

# **The Scottish Land Court and the Lands Tribunal for Scotland**

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

**July 2020**



**Scottish Government**  
Riaghaltas na h-Alba  
gov.scot

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## About the consultation

The objective of this paper is to offer an opportunity for views to be gathered on the future of the Scottish Land Court and the Lands Tribunal for Scotland. The main proposal relates to a possible amalgamation of the two bodies. This would be achieved by the incorporation of the Lands Tribunal for Scotland into an expanded Scottish Land Court.

The consultation also seeks views on four administrative issues. The first relates to issues about recusals by legal members from cases in both the Court and the Tribunal, the second to the necessity for a Gaelic speaker in the Court, the third is about the Lands Tribunal's power to award expenses in title conditions cases, and the fourth has to do with the Land Court's power to award expenses in certain appeals.

## Responding to this consultation

Please respond to this consultation using the online platform 'Citizen Space' which can be found at: <https://consult.scotland.gov.uk/>. Access and respond to this consultation online at <https://consult.gov.scot/justice/land-court-and-the-lands-tribunal>. You can save and return to your responses whilst the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 19 October 2020.

If you are unable to respond using 'Citizen Space', please send your views and comments either by email to **[courtsreform@gov.scot](mailto:courtsreform@gov.scot)** or by posting a paper copy to:

Michael Green  
Civil Law and Legal System  
Scottish Government  
GW-15 St Andrew's House  
Regent Road  
Edinburgh  
EH1 3DG

However you respond, please complete the Respondent Information Form (see 'Handling your response' below). Responses should reach us by 23:59 on **Monday, 19 October 2020**. Earlier responses would be welcome.

## Handling your response

If you respond using 'Citizen Space', you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via 'Citizen Space', please complete and return the **Respondent Information Form** attached to the end of this document. This will ensure that we treat your response appropriately.

All respondents need to be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the 2002 Act for information relating to responses made to this consultation exercise.

### **Next steps in the process**

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

### **Comments and complaints**

If you have any comments about how this consultation exercise has been conducted, please send them to the contact address above or to **courtsreform@gov.scot**.

### **Scottish Government consultation process**

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise, the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and
- be used to finalise legislation before it is implemented.

Whilst details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments. These should be directed to the relevant public body.



## **Ministerial foreword**

The Scottish Land Court and the Lands Tribunal for Scotland are both well respected fora dealing with various types of dispute involving land or property. There is a close relationship between the Court and the Tribunal; they share the same offices, and, at present, the Chair of the Land Court is also President of the Lands Tribunal. However, the work they do is quite distinct, and they have separate administrative staff and systems.

The idea of amalgamating the two bodies is not new. In the mid-1970s, there were discussions on absorbing the Land Court into the Lands Tribunal, but these were not progressed as, at that time, there was little support for abolishing the Court. It had always been held in regard as the bastion of tenants', and particularly crofting tenants', rights. It had come into being as part of a statutory regime put in place to protect these rights in the wake of the Highland Clearances of the 19<sup>th</sup> century and the land "wars" which followed. This view of the Court endures to this day, particularly, but not exclusively, in the Highlands.

Recognising the historical significance of the Court, in this consultation, we are seeking views on whether there are advantages to be found in unifying the two bodies by incorporating the Lands Tribunal for Scotland into an expanded Scottish Land Court.

We are also taking the opportunity to explore views on four administrative matters.

- Arrangements when the legal members of the Court or Tribunal have to recuse themselves from a case.
- The need for a Gaelic speaker at the Land Court.
- The power of the Lands Tribunal to award expenses under the Title Conditions (Scotland) Act 2003.

- The power of the Land Court to award expenses under the Rural Payments (Appeals) (Scotland) Regulations 2015.

Thank you for taking the time to respond to the consultation and we look forward to receiving your considered views on the subject.

A handwritten signature in black ink, appearing to read 'Ash Denham', written in a cursive style.

**Ash Denham**  
**Minister for Community Safety**

## Terms used in this consultation

### Abbreviations

FTT	First-tier Tribunal
IACS	Integrated Administration and Control System
Land Court	Scottish Land Court
Lands Tribunal	Lands Tribunal for Scotland
SCS	Scottish Court Service (the name of the court service before its merger with the Scottish Tribunals Service in 2015)
SCTS	Scottish Courts and Tribunals Service (the name of the courts service after its merger with the Scottish Tribunal Service in 2015)
the 2008 Act	Judiciary and Courts (Scotland) Act 2008
the Electronic Communications Code	Electronic Communications Code (Jurisdiction) Regulations 2017
the Tribunals Act	Tribunals (Scotland) Act 2014
VAC	Valuation Appeal Committee

## Chapter 1: Introduction

1. The Scottish Land Court (“the Land Court”) was created by the Small Landholders (Scotland) Act 1911. It began operations on 1 April 1912. It is a court of law with a jurisdiction set firmly within the context of Scottish farming. It has authority to resolve a range of disputes, including disputes between landlords and tenants, in farming and crofting. Although the Court is based in Edinburgh, it holds hearings throughout Scotland.
2. Although powers to create lands tribunals in the various parts of the United Kingdom have existed since the enactment of the Lands Tribunal Act 1949, it was not until 1 March 1971 that the Lands Tribunal for Scotland (“the Lands Tribunal”) was set up under the Lands Tribunal Act (Appointed Day) (Scotland) Order 1971.
3. The Scottish Government considers that there may be a case for merging the two bodies which share the same head and occupy the same premises in Edinburgh. The purpose of this consultation is to invite stakeholder views on the possibility of amalgamating the Scottish Land Court and the Lands Tribunal for Scotland.
4. This consultation also gives the Scottish Government the opportunity to seek stakeholder views on four administrative matters.
  - There are times when all the legal members of the Land Court or the Lands Tribunal have to recuse themselves from a case. Should statutory arrangements be put in place to provide for an appropriately qualified substitute?
  - There is a statutory requirement that there should be a Gaelic speaker at the Land Court. Is this necessary?
  - The Lands Tribunal has a statutory power under the Title Conditions (Scotland) Act 2003 to deal with various types of dispute involving land or property. Although the Lands Tribunal works in much the same way as an ordinary civil court, the aim is to be as accessible and user friendly as possible. The principle of “expenses follow success” sometimes acts as a deterrent to litigation. Should the 2003 Act be amended in the interests of access to justice?
  - The Land Court has power to award expenses in cases across the range of its jurisdictions and, as with the Lands Tribunal, the principle of expenses following success is applied. There is a question as to whether this operates as a barrier to justice in appeals by farmers and crofters under the Rural Payments (Appeals) (Scotland) Regulations 2015. 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. Does the risk of being found liable in very considerable expenses deter crofters and farmers from challenging Scottish Government decisions which might otherwise be amenable to legitimate challenge and, if so, what should be done about it?

## Chapter 2: Background to the proposal to amalgamate the Land Court and the Lands Tribunal

5. During the last 12 years, the landscape of civil courts and tribunals in Scotland has arguably undergone the most radical and extensive change it has ever experienced. The reforms started with the Judiciary and Courts (Scotland) Act 2008 ("the 2008 Act") which contained a statutory guarantee of judicial independence<sup>1</sup>, appointed the Lord President of the Court of Session as Head of the Scottish Judiciary<sup>2</sup>, and created a body corporate known as the Scottish Court Service ("the SCS") chaired by the Lord President<sup>3</sup>.
6. Subsequent changes were to a large extent driven by the recommendations of the 2009 report of the Scottish Civil Courts Review<sup>4</sup> ("the Gill Review") chaired by the then Lord Justice-Clerk Gill and culminated in the enactment of the Courts Reform (Scotland) Act 2014. This Act gave effect to many of the recommendations in the Gill Review, including the unification of Scotland's courts and tribunals as the Scottish Courts and Tribunals Service (the "SCTS") under the leadership of the Lord President and the governance of the SCTS Board<sup>5</sup>.
7. The process of civil justice reform was not confined to the courts; it also affected the devolved Scottish tribunals. The Tribunals (Scotland) Act 2014 ("the Tribunals Act") created a new, simplified statutory framework for tribunals in Scotland, bringing existing jurisdictions together and providing a structure for new ones. The Act created two new tribunals, the First-tier Tribunal for Scotland and the Upper Tribunal for Scotland. The Lord President is the head of the Scottish Tribunals and has delegated various functions to the President of Scottish Tribunals. The Upper Tribunal for Scotland hears appeals on decisions of the chambers of the First-tier Tribunal for Scotland. In terms of section 27 of and schedule 1 to the Tribunals Act, the Lands Tribunal is one of the tribunals on the list for transfer into the new structure, but this has not yet

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<sup>1</sup> Section 1 of the 2008 Act.

<sup>2</sup> *Ibid*, section 2.

<sup>3</sup> *Ibid*, section 60; the Scottish Court Service was previously an agency of the Scottish Executive (since renamed the Scottish Government).

<sup>4</sup> Volume 1 can be viewed at: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1---9.pdf?sfvrsn=4> and Volume 2 at: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10---15.pdf?sfvrsn=4>.

<sup>5</sup> This unification took effect as of 1 April 2015 by virtue of the Courts Reform (Scotland) Act 2014 (Commencement No. 2, Transitional and Savings Provisions) Order 2015.

taken place<sup>6</sup>. However, its staff have been employees of the SCTS since 1 April 2015<sup>7</sup>.

8. It should be noted that schedule 1 of the Tribunals Act can be modified by way of regulations to allow both the addition and removal of tribunals from the list.
9. By contrast, the Land Court is specifically excluded from the provisions of the Tribunals Act and cannot be added to the list in schedule 1. The Land Court was also originally excluded from the list of the Scottish courts to which the 2008 Act applies and only its Chair was a judicial office holder for the purposes of the 2008 Act. However, that position was altered on 1 April 2017 by virtue of the Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017. As a result the Land Court is now included on the list of Scottish courts to which the 2008 Act applies and the offices of Chair, Deputy Chair, and member are all now judicial office holders<sup>8</sup>.
10. The result of these changes is that the SCTS now has responsibility for both the Land Court and the Lands Tribunal. It is important to note, however, that whilst the SCTS is the administrative body that supports the Lands Tribunal, the Lands Tribunal is not at present formally within the body of the Scottish Tribunals.

#### **Previous consideration of unification**

11. The amalgamation of the Land Court and the Lands Tribunal is not a new idea. The case for combining the judicial headship of both bodies and also for a combined membership was argued by R P Fraser of the Scottish Home and Health Department in a memorandum to the government of the day as long ago as February 1975. That memorandum was written in anticipation of Lord Birsay's retirement as Chair of the Land Court and it led to that post and the Presidency of the Lands Tribunal being unified in the person of Lord Elliott. Although unification did not go further at that time, the idea was not dropped in the years following Lord Elliott's appointment. In particular it was examined as part of "a programme of work to improve performance and value for money in non-departmental public bodies" announced by the government in November 1984<sup>9</sup>. What was contemplated then was the assimilation of the Land Court into the Lands Tribunal<sup>10</sup>.

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<sup>6</sup> The transfer is on a list of tribunals which are expected to transfer but there is no date yet confirmed for it.

<sup>7</sup> See Courts Reform (Scotland) Act 2014, Schedule 4, Part 2, and Judiciary and Courts (Scotland) Act 2008, sections 61A and 70.

<sup>8</sup> Judiciary and Courts (Scotland) Act 2008 (Scottish Land Court) Order 2017, sections 2 and 3.

<sup>9</sup> The Report of the Review of the Scottish Land Court and Lands Tribunal Scotland, Scottish Courts Administration, 1987.

<sup>10</sup> *Ibid*, para 1.2.

12. Since this would have involved the abolition of the Land Court, with its long tradition of serving the crofting and wider agricultural community, it is not surprising that the Report of the Review of the Scottish Land Court and Lands Tribunal Scotland came to the following conclusion: “In all the circumstances, the potential benefits of a radical reform of the Court would appear to be outweighed at present by the disadvantages and difficulties associated with such a course of action.”<sup>11</sup> Among these disadvantages and difficulties was the controversy that any proposal to abolish the Land Court was likely to cause<sup>12</sup>.

13. More recently, as part of its survey of the court landscape generally, the Gill Review commented on the role of the Land Court<sup>13</sup>. Having narrated the origins of the Land Court and noted that it had been set up with a Chair having the status of a Court of Session judge, the Review report stated the following<sup>14</sup>:

“The reputation of the court has grown under a succession of distinguished chairmen in the last 40 years. The modern extensions of its jurisdiction reflect the confidence that the court enjoys from litigants and practitioners.

“In consequence of its clearly delimited subject areas, the flexibility of its procedures and the fact that most of the lawyers who practise in it are experienced in agricultural law, the Land Court has become a model of a specialist court.

“None of our respondents proposed any reforms to the jurisdictions and procedures of the Land Court. We propose none.”

14. The special character of the Land Court and its practical value was also emphasised by Lord Gill as Lord Justice-Clerk in the case of *Jardine v Murray*<sup>15</sup>.

“The Land Court’s approach to fact finding has two special features; namely, its flexible and informal approach to the evidence and its application to the fact-finding process of its own knowledge and expertise. The Land Court is not an ordinary court of law. It is a specialist court whose members have expert knowledge of, *inter alia*, crofting agriculture and the social and economic conditions and

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<sup>11</sup> *Ibid*, para 6.11.

<sup>12</sup> *Ibid*, para 6.10.

