Scottish Pubs Code

Consultation 2: analysis report

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Disclaimer

The views summarised in this report are those of the organisations and individuals who chose to submit them. The recommendations expressed in this report are those of the contractors appointed. The report does not represent the views or intentions of the Scottish Government.

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Executive summary

Background

The Tied Pubs (Scotland) Act 2021 requires the Scottish Government to create a Scottish Pubs Code for 'tied pubs'. Tied pubs are pubs which are owned by a pub-owning business and leased to a tenant. The Scottish Pubs Code will govern the relationship between tied pub tenants and their pub owning businesses. The Scottish Government is currently consulting with stakeholders to develop the Scottish Pubs Code for tied pubs. A written consultation was issued in two parts, to provide the sector with early certainty on key aspects of the code. The first written consultation covered the Market Rent Only lease and guest beer agreement aspects. The purpose of this report is to present the findings from the second written consultation. This consultation covered a range of aspects of the code as follows:

- pre-entry requirements,
- rent review process,
- repairs and dilapidations,
- flow monitoring devices,
- gaming machines,
- arbitration, and
- financial penalties for non-compliance.

The second consultation was hosted online on Citizen Space and was live from 17 March to 12 May 2022.

Consultation response and sample

Thirty responses were received in total, including 16 from organisations and 14 from individuals. Respondent types included:

- 6 tied pub tenants (5 with one tenancy, 1 where the number of tenancies was unclear)
- 6 pub-owning businesses
- 1 brewery
- 7 representative organisations
- 1 other organisation
- 5 consumers

Four did not provide an answer regarding respondent type.

Findings

As in the first consultation, there was some divergence in views between pub-owning businesses and tied pub tenants. Pub-owning businesses' main concerns were around proposed triggers for rent reviews. They often felt these were not well enough defined and posed a potential risk to their business in terms of certainty around future rental income.

For tied pub tenants, concerns were mainly around fees and expenses in relation to disputes. The key challenge that emerged was pitching expenses at a level that discourages vexatious claims but not genuine ones and is acceptable to tenants and businesses alike.

Pre-entry requirements

- Respondents of all types agreed that pub-owning businesses should be required to provide information about pre-entry training to tenants. The key concern was that information provided to new tenants about the pub's past and prospective future performance should be genuinely impartial and accurate. A past tendency was noted for pub-owning businesses to provide over-optimistic forecasts.
- Most proposals in the consultation relating to tenant business plans were supported across respondent types. The exception was around taking into account the tenant's business plan when negotiating the lease. Some pub-owning businesses strongly disagreed (three out of six). Some felt that tenant business plans should not supersede what they viewed as long-standing industry practice whereby profit and loss reports for new tenants are prepared in accordance with the Royal Institute of Chartered Surveyors (RICS) guidelines. Also they wanted clarity on liabilities and obligations that might arise for the business if they had to take into account the tenant's plan for example if the plan forecast a loss in the first year, would the pub-owning business have a responsibility to mitigate that?
- From the tied pub tenants' point of view, the priority was access to impartial, consistent and accurate information and advice around drawing up a business plan. It was felt this would benefit everyone by enabling plans to be based on realistic and reliable information. Financial information provided to tenants needed to be detailed and quite granular in the view of some tenants, covering items such as accurate sales data, historical rents, any previous financial support, utility costs, staffing costs (broken down to each staff role) and photographic evidence of the condition of premises on entry to provide clarity in any future disputes.

Rent review process

- The profit and loss forecast emerged as an issue on which tied pub tenants and pub-owning businesses took different views. For tenants and their representatives, they wanted the forecast to be fully transparent (including the pub-owning business's projected profit based on the proposed rent) and based on actual figures

as far as possible. Pub-owning businesses however were not keen to guarantee profit and loss forecasts and stressed the difficulty of making forecasts.

- Tied pub tenants felt there was a need for more information on industry benchmarking and how it is used to calculate the rent. Some were concerned about the quality of industry data. They wanted actual sales and costs data to be used if possible and felt over-reliance on industry data risked a 'one size fits all' approach to reviewing and setting rents.
- Overall, most respondents supported the proposal to require RICS guidance to be taken into account when preparing the rent assessment statement. Some tied pub tenants however felt that RICS surveyors were sometimes too closely linked to pub-owning businesses.
- Overall, most respondents supported proposals regarding circumstances where a rent review can be requested. However, pub-owning businesses were more likely than others to have reservations. Their main concern was that including the proposed potential triggers for rent reviews sought to introduce a non-contractual obligation without evidence or an impact assessment.
- Most agreed with the proposed changes in circumstances that would trigger the right to request a rent review, but again pub-owning businesses were more ambivalent. They wanted to see clear definitions around some of the changes for example what exactly would count as a 'change to local employment' significant enough to trigger the right to request a rent review?
- Most across all respondent types agreed that tenants should be able to request a rent review for existing leases, but pub-owning businesses were less supportive than tied pub tenants regarding new leases.
- Tied pub tenants agreed that a legal right to request rent review was workable alongside contractual rent review rights, but pub-owning businesses tended to disagree. Tenants felt the legal right was necessary to counter a perceived imbalance of power in the landlord's favour. Pub-owning businesses were put off by the potential cost and complexity they felt this would entail for them.
- Most agreed with the proposed time periods for rent reviews (rent assessment statement should be provided within 4 weeks of a request, and the statutory rent review process should take no longer than 12 weeks). Tied pub tenants were especially supportive as they were keen to prevent the processes from being drawn out by landlords, which they felt was a risk.
- Views were mixed on when to allow disputes to be referred to the Adjudicator. Some felt that other avenues should be exhausted first in order to avoid the risk of overburdening the Adjudicator with cases, whereas others felt that not allowing early access to arbitration risked building in long delays to the dispute resolution process.

Repairs and dilapidations, Flow Monitoring Devices and gaming machines

- Dilapidations was generally acknowledged as a long-running source of tension between tenants and landlords that needed to be addressed. Pub-owning businesses were keen that the arbitration process should safeguard against cases where unscrupulous tenants are potentially looking to avoid their obligations around dilapidations and repairs. Tied pub tenants, on their part, highlighted instances of dilapidations bills being used unfairly, in their view, against tenants by landlords in the past.
- Flow Monitoring Devices were viewed with reservations across respondent types. There was a general recognition that they were not always accurate and it was generally felt that action should not be taken against tenants purely on the basis of their readings.
- It was mostly felt that gaming machines should be covered by the Code. Tied pub tenants especially did not want to see rents proposed that included gaming machines, citing concerns about refusal to accept landlords' machines being used as an excuse to increase rent. Pub-owning businesses were less likely to report that this was an issue.

Arbitration and financial penalties, fees and expenses

- Half of respondents did not think that 1% of turnover should be the maximum penalty for a pub-owning business or group that has failed to comply with the Code. Those who disagreed felt it should be higher in order to be more of a deterrent. Some tied pub tenants stressed it should not be linked to turnover as pub-owning businesses could theoretically arrange their accounts in a way that divided their turnover streams, thus reducing liabilities. They also wanted stricter penalties for repeat violations.
- For pub-owning businesses operating across jurisdictions, the preference tended to be that penalties should be based strictly on the turnover of the relevant part of the business only i.e. the division running the pub business in Scotland, not the turnover of the organization as a whole.
- The proposed £250 fee for submitting a dispute to arbitration was broadly acceptable across respondent types. For most, the key was to have a fee that discouraged vexatious cases but not genuine ones.
- Regarding tenant expenses where arbitration results in an award in favour of the landlord, views were split along respondent lines. Pub-owning businesses were most in agreement that tenants should be required to pay towards arbitration expenses, tied pub tenants less so. Regarding a limit to expenses payable by the tenant, again the issue was striking a balance between discouraging vexatious cases and encouraging genuine ones.
- The picture was similar regarding views on whether tenants should be required to pay expenses in excess of any ordinary limit where an arbitrator has decided that the pub-owning business has no liability on account of the dispute having been submitted for arbitration by the tenants deliberately to cause annoyance. Pub-

owning businesses tended to believe they should as a deterrent, whereas tenants were less supportive.

Introduction

Background

The Tied Pubs (Scotland) Act 2021 requires the Scottish Government to create a Scottish Pubs Code for tied pubs[1]. The Scottish Pubs Code will govern the relationship between tied pub tenants and their pub owning businesses. The Scottish Pubs Code will cover arrangements such as the process for tenants to request a Market Rent Only (MRO) lease (removing all service or product ties), circumstances where a MRO lease cannot be offered, guest beer agreements (where a tenant can select and stock one beer of its choosing), financial penalties for non-compliance with the code, and information requirements on pub-owning businesses. The Act also establishes a Scottish Pubs Code Adjudicator to apply and enforce the code, including arbitrating in disputes about non-compliance between tenant and the pub-owning business. The Scottish Pubs Code could include aspects from both the current voluntary code of practice in Scotland[2], and the English and Welsh code.

The Scottish Government is currently consulting with stakeholders to develop a Scottish Pubs Code for tied pubs. A written consultation has been issued in two parts, to provide the sector with early certainty on key aspects of the code. The first written consultation covered the Market Rent Only lease and guest beer agreement aspects. The second consultation ran from 17 March to 12 May 2022. It covered other aspects of the Scottish Pubs Code as follows:

- Pre-entry requirements
- Rent review process
- Repairs and dilapidations
- Flow monitoring devices
- Gaming machines
- Arbitration
- Financial penalties for non-compliance

The purpose of this report is to present the findings from the second written consultation.

[1] Tied pubs are pubs which are owned by a pub-owning business and leased to a tenant. Tenants must buy some or all of their products and services from the pub-owning business or someone nominated by the pub-owning business ("the tie"). Ties can include, for example, beer and these products and services are often charged at a higher cost than on the open market. In return, tenants sometimes pay lower rent and receive other support from the pub-owning business.

[2] Pub Sector: Code of Practice for Scotland

Method

The consultation questionnaire was developed by the Scottish Government, reviewed by Progressive and hosted online on Citizen Space (See Appendix A). The consultation was live from 17 March to 12 May 2022. Responses received via Citizen Space were automatically collated into a database. A number of responses were received via email. These were manually entered into Citizen Space where possible. Responses were then downloaded by Progressive into an Excel database. This raw data file was used for analysis and creating data tables. Thirty responses were received.

Limitations of the findings

The online survey did not prompt respondents to answer each question before moving on to the next one. Whilst this allows the respondent to complete the survey as they wished, it also means that there are a proportion of 'not answered' responses for each question. The sample sizes for each question state how many respondents answered it. However, this is also an advantage as it enables respondents to respond on areas of interest and expertise, without being forced to respond on issues they have no interest/views on.

It should be borne in mind that this was a consultation, not a representative survey. Therefore the findings reflect the views of respondents, but cannot be extrapolated to those of any particular group, for example, tied pub tenants or pub owning businesses.

Please note also that due to the very small sample size, figures are presented as absolute numbers rather than percentages.

Consultation response and sample

Thirty responses were received in total. The table below shows the breakdown between responses from individuals and from organisations.

Table 1: Consultation responses

	N
Individuals	14
Organisations	16
Total	**30**

The breakdown of respondent types is detailed in the table below.

Table 2: Respondent type

	N
Tied pub tenant – one tenancy	5
Tied pub tenant – number of tenancies unknown	1
Pub-owning business	6
Brewery	1
Representative organisation	7
Other organisation	1
Consumer	5
Not answered	4
Total	**30**

Pub-owning businesses who responded were asked about the location of their tied pubs. All reported having pubs located in cities/towns, and most also in rural settings. Two reported having pubs in island locations. Please note that some pub-owning businesses indicated they had tied pubs in more than one type of location, therefore the responses in Table 3 below do not sum to the total number of pub-owning business respondents (six).

Table 3: Location of tied pubs

	Pub-owning businesses (N)
Islands	2
Cities/towns	6
Rural settings	5

Main findings

The findings are covered in four sections:

- Pre-entry requirements
- Rent review process
- Repairs and dilapidations, Flow Monitoring Devices and gaming machines
- Arbitration and financial penalties, fees and expenses

Pre-entry requirements

Pre-entry training

The majority of respondents thought that there should be a requirement for pub-owning businesses to provide information about pre-entry training to tenants. Two of the six tied pub tenants disagreed, however.

Table 4: Should pub-owning businesses be required to provide information about pre-entry training to tenants? (Q1)

	All (N)	Individuals (N)	Organisations (N)
Yes	25	11	14
No	2	2	-
Don't know	1	-	1
Not answered	2	1	1
Total	**30**	**14**	**16**

Respondents were asked a follow-up open-ended question to comment further on their answer (Q1a). Amongst those who agreed with the proposal, some stressed that the information provided by the training itself should be impartial. In particular, they felt it was important that the information provided about the pub itself (its levels of trade and prospects) should be accurate. Some felt that there had been a tendency in the past to provide over-optimistic information to new starts.

"Not only should there be training but the facts and figures provided need to be accurate and realistic, too many of the figures provided to tenants in the UK are based on very optimistic estimates rather than the actual latest trading figures!" (Representative organisation)

Reasons for disagreeing with the proposal were that it should only be required for new entries to the industry (rather than the start of every lease), and that the

requirement was not in the spirit of free of tie lease being offered on commercial terms, which they felt is how they should be offered under the Code.

“I believe that as pub-owning businesses should under the proposed Scottish Pubs code being offering free of tie leases on commercial terms, then it is not their responsibility to ensure that their prospective tenants undertake pre entry training.” (Tied pub tenant)

Tenant business plan

Respondents were asked whether they agreed or disagreed with the following proposals around whether the code should require pub-owning businesses to undertake the following activities in relation to business plans:

- Advise tenants to seek appropriate advice to develop a suitable business plan.
- Provide tenants with information on sources of independent advice.
- Ask to see any business plan prepared by the tenant.
- Take into account the tenant’s business plan when negotiating the lease.

Overall, the majority agreed (either strongly or tend to) with each of these as summarised in the table below. Agreement was particularly strong amongst pub-owning businesses regarding the first three proposed activities, with tied pub tenants more likely to be neutral or disagree. The exception was regarding ‘tak[ing] into account the tenant’s business plan when negotiating the lease’. Tied pub tenants were almost all in agreement with this whereas pub-owning businesses were more divided, with half of them disagreeing strongly.

Table 5: Agree or disagree with proposed activities around tenant business plans: summary (Q2)

	Strongly/Tend to agree (N)	Neither agree nor disagree (N)	Strongly/Tend to disagree (N)	Don’t know/No answer (N)
Advise tenants to seek appropriate advice to develop a suitable business plan	24	3	-	3
Provide tenants with information on sources of independent advice	24	1	2	3

Ask to see any business plan prepared by the tenant	24	2	1	3
Take into account the tenant's business plan when negotiating the lease	19	3	5	3

The tables below look at the response to each statement in more detail.

After each table are other comments on the proposed activity, where applicable, from the follow-up question (Q2A – Please provide any other comments).

However, the main theme that came out of these comments was the importance of access to accurate and honest information for the tenant from the pub-owning business. One organisation described the importance of avoiding 'asymmetry of information'. They felt the Code needed to be stronger on ensuring pub-owning businesses provide correct and detailed information. In their reported experience, pub-owning businesses sometimes put the onus on the tenant when things go wrong by emphasising it is 'their' (the tenant's) business plan. A stronger obligation on pub-owning businesses to provide certain information about the business would make this harder for them to do as the business plan would be seen to be taking the pub-owning business's own information into account.

"Pub companies routinely rely upon information asymmetry as their "get out" or it was "sales talk" when it goes wrong, and in doing so ensure the tenant's plan built on guesswork is the only "warranty" they have, this is thrown back in the tenants faces when the business fails – i.e. your plan your fault. Tenants need the reverse, that is to say, that the information and answers from the Pub Company become the warranty for when things go wrong… it would be utterly reckless for a tenant to proceed in constructing a plan along the lines the Government proposes in the code as it allows vital business information to be withheld by one party and give the impression of value when in reality it has none." (Other organisation)

Information requirements should be legally imposed on pub-owning businesses, according to another, in order to ensure tenants are always properly informed at the pre-entry stage:

"Whilst these questions are important, they are insufficient and do nothing to deal with the issue of partial/dishonest information being supplied to tenants, rather they infer that advice and assistance with the business plan is what tenants need. When supplied with unrealistic and unachievable figures by pub-owning companies, a tenant will then largely base the business plan on these figures, so the whole basis of such a business plan will be unrealistic and unachievable. This therefore MUST be addressed and outlawed so that tenants receive accurate, honest information

about the pub and recent trading history and any issues or problems." (Representative organisation)

Overall, the activities listed at Q2 were seen as essential to ensure a 'level playing field' and fair sharing of risk between the parties.

"Making sure that these activities are carried out by pub-owning businesses would help to ensure that prospective tenants can make a reasonable assessment of whether the agreement on offer will lead to the tied tenant and the pub-owning business sharing the balance of risk and reward." (Representative organisation)

Advise tenants to seek appropriate advice to develop a suitable business plan

The majority (24 of 30 respondents) agreed strongly that pub-owning businesses should "advise tenants to seek appropriate advice to develop a suitable business plan". All six pub-owning businesses agreed strongly. Two tied pub tenants were neutral with the other four agreeing strongly. Six of the seven representative organisations agreed strongly, with the other not answering. Of the five consumers, four agreed strongly and one was neutral.

Table 6: Advise tenants to seek appropriate advice to develop a suitable business plan (Q2a)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	24	10	14
Tend to agree	-	-	-
Neither agree nor disagree	3	3	-
Tend to disagree	-	-	-
Strongly disagree	-	-	-
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

One respondent stressed that this should be a flexible requirement that should depend on the level of experience the new tenant has. Where the tenant is less experienced, it may in the respondent's view be justified for the pub-owning business to insist more strongly that the tenant seeks advice, but if they are experienced, insisting that they seek advice may not be appropriate.

Provide tenants with information on sources of independent advice

Again, the great majority agreed that pub-owning businesses should 'provide tenants with information on sources of independent advice'. This was driven in particular by organisations (14 out of 16 agreed, 13 strongly). All six pub-owning businesses agreed (five strongly). Tied pub tenants were more divided overall - four agreed (three strongly), one was neutral and one disagreed strongly. Six of the seven representative organisations strongly agreed. One did not provide an answer.

Table 7: Provide tenants with information on sources of independent advice (Q2b)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	22	9	13
Tend to agree	2	1	1
Neither agree nor disagree	1	1	-
Tend to disagree	1	1	-
Strongly disagree	1	1	-
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

One pub-owning business emphasised the importance, in their view, of the need for pub tenants to have access to quality advice, not least to ensure smooth negotiations between them and the landlord:

"We believe that tied tenants should have access to consistent and reliable advice from professional accredited advisors with experience of the industry. Not only will this benefit tied pub tenants by ensuring that they are well advised, but we believe that it will also aid negotiations between the parties." (Pub-owning business)

Others stressed the need to require pub-owning businesses to provide information that is genuinely impartial and free from any industry bias.

Ask to see any business plan prepared by the tenant

Most (24) strongly agreed that pub-owning businesses should 'ask to see any business plan prepared by the tenant'. Only one disagreed. Again, pub-owning businesses were in strong agreement (all six strongly agreed), as were

representative organisations (six strongly agreed, one no answer). Most tied pub tenants agreed (four, all strongly), although two were neutral.

Table 8: Ask to see any business plan prepared by the tenant (Q2c)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	24	11	13
Tend to agree	-	-	-
Neither agree nor disagree	2	2	-
Tend to disagree	1	-	1
Strongly disagree	-	-	-
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Take into account the tenant's business plan when negotiating the lease

Although most agreed (19 out of 30, with 14 agreeing strongly), there was some ambivalence overall with five disagreeing strongly and three neutral. This was driven by organisations – four disagreed strongly and two were neutral.

Looking at respondent types, pub-owning businesses were particularly likely to take issue with this proposal. Three (out of six) disagreed strongly and one was neutral; one tended to agree and only one agreed strongly. Tied pub tenants and representative organisations were broadly supportive (three tied pub tenants strongly agreed, two tended to agree and one disagreed strongly; five representative organisations agreed strongly, one disagreed strongly, one did not answer).

Table 9: Take into account the tenant's business plan when negotiating the lease (Q2d)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	14	7	7
Tend to agree	5	4	1
Neither agree nor disagree	3	1	2
Tend to disagree	-	-	-

Strongly disagree	5	1	4
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Some of the respondents who were neutral or disagreed with this action described a profit and loss report prepared in accordance with Royal Institute of Chartered Surveyors (RICS) guidelines, which they said was always drawn up as part of the information for tenants taking over a new lease. This was felt by them to be a well-established process and suitably impartial, based on assumptions that the parties involved were competent operators and not including any assumptions around for example goodwill arrangements. Some felt this should not be superseded by the tenant's business plan.

