

Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill

Page 2: About you

Are you responding as an individual or on behalf of an organisation?

on behalf of an organisation

Which of the following best describes you? (If you are a professional or academic, but not in a subject relevant to the consultation, please choose "Member of the public".)

No Response

Please select the category which best describes your organisation

Representative organisation (trade union, professional association)

Please choose one of the following; if you choose the first option, please provide your name or the name of your organisation as you wish it to be published.

I am content for this response to be attributed to me or my organisation

Please provide your name or the name of your organisation

Scottish Beer and Pub Association

Please provide a way in which we can contact you if there are queries regarding your response. Email is preferred but you can also provide a postal address or phone number. We will not publish these details.

Q1. 1. Which of the following best expresses your view of establishing a statutory Scottish Pubs Code and Scottish Pubs Code Adjudicator? Please explain the reasons for your response.

Fully opposed

Comments:

The SBPA is the trade body representing breweries and pub operating companies in Scotland. Together with our sister organisation the British Beer & Pub Association, our members account for over 90% of UK beer sales and own around 20,000 pubs. Several of our members (e.g. Heineken, Punch Taverns, Hawthorn Leisure, G1 Group and Admiral Taverns) operate tied tenancies in Scotland. Further information can be

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found on our website, www.scottishbeerandpub.com.

We and our members are fully opposed to the establishment of a statutory Scottish Pubs Code and Scottish Pubs Code Adjudicator, for the reasons set out in this consultation response. We caveat all answers below that we do not feel the imposition of a statutory system, Adjudicator and MRO option are required or justified in Scotland. We also feel that focus at this time should be on helping all Scottish pubs with measures to combat serious pressures on business such the very significant planned increases in business rates and beer duty in the next few years, access to labour after Brexit, and a fair and balanced system of regulation.

The tied pub models allows licensees access to their own pub business for a comparatively small investment, and benefit from the economies of scale of their owner companies. In our view, it is one of the best small business partnerships enabling shared investment, business development, and job creation, which makes it good for the pub sector, and for Scotland's pubgoers. With a number of issues facing

Scottish publicans, such as the change in drink drive laws, increased alcohol taxation and business rates, the support and investment from the pub company is extremely important. As highlighted below, we are of the view the system currently in place in Scotland allows the right balance of protection for tenants and market flexibility.

The SBPA has long supported protections for tied pub tenants in Scotland, and as proof of this developed the first Scottish specific code of practice which was launched in 2016. This came on the back of existing protections in place under the industry framework code of practice which had been in operation on a UK-wide basis for a number of years. These gave a range of protections for those operating tied pubs, covering both behavioural issues and access to a low-cost independent rent resolution service – unique to the pub sector. The recent Scottish code of practice is tailored for the specific Scottish tied pub market and property law, and includes bespoke access to Scottish experts for rent resolution services. We are of the view that the voluntary system works for Scottish tied tenants. Indeed the code ensures that Scottish tied tenants have all the same protections as the c.3500 tied tenants of pub companies and brewers in England & Wales operating less than 500 tied pubs

The statutory system currently in place in England and Wales of pub companies with over 500 tied pubs, which this consultation broadly uses as the basis for the proposed system in Scotland, has proved extremely problematic to implement through both primary and secondary legislation, and has continues to receive open vocal criticism by tenant groups and UK Parliamentary committees. Pub operators covered by the code have committed to work with it and are doing their best to implement it, but there have been a number of technical issues with implementation and interpretation of, what is very complex legislation, that are ongoing. The consultation document offers the option of transposing the English legislation wholesale into Scottish law via the Sewel convention (which presents a number of challenges, not least Scottish tenancy law is very different to that in England and Wales) or bringing forward Scottish specific legislation – which is the preferred option of the document's authors. However, the consultation suggests that this new piece of Scottish legislation will be heavily based on that currently in place in England and Wales which has not proven a straightforward or effective process, as outlined above.

In our view, the evidence base presented in this document to justify a code gives insufficient weight to the most recent and comprehensive piece of work in this area, commissioned by the Scottish Government and published in late 2016.

In November 2015 the Scottish Government, commissioned CGA strategy to produce a report on the Scottish Pub Sector based on the following key requirements:

- To provide a robust evidence base to assist Ministers in coming to a view as to whether legislation on the pub sector in Scotland is required;
- To look into various reports / impact assessments and conduct a literature review of the current state of the evidence;
- To gather further evidence from various operators across different operating models to establish if any part of the pub sector in Scotland is being treated unfairly from others.

The research found that the Scottish pub trade is currently a difficult area in which to operate. There are significant financial difficulties driven by social, legislative and economic changes. These factors have impacted adversely licensees, pub companies, brewers and wholesalers. Overall, the evidence collected did not suggest that any part of the pub sector in Scotland was unfairly disadvantaged. Despite some dissatisfaction among tied licensees with their contractual agreements, none of the licensees stated

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that they had referred a dispute to PIRRS or PICA-Service under the self-regulatory system. We are not aware of significant numbers of tied licensees calling for statutory legislation, or indeed having complained to PIRRS or PICA-Service in the past. Despite variations in beer prices or rent across pub types, these were not identified during the study as areas of dispute. We are surprised that these findings are not mentioned in the evidence base to justify extensive legislation.

Other evidence presented in the consultation consist of surveys looking at the issues from primarily an English perspective, some from a number of years ago.] There is little mention of the detailed results produced by the same polling firm with up-to-date research produced for the Scottish Government published in late 2016, as mentioned above.

Also of note is the fact that this consultation highlights some evidence from the UK Government consultation. The impact assessment for the English legislation included detailed research by independent consultancy firm London Economics. Indeed, this concluded that the legislation would lead to further pub closures and a significant loss of economic value.

We would highlight the table on page 12 is attributed to the SBPA, however we do not recognise parts the data within it.

Survey data presented in the consultation which quotes the majority of tied tenant earn less than £10,000-£15,000 per annum is, we believe, also highly misleading. Forecast net income for Scottish tied tenants based on rental data provided by pub companies averages over £30,000 per year. This will also exclude other benefits such as accommodation in some cases.

We would also highlight that over the many years the tied model has been looked at from a UK perspective, when asked to investigate the Office of Fair Trading (or equivalent body) has each time concluded the tie does not detriment the consumer. This is strictly a business to business issue. If there is no consumer detriment, then we would question given the small number of tied pubs in Scotland, with – as we highlight above – no real evidence of either consumer harm or litany of complaints from licensees, then this is not an effective use of Scottish parliament time – especially when the SG has already committed resource and time to a major study which has not identified any specific harm within a specific part of the Scottish pub sector.

With regard to the principle of fair and lawful dealing, SBPA member companies are totally committed to fair, transparent and lawful dealing with tenants and lessees and all other business partners. We would argue that there is no need for costly and complex legislation to attempt to 'enshrine' this, and already forms part of the Scottish code and previous UK industry framework codes. Any behavioural issues under the code are able to be independently investigated by PICA-Service.

Q2. 2. Could the aims of this proposal be better delivered in another way (without a Bill in the Scottish Parliament)?

Yes (if so, you may wish to specify any possible alternative option(s))

Please explain the reasons for your response.

Yes – protections for tied tenants delivered via the Scottish code and associated structures currently in place. The SBPA believes that self-regulation remains the appropriate way to ensure that all parties are protected from any potential abuse of the tied model. Self-regulation ensures that the business potential, level of support and respective obligations are fully transparent and offer a fair deal for all parties. The bespoke Scottish code of practice provides this. SBPA and its members are also committed to continuing to promote the benefits of self-regulation in Scotland, especially the access to the low cost rent dispute scheme. The detailed Scottish code can be found on the SBPA website [link], along with specific Scottish-facing sections of both the PIRRS and PICA-Service websites, which also hosts the code, for maximum clarity. As noted above, there are Scottish-based experts available for both schemes, and all hearings are able to take place in the Scottish location mutually agreed by both parties in any dispute.

Q3. 3. What do you think would be the main advantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

We do not feel this would be advantageous to the Scottish pub sector. Please see above for detailed reasons as to why.

Q4. 4. What do you think would be the main disadvantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

The majority of our arguments against legislation can be found in answer to question 1, however we explore the issues of marketplace change and perceived impact on consumer choice below.

We would highlight here one of the major unintended consequences of the legislation, as has been seen in England and Wales, has been the changing marketplace. With statutory legislation and MRO in particular, companies will have little choice but to look to move their pubs into more direct control – for example via management or shorter term agreements. Those tenants currently with long term tied leases in Scotland, who can sell on the remainder of the lease for a premium if they build up the business, could have these placed at risk as short term agreements or conversion to managed takes place. This would also detract from new entrants and entrepreneurs entering the tied marketplace. Whilst, companies of course would not wish to do this, however they would be forced to in the face of MRO and Government intervention in a highly complicated market and to enable continued long-term investment in their pubs.

This would lead to a change in the type of agreements being offered in the Scottish marketplace.

This is heightened by the fact that Scottish agreements do not have Landlord and Tenant Act 1954 protection, as in England and Wales. Therefore there is greater risk of companies taking back sites into direct control or seeking a tied arrangement with a new tenant. Currently, under the voluntary system there is little reason to do this as the balance works well for both the landlord company and tenant.

As noted above, and perhaps the most important factor often overlooked, is the critical importance of investment in tied pubs by brewers and pub companies. At least £20 million was invested by companies in their tied estates in Scotland over the last three years. This included an average of £40,000 per project developing more than 250 pubs on top of ongoing maintenance and repairs in hundreds of others. This vital investment would be placed at risk if the agreement changes significantly (such as through MRO) part way through the payback period and companies simply would not invest on the same scale as they do now.

There have been a number of claims (including in this consultation document) that pub company tied tenants are severely restricted in their choice of draught beers to stock, compared to independent pubs.

This is not the case. Recent data shows that in fact choice is greater in tenanted and leased pubs compared to independent pubs. On average leased and tenanted pubs offer over 10 draught beer brands to their customers, compared with less than 8 in the free trade. With regard to cask ale specifically, the choice is again greater in leased and tenanted pubs compared to independents – with an average of 1.9 cask ale brands on offer compared to 0.7.

Draught beer stockists

Av draught beer brands

Scotland Pubs 8.4

Scotland Free Pubs 7.7

Scotland Managed Pubs 9.2

Scotland Leased/tenanted pubs 10.1

Av cask ale brands

Scotland Pubs 1.1

Scotland Free Pubs 0.7

Scotland Managed Pubs 2.0

Scotland Leased/tenanted pubs 1.9

Q4. 4. What do you think would be the main disadvantages, if any, of establishing a statutory Scottish Pubs Code and Adjudicator?

Source: CGA Brand Index data to P04 18/04/2015

Tenants of pub companies in Scotland offer a wide range of Scottish beers, in addition to bestselling products from the rest of the UK. Based on the Scottish product lists of three pub companies (including the largest in Scotland), these tenants have a choice of almost 21 Scottish beer brands and over 130 from the rest of the UK and world beers. Some companies have a rotating craft/cask beer option for their tenants which include an additional number of Scottish micro and craft brewers. The fact that choice is not an issue here was also recognised in England & Wales by the inclusion of stocking rights for those brewers covered by the new legislation.

A vast majority of pubs in Scotland are independent and many of these choose to take up loan agreements with individual brewers, which often restricts the pub to only the brands produced by that particular brewer. There is no reason to believe that this would not continue, or indeed become more widespread, as a result of more pubs going free-of-tie which would have the consequence of less beer choice for the consumer.

Q5. 5. Which of the following best expresses your view of establishing a Market Rent Only option for tenants as part of a Scottish Pubs Code?

Fully opposed

Please explain the reasons for your response

We are fully opposed to establishing a Market Rent Only option as part of a statutory system. As highlighted above, the mechanics of MRO have caused considerable issues in England and Wales. On a practical point, we fail to see how MRO will work in practice in Scotland, given there is no right to renew as there is under the Landlord and Tenant Act 1954 in England and Wales. We would also point out that almost a year in to the operation of MRO in England and Wales, very few tenants have gone down this route reflecting that for the vast majority of tenants the tied agreement is the most appropriate for their business model.

Q6. 6. What do you think of the proposed contents of the Bill and the Code, and the scope of the Adjudicator's powers, as detailed on pages 17-18 of the consultation document?

We would comment that (although these mirror the powers of the England and Wales Pubs Code Adjudicator) the difference in size in the Scottish pub market i.e. around 17% of the total Scottish pub market compared to 40% in England and Wales and the fact there have been no substantiated complaints to the voluntary system over the last few years, suggests that an Adjudicator would not have a busy workload. It is again questionable whether the time and expense to set up a complex statutory system would be beneficial. The Scottish tied pub market is very different to that operating elsewhere in the UK, such as greater freedom in many agreements to purchase wine and spirits for example

Q7. 7. Which of the following best expresses your view of the Scottish Pubs Code Adjudicator being able to impose financial penalties for breaches of the Code?

Fully opposed

Q7. 7. Which of the following best expresses your view of the Scottish Pubs Code Adjudicator being able to impose financial penalties for breaches of the Code?

Please explain the reasons for your response.

As above, we do not believe there should be an Adjudicator, but if one were to exist it should not be able to impose financial penalties.

Q8. 8. In terms of who the Scottish Pubs Code, and Market Rent Only option, should apply to, which of the following best expresses your view? If you choose option (a) you will automatically be taken to question 10. If you choose (b) or (c) you will automatically be taken to question 9.

Please explain the reasons for your response.

None of the above – we believe that there should not be a statutory code or MRO in Scotland.

Q9. 9. How should larger pubcos be defined (e.g. by size of turnover, number of tied pubs owned in Scotland (if so, how many, etc.))?

No Response

Page 17: Financial implications

Q10. 10. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
(a) the pub companies which own tied pubs (Pubcos)	X					
(b) Tied-pub tenants	X					
(c) Tied-pub customers			X			

Please explain the reasons for your response

(a) Given companies would be expected to fund the system, this would be a significant cost for companies which would impact on their ability to invest in their estates, for example. Since there are far fewer tied pubs in Scotland compared to the English system, companies could be paying significantly more depending on the budget of the Adjudicator. (b) Whilst there may not be a direct financial cost on tenants, as highlighted above the move towards managed pubs and shorter agreements as a result of this legislation would lead to longer term agreements (which are beneficial for many tied tenants) being phased out with the loss of ability to charge premiums on assignation, for example. If taking the MRO route, tenants would have in effect a standard free-of-tie agreement. They would lose commercial benefits offered as part of the tie by pub operating companies rather than the licensee having to source and pay for these themselves – these could include licensing training, BII membership, cellar training, Business Development Manager contact and assistance, dispense equipment, marketing, drinks delivery and logistics, advice on websites/social media, internal sales tools, commercial services, and insurance. Having to source and pay for these themselves would be a significant increase in cost for tenants. (c) As

Q10. 10. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

highlighted above, the tie has no impact on consumers therefore we would not expect to see any cost impact on consumers.

Q11. 11. How do you think the associated costs of the proposal (predominantly the establishment and on-going running costs of a Scottish Pub Code Adjudicator) should be funded?

We would expect the set-up costs (at least) to be paid for by the Scottish Government, as was the England and Wales Adjudicator set-up costs. Again, we do believe there is justification for such a system in the first place and this will result in a cost burden on the Scottish taxpayer.

Page 19: Equalities

Q12. 12. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex, sexual orientation?

Neutral (neither positive nor negative)

Q13. 13. In what ways could any negative impact of the Bill on any of the protected characteristics be minimised or avoided?

No Response

Page 21: Sustainability of the Proposal

Q14. 14. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having future disproportionate economic, social and/or environmental impacts?

No Response

Page 22: General

Q15. 15. Do you have any other comments or suggestions on the proposal?

We would point out that the electronic tick box application system is potentially open to multiple responses from the same individual or organisation, we would welcome assurances when the results of the consultation are published that if this does occur such responses will only be counted once. It is also critical that responses are fairly

Q15. 15. Do you have any other comments or suggestions on the proposal?

weighted to reflect the constituent businesses or interest each organisation officially represents.