

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

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

Scottish Land and Estates (SLE) is a member organisation representing the interests of Scottish landowners, farmers and estates. Our vision is for profitable land-based businesses able to contribute to resilient rural economies helping rural Scotland thrive. Our members, some of whom are practising solicitors, are interested in the legal process and system and are grateful for the professionalism of court and tribunal members and staff.

#### **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.**

SLE is not entirely opposed to the amalgamation proposal, but we do have some serious concerns should it go ahead. While we appreciate amalgamation may result in an administrative cost saving, any amalgamated body would still require to be adequately resourced and access to justice be at least as comparable as now. For instance, we would be opposed to increased costs for the parties involved.

We would also impress the need to retain specialisms. It is important that the Land Court's experience in crofting matters for instance is not lost by amalgamation. There is much professional knowledge in the court situation, and we would be keen to avoid any dilution of that. There has been a strong link between small landholding and crofting legislation and the Scottish Land Court over the past century. The retention of a specialist user friendly Court in this area remains important even though there is an increasing move to ADR options. The body of case law on agricultural holdings and crofting have developed these complex areas of legislation and we need an accessible expert body to continue to be able to do so.

Similarly, if the Lands Tribunal was merged into the Land Court it may be that similarities and connections there with other entities in the UK would potentially be lost.

Resourcing and maintenance of expertise in specialist areas (even if they are less regularly litigated) are key. This is as important from the perspective of the Lands Tribunal valuation expertise as it is from the Land Court agricultural and crofting law expertise.

#### **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**

If a decision is made to proceed with amalgamation SLE would on balance favour that the Land Court have the Lands Tribunal functions merged into it. The functions of the Land Court fit suitably to be dealt with as a court and it plays a significant role in providing access to justice. It is our view that the Court is authoritative and well regarded, and it plays a key role in matters relating to agricultural tenancies and crofting. There clearly needs to be faith in the system and operationally this would arguably be impacted if it was to be a tribunal. We also note that courts have wider powers than tribunals.

**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.**

SLE agrees additional functions could be assumed by the new body. However, we recognise that this would mean an increase in workload for the Court and any additional functions would need adequate resourcing, both in terms of staff and members.

We agree with the inclusion of some of proposed extra matters set out in the consultation paper, for instance, the March Dykes Acts, Runrig Lands Act, Division of Commonties Act, right to buy provisions in the Land Reform (Scotland) Acts of 2003 and 2016 and right of responsible access cases. We consider these matters would fit suitably with the knowledge of the Land Court and Land Tribunal and bear similarity to matters which currently arise in terms of agricultural law and crofting more generally.

Specifically we also consider that 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 should be brought within the scope of the Land Court.

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.

**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.**

We believe this approach would make sense should amalgamation not take place and for the reasons set out in the consultation process.

**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.**

While we recognise the cultural and historic importance of Gaelic and its inclusion in government policies, we do have a concern that such a stipulation would present a practical difficulty of limiting the available pool of appointees. It may be that Gaelic could be included 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?**

yes **no**

**Please give your reasons.**

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

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

Currently, if an application to discharge a real burden is unopposed then the Tribunal will automatically grant it – a process which we understand means discharges can be processed in around 8 weeks from the applicant applying. The fact that an objector is on notice that it may be liable for expenses helps ensure that this process is not challenged by vexatious or insignificant objections which would then trigger then need for a hearing, which we fear would have a cost and time impact on both the applicant and the Tribunal.

**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).**

SLE agrees that the present power to award expenses can be an important barrier to appellants seeking justice in rural payment appeals.

Before a rural payment appeal is made to the Land Court, appellants will have been unsuccessful at a Rural Payments and Inspections Division internal review. Frequently

appellants will have incurred professional costs at this stage, such as the cost of instructing a lawyer or for agricultural consultants. In practice, it can be a fairly significant step-up for an appellant to take a case to the Land Court which is time-consuming, stressful and where they risk having to meet the expenses of their own legal advice (if taken). There is then a further risk of having to meet Scottish Government costs, which normally includes instruction of counsel and will undoubtedly be expensive.

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 exercising their right of appeal.

We appreciate that if the power was abolished it could open the door for minor or meritless appeals being made and therefore a cap on expenses may be more appropriate.

We understand that the Land Court has also developed its own particular practice in not awarding expenses in certain crofting applications, but on the whole the general rule in relation to awards of expenses has existed since the early 1800s and recent exceptions have been for particular reasons. It is important that any reform is thoroughly considered and time taken to ensure that it is clear to all parties.

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

We have no further comments.

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