

EXPLANATORY NOTES

Tied Pubs (Scotland) Act 2021 (asp 17)

£6.90

These notes relate to the Tied Pubs (Scotland) Act 2021 (asp 17)
which received Royal Assent on 5 May 2021

TIED PUBS (SCOTLAND) ACT 2021

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Scottish Parliament's Non-Government Bills Unit on behalf of Neil Bibby MSP, the member who introduced the Bill for this Act in the Parliament, in order to assist the reader of the Tied Pubs (Scotland) Act 2021. They do not form part of the Act and have not been endorsed by the Parliament.

2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE ACT

3. The Act establishes a Scottish Pubs Code to govern the relationship between pub-owning companies and their tied tenants and provides for the appointment of a Scottish Pubs Code Adjudicator to enforce the code. Tied pubs are those which have a contractual obligation to buy alcohol from the business which owns the pub.

4. The Act is in four parts, with 26 sections and two schedules.

5. Part 1 (sections 1-6, schedules 1 and 2) deals with the establishment of the code and the adjudicator, sets out regulatory principles, and provides for ministerial guidance and review. Schedule 1 is concerned with the code, and schedule 2 is concerned with the adjudicator.

6. Part 2 (sections 7-19) gives effect to the code by clarifying contract terms that are inconsistent with the code, specifies the adjudicator's powers of investigation and enforcement, establishes an arbitration process and provides a means for dealing with avoidance of the code.

7. Part 3 (sections 20-22) deals with definitions of key terms used in the Act.

8. Part 4 (sections 23-26) is concerned with ancillary provision, regulation-making powers, commencement and the short title.

9. The Act is broadly similar to Part 4 of the Small Business, Enterprise and Employment Act 2015[1] ("the 2015 Act") passed by the UK Parliament. That Act, and its subsequent 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). The Act creates a similar regime in Scotland, but with some variations.

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

PART 1 – THE CODE AND THE ADJUDICATOR

Section 1: Scottish Pubs Code

10. This section requires the Scottish Ministers to make regulations to introduce a Scottish Pubs Code, which will set out rules and procedures to govern the relationship between pub-owning businesses and their tied tenants. The code will be included in a Scottish statutory instrument which (under section 4) must be laid in draft before the Scottish Parliament no later than two years after section 1 comes into force (which is on the day after the Act receives Royal Assent). Under section 24, the instrument will be subject to the affirmative procedure in the Scottish Parliament, which means that a draft must be approved by resolution of the Parliament before the regulations can be made.

11. This section also introduces schedule 1 which sets out various details relating to the Scottish Pubs Code.

Section 2: Scottish Pubs Code Adjudicator

12. This section establishes a Scottish Pubs Code Adjudicator (a separate office from the Pubs Code Adjudicator that governs a Pubs Code in England and Wales). The adjudicator's role is to apply the code and consider disputes and alleged breaches. The section also introduces schedule 2 which contains details of the adjudicator's role and powers etc., including the adjudicator's power to impose a levy on pub-owning businesses.

Section 3: Duty to act consistently with regulatory principles

13. The Scottish Ministers must use best endeavours to ensure that the code is consistent with three regulatory principles: fair and lawful dealing by pub-owning companies to their tenants; that tied tenants should be no worse off than if they were not bound by any product or service tie (as defined in the Act); and that a tied agreement offers a fair share of risk and reward to pub-owning businesses and their tenants.

14. Subsection (2) states that the adjudicator must also use best endeavours to act consistently with these three principles. It is expected that the adjudicator will apply the three principles to decision-making and that they will act as an underpinning framework for processes set out in the Act, such as investigations and arbitrations.

Section 4: Scottish Ministers' duty to seek to make code and appoint adjudicator

15. Subsection (1) requires the Scottish Ministers to lay before the Scottish Parliament draft regulations containing the Scottish Pubs Code, and appoint a Scottish Pubs Code Adjudicator, within two years of section 4 coming into force (which was the day after the Bill received Royal Assent – see section 25). These two things need not be done on the same day (subsection (2)).

16. If the Parliament approves the regulations (as laid in draft, in the form of a Scottish statutory instrument), the Scottish Government must then make the regulations (subsection (3)). Subsection (4) provides for section 4 to be repealed once its requirements have been fulfilled.

Section 5: Review of the code and adjudicator's performance

17. This section states that the Scottish Ministers must carry out a first review of the Scottish Pubs Code and the adjudicator's performance as soon as is practicable after 31 March in the second year following the year in which the adjudicator is appointed. Further reviews must then be carried out every three years after that. Once a review has been completed, the Scottish Ministers must publish a report of the review's findings and lay a copy of the report before the Scottish Parliament. This will allow for consideration and scrutiny by the Parliament as appropriate.

18. Subsection (2) specifies that reviews of the code must look at how far the three regulatory principles have been met and whether the code should be revised to reflect these principles more fully.

19. Subsection (3) specifies that reviews of the adjudicator can cover anything that Ministers consider appropriate. However, a review must consider how effective the adjudicator has been at enforcing the code and may also consider whether any changes are required to financial penalty and/or fees and expenses regulations.

Section 6: Ministerial guidance to the adjudicator

20. Under this section, the Scottish Ministers may issue guidance to the adjudicator following a review and the adjudicator must take any such guidance into account.

PART 2: GIVING EFFECT TO THE CODE

Agreements that are inconsistent with the code

Section 7: Unenforceability of contract terms

21. This section provides that any contract terms between pub-owning businesses and their tied tenants are not enforceable by the business if they are prohibited in the code. It therefore provides tenants with a legal remedy they may wish to explore. This section should be read together with paragraph 3 of schedule 1, "restriction on enforcing certain terms of agreement" (see paragraph 16), which sets out the kinds of terms which a pub-owning business cannot enforce on a tied tenant.

Investigations by the adjudicator

Section 8: Power to investigate

22. This section enables the adjudicator to investigate whether a pub-owning business has failed to comply with the code, but only after the adjudicator's statement of investigation policy has been published (under section 13, see below).

Section 9: Enforcement action

23. If the adjudicator concludes following an investigation that a pub-owning business has failed to comply with the code, the adjudicator may do one or more of the following: direct the pub-owning business on how it should comply with the code; direct the pub-owning business to publish information; and/or impose financial penalties on the pub-owning business (section 10 says more about financial penalties – see below).

24. Failing to comply with a direction under this section will be a breach of the code (see schedule 1, paragraph 2). If, at the conclusion of an investigation, the adjudicator directs a pub-owning business, the adjudicator must then monitor the business's compliance with those directions (under section 9(2)). If the adjudicator finds that the directions have not been complied with, the adjudicator may impose a financial penalty. The decision about what enforcement action to take at the end of any investigation will be for the adjudicator to take in light of all the facts and circumstances of the case.

25. If the adjudicator directs a pub-owning business to publish information relevant to the investigation then the adjudicator can specify in writing to the pub-owning business what the information is, how it should be delivered or presented, and by what deadline the information should be provided.

Section 10: Financial penalties under section 9

26. Under section 9, the adjudicator may impose a financial penalty on a pub-owning business if, following an investigation, the adjudicator concludes that the business has failed to comply with the code. The business becomes liable to pay the penalty when the adjudicator sends a notice under section 10 confirming that a penalty has been imposed, setting out the reason for the penalty, the amount, and when and how it is to be paid. The amount of the penalty may not exceed whatever maximum penalty is fixed by the Scottish Ministers (subsections (2) to (4)). The imposition and amount of the penalty may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.

27. Any money received from financial penalties must be paid into the Scottish Consolidated Fund (subsection (5)) rather than being kept by the adjudicator.

Section 11: Investigation report

28. This section requires the adjudicator to publish a report at the end of an investigation.

29. Subsection (2) specifies that an investigation report must set out and explain any findings and any actions taken or proposed.

30. Under subsection (3), the report does not have to disclose the identity of the pub-owning business in question (for example, because the adjudicator considers that the objectives of the code can be effectively achieved whilst dealing with the relevant pub-owning business privately). If the adjudicator does choose to identify the pub-owning business in an investigation report, the business must be given an opportunity to comment on a draft before it is published (subsection (4)).

Section 12: Recovery of investigation costs

31. The adjudicator may require a pub-owning business to pay some or all of the costs of an investigation if the adjudicator finds that the pub-owning business has failed to comply with the code.

32. Subsection (2) states that where a person (for example, a tenant) has made a complaint which was found to be vexatious (intended to frustrate or delay without any chance of success) or wholly without merit, the adjudicator may require that person to pay some or all of the costs of the resulting investigation.

33. Subsection (3) provides that the business or person required to pay costs becomes liable to pay those costs when they receive a notice in writing informing them of the requirement; the reasons for imposing the requirement; the amount; and when and how it must be paid. The adjudicator cannot seek to reclaim in this way more than the total cost of the investigation (subsection (4)). The imposition and amount of the costs being recovered may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.

Section 13: Investigation policy

34. This section requires the adjudicator to publish the details of its investigation policy. Such a statement must include the criteria that the adjudicator will use when deciding whether to investigate and set out the practices and procedures that will be followed by the adjudicator when investigating. The statement must also set out criteria relating to enforcement decisions and actions and setting levels of financial penalties (see paragraphs 69 to 73). In drawing up the criteria (other than those relating to practices and procedures) the adjudicator must have regard to the impact the behaviour of tied-pub tenants may have on compliance with the code by pub-owning businesses. The criteria (which the adjudicator will adopt in relation to whether to carry out an investigation under section 8 of the Act) must also include time limits within which an investigation may be initiated (therefore ensuring that tenants and pub-owning businesses do not remain subject to, and the adjudicator is not able to take action under, the code indefinitely including, for example, after the tied lease comes to an end).

35. Subsection (2) confirms that the adjudicator must be guided by the statement when investigating and subsection (3) confirms that the adjudicator can amend the statement at any time. As the statement must be published, any changes made to it will therefore be available for all to see. Subsection (4) requires the adjudicator to consult before preparing or amending the statement.

Arbitration

36. Disputes about the application of the code can be referred to arbitration which, it is intended, will usually be carried out by the adjudicator directly. The intention of this is to ensure that the code is being complied with, by both tenants and pub-owning businesses, and that where it is not working, and either side feel it is not being complied with, then constructive action can be taken, via arbitration, to resolve a dispute.

Section 14: Adjudicator's duty to arbitrate or appoint arbitrator

37. This section requires the adjudicator to act as arbitrator, or appoint another person to do so, if there is a dispute between a tied-pub tenant and a pub-owning company about whether the business has complied with a non-excluded term of the code and if the dispute is submitted for arbitration either under section 15 (see below) or in accordance with an agreement between the tenant and pub-owning company.

38. In most circumstances, the adjudicator is expected to arbitrate such disputes. However, the adjudicator is also able to appoint another person to do so if, for example, the adjudicator does not have enough time to act as the arbitrator (due to caseload volume), or because the adjudicator considers that a conflict of interest may exist (for example, where the adjudicator has previously advised on or investigated an issue which is relevant to the dispute).

39. Subsection (2) confirms that arbitration proceedings must be conducted in accordance with the rules of the Chartered Institute of Arbitrators or any other dispute resolution body nominated by the arbitrator. This will ensure that arbitrations are conducted in line with recognised sectoral rules and guidelines.

40. Subsection (3) gives the Scottish Ministers power to make regulations to exclude a term, or terms, of the code from being subject to arbitration by the adjudicator. Under section 24, any such regulations are subject to the affirmative procedure in the Scottish Parliament, which means that they must be laid in draft for approval by the Parliament.

Section 15: Submission of dispute to adjudicator

41. This section provides a statutory right of arbitration for Scottish Pubs Code disputes for tied pub tenants and pub-owning business. Such arbitrations will be "statutory arbitrations" as set out in section 16 of the Arbitration (Scotland) Act 2010. (Section 16 of the 2010 Act sets out certain rules that apply to statutory arbitrations, although the section had not been brought into force at the time of Royal Assent of this Act.) Section 17 of the 2010 Act, which is in force, allows Scottish Ministers to make further provision about the handling of statutory arbitrations.

42. A dispute may be referred to arbitration only if the tenant has first notified the pub-owning business that they consider there has been a failure to comply with the code. The notification must be given within 6 months, beginning on the day the alleged failure occurred (or the last day of a continuing failure, or the day when the tenant became aware, or could reasonably have become aware, of the alleged failure). There is then a window, beginning 21 days after the business is notified of the alleged failure and ending 4 months later, within which either party (tenant or pub-owning business) may refer the dispute, to arbitration. The 21-day period is to allow the parties a reasonable time to try to resolve the dispute without the need for arbitration. The six-month and four-month limits ensure that any alleged failures to comply with the code are addressed reasonably promptly. The four and six months periods are always measured in calendar months, so if either begins on the 29th, 30th, or 31st of a month, and there is no corresponding date four or six months later, then the period ends on the last day of that later month (e.g. a four month period would end on 28th February if the period began on 31st October).

Section 16: Liability for arbitrator's reasonable fees and expenses

43. Under this section, a pub-owning business that is party to an arbitration is normally liable to pay the arbitrator's fees and expenses if the adjudicator, or someone appointed by the adjudicator, is the arbitrator. However, under subsection (2), this does not apply if the referral was made by a tied pub tenant and the arbitrator considers the referral to be vexatious (intended to frustrate or delay without any chance of success). A pub-owning business may also ask the adjudicator to relieve it of a liability for any fees and expenses, or to transfer a portion (as the adjudicator sees fit) of a liability to a tied-pub tenant who was a party to the arbitration.

Section 17: Further fees and expenses payable to the adjudicator

44. Subsections (1) and (2) provide that the Scottish Ministers must make regulations to require tied pub tenants to pay a fee to the adjudicator in situations where the adjudicator, or a person appointed by the adjudicator, is the arbitrator (under section 15) because of a referral

or request made by the tenant. Subsection (3) states that such regulations may set out the amount of the fee to be paid, and situations where the fee would be refunded, or need not be paid at all.

45. Subsections (4) and (5) allow the Scottish Ministers to make regulations to require tied pub tenants to pay towards the expenses of the adjudicator in any other situations where the adjudicator, or a person appointed by the adjudicator, is the arbitrator. Subsection (6) states that such regulations may set out the circumstances in which payment towards expenses may be required; limit the amount payable (by amount or methodology); and/or specify circumstances where a tenant may be liable for expenses beyond any limit that is set.

Section 18: Information about arbitration

46. This section enables the adjudicator to obtain information on an arbitration carried out by a person appointed by the adjudicator, either from that person or from the parties to the arbitration. The purpose of this to help the adjudicator carry out their functions, such as preparing annual reports and providing advice and guidance on the code. Subsection (2) states that the adjudicator may enforce this requirement through civil proceedings.

Section 19: Reports on avoidance

47. This section requires the adjudicator to report any cases of pub-owning businesses trying to avoid the code to the Scottish Ministers. Subsection (2) defines "avoidance activity" as acts or omissions (or both) which are unfair and intended to avoid the code to the detriment of tenants. A similar provision was added to the 2015 Act, by the Enterprise Act 2016, in response to allegations of pub-owning businesses trying to find ways around the England and Wales code.

PART 3: INTERPRETATION

Section 20: Tied pub

48. This section defines a "tied pub", for the purposes of the Act, as a pub leased to a tenant subject to a requirement that the tenant buys some or all of the alcohol to be sold in the pub from the landlord (a pub-owning business) or someone nominated by the landlord. This does not include contractual terms which include a stocking requirement.

49. Subsection (2) defines a "stocking requirement" as a contractual obligation that requires a tenant to stock some beer and/or cider produced by the pub-owning company but does not require the products to be bought from the pub-owning business and does not prevent or penalise the tenant from stocking and selling beer and/or cider from other sources, although the pub-owning business can restrict such sales. This means that a stocking requirement is not a "tie" and that a pub-owning business could impose a stocking requirement on a pub that was not tied (for example, a pub that was operated on a market-rent-only contract basis).

50. Subsection (3) confirms that references to "landlord" include anyone who is a group undertaking (i.e. a company which owns or has a controlling interest in the pub-owning company) to which the landlord belongs.

Section 21: Pub-owning business and tied-pub tenant

51. This section states that, for the purposes of the Act, a pub-owning business is any business which leases a tied pub. (In this respect, the Act differs from the equivalent legislation in England and Wales, which, as of the time of Royal Assent of this Act, applies only to businesses that own 500 or more tied pubs.) The section also confirms that references in the Act to a "pub-owning business" and "tied-pub tenant" includes both current and former businesses and tenants, which will allow any disputes to be considered by the adjudicator following the end of a lease.

Section 22: Other expressions

52. This section defines certain other terms used in the Act.

53. The definition of "beer" and "cider" is taken from section 1 of the Alcoholic Liquor Duties Act 1979. In the 1979 Act, beer is defined to include "ale, porter, stout and any other description of beer, and any liquor which is made or sold as a description of beer or as a substitute for beer and which is of a strength exceeding 0.5 per cent". Cider is defined as exceeding 1.2 per cent but being less than 8.5 per cent in strength.

54. The definition of "group undertaking" is from section 1161 of the Companies Act 2006, which defines it as follows:

"group undertaking", in relation to an undertaking, means an undertaking which is—

(a) a parent undertaking or subsidiary undertaking of that undertaking, or

(b) a subsidiary undertaking of any parent undertaking of that undertaking.

55. "Parent undertaking" and "subsidiary undertaking" are themselves defined in section 1162 of the 2006 Act.[2]

PART 4: FINAL PROVISIONS

Section 23: Ancillary provision

56. This section allows the Scottish Ministers to make regulations for such further incidental, supplementary, transitional, transitory or saving provision as they consider appropriate. Under section 24(3), such regulations are subject to the affirmative procedure if they add to, replace or leave out any part of an Act and are otherwise subject to the negative procedure. Regulations subject to the affirmative procedure are laid before the Parliament in draft form and require the approval of the Parliament in order to come into force. Regulations subject to negative procedure are laid before the Parliament after they are made and come into force on the day specified in the regulations unless annulled by the Parliament within 40 days of being laid.

[2]Companies Act 2006, section 1162. Available at: http://www.legislation.gov.uk/ukpga/2006/46/part/38/crossheading/meaning-of-undertaking-and-related-expressions.

Section 24: Regulation-making powers

57. This section specifies the parliamentary procedure to which regulations made under the Act are subject. Those subject to the affirmative procedure (explained in paragraph 11) are:

- regulations that contain the code, as required by section 1 of the Act;
- regulations which define the permitted maximum for a financial penalty, under section 10;
- regulations to exclude any provisions of the code from being subject to arbitration by the adjudicator, under section 14;
- regulations making provision about the fee to be paid by tenants in respect of arbitrations that go before the adjudicator, and making provision about payments in respect of expenses for such arbitrations, under section 17; and
- regulations making ancillary provision, under section 23, if that provision amends an Act.

58. As noted above, regulations under section 23 are subject to the negative procedure if they do not amend any legislation (or amend only subordinate legislation).

59. Regulations under the following provisions, not mentioned in section 24, are not subject to either the affirmative or negative procedure, and require only to be laid before the Parliament (by virtue of section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010):

- regulations to repeal section 4 once it is spent, and
- regulations to bring into force those provisions of the Act not listed in section 25(1) (see below).

Section 25: Commencement

60. Sections 3 (duty to act consistently with regulatory principles), 4 (Scottish Ministers' duty to seek to make code and appoint adjudicator) and 5 (review of the code and adjudicator's performance), together with Part 3 (interpretation) and Part 4 (final provisions), came into force on the day after the Act received Royal Assent. This enables the Scottish Government to lay regulations containing a Scottish Pubs Code, and appoint a Scottish Pubs Code Adjudicator, within two years of the day after Royal Assent (as required by section 4(1)). It also ensures that the review processes are enabled and ready for when those things happen, that the relevant definitions have statutory effect, and that the Scottish Government has the power to make other relevant regulations. Scottish Ministers will determine by regulations (under section 24(2)) when the remaining parts of the Act come into force.

SCHEDULE 1: THE SCOTTISH PUBS CODE

Requirement to provide information

61. Paragraph 1(1) provides that the code may require pub-owning companies to give information to their tenants (including prospective tenants) and to the adjudicator. Sub-paragraph (2) sets out one example of such a requirement: that the code may require pub-owning businesses to give tenants an assessment of what the rent of the premises will be.

62. Under sub-paragraph (3) the code can require pub-owning companies to follow a certain methodology when producing such information and present it in a certain way. Under sub-paragraph (4) the code may contain references to other documents in relation to any requirements concerned with the provision of information, which could include referencing documents that will be published in future. This allows the adjudicator to prepare (and later revise) documents referred to in the code after the code itself has been made, without this undermining the enforceability of the requirement on pub-owning companies under sub-paragraph (3).

Requirement to comply with adjudicator's directions following an investigation

63. Paragraph 2 states that the code must require pub-owning businesses to comply with any directions given to them by the adjudicator following an investigation (see discussion of section 9).

64. As a result, a failure to comply with such a direction would be a failure to comply with the code and would therefore be subject to investigation and potentially sanction by the adjudicator (see discussion of sections 8 and 9).

Restriction on enforcing certain terms of agreement

65. Paragraph 3 requires the code to include a prohibition on the enforcement of certain contract terms (set out in sub-paragraph (2)) and allows the code to identify other terms which pub-owning businesses will be prohibited from enforcing. This relates to section 7 of the Act which states that any contract terms between pub-owning businesses and their tied tenants are not enforceable if they are prohibited in the code.

Requirement to offer a guest beer agreement

66. Paragraph 4 states that the Scottish Pubs Code must require pub-owning businesses to offer their tenants the opportunity to sell at least one guest beer of the tenant's choosing. A tenant can change the guest beer as often as they choose. If a tenant accepted this offer, they would be able to source, stock and sell a guest beer, i.e. a beer other than those they are contractually obliged to buy from their pub-owning business. If accepted, the guest beer arrangement would therefore form part of the contractual arrangement between the tenant and the pub-owning business. Further details about the guest beer right are to be set out in the code.

67. The guest beer arrangement is unrelated to the market rent only provisions in the Act (see below) and any tied tenants that take up the guest beer arrangement opportunity will remain tied premises as per their contract with their pub-owning business.

Requirement to offer market rent only lease

68. A market rent only (MRO) tenancy is one in which the tenant pays the market rent for the lease of the premises only (either as agreed between the parties, or, where there is no agreement, as determined by an independent rent assessor) and is freed from all product or service ties (i.e. the requirement to purchase products, such as alcohol, and/or services, other than insurance, from the pub-owning business). An MRO tenancy would therefore end the tied arrangement and MRO tenants would no longer be tied tenants. An MRO tenant would no longer be covered by the code or have recourse to the adjudicator (but see the commentary below on section 21).

69. Paragraph 5(1)(a) states that the Scottish Pubs Code must require pub-owning businesses to offer their tied tenants an MRO lease if requested to do so by the tenant. However, sub-paragraph (3)(b) allows the code to set out circumstances in which a pub-owning business need not offer to enter into an MRO lease with a tenant (and provides an example circumstance of where an agreement to invest in a tied pub has been entered into). Sub-paragraph(1)(b) provides that an MRO offer must be made by varying the terms of the existing tenancy agreement, rather than via a new lease, and should vary the terms only to the extent required to make the lease a MRO lease. However, sub-paragraph (3)(c) allows the code to set out circumstances in which pub-owning businesses could make an MRO offer by instead offering a new lease or by offering to modify the terms of an existing agreement in ways other than only those that are strictly required to make it a MRO lease.

70. Under sub-paragraph (1)(c) the code must require pub-owning businesses to make every effort to enter into an MRO agreement as soon as possible following a request from a tenant. As a result, the adjudicator will be able to investigate allegations that a pub-owning business has not been making a genuine attempt to conclude an MRO agreement and could impose a financial penalty if a pub-owning business was found not to have been complying with this requirement of the code.

71. Sub-paragraphs (2) to (4) define an MRO lease.

72. It should be noted that the scope of the availability and delivery of the MRO is one of the fundamental differences between the Act and the equivalent legislation in England and Wales under the 2015 Act. In England and Wales, the MRO is available to tenants only in certain specified circumstances and in line with various trigger points and is not required to be delivered by varying an existing lease.

Market rent only lease: further provision

73. Paragraph 6 provides some examples of what the MRO process set out in the code may include. Sub-paragraph (a) provides that the code can specify a period for an MRO negotiation. This is in addition to the requirement on pub-owning businesses to use best endeavours to deliver an MRO as soon as is possible when requested to do so (see paragraph 21).

74. Sub-paragraphs (b) to (e) mention that the code may include provision about the appointment of a rent assessor, whose role is to determine what the market rent should be.

Generality of enabling power unaffected

75. Paragraph 7 confirms, for the avoidance of doubt, that the Scottish Pubs Code may impose restrictions and obligations on pub-owning business other than those listed in the schedule.

SCHEDULE 2: SCOTTISH PUBS CODE ADJUDICATOR

Part 1: Status and Liability

Legal personality

76. Paragraph 1 confirms that the adjudicator has a distinct legal personality which is separate from any person holding the office. This will, for example, allow the adjudicator to enter contracts, and to sue and be sued, in that capacity (as the holder of the office) rather than in an individual capacity.

Exclusion of Crown Status

77. Paragraph 2(1) confirms that the adjudicator does not act on behalf of the Crown (and therefore is not a civil servant) and sub-paragraph (2) states that any staff seconded to the adjudicator are not to be classed as civil servants simply by virtue of working for the adjudicator.

Exemption from liability for damages

78. Paragraph 3 protects the adjudicator and seconded staff from claims for damages by third parties, except where they have acted in bad faith or in breach of human rights. In the absence of this protection it might, for example, be possible for a tied tenant or pub-owning business to claim against the adjudicator for negligence in relation to advice given or the way the adjudicator had carried out an investigation.

Part 2: Powers

Chapter 1: Power to require information

Imposition of requirement

79. Paragraph 4 gives the adjudicator power to require information and documents.

80. The statutory limits on the extent to which the adjudicator can require information do not limit the adjudicator's ability to ask for information to be provided voluntarily on any matter, at any time.

Offence of failing to comply with requirement and of providing false information

81. Paragraphs 5 and 6 create offences, punishable on conviction by a fine[3], for intentional failure to comply with a requirement to provide information (subject to a defence of having a reasonable excuse) and for knowingly providing false information. A failure to provide information in the way specified will be considered as a failure to comply with a notice requiring the information to be provided.

[3] On summary conviction, the maximum fine is the "statutory maximum", which was £10,000 at the time of Royal Assent.

Chapter 2: Other Powers

Powers to advise on the code and issue guidance

82. Paragraph 7 allows the adjudicator to give anyone advice about any aspect of the code. This power is likely to be exercised with a view to encouraging compliance with the code, but could also, for example, be used to advise prospective tenants about the code. This is a power and not a duty, so the adjudicator has discretion regarding whom to advise, and how.

83. Paragraph 8(1) provides that the adjudicator may publish guidance on the practices and procedures of the adjudicator, the application of the code and what pub-owning businesses must do to comply with it, and anything else related to the code. For example, this would enable the adjudicator to give general guidance about the application of a particular provision of the code (the Pubs Code Adjudicator for England and Wales has published a number of such guidance documents on its website). Sub-paragraph (2) requires the adjudicator to follow his or her own guidance, in the interests of consistency.

84. Sub-paragraph (3) states that the adjudicator must consult any organisation or person considered to be appropriate before issuing any guidance. This makes it possible for the adjudicator to conclude that it is not appropriate to consult with anyone, if (for example) the guidance reflects practice that is already well-established and uncontroversial. Should the adjudicator decide to consult, it is left to the adjudicator to decide whom to consult.

General powers

85. Paragraph 9 allows the adjudicator to do anything that will help with performing the functions of the role, even if it is not mentioned in the earlier paragraphs of the schedule. This is to avoid the schedule being interpreted as an exhaustive list of powers and so leading to an unintended narrowing of the adjudicator's room for manoeuvre.

Part 3: Funding and other support

Chapter 1: Assistance from the Scottish Ministers

Loans and other assistance

86. Paragraph 10 enables the Scottish Ministers to make loans to the adjudicator. This may, for example, be needed at the time of establishing the adjudicator, before the levy on pub-owning businesses has been imposed and collected.

87. Paragraph 11 allows the Scottish Ministers to provide staff (including on a seconded basis, see notes on paragraph 24 of schedule 2 below), premises, facilities or other assistance to the adjudicator and may decide whether or not to do so at a charge. This would allow the Scottish Government, for example, to offer the adjudicator and relevant support staff space within existing premises, supported by existing administrative and IT services etc.

Chapter 2: Levy funding

Annual levy on pub-owning businesses

88. The adjudicator is to be funded primarily[4] by means of a levy on pub-owning businesses.

89. Paragraph 12(1) specifies that the levy for any particular financial year is payable by any person (legal or natural) who is or was a pub-owning business during that financial year. Accordingly, a business that ceased to qualify as a pub-owning business mid-way through the year would still be liable to pay the levy.

90. Paragraph 12(2) states that the adjudicator can only impose a levy in a financial year if the Scottish Ministers have given their approval. Requiring the consent of Scottish Ministers ensures that the levy is subject to a level of scrutiny and accountability and cannot be determined solely by the adjudicator.

Amount of levy

91. Under paragraph 13, the adjudicator can decide what proportion of the levy will be imposed on each pub-owning business in each financial year. If the adjudicator charges different pub-owning businesses different amounts, the differences must be based on the expenses the adjudicator has incurred, or expects to incur, dealing with relevant matters. Sub-paragraph (7) confirms that "expenses" includes the payroll of the adjudicator and any staff. In this way, a pub-owning business that is regularly accused of breaching the code, thus generating a significant case-load for the adjudicator, is liable to be charged more than a business that maintains good relations with its tenants and does not generate work for the adjudicator.

92. Sub-paragraph (5) requires the adjudicator to take account of non-levy income when setting the levy rate (or rates). This is to ensure that the levy provides necessary funding only. The sub-paragraph also allows the adjudicator to take account of estimated expenditure when setting the levy rate (or rates).

93. Sub-paragraph (6) states that the adjudicator must publish details of the levy, including the rate (or rates) set, and an explanation of how the rate-setting was done, including how variations among the workload generated by different pub-owning businesses were used to decide the different rates those business must pay. This will ensure transparency in the total levy amount, the separate amounts for each pub-owning business, and the methodology used.

Liability to pay

94. Paragraph 14 makes pub-owning businesses liable to pay the rates set if they are generally liable to pay the levy in the relevant year and have received a charging notice. So, for example, a business that had ceased to be a pub-owning business before the year in question would not be liable to pay the levy even if it had received a charging notice. Under sub-paragraph (2), a charging notice may specify not just how much is to be paid but also when and how it is to be paid.

[4] Some funding may also come via fees and/or payments from tenants (such as via fees payable for requesting a Market Rent Only lease, and costs of arbitration and investigation processes, in certain circumstances).

Rebate

95. Paragraph 15 confirms that any surplus funds held by the adjudicator at the end of a financial year may be repaid (in full of in part) to the relevant pub-owning businesses.

96. This prevents the adjudicator building up more funds than are needed to operate the adjudicator's office and meet its expenses and ensures that pub-owning businesses have a financial incentive to reduce the number of complaints to the adjudicator.

Appeals

97. Under paragraph 16 the imposition and/or amount of the annual levy on a pub-owning business may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.

Part 4: Accountability

Accounts and audit

98. Paragraph 17 requires the adjudicator to keep proper accounts and gives the Scottish Ministers power to give directions as to the form of those accounts. A copy of the accounts must be sent to the Auditor General for Scotland. This makes the adjudicator subject to sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000[5], which includes requirements relevant to the auditing of accounts by the Auditor General for Scotland (for example, that accounts must be sent to the Auditor General no later than 6 months after the end of the financial year to which the account relates).

Annual report

99. Paragraph 18 requires the adjudicator to publish an annual report after each financial year and send it to the Scottish Ministers (this may mean that the first annual report covers a shorter period than one year, depending on when the office of adjudicator is established). The Scottish Ministers must lay a copy of each annual report before the Scottish Parliament. This will bring the report to the attention of the Parliament (including to relevant committees) and allow further scrutiny as appropriate.

Information to Scottish Ministers

100. Under paragraph 19, the Scottish Ministers can require information from the adjudicator to assist them in carrying out their functions under the Act. This is a general power which will help to ensure the appropriate accountability of the adjudicator.

Part 5: Appointment and terms and conditions

Appointment and tenure

101. Under paragraphs 20 and 21, it is for the Scottish Ministers to appoint the adjudicator, but they must first secure the Scottish Parliament's approval of their choice. Each person (including an individual who holds another office) may be appointed to the office on a maximum of three occasions, whether or not consecutive. An individual's period of

[5] Public Finance and Accountability (Scotland) Act 2000 (asp 1). Available at: https://www.legislation.gov.uk/asp/2000/1/contents.

appointment is for a maximum of 4 years on the first occasion, and 3 years on later occasions, making an overall maximum of 10 years (whether consecutive or not) (see paragraphs 20(4) and 21(3)(b)).

102. Paragraph 20(2) requires Ministers to be confident that any person appointed as adjudicator will be impartial in balancing the interests of tied pub tenants and pub-owning businesses.

Defect in appointment

103. Paragraph 22(1) states that if there has been a defect in the appointment of the adjudicator, that does not invalidate anything they have done in their role. However, under sub-paragraph (2), once Ministers are aware of a defect in the appointment, they must remove the adjudicator from office as soon as possible. An individual removed in this way may be immediately reappointed, provided the Parliament agrees to that, and the reappointment is to be considered as a continuation of the original appointment (see sub-paragraphs (3) to (5)). This ensures that a defect in an individual's appointment and its subsequent correction does not affect the number of times the individual may be appointed or the total duration the individual may serve.

Remuneration and other terms and conditions

104. Paragraph 23 provides for the adjudicator to be paid salary, allowances and pension payments, subject to such constraints as may be determined by the Scottish Ministers.

105. Paragraph 24 states that other terms and conditions of the adjudicator's appointment, not covered by schedule 2, may be determined by the Scottish Ministers. For example, this could include issues relating to working location, patterns and hours (such as flexible and/or part time working arrangements).

Part 6: Staff

Secondees

106. Paragraph 25 allows the adjudicator to arrange for staff to be seconded to work as members of the adjudicator's office, and to be paid either by the organisation from which they are seconded, or by the adjudicator (sub-paragraph (2)). Secondment arrangements must be approved in advance by the Scottish Ministers (sub-paragraph (3)).

PARLIAMENTARY HISTORY

107. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	***Reference***
Before introduction	
Draft proposal – lodged 16 February 2017 Final proposal – lodged 9 January 2018	Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill

Proceedings and reports	***Reference***
Introduction	
Bill (as introduced) – 3 February 2020	SP Bill 62, Session 5 (2020)
SPICe briefing on Bill (as introduced) – published 17 July 2020	SPICe briefing SB 20-45
Stage 1	
Economy, Energy and Fair Work Committee — Stage 1 report (published 11 November 2020)	7th Report, 2020 (Session 5)
Delegated Powers and Law Reform Committee — Stage 1 report (published 26 August 2020)	45th Report, 2020 (Session 5)
Stage 1 debate — 26 November 2020	Columns 87-118
Stage 2	
Consideration of amendments (day 1) – 23 February 2021	Columns 3-62
Consideration of amendments (day 2) – 2 March 2021	Columns 5-18
Bill (as amended at Stage 2) – 3 March 2021	SP Bill 62A, Session 5 (2021)
Stage 3	
Stage 3 proceedings – 23 March 2021	Columns 83-117
Bill (as passed) – 24 March 2021	SP Bill 62B, Session 5 (2021)
Royal Assent	
Royal Assent given 5 May 2021	Tied Pub (Scotland) Act 2021 asp 17

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