

29 April 2024

Dear Mr McMillan

Judicial Factors (Scotland) Bill – Further comments following evidence session on 23 April 2024

May I thank the Delegated Powers and Law Reform Committee for considering the submission by the Charity Law Association (CLA) in response to the Committee's consultation at Stage 1 of the Judicial Factors (Scotland) Bill and for subsequently inviting me to give evidence in person on 23 April 2024 (alongside other witnesses).

You kindly invited me to respond in writing with any further comments, and towards the end of the evidence session, the Committee specifically invited the CLA to submit a possible 'wish list' of additions or amendments to the Bill that we would like to see in order to address more clearly the specifics of judicial factors (JFs) appointed in charity cases as a result of a petition by OSCR under section 34(5)(c) of the Charities and Trustee Investment (Scotland) Act 2005.

I have discussed these issues with the other members of the CLA Working Party that made the earlier submission to the Committee, and the comments below are made on the same basis.

1. We noted the helpful comments of Patrick Layden KC when he gave evidence to you on 16 April 2024. He referred to the CLA submission and he noted that the Bill says nothing about some of the specific duties applicable in charity cases. He suggested these might be addressed by "the inclusion of specific provisions in sections 3, 15, 27 and Schedule 1".
2. However, we feel on balance it might be clearer to add a new section to the Bill dealing specifically with charities, so that, as far as possible, the additional requirements of JFs appointed in charity cases are brought together in one place.
3. We therefore felt it might be simplest to offer some drafting of additional provisions to be added to the Bill – please see the Appendix below. We note that the Bill is only at Stage 1 – so we appreciate the Committee is not yet at the stage of tabling specific amendments – but given that this Bill began from a full draft prepared by the Scottish Law Commission, we hope it is helpful to offer a full draft of the additions we suggest.
4. Our suggested new clause draws considerably on section 78 of the Charities Act 2011 regarding the appointment of Interim Managers (IMs) to charities in

England and Wales. As explained in my evidence, we believe there are considerable parallels between the role of an IM in E&W and the role of a JF appointed in a charity case in Scotland. Of course, there are important differences – not least the IM is appointed directly by the Charity Commission, whereas the JF is appointed by the court (not directly by OSCR) and the JF also works within the other provisions of the Bill. But we suggest that our proposed new clause takes account of these differences.

5. We note that a JF appointed under section 34(5)(c) of the Charities and Trustee Investment (Scotland) Act 2005 could be appointed to a Scottish charity with any legal structure (for example: a charitable trust, a charitable association, a SCIO or a charitable company) or to a non-charitable body that is controlled by one or more charities (s.34(1) of the 2005 Act). We believe our suggested wording allows for all these possibilities.
6. In our evidence, we also raised the suggestion that it might be helpful for OSCR to be able to petition the relevant Sheriff Court for appointment of a JF (in the same way as the Bill allows for other JF appointments) and so we also offer a possible amendment to the 2005 Act that could achieve this by an addition to Schedule 2 of the present Bill. Our drafting for this draws on the style of amendments made to the 2005 Act by the Charities (Regulation and Administration) (Scotland) Act 2023.
7. We note that OSCR did not make any submission to the Committee at this stage of the Bill, but most of our suggestions have potential implications for the role of OSCR, so we suggest the Committee may wish to encourage the Bill team to have further discussion with OSCR (probably at Stage 2) on the detail of these proposals.

Thank you for considering these further suggestions.

Yours sincerely

Professor Gareth G Morgan

On behalf of the Charity Law Association Working Party in relation to the Judicial Factors (Scotland) Bill.

Attached: Appendix with draft of possible additions to the Bill.

Appendix

Possible text for additional provision in Judicial Factors (Scotland) Bill in respect of judicial factors appointed to charities and connected bodies

New clause

(.) Charities

- (1) The following provisions shall apply to a judicial factor appointed under section 34(5)(c) of the Charities and Trustee Investment (Scotland) Act 2005 (in addition to any other relevant provisions of this Act).
- (2) Notwithstanding the powers under schedule 1, a judicial factor appointed to a charity shall have all the powers and duties of the charity trustees of the charity concerned (whether arising under the 2005 Act or otherwise) unless otherwise specified in the interlocutor.
- (3) The interlocutor may direct that any powers or duties specified by virtue of subsection (2) are to be exercisable or performed by the judicial factor to the exclusion of those charity trustees.
- (4) The powers of OSCR in relation to the supervision of charities or bodies controlled by one or more charities shall apply to the judicial factor and to the judicial factor's functions as they apply to a charity trustee of the charity or charities concerned and to the charity trustees' duties as such.
- (5) OSCR may apply to the court for a variation of the judicial factor's functions or for directions in relation to any particular matter arising in connection with the discharge of those functions.
- (6) The court may on an application under subsection (5)—
 - (a) make such variation,
 - (b) give such directions, or
 - (c) make such orders declaring the rights of any persons (whether before the court or not),as it thinks just.
- (7) The costs of an application under subsection (5) must be paid by the charity or body concerned unless otherwise specified by the court.
- (8) All reports and documents sent by the judicial factor to the Accountant must also be sent to OSCR.
- (9) Any references in this Act to persons who have an interest in the estate shall, in the case of a charity, be understood as a reference to the public or to the section of the public entitled to benefit from the charity. Where the judicial factor

considers the class of beneficiaries to be too large to make intimations to each beneficiary under section 27, an intimation to OSCR (with such public advertising as OSCR may require) shall suffice.

Addition to clause 50

“OSCR” has the same meaning as in section 106 of the Charities and Trustee Investment (Scotland) Act 2005

Addition to Schedule 2 – Modification of Enactments

Charities and Trustee Investment (Scotland) Act 2005

(.) (1) The Charities and Trustee Investment (Scotland) Act 2005 is modified as follows.

(2) The cross heading of sections 34 to 37 becomes “Powers of the Court of Session and sheriff court”.

(3) After section 37, insert –

37A Powers of sheriff court

(1) The power to appoint a judicial factor in section 34(5)(c) may, on an application by OSCR under sections 34(1) or (2), be exercised by the sheriff and references to the court in section 34 shall be interpreted accordingly.

(2) Subsection (3) applies where a judicial factor has been appointed by the sheriff to manage the affairs of a charity or a body controlled by one or more charities.

(3) In proceedings before it under section 34, the sheriff may, instead of awarding expenses against the charity, award expenses against a charity trustee of the charity or against any two or more of its charity trustees jointly and severally.