



Law Society  
of Scotland

**70**  
Years  
1949-2019

# Consultation Response

## Judicial Factors: Consultation

November 2019



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We welcome the opportunity to consider and respond to the Scottish Government's consultation on judicial factors. In April 2011, we responded to the Scottish Law Commission (SLC) discussion paper on judicial factors (Discussion Paper No.146).<sup>1</sup> Following the discussion paper, the SLC published its report in April 2013, the recommendations of which, as we understand, are the basis of the current consultation by the Scottish Government.

In fulfilment of our statutory function in terms of the Solicitors (Scotland) Act 1980, the Law Society has a duty to protect the public. In circumstances where solicitors have been found to have a shortfall on their client account, or the firm's books and records are in such a state that it is impossible to tell if a shortfall on the client account has arisen, the Law Society can petition the court for the appointment of a judicial factor as laid down in section 41 of the Solicitors Scotland Act 1980. The petition will seek the appointment of a judicial factor to take charge of the solicitor's estate (or that of the incorporated practice) and, after due consideration of the circumstances which gave rise to the appointment, deal with the assets and liabilities of the solicitor/firm all according to law. Additionally, where appropriate, the judicial factor appointed will assist clients in recovering the sums which should have been held on their behalf in the solicitor's/firm's client account.

## General comments

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We are pleased to note that the Scottish Government intends to take forward the recommendations made by the SLC in their 2013 report and which recognise the reforms needed to ensure that the appointment, role and duties of a judicial factor are sufficient and appropriate to ensure property and estate is

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<sup>1</sup> Discussion paper 146 at <https://www.scotlawcom.gov.uk/files/4512/9744/4722/dp146.pdf>

safeguarded and administered appropriately and when necessary. We worked closely with the SLC in developing the recommendations, and we are further pleased to note that the recommendations and the resultant draft Bill, address many of the concerns that we raised at that time in relation to the current legislative framework.

### **Appointments made under section 41 Solicitors (Scotland) Act 1980**

Although we are supportive of many of the recommendations and respond accordingly to the questions below, there is one recommendation about which we have several concerns and do not agree with, this being recommendation 7 of the SLC report, which relates to judicial factor appointments made in terms of section 41 of the Solicitors (Scotland) Act 1980.<sup>2</sup> The consultation discusses jurisdiction and the Scottish Government and SLC view that applications made under the powers contained within section 41 1980 Act to appoint judicial factors should be heard in the sheriff court rather than the Court of Session.<sup>3</sup> We strongly disagree with this view and proposal.

Section 41 provides the Law Society Council with the power to apply to the court for the appointment of a judicial factor on the estate of a solicitor or incorporated practice. This is a fundamental power which is aimed at protecting the interests of clients. The appointment under section 41 ensures that the power is given to the judicial factor to control, manage and protect the client account as well as client files. The role of the judicial factor in relation to solicitor firms and incorporated practices differs significantly from the role of other judicial factor appointments. This difference in role and the requirements for particular expert knowledge and awareness by the courts was recognised and strongly acknowledged by Lord Penrose in the case of *Council of the Law Society of Scotland v McKinnie 1994*<sup>4</sup>.

<sup>2</sup> Section 41 Solicitor (Scotland) Act 1980;

**Appointment of judicial factor.**

*Where the Council, in exercise of any power conferred on them by rules made by virtue of section 34(1D) or the accounts rules, have caused an investigation to be made of the books, accounts and other documents of a solicitor or an incorporated practice, and, on consideration of the report of the investigation, the Council are satisfied—*

- (a) that the solicitor or, as the case may be, the incorporated practice has failed. to comply with the provisions of those rules, and*
- (b) that, in the case of a solicitor, in connection with his practice as such, either—*
  - (i) his liabilities exceed his assets in the business, or*
  - (ii) his books, accounts and other documents are in such a condition that it is not reasonably practicable to ascertain definitely whether his liabilities exceed his assets, or*
  - (iii) there is reasonable ground for apprehending that a claim on the Guarantee Fund may arise; or*
- (c) that, in the case of an incorporated practice, either—*
  - (i) its liabilities exceed its assets, or*
  - (ii) its books, accounts and other documents are in such a condition that it is not reasonably practicable to ascertain definitely whether its liabilities exceed its assets, or*
  - (iii) there is reasonable ground for apprehending that a claim on the guarantee fund may arise.*

*the Council may apply to the Court for the appointment of a judicial factor on the estate of the solicitor or, as the case may be, of the incorporated practice; and the Court, on consideration of the said report and after giving the solicitor or, as the case may be, the incorporated practice an opportunity of being heard, may appoint a judicial factor on such estate, or do otherwise as seems proper to it*

<sup>3</sup> See paragraphs 4.1 to 4.10: Judicial Factors Consultation August 2019.

<sup>4</sup> Council of the Law Society of Scotland v McKinnie (No 2)1995 S.C. 94

Appointments under section 41 often arise where potential or actual fraud has been identified or there appears to be a discrepancy within client accounts or the management of client files. Therefore, it is of paramount importance to prevent further detriment, and at times to preserve evidence, that the appointment under section 41 is made without undue delay and by a court that fully understands the issues and complexities of the matter at hand.

Paragraph 4.8 of the consultation helpfully sets out our previous reasoning for suggesting that appointments continue to be made by the Court of Session. We are still firmly of the view that passing matters to the sheriff courts may lead to:

- **Inordinate delay:** appointments often need to be made as a matter of urgency to secure documents, monies and estate, as discussed above. Should the hearing be heard in a remote sheriff court, this will undoubtedly incur delay as the Law Society will need to arrange expert representation from Edinburgh to attend the appropriate sheriff court. As a courtesy to the court we often send representatives to the hearings to provide additional information, should the matter be sufficiently complex or unusual. Any delay between the decision to appoint a judicial factor and the matter being placed before the court poses, a risk to the estate and the clients of the firm.
- **Potential conflict issues:** where we seek an appointment over a solicitor's practice, particularly in more remote communities, there is a risk of the local sheriff court being unable to hear the case because of a conflict of interest issue. The solicitor in question may be known to the sitting sheriff, who will then be required to recuse him or herself from hearing the action. This will cause further delay and may require the hearing to be transferred to another sheriff court. This is not a hypothetical situation and has arisen in relation to actions raised against a solicitor and the judicial factor and thus delayed justice for all.
- **Increased costs:** may be incurred as a result of travel to single, or potentially multiple, sheriff courts. The increase in costs will ultimately be borne by the estate. Costs can also substantially increase from the known and unknown risks associated with any delay in appointing a judicial factor.
- **Dilute the development of procedural expertise:** applications in relation to judicial factor appointments over the property and monies of law firms arise only occasionally. Given the potential detriment to clients, it is important that those court staff involved in such hearings have a detailed and thorough knowledge of this subject area so as to avoid any pitfalls that may arise and to ensure the application and hearing proceed smoothly and in accordance with relevant processes and legislation. Holding hearings in local sheriff courts on such an infrequent bases will not provide sufficient opportunity for staff to develop the knowledge needed. The issue is perhaps best demonstrated by way of an example. We recently applied to the outer house of the Court of

Session for the appointment of a judicial factor. At that time the clerk to the court, who was unfamiliar with the process, was uncertain as to how to deal with the interlocutor requested and incorrectly copied from a previous interlocutor. Counsel was then required to redraft the document required for the court to sign. This resulted in substantial expense and further delay in securing the client account of the law practice in question.

Given the complexity and urgency of section 41 appointments, and how infrequently these arise, we believe that there is full justification for these matters to be retained within the Court of Session jurisdiction. However, it is accepted that retaining them as the preserve of the Inner House of the Court of Session is unnecessary and therefore, we would be happy for such appointments to be made in the Outer House.

### **Powers to manage accounts of incorporated practices**

In the context of this consultation, we have identified and consider it appropriate to raise a further serious problem which relates to incorporated practices. An incorporated practice is a body corporate recognised by the Law Society in terms of section 34(1A) of the 1980 Act. Many incorporated practices operate as limited liability partnerships and some as limited companies. In either case, it is possible (and in fact, reasonably common) for there to be only one individual within the incorporated practice who is qualified, in terms of the legislative and regulatory requirements, to manage and control the incorporated practice. If that individual ceases to be qualified to exercise that management and control (perhaps as a result of suspension, restriction or withdrawal of his or her practising certificate) or is unable (perhaps due to ill-health) to manage the business, there is currently no mechanism within the 1980 Act whereby the Society can step in to protect the interests of clients.

This contrasts markedly with the position in the event that a sole practitioner (i.e. a solicitor practising under his or her own name or a firm name, but who does not operate through a corporate body) loses the ability to practise due to suspension, restriction or withdrawal of his or her practising certificate, or is unable to practise due to ill-health. In those scenarios, the 1980 Act makes provision for the power to manage the solicitor's client account to vest in the Society.<sup>5</sup> This is to allow the Society to safeguard the interests of clients and protect and manage client funds and files to minimise any detriment to clients. For example, this allows the Society to authorise the release of client funds held in the solicitor's client account which are required to complete transactions, such as house purchases, avoiding the client incurring interest charges and penalties for late payment – or possible cancellation of the contract by the seller.

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<sup>5</sup> Solicitor (Scotland) Act 1980 section 45 'Safeguarding interests of clients of solicitor struck off or suspended'

The absence of an equivalent mechanism within the 1980 Act, which can be applied in relation to incorporated practices where there is no qualified person able to manage and control the incorporated practice, means that clients of such practices are placed at heightened risk– as the Society cannot step in to protect their interests in the same way that it could step in, had the client chosen to consult a solicitor or firm which is not operating as a corporate body. This is wrong in principle and causes significant difficulties in practice.

The Society does, of course, do everything in its power to protect the interests of clients of an incorporated practice in such circumstances. However, the only option currently available is for the Society to apply to the Court of Session for the appointment of a judicial factor, under section 41 of the 1980 Act, under common law or based on the nobile officium. This is a costly and lengthy process and delay can be detrimental to the interests of the clients of the incorporated practice at a point where time is of the essence. Requiring such measures to be taken in order to secure clients' interests can also be wholly disproportionate, when considered in the context of the monies and files held by the incorporated practice. A faster, simpler process which replicates that available in the context of sole practitioners would allow the Society to better protect consumers of legal services in a more efficient, effective and proportionate manner. This is an issue which we consider could be resolved by simple amendments to both sections 45<sup>6</sup> and 46<sup>7</sup> of the 1980 Act made through the provisions of the draft Judicial Factors (Scotland) Bill.

To help ensure a full and clear understanding of the serious problem and challenges currently faced by what we believe is a significant gap in the current legislation, we would welcome the opportunity to discuss the issue we have raised in this response with the Scottish Government at the earliest opportunity.

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<sup>6</sup> Section 45 Solicitors (Scotland) Act 1980: 'Safeguarding interests of clients of solicitor struck off or suspended'

<sup>7</sup> Section 46 Solicitors (Scotland) Act 1980: 'Safeguarding interests of clients in certain other cases'

## Specific Comments

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**1. Should the Scottish Government implement the Report by the Scottish Law Commission?**

Yes. We are fully supportive of the implementation of the SLC Report by the Scottish Government and taking forward the recommendations made by the SLC, subject to our comments above relating to section 41 appointments.

**PART 2: Missing Persons**

**2. Please provide any comments on the current procedure for the appointment of judicial factors in the case of a missing person.**

We believe that the current procedure is too cumbersome, prescriptive and restrictive. Jurisdiction on the basis of habitual residence is appropriate and would correspond, for example, with the general trend in private international law as exemplified by various Hague Conventions. The qualification “for one year” appears to be unnecessary and impractical and may give rise to considerable practical difficulties of proof in many situations, as well as effectively removing this ground of jurisdiction for some individuals. “Habitual residence” is a clear concept, reasonably well established by UK cases concerning adults with incapacity. It indicates a degree of permanence and an individual can only have one habitual residence.

**3. Should there be a qualifying period during which a factor in loco absentis cannot be appointed? If so, what should that period be?**

Yes, we agree that there should be a qualifying period. We suggest that the 60-day period would be appropriate. We have suggested this period in light of the ability of individuals to travel extensively and more widely, whilst remaining in contact through email and other digital channels. Given the extensive availability and variety of communication methods in the modern age, individuals being out of touch without reasonable notice for a period of 60 days is likely to be unusual. The consequences for families and loved ones can be devastating when these situations arise. The balance between the individuals’ interests and those of the family can be managed with the direction of the accountant of court given that they will be aware of the full circumstances of a case. The accountant can deal with these matters on a case by case basis in the management plan. The emphasis can be on the initial preservation in, for example, the

first two years, but with a view that in specific circumstances, the emphasis could be changed in later periods.

**4. Should the duty of a judicial factor appointed in the case of a missing person be limited to acting in their best interests only?**

No. The position needs to be considered taking account of all the circumstances and facts of the case. Where there is a presumption of preserving the estate for the benefit and interest of the missing person, this may impact on that person's dependents (family, children etc). This may cause financial hardship to the dependents and increase, what will in any case be, a very stressful situation.

A "best interests" test in relation to adults is entirely inappropriate for the reasons given in paragraph 2.50 of the Scottish Law Commission's 1995 Report on Adults with Incapacity<sup>8</sup>, and is now strongly reinforced by, for example, General Comment No 1 by the UN Committee on the Rights of Persons with Disabilities.<sup>9</sup> Following AWI and General Comment No 1, the requirement should be to act as the adult would, if available to make decisions, having regard to what is known about the adult's past wishes and feelings and a "best interpretation" of the adult's will and preferences in any matter.

In situations where the missing person had customarily made gifts, or could reasonably be expected to want to make a one-off gift (such as for the wedding of a child), we suggest that it may be appropriate for a procedure similar to that under the Adults with Incapacity (Scotland) Act 2000 (the 2000 Act) to authorise such gifts. Also, where the missing person has title to heritable property, we suggest there should be an obligation – as in the 2000 Act – to include a title description of the property in the application, and then to register the interlocutor in the Land or Sasine Register.

**5. Should the Scottish Courts only have jurisdiction to appoint a judicial factor to an estate of a missing person?**

Yes, we agree for the reasons as set out in the consultation, that jurisdiction on the basis of habitual residence is appropriate and would correspond, for example, with the general trend in private international law as exemplified by various Hague Conventions. However, the qualification "for one year" appears to be unnecessary and impractical and may give rise to

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<sup>8</sup> Scottish Law Commission Report on Adults with Incapacity (paper Scot Law Com 240)

<sup>9</sup> Committee on the Rights of Persons with Disabilities Eleventh session 31 March–11 April 2014 see: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>

considerable practical difficulties of proof in many situations, as well as effectively removing this ground of jurisdiction for some individuals. “Habitual residence” is a clear concept, reasonably well established by UK cases concerning adults with incapacity. It indicates a degree of permanence and an individual can only have one habitual residence.

**6. Are there any other provisions in the Guardianship (Missing Persons) Act 2017 which could be usefully replicated in any Scottish Legislation?**

As with applications made under the provisions of the 2000 Act for adults with incapacity, applications should be by Summary Application in the sheriff court. There should be a power to give directions similar to that contained in the 2000 Act section 3(3). All subsequent applications in relation to an appointment should be by minute in the existing process, not by separate petition. There may also be value in requiring the factor to submit a management plan, as under the 2000 Act.

**7. Should there be a change of name of ‘loco absentis’ cases?**

Yes. It would be sensible to replace with wording which would accurately reflect the aim of the missing person provisions, therefore raising awareness with users.

**8. If so what are your views on ‘judicial factor on a missing persons estate’?**

We agree that it would be appropriate to replace ‘in loco absentis’ with the wording within the question, ‘judicial factor on a missing persons estate’. However, this wording may be viewed as unnecessarily cumbersome. The reference to “estate” is tautological. “Judicial factor for a missing person” would be, in our view, fully adequate, and in the modern human rights environment more appropriate by focusing on the person, rather than signalling a potentially depersonalised focus on ‘estate’.

**PART 3: Safeguarding of Property: Children (Scotland) Act 1995**

**9. Should the accountant in Court be able to draw matters of concern to the attention of the relevant Sheriff court?**

Yes, we agree with this proposal. Unfortunately, it is sometimes the case that family members, or others appointed to safeguard and manage the property of children, do not always act in the best interests of the child. We believe that providing the necessary powers to the accountant of court to report matters of concern to the court would help to safeguard and promote the interests of the child.

**10. Should the Accountant of Court be able to vary or recall directions?**

Yes. Providing such powers would put the current informal practice which exists for the recall and variation of direction issued by the court, onto a statutory footing. This would create certainty and remove any ambiguity or inconsistency which may currently exist.

**11. Do we need to specify the procedure where no joint minute or subsequent decree has taken place?**

Yes. The procedure must be express, clear and transparent to demonstrate that it has been managed appropriately and centred upon the best interests of the child. We also suggest that any procedure adopted must be flexible enough to reflect the sum awarded, as management of very substantial sums require more consideration than awards which are mainly made to cover day-to-day living costs.

**12. Do you agree that the views of the child should be taken into account (where practicable and taking account of their age and maturity) where a parent is appointed as the child's legal representative?**

Yes. However, we suggest that it should not be limited to the child's view. Depending on the nature and size of the estate, the considerations may be complex. Therefore, it is important to ensure clear and accurate record keeping of the views expressed by the child and the person with parental responsibility. This should provide substantial analysis of the complex issues arising and provide detailed explanation of any divergence from the views expressed and the reasoning for that divergence. We also suggest that there should be an express requirement for the child's view, where practicable and taking account of their age and maturity, to be obtained by a person appointed by court, such as a reporter or curator ad litem.

**13. (a) What would be the most proportionate way of ensuring that a child's views are taken into account?**

As cases are likely to involve finances, and as referred to above in response to question 12, we believe it would be inappropriate to obtain the views of the child on an informal basis given the importance of the matter and the need for an accurate record. Therefore where it is deemed appropriate to obtain the views of the child, these should be obtained and accurately recorded in a formal manner.

## **PART 4: Further testing of recommendations**

### **14. Should applications to appoint a judicial factor be heard in the sheriff court rather than the Court of Session?**

Yes, but subject to the exception of those applications made under the provision of section 41 and the 1980 Act, as discussed above (see general comments). Those applications should continue to be made to the Court of Session to ensure:

- they are dealt with in a timely manner
- they are dealt with by a court that is experienced and understands those types of applications and the complexities that can arise and
- maintenance of a central accessible location for all parties which ensures the necessary expertise is available for both sides, supporting the equality of arms principle.

In our experience, cases where the appointment relates to powers under the Solicitor (Scotland) Act are rarely under the value of £500k. Given the significant value of the estate, it is paramount that these are decided upon by a court which fully appreciates and understands the complexities of applications and appointments under the 1980 Act. To remove the jurisdiction of such high value cases and re-route these to the sheriff court is contradictory to the Gill review which recognised the risks associated with high value cases.<sup>10</sup> The Courts Reform (Scotland) Act 2014 provides exclusive jurisdiction to the sheriff court on matters not exceeding £100k.<sup>11</sup> This reflects the recognition that higher value cases are likely to be the more complex matters where greater risks may materialise.

In addition, the powers created by the nobile officium are prescribed only to the Court of Session and these provide an equitable jurisdiction by virtue of which the court may, within limits, mitigate the strictness of the law and provide a legal remedy where none exists. There have been occasions where we have sought an interlocutor by way of a S41 application, but because of the particular circumstances of the matter, the Court of Session granted the interlocutor under its nobile officium powers to avoid an inequitable outcome which would have resulted in a detriment to clients' interests. It is paramount that any new reform proposals do not inhibit the Court of Session from exercising this power where it is considered appropriate to do so taking into account the circumstances of the case at hand.

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<sup>10</sup> Report of the Scottish Civil Courts Review (the Gill Report) at; <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4>

<sup>11</sup> Section 34 Courts Reform (Scotland) Act 2014

**15. If applications to appoint a judicial factor are to be heard in the sheriff court rather than the Court of Session, should it be the same rule for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980?**

This question is ambiguous. It is not clear if it is referring to a suggested new rule and process applicable to appoint a judicial factor under the Solicitors (Scotland) Act 1980 to the sheriff court, therefore creating two separate rules and processes – to the sheriff court and the Court of Session - or a single alternative to the sheriff court.

As we have referred to in our opening comments and in response to question 14 above, we believe that the current avenue for applications to appoint a judicial factor under the Solicitors (Scotland) Act 1980, must remain open to the Court of Session and in that respect, the processes must be consistent and reflective of this route.

**16. a. The Scottish Government proposes that the “appropriate sheriff court” for an application would be:**

Estates of missing persons

- where the missing person was domiciled the day before the person was first known to be missing; or
- where the missing person had been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent); or
- where the person’s spouse or civil partner or cohabitee is domiciled or has been habitually resident for at least one year (or, if more than one place in Scotland, where most time had been spent).

Estates of other natural persons

- in the sheriffdom where the applicant, or any person with an interest in the estate is domiciled or has been habitually resident.

Non-natural persons

- In the sheriffdom where the person who has the estate has a place of business.

None of the above applies• If none of the above applies, the “appropriate sheriff court” would be the sheriff court in Edinburgh.

**16. b Does this seem a reasonable approach?**

We believe that much of this provides greater clarity on jurisdiction. However, as referred to above in response to question 5, the qualification “for one year” appears to be unnecessary and impractical and may give rise to considerable practical difficulties of proof in many situations, as well as effectively removing this ground of jurisdiction for some individuals.

**17. Should sections 4 and 6 of the draft Commission Bill be followed in relation to who may be appointed as a judicial factor?**

Yes. We agree with the grounds on which a judicial factor may be appointed as set out within the provision in section 4 of the draft Judicial Factors (Scotland) Bill. We also agree as to the qualifications of the person who may be appointed, section 6, providing they are a suitable person of full legal capacity, so as to allow the flexibility of appointment of family members. However, we suggest that there may also be merit in a power to appoint a substitute factor where considered appropriate, simplifying procedural aspects if for any reason, the factor first appointed were to cease to act while the factor was still current.

**18. Do you agree that the wording at section 7 of the draft Bill reflects that caution is only required in exceptional circumstances?**

Yes. We believe that this is a risk-based approach. Allowing the discretion for caution provides flexibility to the accountant of court to take appropriate steps and to set a level of caution where risk is identified and will not unduly burden those estates with costs, where risk is minimal.

**19. Do you consider that interlocutors should contain provisions on how proactively an estate should be managed?**

Yes. The estates under management are held for different purposes, thus the courts can determine the appropriateness of implanting any proposed management plan based on the circumstances of each case. The petitioners, as a matter of practice, should address this issue in the petition.

**20. Should judicial factors continue to be paid a commission?**

Yes. These cases can be complex and require a range of professionals/individuals with expertise in the relevant area. Providing the accountant of court with the power to determine and fix remuneration allows recognition of the skills required in any particular circumstances. Setting a reasonable rate at which commission is paid, enables the appropriate professional/person of skill to take on such appointments.

The involvement of the independent accountant of court fixing remuneration ensures judicial factors cannot fall foul of the auctor in rem suam doctrine. The intention to annually review rates of remuneration will ensure that judicial factors will continue to be appropriately remunerated

**21. Do you have any other comments on how judicial factors should be paid in future?**

No.

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