Response by the Faculty of Advocates
to
A consultation on the future of the Land Court and the Lands Tribunal

1. Not in favour

   (a) Both the Scottish Land Court (SLC) and the Lands Tribunal for Scotland (LTS) operate well at present (subject to resource limitations), and in our view in the clear majority of cases they deal with matters clearly within their own function. There is no structural incoherence apparent to those that appear before them. Such anomalies that do exist can be dealt with without the changes proposed.
   (b) The resolution of the disputes that come before them requires a different approach; compare, for example compensation cases and a landlord's application to promote a scheme on common grazing land. The former is likely to be concerned with planning, transportation and valuation matters and will primarily if not wholly concern expert evidence. The latter will concern all aspects of crofting, legal and practical, and whilst it may involve some valuation evidence it is likely to involve significant evidence from individual crofters. It is for this reason that the Land Court is regularly peripatetic whilst the Tribunal is not.
   (c) The greater formality that is inherent in a Court is sometimes appropriate in the SLC, but would be out of place in matters the Tribunal deals with. That said, the flexibility of the SLC procedures allows it to adopt procedures appropriate to the circumstances of individual cases.
   (d) The identification of agricultural experts for the SLC and surveyors for the LTS is indicative of a real division of work that each deals with. The bodies of expertise which reside within the two bodies are distinct from each other.
   (e) If the two were joined, we do not believe that a unitary set of Court rules would be appropriate for the quite different types of cases involved. In our view it is almost inevitable that different rules/practices would have to be adopted for different subject matter and that would broadly break down according to the current split between the Court and the Tribunal, so that the change would be purely formal with little other real advantage.
   (f) We do not agree that the list of valuation areas set out in paragraph 22 of the Consultation fully support an argument that there are areas of valuation expertise in the LTS that would assist the SLC. For example, in the valuation of the site of a croft house under Section 15(2) of the 1993 Act, the statutory assumptions in place mean that the land requires to be valued as bare agricultural land. The SLC has its

own expertise in the valuation of agricultural land, and in this case the site will be small and not of any significant value. The SLC is well placed to determine the compensation payable for deterioration or damage to fixed equipment (1993 Act, Section 34). The SLC has considerable experience of determining the rents of agricultural holdings and compensation for disturbance and for improvements. The fixing of rents under Section 13 of the 1991 Act is not a land-valuation issue under the existing legislation in force, and under the amended test to be introduced the test is even more of an agricultural matter. Under the 1991 Act, compensation for disturbance is typically accepted as the statutory minimum of one year's rent, without the tenant having to prove additional loss or expense. If the SLC does require to determine the existence and value of such loss and expense, it is well suited to doing so. The SLC has considerable experience in dealing with crofting-registration disputes where the issues commonly concern whether the land is croft land or not, and crofting boundaries. The SLC's knowledge and experience of crofting boundary disputes in our view means that there is little apparent additional benefit that would arise from merging the LTS with the SLC. Croft boundary disputes are typically concerned with historic questions of where the boundary lies between crofts, or between crofts and common grazings or non-croft land. We are not aware of any general concern that the functioning of the SLC in determining such disputes has been harmed by the absence of any skills it lacks but which are in the hands of the LTS.

(g) In relation to paragraph 27 of the Consultation, and those situations where a valuer is appointed by the SLC, but an appeal is available to the LTS in respect of the valuation which is made, in our view the distinction between the two bodies provides a vital procedural safeguard. We believe that if the Land Court were to appoint a valuer, but that a party wished to dispute the valuation, the body determining the dispute over the valuation should not be same as the appointing body.

(h) We echo the concern that it would be a clear backward step if the SLC were to be amalgamated into another body, and presume that is quite unlikely. But likewise, given the association of the SLC with crofting in particular, we consider it would not send the correct message to incorporate the Lands Tribunal within it.

(i) We consider that many of the proposed advantages could be achieved by the sharing of administrative resources between the Land Court and the Lands Tribunal, which share the same premises, without any reform of the existing structures.

(j) We are concerned that any amalgamation could have an adverse effect on delays currently experienced due to workload. Any additional available resources would be better directed to alleviating such pressures and to improving access to the SLC and LTS by means of greater use of technology.

2. Court

For the reasons set out above and in the consultation paper we consider it would be a retrograde step to lose the Land Court which would send the wrong signals to the communities it effectively serves. In the event of an amalgamation, the merged body should be a Court rather than a Tribunal.

3. No (on balance). We have three further points to add

(i) We agree that the matters referred to at paragraph 48 of the Consultation Paper should be transferred to the Land Court in its existing form.

(ii) We see benefit in the transfer of right-to-buy cases to an expanded Land Court; the present system of summary application in the Sheriff Court lacks clarity in terms of procedure, and the mechanism of appeal is uncertain.

(iii) We would, however, in particular resist the transfer of wind-farm applications or applications for development on green belt land to the SLC, as suggested at paragraph 46 of the Consultation Paper. We consider that it would be inconsistent to remove such applications from the planning system. They are more appropriately dealt with by local planning authorities with a right of appeal to the Scottish Ministers to consider through the DPEA and its reporters, who have expertise and considerable experience in assessing and balancing the impact on the environment and making judgments on the competing issues. Further, assumption of wind-farm applications by the SLC would result in a division of planning appeals as between the Scottish Ministers and the SLC which seems both unnecessary and undesirable and would significantly increase the workload of the SLC (or the LTS).

4. a Agree
b Agree

These are obviously sensible provisions to deal with situations that are rare but do arise.

5. Whilst we consider it advantageous (even beneficial) for there to be a member of the Land Court who is a Gaelic speaker, we agree that it should not be a compulsory requirement. We agree that such a requirement would, in future, exclude from appointment individuals who are otherwise highly qualified and eminently suitable. Such a disadvantage would not, in our view, be outweighed by the advantage of there being a Gaelic speaking member. Should a party to proceedings before the Land Court express a preference that proceedings take place in Gaelic, an interpreter might be employed.

6. We support the general principle that expenses should follow success. We believe that it would be unfair for parties in the Sheriff Court to be liable for expenses in an action for interdict to prevent breach of a title condition, but for the same parties not to be liable for expenses in a dispute over removal or variation of a title condition. Treating similar situations differently on a topic-by-topic basis risks creating unfairness and anomalies. We were divided in our view as to whether the general principle ought to be subject to modification, for example by expenses-capping, such as happens in environmental law cases. However, that example arises from obligations in the Aarhus Convention 1998 in relation to the rights of the public in environmental law matters. We are of the view that similar issues as are identified by the Consultation Paper are apparent in other judicial fora, and that it would be more appropriate for these matters to be considered as a matter of principle on a wider basis.

7. This question raises a similar point to Question 6, but in this particular case the distinguishing feature is that the Respondent is always the Scottish Government which (as the Consultation Paper notes) has access to significant resources in order to defend its position. There is therefore very likely to be an inherent inequality of arms in the system. We accept that there is anecdotal evidence that there are likely to be disputes where the complexities of the issues and the risks of being found liable for expenses are both matters which discourage an appeal being brought to the Land Court. We note that removing any risk of being found liable for expenses increases the risk of an increase in unmeritorious appeals, which creates additional burdens on the Court's resources. Potential solutions may either be for applications for expenses-capping to be introduced (possibly related to the value of the disputed subsidy) or the creation of an express discretion to limit awards of expenses against a party in appropriate cases, where it appears to the Court that the interests of justice so require. If such a change were to be introduced we believe that there ought to be further consultation on the appropriate form it should take and the tests that should be applied. Again, however, similar issues arise in other courts and tribunals, and if practice with regard to expenses is to be consistently addressed on the basis of general principles, then that should be in the context of civil litigation generally.