estimated reduction of at least £1000 due to the fact that the cross checks included in an account of charge and discharge would not be necessary. It is anticipated that, as a result of the simplified form of accounts, audit costs too would fall. In a sample of nine cases in terms of the Solicitors (Scotland) Act 1980, over a period of three years, audit costs ranged from approximately £325 to approximately £25,800.
- **Settlement:** Currently, in cases such as those in partnership disputes and cases under the Solicitors (Scotland) Act 1980, incidental costs can arise because of the contentious nature of these appointments. The recommended introduction of a duty on the judicial factor to promote agreement on how to manage the estate by means including mediation or

arbitration, and failing such agreement to formulate a scheme for the management or distribution of the estate, would assist in the reduction of costs by breaking through the stalemate created by entrenched positions.

- **Termination:** Currently, the average costs of bringing a judicial factor to an end range from approximately £1250 - £5000. An extended use of procedures for distribution, termination, recall and discharge by the Accountant of Court as recommended in the Bill would, in the words of one practitioner, "reduce these costs substantially but more importantly would reduce delays and red tape at the culmination of a factor." At present, a petition to the court requesting that the factor be brought to an end requires the Accountant to produce a report on the factor. Dealing directly with termination, recall and discharge would involve similar considerations by the Accountant. With ever increasing court costs and law agents' costs, however, an extended use of procedures for distribution, termination, recall and discharge by the Accountant would be likely to result in significant savings over a period of time.

- **Costs**

**Option 1**

The disproportionate expense sometimes attaching to cases under Option 1 due to the cumbersome nature of the current procedure would remain. Due to uncertainties over powers and duties, there may be ongoing costs in relation to the need to resort to litigation to resolve matters.

**Option 2**

From the information provided to us by those who have acted as judicial factors, the costs of having a petition for the appointment of a judicial factor drafted and presented to court vary from case to case depending on the nature of the judicial factor and can range from approximately £2000 - £13000. It is not anticipated that these figures would alter as a result of the reforms introduced by the Bill but it is thought that wider knowledge of the general concurrent jurisdiction of the sheriff court and the Court of Session would assist in keeping these costs to the estate as low as is possible. (The outcomes of Lord Gill's review of civil procedure should also be borne in mind.)

The existing system of commission is regarded by most judicial factors as outmoded and unacceptable as it does not (in their opinion) reflect the rates which they are able to charge for similar professional duties; in other words, rates of commission have been kept at artificially low rates. The reforms introduced by the Bill would result in professional people acting as judicial factors being paid at appropriate professional rates. But there are two matters which may nevertheless reduce overall costs.

First, the reforms would require work done at a lower level on the factor's behalf to be charged at rates reflecting the lower level nature of that work. As much of the work of a judicial factor is of an administrative nature, we would therefore anticipate, overall, the possibility of a decrease in costs to the estate in this regard, or that the recommendation would be cost neutral.

Second, there is an element of prestige in being appointed by the court to act as a judicial factor: it is in a sense a public acknowledgment of the professional calibre of the person involved. It may therefore be that, as in cases where independent counsel are appointed to act on behalf of the Government, factors may be prepared to charge a lower rate. We would certainly expect the Accountant of Court, who will be tasked with negotiating and, in the last resort, fixing the fees, to take that into account.

Fees would be payable from the estate in the event of the judicial factor deciding that it would be appropriate, in the circumstances of that particular judicial factory, to complete title to property forming the estate or any part of it. Fees for registration of a Notice of Title in the General Register of Sasines and an application to complete title in the Land Register are calculated on the value of the subjects. Current fees range from £60 for subjects the value of which does not exceed £50,000, to £600 for subjects the value of which does not exceed £500,000 to £7,500 for subjects the value of which exceeds £5,000,000. Such fees are less if ARTL is used. The standard fee for registering transfer of ownership of a vessel on the UK Ship Register is £80. For registering transfer of ownership of an aircraft with the Civil Aviation Authority, the fees are £69 or £138 according to the weight of the aircraft. No fee is charged by Companies House for the registration of title to company shares.

Fees would be payable in respect of the requirement to register (and re-register) notices of appointment and certificates of termination of the judicial factory in the Register of Inhibitions. Under the current Fee Order, there would be a £15 registration fee on each occasion.

Incidental costs such as key personnel insurance, costs for basic banking facilities and costs of correspondence and telephone calls apply in all existing cases and tend not to be excessive. It is not anticipated that these costs would alter as a result of the reforms introduced by the Bill.

#### **Scottish Firms Impact Test**

- It is not anticipated that the proposals would have any significant impact on any particular sector, market or industry. The average number of new judicial factories per year is twelve.

As previously stated, the Commission engaged with the following business interests: Ewen Alexander, Johnston Carmichael; Bill Cleghorn, AVER; Derek Francis, Advocate; Tom Hughes, Gerber, Landa & Gee; the Law Society of Scotland; and John McArthur, Gillespie Macandrew. The input of these interests, whose businesses had a variety of experience in dealing with the existing regime governing judicial factors, greatly assisted the formulation of policy in relation to the practical aspects of judicial factories. All supported a modernisation of the current regime.

- **Competition Assessment**

It is not anticipated that the Bill would have an impact on competition within Scotland. The proposals do not create a competitive advantage or disadvantage for any particular sector or individual.

- **Test run of business forms**

The Bill prescribes no new business forms. There is therefore no requirement to carry out a test run.

#### **Legal Aid Impact Test**

As we do not anticipate any marked difference to the annual average applications for the appointment of a judicial factor, a majority of which will be applications by the Law Society of Scotland under the Solicitors (Scotland) Act 1980, and as the use of procedures for distribution, termination, recall and discharge by the Accountant of Court will be the norm, the proposals are not expected to have any impact on the legal aid fund. The Access to Justice team is content that the Bill would not adversely affect either the legal aid scheme

or the legal aid fund.

### **Enforcement, sanctions and monitoring**

The Bill does not require public enforcement as such. Judicial factors would continue to be under the supervision of the Accountant of Court as they are under the current law. The Bill does not impose any sanctions.

### **Implementation and delivery plan**

If passed by the Scottish Parliament, the substantive provisions of the Bill would come into force on such day as the Scottish Ministers may by order appoint. This would allow time for revision of the relative rules of court. It will also be necessary to obtain a section 104 order a draft of which is included in the Report on Judicial Factors. See Chapter 1 and Appendix B.

- **Post-implementation review**

Given the relatively small number of judicial factories each year, it is difficult to state a case for an urgent post-implementation review. We expect that the Scottish Ministers will review the legislation within 10 years of the date on which it is brought into effect.

### **Summary and recommendation**

#### **Dismiss Option 1**

Under this option, the existing outmoded and cumbersome law on judicial factors would continue. It is submitted that this is an unacceptable outcome.

#### **Recommend Option 2**

It is recommended that Option 2, the introduction of the Judicial Factors (Scotland) Bill, be adopted for the various reasons outlined above.

- **Summary costs and benefits table**

	<b>Option 1</b>	<b>Option 2</b>
Benefits	None.	Option 2 would provide a modernised, simplified and fit for purpose regime, resulting in all those coming into contact with it being better informed and being better able to handle matters more efficiently. There would be clarity as to appropriate processes to be followed and as to which powers and duties a judicial factor has. The flexibility introduced by the Bill would also mean that the solution of appointing a judicial factor could become more attractive in a wider range of circumstances. It is hoped that in the majority of cases there



		<p>would be a reduction in the duration of a judicial factory. The Bill would also introduce a more structured system of remuneration which may encourage practitioners to take on this kind of work. The introduction of matters such as modern accounting methods and increased use of bringing judicial factories to an end by the Accountant of Court would bring substantial cost savings.</p>
Savings: costs	None.	<p>Clarity regarding powers and duties would mean that the need for a judicial factor to petition the court for other powers should virtually disappear, resulting in a saving to the estates concerned of the relative court costs. Similarly, a speedier process would result in savings as the period for which the factor could potentially be remunerated would be reduced.</p> <p>A move from the current system where caution must be found in all cases to a system where the court has a discretion, where it considers that exceptional circumstances peculiar to that appointment make it prudent to do so, to require caution to be found, would produce substantial savings. Simplified accounts would cost less to produce and audit.</p> <p>The recommended introduction of a duty to promote settlement would assist in the reduction of costs by breaking through the stalemate created by entrenched positions.</p> <p>An extended use of procedures for distribution, termination, recall and discharge by the Accountant of Court would reduce substantially the costs of bringing a judicial factory to an end, but more importantly would reduce delays and red tape at the culmination of a factory.</p>
Savings: time	None.	Clarity would enable cases to

			<p>proceed without delay as third parties would have easy access to a statement of the powers of a judicial factor. Judicial factors would also be clear as to their role and responsibilities so that there should no longer be any need for judicial factors to spend time consulting the Accountant of Court about whether or not they have a particular power. A speedier process would result in savings as the period for which the factor could potentially be remunerated would be reduced.</p> <p>An extended use of procedures for distribution, termination, recall and discharge by the Accountant would reduce delays and red tape at the culmination of a judicial factory.</p>
	<p><b>Costs</b></p>	<p>The disproportionate expense sometimes attaching to cases under Option 1 due to the cumbersome nature of the current procedure would remain. Costs of finding caution can be onerous. Outmoded accounting methods are expensive to comply with and to audit.</p> <p>Due to uncertainties over powers and duties, there may be ongoing costs in relation to the need to resort to litigation to resolve matters. This can cause judicial factories to be in place for longer than is necessary and thereby cost more in terms of matters such as remuneration of factors. The current lack of a structured system of remuneration of factors can lead to over-charging. A restricted ability to bring a judicial factory to an end without court intervention results</p>	<p>Petition costs would be unlikely to alter post reform but wider knowledge of concurrent jurisdiction should assist in keeping these as low as possible. The reforms would result in judicial factors being paid at professional rates. However, requiring work done at a lower level to be charged at lower rates may reduce overall costs.</p> <p>Registration dues would be payable in instances of completion of title and also for the registration of certain notices in the Register of Inhibitions.</p> <p>Incidental costs would be much as under the current regime.</p>

	in further court costs being incurred. There would also be certain incidental costs.	
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**Declaration and publication**

I have read the impact assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

**Signed:**

*Hyndle Clerk*

**Date:**

*6 August 2013*

**Chairman of the Scottish Law Commission**