"Whilst there may be circumstances where a prospective tenant would wish to negotiate terms, for example a rent free or concession period based on carrying out works at their expense, it would not be appropriate for there to be an assumption that a long established and recognised means of calculating a premises rental value should be disregarded based on the untested provisions contained within a prospective tenant's business plan. Pub companies engage with RICS qualified assessors to ensure consistency and clearly identifiable methodology for their assessments. Ultimately if the tenant's business plan resulted in sales and profit materially below market expectations then it would be in neither party's interest to proceed." (Pub-owning business)

One pub-owning business wanted to see clarity regarding any liabilities or obligations that might be implied for pub-owning businesses:

"It is unclear as to what is meant by 'taking the business plan into account when negotiating the lease'. For example, if the business plan prepared by the tied pub tenant was to show a loss for the first year of the lease, would the landlord therefore have to attempt to mitigate that loss (and therefore 'take the business plan into account') by providing additional financial and commercial support? This would be an unreasonable expectation considering the offer put forward by the landlord is based on fair maintainable trade achieved by a reasonably efficient operator and not based on the individual circumstances of the particular tied pub tenant. We therefore welcome clarity on what is intended by the proposed regulation." (Pub-owning business)

Other comments

Other comments and suggestions were made as follows at Q2A:

- Any information should be delivered to prospective tenants early enough in the process to feed into their business plan development.
- The four actions mentioned in Q2 should not be considered an exhaustive list for pub-owning businesses to undertake.
- Avoid making it the default that the pub-owning company is responsible for ensuring the competence of the tenant (this was mentioned by one tied pub tenant).

Information requirements for new and renewing tenants

Respondents were invited in two open-ended questions (Q3a and Q3b) to suggest information requirements which could be added or removed for new and existing tenants, and to provide their rationale for these suggested additions and removals. Suggestions were generally focused on ensuring tenants got the most accurate information on the pub's past and projected running costs and performance. This was felt to be essential in enabling them to draw up a realistic business plan with a good chance of success.

The table below details key suggestions made and the rationale (where it has been provided) for each.

Table 10: Suggestions for information requirements to be added or removed, with rationale (Q3a/b)

Suggestion	Rationale
Spending on property including a list of works (for example repairs or investment spend), also projected dilapidations charges.	Transparency regarding money spent/projected to be spent on property enables tenant to ensure works have been completed to satisfactory level and plan ahead.
Details of any capital expenditure carried out at pub in last 10 years	Ensure dilapidations identified at end of previous lease have been dealt with, and give new tenants a good idea of what will be considered dilapidations at the end of their lease.
Details of tied versus open market prices	Transparency, helps tenants make realistic business plan
Details of any pub company support and whether this is contractual and guaranteed throughout the tenancy or not	Transparency, helps tenants make realistic business plan
Rents and barrelage figures for the last 10 years	(No rationale given)

Frequency of rent and whether the RPI or CPI inflation measure is applicable in rent calculations	Key information to support s comprehensive business plan
Dispute procedures	Key information needed to support a comprehensive business plan
User clauses i.e. pub, restaurant and lettings	Key information needed to support a comprehensive business plan
Full up-to-date trading history of the pub including duration of past tenancies / operators and any periods of closure. If the pub has been closed or not trading, specify how long this has been for.	(No rationale given)
Projection of pub-owning business's profit from beer margin.	Current rent model in RICS guidelines only shows the profit the pub-owning business is making from rent
Figure for utilities costs, and how these costs work in the business market	Utilities can be a huge cost and easily exceed expectations
Full list including photos of condition of premises on entry	Will provide clarity in case of future disputes over repair costs.

In addition, one of the representative organisations provided a detailed list of information requirements they felt were necessary to address the perceived 'asymmetry of information' in favour of pub-owning businesses and to the detriment of tenants, which they felt had been exploited by pub-owning businesses in the past in negotiating leases. The general rationale was to ensure that new tenants were in possession of the same information about the pub as the pub-owning business in terms of costs and performance. The information needed to be as accurate, up-to-date and realistic as possible. Suggestions were as follows:

- Accurate operating costs based on current actual pricing for example energy pricing for a new contract today.
- Wage estimates based on local market recruitment conditions for each role.
- Competitor retail pricing for key products (top selling 10 items for food and drink as an example) against the closest comparable 5 competitors in the market – and a comparison of those prices versus the retail pricing included in the rent assessment model.
- Accurate sales data for last 5 years where such data is held by or available to the pub-owning business, or has been indicated to the pub-owning business as part of

their Business Development Manager business review meetings with previous tenants.

- Calculation of rotas and hours required to run the business – explanation of how many hours the tenant will have to work and a calculation of average wage per hour – along with a prohibition on any expectation that the tenant would work so many hours that their income would be less than the living wage on an hourly basis.
- Estimate of minimum wage rises over next 5 years.
- Historical performance - beer volume.
- Historical rents and any rent concessions, free stock, or other financial support required by previous tenants for each tenancy over the last 5 years.
- The number of tenants in the last 10 years, including temporary operators, and the duration each remained in the pub.

One respondent was keen to point out that as a general rule, information requirements for experienced operators taking on a new lease should be kept to a minimum to reduce the potential administrative burden on the pub-owning business.

“A number of information requirements for long-standing existing tenants could be a large administration burden with much of the information already available to them.” (Representative organisation)

Another issue raised in relation to pre-entry requirements and potential burden on businesses was the need to update the British Institute of Innkeeping’s pre-entry awareness training (PEAT) to take account of the Scottish Pubs Code. This was a particular concern for pub-owning businesses operating across the UK who worried that differing requirements between Scotland and other areas would add cost and complexity as they adapted to different sets of requirements for their businesses in different jurisdictions. One suggestion was for an implementation period after the Code comes into force to allow time for changes to be made an avoid a squeeze on pub-owning businesses’ resources.

Rent review process

Minimum information requirements for rent assessment statement

Consultation respondents were asked at Q4 whether they would add or remove any items from the following proposed list of minimum information requirements for the rent assessment statement:

- The new rent.
- Methods, assumptions and disregards used to calculate the rent.
- Profit and loss forecast for the next 12 months.
- Any other information or sources used to assess the proposed rent.

Sixteen respondents provided a response that included suggestions and concerns.

Profit and loss forecast

A number of comments focused on the profit and loss (P&L) forecast, with some tension between the views of pub-owning companies and other types of respondent. Some pub-owning businesses stressed the difficulty in forecasting P&L with so much, in their view, depending on the tenant's performance. Some were therefore keen that the P&L forecast should not be guaranteed.

"P&Ls would be difficult to forecast beyond a hypothetical circumstance (due to the vast difference in quality of operators, style of operations, etc.) so if included it should be made very clear that there is no guarantee of the P&L figures. That is, should a tenant go into the pub and manage to secure a better utilities deal than projected or demand higher prices for better food, the profit will exceed forecasting. If a tenant goes in and delivers a poorer quality offer than anticipated, or overstaff the pub, then inevitably the profit will be lower than forecasted." (Pub-owning business)

Other types of respondent however were keen that P&L forecasts should be based on actual known figures where possible. One respondent suggested that tenants ought to produce their own P&L forecasts.

"A tenant should be assessing their own independently produced profit & loss as part of their business plan. Through this they should be able to assess the viability for themselves of the agreement including the rent." (Representative organisation)

One tied pub tenant wanted to see a breakdown of the pub-owning company's projected profit on any proposed rent. They explained that this was because pub-owning businesses do not take into account margins made from beer in their P&L rent calculation. They set out an example indicating how in their view profits on beer differed quite significantly depending on whether the pub-owning business is owned by a brewery or not.

"Currently the pub-owning business (POB) uses a P&L rent calculation basis split roughly 50:50. However this does not take into account what they make in the margin on the beer, so a POB selling their own beer is likely to make a minimum of £300 per barrel, an average pub will do 200 barrels per year meaning they make £60k profit alone on the beer supply before you apply rent, [whereas] a POB which is not brewery-owned is likely to make circa £220 per barrel - a profit or £44k." (Tied pub tenant)

Transparency and benchmarking

Some representative organisations and tied pub tenants felt there needed to be more information on industry benchmarking and how it is used to calculate the rent. Some respondents were concerned about the current quality of industry benchmarking and suggested it should be replaced with actual current or recent costs and sales data where possible.

“The rent should be set on the existing fair and maintainable trade not a figure based on when the pub was trading at a better level several years ago!” (Representative organisation)

In addition, one wanted to see wage costs broken down as these were subject to variation between roles and over time.

“Relevant benchmarking - currently [pub-owning businesses] are using outdated information, also they need to substantiate their wage costs by breaking it down by area i.e. kitchen, bar, cleaning, rooms etc. as they are so far out of touch with this.” (Tied pub tenant)

There was also concern that industry standard models used by some pub-owning businesses amounted to a ‘one size fits all’ approach and did not take into account the location of businesses. It was suggested that standard costing information may not fit both a Highland pub and one in the central belt, for example, due to different climates.