<sup>13</sup> Volume 1 can be viewed at: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-1-chapt-1--9.pdf?sfvrsn=4> and Volume 2 at: <https://www.scotcourts.gov.uk/docs/default-source/civil-courts-reform/report-of-the-scottish-civil-courts-review-vol-2-chapt-10--15.pdf?sfvrsn=4>.

<sup>14</sup> The Scottish Civil Courts Review, paragraphs 219-221.

<sup>15</sup> 2012 SC 185, paragraphs 46 to 48.

customs in the crofting communities. It also has the advantage in most cases of carrying out a formal inspection of the land to which the dispute relates. The inspection is generally a primary evidential source (cf. *Macpherson v Shareholders in Achintee Common Grazing*).

“Crofting cases are dealt with at first instance on circuit by a Divisional Court consisting of a single member, who is usually one of the practical members of the court. The Divisional Courts have a unique body of expertise and understanding with which to deal with questions of the kind that this case has raised.

“It is with these considerations in mind that, in my opinion, we should assess the adequacy of the Divisional Court's findings and the criticisms of the Full Court's decision that are made in this appeal.”

15. In a concurring judgment in the same case, Lord Malcolm said that “unlike the Land Court, the Court of Session is not an expert tribunal in respect of the matters under consideration, and so should be careful to avoid trespassing on the Land Court's jurisdiction” (para 80).
16. The Scottish Government has taken note of the previous considerations of a merger of the two bodies and considers that if the two bodies are to become one, historical, political, legal and logical considerations concur in pointing to incorporation of the Lands Tribunal into the Land Court, rather than the other way round. The historical role of the court as the protector of tenants' rights goes back to the early days of crofting legislation, around the turn of the early 20<sup>th</sup> century, has given it a very important part in Scottish legal history. This reads across into the political domain in which there would be strong resistance to the abolition of the court. The legal and logical considerations are the court's place in the hierarchy of Scottish Court (on a par with the Outer House of the Court of Session and, therefore, higher than any of the tribunals). It might be seen as illogical to abolish the senior and more historic body in favour of the junior body.
17. However, another option would be to incorporate the Land Court into the Lands Tribunal as was proposed in the 1970s, and we would be pleased to hear from you if you favour this possibility together with your reasons for supporting this option (see question 2).

### **The present position**

18. The present position is that since 1978 the two bodies have been led by the same person although that is not a statutory requirement. They both occupy premises on the third floor of George House, Edinburgh but are not otherwise integrated other than by way of a limited sharing of administrative functions such as mailroom tasks and photocopying.

19. The Land Court has, in addition to its Chair, a part-time Deputy Chair, two part-time agricultural members, a Principal Clerk plus four members of staff (three full-time and one part-time).
20. The Lands Tribunal is currently composed of a President and three other members. The number of member posts is determined by the Scottish Ministers, though the number of members which are to be legal members is to be determined by the Lord President of the Court of Session. All members are appointed by the Scottish Ministers on the recommendation of the Lord President under section 2<sup>16</sup> of the Lands Tribunal Act 1949<sup>17</sup>. The Lord President, in making his recommendations, must consult the Scottish Branch of the Royal Institution of Chartered Surveyors in respect of any member appointment other than the President. The President of the Lands Tribunal must be legally qualified having previously served in judicial office, or having been an advocate or solicitor<sup>18</sup>. At present, the Lands Tribunal has a full-time legally qualified member, two part-time surveyor members (Fellows of the Royal Institution of Chartered Surveyors), a Clerk and two full-time members of staff.

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<sup>16</sup> As amended by Judicial Pensions and Retirement Act 1993, Scotland Act 1998, Constitutional Reform Act 2005, Transfer of Functions (Lands Tribunal and Miscellaneous Amendments) Order 2009, Courts Reform (Scotland) Act 2014, and Courts Reform (Scotland) Act 2014 (Consequential Provisions) Order 2016.

<sup>17</sup> Lands Tribunal Act 1949, section 2(7) and (9).

<sup>18</sup> *Ibid*, section 2(2).

## Chapter 3: Jurisdictions of the Land Court and Lands Tribunal

### The Land Court

21. The primary jurisdiction of the Scottish Land Court is to deal with questions between the landlords and tenants of agricultural land, including crofts under the Crofters (Scotland) Act 1993, the Crofting Reform etc. Act 2007 and the Crofting Reform (Scotland) Act 2010, smallholdings under the Crofters Holdings (Scotland) Act 1886 and tenanted farms under the Agricultural Holdings (Scotland) Acts 1991 and 2003. It also has a number of other jurisdictions, including the determination of:
- appeals from decisions of the Crofting Commission under section 52A of the Crofters (Scotland) Act 1993;
  - references made to it by the Crofting Commission under section 53 of the Crofters (Scotland) Act 1993;
  - questions under the Crofting Community Right to Buy provisions of Part 3 of the Land Reform (Scotland) Act 2003;
  - challenges to entries in the Crofting Register under the Crofting Reform (Scotland) Act 2010;
  - appeals against certain decisions of Scottish Natural Heritage under the Nature Conservation (Scotland) Act 2004;
  - appeals against enforcement measures taken by the Scottish Environmental Protection Agency under the Environmental Regulation (Enforcement Measures) (Scotland) Order 2015; and
  - appeals under the Rural Payments (Appeals) (Scotland) Regulations 2015 where farmers or crofters have been subject to a reduction, refusal or recovery of payments made by the Scottish Ministers in relation to subsidy schemes under the Common Agricultural Policy.
22. As a consequence, the Land Court is involved in adjudicating on a very wide range of disputes but of particular note are the areas in which its work is analogous to that of the Lands Tribunal or involves functions which could benefit from the skills available in the Lands Tribunal. These include determination of:
- the value of croft house sites<sup>19</sup>;
  - the value of land being resumed from crofting<sup>20</sup>;
  - compensation payable to crofters for crofters' improvements<sup>21</sup>;

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<sup>19</sup> Crofters (Scotland) Act 1993, section 15(2).

<sup>20</sup> *Ibid*, section 21.

<sup>21</sup> *Ibid*, sections 30-32.

- compensation payable to landlords of crofts for deterioration of or damage to fixed equipment<sup>22</sup>;
- share in the value of croft land compulsorily acquired by an acquiring authority<sup>23</sup>;
- share in value of trees under joint forestry ventures<sup>24</sup>;
- rents of agricultural holdings<sup>25</sup>;
- compensation payable to tenants for improvements on agricultural holdings<sup>26</sup>;
- compensation for disturbance and other heads of claim in relation to agricultural holdings<sup>27</sup>;
- appeals against the valuation of land being acquired by a crofting community body<sup>28</sup>;
- challenges to first registration in the Crofting Register<sup>29</sup>; and
- croft boundaries<sup>30</sup> (where mapping and surveying skills available in the Tribunal are of obvious relevance).

## The Lands Tribunal

23. The Lands Tribunal also has an extensive range of jurisdictions, including determination of:
- disputed compensation for the compulsory acquisition or loss in value of land under the Land Compensation (Scotland) Act 1963<sup>31</sup> and, under the Land Compensation (Scotland) Act 1973<sup>32</sup>, for depreciation caused by public works;
  - appeals to a Valuation Appeal Committee, relating to valuation for rating of non-domestic premises under the Lands Tribunal Act 1949, which are then remitted to the Lands Tribunal for consideration on one of the statutorily permitted grounds;

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<sup>22</sup> Crofters (Scotland) Act 1993, section 34.

<sup>23</sup> *Ibid*, section 37.

<sup>24</sup> *Ibid*, section 50A.

<sup>25</sup> Agricultural Holdings (Scotland) Act 1991, section 13.

<sup>26</sup> *Ibid*, section 34.

<sup>27</sup> *Ibid*, Part V.

<sup>28</sup> Land Reform (Scotland) Act 2003, section 92.

<sup>29</sup> Crofting Reform Act 2010, section 14.

<sup>30</sup> Crofters (Scotland) Act 1993, section 53(1)(c).

<sup>31</sup> Land Compensation (Scotland) Act 1963, section 8.

<sup>32</sup> Land Compensation (Scotland) Act 1973, section 14.

- appeals against the decision of a Valuation Appeal Committee not to remit a case, relating to valuation for rating of non-domestic premises under the Lands Tribunal Act 1949, to the Lands Tribunal on one of the statutorily permitted grounds;
  - references relating to the accuracy of the Land Register under the Land Registration (Scotland) Act 2012<sup>33</sup>;
  - appeals regarding the valuation of land being acquired under Part 2 of the Land Reform (Scotland) Act 2003 (the Community Right to Buy)<sup>34</sup>;
  - appeals against valuation of land being acquired under Part 3A of the Land Reform (Scotland) Act 2003 (right to buy abandoned, neglected and detrimental land)<sup>35</sup>;
  - determination of questions arising in applications to buy abandoned, neglected and detrimental land<sup>36</sup>
  - appeals against valuation of land being acquired under Part 5 of the Land Reform (Scotland) Act 2016 (right to buy land to further sustainable development)<sup>37</sup>;
  - questions arising under said right to buy land to further sustainable development<sup>38</sup>;
  - applications for variation and discharge of land obligations and for determination of the validity, applicability or enforceability of real burdens under the Title Conditions (Scotland) Act 2003<sup>39</sup>; and
  - applications brought under the new Electronic Communications Code contained in Schedule 3A of the Communications Act 2003 (as amended by the Digital Economy Act 2017)<sup>40</sup>.
24. In addition, the Lands Tribunal has many less frequently exercised jurisdictions such as those under:
- the Coal Mining Subsidence Acts 1958 and 1991;
  - the Electricity Act 1989;
  - the Flood Prevention (Scotland) Act 1961;

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<sup>33</sup> Land Registration (Scotland) Act 2012, section 82

<sup>34</sup> Land Reform (Scotland) Act 2003, section 62

<sup>35</sup> *Ibid*, section 97W

<sup>36</sup> *Ibid*, section 97X

<sup>37</sup> Land Reform (Scotland) Act 2016, section 70

<sup>38</sup> *Ibid*, section 71

<sup>39</sup> Title Conditions (Scotland) Act 2003 sections 90 and 91

<sup>40</sup> Brought under the Lands Tribunal's jurisdiction by the Electronic Communications Code (Jurisdiction) Regulations 2017

- the Leasehold Casualties (Scotland) Act 2001;
  - the Long Leases (Scotland) Act 2012; and
  - the Taxes Management Act 1970.
25. Finally, the Lands Tribunal also has a jurisdiction as “arbitrator of consent” under section 1(5) of the Lands Tribunal Act 1949<sup>41</sup> whereby parties to a dispute can agree to submit their differences to the Lands Tribunal for decision.
26. Just as there are areas of the Land Court's work where Lands Tribunal expertise may be valuable, the same applies in relation to the Lands Tribunal's work, where the following areas are identified which would benefit from the skills available in the Land Court:
- appeals against the valuation of land being acquired under the Community Right to Buy<sup>42</sup>, where that land comprises or includes agricultural land;
  - assessment of the value of agricultural land for compulsory purchase purposes and of the impact of a compulsory purchase scheme on agricultural operations for injurious affection or severance claims<sup>43</sup>;
  - the quantification of farm loss payments under the Land Compensation (Scotland) Act 1973<sup>44</sup>; and
  - some aspects of the discharge of title conditions applications under the Title Conditions (Scotland) Act 2003<sup>45</sup> and some aspects of the rectification of Land Register cases under the Land Registration (Scotland) Act 2012<sup>46</sup> involving agricultural land.

### **Situations in which the Land Court and Lands Tribunal have roles in the same procedure**

27. In some instances both the Court and the Tribunal have roles in the same procedure:
- In respect of a tenant of an agricultural holding's right to buy under Part 2 of the Agricultural Holdings (Scotland) Act 2003, section 33(4)

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<sup>41</sup> As amended.

<sup>42</sup> Land Reform (Scotland) Act 2003, section 62.

<sup>43</sup> Land Compensation (Scotland) Act 1963, section 8 and subsequent provisions.

<sup>44</sup> Land Compensation (Scotland) Act 1973, section 32.

<sup>45</sup> e.g. *Duffus v McWhirter* 2015 SLT (Lands Tr) 2.

<sup>46</sup> e.g. *Mathers v The Keeper of the Registers of Scotland* LTS/LR/2014/01, decision of 8 December 2014, reported 2015 GWD 3-68, (decided under the Land Registration (Scotland) Act 1979) which involved consideration of whether a typical historical boundary between agricultural subjects was more likely to have been a burn rather than a fence beside the burn.

provides that if there is no agreement between the parties, a valuer is to be appointed either directly by the Land Court or by someone nominated by the Court. Any appeals against the appointed valuer's decisions must be made to the Lands Tribunal under section 37 of that Act. If a question of law which may competently be determined by the Land Court arises in the course of such an appeal, section 38 provides that the Lands Tribunal is to refer the question to the Land Court for determination (unless it considers that it is not appropriate so to do).

- This interplay of the two bodies is carried through into section 100 of the Land Reform (Scotland) Act 2016, which amends section 38 of the Agricultural Holdings (Scotland) Act 2003 on the question of what is to happen when the landlord of an agricultural holding fails to comply with an order to remedy a material breach of his obligations and the tenant consequently acquires a right to buy the holding<sup>47</sup>.
- Sections 3B and 3C of the Crofters (Scotland) Act 1993 (as amended) contain similar provisions in relation to the compensation payable to landowners for the creation of new crofts. If no agreement can be reached, it is for the Land Court to appoint a valuer to assess the compensation payable whilst appeals against such a valuer's decision go to the Lands Tribunal<sup>48</sup>.

## The respective powers of the Land Court and Lands Tribunal

### (i) Power to grant orders

28. A point of difference between the two bodies is the range of powers available to them. The Chair of the Land Court, who has the rank and tenure of a Court of Session judge<sup>49</sup>, has power to punish for contempt of court<sup>50</sup> and the Land Court itself has a wide range of powers to enforce, in particular, its agricultural holdings jurisdiction. It may grant decrees for interdict (including interim interdict), orders *ad factum praestandum* and orders for specific implement, restitution, reduction or rectification, removal or ejection, damages or other substitutionary redress and declarator<sup>51</sup>. There is also provision for remitting cases from the Land Court to the sheriff court or the Court of Session and *vice versa*<sup>52</sup>.

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<sup>47</sup> Section 38G of the Agricultural Holdings (Scotland) Act 2003.

<sup>48</sup> Sections 3A - 3C are inserted to the Crofters (Scotland) Act 1993 by the Crofting Reform etc. Act 2007, section 6 and the Crofting Reform (Scotland) Act 2010, section 23.

<sup>49</sup> Scottish Land Court Act 1993, section 1(3).

<sup>50</sup> *Ibid*, schedule 1, para 13(3).

<sup>51</sup> Agricultural Holdings (Scotland) Act 2003, section 84(1).

<sup>52</sup> *Ibid*, sections 85 and 86.

29. By contrast, the Lands Tribunal's powers are much more circumscribed. It has no power to deal with contempt, nor to grant interdict, nor orders *ad factum praestandum*, nor for specific implement, removal or ejection, nor to grant declarators, except that it can determine the validity, applicability or enforceability of real burdens<sup>53</sup>. A power which makes the Lands Tribunal akin to a court is the power to award expenses<sup>54</sup>.

## **(ii) Power to appoint assessors, etc**

30. The Lands Tribunal has a power to employ assessors to sit along with its members on particular cases<sup>55</sup>.

31. The Land Court has power to appoint a person to act as an assessor should the Land Court consider that the assistance of a person specifically qualified by skill or experience is desirable for the better disposal of a matter in dispute<sup>56</sup>.

## **Appeals**

32. The Land Court has fairly extensive appellate functions. By contrast, the Lands Tribunal's appellate function is very restricted, confined as it is to challenges to decisions of the Keeper of the Land Register. As the Keeper's decisions are administrative rather than judicial, or quasi-judicial, it is doubtful whether this can properly be described as an appellate jurisdiction at all.

33. The Lands Tribunal also hears appeals against Valuation Appeal Committee decisions to remit cases to it. But if granted, the Lands Tribunal sits as a first instance decision-making body rather than exercising an appellate function.

34. The Land Court has an internal appeal system whereby decisions taken by single members, sitting as what are called "Divisional Courts", may be appealed to the Full Court<sup>57</sup>. Although individual members of the Tribunal may, and do, decide cases on their own, the Tribunal has no such internal appeal procedure.

35. Appeals on matters of law from both bodies go to the Court of Session, in the case of the Lands Tribunal, specifically to the Lands Valuation Appeal Court<sup>58</sup>.

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<sup>53</sup> Title Conditions (Scotland) Act 2003, section 90(1)(a)(ii).

<sup>54</sup> Lands Tribunal for Scotland Rules 2003 (SSI 2003/452), Rule 28.

<sup>55</sup> Lands Tribunal for Scotland Rules *supra*, Rule 24.

<sup>56</sup> The Rules of the Scottish Land Court Order 2014, Rule 41.

<sup>57</sup> *Ibid*, Rules 64-73.

<sup>58</sup> Lands Tribunal Act 1949, section 3; Tribunals and Inquiries Act 1992, section 11(7), Scottish Land Court Act 1993 section 1(7); Agricultural Holdings (Scotland) Act 2003, section 88.

## **Chapter 4: The case for unification**

36. The integration of the Lands Tribunal for Scotland and the Scottish Land Court is considered desirable by its proponents on grounds of structural coherence, efficiency, and the delivery of a better service to litigants in meeting the challenges of future developments.

### **Structural coherence**

37. It has been noted in the previous chapter that there are examples of the Lands Tribunal for Scotland and Scottish Land Court both having roles to play under the same piece of legislation. A number of points may be made in relation to these situations.
38. Firstly, whereas there is some rationale behind the allocation of their respective roles, it can be argued that the distinction between the two bodies is eroded by the fact that, at present, they have the same judicial head and are not, therefore, entirely separate and distinct. However, as the positions of Chair of the Land Court and President of Lands Tribunal are not required by statute to be the same person, this could change in the future.
39. Secondly, as has been noted above, there is presently a situation where the Lands Tribunal, under section 38 of the Agricultural Holdings (Scotland) Act 2003, is required to refer questions of law to the Land Court (unless it considers it inappropriate so to do) which is, in effect, a reference to its own President, but sitting in a different capacity although, as noted in the paragraph above, the positions of Chair and President are not required by law to be the same person.
40. Thirdly, although there is a rationale for the Lands Tribunal to deal with matters of valuation and the Land Court to deal with questions of law (within its jurisdiction), the Land Court, as has been seen, also engages in valuation in the exercise of some of its jurisdictions. It raises the question as to whether the valuation functions of each body would not be better discharged by access to the expertise available in both bodies.
41. It is possible that these anomalies would be resolved and the interests of the public would be better served by the creation of a “one-stop shop” giving access to the whole range of remedies presently divided between the two jurisdictions.

### **Efficiency**

42. Both bodies presently carry out their duties efficiently, in as much as cases are generally disposed of on reasonable timescales and at little expense to litigants so far as Lands Tribunal and Land Court fees are concerned. However, the situation of having two small staffs working side by side, with

similarities in aspects of what they do and already joined at the head by a single judicial office holder is one which calls for consideration to be given as to whether a better service can be delivered to users by their unification.

43. Although unification of the two bodies might lead to financial savings over time, the main gain in terms of efficiency would be expected to come from the ability to deploy personnel flexibly so that every case is dealt with by people with the appropriate skills and expertise. Even though that result can be achieved to some extent under the present arrangements as each body has the power to recruit appropriate expert assistance when required, (a) the appointment of such experts involves extra administrative work, and (b) experts so appointed are not full members of the Court or Tribunal conducting the hearing. These *ad hoc* arrangements therefore lack the advantages of fully collegiate decision-making. Unification would make available the entire range of skills in every case and has the potential to lead to better decision-making.
44. As well as allowing the specialist members of both bodies to be available across the range of both jurisdictions, unification would also allow the deployment of legal members in the same way, something that is envisaged would happen more frequently than the deployment of surveyors on Land Court type cases and agriculturalists on Lands Tribunal type cases. This would lead to greater efficiency in that the lawyers can be deployed wherever the workload is heaviest at any particular time.

#### **The delivery of a better service to litigants**

45. Ultimately both bodies exist in order to serve the public and proponents of unification strongly believe that the public would be better served by the creation of a single body to deal with the range of issues currently dealt with either by the Land Court or the Lands Tribunal.

#### **The opportunity for additional functions to be bestowed upon the court**

46. If an amalgamated body is created, then the opportunity arises to consider whether the new body can or should take on additional functions beyond those currently performed by the two existing bodies. For example the Land Court has extensive experience of dealing with cases that touch upon environmental justice e.g. wind-farm applications or the development of greenbelt land. It may be worth exploring if an expanded jurisdiction to provide a specialist forum for particular types of case is desirable.
47. The present proposal prompts the question whether there is further scope for simplifying and rendering more coherent the way land issues are dealt with in Scotland's courts and tribunals. Whilst the Scottish Government, having consulted on the matter, recently decided against the creation of a specialist

Environmental Court in Scotland<sup>59</sup>, there are land issues in respect of which jurisdictions presently held by the sheriff court which might equally appropriately be dealt with by an expanded Land Court.

48. The following, perhaps more obscure, jurisdictions presently held by the sheriff court might, arguably, be more appropriately placed within the jurisdiction of an expanded Land Court, if only as a tidying up exercise:

- the March Dykes Act 1661;
- the March Dykes Act 1669;
- the Runrig Lands Act 1695; and
- the Division of Commonties Act 1695.

The March Dykes Acts are still resorted to from time to time but the Runrig and Division of Commonties Acts are virtually, if not entirely, moribund. Nevertheless, they may be suitable jurisdictions for the Land Court to exercise, should the need arise.

49. A much more significant reallocation of jurisdictions would be to transfer the sheriff's role in the "right to buy" provisions of the following Acts to the Land Court:

- the Land Reform (Scotland) Act 2003: sections 60A(4), 61, 91, 97V; and
- the Land Reform (Scotland) Act 2016: section 69.

The aim would be to bring greater cohesion to the presently diffuse appeal provisions which accompany these rights (sheriff court/Land Court/Lands Tribunal). The expanded Land Court could handle all referrals of questions and appeals, whether on questions of law or valuation.

50. 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.

51. More generally it might be argued that a dedicated Land Court, rather than a generalist sheriff court, is the more appropriate forum for the litigation generated by the substantial body of land reform legislation introduced by the Scottish Parliament.

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<sup>59</sup> See "Developments in environmental justice in Scotland: analysis and response" at: <https://www.gov.scot/publications/developments-environmental-justice-scotland-analysis-response/>

## Chapter 5: Arguments against unification

52. Surveyors have always seen a clear distinction between the roles of the two bodies that is reflected in their composition. The Chair/President is at present common to both but otherwise the Lands Tribunal comprises a QC and two chartered surveyors whilst the Land Court consists of a legally qualified Deputy Chair and two agricultural experts. It can be argued that this difference is an important distinction between the two bodies which should be preserved.

53. Others also question whether, in reality, there is any major overlap between the Lands Tribunal and the Land Court. The argument is that it is clear which forum handles what work. The Lands Tribunal website makes it clear that the Land Court and the Lands Tribunal have distinct functions which should not be confused<sup>60</sup>:

“In particular you should note that although our jurisdiction is related to land issues, most disputes about rights to land (for example, disputes over ownership or succession) are dealt with by the ordinary courts: the Sheriff Court or the Court of Session. The Scottish Land Court also has jurisdiction to deal with some land cases. This Court is sometimes confused with the Lands Tribunal. They share the same offices. But the work of the Court is quite distinct. The Land Court deals with cases involving agriculture and is mainly concerned in matters involving landlords and tenants.”

54. It can be argued that following a merger of the two bodies the same Tribunal/Court members would continue to deal with the same matters as they do at present, with little or no crossover, inviting the question, “Where’s the gain?”. For example, many of the high profile Lands Tribunal cases involve an in-depth knowledge of things such as rating, compulsory purchase and a range of valuation matters which Land Court members do not possess. Conversely, both the law relating to agricultural holdings and the law relating to crofting are complex and require specialist knowledge which Lands Tribunal members are unlikely to hold.

55. The Valuation Appeal Committees (VACs) are slated to go into the First-tier Tribunal (FTT) in the Scottish Tribunals in 2022 and work is already underway. They currently remit cases to the Lands Tribunal which are complex, may set a precedent or have a national impact in relation to non-domestic rates. We anticipate that these functions will transfer into the Upper Tribunal and that, in order to utilise their expertise, members of the Lands Tribunal will be authorised, by regulations, to sit on these cases in the Upper Tribunal. This

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<sup>60</sup> <http://www.lands-tribunal-scotland.org.uk/>.

would not impact on the remaining, substantive workload of the Lands Tribunal and its members.

56. Both the Land Court and the Lands Tribunal are regarded by those who use them as very effective with good staff. The core of the Land Court's functions is centred on farming and crofting. Whilst it is noted that the proposal is for the Lands Tribunal to be incorporated into the Land Court, the amalgamation could well be viewed by the Land Court's stakeholders as posing a threat to the Court's identity and focus, particularly if new jurisdictions are also added to its remit.
57. Like the Land Court, the Lands Tribunal is well respected amongst users, who value the way members and staff deal with cases and place great value on its judgments. Some have concerns about whether this level of service and the Lands Tribunal's whole specialist focus might be compromised by the proposed merger.
58. It could be argued that, as both the Land Court and Lands Tribunal are presently working separately and effectively without major criticism, there is no need for an amalgamation, the implementation of which may have cost implications both in terms of time and resources.
59. The terms and conditions of members would have to be harmonised. A significant discrepancy remains between the salary levels of Lands Tribunal members (higher) and Land Court members (lower) notwithstanding a narrowing of the gap following upon the partial implementation of recommendations made by the recent report of the UK Government Senior Salaries Review Body. Serving members would not, of course, lose any of their present entitlements but harmonisation would have to take place. As this only involves two part-time Land Court members, the cost implications would be relatively modest.

## Chapter 6: Issues requiring consideration

### The necessity for legislation

60. Amalgamation of the Land Court and the Lands Tribunal would require primary legislation for which appropriate time and resources will require to be allocated. The required Bill would not be introduced into the Scottish Parliament this session and whether amalgamation should be progressed and, if so, with what priority, would be a matter for the next Scottish Government. This means that it is unlikely that a Bill could be introduced before 2022 at the earliest. If it were decided to add new functions to the merged Court as outlined in paragraphs 46 to 51, the drafting of the Bill would take longer and therefore need more resources than if a Bill just provided for amalgamation. Any Bill introduced would then be subject to a timetable set out by Parliament.

### Rules

61. The issue of rules would also have to be addressed. In 2014, the Land Court benefited from a new set of rules<sup>61</sup>. These were the subject of long consideration by Lord McGhie, the then Chair of the Land Court. The rules are considered to be fit for purpose in the modern age. The Lands Tribunal for Scotland rules<sup>62</sup> are similarly modern. They are relatively brief and largely tailored to the Lands Tribunal's specific jurisdictions. It is probable that it should not be difficult to incorporate them into an expanded set of Rules for an enlarged Land Court. However, if the merged Land Court were to be expanded to take on functions presently undertaken by other courts, this could extend the time and work needed to draft rules.
62. A decision would have to be taken as to who should draft the new rules – would it be the expanded Land Court itself or the Scottish Civil Justice Council (which is responsible for drafting most court rules at present)? Whichever body is charged with drafting the rules, a start will not be able to be made until the legislation amalgamating the Court and the Tribunal is enacted.
63. The fact that the Land Court has an internal appeal structure which the Lands Tribunal does not was thought to pose an insuperable obstacle to the production of a joint set of rules on a previous occasion<sup>63</sup>. However, that was in the context of a proposal to incorporate the Court into the Tribunal. In that situation either the Court would have to lose its internal appeal procedure or one would have to be created for the Tribunal. If the Tribunal were to be incorporated into the Court it would become subject to the Court's internal

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<sup>61</sup> The Rules of the Scottish Land Court Order 2014.

<sup>62</sup> The Lands Tribunal for Scotland Rules 2003.

<sup>63</sup> Observations by Members of the Scottish Land Court and Lands Tribunal for Scotland in Report by Norman R Y Agnew on Proposals for Future Staffing, 1981, para 115.

appeal mechanism, unless, of course, the need for such a mechanism was revisited in the context of a comprehensive review of the Court's rules to take account of the unification.

64. As far as members of staff are concerned, both staffs have transferred into the SCTS, so their terms and conditions of employment have been standardised as part of that process. It is expected that the staff of both the Land Court and the Lands Tribunal would be retained to work in the new amalgamated body.
65. Both the Court and Tribunal charge their users fees. If amalgamation goes ahead, fees would have to be reviewed across the range of jurisdictions to exclude discrepancies and inconsistencies.

### **Financial matters**

66. It is difficult to ascertain the extent to which amalgamation will result in administrative savings but it is reasonable to assume that, going forward, there may be some efficiency savings. However, there would be a cost to the taxpayer in the drafting of legislation and in the passage of the Bill through the Parliamentary process. Salaries of the specialist members of the two bodies, which presently diverge significantly, would have to be standardised.

### **Workloads**

67. As there is with their staffing, there is broad parity between the workloads of the Court and the Tribunal, but these workloads vary over time. At present, it is not possible to deploy members (other than the Chair/President) and staff from one jurisdiction to the other. Unification would solve that problem in that all personnel would be available for deployment across the unified range of jurisdictions, avoiding some being overloaded whilst others might be having a quieter time.
68. In relation to this, it is important to bear in mind recent and possible future changes to the workloads of the bodies. Applications under the Electronic Communications Code are already impacting on the Tribunal's workload while it remains too early to say what the effect of the right to buy abandoned, neglected and detrimental land and the right to buy land to further sustainable development will have. The point is that a unified workforce will be better placed to deal with an increased workload, irrespective of its origin.

## **Chapter 7: Administrative matters**

### **Arrangements when the legal members of the Land Court and Lands Tribunal both recuse themselves**

69. Occasionally, the Chair and the Deputy Chair of the Land Court have both had to recuse themselves from a case at the same time. This happened in 2015 and resulted in a sheriff principal being appointed to hear a case and twice in 2019; firstly, when the other legal member of the Lands Tribunal was appointed to hear a case, and secondly when a sheriff principal was again appointed to a case. In all three instances, the appointment was on a temporary basis for the one specific legal case in question and was accomplished by means of an “Instrument of Appointment” granted in terms of The Scottish Land Court Act 1993<sup>64</sup>.
70. If the merger between the Land Court and the Lands Tribunal does not take place, or until a merger does take place, it has been suggested that it would be administratively expedient if there was a more permanent solution as to who should deputise for the Chair and Deputy Chair of the Land Court if a similar situation should arise in the future. In many ways, the simplest option is to appoint the other legal member of the Lands Tribunal to hear the case.
71. Should that option be chosen, it would make sense to have a reciprocal arrangement between the two bodies whereby the Deputy Chair of the Land Court stood in for the President and the other legal member of the Lands Tribunal should both have to recuse themselves from a case. However, such a reciprocal arrangement would not always be appropriate and, in such cases, the present arrangements of temporary appointment would apply. In one of the situations in 2019, it would have been inappropriate for the other legal member of the Lands Tribunal to be appointed to a case in the Land Court as he would have had to recuse himself for the same reason as the Chair and Deputy Chair.
72. The Scottish Government would very much welcome any views on a proposal to use the deputies from the other forum when the principal legal practitioners have had to recuse themselves (see question 4 of this consultation).

### **The necessity for a Gaelic speaker**

73. There has been a statutory requirement for the Land Court to have a Gaelic speaking member ever since the Court’s inception in 1912<sup>65</sup>. That requirement<sup>66</sup> is presently fulfilled in the person of the present Chair. He will retire at some point between October 2020 and December 2022. Unless

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<sup>64</sup> See Schedule 1 paragraphs 10(1) and (2).

<sup>65</sup> Small Landholders (Scotland) Act 1911, section 3(3)

<sup>66</sup> Now contained in section 1(5) of the Scottish Land Court Act 1993

there is another vacancy on the court at that time, a Gaelic speaking Chair would require to be appointed. The likelihood is that it would be impossible to find such a replacement, given the other qualifications for the role of Chair in terms of section 1(3) of the Scottish Land Court Act 1993.

74. Although the question is likely to arise in that acute form on the present Chair's retirement, there is a more general factor which should be borne in mind. That is how the requirement for a Gaelic speaker reduces the pool of possible appointees and excludes many people from a crofting or farming background who might otherwise be eminently suitable for appointment. The question arises whether any continuing need for a Gaelic speaker outweighs these restrictive effects of the present requirement. Whereas in the court's early days and for most of the 20th century there were many court users who were very much more comfortable speaking Gaelic than English, that is less so today and, whilst it can be an advantage to have a member of the Court who speaks Gaelic, the situations in which that is so are relatively rare. (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.<sup>67</sup>)
75. We are taking the opportunity provided by this consultation to gauge opinion on whether the Land Court requires to have a Gaelic-speaker. There is the option that section 1(5) be repealed by way of primary legislation. The Scottish Government would welcome views on this further issue (see question 5).

### **The Lands Tribunal's power to award expenses under section 103 of the Title Conditions (Scotland) Act 2003**

76. Paragraph 42 above notes there is "little expense to litigants so far as Lands Tribunal and Land Court fees are concerned". However, as noted in paragraph 29, the power which makes the Tribunal akin to a court is the power to award expenses.
77. Part 9 of the Title Conditions (Scotland) Act 2003 provides for powers of the Lands Tribunal in respect of title conditions. In 2013, the Scottish Parliament Justice Committee published a report entitled "An inquiry into the effectiveness of the Title Conditions (Scotland) Act 2003"<sup>68</sup>. The report raised concerns about the principle that "expenses follow success". Specifically, it questioned whether provisions on expenses in title conditions cases should be changed. Under section 103 of the Title Conditions (Scotland) Act 2003, in relation to title conditions cases, the Lands Tribunal may "make such order as

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<sup>67</sup> Rules of the Scottish Land Court 2014, rule 103

<sup>68</sup> Available at [https://www.parliament.scot/S4\\_JusticeCommittee/Reports/juR-13-08-w-rev.pdf](https://www.parliament.scot/S4_JusticeCommittee/Reports/juR-13-08-w-rev.pdf).

to expenses as they think fit but shall have regard, in particular, to the extent to which the application, or any opposition to the application, is successful”.

78. The Justice Committee considered that the possibility of being found liable in expenses may deter homeowners from using the Lands Tribunal. The Lands Tribunal provided written evidence on this issue in which it stated<sup>69</sup>:

“We note that in the Explanatory Notes which accompanied the 2003 Act it was said that this provision directed the Tribunal to have ‘some regard’ to the principle of expenses following success. However, it is not easy to distinguish between ‘regard’ and ‘some regard’ and the effect of the provision is that the Tribunal must award expenses to the successful party unless there are specific reasons not to do so. In other words, although it does appear to give a broad discretion to the Tribunal, this simply reflects the wide discretion all courts have in this respect. Courts are said to have a wide discretion in relation to expenses but must apply the rule of ‘expenses following success’ unless there are sound reasons for modification.

79. The Lands Tribunal evidence went on to suggest alternative approaches in the treatment of expenses in this context:

“Alternative approaches might be to substitute a broad test of reasonableness instead of express reference to success. Another might be to have a cap on expenses. This might be a statutory figure or statutory authority to the tribunal to fix a figure at the outset either at its own hand or on request by either party. This would get over the problem of an objector saving expense by acting on his own behalf and then being faced with a claim for the expense of solicitors and counsel. If parties disputing over a proposed conservatory knew that the recoverable expenses were fixed at, say, £1000, they could decide whether the issue was worth it. If they thought it was, they could decide to spend more on their own behalf, if they wished, knowing they would not get it back but also knowing the risk of payment to the other side was limited. If the issue was a major development, the tribunal could fix a much larger figure.

“It has been suggested that another approach could be to authorise the Tribunal to make their decision on the basis of written material and a site visit. This is often done by agreement and appears to work satisfactorily. It would be much cheaper in most cases although it must be recognised that preparation of full written submissions does cost money. It also reflects the importance of the site visit. Statutory authority to compel parties to accept this approach where the Tribunal considered it appropriate would solve a lot of problems but, although

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<sup>69</sup> [www.parliament.scot/S4\\_JusticeCommittee/Inquiries/TC22a\\_Lands\\_Tribunal\\_for\\_Scotland.pdf](http://www.parliament.scot/S4_JusticeCommittee/Inquiries/TC22a_Lands_Tribunal_for_Scotland.pdf).

we profess no expertise in this area, we recognise that Art 6 of ECHR appears to require an open hearing of some sort.”

80. The Scottish Government accepted that there were concerns about access to justice in relation to “expenses following success” and gave a commitment to look at the issue<sup>70</sup>. The present consultation gives the opportunity of seeking stakeholder views and question 6 invites consultees’ responses.

### **The Land Court’s power to award expenses in appeals under the Rural Payments (Appeals) (Scotland) Regulations 2015**

81. Regulation 10 of the foresaid Regulations provides as follows:

”Without prejudice to paragraph 15 of Schedule 1 to the Scottish Land Court Act 1993 or rules 88 to 95 (expenses) of the Rules of the Scottish Land Court Order 2014, the Land Court may in considering an award of expenses against any party to an appeal have regard to the conduct of that party during the review process as a whole.”

82. This provision, therefore, applies the Court’s general expenses-awarding powers to Rural Payment appeals and goes on to make clear that when finding a party liable in expenses the Court may have regard to the conduct of that party during the earlier (administrative rather than judicial) review process. This opens up the possibility of awarding expenses on what is called an “agent and client, client paying” basis to mark disapproval with the way a case has been conducted.
83. The focus of this consultation, however, is on whether the power to award expenses against an unsuccessful appellant operates as a barrier to justice. The fact that the Scottish Government is able to employ the best representation available and pay for it from public funds leads, not infrequently, to an inequality of arms, particularly when appellants are representing themselves. But, aside from the inequality of arms point, there is a question as to whether recipients of agricultural subsidies who find themselves penalised for some alleged infringement of the relevant agricultural or environmental subsidy rules are discouraged from taking what might well be good cases to the Court for fear of being found liable for the very substantial costs which the employment of high quality legal representation invariably entails.
84. If the present provisions do indeed act as a barrier to justice, there is more than one way of dealing with the problem. An obvious way would be the abolition of the power to award expenses in such cases but that might be thought to be going too far since it would mean that appellants would never be

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<sup>70</sup> [www.parliament.scot/S4\\_JusticeCommittee/Inquiries/20130904\\_SG\\_response\\_to\\_Title\\_Conditions\\_inquiry.pdf](http://www.parliament.scot/S4_JusticeCommittee/Inquiries/20130904_SG_response_to_Title_Conditions_inquiry.pdf)

found liable in expenses no matter how unmeritorious their appeals, or the conduct of their appeals. Alternatives would include the introduction of a statutory cap on awards of expenses – so that appellants would know in advance what their maximum exposure to expenses was – or a discretion to the Court to limit awards in appropriate cases or to depart from the principle that expenses should follow success where that seemed to accord with the interests of justice. There may also be other possibilities.

85. The Scottish Government would therefore welcome views as to (a) the extent to which the risk of a substantial adverse award of expenses operates as a barrier to justice, and (b), if it does, what ought to be done about it (see question 7).

## Questions

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

Please give your reasons.

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

Please give your reasoning

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

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

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

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.

- agree
- disagree

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.

- agree
- disagree

Please give your reasons.

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

yes

no

Please give your reasons.

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

Please give your reasons.

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

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).

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

A large, empty rectangular box intended for providing comments.



## Respondent information form

**Please note:** this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:  
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual  
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

**Information for organisations:**

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

- Publish response with name
- Publish response only (without name)
- Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

- Yes
- No



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