

Response ID ANON-KPJS-QA13-E

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

Submitted on **2020-10-19 16:27:36**

Questions

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

Not in favour

Please provide your comments in the box below:

The Association is not in favour of the proposal.

Both the Land Court and the Lands Tribunal were created under statute with particular purposes and functions at the time of their creation. Although over time, the role of each has been expanded, the subject matters they deal with remain distinct. Both bodies command trust and respect in exercising their functions, and they are generally regarded as acting efficiently and effectively. They have their own areas of expertise. 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.

In our experience users of both the Court and the Tribunal (whether professional or members of the public) are not in practice confused or disadvantaged by the distinction between the two bodies, and such practical problems as exist are relatively minor administrative ones. Any difficulties which do exist are likely to be associated with limitations on resources (which has become more apparent as a consequence of the COVID-19 pandemic). We believe that there is a risk that if the two bodies were amalgamated, that would risk diluting the specialist expertise of each body. We would be particularly concerned that it would dilute the identity of the Scottish Land Court as a specialist body dealing with agricultural affairs (crofting and agricultural holdings).

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

Please provide your comments in the box below:

Our view is that if the two bodies were to be merged, the merged body should be a Court. We believe that courts are seen by the public as being more substantive and authoritative. If a merged body was to be a tribunal, we believe that this would be detrimental as to how it is perceived by crofting and agricultural communities. Courts have wider powers than tribunals. The powers of the Land Court to grant remedies have been expanded under recent reforms, and this is an aspect of its functions that should be maintained.

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

If 'yes', please list the extra function(s) to be undertaken and your reasoning. If 'no', please provide your reasoning for this view.:

We support the transfer of some functions to the Scottish Land Court to a limited extent.

The matters noted at paragraph 48 of the Consultation Paper ought to be transferred to the Land Court in any event. We also consider that there might well be benefits in transferring right to buy cases and right to roam cases to the Land Court. We do not believe that it is necessary to amalgamate the two bodies to achieve that.

We believe that the scope of appeals in the Scottish Land Court ought to be expanded by creating an appeal system to the court from decisions of the British Cattle Movement Society in respect of the issuing and removal of cattle passports. This is a practical matter which is close to the existing jurisdiction of the Land Court over agricultural subsidy appeals. The BCMS operates as an agency of the Scottish Government, and works closely with the Scottish Government Rural Payments and Inspectorate Division and also with Scottish Government Disease Prevention Policy officials. The issuing and removal of passports is often linked to SGRIPD farm inspections and the regime for claims under agricultural support schemes. At present there is no right of appeal from BCMS decisions, which are often based on factual findings made by SGRIPD inspectors. This gives rise to the anomalous situation that factual findings of SGRIPD inspectors are subject to a right of appeal where a decision is made by SGRIPD itself, but the actions of BCMS which is based on the same material can only be challenged by judicial review.

We are not in favour of the suggestion that cases which are currently dealt with under the planning system (wind-farm developments and green-belt developments) ought to be transferred (whether to an amalgamated body, or to either of the existing bodies). Doing so would be detrimental to the integrity of the planning system, and would serve no useful purpose or give rise to any benefit.

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

4 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

Please provide your comments in the box below:

The proposals appear sensible for the reasons set out in the consultation paper at paragraphs 69-72.

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

No

Please provide your comments in the box below:

We do not think that this is a necessity. We recognise the practical difficulties that this is likely to give rise to. We also note that circumstances have changed since the creation of the Scottish Land Court, and that removal of this mandatory requirement would be unlikely to cause practical harm. However, we believe that it remains advantageous for the membership of the court to have a Gaelic speaker when dealing with crofting cases, and that knowledge of the Gaelic language assists the Court in dealing with historic issues and communicating with witnesses. We recommend that speaking Gaelic should be listed as a desirable skill for future applicants.

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?

No

Please provide your comments in the box below:

We do not wish to respond to this question as being outwith the scope of the Association's role.

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

Please provide your comments in the box below:

We believe from the experience of our members that the risk of an award of expenses against an unsuccessful appellant can operate as a barrier to justice because of the risk of an adverse award of expenses which is potentially ruinous and worse than living with the consequences of the decision appealed against. The consultation paper makes the case for removing the risk of awards of expenses at paragraph 84, but the underlying problem of inequality of arms in challenging the state which it identifies also arises in other contexts.

The general rule in relation to awards of expenses has existed since the beginning of the nineteenth century. Recent exceptions have been limited to public interest litigation and environmental cases. The rationale for the exception has been linked to the public interest benefit from having the litigation brought where there is unlikely to be a private interest involved. The Land Court has also developed its own particular practice in not awarding expenses in certain crofting applications. Piecemeal reform runs the risk of creating further injustice in the sense that some categories of litigant against the state would have the benefit of particular protections while others would not. Piecemeal reform also runs the risk of obscuring the need for a fully thought through approach to the wider problem.

We note that it is within the power of the Scottish Government to make a policy decision not to seek expenses in such cases, or not to enforce any award of expenses.

8 Please provide any further comments on any matters relevant to this consultation.

Please use the box below for your comments.:

We have no further comments

About you

What is your name?

Name:

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What is your email address?

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Are you responding as an individual or an organisation?

Organisation

What is your organisation?

Organisation:

Agricultural Law Association

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

Publish response only (without name)

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

I confirm that I have read the privacy policy and consent to the data I provide being used as set out in the policy.

I consent

Evaluation

Please help us improve our consultations by answering the questions below. (Responses to the evaluation will not be published.)

Matrix 1 - How satisfied were you with this consultation?:

Slightly satisfied

Please enter comments here.:

Matrix 1 - How would you rate your satisfaction with using this platform (Citizen Space) to respond to this consultation?:

Neither satisfied nor dissatisfied

Please enter comments here.: