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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Tied Pubs (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

- (a) any—
 - (i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;
 - (ii) [deleted]
 - (iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;
- (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;
- (c) general questions relating to powers to make subordinate legislation;
- (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;
- (e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;
- (f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;
- (g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and
- (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 10 March and 25 August 2020, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Tied Pubs (Scotland) Bill (“the Bill”).ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.
3. The Member in Charge has provided the Parliament with a memorandum on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The delegated powers memorandum is available [here](#).

Overview of the Bill

4. This Member's Bill was introduced by Neil Bibby MSP on 3 February 2020. The lead committee is the Economy, Energy and Fair Work Committee.
5. The Bill provides for the establishment of a Scottish Pubs Code (the "Code") to govern the relationship between tenants of tied pubs and the business which owns the pub and leases it to them ("the pub-owning business"). It also provides for an adjudicator to enforce the Code. "Tied" tenants are pub-tenants who are under a contractual obligation to buy some or all of their products from the pub-owning business.
6. The Policy Memorandum states that the aim of the Bill is "to improve the position of tied pub tenants" and lists three fundamental aims (which are also on the face of the Bill in section 3):
 - that there is fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants;
 - that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie; and
 - that the tied agreements offer a fair share of risk and reward to both parties.

Delegated Powers

7. At its meeting on 10 March 2020, the Committee agreed that it was content with the following delegated powers in the Bill:
- **Section 4(4) – power to repeal section 4**
 - **Section 6 – Ministerial guidance to the Adjudicator**
 - **Section 10(3) – power to define permitted maximum financial penalty payable by pub-owning business for failure to comply with the Code**
 - **Section 14(3) – power to make provision about ‘excluded terms’ under the Code in the context of arbitration**
 - **Section 17(1) – power to provide for fees payable by tied-pub tenant in certain circumstances relating to arbitration**
 - **Section 17(4) – power to require a tied-pub tenant to pay adjudicator expenses of arbitration in certain circumstances**
 - **Section 23 – Power to make ancillary provision**
 - **Section 25 – Commencement**
8. In relation the delegated power in section 1(1) to make a Scottish Pubs Code, the Committee agreed to write to the Member in Charge (see Annex A). The response from the Member (see Annex B) was then considered by the Committee at its meeting on 25 August 2020. The Committee's consideration and recommendations in relation to this power are set out below.

Section 1(1), read with schedule 1 and section 4(1) and (3) – power to make a Scottish Pubs Code

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

9. Section 1(1) requires the Scottish Ministers to make regulations imposing requirements and restrictions on pub-owning businesses in connection with tied pubs. Section 1(2) introduces Schedule 1, which sets out what the Scottish Pubs Code to be provided for in regulations under section 1(1) may and must include, without prejudice to the generality of that power.
10. The Code *must* include a requirement to comply with the Adjudicator's directions following an investigation and a restriction on enforcing certain terms of an agreement. The Code is also to require the pub-owning business to offer a guest beer agreement and a market rent only (“MRO”) lease. A guest beer agreement is a right for the tenant to stock at least one beer of their choosing at any time. An MRO

lease is one based on a market rent (in the absence of agreement between the landlord and the tenant) and which imposes neither a “product tie” nor a “service tie” in relation to the pub (as defined in paragraph 5(4) of Schedule 1). Provision is to be made about the period for negotiation of an MRO lease and the appointment of a rent assessor to determine the market rent where there is no agreement.

11. Examples of provision which the regulations *may* make provision for are in relation to information to be provided by pub-owning businesses to tenants of tied pubs and making further procedural provision in regard to market-rent-only leases.
12. Regulations made under the power in section 1(1) are subject to the affirmative procedure. Section 4(1) provides that the Scottish Ministers must lay draft Scottish Pubs Code regulations under section 1 within a year of section 4 coming into force. The Scottish Ministers must make the Scottish Pubs Code regulations if the Parliament approves the draft instrument (section 4(3)).

Committee Consideration

13. The power in section 1(1) is wide in its scope and the provision in Schedule 1 is without prejudice to the generality of that power. Paragraph 14 of the Delegated Powers Memorandum recognises that the regulations will be significant, complex and lengthy and that they are a core element of the overall legislative package.
14. The Code to be provided for in the regulations can and will, if the Bill is enacted in its current form, make significant provision that will impact on the rights of pub-owning businesses by providing for the regulation of their actions in their dealings with tied-pub tenants. In particular, it will set various restrictions on the contractual freedom of pub-owning businesses by requiring them to offer certain changes to their existing contractual relationships with tied-pub tenants. Schedule 1 contains provisions that go further than the equivalent pubs code regime in England and Wales; for example, by requiring a pub-owning business to offer a guest beer agreement
15. In light of the significance of the provision that can and must be made in regulations containing the Code, the Committee asked the Member in Charge whether a super-affirmative would be more appropriate to apply to the exercise of the power in section 1.
16. In his response to the Committee, the Member in Charge recognised that the regulations made under section 1 are fundamental to the Bill and that the Code to be provided for in the regulations will deliver essential elements in achieving the aims of the Bill.
17. Mr Bibby indicated that the affirmative procedure was chosen to ensure an appropriate level of Parliamentary scrutiny by requiring that the regulations must actively be approved by the Parliament. However, he indicated there are potential further advantages to a higher level of scrutiny afforded by a form of super-affirmative procedure. In particular, he identified that making provision for an additional requirement on Ministers to consult on the draft regulations before they are laid could provide a formal opportunity for industry experts, including tied tenants, to contribute to the process and help shape the Code.

18. Mr Bibby indicated in his response that he will reflect on this further as Stage 1 scrutiny of the Bill continues and will consider whether to seek to amend the Bill accordingly at Stage 2 should the Bill progress this far.
19. The Committee recommends that regulations under section 1 should be subject to a form of super-affirmative procedure and would encourage the Member to amend the Bill at Stage 2 to reflect this.
20. In addition to the observations made above, certain provisions of the Code will constitute a control of use of the property of pub-owning businesses engaging their rights to peaceful enjoyment of property under Article 1 of Protocol 1 of the European Convention on Human Rights. The application of a form of super-affirmative procedure to regulations under section 1 would afford the Parliament a greater opportunity to conduct enhanced scrutiny of the impact of the Code on the competing rights of pub-owning businesses and tied-pub tenants.
21. Applying a form of super-affirmative procedure could be achieved by inserting a requirement for a pre-scrutiny draft of the regulations under section 1 to be laid before the Parliament. This would afford the Parliament an initial opportunity to comment on the proposed regulations. The period for comments could be 40 or 60 days and could be accompanied by a requirement for the Scottish Government to formally consult publicly. The Government could be required to consider any comments made and report on how these were taken into account when laying the final version of the regulations before the Parliament for approval under the affirmative procedure.

Annex A: Letter to the Member in Charge

Letter to Neil Bibby MSP dated 11 March 2020

Tied Pubs (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 10 March 2020 and seeks an explanation of the following matter:

Section 1(1), read with schedule 1 and section 4(1) and (3) – power to make a Scottish Pubs Code

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Section 1(1) requires the Scottish Ministers to make regulations imposing requirements and restrictions on pub-owning businesses in connection with tied pubs.

Schedule 1 sets out further details of what may and must be included in the Scottish Pubs Code regulations.

The power in section 1(1) is wide in its scope and the provision in Schedule 1 is without prejudice to the generality of that power. In particular, the provision required and capable of being made under the regulations will impact on the rights of pubowning businesses by providing for the regulation of their actions in their dealings with tiedpub tenants. For example, paragraph 4 of Schedule 1 states that the Code must require a pub-owning business to offer a guest-beer agreement and paragraph 5 of Schedule 1 provides that the Code must require a pub-owning business to offer a market rent only lease to the tied-pub tenant.

In light of the wide scope and the significance of the power in section 1(1), would a form of “super-affirmative procedure” be more appropriate? This would afford the Parliament the opportunity to conduct enhanced scrutiny of the regulations setting the Code.

I'd be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Wednesday 8 April 2020.

Thank you.

Andrew Proudfoot

Clerk to the Delegated Powers and Law Reform Committee

Annex B: Response from the Member in Charge

Response from Neil Bibby MSP dated 23 March 2020

Dear Andrew

Thank you for your letter of 11 March 2020 seeking a response regarding an issue raised by the Delegated Powers and Legislative Reform in relation to my member's bill.

Your letter raised an issue relating to the following—

Section 1(1), read with schedule 1 and section 4(1) and (3) – power to make a Scottish Pubs Code

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Your letter stated— “In light of the wide scope and the significance of the power in section 1(1), would a form of “super-affirmative procedure” be more appropriate? This would afford the Parliament the opportunity to conduct enhanced scrutiny of the regulations setting the Code.” As your letter noted, section 1(1) requires the Scottish Ministers to make regulations imposing requirements and restrictions on pub-owning businesses in connection with tied pubs, and schedule 1 sets out further details of what may and must be included in the Scottish Pubs Code regulations.

These regulations are fundamental to the Bill as they will contain the tied pubs code provided for by the Bill. The code will deliver essential elements in achieving the aims of the Bill, including the requirement for pub-owning businesses to offer a market-rent-only lease to tied-pub tenants when asked to do so. To ensure the regulations are subject to an appropriate level of Parliamentary scrutiny, given their significance, the Bill provides for the affirmative procedure to be used, thus requiring them to be actively approved by the Parliament.

However, I can see potential further advantages in the regulations being subject to a higher level of scrutiny, via a form of the super-affirmative procedure. I understand this would normally mean adding a requirement on Ministers to consult on the draft regulations before laying them for approval in the normal way. This could potentially provide a formal opportunity for industry experts, including tied tenants, to contribute to the process and help shape the code.

I will therefore reflect on this further as stage 1 scrutiny of the Bill continues and consider whether to seek to amend the Bill, should it progress to stage 2, accordingly.

Yours sincerely,

Neil Bibby MSP

