Questions

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

Not Answered

Please provide your comments in the box below:
I swithered about answering this at all, as my own practice as an academic lawyer does not see me interacting with the two fora under discussion on a day-to-day basis and I have no particular complaints about the output of either forum as things stand. This means I am loath to express a view that might be seen as tinkering just for the sake of it.

Further, the historical significance of the Scottish Land Court should not be understated (and, in fairness, it has not been understated in the consultation document).

I am also conscious of the consultation response of the Faculty of Advocates, arguing against any merger.

That being said, if further roles were to be directed to a new forum, and this is coupled with the possibility of simplifying matters for members of the public in terms of knowing where specialist "land" disputes are heard, there is perhaps on balance enough for a vote in favour of this amalgamation.

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:
Given it is to be a successor to the Scottish Land Court, the continuity of "Court" seems to be useful. Plus, it might usefully differentiate the court from (for example) the Housing and Property Chamber of the First-tier Tribunal.

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:

There are some functions that could properly be brought to the single body if it is formed. Arguably, there might be some role reallocation away from sheriff courts even without a new forum, but this response will now focus on the potential for a single body.

The matters noted at paragraph 48 are logical (if niche) examples for the merged body to take on. I am also comfortable with the idea of the various roles under the Land Reform (Scotland) Act 2003 and the Land Reform (Scotland) Act 2016 coming to this body.

Focussing on the access/"right to roam" (and public rights of way - see below) provisions, the section 28 "declarator" scheme to determine excluded land and responsible conduct has struck me as something that was ripe for reform for a little while. In a 2014 paper in the Juridical Review (entitled "Get off that land: non-owner regulation of access to land", at page 287) I bemoaned the scheme for resolving disputes amongst access takers as being one that escalates rapidly from essentially a) sort the problem yourself (with possible local access forum conciliation); b) report anything criminal to the police; then c) go to the sheriff court. Admittedly substituting this new body for the sheriff court would not change that structure and any argument (such that it is) for an intermediate stage of dispute resolution remains, and that would be for another consultation exercise on the topic at hand, but where this change would have an impact is where the substitute forum is able to hear cases comparatively more quickly and cheaply. Accordingly, this particular power might well be reallocated.

Staying with that 2003 Act, it is worth noting that section 28 also deals with public rights of way. Presumably right to roam applications would not be hived off, to leave public rights of way cases to the sheriff court? I would surmise this is not the plan but the consultation document only mentions the right to roam.

Also, what of section 14 appeals against local authority enforcement action: would that stay at the sheriff court?

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:
These seem pragmatic proposals.

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

Not Answered

Please provide your comments in the box below:
My heart says “yes” but my head says “no”. Incidentally, that internal dialogue - much like this consultation response - took place in English rather than Gaelic; if this consultee who has something of a Gaelic heritage is responding in that way that is perhaps indicative of the fact that a provision for Scots Gaelic is not a practical necessity. And yet...

The Gaelic language does not have many trappings of officiality left. Removing one of the few specific references to it chips away at an already much eroded edifice. This is, of course, a point about minority language protection and vitality rather than about the running of a court, and the clarification that proceedings can still be conducted in Gaelic is heartening.

As a “third way”, I wonder if attention might be drawn to section 11 of the Land Reform (Scotland) Act 2016, which exhorts some attention be paid to Scots Gaelic in the recruitment process for Scottish Land Commissioners. This consultee had some input into securing that provision in the 2016 Act as the relevant bill passed through the Scottish Parliament. Granted, recruiting people from across Scottish society for the office of Land Commission will be a very different exercise to recruiting a legal expert for the Land Court (or its successor body), but it would would be less of a bump for the position of Scots Gaelic to go from a “requirement” to “desirable, if possible” as compared to going from “requirement” to “unnecessary”.

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

Please provide your comments in the box below:
On an access to justice basis, I can see the argument for this not to be “as tied”, but I am not strongly of the view that section 103 is horribly skewed against an unsuccessful applicant. There is a place for the principle that “expenses follow success”, although problems can arise from its blanket application or prioritisation over other considerations. Perhaps the “,” in particular, “wording in the section could be deleted to mitigate the position slightly. Please note the consultee sits on the Access to Justice Committee of the Law Society of Scotland and this is a personal view tentatively offered.

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:
The general point about access to justice applies here as well, albeit with the twist of the nature of the dispute under discussion. I have no particular experience of the system so I cannot offer any strong view, but I erred towards “yes” owing to my general understanding and also the likely balance of power between the parties involved in such cases. I have no particular solutions in mind but the options suggested seem viable.

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

Please use the box below for your comments.:
N/A

About you

What is your name?

Name:
Malcolm Combe

What is your email address?

Email:
malcolm.combe@strath.ac.uk

Are you responding as an individual or an organisation?

Individual

What is your organisation?

Organisation:
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.: