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Tied Pubs (Scotland) Bill

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The Tied Pubs (Scotland) Bill is a Member's Bill introduced by Neil Bibby MSP. The Bill aims to improve the position of pub tenants who are engaged in a tied lease with pub owners. The Bill seeks to establish a pubs code to govern the relationship between tied pub tenants and pub owners in Scotland, and create a code adjudicator to oversee compliance with the code.



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Executive Summary

Tied pubs are pubs which are owned by a company and rented out to the tenants, and where the terms of this lease mean that the tenant is sometimes paying below the market rate for rent. The tenant is also limited to only purchasing and stocking beer approved by the pub owning company, and usually at a rate above the usual wholesale rate for these products. These arrangements tend to lower the entry costs to the market, but mean that tied pubs might not be able to achieve the same profit margins as non-tied pubs. Around a quarter of Scotland's pubs operate on a tied basis: there are around 750 tied pubs in Scotland out of around [2,840 pubs in total](#).

In 2015 legislation was passed in England and Wales to create a Pubs Code and an Adjudicator which would govern the relationships between some tied pubs tenants and their pub-owning company landlords. Following the passage of this Bill, the Scottish Government commissioned [research into the pub sector in Scotland](#)¹ in 2015 which was published in 2016. This research concluded that while the pub sector in Scotland faced many challenges, no sub-sector was unfairly disadvantaged and that there was not a clear need for legislation in this area.

The Tied Pubs (Scotland) Bill aims to ensure that Scottish tied pub tenants have at least the same protections and opportunities as those covered by the 2015 Act in England and Wales

Overview of the Bill

Part 1 requires Scottish Ministers to establish requirements and restrictions on pub-owning businesses in connection with tied-pubs (the [pubs code](#)), and to establish an [adjudicator](#) to oversee this pubs code. This sets a timetable for the establishment of the pubs code, and for review of the code and adjudicators performance. Part 1 also sets out the regulatory principles which should guide the operation of the pubs code and adjudicator in Scotland. These are:

1. that there is a fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants
2. 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
3. that the tied agreements offer a fair share of risk and reward to both parties.

Part 2 gives effect to the code, including provisions which make an agreement between a pub-owning business and a tied pub tenant unenforceable if the code prohibits an agreement of that kind, and sets out the powers of the adjudicator to investigate, carry out [enforcement action](#) and set financial penalties in order to uphold the pubs code. Part 2 also sets out the [arbitration process](#) for resolving disputes between pub-owning business and tied pub tenants.

Part 3 defines the terms used in this legislation, including defining which pub-owning businesses will be covered by the legislation.

Part 4 includes final provisions such as the Parliamentary procedure applicable to regulations made under the Bill and commencement.

Background and Context

Tied pubs are pubs which are owned by a company and rented out to the tenants, and where the terms of this rent mean that the tenant sometimes pays below the market rate for rent. The tenant is also limited to only purchasing and stocking beer approved by the pub owning company, and usually at a rate above the usual wholesale rate for these products. These tend to lower the entry costs for the market, but mean that tied pubs might not be able to achieve the same profit margins as non-tied pubs.

In 2015 the UK Parliament passed the Government Bill that became the [Small Business, Enterprise and Employment Act 2015](#). [Part 4 of this legislation](#) established the Pubs Code Adjudicator, and included provisions to require the Secretary of State to introduce a Pubs Code in England and Wales. This was introduced in 2016 through [the Pubs Code etc. Regulations](#).

The UK Government cited the need for legislation based on the evidence heard in Select Committee investigations:

“ 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.”

Pubs Statutory Code and Adjudicator, 2015²

Background to the bill in Scotland

On 21 July 2016, in response to the Pubs Code coming into force in England and Wales, the Scottish Beer and Pub Association (SBPA) published a voluntary code of practice for tied pubs in Scotland. The code replaced the British Beer and Pub Association (BBPA)'s voluntary UK Industry Framework Code version 6, and previous individual company codes. This Code is supervised by the [Pub Governing Body](#), which is made up of industry associations representing both tenants and landlords. 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 tied pubs in Scotland have signed up to the code.

On 16 February 2017 Neil Bibby MSP lodged a proposal for a Bill to establish a Pubs Code in Scotland to govern the relationship between tenants of tied pubs and their owners, and to create an Adjudicator to enforce the code. On 20 February a [consultation](#)³ was launched on the proposal, which ran until 31 July 2017. This noted that while a voluntary code had been created, this did not provide sufficient protection for tied pub tenants in Scotland as it did not cover all pub-owning companies, is a voluntary code of practice, and does not go as far as the Pubs Code in England and Wales - for example offering a market rent only lease option. Neil Bibby MSP published a [summary of responses to the](#)

[consultation in January 2018](#)⁴. A large majority of the 275 responses were supportive of the proposal, with 87% fully supportive and 6% partially supportive.

The Policy Memorandum identifies ten companies that own tied pubs in Scotland as of March 2019 - tied pubs account for the majority of their businesses in Scotland.

Tied pub-owning businesses in Scotland

| Pub-owning business | Total number of pubs in Scotland | Total number of tied pubs in Scotland | % of Scottish pubs which are tied |
|--------------------------------------|----------------------------------|---------------------------------------|-----------------------------------|
| Admiral Taverns | 15 | 15 | 100% |
| Belhaven/ Greene King/ Spirit Leased | 128 | 124 | 96.9% |
| Caledonian Heritable | 64 | 30 | 46.9% |
| G1 Group/ Iona Pub Partnership | 100 | 90 | 90.0% |
| Hawthorn Leisure | 92 | 71 | 77.2% |
| Kingdom Taverns | 29 | 29 | 100% |
| Punch Taverns | 40 | 34 | 85.0% |
| Rosemount | 44 | 44 | 100% |
| Star Pubs & Bars/ Heineken | 255 | 250 | 98.0% |
| Trust Inns | 47 | 45 | 95.7% |
| Total | 814 | 732 | 89.9% |

Of these businesses five are covered by the Pub Code in England and Wales, and six are signatories of the Scottish Beer and Pub Association (SPBA) Voluntary Code of Practice (four are covered by both codes).

Scottish Government research

In England and Wales, there has been concern since the early 2000s around the relationship between pub companies and their contractually tied tenants. Between 2004 and 2011 [four Select Committees](#) conducted inquiries into the tied pubs model which identified several issues including level of rents and the price of beverages. The UK Government initially sought a voluntary code, but in 2013 determined that this was not working and launched a [public consultation](#). This led to the UK Parliament passing legislation for England and Wales as part of the [Small Business, Enterprise and Employment Act 2015](#) (the '2015 Act'). Prior to this legislation being introduced in England and Wales, the Scottish Government says no 'robust representations' were made to Scottish Ministers by anyone operating in the tied pub sector⁵, but the passage of the 2015 Act led to this changing and in 2016 the Scottish Government put out a tender for commissioned research.

In December 2016 the Scottish Government's Economic Development Directorate published '[Research on the pub sector in Scotland phase 1: scoping study](#)'⁶. This research noted that in the last few decades there was a radical change in the pub industry across the UK. The total number of pubs operating in the UK fell from around 70,000 in 1982 to around 48,000 by 2013. This reduction has been driven by changing patterns of alcohol consumption, regulation, competition from cafes and restaurants, and demographic change.

Key findings of the research

There was a 23% fall in pub numbers in Scotland between 2005 and 2015, while on trade (i.e. alcoholic drinks sold in licensed premises) sales of alcohol fell by 30.4%. Like for the UK as a whole there has been a general shift to drinking at home. Sales from alcoholic and non-alcoholic drink (wet revenue) dominate the tenanted pub sector sales in Scotland - over 80% of current sales. Other pub sectors have less reliance on wet sales, i.e. tied pubs generally sell less food than their non-tied competitors.

There are three factors which influence the decision about the type of pub model to operate: the level of experience of the tenant, the cost of entrance and the level of independence sought. The fully tied model is preferred by those with less experience in the sector - the model is seen as low risk and low cost. Cost of entry is estimated at 13 times lower compared with purchasing a freehold.

The research highlighted that there is limited flexibility to amend an agreed contract. Fully tied outlets generally have the opportunity to choose a longer commitment at the start, while partially tied outlets appeared to enjoy less restrictive contractual arrangements. The degree of flexibility in contracts does not appear to improve the satisfaction levels of tenants - the research found that there was a general dissatisfaction with the tie itself and a feeling of a lack of support. However, despite this dissatisfaction none of the licensees had referred a dispute to the Pubs Independent Rent Review Scheme ([PIRRS](#)) - the research suggested that this supports the view shared by pub companies that the overall level of serious dispute in the tenanted trade in Scotland was low.

The research found that there is little difference in beer purchasing behaviour across different pub models, although partially tied and non-tied outlets obviously actively shop around for the best price. There was also some evidence of 'local' flexibility from pub-owning companies to fully tied pubs to purchase regional beers and Scottish spirits. Analysis of overall beer costs showed a clear purchase price advantage for non-tied businesses, but found limited difference between fully and partially tied businesses. The research found that fully or partially tied tenants had a poor understanding of 'special commercial or financial advantages', known as SCORFA benefits. Examples of these benefits include business development advice, branding or free commercial TV packages.

In terms of financial performance the research found that turnover was broadly similar across the three models, but non-tied businesses outperformed in terms of higher profit margins and higher liquidity ratios. The research concluded that overall, non-tied pubs are the more robust and solvent businesses.

The research involved participation from 25 pub licensees: ten independent free trade outlets, ten fully tied pubs, five partially tied pubs and five pub companies. A self-completion survey was also launched, but no managed business agreed to take part.

Conclusions of the research

The research found that the 'on licence trade' market was generally a difficult area to operate in, with significant financial difficulties driven by social, legislative and economic changes. These factors have impacted licensees, pub companies, brewers and wholesalers - and are evidenced in pub closures which are expected to continue. Despite the differences in beer prices and rents, these were not the main areas identified as areas

of dispute (rather main concerns were around maintenance and pub upkeep issues). The research concluded that the evidence did not suggest that one sector of the pub market in Scotland is being unfairly disadvantaged in relation to another, and that further dialogue should take place between Government, trade bodies and other interested parties before making changes to legislation.

The [Campaign for Real Ale \(CAMRA\)](#) and the [Scottish Licensed Trade Association \(SLTA\)](#) stated the report was too limited, that the sample was not representative and so the conclusions were of extremely limited value. No 'free of tie' pubs were included, and the sample size of 25 was far lower than expected.

Two years on - reaction to the Pubs Code in England and Wales

On [24 January 2018](#) the [House of Commons](#) held a debate to review the impact of the implementation of the Pubs Code in England and Wales. This noted two areas of concern: the operation of arbitration and the provisions relating to market rent only options. The debate highlighted the following specific concerns:

- There have been questions regarding the impartiality and suitability of the arbitrator given a previous connection to pub-owning businesses.
- Too many decisions being taken in private leading to a lack of transparency.
- Pub-owning businesses using various strategies to make market rent only (MRO) leases 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, and unreasonable, unexpected and novel improvements of dilapidation requirements.
- The 21-day period from one of the four 'trigger events' (at a rent review, serving of a renewal notice, if there is a significant increase in price or a substantial change in circumstances) to make an MRO being too short for tenants.
- The MRO process being too complex which means tenants need expensive legal support.
- The arbitration process being far too slow, easily disrupted and delayed.

The Department for Business, Energy and Industrial Strategy launched a consultation in 2019 to inform the [government's statutory review of the Pubs Code and the performance of the Pubs Code Adjudicator](#). The review closed on 22 July 2019, however the outcome of the review is not yet available.

Overview of the Bill

This section outlines the Bill as introduced to the Scottish Parliament on 3 February 2020. The Bill requires that Scottish Ministers establish a Scottish Pubs Code and a Scottish Pubs Code Adjudicator. The Bill does not set out a draft code, but does include a number of requirements to guide Scottish Ministers in creating this code; namely that it must include the right for tenants to request a market rent only lease, and that it must include a right for tenants to stock one 'guest beer' which is not limited by the pub owning company. The following sections of this briefing set out the detail of the Bill.

1. [Scottish Pubs Code](#)
2. [Market rent only \(MRO\)](#)
3. [Guest beer right](#)
4. [Arbitration](#)
5. [The Scottish Pubs Code Adjudicator](#)
6. [General provisions](#)
7. [Financial Memorandum](#)

The Scottish Pubs Code

Section 1 (1) of the Bill grants Scottish Ministers the power and requires that they introduce the Pubs Code in Scotland through regulations, to be laid before the Scottish Parliament for approval within one year of Section 4 of the Bill coming into force. This code must be drafted to comply with three regulatory principles which are set out in section 3(3) of the Bill:

1. the principle of fair and lawful dealing by pub-owning businesses in relation to their tied-pub tenants
2. the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie
3. the principle that any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

Part 2 of the Bill (Giving effect to the code) states that a term of an agreement between a pub-owning business and a tied-pub tenant which is prohibited by the code will be unenforceable.

Differences to Pubs Code as implemented in England and Wales

This section details the main differences compared to the 2015 Act as implemented in England and Wales. There are five main areas of difference:

1. A broader scope: the Scottish Pubs Code will apply to all pub-owning companies which operate tied pubs, while in England and Wales it applies only to pub-owning companies who meet the threshold of 500 premises.
2. Changes to the process for applying for a 'Market rent only' (MRO) lease.
3. The inclusion of a right for tenants to stock a [guest beer](#).
4. Changes to the [arbitration process](#).
5. Some additional requirements around the [appointment of the adjudicator of the code](#).

Market rent only (MRO)

A market rent only (MRO) lease is a lease where the rent is set at the market rate for the property. This means the rent is not reduced and offset by other restrictions that would limit how the tenant conduct their business in the pub – for example a tie restricting the type of beers stocked and the price they are purchased for. The Bill requires that the Code includes provisions relating to a market rent only lease option; pub-owning businesses (PoB) must offer to enter into a market rent only lease with any tenant who requests that offer. Any modification to the existing terms must only be to the extent that it is necessary to convert the lease to market rent only - although the Scottish Pubs Code can specify circumstances which are exempt from this. The PoB must enter into the MRO lease as soon as possible following the tenant's request. This lease offer should not contain any unreasonable terms, and the code may specify which terms are to be considered unreasonable.

In England and Wales, an MRO is available to tenants only in certain specified circumstances, and is not required to be delivered by varying an existing lease. In contrast, the Bill proposes that in Scotland a tenant can request an MRO at any time, and that this MRO option must be a variation of the existing lease between the tenant and the pub-owning business. The Scottish pubs code must include a provision which requires PoBs to make every effort to enter into an MRO agreement as soon as possible following a request from a tenant.

Guest beers

The UK government initially consulted on a range of options for the pub code, including creating the right for tied tenants to stock guest beers. London Economics [modelled the impact of this](#) ⁷ in 2013 and concluded that including the guest beer right was likely to increase the number of pub closures and job losses resulting from the legislation, as allowing pubs to stock a guest beer would have a significant impact on the profitability of the pub owning businesses (PoB):

“ In relation to why the guest beer option appears to give the worst results, in terms of pub closures, this is because the introduction of a guest beer option leads to distinct differences in several of the key parameters which affect the profit which a pubco can derive from a given tenant under Policy Option I (Introduction of a Statutory Code and Independent Adjudicator). Under the guest beer option, compared to the scenario without this option, it is assumed that the tenant will be allowed to buy its standard lager (which constitutes an estimated 38% of total beer sales) from a supplier other than the pub company itself. As a result of this switching of some beer purchases to another supplier, the wet rent which the pub company receives from the given tenant reduces by 38%, i.e. the wet rent received by the pubco is lower under the guest beer option than otherwise. ”

Modelling the impact of proposed policies on pubs and the pub sector, London Economics London Economics, 2013⁷

A guest beer right was not included in the legislation for England and Wales. Although the [consultation document](#)⁸ published by Neil Bibby MSP did not include specific questions around a guest beer right, the consultation received supportive responses from The Campaign for Real Ale (CAMRA) and some individuals.

The Bill states that the code must require a PoB to offer to enter into a guest beer agreement with a tied pub tenant in certain circumstances – which should be specified in the code. This agreement would allow the tenant to sell to their customers at least one beer chosen by the tenant, at a price of their choosing. This beer can be changed as frequently as the tenant wishes.

Arbitration

The Bill sets out a simplified arbitration process compared to the 2015 Act, which limited referrals to tenants only and provided specific processes for a variety of possible circumstances. The Bill in Scotland would give pub-owning businesses (PoBs) and tenants the right to refer any dispute about the Scottish pubs code to arbitration. The Scottish Pubs Code Adjudicator can act as the arbitrator in this process, or appoint someone else to act in their place. The Bill does not propose that a dispute can be submitted immediately for arbitration however. If a tenant notifies their PoB of an alleged failure to comply with the pub code, the business has 21 days after the date it was notified of the dispute to respond before the dispute can be referred to arbitration. The Bill also sets an end date for a dispute being submitted to arbitration - four months after the first possible date (in other words four months plus 21 days after the PoB is notified of the dispute). Any arbitration must be conducted in accordance with relevant rules issued by the Chartered Institute of Arbitrators.

The Bill requires regulations to be made requiring tenants to pay a fee towards arbitration if initiated by the tenant – regulations can set out a fee amount, where a fee will not be required, and where a refund can be sought. A PoB that is party to an arbitration will be liable to pay the balance of the arbitrator's fees, unless the arbitration began as a result of a tenant submitting a dispute and the arbitrator concludes that this submission was vexatious.

The Scottish Pubs Code Adjudicator

Under the Bill, Scottish Ministers must appoint someone to the office of Scottish Pubs Code Adjudicator within one year of Section 4 of the Bill coming in to force.

The adjudicator may investigate a pub owning business's compliance with the code should it have reasonable grounds to suspect that it has not complied. Section 13 requires that the adjudicator publish a statement setting out the criteria that the adjudicator will adopt in deciding whether to carry out an investigation, and the practices and procedures that the adjudicator will follow in carrying out an investigation. An investigation may not begin until this statement has been published (Section 8(2)).

Publication of reports

Having carried out an investigation into a pub owning business (PoB), the adjudicator must publish a report setting out the findings of the investigation, and any enforcement action to be undertaken as a result. If the report identifies a PoB, then the PoB must be given the opportunity to comment on the report before publication. However, a report does not need to identify the PoB.

The adjudicator may require the PoB to cover some or all of the costs of the investigation, if at the end of the investigation the adjudicator finds that the PoB has not complied with the code. The adjudicator may require a tenant to pay for the costs of the investigation if it was initiated by a complaint from a tenant, and if the complaint was found to be wholly without merit or vexatious.

The total value of any payments received from a PoB or individuals must not exceed the total costs of the investigation and any enforcement action resulting from it.

The adjudicator must publish a statement setting out:

- the criteria used to decide whether an investigation under section 8
- the practices and procedures the adjudicator will follow in pursuing the investigation
- the criteria that the adjudicator will take in deciding whether to take enforcement action under section 9, and what type of action to take
- the criteria the adjudicator will use in deciding the level of financial penalty.

The adjudicator can make modifications to this statement at any time, and must consult any person it considers relevant while doing so.

Arbitration

The adjudicator must act as arbitrator (or appoint someone else to do so) in the event of a dispute, provided the dispute is:

1. between a PoB and a tied pub tenant
2. concerning compliance with the Code (other than with excluded terms)

3. is submitted to the adjudicator for arbitration under section 15 or in accordance with an agreement between the parties to the dispute.

The appointed arbitrator must comply with the rules issued by the Chartered Institute of Arbitrators, and any other rules from another dispute resolution body as nominated by the arbitrator. Either a PoB or a tied tenant can submit a request for arbitration to the adjudicator. A tied pub tenant cannot submit a request for arbitration prior to the 'earliest possible date' - which is 21 days after the tenant has notified the PoB of the alleged failure to comply with the code. A request for arbitration cannot be made more than four months after the earliest possible date either.

Scottish Ministers must set in regulations the limits on fees payable by tenants who submit a claim for arbitration under section 15.

Appointment of the adjudicator

The Bill provides for Scottish Ministers to have some flexibility in terms of the nature and the structure of the Scottish pub code adjudicator's role and office. The [policy memorandum](#)⁹ notes that the role may not require a full time appointment, and so this flexibility should allow Scottish Ministers to staff the office appropriately for the workload once the details of the pubs code are finalised.

The Bill aims to make the process around the appointment of the adjudicator more robust in Scotland by requiring that the Scottish Government consider the impartiality of the office holder. The Bill also states that the Scottish Parliament must agree the appointment by resolution.

The Bill does not make provision for a deputy, again in anticipation that the workload of the Scottish pub code adjudicator will not be as large as that in England and Wales. The [policy memorandum](#) notes that in England and Wales the work load for the pubs code arbitrator was highest in the first 12 - 18 months, but thereafter reduced. The Bill states that the Scottish pubs code adjudicator can be staffed by seconded staff.

Scottish Ministers will appoint the adjudicator but will require the Scottish Parliament's approval. An individual can be appointed a maximum of three times, with the first term being for four years and all subsequent terms three years. This means any one individual can serve a maximum of ten years as adjudicator. Paragraph 19(2) requires Scottish Ministers to be confident that any person appointed as adjudicator will be impartial in balancing the interest of tied pub tenants and pub-owning businesses.

General provisions

This section summarises some of the additional provisions included in the Bill relating to [reviews of the legislation](#) and [enforcement powers](#).

Review periods

The Bill provides that the operation of the Scottish pubs code and the performance of the Scottish Pubs Code Adjudicator are reviewed every two years. The first review period will

start on the day that the adjudicator is appointed, and will end on the 31st March one year later before reverting to a standard two year period. The review of the operation of the code and the adjudicators performance must consider whether it has been consistent with the regulatory principles which are set out in Section 3 of the Bill, and should consider whether any changes are required to reflect the principles more fully. These regulatory principles are:

1. the principle of fair and lawful dealing by pub-owning businesses (PoB) in relation to 20 their tied-pub tenants
2. the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie
3. the principle that any agreement between a PoB and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

In considering the performance of the adjudicator, Scottish Ministers must consider how effective the adjudicator has been in enforcing the code, consider whether it would be desirable to modify any regulations under sections 10 to 17 of the Bill, and any other matters the Minister considers important. Scottish Ministers may give guidance to the administrator concerning any aspect of their operation.

Powers of enforcement

The Bill provides powers which will be available to the Scottish Pubs Code Adjudicator (SPCA) in order to enforce the pubs code. The SPCA can direct a pub-owning business (PoB) to start or stop doing an activity in order to bring it into compliance with the Code, direct a business to publish specified information relating to the investigation by a certain deadline, or impose a financial penalty. The adjudicator must monitor whether the business complies with the direction to start or stop an activity, or publishing information by a certain deadline.

Any penalty notice must set out the deadline, the amount of the fine, how it should be paid, the reasons for the penalty and the period over which it should be paid. The penalty must not exceed the permitted maximum, which will be defined through secondary regulations. These regulations must define the permitted maximums as well as the methodology for arriving at the level of penalty. The imposition and amount of the penalty may be appealed to the Sherrif Appeal Court.

All financial penalties are to be paid into the [Scottish Consolidated Fund](#) where it can be used to fund the general spending plans of the Scottish Government as approved by the Scottish Parliament.

Section 19 of the bill requires that the adjudicator report any cases of PoBs trying to avoid the code to Scottish Ministers. 'Avoidance activity' is defined as acts or omissions which are unfair and intended to avoid the code to the detriment of tenants.

Financial Memorandum

The Financial Memorandum (FM) sets out the expected costs if this Bill passes into law. This section gives an outline of:

- The [funding model](#) for the Scottish pub code adjudicator proposed in the Bill.
- The [costs that the Scottish Government](#) will bear in creating the code and setting up the adjudicator.
- The [costs for pub-owning businesses](#) once the pub code and adjudicator start their operation.
- How these [estimated costs](#) have been calculated, and the possible range of costs identified.

Funding model

The funding model in the bill would mean that pub owning companies bear the majority of the ongoing costs of the Scottish pub code adjudicator's office. These costs will be met by an annual levy on those businesses covered by the code, and follows the model used in the 2015 Act. This levy would be raised at the start of the financial year based on estimated expenses - with any surplus to be repaid to pub owning businesses in the next financial year.

Expenses will be generated prior to the first levy being raised. Initial costs are expected to be funded by a loan from the Scottish Government, which could be repaid from either the first levy, or spread over subsequent levies.

Costs on the Scottish Government

The implementation and operation of the Pub Code Adjudicator in England and Wales is used as a reference for the likely costs resulting from the Bill. The PCA in England and Wales covers around 9,600 tied pubs, while the Scottish Beer and Pub Association estimates there are 732 tied pubs in Scotland. The Bill uses an estimate of 750 tied pubs to model expenses, which is 7.8% of the number of tied pubs covered by the PCA in England and Wales.

In addition to the loan to the Scottish Pubs Code Adjudicator (SPCA), the Scottish Government will bear initial costs related to developing, consulting on and introducing the code, guidance and other secondary legislation required by the Bill. There would also be costs related to promoting the guidance and the code to stakeholders to ensure sufficient public awareness. The [Financial Memorandum](#)¹⁰ states that these costs should be able to be absorbed within the Scottish Government's existing budgets.

The Scottish Government would also have to bear costs in relation to the recruitment of the SPCA and their staff, including advertising for the position, sifting applications and convening a panel to interview candidates. The [Financial Memorandum for the Scottish Biometrics Commissioner Bill 2019](#)¹¹ included an estimate of £4,000 for recruitment costs, which covered a commissioner and three FTE staff.

The Scottish Government will also bear initially costs related to the set-up of the SPCA's office, including securing the location and IT systems, and arrangements for hosting the code and guidance on the Scottish Government website (as has been used to host information relating to the [Poverty and Equality Commission](#)). These expenses could be allocated to the Scottish PCA's expenses, which would mean they are recouped once the SPCA begins to collect the levy. However, in England and Wales the PCA do not pay the Government for the pages used on the Government website.

The Financial Memorandum notes that Neil Bibby's preferred option is for the SPCA to share an office with an existing officeholder to minimise expenses for the Scottish Government; should a separate office be required then this will increase the costs.

In total, the Financial Memorandum sets out expected costs on the Scottish Government of £210,000 or £275,000 in the first year of operation (not including the salary of the SPCA), depending on whether the SPCA uses existing Scottish Government office space or not. These costs are expected to be reimbursed through receipts from the levy on pub owning businesses.

Costs on pub-owning businesses

Most of the costs of the Bill will fall on pub-owning businesses (PoBs). These costs will be either the annual levy which PoBs will be required to contribute to, or as a result of actions in relation to implementing the code (such as moving to an MRO agreement, participating in arbitration or a result of financial penalties issued by the Scottish Pubs Code Adjudicator (SPCA)). A PoB's share of the annual levy will be determined by the number of tied pubs in Scotland owned by the business, as well as the number of cases referred to the SPCA. The details of the levy are to be set out in regulations. The [Financial Memorandum](#)¹⁰ estimates that the costs on each PoB in scope of the levy will be between £6,000 and £86,700.

Estimated costs

The FM estimates the number of cases that will be brought to the Scottish Pubs Code Adjudicator (SPCA) with reference to number of enquiries raised and arbitration cases that the PCA heard in England and Wales during the first four years of its operation.

Table 1: PCA in England and Wales: cases and arbitration

| | 21 July 2016 - 31 March 2017 | 2017/18 | 2018/19 | 2019/20 (estimated) |
|--|-----------------------------------|----------------------------------|---------------------------------|-------------------------------------|
| Number of enquiries raised | 490 | 202 | 139 | 196 |
| Average number of enquiries per month | 59 | 17 | 12 | 16 |
| Total number of referrals accepted for arbitration | 116 (102 of which were MRO cases) | 100 (89 of which were MRO cases) | 96 (84 of which were MRO cases) | 68 (58 of which would be MRO cases) |
| Average number of referrals accepted for arbitration per month | 14 | 8 | 8 | 6 |

The number of tied pubs in Scotland is estimated to be 7.8% of the number in England and Wales, and the Financial Memorandum uses this percentage to estimate the number of cases in the first three years of operation of the SPCA. These estimates will be impacted by several other factors though, including the level of support among Scottish tied pubs for the Scottish code, the levels of dissatisfaction among tied pub tenants with their pub-owning businesses, and market conditions which will affect the extent to which tied pub tenants believe they would gain financially by breaking the tie.

Table 2: Scottish PCA estimated cases and arbitration

| | Year One | Year Two | Year Three |
|----------------------------------|----------|----------|------------|
| Estimated number of enquiries | 55 | 16 | 11 |
| Estimated number of arbitrations | 13 | 8 | 8 |

Beyond investigating cases and conducting arbitration, it is expected that the role of the SPCA would also include issuing guidance to tied pub tenants and pub owning businesses to assist with interpretation of the code, and conducting research with stakeholders to understand how the code is being applied. The Financial Memorandum concludes that based on the expected case and arbitration load and the anticipated other duties of the SPCA, the position will not have to be a full time position. Similar positions public positions and their remuneration and set out in table 3 below.

Table 3: Comparable positions and salary details

| Scottish Parliament Supported Office-holder | Salary for 2018/19 | Employer National Insurance Contribution | Employer Pension contribution in 2018/19 | Total |
|---|--------------------|--|--|----------|
| Scottish Information Commissioner | £74,095 | £9,165 | £16,539 | £100,540 |
| Ethical Standards Commissioner | £77,105 | £9,478 | £17,040 | £103,623 |
| Children and Young People's Commissioner for Scotland | £71,761 | £8,741 | £15,859 | £96,361 |
| Chair of the Scottish Human Rights Commission | £72,479 | £8,840 | £16,018 | £97,337 |

These positions are used to arrive at an estimate of £100,500 for the total remuneration package on an FTE basis for the SPCA. The Financial Memorandum estimates that a position of 0.5 FTE will be required in order to handle the expected workload of the SPCA, and so the estimated remuneration for the position would be £50,250. Additionally, it is estimated that the SPCA will require one senior and two junior members of staff to support its work (the same staffing model used by the Standards Commission), which is a total of £160,000 in staff costs for the adjudicator and their staff.

The biggest variable in the projected year 1 costs included in the Financial Memorandum relates to the location of the SPCA's office. If the SPCA is able to share an existing Scottish Government office then the total set up costs in year 1 are expected to be £210,000. However, if the SPCA requires its own office then the costs will increase to £275,000 for year 1. This does not include the SPCA's salary.

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