Response ID ANON-KPJS-QA12-D

Submitted to A consultation on the future of the Land Court and the Lands Tribunal
Submitted on 2020-10-19 18:06:21

Questions

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

In favour

Please provide your comments in the box below:
We are generally in favour of the proposal to amalgamate the Scottish Land Court and the Lands Tribunal for Scotland. 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, which involves a complicated range of jurisdictions for the Land Court and Lands Tribunal, with some intertwining of jurisdiction. Although there is limited overlap of jurisdiction at present, the matters dealt with in both fora are related. It is not entirely clear why some matters are dealt with in the Land Court and others in the Lands Tribunal. Creating a larger specialist court with a coherent jurisdiction to deal with a range of matters in the area of land law is sensible. In addition, it would mean that the allocation of new responsibilities and functions to the expanded Land Court in future, whether from the sheriff court or under new legislation, would be more straightforward. The proposed reform should also lead to a more effective sharing and utilisation of expertise and resources. Having the ability to call on experts like surveyors and/or agricultural experts whatever matter comes before the court would be useful on a more than ad hoc basis.

We acknowledge that certain arguments against amalgamation of the Land Court and Lands Tribunal have merit. However, we consider the arguments in favour of change to outweigh the arguments against. We note that there are some aspects of distinct identity of the courts. Yet the fact that the Lands Tribunal website (quoted in the Consultation Paper) recognises that the Lands Tribunal is sometimes confused with the Land Court, and has to seek to explain the difference between them, suggests that the current position is confusing and not wholly satisfactory. The identities of the Land Court and Lands Tribunal have to some extent been forged by a range of specific matters being allocated to them on an intermittent basis in various pieces of legislation. We do not think that the changes would constitute a “threat” to the Land Court’s identity and focus. Indeed, not only will the Land Court retain its existing functions but its status and remit would be expanded and enhanced by the changes.

If it was considered desirable to retain some form of distinction between the two fora after the amalgamation, then perhaps the larger court could be comprised of different “chambers” or “sections” with, for example, a crofting and agricultural section and another section for other land law matters.

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:
The merged body should be a court rather than a tribunal. It is important to respect the Land Court’s history and heritage. Incorporating the Lands Tribunal into the Land Court would achieve this, in a way that incorporating the Land Court into the Lands Tribunal (as was suggested in the 1980s) would not. It is also desirable for the merged body to have the powers and remedies that a court is able to exercise, some of which a tribunal does not have. This is especially important if jurisdiction for various matters is to be transferred from the sheriff court: the new forum should have the same, or at least similar, powers and remedies to those available currently in the sheriff court.

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 would be generally supportive of additional functions being conferred upon the new court as a specialist forum dealing with land matters. This would also lead to more consistent decision-making in this area of law over time. We note that there is reference on page 22 of the Consultation Paper to certain pieces of legislation being “virtually, if not entirely, moribund”. If they are to continue in existence, then the expanded Land Court should deal with relevant matters arising from such legislation. However, if they have fallen into desuetude, then an argument can be made that the legislation should be repealed (as a “tidying up” exercise).

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:
4 (a) We agree. That legal member is likely to have more expertise in the general area (albeit that there is perhaps not an exact overlap of expertise) than, for
example, a sheriff, who will ordinarily be dealing with a wide range of matters far beyond the scope of land law.

4(b) We agree, for the same reasoning as set out above for 4(a).

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:

Whilst we consider there may be some symbolic value in retaining this, we consider the requirement to have a Gaelic speaker as one of the members of the Land Court creates practical issues. Most obviously, it significantly limits the pool of suitable candidates and, as suggested in the Consultation Paper, there is unlikely to be an individual who meets all of the relevant criteria when the present Chair retires. In addition, if the jurisdiction of the Land Court is expanded, the overall proportion of work being dealt with that may involve Gaelic will be reduced accordingly. Therefore, on balance, we consider that it should no longer be necessary to have a Gaelic speaker as one of the members of the Land Court. It could, however, be considered a desirable trait for candidates in future, albeit that this might also have disadvantages by, for example, causing otherwise suitable candidates not to apply and thereby narrow the list of (potential) applicants. Perhaps the ability to speak Gaelic could be used in future to separate otherwise evenly matched candidates. In any event, we agree that the parties’ rights to use Gaelic in the court should continue and, of course, translators should be used to assist the court’s work as much as possible when Gaelic is being used.

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?

Not Answered

Please provide your comments in the box below:

We broadly support a default approach that expenses follow success but this could be modified or limited in certain ways. For example, there could be an expenses cap, similar to the simple procedure (albeit perhaps with different levels of expenses). The Tribunal could also have the power to exercise discretion in some circumstances to lift the cap. Any test for doing this should be laid down. An alternative approach would be to utilise “normal” rules regarding expenses but with the Tribunal having the power to impose a cap in some circumstances and/or on cause shown. Again, clear rules regarding when the Tribunal may exercise discretion would be desirable. Another approach would be to introduce an appropriate and limited fees scale.

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?

Not Answered

Please provide your comments in the box below:

We do not know the answer to this from experience but the fear of paying expenses does represent a barrier regarding litigation generally, i.e. not only in relation to litigation in the Land Court. We think the same approaches discussed in our answer to question 6 should also be considered here.

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

Please use the box below for your comments:

We note that for a number of the questions in this consultation, only an affirmative or a negative can be selected (albeit that comments can be written in the boxes). These two possibilities do not always reflect the nuance that might be necessary when responding to the questions. As such, the inclusion of an intermediate answer would also be desirable.

About you

What is your name?

Name: Dr Alisdair MacPherson and Donna McKenzie Skene, acting as a working group of the Centre for Scots Law at the University of Aberdeen

What is your email address?

Email: alisdair.macpherson@abdn.ac.uk

Are you responding as an individual or an organisation?

Individual

What is your organisation?

Organisation: N/A - see above

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

Publish response with 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?:
Slightly satisfied

Please enter comments here.: