



Law Society  
of Scotland

# Consultation response

## Future of the Land Court and the Lands Tribunal

October 2020



## 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 respond to Scottish Government's consultation on the *Future of the Land Court and the Lands Tribunal*<sup>1</sup>. We have the following comments to put forward for consideration.

## Questions

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### **1 Please indicate your views on the proposal to amalgamate the Scottish Land Court and the Lands Tribunal for Scotland. Please give your reasons.**

We consider that it would be most suitable for the Scottish Land Court and the Lands Tribunal to remain as separate bodies.

We note that the existence of the Scottish Land Court and the development of small landholding and crofting legislation since 1911 have been inextricably linked. We note the importance of the Land Court as referred to within the consultation document<sup>2</sup>. It is vital that the Court's expertise in crofting matters is retained and is not diluted by an amalgamation with the Lands Tribunal. This is equally true of the specialist work carried out by the Lands Tribunal and we consider it important that the particular expertise of the two bodies is not lost by an amalgamation.

However, we note that a persuasive argument for amalgamating the Land Court and the Lands Tribunal is the potential savings in administrative costs and alignment of the membership so as to resolve some of the difficulties which presently arise. It may be possible for the bodies to remain as separate entities but to share all administrative functions (we note that some administrative functions are already shared). Any amalgamated body must be properly resourced, and an amalgamation should not be seen purely as a means of reducing

<sup>1</sup> <http://www.gov.scot/publications/consultation-future-land-court-lands-tribunal/>

<sup>2</sup> Paragraphs 11 – 15.

resource. It is vital that access to justice is maintained. We consider that it is important that an amalgamation of the bodies does not in itself result in increased costs for parties.

**2 If there is a decision to merge the Scottish Land Court and the Lands Tribunal for Scotland, do you consider that the merged body should be a court or a tribunal? Please give your reasoning.**

We would favour that the Land Court have the Lands Tribunal functions merged into it. We consider it important for the functions of the Land Court to be dealt with as a court rather than as a tribunal. The Court is held in high regard and for many people, particularly in relation to agricultural tenancies and crofting matters, the Court plays a very important role. It is important that faith in the system is maintained and we consider that any loss of that would have a detrimental impact on the Court's operation.

Some agents consider the Land Court to be more 'user-friendly' and accessible than Sheriff Courts. The expertise of the Court is very significant. While the character of the Court may be considered quite unique, the role it plays in terms of access to justice is significant.

We note that the Lands Tribunal reflects similar entities in other UK jurisdictions and there is a potential for connections with other bodies to be lost if the Lands Tribunal is merged into the Land Court. We note that the Consultation document does not make reference to that and we suggest that consideration be given to this matter.

We note that COVID-19 has impacted upon court and tribunal management and processes, with greater use of technology and electronic processes being deployed to allow continued operation. We consider that this presents opportunities to develop new practices and we would welcome retention of some of the newly developed ways of working. However, concerns have been expressed about court processes in general being held remotely, as these processes cannot and do not work successfully for all. It is important that parties can participate effectively in proceedings, including being able to instruct their solicitor (where applicable) and to give evidence if appropriate.

**3 If there is a decision to merge the Scottish Land Court and the Lands Tribunal for Scotland, do you consider that the merged body should take on more functions than those separately undertaken by the two bodies at present?**

**If 'yes', please list the extra function(s) to be undertaken and your reasoning.**

**If 'no', please provide your reasoning for this view.**

We consider that it would be appropriate for an amalgamated body to take on some additional functions. We agree with the inclusion of some of proposed additional matters detailed in the consultation paper, for

example, the March Dykes Acts, Runrig Lands Act, Division of Commonties Act, right to buy provisions in the Land Reform (Scotland) Acts of 2003 and 2016 and right to roam cases.

These matters appear to fit well with the skill set and knowledge of the Land Court and Lands Tribunal members. There are potential benefits in terms of ensuring greater consistency. In addition, the wider context of these matters sits squarely within rural law, and some have similarity to issues which arise in the context of crofting and agricultural law more generally.

We also suggest that consideration be given to bringing into the scope of the Land Court applications by an executor under 16(3) of the Succession (Scotland) Act 1964 to extend the period of 24-months for transfer of crofting tenancies.

In terms of environmental matters, we note that the Land Court currently has jurisdiction to deal with wildlife matters under Nature Conservation (Scotland) Act 2004. We also note that appeals in relation to SEPA's enforcement measures<sup>3</sup> are also dealt with by the Land Court, in terms of the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. These are appeals against fixed monetary penalties, variable monetary penalties, costs recovery notices, and non-compliance notices.

In light of existing jurisdiction in these matters, there may be scope for the remit of an amalgamated body to be widened to deal with other environmental matters, such as littering and matters arising under the Environmental Protection Act 1990. This would bring a benefit of having a more specialised bench to deal with such cases, particularly if use is made of part time members with different specialities. In a fairly small jurisdiction such as Scotland, there may be resource efficiencies to be had by having a single body to consider the interconnected matters of land use and the environment.

While there may be benefits in this, we recognise that this would reflect a fairly significant increase in workload for the Court and any additional functions would need adequate resourcing, both members and staff. Effective resourcing is crucial if the bodies are to be amalgamated and any additional functions taken on.

In addition, there is currently inconsistency and fragmentation in the appeal mechanisms for environmental matters in Scotland, for example, abatement notices served under the Environmental Protection Act 1990 are considered by the Sheriff Court but planning appeals by the Scottish Ministers. It is important that there is necessary expertise to deal with environmental matters, particularly appeals.

We would welcome action being taken to rationalise, in a consistent manner, how legal issues and appeals are determined across the regulatory frameworks affecting environmental issues. We note that the Land Court has dealt with a variety of environmental matters in the past, however, there has been little apparent pattern to how matters have been dealt with and we consider that there is a need for a wider review to be undertaken. It is likely that conferring only some additional powers on an amalgamated Land Court and Lands Tribunal in respect of environmental matters would further complicate the landscape.

<sup>3</sup> introduced by the Regulatory Reform (Scotland) Act 2014

**4 a. Please indicate your views on the proposal that the other legal member of the Lands Tribunal could be entitled to be appointed to hear a case from which the Chair and the Deputy Chair of the Land Court have had to recuse themselves.**

**b. Please indicate your views on the proposal that the Deputy Chair of the Land Court could be entitled to be appointed to hear a case from which the President and the other legal member of the Lands Tribunal have had to recuse themselves. Please give your reasons.**

We consider that this would be a sensible approach in the event that amalgamation does not take place.

**5 Do you consider it necessary to continue to have a Gaelic speaker as one of the members of the Land Court? Please give your reasons.**

We appreciate the predicament in this regard. We consider that there remains benefit in having a Gaelic speaking member of the Land Court, particularly in terms of the historical and cultural background of the language which will be important to some parties. It is important to consider this matter in the context of having a modern and diverse Scotland, and existing policies which encourage a diversified country and consider how to support Gaelic culture. We recognise that the requirement may reduce the pool of possible appointees. We note that an amalgamation of the Land Court and Lands Tribunal would open the scope to some extent.

We note that the consultation paper states that: “This question is not to be confused with parties’ rights to use Gaelic in the court’s proceedings, which is enshrined in the court’s rules.” However, it is not clear from the consultation what is intended where parties use Gaelic in the court’s proceedings but there are no members of the court who are Gaelic speaking. We presume that an interpreter would be required.

**6 Do you consider that the Lands Tribunal power to award expenses under section 103 of the Title Condition (Scotland) Act 2003 should be amended so that expenses are not as tied to the success of an application as they are at present? Please give your reasons.**

We do not favour amending the Lands Tribunal power to award expenses. Currently, expenses follow success which is a generally recognised means of awarding expenses across a range of legal matters.

In practical terms, when an application is submitted, the Lands Tribunal notifies all parties who might have interest in the application, who may lodge an objection. Parties lodging an objection will be on notice that they may be found liable for expenses if not successful. In the event that the Lands Tribunal power to award expenses is removed, this has the potential to open the floodgates for objections which may be ill-founded. It

may also weaken the Tribunal's power to discharge real burdens 'as of right' and without the need for a hearing if an application is unopposed (section 97 of the Title Conditions (Scotland) Act 2003). Currently, if an application to discharge a real burden is unopposed then the Tribunal will automatically grant it – a process which can mean discharges can be processed in around eight weeks from the applicant applying. The fact that an objector is on notice that it may be liable for expenses helps ensure that this process is not challenged by frivolous or minor objections which would then trigger then need for a hearing, which would have a cost and time impact on both the applicant and the Tribunal.

Although we favour a status quo in relation to the power to award expenses under section 103 of the Title Condition (Scotland) Act 2003, we note that an alternative would be for parties to bear their own costs. While this approach is consistent with other tribunals, we recognise that Tribunal cases commonly involve an action between a party and the state, whereas applications under part 9 of the Title Condition (Scotland) Act 2003 concerns property owners. In light of our comments above, if parties were to bear their own costs, the court could order expenses in favour of a party where the court considers that a party or their representatives has acted unreasonably in bringing, defending or conducting the proceedings.

## **7 Do you think that the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice?**

**If your answer is “yes”, please indicate:**

- **why (e.g., from your personal experience of the system or some other reason) in the box below; and**
- **what, if anything, do you think should be done about it (e.g. abolish the power or introduce a ceiling on awards of expenses in such cases).**

Yes, we consider that the present power to award expenses in rural payment appeals can be a barrier to justice given that “The Scottish Government, as respondent, is in a position to deploy considerable legal firepower, in the form of counsel, sometimes senior counsel, in addition to its own in-house solicitors, all funded at public expense.”

Before a rural payment appeal is made to the Court, appellants will have been unsuccessful at Rural Payments and Inspections Division internal review. It is common for appellants to have incurred professional costs at this stage, for example, for agricultural consultants. In practice, it can be a fairly significant step-up for an appellant to take a case to the Land Court where they risk having to meet the expenses of their own legal advice if taken, and risk of having to meet the Scottish Government's costs, which generally includes instruction of counsel. In terms of securing access to justice, the ability to appeal a decision must not be on such a basis that people are deterred from appealing.

We do not consider it appropriate for the power to award expenses to be abolished. This could open the door for frivolous appeals to be made. We suggest that cap on expenses would be appropriate. This could be taken forward by way of a protective expenses order model. Alternatively, parties could be required to bear their own

costs. We note that this would be consistent with the approach generally taken by Tribunals, which often involve similar appeals against the state.

## **8 Please provide any further comments on any matters relevant to this consultation in the box below.**

In relation to expenses more generally, we note that some difficulties have arisen in relation to applications by telecoms companies under the new Electronic Communications Code<sup>4</sup> which requires to operators to pursue their 'code rights' via the Lands Tribunal. We are aware of instances where the threat of significant expenses being incurred by the telecoms company at the Lands Tribunal has been used to try and leverage the landowner to accept an offer. In the circumstances, it may be appropriate to consider some form of cap on expenses which may be awarded against respondents where a telecoms companies are initiating a Lands Tribunal application under the Code.

We consider that any discussion in relation to rules concerning expenses should bear in mind the UK's obligations under the Aarhus Convention<sup>5</sup>. Some of the business of the Land Court might fall within the definition of challenging "acts and omissions by private persons and public authorities which contravene the provisions of its national law relating to the environment" under Article 9(3) of the Convention. We understand the Compliance Committee to have taken a fairly broad view of this, for example, such that private nuisance actions can fall within scope<sup>6</sup>. We note that the ability to award expenses in appeals under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015 is restricted in that the Court may not make an award of expenses other than an award for the court fees paid or payable, or where the court considers that a party or their representatives has acted unreasonably in bringing, defending or conducting the proceedings<sup>7</sup>.

### **For further information, please contact:**

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<sup>4</sup> As introduced by the Digital Economy Act 2017.

<sup>5</sup> United Nations Economic Commission for Europe (UNECE) [Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters](#)

<sup>6</sup> See cases ACCC/C/2013/85 and ACCC/C/2013/86 at [https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-55/ece.mp.pp.c.1.2016.10\\_eng.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-55/ece.mp.pp.c.1.2016.10_eng.pdf)

<sup>7</sup> Environmental Regulation (Enforcement Measures) (Scotland) Order 2015, paragraph 8 (4)-(6).