

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Tied Pubs (Scotland) Bill

Policy Memorandum

Introduction

1. As required under Rule 9.3.3A of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Tied Pubs (Scotland) Bill introduced in the Scottish Parliament on 3 February 2020. It has been prepared by the Parliament's Non-Government Bills Unit on behalf of Neil Bibby MSP, the member who introduced the Bill.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the member who introduced the Bill (SP Bill 62–LC);
 - a Financial Memorandum (SP Bill 62–FM);
 - Explanatory Notes (SP Bill 62–EN).

Policy objectives of the bill

3. The aim of the Tied Pubs (Scotland) Bill (“the Bill”) is to improve the position of tied pub tenants by requiring the establishment of a Scottish Pubs Code to govern the relationship between pub-owning businesses and their tied tenants and ensuring the appointment of a Scottish Pubs Code Adjudicator (SPCA) to apply the code.
4. The policy objectives of the Bill are broadly similar to those of Part 4 of the Small Business, Enterprise and Employment Act 2015¹ (“the 2015 Act”) passed by the UK Parliament. That Act, and its subsequent

¹ The Small Business, Enterprise and Employment Act 2015. Part 4. Available at: <http://www.legislation.gov.uk/ukpga/2015/26/part/4/enacted>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

regulations, ensures that some tied pub tenants in England and Wales (those who have tenancies with pub-owning businesses that own 500 or more tied pubs) are covered by a statutory Pubs Code, which is governed by a Pubs Code Adjudicator (PCA). A further objective of the Bill is to ensure that Scottish tied pub tenants have at least the same protections and opportunities as are now enjoyed by some tied pub tenants in England and Wales.

5. The fundamental aims are set out on the face of the Bill. Section 3 states that the Scottish Pubs Code must be consistent with three principles (the first two of which underpinned the 2015 Act) and that these must also be applied consistently by the SPCA when making decisions. The three principles are—

- that there is fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;
- that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie; and
- that the tied agreements offer a fair share of risk and reward to both parties.

6. Like the 2015 Act, as well as requiring the introduction of a statutory code, and the appointment of an adjudicator to apply that code, the Bill also requires that the code includes provision to give tied tenants the ability to opt out of tied arrangements if they wish, and instead pay a fair and reasonable market rent for their pub premises only. Tenants who take up this “market-rent-only” (MRO) option would be free to source and purchase products as they see fit and to have the flexibility they need to react to changes which affect their business in a competitive and often crowded market.

7. Two further objectives of the Bill are to—

- adapt the model provided by the 2015 Act according to Scottish circumstances; and to
- avoid problems experienced in implementing the 2015 Act in England and Wales.

8. The Bill therefore used the 2015 Act as its starting point, largely replicating the policy of provisions appropriate for delivering shared policy

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

aims in Scotland but amending that Act where a different approach and/or outcome was desired or considered appropriate.

9. The most significant differences, compared to the 2015 Act, are that all tied pub tenants in Scotland will be covered (rather than only those who have tenancies with larger pub-owning businesses, as in the 2015 Act), and that there will be an automatic right to exercise the market-rent-only option (rather than it being subject to various conditions and trigger points, as in the 2015 Act).

10. As well as setting out the policy objectives of the Bill which are shared with those of the 2015 Act, this Memorandum also sets out where, and why, the Bill takes a notably different approach to that taken in the 2015 Act.

Background

Pubs in the UK

Numbers

11. The number of pubs in the UK has been declining for many years, from 60,800 in 2000 to 48,350 in 2017 (according to the British Beer and Pub Association² (BBPA)) or from 52,500 in 2001 to 38,815 in 2018 (according to the Office of National Statistics³ (ONS)). The ONS statistics show that the number of pubs in Scotland has fallen from 3,595 in 2001 to 2,840 in 2018. However, the Scottish Beer and Pub Association (SBPA) website⁴ states that there are 4,189 pubs in Scotland currently. A report

² British Beer and Pub Association, Pub numbers statistics. Available at: <https://beerandpub.com/statistics/pub-numbers/>.

³ Office of National Statistics (26 November 2018). Economies of ale: small pubs close as chains focus on big bars. Available at: <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/articles/economiesofalesmallpubscloseaschainsfocusonbigbars/2018-11-26>.

⁴ Scottish Beer and Pub Association. Pubs in Scotland. Available at: <https://www.scottishbeerandpub.com/statistics/scottish-pubs/>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

produced for the Campaign for Real Ale (CAMRA) in 2014 includes a figure of 4,663 pubs in Scotland^{5,6}.

Economics

12. Despite the decline in pub numbers, the ONS report and data also suggests that turnover and employment in the pub sector in the UK, and specifically in Scotland, has remained steady. This suggests a trend towards a smaller number of larger public houses, sustaining the overall level of employment.

13. In terms of the economic contribution of the sector, the BBPA states on its website that the gross value added to the UK economy by pubs is £22.9 billion annually, with Scotland's contribution being £1.7 billion, and that the sector raises £12.7 billion in UK tax revenues each year, of which £947 million is generated in Scotland. The website states that around 895,000 people are employed in the brewing and pub industries in the UK (74% of them directly employed), and they earn £11.1 billion in wages each year (of which 58% is earned by those directly employed). The equivalent figures for Scotland are 67,000 employed (77% directly), earning £783 million annually (of which 63% is earned by those directly employed).

Models of ownership and management

14. There are several different models for owning and managing pubs in the UK—

- free houses – pubs that are owned/leased and managed by individuals who have freedom to decide what products to buy, stock and sell;

⁵ CGA Strategy for CAMRA (September 2014). Scottish Tied Pub Licensee Survey: Methodology & Key Findings Overview. Available at:(the link will open up a folder from which a PDF can be accessed)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269640/Interest_groups_trade_bodies_and_other_organisations.zip (response 548).

⁶ The differences between ONS and BBPA/SBPA data is understood to be due to a difference in terminology, i.e. the BBPA/SBPA having a broader definition of what constitutes a pub which includes some hotels (pubs with rooms), inns and restaurants. However, the data trends are similar.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

- tied – pubs that are owned by a pub company or brewery and are rented to individuals who are required to buy some or all of their products from that company/brewery;
- managed – pubs that are owned by a pub company or brewery and employ a manager and staff to run the pub;
- free of tie tenant/lease – pubs owned by a pub company or brewery who rents the pub to an individual, but which have no tie i.e. no requirement to buy specific products from the company/brewery.

15. According to SBPA data, 43% of pubs in the UK are free houses. However, this proportion is significantly higher in Scotland, where 64% of all pubs are free houses.

Tied pubs

What are tied pubs?

16. Tied pubs are so called because there is a contract between the owner (pub-owning businesses) and the tenant which means that the tenant is obliged to purchase at least some of their beer, and sometimes other products too, from the owner. The tied agreement operates on the basis that the rent paid by the tenant consists of “dry” and “wet” elements. The dry element is the rent for the pub premises itself (sometimes including insurance) and, in theory at least, this is often set at a lower rate than market value, to take account of the additional wet rent, which is the price paid for the beer and other products which must be purchased from the pub company at a higher than normal wholesale cost.

17. Perceived advantages of the tied model include that: it makes it easier for some people to enter the industry (renting rather than buying a pub); it makes economies of scale possible (tenants paying less for fixtures and fittings); and that it enables some tenants to benefit from additional extras to help drive up business, such as satellite television or, more recently, Wi-Fi, at reduced, or even no, cost.

Numbers

18. According to SBPA data, while 39% of UK pubs operate on a tied basis, the sector in Scotland is markedly different, with only 17% of Scottish pubs having a tied arrangement.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

19. It is estimated that there are around 20,000 tied pubs in England and Wales⁷, and the latest annual report⁸ from the PCA states that 9,600 of those pubs are covered by the code.

20. A 2014 survey commissioned by the Campaign for Real Ale (CAMRA) stated that there were 1,038 tied pubs in Scotland⁹. The SBPA website¹⁰ gives a figure of 910 “tenanted and leased” pubs in Scotland in 2018 (down from 1,183 in 2010). In preparing this document, enquires were made to the SBPA to establish an updated estimate of the number of tied pubs in Scotland. The estimate given (see below) was 732 tied pubs. However, the SBPA acknowledges that there are other tied pubs in Scotland owned by businesses which are not SBPA members, although it believes these numbers to be low. It therefore seems reasonable to estimate the number of tied pubs in Scotland at 750.

21. There is no definitive published list of businesses which own tied pubs in Scotland. The SBPA provided the following information on request in March 2019. Those marked with an asterisk (*) are covered by the England and Wales pub code legislation and those marked with a

⁷ UK Government Department for Business, Innovation and Skills, Pubs Statutory Code and Adjudicator – Final Impact Assessment, January 2015 p3 (this cites statistics published by the British Beer and Pub Association). Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf.

⁸ The Pubs Code Adjudicator Annual Report and Accounts 01 April 2018 to 31 March 2019. Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/819009/PCA-Annual_Report_2018-19_WEBSITE.pdf.

⁹ Statistics from a 2014 survey commissioned by the Campaign for Real Ale (CAMRA) and carried out by CGA Strategy:(the link will open up a folder from which a PDF can be accessed)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269640/Interest_groups_trade_bodies_and_other_organisations.zip
(response 548)

¹⁰ Scottish Beer and Pub Association: Pubs in Scotland facts and figures. Available at: <https://www.scottishbeerandpub.com/statistics/scottish-pubs/>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

circumflex (^) are signatories of the voluntary code in Scotland. The SBPA acknowledged that there are some other, small, pub-owning businesses that are not members of the SBPA and that they do not know how many tied pubs those businesses may own, although the numbers are believed to be low. Bruce Taverns and Old Town Pub Co are two examples.

Pub-owning business	No. of pubs in Scotland	No. of tied pubs in Scotland
Punch Taverns*^	40	34
Belhaven/Greene King/Spirit Leased*^	128	124
Hawthorn Leisure^	92	71
Star Pubs & Bars/Heineken*^	255	250
G1 Group/Iona Pub Partnership	100	90
Trust Inns^	47	45
Caledonian Heritable#	64	30
Rosemount~	44	44
Kingdom Taverns~	29	29
Admiral Taverns*^	15	15
Total	814	732

#Caledonian Heritable includes a number of businesses operating across industries. It does not consider itself a ‘pub company’

~Not current SBPA members – estimates based on data available on company websites.

Problems with, and inquiries into, the tied pub model

22. Due to concerns regarding lack of competition and dominance by certain brewers (such as Bass, Whitbread and Courage), the Supply of Beer (Tied Estate) Order 1989 and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 (commonly known as the Beer Orders), were made by the UK Government. It is commonly agreed in the sector that the Beer Orders dramatically changed the industry. The Orders restricted the number of tied pubs a brewery could own and made several other changes, including limiting the tie, where it existed, to beer only, and ensuring “guest beer” rights in tied premises. The Orders contributed significantly to the creation of the pub-owning businesses which exist today, as the dominant brewers at the time sold off many pubs.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

23. The Beer Orders were revoked in 2003, but by this time the landscape of the industry had completely changed. However, the pub-owning businesses created as a result of the Beer Orders soon came under scrutiny due to concerns regarding competitiveness, fairness and transparency.

24. Following the revocation of the Beer Orders, the UK Parliament saw many years of investigation and inquiry into the tied pub sector, including four select committee inquiries (in 2004¹¹, 2009¹², 2010¹³ and 2011¹⁴). Those years of inquiry established a body of evidence from tenants which clearly identified that there were significant concerns and problems with the tied pub model and the relationship between large pub businesses and their tenants.

25. During those inquiries, tenants reported issues¹⁵ including—

¹¹ House of Commons Trade and Industry Committee (2004). Pub Companies, Second Report of Session 2004-05. Available at: <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/128/128i.pdf>.

¹² House of Commons Business and Enterprise Committee (2009). Pub Companies, Third Special Report of Session 2008–09. Available at: <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmberr/798/798.pdf>.

¹³ House of Commons Business, Innovation and Skills Committee (2010). Pub companies: follow-up, Fifth Report of Session 2009–10. Available at: <http://www.publications.parliament.uk/pa/cm200910/cmselect/cmbis/138/138.pdf>.

¹⁴ House of Commons Business, Innovation and Skills Committee (2011). Pub Companies, Tenth Report of Session 2010–12. Volumes 1 and 2 available at: <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/1369/1369i.pdf> and <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmbis/1369/1369vw.pdf>.

¹⁵ UK Government (2015). Pub companies and tenants: Pubs Code and adjudicator. Final Stage Impact Assessment. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

- delays in opening rent review negotiations;
- a lack of transparency in those negotiations and in other matters;
- a failure to carry out agreed repairs;
- ignoring verbal agreements;
- harassment of tenants when they were vulnerable through bereavement;
- high cost of tied products;
- increased levels of rent; and
- a lack of compliance with other agreements and obligations.

26. Many of these problems were believed to have occurred due to an inherent inequality between the bargaining power of landlords and tenants.

27. The evidence also suggested that the balance of the tied pub arrangements has shifted over the years, and that the cost of the dry rent was no longer sufficiently reduced (if at all – there were reports of some tied rents being higher than those on non-tied premises) to negate the impacts of the wet rent, i.e. having to buy products at inflated prices. The reported result of this was that many of those operating in the tied system were facing much higher costs than their non-tied competitors, and were struggling to make a living.

28. According to research published in 2013¹⁶ by CAMRA, tied pubs often pay well over 50% more for products than the wholesale price, with examples given of 77% more for a keg of Fosters, 67% more for a keg of San Miguel and 55% more for a keg of Heineken. The research also showed that tied licensees are an average of £13,000 a year worse off than

¹⁶ Pub Companies and Tenants: A Government Consultation: Response from CAMRA, the Campaign for Real Ale, June 2013 (including CGA Strategy Licensee Survey Report). Available at: (the link will open up a folder from which a PDF can be accessed)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269640/Interest_groups_trade_bodies_and_other_organisations.zip.
(response 548)

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

non-tied licensees. Drawing on this research, the CAMRA submission to the UK Government's consultation on the proposals which ended up in the 2015 Act gives clear and persuasive evidence of the problems being faced by tenants. This includes several case studies which highlight the challenges tenants are faced with because of the tied arrangement.

Legislation in England and Wales

29. The years of inquiry at Westminster established a robust evidence base for change and the UK Government announced in 2014 that it would legislate to establish a statutory code and adjudicator. This was delivered in the Small Business, Enterprise and Employment Act 2015¹⁷. This contains, in Part 4, the requirement for a Pubs Code for tied owners and tenants, and the establishment of an adjudicator to apply the Code. The Act limited the application of code and adjudicator to pub-owning businesses owning 500 or more tied pubs in England and Wales.

30. The case for legislative intervention was summarised in the UK Government's Impact Assessment for Part 4 of the 2015 Act. This stated that—

“Government intervention is needed to ensure the fair treatment of tenants of tied pubs by large pub companies. Evidence of a problem has come from four Select Committee investigations over the last decade and a steady and continuous stream of correspondence from tenants. These poor outcomes for tenants are driven by features of the market and exacerbated by the nature of the tie between pub companies and tenants. In particular the market is characterised by asymmetric information, imbalance of bargaining power, behavioural biases and lock-in through the tie. Given the evidence, particularly from the Select Committee reports, Ministers believe there is reason to intervene on the basis of fairness to rebalance outcomes.”¹⁸

¹⁷ The Small Business, Enterprise and Employment Act 2015. Available at: <http://www.legislation.gov.uk/ukpga/2015/26/enacted>.

¹⁸ UK Government (2015). Pub companies and tenants: Pubs Code and adjudicator. Final Stage Impact Assessment. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/f

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

31. That Impact Assessment also states that “a self-regulatory approach has been tried and was found wanting by the Select Committee in 2011 and the Government in 2012.”.

32. A key provision of the 2015 Act, which was not included in the Bill as introduced, was the introduction of a Market Rent Only (MRO) option for tenants of tied pubs owned by large businesses. This provision was added to the Bill by an amendment brought forward by Greg Mulholland MP. It gives tenants the ability, in certain circumstances, to opt out of the contractual obligation to buy certain products from the owner. Instead, tenants can opt to pay a market value dry rent only, either at a level agreed with the owner or set by an independent assessor, and source their own products as other tenants and owners do, thereby ending the tie, and the wet element of their rental agreement.

33. The 2015 Act (and the subsequent 2016 regulations which set out the code in full) sets out the circumstances where tenants can request a MRO option, including when there is a significant increase in the price of a product or service; when a rent agreement or contract is due for renewal; or at the point of a rent review or rent assessment. There are provisions for the MRO right to be set aside in circumstances where a pub company intends to invest significantly in the pub.

34. As stated above, the Pubs Code in England and Wales only applies to those pub businesses which own 500 or more tied pubs in England and Wales. The six pub-owning businesses currently affected by the 2015 Act are: Greene King; Marstons; Star Pubs and Bars (Heineken); Admiral Taverns; Punch Taverns; and Enterprise Inns. Two of these pub-owning businesses, Marstons and Enterprise Inns, appear to have no tied pubs in Scotland.

35. The detail of the Pubs Code and the associated fees, costs and financial penalties were left to regulations. Following a consultation process, the final regulations containing the code¹⁹ were approved by the

[ile/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf](https://www.legislation.gov.uk/uksi/2016/790/contents/made).

¹⁹ The Pubs Code etc. Regulations 2016. Available at: <http://www.legislation.gov.uk/uksi/2016/790/contents/made>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

UK Parliament and came into force on 21 July 2016²⁰. On 19 August 2016 an additional consultation was issued (closing on 30 September 2016) seeking views on draft guidance explaining how the PCA will investigate and enforce breaches of the code²¹. The UK Government also published several fact sheets²² summarising the main parts of the Code, and the House of Commons Library published two information notes²³ on the background to, and passage of, the legislation.

36. The 2015 Act requires the UK Government to review the code, and the first review covers the period from the introduction of the code up to 31 March 2019 (no report had been published at time of publication of this document). On 30 April 2019 the UK Government published a consultation document, seeking views to inform the review, titled: “Pubs Code and Pubs Code Adjudicator: statutory review²⁴”. The closing date for the consultation was 22 July 2019, and the document states—

“The government consultation principles published by the Cabinet Office, which we are following for this part of the review, state that responses to consultations should be published within 12 weeks of the consultation closing. The Government aims to publish a

²⁰ UK Government press release (21 July 2016). Available at: <https://www.gov.uk/government/news/pubs-code-comes-into-force>.

²¹ Open consultation: Pubs Code Adjudicator: investigation and enforcement - draft guidance. Available at: <https://www.gov.uk/government/consultations/pubs-code-adjudicator-investigation-and-enforcement-draft-guidance>.

²² UK Government Pubs Code factsheets (21 July 2016). Available at: <https://www.gov.uk/government/collections/pubs-code-factsheets>.

²³ House of Commons Library (13 May 2015). Pub companies, pub tenants & pub closures: background history (up to 2014): <http://researchbriefings.files.parliament.uk/documents/SN06740/SN06740.pdf>; and

Pub companies, pub tenants & pub closures: introducing statutory regulation (2014-15): <http://researchbriefings.files.parliament.uk/documents/SN07074/SN07074.pdf>.

²⁴ UK Government (30 April 2019). Pubs Code and Pubs Code Adjudicator: statutory review. Available at: <https://www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-statutory-review>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

report of the review, which will also be its response to the views submitted, as soon as practicable within that timescale.”

37. The consultation document confirms that the UK Government’s report will set out—

- the extent to which, in the Secretary of State’s opinion, the Pubs Code is consistent with the principles set out in section 42(3);
- any revisions of the Pubs Code which, in the Secretary of State’s opinion, would enable the Pubs Code to reflect more fully those principles;
- how effective the PCA has been in enforcing the Pubs Code;
- whether it would be desirable to amend or replace the regulations setting out fees, costs and financial penalties under sections 51(2) or (7) or 58(6); and
- whether the Secretary of State intends to give guidance to the PCA under section 65 or if the Secretary of State intends to use the powers in section 66 (abolition of the Adjudicator).

Pubs Code and PCA in operation

38. On 2 May 2016, Paul Newby²⁵ took up the role of PCA for England and Wales, ahead of the code coming into force on 21 July 2016. On 24 October 2017, Fiona Dickie was appointed Deputy PCA.

39. The PCA has published a wide range of material on its website²⁶ since it began to operate, including: information, advice and clarification notes; reports of meetings held; consultations; annual reports (including accounts); and, from late 2018, outcomes of arbitrations undertaken (including summary data). The PCA has also (July 2018) published the first compliance reports made by the six pub-owning businesses covered by the

²⁵ On 22 August 22 2019 Paul Newby announced that he will not be seeking reappointment and will leave office at the end of his current term in May 2020.

²⁶ Pubs Code Adjudicator for England and Wales. Details at: <https://www.gov.uk/government/organisations/pubs-code-adjudicator>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

code, and required by the 2015 Act, as well as a commentary on the contents of those reports.

Reported problems with the operation of the code and adjudicator

40. Since the establishment of the Pubs Code and PCA for England and Wales there have been several reported problems with the implementation and effectiveness of the legislation.

41. In 2017-18, the House of Commons Business, Energy and Industrial Strategy Committee held an inquiry to review the operation of the Code and the performance of the PCA. The inquiry concluded with the Committee writing to the Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy²⁷ to express concerns that, two years after the code had come into force, it had not delivered the level playing field between tenants and pub-owning businesses that was intended by the UK Parliament. The letter highlighted allegations and concerns that pub-owning businesses were thwarting the legislation and indicated that the Committee would support further legislative change if there were no immediate signs of progress. The Minister for Energy and Industry replied on 9 July 2018²⁸ acknowledging the Committee's concerns, setting out some areas where progress was being made, and confirmed that the first review of the code required by the 2015 Act will cover the period up to 31 March 2019, and set out some information relating to the review.

²⁷ Letter from Rachel Reeves MP, Chair of the House of Commons' Business, Energy and Industrial Strategy Committee, to the UK Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy (3 July 2018). Available at: <https://www.parliament.uk/documents/commons-committees/business-energy-and-industrial-strategy/Correspondence/Letter-from-Chair-to-Richard-Harrington-Pubs-code-adjudicator-3-July-2018.pdf>.

²⁸ Letter from the UK Minister for Energy and Industry to Rachel Reeves MP, Chair of the House of Commons' Business, Energy and Industrial Strategy Committee (9 July 2018) Available at: <https://www.parliament.uk/documents/commons-committees/business-energy-and-industrial-strategy/Correspondence/Letter-to-Chair-from-Richard-Harrington-MP-on-Pubs-Code-Adjudicator-9-July-2018.pdf>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

42. On 24 January 2018 a House of Commons Westminster Hall debate²⁹ was held on the Pubs Code. The debate was led by Adrian Bailey MP and highlighted a number of concerns about the ineffective operation of the code and the dissatisfaction of many tied tenants. The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, Richard Harrington MP, took part in the debate and acknowledged that there were problems with the implementation of the code.

43. One key strand of criticism relates to the PCA, including—

- questions regarding his impartiality and suitability given a previous connection to pub-owning businesses; and
- too many decisions being taken in private leading to a lack of transparency.

44. Another other key strand related to the MRO process, with issues including—

- pub-owning businesses using various strategies to make MROs unattractive or to thwart them completely;
- pub-owning businesses are seeking brand new tenancy agreement for MROs rather than using deeds of variation. Those new tenancies reportedly include new, unfavourable, terms, such as rent in advance, large deposits, unreasonable, unexpected and novel improvements of dilapidation requirements;
- the 21-day period from trigger event to make an MRO being too short for tenants;
- the MRO process being too complex which means tenants need expensive legal support; and

²⁹ UK Parliamentary research briefing (24 January 2018). House of Commons Westminster Hall debate. Available at: <http://researchbriefings.files.parliament.uk/documents/CDP-2018-0019/CDP-2018-0019.pdf>. House of Commons Westminster Hall debate (24 January 2018). Transcript available at: <https://hansard.parliament.uk/commons/2018-01-24/debates/18012432000001/PubsCode2016>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

- the arbitration process being far too slow, easily disrupted and delayed.

45. Some commentators (including some MPs) called for two key changes to the Code to address some of these issues—

- i) amending the MRO definition to make it clear that the tenant has a right to pay an independently assessed market rent, and only that rent, to the pub-owning business; and
- ii) stating that a deed of variation must be preferred in MRO cases (rather than brand new tenancy agreements being demanded) with the only changes being the severing of tied terms and rent being independently assessed.

The need for a statutory code and adjudicator in Scotland

46. As a result of the 2015 Act and the subsequent establishment of a tied pubs code and adjudicator for England and Wales, tied pub tenants in Scotland do not have equivalent statutory rights and protections as their counterparts in England and Wales. This also means that pub-owning businesses which operate in Scotland as well as England and Wales are operating in very different statutory environments. The Bill would therefore help to ensure that tied tenants in Scotland are no worse off than their colleagues in England and Wales, and have at least the same, if not further improved, rights and protections as the 2015 Act affords.

47. In August 2014, CAMRA commissioned CGA Strategy to survey³⁰ tied pub tenants in Scotland to better understand the impact of the tied tenant system. A random sample base of 200 leased/tenanted pubs was polled (an estimated 20-25% of all tied pub tenants in Scotland) covering outlets from across the country. CAMRA believes that unfair business practices in the tied pub sector in Scotland have resulted in higher prices

³⁰ CGA Strategy (September 2014). Scottish Tied Pub Licensee Survey: Methodology & Key Findings Overview: Report produced by CGA Strategy for CAMRA. Available at: (the link will open up a folder from which a PDF can be accessed)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/269640/Interest_groups_trade_bodies_and_other_organisations.zip
(response 548)

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

for pub-goers, lower investment in the sector and ultimately a higher rate of pub closures.³¹

48. The results of the Scottish survey included that—

- 96.5% of all respondents believed that paying a reduced rent did not fully take into account the higher prices they paid for their tied products;
- only 3% had a positive sentiment about the tie agreement (with 63.5% negative and 33.5% neutral);
- 99% of respondents felt that the Scottish Government should act to ensure the protections afforded to tied licensees in England and Wales also applied in Scotland;
- only 4% of tenants had an annual income of over £30,000, with 31.5% having an income of between £15,000 and £30,000, 54% having an income of between £10,000 and £15,000, and 10.5% having an income of £10,000 or less;
- 74% of respondents considered themselves worse off as a result of their tie, with only 1.5% considering themselves better off (the remainder were either unsure or considered themselves neither better nor worse off).

49. The results of this survey were echoed in the member's own consultation on his proposed bill, the details of which are set out below.

Voluntary Scottish pubs code of practice

50. On 21 July 2016, in response to the Pubs Code coming into force in England and Wales, the SBPA published a voluntary code of practice for tied pubs in Scotland³². The code replaced the UK Industry Framework

³¹ Campaign for Real Ale (CAMRA). News Release. Available at: <http://www.protectourpubs.scot/wp-content/uploads/bsk-pdf-manager/2017/08/Response-242-ID-61799434-Campaign-for-Real-Ale.pdf>.

³² Scottish Beer and Pub Association (2016). Pub Sector – Scotland Code of Practice. Available at: <http://www.thepubgoverningbody.co.uk/wp-content/uploads/2016/07/Code-of-Practice-Scotland.pdf>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Code version 6³³ and previous individual company codes. The Code is supervised by the Pub Governing Body³⁴. Admiral Taverns Limited, Belhaven/Greene King plc, Hawthorn Leisure Limited, Punch Taverns plc, Star Pubs & Bars/HEINEKEN UK Limited and Trust Inns Limited have all agreed to abide by the code, which means six of the ten businesses understood to be operating in Scotland have signed up to the code.

51. The voluntary code sets out industry requirements relating to: letting of premises; rent reviews; agreement renewal; interaction with landlord; operation of amusements; use of flow monitoring equipment; complaints procedure; and surrender of tenancies.

52. Neil Bibby, while acknowledging the voluntary code as a step in the right direction, believes that it does not remove the need for Scotland to have a statutory pubs code and pubs code adjudicator, given that—

- the code of practice is voluntary, not compulsory;
- only six of the ten pub businesses with tied pubs in Scotland have signed up to abide by the code;
- the code does not go as far as the pubs code in England and Wales and does not contain the crucial MRO option for tenants;
- prior to the introduction of the statutory code and adjudicator in England and Wales in 2016 there was a similar voluntary code, revised and amended several times, and which was deemed to not be sufficiently effective³⁵, hence the introduction of statutory measures; and
- the code is regulated by industry representatives rather than by an independent person/body outside of the industry.

³³ British Beer and Pub Association. UK Pub Industry Framework Code, Sixth Edition (2013). Available at: <http://flva.co.uk/wp-content/themes/flva/pdf/BBPA-V6-feb-13.pdf>

³⁴ Details available at: www.thepubgoverningbody.co.uk.

³⁵ Pub companies, pub tenants & pub closures: background history (up to 2014). Operation of the voluntary code, pages 6-12. Available at: <http://researchbriefings.files.parliament.uk/documents/SN06740/SN06740.pdf>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Scottish Government commissioned research

53. On 20 May 2015 the Scottish Government announced it would commission research into tied pubs, seemingly as a reaction to the 2015 Act. The then Business Minister, Fergus Ewing MSP, stated in the announcement—

“Before Scottish Ministers can commit to the legislative route it is important to carry out this research – which will help us come to a view. We will then be in a better position to consider whether legislation should be introduced and who it should apply to – which may be different to that identified in England and Wales where the make-up of the sector is very different to Scotland.”³⁶

54. On 6 December 2016 that research³⁷ was published and concluded “that the evidence collected did not suggest that any part of the pub sector in Scotland was unfairly disadvantaged”. The research recommended that “further dialogue between the relevant trade bodies, government, and other interested parties, should continue before making any changes to legislation.” The then Minister, Paul Wheelhouse MSP, stated—

“The Scottish Government will now engage with pub sector interests to discuss the findings of this research and how we can work together to create a more successful sector moving forward.”³⁸

55. Neil Bibby believes that no meaningful and effective action has taken place since that time to address the challenges being faced by the tied pub sector in Scotland, as documented in this Memorandum.

³⁶ Scottish Government (20 May 2015). News release. Available at: <https://news.gov.scot/news/minister-announces-study-on-pub-tenancies>.

³⁷ Scottish Government (2016). Research on the Pub Sector in Scotland - Phase 1 ‘Scoping Study’. Available at: <http://www.gov.scot/Resource/0051/00511075.pdf>.

³⁸ Scottish Parliament. Written answer 6 December 2016. S5W-05341. Available at: [https://www.parliament.scot/S5ChamberOffice/WA20161206_\(2\).pdf](https://www.parliament.scot/S5ChamberOffice/WA20161206_(2).pdf).

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Shared policies with the 2015 act

56. The Bill shares many of its central policies with the 2015 Act. These include the requirement for a tied pubs code and the establishment of an adjudicator to govern that code. It also includes the requirement for the code and adjudicator to be funded via a levy on pub-owning businesses. This reflects Neil Bibby's view that, as is the case in England and Wales, it is reasonable and proportionate for pub-owning businesses to pay for the necessary regulation of their sector.

57. As is the case with the 2015 Act, the adjudicator can decide what proportion of the levy will be imposed on each pub-owning business based on the expenses they incur dealing with relevant matters. This means that a pub-owning business that is regularly accused of breaching the code is likely to be charged more than a business that maintains good relations with its tenants and does not generate work for the adjudicator. In turn, this gives pub-owning businesses a financial incentive to maintain or enhance relations with tenants and protects those that abide by the code and have good tenant relations from unfairly paying for the bad behaviour of others.

58. Also, as is the case with the 2015 Act, the detail of the code (within the parameters set by the Bill) is left to secondary legislation, to allow for further consultation and scrutiny, once the parent legislation has been agreed.

59. As is the case with the 2015 Act, the Bill also sets out—

- underpinning regulatory principles;
- the functions and powers of the adjudicator in investigating, reporting, and taking action on, alleged breaches of the code;
- a process for arbitrating on pubs code disputes; and
- a requirement for the pubs code to include an option for tied tenants to become free of the tie and pay only the market rent for the premises.

60. These provisions are all central to the Bill's objectives of improving the position of tied tenants and redressing the balance of power between tied tenants and pub-owning businesses.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Policy divergence from the 2015 Act

61. The Bill takes a different direction in certain areas to the 2015 Act. This policy divergence has been prompted by three factors—

- the different scale and structure of the sector in Scotland, which involves a relatively large number of pub-owning businesses owning relatively small numbers of tied pubs, compared to England and Wales;
- that the 1954 Landlord and Tenant Act, which underpinned the MRO process in the 2015 Act by providing certain protections to tenants, does not apply in Scotland; and
- the previously outlined problems experienced in seeking to implement the 2015 Act in a way which delivers its objectives.

The adjudicator

62. The Bill requires that a Scottish Pubs Code Adjudicator (SPCA) be appointed and sets out various functions and powers of the adjudicator. However, the Bill ensures that the Scottish Ministers will have some flexibility in terms of the nature and structure of the SPCA's role and office. This is a reflection of the relatively small scale of the task: the SPCA will be governing a code which is applicable to around ten pub-owning businesses and 750 tenants. Based on numbers in England and Wales, it can be estimated that, annually, 1.5% of tenants will make an enquiry, 1% will seek arbitration, and 3% may apply for an MRO³⁹. This would result in an estimated annual caseload of approximately 11 enquiries, 8 arbitration cases, and 23 MRO applications. That being the case, and even making allowances for these figures to increase in the first 12-18 months before settling down, the role of adjudicator is unlikely to require a full-time appointment, the support of a deputy adjudicator, or a significant number of supporting staff. The Bill therefore gives Scottish Ministers flexibility in how the role is established, including the option of adding it to an existing post-holder's remit.

63. There have been strong criticisms, mainly from tenants, questioning the impartiality of the person appointed as the PCA in England and Wales,

³⁹ Data on MRO applications and outcomes can be found on the British Beer and Pub Association website here: <https://beerandpub.com/briefings/mro-data-summary-of-results/>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

given that individual's previous employment history and professional interests.

64. Therefore, in a bid to avoid an adjudicator being appointed in Scotland who does not have the confidence of the sector, the Bill makes the appointment process more robust. The Scottish Government is required to take issues of impartiality into account when selecting the SPCA, and the Scottish Parliament must agree, by resolution, to the appointment put forward.

65. The Bill also makes no specific provision for a Deputy Adjudicator. This, again, reflects the smaller scale of the tied sector in Scotland and the anticipated workload of the SPCA and their team. As it is not considered that the SPCA will require a full-time appointment, it is not considered necessary to make statutory provision for the appointment of a deputy. However, the Bill provides for the possibility of the secondment of staff to the SPCA's office, which would allow the office to react to demand.

Scottish Pubs Code

66. As previously mentioned, the Bill adds a third principle to the two which underpin the 2015 Act: "that the tied agreements offer a fair share of risk and reward to both parties". The Bill also goes beyond the 2015 Act by requiring all three principles to be applied by the SPCA in decision-making and application of the code. The intention of these two additions to the 2015 Act is to further clarify the purpose of the legislation and the outcomes expected, and to strengthen the adherence to the principles throughout the application of the code and arbitration process.

67. The Bill also shortens the review periods which are set out in the 2015 Act. The first statutory review of the code and the SPCA is required one year after the code comes into force (as opposed to two years in the 2015 Act) and subsequent reviews are required every two years (rather than every three years as required in the 2015 Act). These measures are again a response to the dissatisfaction with the effectiveness of the code in England and Wales, and are intended to provide a faster assessment of the effectiveness of the Scottish Code and adjudicator, allowing for quicker actions and redress to be taken if necessary. It is hoped that this will help prevent problems persisting in the industry for a long period of time.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Arbitration

68. The Bill provides for an altered and simplified arbitration process compared to the 2015 Act. Rather than limiting referrals to tenants only and providing specific processes for a variety of possible circumstances, the Bill gives pub-owning businesses and tied tenants the right to refer a dispute about the Scottish pubs code to the adjudicator for arbitration, and also allows the adjudicator to arbitrate if in accordance with an agreement between the tenant and pub-owning business.

69. Other aspects of the arbitration process mirror those found in the 2015 Act, such as: the adjudicator being able to appoint another person to adjudicate; the timescales involved for referring a dispute to arbitration (no earlier than 21 days before notification of an alleged breach of the code and no later than four months after that date); and that those involved in arbitration are subject to paying the fees and expenses involved.

Guest beer agreement

70. The Bill states that the code must require pub-owning businesses to offer to enter into a guest beer agreement with their tenants in circumstances which will be set out in the code. The policy expectation is that tied tenants will have the right to stock at least one beer of their choosing at any one time, regardless of the terms of their tied agreement with the pub-owning business. This could lead to more locally brewed beers and/or beers from small brewers being stocked in pubs and more choice for customers.

Market Rent Only option

71. The 2015 Act sets out a complex procedure for tied tenants to follow and adhere to if they want to apply to their pub-owning businesses for an MRO. This included various trigger points and conditions which had to be met by tenants. The MRO has proved highly contentious since it has been available in England and Wales, with the PCA expressing concern about the very low numbers of MROs which have been successfully achieved.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Between August 2016 and the end of September 2019, 93 MROs had been agreed out of 1005 applications made (9%)⁴⁰.

72. Many in the industry believe that the complexity of the MRO process partly explains why so few MROs are being granted in England and Wales, a view shared by Neil Bibby. Therefore, this Bill presents a much simpler MRO process, making it available to all tied tenants at any time. Rather than having to meet various criteria, and introducing various trigger points, the Bill requires that the code includes a right for any tied tenant in Scotland to apply to their pub-owning business for an MRO 'quote' which abides by the fundamental principles set out in the Bill.

73. The Bill also requires that the MRO be an option for all types of tied tenancy (including short term or temporary tenancies often known as 'tenancies at will') and that MRO agreements must be enabled via a deed of variation, rather than by a new tenancy agreement (although the Bill does allow the code to set out circumstances where an MRO offer can be made via a new lease, rather than a deed of variation).

74. Finally, in response to reports of the MRO process in England and Wales taking too long to complete, leaving tenants at a disadvantage, the Bill states that the Bill must require pub-owning businesses to make every effort to engage properly with the MRO process and deliver an MRO as soon as possible if requested to do so by the tenant. This gives the adjudicator the power to investigate any instances where a tenant believes this not to be the case as an alleged breach of the code. This also means that the adjudicator will have the power to fine pub-owning businesses if an investigation concluded that the code had not been adhered to. The intention is to prevent pub-owning businesses from deliberately frustrating the negotiation process in a bid to delay or prevent an MRO from being agreed.

⁴⁰ Data on MRO applications and outcomes can be found on the British Beer and Pub Association website here:
<https://beerandpub.com/briefings/mro-data-summary-of-results/>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Application of the code and access to the adjudicator after the end of a tenancy

75. The Bill allows former tenants access to the adjudicator. This is in response to tenants who have noted difficulties in dealing with disputes in the immediate aftermath of a tenancy ending.

Definitions

76. The word “licence” does not appear in the definition of a tied pub in the Bill and it is not a recognised term in the Scottish pub sector. The Bill instead refers to leases and/or tenancies.

77. The Bill states that references to both tied tenants and pub-owning businesses includes former tenants and pub-owners (apart from when defining a pub-owning business for the purpose of the levy). This will ensure, as stated above, that pub code disputes that are unresolved when a lease ends can continue to be referred to the adjudicator.

78. As set out above, the Bill also provides a different definition of what constitutes a pub-owning business to that in the 2015 Act, where the Code only applies to businesses owning 500 tied pubs or more in England and Wales. The Bill requires the Scottish Code to be applied to all tied pubs in Scotland. This is fundamentally because Neil Bibby believes that all tied tenants in Scotland should have the same legal rights and protections.

79. The 500-pub threshold applied in the 2015 Act could not be applied in Scotland in any case, given that no pub-owning business owns that number of tied pubs in Scotland.

Alternative approaches

80. To deliver the desired policy outcomes, Neil Bibby considered options of—

- not legislating and relying on the current self-regulation of the industry, perhaps supported by various forms of additional guidance from the Scottish Government;
- seeking to persuade the UK Parliament to extend the scope of the 2015 Act provisions to Scotland (which would require the Scottish Parliament’s legislative consent under the Sewel Convention); or

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

- bringing forward separate legislation in Scotland.

81. Neil Bibby has been aware throughout the process that some pub-owning businesses in Scotland believe that any issues in the tied pub sector should be managed through the current voluntary code of practice, which some pub-owning businesses in Scotland are signatories to. However, Neil Bibby does not consider that the voluntary code is sufficient to deliver his policy aims, partly because it only applies to tenants of those pub-owning businesses which choose to sign it, and partly because it is not statutory and hence non-binding.

82. Extending the UK legislation to Scotland would not be appropriate as the 2015 Act is designed for the very different circumstances that apply in England and Wales and would therefore require amendment to enable it to work in a Scottish context (taking account, in particular, of the much smaller number and different distribution of ownership of tied pubs in Scotland). It would also not be easy, under this approach, to address the defects in the 2015 legislation that have become apparent since it was enacted. In addition, extending the 2015 Act to Scotland would require action by the UK Parliament and support from the UK Government. There is no reason to believe that either Government is willing to pursue such a course of action. Neil Bibby therefore discounted this as an option for delivering the policy.

83. Neil Bibby is also aware of the Scottish Government commissioned research referred to earlier in this Memorandum. That research concluded that “the evidence collected did not suggest that any part of the pub sector in Scotland was unfairly disadvantaged” and recommended that relevant parties enter into further dialogue before any decisions are taken on the need for legislation. A further alternative approach could therefore be to allow further time for such dialogue to take place and to begin to have a meaningful impact. However, Mr Bibby did not accept the conclusions of that research and believes that the outcome of the consultation for his draft proposal, together with other evidence set out in this document, provides clear evidence that tied pub tenants are unfairly disadvantaged. Mr Bibby therefore did not consider allowing further time for dialogue to be an acceptable alternative approach to legislation.

84. Consideration was given to alternative policy choices within the overall aim of establishing a tied pubs code and adjudicator for Scotland. For example, Neil Bibby considered whether it would be appropriate to

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

mirror the policy in England and Wales and only seek to apply the Bill to the pub-owning businesses which own the largest number of tied pubs. However, the tied pub sector in Scotland is very different to that in England and Wales, in that there are fewer tied pubs, representing a smaller percentage of the overall pub sector, owned by a wide variety of pub-owning businesses. Neil Bibby therefore considered that the only way to ensure that all tied tenants in Scotland had the same rights, was to apply the Bill to every tied pub in the country.

Consultation

85. Neil Bibby carried out a consultation exercise on a draft proposal⁴¹ lodged on 16 February 2017, which ran from 20 February to 31 July 2017 (it was originally due to close on 20 June 2017 but was extended on 3 May 2017 due to the calling of a UK General Election). There were 275 responses⁴² to the consultation and a summary⁴³ of those responses was published along with the final proposal.

86. Forty-six responses (17% of the total number) were from organisations and the remaining 229 (83% of the total number) were from individuals.

87. A large majority of responses (257, 93%) were supportive of the proposal (240, 87%, fully supportive and 17, 6% partially supportive). This included 36 of the 46 organisations which responded, including: individual pubs and bars; breweries and drinks companies; the GMB trade union and the STUC; the Scottish Co-operative Party; trade, membership and representative bodies (the Federation of Small Businesses, Scottish

⁴¹ Neil Bibby MSP (20 February 2017). Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill Consultation document. Available at: http://www.scottish.parliament.uk/S5MembersBills/tied_pubs_consultation_extended_deadline.pdf.

⁴² Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill Consultation responses. Available at: <http://www.protectourpubs.scot/>.

⁴³ Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill Consultation document (9 January 2018). Available at: http://www.scottish.parliament.uk/S5MembersBills/Consultation_summary_tied_pubs_FINAL.pdf.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Licensed Trade Association, CAMRA, Scottish Tourism Alliance); and West Dunbartonshire Licensing Board.

88. Many of the comments made in support of the proposal reiterated arguments made in the consultation paper, including that introducing a tied pubs code and adjudicator in Scotland would: help to ensure a fairer and more appropriate balance of power in the relationship between pub-owning businesses and tenants; improve and protect tenants' rights; improve tenants' ability to make a successful living from the business; lead to cheaper and more appropriate rents; and enable tenants to buy stock more cheaply and sell a wider range of products (which would widen consumer choice and boost Scottish businesses).

89. A small minority of respondents (14, 5%) were opposed to the proposal (12, 4%, were fully opposed, and two, 1%, were partially opposed). This included nine of the 46 organisations which responded. The fully opposed organisations included the SBPA (which represents breweries and pub-owning businesses in Scotland) and several of its members (Punch Taverns, Greene King plc, Admiral Taverns, Heineken UK, and Hawthorn Leisure Ltd). The Scottish Property Federation was partially opposed.

90. Reasons given for opposition included that: the tied arrangement is mutually beneficial to tenants and landlords; the current range of management options, including tied arrangements, are sufficiently flexible and appropriate to allow businesses to succeed; the proposal would introduce unnecessary and unhelpful complexity; the proposal would significantly increase costs for all involved; it would remove valuable investment in the industry provided by pub-owning businesses; and that there is a sufficient and effective voluntary code in Scotland.

Effects on equal opportunities, human rights, island communities, local government, sustainable development etc.

Equal opportunities

91. The Bill is fundamentally about fairness and bringing fairness to those tied tenants who are, in Neil Bibby's view, currently subject to unfair contractual arrangements. The proposal also seeks to establish a similar

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

legal framework in Scotland to the one that exists already in England and Wales. Consequently, tenants who find themselves economically worse off than those who do not have a tied arrangement should hopefully find themselves with greater flexibility and opportunities to increase their income and financial situation.

92. An initial Equality Impact Assessment (EQIA) was completed to inform the consultation document and showed that, whilst being a proposal with fairness at its centre, the Bill itself should have no disproportionate effect, or indeed any negative or positive effect, on any particular group with characteristics protected by the Equality Act 2010. A full EQIA will be carried out and sent to the Stage 1 lead committee.

Human rights

93. The Scotland Act 1998 places a duty on the Scottish Ministers and the Scottish Parliament to act in accordance with the European Convention on Human Rights (ECHR). It was acknowledged that the pubs code legislation for England and Wales engaged Article 1 of Protocol 1 (A1P1 - right to peaceful enjoyment of property) of the ECHR and the UK Government concluded that, in its view, the provisions were justified and proportionate⁴⁴.

94. With regard to A1P1, it is Neil Bibby's view that the Bill strikes a fair balance between the competing interests of landlords and tenants, particularly so far as existing landlord/tenant relationships are concerned, and that the measures in the Bill are justified and proportionate. It is Neil Bibby's view that the evidence of the nature and scale of the problem, which was demonstrated in the consultation process, justifies legislative interference in the terms outlined in the Bill.

Island communities

95. The Bill will apply to all pub-owning businesses that own any tied pubs in Scotland, and therefore to all tied pub tenants in Scotland,

⁴⁴ The Small Business, Enterprise and Employment Bill (2014). Explanatory Notes. Pages 129 – 130. Available at: <http://www.publications.parliament.uk/pa/bills/cbill/2014-2015/0011/en/15011en.pdf>.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

including any on Scotland's islands. The extent of tied tenancies on the islands is not known. However, tied premises on any of Scotland's islands may experience specific economic circumstances and challenges (for example, potentially higher costs of transporting supplies on a regular basis by ferry).

96. The SBPA confirmed that it only holds data at a national level but believed the number of tied pubs on Scotland's islands would be in single digits.

Local government

97. The Bill has no direct implications for local authorities. However, local authorities may have an interest in the number of tied pubs in their area, and the potential impacts of the Bill in terms of pub numbers, turnover and employment, and impacts on other local businesses.

Sustainable development

98. Neil Bibby believes that the Bill should have a positive impact on sustainable development by improving outdated contractual arrangements that are not fit for the 21st century. It is his view that this will help current and future generations to enjoy greater freedom and flexibility, free of the particular contractual obligations which are proving so difficult for many tenants to operate within at present.

99. Mr Bibby believes that the Bill has the potential to help to stimulate a flourishing, growing, pub trade, bringing a host of a positive social, economic and environmental impacts. These include—

- preventing vulnerable pub tenants being exploited and helping to deliver fairer principles of a civilized society;
- ensuring that local communities continue to have access to local pubs, which are often used as meeting places and community hubs;
- encouraging competition and allowing more businesses to open and thrive (including smaller breweries);
- boosting tourism by ensuring local pubs with a wider range of available products;
- improving the availability of locally produced beers, which could boost local production and employment; and

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

- by indirectly encouraging more use of local products there could be positive environmental impacts due to shorter transportation distances of products.

100. The Bill fits within many of the underpinning principles of sustainable development, such as ensuring a just society; promoting good governance; and achieving a sustainable economy which provides prosperity and opportunity for all. The Bill also achieves its aims without placing any undue burden on environmental limits. Its aim is to help improve the wellbeing of tied pub tenants without disproportionately impacting pub-owning businesses as a result. It is therefore consistent with ensuring a balance between economic, social and environmental needs and objectives and ensuring that future generations will not be negatively burdened because of the Bill.

101. A small number of those who responded to the consultation run by Neil Bibby on his draft proposal for a Member's Bill felt there would be a negative impact on sustainability. This was based on a belief that the Bill could lead to pub closures because of it leading to a lack of investment/support by pub-owning businesses, or that pub-owning businesses would be forced to close, with negative impacts on jobs and communities.

102. Neil Bibby acknowledges that there is a potential risk of some pub closures because of the Bill, but also believes that the Bill could help to sustain, or increase, pub numbers. Mr Bibby therefore believes that the risk is not enough to outweigh the need for action to be taken. His view is that it is pub-owning businesses' reaction to the Bill which will determine any likely pub closures, and that it is in the interests of pub-owning businesses to ensure that their businesses are successful and that the sector is as healthy as possible.

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Tied Pubs (Scotland) Bill

Policy Memorandum

© Parliamentary copyright. Scottish Parliamentary Corporate Body

Information on the Scottish Parliament's copyright policy can be found on the website -

www.parliament.scot

Produced and published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish Parliament website at:

www.parliament.scot/documents