The Scottish Land Court and the Lands Tribunal for Scotland

A consultation on the future of the Land Court and the Lands Tribunal

Scottish Government analysis of responses

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Abbreviations and acronyms

ADR	Alternative Dispute Resolution
DPEA	Scottish Government Planning and Environmental Appeals Division
CAAV	Central Association of Agricultural Valuers
ERCS	Environmental Rights Centre for Scotland
Faculty	Faculty of Advocates
FtT	First-tier Tribunal
Land Court	Scottish Land Court
Lands Tribunal	Lands Tribunal for Scotland
Law Society	Law Society of Scotland
LTS	Lands Tribunal for Scotland
NFUS	National Farmers Union Scotland
QOCS	Qualified one-way costs shifting
SAA	Scottish Assessors Association
SAAVA	Scottish Agricultural Arbiters and Valuers Association
SCTS	Scottish Courts and Tribunals Service
SEPA	Scottish Environment Protection Agency
SG	Scottish Government
SLC	Scottish Land Court

Introduction and executive summary

The Scottish Government consulted on various issues relating to the Scottish Land Court (the Land Court) and the Lands Tribunal for Scotland (the Lands Tribunal) from August to October 2020.[1] The main questions were whether the two bodies should be amalgamated and, if so, whether the resultant body should be a court or a tribunal. The other questions related to administrative matters relating to the Court and Tribunal.

The consultation produced an even split on the question as to whether the land Court and the Lands Tribunal should be amalgamated. The main reasons given for supporting the merger were that it would mean a more efficient administration of the services that the Land Court and the Lands Tribunal currently offer. In particular, those that responded in favour considered that the sharing of resources and staff would be advantageous. Also a merger would clarify and offer more certainty to those who presently use the bodies. Finally, some thought a merged body could form the basis for an environmental court.

The opposing views argued that the Land Court and the Lands Tribunal are quite distinct and that the resolution of the disputes in the two bodies requires different approaches. A unitary set of court rules would not be appropriate. In addition, a merger may result in the compromising of the expertise each possesses. Finally, the Lands Tribunal would lose its valued informality.

As regards the question of whether a merged body should be a court or tribunal, 83.3% of those that answered the question thought it should be a court. The main reasons given were that a court has higher status and is more authoritative. Some considered that a court may be a more suitable for taking on extra functions.

The arguments for a tribunal included the view that a tribunal is less formal than a court and that, as a result, it was more user-friendly. There were also concerns that the Land Court consists principally of lay members with no legal qualification and that this is unsatisfactory.

The third question asked whether, in the case of a merger, the resultant body should take on more functions. A slight majority of those answering considered that it should. Many thought that the extra functions suggested in the consultation were appropriate. The main suggestion beyond that was that an expanded Land Court

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[1] The consultation can be viewed at: https://www.gov.scot/publications/consultation-future-land-court-lands-tribunal/

could take on functions relating to environmental law. There was also a proposal that applications by an executor under 16(3) of the Succession (Scotland) Act 1964 should come into the scope of the Land Court.

There was opposition to the transfer of wind-farm applications or applications for development on green belt land to the Land Court. Also, there was a view that the extra functions suggested in the consultation should remain in the sheriff court, the Sheriff Appeal Court, and the Court of Session.

The fourth question had two elements; arrangements when members of the Land Court had recuse themselves and arrangements when members of the Lands Tribunal had to take the same action. 86.1% and 88.6% respectively of those answering were in favour of an arrangement where a member of the other body would be drafted in to cover the recusal. The main argument was that the proposal was sensible, flexible or pragmatic.

The fifth question concerned the necessity for a Gaelic-speaking member of the Land Court. This question attracted the most attention and 52.2% of those who responded to it thought it was necessary. The main reasons given concerned Gaelic's importance in the world of crofting where there is a close relationship between the language and the land. Many crofters think in Gaelic and some consider it essential that a person hearing a case not only understand the language, but also understood the law concerning crofting. It was also argued that a change in statute would be contrary to the Scottish Government Gaelic Language Plan 2016-2021.

Most of the respondents who thought it unnecessary to have a Gaelic-speaking member considered it to be a desirable requirement but not really practical. They saw that it made recruitment of legal members difficult as it substantially reduced the number of suitable candidates. It was also argued that court hearings are in public and the parties, staff and the public must all be able to follow the proceedings. If Gaelic were to be required, interpreters were available.

Question 6 sought views on whether the power that the Lands Tribunal has 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. 75% of those who answered the question were in favour of some amendment. A number of the respondents considered that the principle of expenses following success raised access to justice issues. Others considered that the issue was perhaps a little more complicated and that a balance needs to be struck between maintaining access to justice and discouraging claims which lack merit.

Those who opposed any emendation of the principle of “expenses following success” pointed out that it was a common and well understood practice in the court and changing it led to this risk of ill-founded or frivolous objections. A few respondents suggested an alternative would be an option for the Lands Tribunal not to award expenses except in ill-founded cases.

The seventh question asked whether the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice. 83.9% of those who answered considered that the threat of expenses was an access to justice issue. Some noted that those appealing against the Scottish Government could be completely out-matched by the representation the government can afford at public expense. However, others considered that if the power to award expenses is abolished, it risks frivolous appeals. Perhaps it would be better to introduce a cap on expenses, or introducing qualified one-way cost shifting, or protective expenses orders, or better sifting of cases to identify appeals with little or no reasonable prospect of success. Finally, there was a suggestion that challenges to routine administrative decisions by government bodies should be free of charge.

The last question asked for any other comments. Suggestions made included more use of alternative dispute resolution in matters of dispute that would normally be brought to the Land Court or Lands Tribunal.

Question 1

Please indicate your views on the proposal to amalgamate the Scottish Land Court and the Lands Tribunal for Scotland.

In favour	Not in favour	Other	Not answered
17	17	1	23
29.3%	29.3%	1.7%	39.7%

34 respondents answered this question. 17 were in favour of and 17 were opposed to a merger of the Land Court and the Lands Tribunal. Both the Law Society of Scotland and the Faculty of Advocates were opposed to a meger. The other response stated:

> "I would be in favour of abolishing the Scottish Land Court and the Lands Tribunal for Scotland and transferring their functions to the First-tier Tribunal for Scotland."

In favour

The main reasons given for supporting the merger were that it would mean a more efficient administration of the services that the Land Court and the Lands Tribunal currently offer. In particular those that responded in favour considered that the sharing of resources and staff would be advantageous. For example, one respondent stated:

> "I am persuaded by the reasons in favour set out in the consultation paper. I think these outweigh any of the disadvantages identified. I think the main advantage of unification is the ability to utilise personnel across jurisdictions."

The Scottish Tenant Farmers Association wrote:

> "Reform would enable the more efficient running of the two bodies including the sharing of resources and personnel. It would be useful if the efficiency savings could be quantified."

Stirling Council and the Scottish Crofting Association responded in the same vein.

The Centre for Scots Law at the University of Aberdeen, Alisdair MacPherson, and Andrew Francis considered that not only would there be an advantage in terms of efficiency, but a merger would clarify and offer more certainty to those who presently use the bodies. The former's response stated:

> "The change would lead to a more efficient use of resources (for various parties, including the state). It would also provide more clarity and certainty regarding jurisdictional matters for the public and even for legal practitioners. A 'one stop shop' for a large number of land law matters is preferable to the current arrangement…"

The Senators of the College of Justice added another dimension, that of "structural coherence":

> "We are in favour of the proposal. In our view the pros decisively outweigh the cons. Amalgamation would yield structural coherence. At present many persons are unaware of the scope of each one's jurisdiction. By bringing them together, the new body could develop a broader range of skills.

Three of the respondents considered that it would not only rationalise the current situation, but that the merged body would form the basis for an environmental court. The Scottish Land Commission, the Environmental Rights Centre for Scotland (ERCS), and Professor J Campbell Gemmell all took this view.

However, James McPherson, whilst supporting an amalgamation of the two bodies, added a note of caution.

> "However, whatever gloss is placed on an amalgamated body which becomes the Scottish Land Court it will continue in what is effectively 2 divisions with separate skill sets relative to 'surveyors' and 'agriculturalists'."

In support of this, he quoted the Scottish Civil Courts Review conducted under the chairmanship of Lord Gill in 2009 which states that "the Land Court has become a model of a specialist court".[2] Mr McPherson goes on to say:

> "It must continue as before, meeting in Edinburgh but also throughout the crofting counties. While parties before the Land Court can agree to a case being settled on written submissions, it must not in the interest of 'efficiency' adopt the procedures of that other specialist court, the Personal Injury Court where it sits in Edinburgh and motions are submitted by email and electronically."

Not in favour

Whereas most respondents had high respect for the Land Court and Lands Tribunal, Colin Gibson took a different stance:

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[2] Scottish Civil Courts Review, 2009, chapter 4, paragraph 220.

> "Presently both Land Court and Lands Tribunal appear to very politicised any proposal would merely exacerbate already incompetent administrative offices."

He suggests that a 'real-world review' is required of the service that both the Land Court and the Lands Tribunal delivers to the community at large.

The Faculty had a number of objections to a proposed merger. Firstly, it considered that the resolution of the disputes in the two bodies requires different approaches. Secondly, it is concerned about a unitary set of court rules and whether they would be appropriate across the board. Next, it questioned whether the informality at present enjoyed in the Lands Tribunal would be lost if it was to be subsumed into the Land Court. Finally, it considered that any amalgamation could have an adverse effect on the delays which currently experienced in the Land Court and Lands Tribunal. It went on to say:

> "We consider that many of the proposed advantages could be achieved by the sharing of administrative resources between the Land Court and the Lands Tribunal, which share the same premises, without any reform of the existing structures. … Any additional available resources would be better directed to alleviating such pressures and to improving access to the SLC and LTS by means of greater use of technology."

The Law Society was concerned that an amalgamation of the two bodies would result in the expertise each currently possesses would be compromised:

> "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."

Inksters Solicitors echoed this:

> "The SLC and the LTS are different institutions and have a different focus from each other. This, we believe, is demonstrated by the different ways in which they are constituted. The SLC requires agricultural experts to be appointed while the LTS requires surveyors."

It also agreed with the concerns expressed by the Faculty about the court rules and considered that the functions of the Land Court and the Lands Tribunal were so different that even in an amalgamated body, two sets of rules would be required.

The Central Association of Agricultural Valuers and the Scottish Agricultural Arbiters and Valuers Association (CAAV and SAAVA) completed a joint response in which they too, like the Faculty "would rather see effort spent on improving the service

offered by each: remedying present issues of pressure and delay found with both bodies".

Robert Robertson took the view that any amalgamation of the Land Court and Lands Tribunal needs to take place in the context of a wider look at the system for dealing with property law:

> "This would only make sense if it were part of a greater reorganisation of the courts and tribunals concerned with Property in Scotland."

The Agricultural Law Association noted that "[b]oth the Land Court and the Lands Tribunal were created under statute with particular purposes and functions at the time of their creation". It takes the view that their roles are quite distinct even though there has been expansion of their functions over time:

> "We consider that many of the potential benefits set out in the Consultation in support of the proposal are more theoretical than real and do not stand up to detailed scrutiny. In particular, we do not consider that there is any overlap in the valuation areas listed in the consultation."

Finally, Scottish Lands & Estates, whilst indicating that it was not in favour of an amalgamation, stated that it was "not entirely opposed to the amalgamation proposal, but we do have some serious concerns should it go ahead". Those concerns were about whether the amalgamated body would be adequately resourced, whether access to justice be at least as comparable as now, and whether expertise would be compromised. It would also be opposed to any increased costs for the parties using the amalgamated body.

Other views

Lord McGhie is a former Chair of the Land Court and President of the Lands Tribunal. It is perhaps worth noting his response:

> "I now have no view one way or another. When I was Chairman I thought that the similarities between Court and Tribunal were more apparent than real. But times change and as I am out of current practice, I express no view as to where the balance lies on this issue."

He also warned that any amalgamation should not compromise the specialist skills of each forum. He considered that it would be difficult to produce a single set of rules for an amalgamated body though "this might be ameliorated by having a fresh look at the idea of having just a few broad rules accompanied by more detailed Practice Notes".

The Scottish Environment Protection Agency (SEPA) also expressed no view on whether there should be an amalgamation, but cautioned that if such an

amalgamation were to take place “it is vital that the specific rules for appeals to the Land Court against the new enforcement measures are preserved” and also that “it is vital that the specific rules in relation to the cost of applying to appeal against enforcement measures decisions taken by SEPA are preserved”.

Finally, NFU Scotland indicated that it considered that “compelling” arguments can be made both for and against amalgamation. “Unification is preferable to some, as it represents the potential for shared resource and thus a cost saving. However, NFUS members have concerns about the potential to lose more specialist knowledge that may be applied to issues such as crofting.”

Question 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?

Court	Tribunal	Not answered
30	6	22
51.7%	10.3%	38%

It will be noted that the overwhelming majority (83.3%) of those who answered this question on whether an amalgamated body should be a court or a tribunal considered that it should be the former.

Those that favour that the amalgamated body should be a court

Many of those who gave reasons for their view that if there is to be an amalgamation of the Land Court and the Lands Tribunal, the resultant body should be a court as a court has higher status. For example, the ERCS stated that "as far as the general public is concerned, the concept of a court is more familiar and suggests greater status and authority than that of a tribunal, so ERCS would on balance prefer the merged body to be a court". Professor Colin Reid, who favoured a merger, stated the view well:

> "A lot depends on the regard in which the body is held, which is not determined by the label alone, but I suspect that it is more positive to elevate all aspects to a court rather than running the risk of being thought to diminish the work through what was a court becoming 'merely' a tribunal."

Others also considered that a court has greater status and powers and is more authoritative. Perhaps it is important to note the comment of the Senators of the Court of Justice:

> "We would prefer the new body to be a court. It should generally have the authority and powers of a court. Any perceived reduction in the status of the Land Court should be avoided, given that it enjoys the confidence of the Highland community."

The Faculty, which also opposed the amalgamation, considered that "it would be a retrograde step to lose the Land Court which would send the wrong signals to the communities it effectively serves". Robert Robertson and Kieran Buxton expressed a similar view.

Other respondents also suggested that it was important to consider the current Land Court users in making the decision, particularly those in the crofting and agricultural communities. For example, the Law Society wrote:

> "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."

Inksters Solicitors, Scottish Land & Estates, the Crofting Commission, the Scottish Crofting Federation, and the Scottish Tenant Farmers Association echoed this view.

Lord McGhie referred to the high regard in which the Land Court is held and considered that the work of the Lands Tribunal was often quite complex and appropriate for a court:

> "The Land Court has a well-recognised and well regarded status as a court. Much of the work of the LTS is close to the work of the Court of Session in difficulty and importance and it is entirely appropriate that such work be seen to be dealt with by a court."

Finally, three of the respondents considered that a court was more suitable for the extra functions that they would like to see the amalgamated body take on. Professor J Campbell Gemmell advocated that the resultant body take on the functions of an environmental court:

> "A court is simpler and clearer to the public and of suitable status for serious environmental cases to be addressed there. It is also more in keeping with proposals and suggestions made for Scottish environmental governance bodies in the context of what is needed for all related matters to be considered and to fulfil the needs of post-Brexit institutional arrangements."

The ERCS is also an advocate of the amalgamated body taking on the functions of an environmental court and considers that a court is more suitable for that purpose as such a court is also likely to be a more suitable forum than the Court of Session for judicial review of environmental decisions and the sheriff court for the prosecution of environmental offences.

The other respondent that would prefer a court as it considers a court more appropriate to the extra functions a merged body might receive was ScotWays.

> "With reference to our answer to question 3 below, as we are supportive of the potential transfer of Section 28 cases under the Land Reform (Scotland) Act 2003 moving from the sheriff court to an expanded Land Court, we consider that the merged body should be a court, not a tribunal."

Section 28 of the 2003 Act is concerned with judicial determination of existence and extent of access rights and rights of ways.

Those that favour that the amalgamated body should be a tribunal

Only four respondents out of the six who would prefer the merged body to be a tribunal gave reasons.

Two of the respondents took the view that a tribunal is less formal than a court and that as a result, it was a more user-friendly option. Stirling Council was one:

> "It is preferable to make proceedings as informal as possible: avoids formality of traditional court procedures."

The other was the barrister, Andrew Francis:

> "My experience is that for clients a tribunal (as opposed to a court) is a more user friendly concept and experience."

The third respondent was concerned about the composition of the Land Court:

> "Despite being a court, the Land Court consists principally of lay members with no legal qualification. Nor is their qualification as agricultural experts clear. As they act as both 'judge and jury' this is unsatisfactory both in terms of qualification and the pressure placed on the Chairman."

Finally, Colin Gibson considered that members of a tribunal might be held more accountable for their decisions than members of a court:

> "Tribunal, as therefore the remote possibility of holding to account members may be simpler than the questioning judiciary who are seldom in receipt of good press in Scotland."

Question 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?

Yes	No	Not answered
20	14	24
34.5%	24.1%	41.4%

A majority (58.8%) of those who answered this question considered that, if there was an amalgamation, the resultant body should take on more functions.

Those that consider that an expanded Land Court should take on extra functions

Paragraph 50 of the consultation read:

> "A further area for consideration of a transfer of jurisdiction from the sheriff court to the Land Court might be "right to roam" cases under section 28 of the Land Reform (Scotland) Act 2003. The present arrangements mean that individual sheriffs are unlikely to gain extensive expertise in the determination of such case and there is, consequently, a risk of lack of consistency of approach."

Six of the respondents agreed that cases under section 28 of the Land Reform (Scotland) Act 2003 would be suitable to be transferred to an expanded Land Court. James McPherson and ScotWays pointed out that the provisions of section 28 were not about a "right to roam" but about a "right to take responsible access".

Malcolm Combe stated that "the section 28 "declarator" scheme to determine excluded land and responsible conduct has struck me as something that was ripe for reform for a little while". Kieran Buxton concurred with this view.

ScotWays considered that under the present arrangements in the sheriff court, there is little consistency in judgments. This is because cases are fairly rare and it is not possible for sheriffs to build up expertise in this matter. It stated that:

> "ScotWays considers there would be benefit in transferring the jurisdiction in matters of access under the Land Reform (Scotland) Act 2003 from the sheriff

> court to a specialised body. Whilst statutory access rights under section 28 are specifically mentioned by the consultation paper, section 14 should also be under consideration as should the provisions relating to public rights of way. The purpose of such a transfer would be to ensure that there was appropriate jurisdictional expertise and consistency of decision making."

Scottish Land & Estates agreed that section 28 was suitable to move to the jurisdiction of an extended Land Court and also suggested section 14 should be considered:

> "We would also suggest that the government consider the inclusion of appeals under section 14 of the Act to be transferred to the new body. Notices served under section 14 of the Act require a landowner to remove any deterrent or obstruction to access, and appeals are made to the sheriff."

James McPherson considered that, under the provisions of section 28, a sheriff can make a declaration that the access rights have not been exercised responsibly but no more. He considered that if the Land Court took on the function of dealing with section 28 cases, it could open up the possibility of allowing a litigant "to make a single application to a court to include a declaration that the access rights have not been exercised responsibly and for damages, where relevant, to the Land Court - the one stop shop".

Paragraph 48 of the consultation suggested that an extended Land Court might take on responsibility for the March Dykes Act 1661, the March Dykes Act 1669, and the Runrig Lands Act 1695 and the Division of Commonties Act 1695. Six of the respondents agreed with this suggestion including the Faculty, the Law Society, the Scottish Crofting Association, and the Agricultural Law Association.

Paragraph 49 of the consultation suggested that the sheriff's role in the "right to buy" provisions of the following the Land Reform (Scotland) Act 2003: sections 60A(4), 61, 91, 97V, and the Land Reform (Scotland) Act 2016, section 69 might also transfer to an expanded Land Court. One of the respondents wrote of this and section 28 of the 2003 Act:

> "I also agree with the proposals at paragraphs 49 and 50 of the Consultation Paper. At present, the splitting up of appeals under these Acts to three separate courts/tribunals (the Land Court, the Lands Tribunal, the sheriff [court]) makes no practical sense to me. I believe this would be a useful reform."

The Law Society also agreed with the section 49 suggestions.

Six of those who responded to the consultation considered that it might be appropriate for an expanded Land Court to take on the functions relating to environmental law. Professor Colin Reid noted that the Land Court and the Lands Tribunal "have a range of stray jurisdictions in the broadly environmental field". He stopped short of suggesting an environmental court but noted that appellate and other functions in this area are fragmented and incoherent. He suggested that "there is a need for a thorough review and rationalisation of where regulatory appeals and other disputes are heard across the land and environmental field, as opposed to the current seemingly haphazard distribution across the Land Court, Lands Tribunal, DPEA, sheriff court, Court of Session, and Scottish Ministers".

Others were more definite about the need for an environmental court and would advocate that an expanded Land Court take on the functions of an environmental court. The ERCS recognised that the functions of an environmental court could be quite diverse and proposed a three step staged introduction. It suggested:

> "In order to manage the transition and allow for review and reflection at each stage, ERCS supports a phased approach to transferring appeal functions to the merged court:
>
> 1. starting as soon as possible with appeals currently heard in the sheriff court against decisions by (a) environmental regulators and (b) access authorities (under Part I of the Land Reform (Scotland) Act 2003),
> 2. as a second step, transferring appeals currently made to the Scottish Ministers against decisions by environmental regulators and
> 3. as a third step, transferring appeals currently made to the Scottish Ministers against land-use planning decisions too."

It then went on to state:

> "ERCS would in due course expect judicial review of environmental and planning decisions to be transferred from the Court of Session to the merged court, in order to improve access to justice in environmental matters and bring Scotland finally into compliance with international law."

Professor J Campbell Gemmell noted that the "overall landscape of appeals relating to land and the environment in Scotland is less simple, logical, coherent and consistent than it might be". The professor considered that reform for a post Brexit world was necessary. He endorsed the approach suggested by ERCS.

However, Scottish Land & Estates did not agree in terms of planning appeals:

> "We would not favour planning law matters being brought within the scope of either the Court, Tribunal or an amalgamated body. Such a transfer would be disruptive and go against the integrity of the planning system."

The Agricultural Law Association took a same view of planning appeals particularly in relation to wind-farm and green-belt developments.

The Law Society made a similar point about inconsistency and fragmentation in the appeal mechanisms for environmental matters in Scotland as Professor Campbell Gemmell, "for example, abatement notices served under the Environmental Protection Act 1990 are considered by the sheriff court but planning appeals by the Scottish Ministers".

The Law Society also noted that in terms of environmental matters, the Land Court currently has jurisdiction to deal with wildlife matters under Nature Conservation (Scotland) Act 2004, and appeals in relation to SEPA's enforcement measures are also dealt with by the Land Court, in terms of the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015. Based on this it went on to suggest:

> "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."

The Scottish Crofting Association and the Scottish Tenant Farmers Association responses were more general on environmental matters, the former saying that the merged body "should take on environmental judgements" and the latter saying that the Land Court will in the future "be faced with disputes over environmental and conservation policies and objectives".

The Law Society and Scottish Land & Estates both raised the possibility of 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 coming into the scope of the Land Court.

Finally, there were some rather less specific suggestions. One respondent suggested that if the Land Court were to be merged with the Lands Tribunal, there would be scope to tidy and include all proceedings which require a valuation input. Another suggestion, from the Scottish Crofting Association, was that the merged body might deal with all things effecting crofting and land.

Those that consider that an expanded Land Court should not take on extra functions

The Faculty was opposed to the merger of the Land Court and the Lands Tribunal and considered that if it should happen, the resultant body should not take on only

limited extra functions. Those limited extra functions were responsibility for the March Dykes Act 1661, the March Dykes Act 1669, the Runrig Lands Act 1695; and the Division of Commonties Act 1695. Its preference was that this should be done by the Land Court in its existing form. It could also see benefit in the transfer of right-to-buy cases to an expanded Land Court as it considered that "the present system of summary application in the sheriff court lacks clarity in terms of procedure, and the mechanism of appeal is uncertain".

Both the Agricultural Law Association and the Faculty would in particular resist the transfer of wind-farm applications or applications for development on green belt land to the Land Court, as suggested at paragraph 46 of the Consultation Paper.

The Sheriffs' Association was concerned about the extra functions suggested in paragraphs 46 to 51 of the consultation paper. It noted that many statutory appeals in licensing and regulatory matters are dealt with in the sheriff court by way of summary application procedure. The Association argued that summary application "is a well-established and important sheriff court procedure, used for a wide variety of statutory and common law applications, new and old". It concluded by stating that the "view of the Association is that the jurisdiction of the sheriff court in these matters is of value to parties to such proceedings and there is no sound basis to remove that jurisdiction".

Another respondent also considered that the judiciary is the principal structure for resolving legal disputes and that the extra functions suggested in the consultation should not be given to the Land Court. This particular respondent took an opposite view from most of the other respondents in regards to its reputation.

> "There is a clear, if not widely publicly expressed, consensus among agricultural specialists and lawyers that the Land Court is not fit for purpose. It follows that the role of the Land Court should only be expanded if a clear cost benefit can be demonstrated. Otherwise functions should be retained by the 'conventional' legal system."

Finally, Inksters Solicitors considered "that the taking on of additional functions by the amalgamated body may be seen by the crofting communities as diluting the SLC's current focus".

No preference

Some of the respondents indicated that they had no preference on the subject of an expanded Land Court taking on extra functions. However, they did express some views that are relevant.

SEPA considered that the Scottish Government should consider whether the Land Court whether merged with the Lands Tribunal or not should take on a specialist role in the determination of certain appeals arising from decisions of the proposed new environmental governance body, Environmental Standards Scotland, as set out in the UK Withdrawal from the European Union (Continuity) (Scotland) Bill.

Lord McGhie considered that there are many issues relating to use or management of land where either the Land Court or the Lands Tribunal would be better placed to exercise jurisdiction than the sheriff court.

The Senators of the Court of Justice considered that the question of an expanded Land Court taking on extra functions to be a political decision. They set out pros and cons:

> "On the one hand, it might be useful for the new court to adjudicate on other types of land dispute, such as (a) environmental questions connected with wind power; and (b) issues arising from the 'right to buy' and the 'right to roam'. On the other hand, amalgamation itself will be a tricky enterprise. It might be preferable to allow the new court to settle into its role before extending its jurisdiction."

Question 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.

Yes	No	Not answered
31	5	22
53.4%	8.6%	37.9%

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.

Yes	No	Not answered
31	4	23
53.4%	6.9%	39.7%

It will be noted that the overwhelming majority (86.1% and 88.6% respectively) agreed to proposals set out in the consultation. The reason why one person who objected in the case of 4a and did not answer 4b is that that respondent stated that the question was not applicable, "as I consider the SLC and LTS should be merged".

Those that agreed with the proposal

Twenty respondents gave reasons for their agreement with the proposals. Of that twenty, ten simply answered that the proposal was sensible, flexible or pragmatic. For example, one respondent stated:

> "This is a good idea in my opinion as it represents a ready-made solution to the problem. There would be no need for ad hoc arrangements involving sheriffs principal and the experience of the Deputy Chair would be a suitable person to act in this capacity."

In its response, the Sheriffs' Association clarified that the qualifications required to be appointed as Deputy Chair also qualify the holder of that office to hear a case in the Lands Tribunal.

Some of the other respondents caveated their response. The ERCS saw that it is important "that the merged court is, and can be clearly seen to be, fully impartial and independent". It considered that it raised questions about the current judicial appointments system in respect of the two bodies and suggested that there should be a wider pool of candidates to increase diversity and reduce conflicts of interest. It concluded that "ERCS's view, should be satisfied by appointing specialist assessors to assist the merged court, as currently happens in the SLC".

Lord McGhie thought the proposals sensible, but that there must be flexibility "to make *ad hoc* appointments from elsewhere if appropriate" where there may be a "need for specialist legal knowledge outwith the expertise of a particular legal member". He went on to raise the problem of fixing diet dates which are suitable for all parties, lawyers, and expert witnesses. He concluded with a suggestion that retired members might also be used:

> "Flexibility of membership - including use of recently retired members - would help avoid adding to that problem by lack of availability of a suitable court."

Inksters also offered an alternative option. They did not oppose the proposal in the consultation but questioned whether the Deputy Chair of the Land Court would have the expertise necessary for a Lands Tribunal case or whether the legally qualified member of the Lands Tribunal may have the expertise for an Land Court case. The alternative solution proposed would be a cadre of a small number of suitably qualified solicitors and/or advocates who remain in, or who have retired from, private practice which could be appointed as *ad hoc* members of the Land Court. They could then be called upon by the Chair to deal in recusal situations and if there was an issue with volume of work.

Although not either accepting or rejecting the consultation proposal, one respondent stated that, "we see this as pragmatic matter to be resolved by the relevant President, with the approach here being one option, perhaps the first option, subject to the circumstances and issues of the case in hand. It should perhaps not be the only option". However, the respondent did not offer any other suggestions.

James McPherson agreed with consultation whilst questioning whether it was really a problem given the rarity of the need for recusals.

Those that disagreed with the proposal

Only two of those who opposed the proposal commented. One questioned the impartiality of the Deputy Chair and the Legal Member when acting in the other forum. The other, Colin Grant, simply stated:

“I have no strong inclination on this but would again follow the principle of keeping functions discrete.”

Question 5

Do you consider it necessary to continue to have a Gaelic speaker as one of the members of the Land Court?

Yes	No	Not answered
24	22	12
41.4%	37.9%	20.7%

Section 1(5) of the Scottish Land Court Act 1993 is contains a statutory requirement for the Land Court to have a Gaelic-speaking member. In drafting question 5, the Scottish Government sought views on whether this was still a necessary requirement. It should be noted that the Government was not suggesting that anyone should lose the right to conduct their case in Gaelic in the Land Court, though it is possible that some respondents misunderstood that point. This issue was particularly concerning for many of the respondents who are crofters or have associations with crofting. Twelve of the respondents' only interest in the consultation was this question. Some only answered in Gaelic.

A slight majority (52.2%) of those who answered this question considered it essential to have a Gaelic-speaking member of the Land Court.

Those who consider it necessary to continue to have a Gaelic speaker as one of the members of the Land Court

Many of those who thought it essential that one of the members of the Land Court must be a Gaelic speaker were from the crofting community. There were a number of arguments put forward. Firstly, it was noted that for many crofters, Gaelic was the first language. For example, Elma NicÌomhair wrote:

> Tha Gàidhlig riatanach anns an t-saoghal chroitearachd. 'S e a' chiad chanan de iomadach chroiteraran agus dh'fheumadh an aithnicheadh seo a bhith aidicheadh. Gun an suidheachadh seo thathar na còraichean chatharra agus daonna againn crèimeadh.[3]

The importance of this point was expanded by James McPherson:

[3] Gaelic is essential in the world of crofting. It is the first language of many crofters and this identity has to be acknowledged. Without this situation our civil and human rights are eroded.

> Having and having had a strong connection with native Gaelic speakers I have the impression that their reasoning is in Gaelic and then translate when speaking English. There is no direct translation for many Gaelic phrases and this can give the wrong emphasis to what is being said if the listener has no knowledge of the Gaelic language.

In other words, sometimes an argument can only be properly made in Gaelic and it requires a Gaelic speaker to fully understand the point.

This argument was taken even further by the Crofting Commission and Sine Ghilleasbuig who argued that simply using a translator was an unsatisfactory solution. Their point was that it was important that a person hearing a case not only understood Gaelic, but also understood the law concerning crofting.

A second argument was that a change in statute would be contrary to the Scottish Government Gaelic Language Plan 2016-2021. This was a point made by the Bòrd na Gàidhlig and others. The Bòrd na Gàidhlig considered that when the requirement for a Gaelic-speaking member of the Land Court was first made in statute in 1912, "Gaelic-speakers had almost no protection in law. The inclusion of this requirement created an opportunity for Gaelic-speakers to use their language of preference in at least one institutional setting of importance to them. The requirement also was an important recognition of the worth of the language and of its Speakers". The argument is that it is important that this respect for the language is not lost. Professor Colin Reid agreed with the point:

> "Although sympathetic to the difficulties caused, this is one of the very few areas where there is legal recognition of Gaelic speakers in Scotland and removing this requirement might well be seen as a diminution of respect for the language at a time when official policy is to support it."

Finally, there was support for this point from Alasdair Allan MSP:

> "I am afraid that the idea that we don't need to promote Gaelic in this context because there are now fewer Gaelic speakers misses the point of the Government's Gaelic language commitments, which is to increase the number of settings in which Gaelic can be and is used."

A third argument was that there is a close relationship between the Gaelic language, the land, and crofting. For example, one respondent wrote that "[t]his role honours the connection between land and language" and another that "[c]rofting and Gaelic have a symbiotic relationship in areas where both are strongest". Sine Ghilleasbuig agreed with these points:

> "Whilst not every crofter in Scotland is a Gaelic speaker, crofting and the Gaelic language are inextricably linked in our nation."

A number of others made similar points which combined this and the previous argument suggesting that at a time when the Scottish Government is trying to revitalise both crofting and Gaelic, it would seem counter-intuitive to remove or weaken this requirement to have a Gaelic-speaking member in the Land Court.

Three respondents noted that there are many young Gaelic-speaking lawyers are currently coming through the universities and the requirement for a Gaelic-speaker in court is important for encouraging more young Gaelic speaking lawyers.

Others recognised the difficulty that will arise when the present Chair of the Land Court retires in the near future as he is the Gaelic-speaking member. For example, the Crofting Commission wrote:

> "Whilst a Gaelic speaking member could be seen to limit the number of potential applicants, it is considered that an amalgamated and expanded Court would be able to accommodate one Gaelic speaker. The Gaelic speaking member need not be the chair or one of the legally qualified members."

Professor Colin Reid wondered if the "practical difficulty might be reduced if the bodies were merged and the requirement was for there to a Gaelic speaker among the wider membership of the merged body, opening up a broader range of possible candidates".

Many of these arguments are picked up in a statement made by a respondent who wished to remain anonymous:

> "The arguments given in favour of this requirement are narrowly utilitarian (roughly 'Gaelic speakers, by and large, can get by in English'). This overlooks the wider social and political context of maintaining a Gaelic presence on the Land Court. Given the deep historical connections between Gaelic and land rights and the fact that these issues continue to be central to debates around the future of Gaelic-speaking communities, for the Land Court to abandon this requirement would be a highly political action signalling the abandonment of these communities."

Those who consider it not necessary to continue to have a Gaelic speaker as one of the members of the Land Court

Most of the respondents who thought it unnecessary to have a Gaelic-speaking member considered it to be a desirable requirement but not really practical. The responses from the judicial and legal professions mainly expressed this view. This includes the Senators of the College of Justice, the Sheriffs' Association, the Faculty and Inksters Solicitors. For example, the Faculty wrote:

> "Whilst we consider it advantageous (even beneficial) for there to be a member of the Land Court who is a Gaelic speaker, we agree that it should not be a compulsory requirement. We agree that such a requirement would, in future, exclude from appointment individuals who are otherwise highly qualified and eminently suitable. Such a disadvantage would not, in our view, be outweighed by the advantage of there being a Gaelic speaking member. Should a party to proceedings before the Land Court express a preference that proceedings take place in Gaelic, an interpreter might be employed.

This was also the view of the Senators of the Court of Justice:

> "No. In our view, it is desirable but not necessary. 'Desirable' because a significant number of cases relate to crofts in the Highlands & Islands. 'Not necessary' because an interpreter could be instructed to attend if appropriate. Making it a requirement to have one Gaelic speaker restricts the pool of applicants."

The point about the restriction of the pool of applicants which results from the requirement for a Gaelic-speaker was re-iterated by many of the respondents.

One or two respondents went further with their arguments. Lord McGhie, the previous Chair of the Land Court. He argued that there is no practical benefit in having a requirement for a Gaelic-speaker:

> "I think it clear that, in modern practice, any attempt by a member of a court to use Gaelic in course of a case would only be possible if there was an independent Gaelic interpreter there as well. Court hearings are to be held in public and the parties, staff and the public must all be able to follow the proceedings. A judge could never use the skill to engage in what would be a private conversation with a witness or party. This would apply even if the witnesses only wanted to resort to Gaelic to make a short point where they felt more comfortable expressing it in that language. It might be thought that the Court could simply interpret for the benefit of everyone else. But if the Court had to try to convey the flavour in English there would be no good reason why the witnesses could not do so themselves. In any event it would, I think, be necessary to have a translator even in that situation to avoid any risk of the judge appearing to have a private conversation with the witness."

It will be noted that this view disagrees with the view that James McPherson expressed (see above) about sometimes it is not possible to translate some of the nuances of Gaelic in English. It does however raise the problem that there may be a disadvantage to one or other of the parties concerned in a case if they have different first languages.

No view expressed

Whilst not expressing a view on the question, the Scottish Courts and Tribunals Service (SCTS) pointed out that it has formal arrangements for language services which are used routinely in the High Court, sheriff courts and justice of the peace courts.

The Law Society also did not express a view but stated:

> "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."

Question 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?

Yes	No	Not answered
24	8	26
41.3%	13.8%	44.8%

A considerable majority (75%) of those who answered this question considered that expenses should not be as tied to success as they are at the moment.

Those who consider that 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

A number of the respondents including, the Scottish Land Commission, the Scottish Land & Estates, and the Scottish Tenant Farmers Association and another respondent considered that the principle of expenses following success raised access to justice issues.

The Scottish Tenant Farmers Association were very direct:

> "Winner takes all has always been a dangerous principle and frequently acts as a disincentive to individuals seeking justice where the opposing party has deeper pockets."

The Scottish Land Commission gave an example of the problem:

> "I am aware of cases, particularly in respect of rent negotiations, where the threat of the Land Court and the costs involved, is used by one party, normally the landlord, to persuade the other party to agree to a rent that they would otherwise consider to be unduly high. When faced with agreeing to a rent rise that seems unduly high or facing the costs of challenging the rent, many tenants will chose the former."

However, they and several others including Lord McGhie, did note that the issue was perhaps a little more complicated. For example, one respondent wrote that "[c]osts should not be allowed to be a barrier to justice and public bodies will be open to criticism if this is perceived to be the case". He then went on to caveat this though by stating that "neither is it reasonable for the taxpayer to fund costs which arise from an unsuccessful party pursuing a spurious case which had no merit. There is a

balance. The Tribunal is well placed to exercise discretion to achieve that balance". He also stated that costs become more of an issue when they become disproportionate to the value in dispute and suggested a lower cost simplified procedure to resolve this sort of dispute.

Malcolm Combe also tried to present a balanced view:

> "On an access to justice basis, I can see the argument for this not to be 'as tied', but I am not strongly of the view that section 103 is horribly skewed against an unsuccessful applicant. There is a place for the principle that 'expenses follow success', although problems can arise from its blanket application or prioritisation over other considerations. Perhaps the ', in particular,' wording in the section could be deleted to mitigate the position slightly.

Kieran Buxton agreed with this position.

Although he indicated that he was in favour of the Lands Tribunal power to award expenses under section 103 of the Title Condition (Scotland) Act 2003 being amended, Lord McGhie stated that he did not have a clear view stating:

> "It should be noted that reference to 'expenses following success' is shorthand for the more complex requirement to find against the party whose conduct 'really caused the expense'. … This plainly can discourage people, both applicants and objectors. … It is particularly hard for a party litigant who thinks that title conditions issues can easily be explained without lawyers - as is very often the case – to find themselves liable in the expenses of solicitors and expert witnesses. A 'no expenses' rule would let people decide for themselves what level of firepower to engage."

The CAAV and SAAVA, Stirling Council, the Senators of the College of Justice indicated that they were in favour of amending the Lands Tribunal's power without offering any argument in support of the view.

The Sheriffs' Association raised possibilities that might apply if the Land Court and Lands Tribunal were to merge and be brought within the Scottish Tribunals Structure. It considered that if that happened, there may be merit in bringing the rules about expenses broadly into line with the current rules that apply within the tribunal world. It noted that the power to award expenses in the First-tier Tribunal (FtT) is somewhat restricted and in the Housing and Property Chamber the FtT may award expenses as taxed by the Auditor of the Court of Session against a party but only where that party through unreasonable behaviour in the conduct of a case has put the other party to unnecessary or unreasonable expense. It continued:

> "Further where expenses are awarded the amount of the expenses awarded must be the amount of expenses required to cover any unnecessary or unreasonable expense incurred by the party in whose favour the order for expenses is made. Any such change is likely to increase the amount of business coming to the new merged Scottish Land Court and the Lands Tribunal for Scotland tribunal because the threat of an adverse award of expenses is much reduced."

On the other hand, the Scottish Crofting Association took the view that if there was a merger, the resultant body would be a court. It argued that "costs awarded should be proportional to the case and that protected expenses orders are made available. Appellants will incur expenses getting the case to court which can deter frivolous applications".

Professor Colin Reid and the ERCS tried to widen the argument of costs to environmental matters and the UK's international obligations under the Aarhus Convention.

Those who do not consider that 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

The Law Society was firmly against any emendation of the principle of "expenses following success". It noted that it is a generally recognised norm across a range of legal situations. It considered that any change has "the potential to open the floodgates for objections which may be ill-founded". It further argued that 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)". It did, however, suggest an alternative:

> "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."

Two respondents whilst indicating that they did not favour any change, noted that there was always the option for the no expenses to be awarded by the Lands Tribunal and perhaps this is the way forward.

Other

Some respondents did not indicate whether they favoured an emendation to section 103 Title Condition (Scotland) Act 2003 but made comments that are worthy of note.

The Faculty stated that it supported the general principle that expenses should follow success and that it would be "unfair for parties in the sheriff court to be liable for expenses in an action for interdict to prevent breach of a title condition, but for the same parties not to be liable for expenses in a dispute over removal or variation of a title condition". It was, however, divided in its view as to whether the general principle ought to be "subject to modification, for example by expenses-capping, such as happens in environmental law cases".

The Crofting Commission stated that it had no view, but did note that the possibility of an adverse award of expenses in crofting disputes can be a deterrent to litigation and also prevents frivolous appeals.

Working Group for the Centre for Scots Law, indicated that it broadly supported a default approach that expenses follow success but that it could be modified or limited in certain ways. The suggested modifications included an expenses cap, similar to the simple procedure or the introduction of "an appropriate and limited fees scale".

The Scottish Assessors Association noted that in respect of the Lands Tribunal's power to award expenses, the current normal practice with regard to non-domestic rating appeals is that each party bears its own costs. The Association understood that the Tribunal does have powers to award costs, but normally does not so do "unless the behaviour of one of the parties in their conduct of the appeal is considered to be unreasonable". The Association consider that this procedure struck the right balance between preserving access to justice whilst protecting parties from inappropriate behaviour that results in unnecessary costs.

Question 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?

Yes	No	Not answered
26	5	27
44.8%	8.6%	46.6%

An overwhelming majority (83.9%) considered that the present land Court power to award expenses against unsuccessful applicants acts as a barrier to justice.

Those who consider that the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice

Nine of the respondents including Scottish Land & Estates, the Law Society, the Scottish Tenant Farmers Association, the Agricultural Law Association, and the Scottish Crofting Association, specifically stated that the present power of the Land Court to award expenses against unsuccessful appellants was a barrier to justice.

The Scottish Crofting Association put things succinctly:

> "Someone appealing against the Scottish Government is completely out-matched in regards to the representation the SG can afford – at public expense. It therefore deters appellants from coming forward to appeal against a SG decision due to the fear of incurring the SG expenses, which could be ruinous."

The Scottish Tenant Farmers Association were very much of the same point of view noting that "the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice. These hearings should be either conducted on the basis of each side paying its own expenses or capped at a reasonable level which should deter vexatious appeals but should not act as a deterrent for genuine appellants".

The Law Society stated, and Scottish Land & Estates concurred:

> "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."

The Society went on to say that it did not consider it appropriate for the power to award expenses to be abolished as this risked frivolous appeals. Instead, it suggested a cap on expenses would be appropriate which could be "taken forward by way of a protective expenses order model". It also suggested an alternative possibility where each party would bear its own expenses.

The Scottish Land Commission was also aware of the need to discourage frivolous cases, but nevertheless was "quite convinced that the fear of having costs awarded is a barrier to justice".

The idea of a cap on expenses as suggested in the previous paragraphs was also proposed by others. One respondent stated:

> "My suggestion is that expenses are awarded only where the appellant has acted unreasonably in the conduct of the appeal. The Court should also be able to place a cap on the amount payable on a discretionary case by case basis subject to a prescribed maximum."

The Scottish Crofting Association agreed saying that a statutory cap on awards of expenses would allow appellants to know in advance their maximum exposure to expenses.

James McPherson noted that protective expenses orders already exist in environmental cases. He thought that it should be possible to apply to the court for a similar sort of order.

Three of the respondents suggested that there should be a better sifting of cases to avoid expensive appeals. J Campbell Gemmell was one of these:

> "As above, it would be worthwhile analysing these cases to see what better triage, preparation and early attempts to reach agreement or mediated resolution so as to avoid expensive appeals where an appellant in particular could face serious costs implications."

Stirling Council suggested that "a sifting process could be introduced to identify the appeals with little or no reasonable prospect of success and a party who pursue an appeal identified as having little or no reasonable prospects of success and fails should be potentially liable for the other party's expenses".

Lord McGhie went a step further stating that there is "much to be said for the view that challenges to routine administrative decisions by Government bodies should be free of charge. It is my understanding that such a policy applies in relation to most decisions which are open to challenge before tribunals. There is no strong reason why it should not apply to Land Court hearings".

Again Professor Colin Reid wished to link the idea of costly appeals to the UK's international obligations under the Aarhus Convention to provide access to justice that is "not prohibitively expensive". He went on to say that "[a]lthough changes have been made to meet this obligation in core areas of judicial and statutory review, there may well be more peripheral forms of proceedings where the rules have not yet caught up".

Those who do not consider that the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice

There were only three comments from those who opposed the idea that the present power of the Land Court to award expenses against unsuccessful appellants in rural payment appeals operates as a barrier to justice. Robert Robertson thought that it was probable that the power was not a barrier but, "it partly depends how strong the 'Justice Complex' is as a motivator".

Another thought that the power "is a function that is well understood by all parties and should stand". That person did suggest that there might be a ceiling could be considered on a case by case basis.

Finally Colin Grant was willing to trust the Land Court saying:

> "Really boils down to whether trust in the Land Court is justified, which, on balance, I think it should be."

Other responses

The Faculty and Inksters Solicitors did not indicate whether they considered that the power to award expenses was a barrier to justice. They both suggested expenses-capping as a possible solution to the issue. Inksters also suggested that qualified one way costs shifting or QOCS[4] may be an alternative remedy.

[4] QOCS is a provision introduced by the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 whereby equality of arms is ensured in personal injury actions by protecting a

Question 8 – other comments

There were quite a few other comments, some re-iterating points made in earlier answers to the consultation questions and some making new points.

Jennifer Henderson, the Keeper of the Registers of Scotland, did not consider it her place to comment on the questions raised in the consultation. However, she did wish to state that she noted that the main proposal was an amalgamation of the Land Court and Lands Tribunal by means of the incorporation of the latter into the former. She continued:

> "As things stand at this time I am, as Keeper, involved in appeals under s103 of the Land Registration etc. (Scotland) Act 2012, which fall under the auspices of the [Lands Tribunal] and reflects the effect of any [Lands Tribunal] determination in the Land Register. In respect of the [Land Court], I, as Keeper, will make any amendments, as the result of a successful appeal to the [Land Court], to the extent of a croft on the Crofting Register as instructed by the Court.

One of the respondents asked if there was an error in paragraph 35 of the consultation paper. Their understanding was that "appeals lie from the Lands Tribunal on a point of law to the Court of Session under section 11(7) of the Tribunals and Inquiries Act 1992". They considered that paragraph 35 gave the impression that all appeals from the Lands Tribunal lie to the Lands Valuation Appeal Court, "which, however, is only correct in the case where the Tribunal hears rating valuation appeals as per the Lands Tribunal Act 1949, section 1(3C)".

The Scottish Land Commission suggested that "it would be good to see the court/tribunal encouraging, or indeed requiring, applicants to have tried some form of alternative dispute resolution (ADR) before their case can be submitted to the court". It reasoned that ADR is becoming more common and "is proving to be a successful way of resolving issues at lower cost than litigation and in a way that is more likely to have a positive result in terms of maintaining a good relationship between the parties, something that is highly desirable in terms of the landlord/tenant situation". The Scottish Tenant Farmers Association was also in favour of ADR.

J Campbell Gemmell, the ERCS, the Law Society, and J Campbell Gemmell raised the issues of the Aarhus Convention and an environmental court for Scotland that

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pursuer who takes such court action from the defender's expenses in the event of their case being unsuccessful.

had already alluded to in answers to some of the questions asked in the consultation.

Inksters made an observation about fees and sees that an amalgamation of the Land Court and Lands Tribunal as an opportunity to address what it considers to be an omission in that it appears as though it is not currently possible for solicitor firms with Scottish Courts and Tribunals Service credit accounts to be able to use these for the purposes of Land Court fees.

James McPherson and the Scottish Crofting Federation raised an issue about the archive held by the Land Court. Both felt it imperative that all archived material of the Land Court remain accessible.

ScotWays was concerned that transferring Land Reform cases from the sheriff court to an expanded Land Court could prove more expensive.

The Crofting Commission and another respondent made suggestions as to the qualifications that should be required of the Chair of any expanded Court. It also considered that the role of Principal Clerk should be retained.
.
The Scottish Assessors Association noted at that at paragraph 63 of the consultation that, if the Tribunal were incorporated into the Scottish Lands Court, it would become subject to the Court's internal appeal system. At present non-domestic rating appeals against decisions of the Lands Tribunal are made directly to the Lands Valuation Appeal Court. The Association would like the present procedure to continue rather than being replaced by the Land Court's internal appeal system. The Association also warned that it considered that fee review mentioned in paragraph 65 of the consultation that would occur if the Lands Tribunal were incorporated into the Land Court must not result in any increase in the level of fees charged for the referral of appeals to the resultant body as any significant change could be detrimental to the public purse.

Finally, one respondent raised concerns about the time taken to obtain a hearing at present saying that "justice delayed is justice denied". This respondent presumed that the extended timescales are owing to capacity and they hoped that amalgamation would be helpful in dealing with the issue.

Appendix 1 – Respondents

There were 58 respondents to the consultation.

	Number	Percentage
Individuals	35	60.3%
Organisations	23	39.7%
Total	58	100%

Of these, 35 were individual responses of whom at least 5 had a judicial/legal background. The other 24 responses were from organisations. These break down as follows:

4	academic groups with interests in land use or environmental matters
2	judicial representative groups
3	legal representative groups
2	public bodies set up by the Scottish Government
3	non-departmental public bodies (NDPB)
1	legal firm
2	farmers' representative body
3	land valuation organisations
1	council
1	government body
1	land use management representative body
1	outdoor pursuit body
1	environmental non-governmental organisation (NGO)

Individual respondents who gave permission for publication with name

Alasdair Allan MSP

Kieran Buxton

Malcolm Combe

Andrew James Francis

Professor J. Campbell Gemmell

Sine Ghilleasbuig

Colin Gibson

Colin Grant

Donald MacDonald

Wilson McLeod

The Honourable Lord McGhie

James McPherson

Elma NicÌomhair

Professor Colin Reid

Robert Robertson

Responses from organisations

Agricultural Law Association/Scottish Agricultural Arbiters and Valuers Association

Bòrd na Gàidhlig

Central Association of Agricultural Valuers

Centre for Scots Law

Crofting Commission

Environmental Rights Centre for Scotland

Faculty of Advocates

Inksters Solicitors

Law Society of Scotland

NFU Scotland

Ramblers Scotland

Registers of Scotland

Scottish Assessors' Association

Scottish Courts and Tribunals Service

Scottish Crofting Federation

Scottish Environment Protection Agency

Scottish Land & Estates

Scottish Land Commission

Scottish Rights of Way & Access Society (ScotWays)

Scottish Tenant Farmers Association

Senators of the College of Justice

Sheriffs' Association

Stirling Council

Appendix 2 – Summary table

Question	Assessment	Main comments
Q1: Please indicate your views on the proposal to amalgamate the Scottish Land Court and the Lands Tribunal for Scotland.	There was no majority of those who responded to the question either for or against	**Points in favour** • More efficient administration of the services • Sharing of resources and staff would be advantageous • Merger would bring a wider range of skills as members from the Court and Tribunal would be available in a unified body • Role of a single body would offer more clarity and certainty regarding jurisdictional matters • A 'one stop shop' for a large number of land law matters is preferable to the current arrangements • Merged body could form the basis for an environmental court. **Points against** • Land Court and the Lands Tribunal are quite distinct • Resolution of the disputes in the two bodies requires different approaches • A unitary set of court rules would not be appropriate • Expertise each possesses may be compromised • Lands Tribunal would lose its valued informality
Q2: 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?	83.3% of those who responded to the question favoured a court	**Points in favour** • A court has higher status and is more authoritative • A court may be a more suitable for taking on extra functions **Points against** • A tribunal is less formal than a court and thus more user-friendly • The Land Court consists principally of lay members with no legal qualification and that this is unsatisfactory

Question	Assessment	Main comments
Q3: 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?	58.8% of those who responded to the question favoured a merged body taking on more functions	**Points in favour** • The extra functions suggested in the consultation were appropriate • An expanded Land Court could take on functions relating to environmental law • Merged body could be responsible for applications by an executor under 16(3) of the Succession (Scotland) Act 1964 **Points against** • A tribunal is less formal than a court and thus more user-friendly • There should be no transfer of wind-farm applications or applications for development on green belt land to the Land Court • It is more appropriate that the extra functions suggested in the consultation should remain in the sheriff court, the Sheriff Appeal Court, and the Court of Session
Q4: 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.	86.1% and 88.6% respectively of those who responded to these questions were in favour of the proposals	**Points in favour** • The proposals are sensible, flexible or pragmatic • The qualifications of the Land Court Deputy Chair also qualify the holder to hear a case in the Lands Tribunal **Points against** • Would the Deputy Chair of the Land Court have the expertise necessary for a Lands Tribunal case or would the legally qualified member of the Lands Tribunal have the expertise for an Land Court case? **Other suggestions** • Appoint a cadre of a small number of suitably qualified solicitors and/or advocates which could be appointed as *ad hoc* members of the Land Court to deal in recusal situations and if there was an issue with volume of work • Use retired members

Question	Assessment	Main comments
Q5: Do you consider it necessary to continue to have a Gaelic speaker as one of the members of the Land Court?	52.2% of those who responded to it thought it was necessary for the Land Court to have a Gaelic-speaking member	**Points in favour** • Gaelic's importance in the world of crofting • The close relationship between crofting, the language and the land • Crofters often think in Gaelic including in court • Essential that a person hearing a case not only understands the language, but also understood the law concerning crofting • A change would be contrary to the Scottish Government Gaelic Language Plan 2016-2021 • Using translators is unsatisfactory **Points against** • Desirable but not really practical • Recruitment of Gaelic-speaking legal member difficult as few suitable candidates • Court hearings are in public and the parties, staff and the public must all be able to follow the proceedings • Almost all Gaelic speakers can speak English **Alternative** Use translating service offered by Scottish Courts and Tribunals Service
Q6: 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?	75% of those who answered the question were in favour of amendment	**Points in favour** • The principle of expenses following success raises access to justice issues • A balance needs to be struck between maintaining access to justice and discouraging claims which lack merit **Points against** • It is a common and well understood practice in the court • Emendation risks of ill-founded or frivolous objections **Other possibilities** • The Lands Tribunal should have an option not to award expenses except in ill-founded cases

Question	Assessment	Main comments
		• If the merged body is a tribunal, use Scottish tribunal rules • Each party to bear its own costs
Q7: 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?	83.9% of those who answered considered that the possibility of expenses was an access to justice issue	**Points in favour** • Those appealing against the Scottish Government could be completely out-matched by the representation the government can afford at public expense **Points against** • It is a common and well understood practice in the court • Emendation risks of ill-founded or frivolous objections **Other possibilities** • Introduction of a cap on expenses • Introduce a protective expenses arrangement • Introduce qualified one-way cost shifting • Better sifting of cases to identify appeals with little or no reasonable prospect of success • Challenges to routine administrative decisions by government bodies should be free of charge
Q8: Other comments		• More use of alternative dispute resolution in matters of dispute that would normally be brought to the Land Court or Lands Tribunal. • The need to tackle environmental issues and comply with the Aarhus Convention • All archived material of the Land Court must remain accessible • Suggestions as to the qualifications that should be required of the Chair of any expanded Court • The present procedure for non-domestic rating appeals should remain rather than being replaced by the Land Court's internal appeal system • Concerns over delays in the Land Court and Lands Tribunal

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