Compatibility of rent assessment proposals with RICS guidance

It was noted by one pub-owning business that parts of the draft regulations did not in their view accord with RICS guidance on rent assessments. The RICS guidance, in their opinion:

“…requires that the assessment of Fair Maintainable Operating Profit should reflect the income, costs and outgoings of the Reasonably Efficient Operator (REO). The REO is assumed to be a competent operator acting in an efficient manner.” (Pub owning business)

The regulations around this however are. in their view. at odds with the RICS guidance:

“Regulation 14 (2) c requires the assessment to be a ‘forecast for the 12 months beginning on the date the proposed rent is payable’ and therefore requires consideration of current circumstances and potentially the individual circumstances of the current or proposed licensee. In addition, Regulation 14 (4) requires the use where possible of actual costs relevant to the pub in question or to a pub in the same vicinity. Both of these requirements are fundamentally different to the RICS guidance.” (Pub-owning business)

The issue, according to the respondent, is that focusing on actual costs in making the assessment, or looking at costs in a nearby pub, must be viewed in the light of the RICS guidance assumptions of a REO. These assumptions include the following:

“The REO would for example operate an efficient staff rota, adopt sensible energy efficiency policies, prudentially check and challenge all bills, negotiate competitive

terms with all third part suppliers, regularly service and maintain equipment to ensure efficient operating costs." (Pub-owning business)

They point out that the RICS guidance is therefore based on trading potential rather than actual costs because it assumes an REO going forward – which may or may not be the case. So whilst actual costs can be useful, in their view they should not take precedence in future projections. The respondent therefore suggests that:

"…reference in the rent assessment statement to the available benchmarking guides on operating costs would be of significantly more benefit [than actual costs] to help indicate the appropriate operating costs for the REO." (Pub-owning business)

It is worth stressing again at this point that there were concerns about benchmarking amongst other respondents, making this potentially an area to focus on to ensure that rent assessments are conducted in a way that satisfies all parties.

"Yes, the offer needs to give more information – verifiable benchmarking is required, the current system is not transparent and there is no way to check the raw data being supplied by the superior party. Benchmarking is opaque and often years out of date." (Representative organisation)

Requirement to take into account RICS guidance

Respondents were asked whether or not they thought pub-owning businesses or someone acting on their behalf should be required to take into account guidance on rent assessment issued by RICS. Overall, most (22 of 30) thought they should. Views were consistent across respondent types with six of seven representative organisations, five of six tied pub tenants and five of six pub-owning businesses saying yes.

Table 10: When preparing a rent assessment statement, should pub-owning businesses, or someone acting on their behalf, be required to take into account guidance on rent assessment issued by the Royal Institute of Chartered Surveyors (RICS)? (Q5)

	All (N)	Individuals (N)	Organisations (N)
Yes	22	10	12
No	3	1	2
Don't know	3	2	1
Not answered	2	1	1
Total	**30**	**14**	**16**

Respondents were asked to expand on their answer to Q5 in a follow-up open ended question. It was generally felt that referring to RICS guidance would help ensure the rent assessment process is consistent and fair.

“Everything in the process should be fair and above board and the potential tenant should be able to avail themselves of information like this to allow them to decide whether or not they want to take a pub on.” (Consumer)

It was also felt to be crucial that the arbitrator in the rent assessment process should be genuinely independent.

“This role should be taken by an appropriately skilled and qualified INDEPENDENT arbitrator. Perhaps paid for jointly by the pub-owning business and the tenant.” (Tied pub tenant)

Some doubt was voiced at this point about whether it was necessary for RICS surveyors to have a monopoly on rent assessments. There were concerns from some that surveyors are often too reliant on pub-owning businesses for part of their revenue, and that their assessments can therefore sometimes be aligned too much with the interests of the pub-owning business.

“RICS are too closely linked to the major pubcos. They have failed to be impartial.” (Tied pub tenant)

Another issue for a minority of respondents other than pub-owning businesses was a perception that surveyors sometimes rely too much on evidence from and comparison with other sites when making an assessment. It was felt that more consideration could be given to the qualities of the individual prospective tenant (for example their drive, ambition, track record) and the level and type of support to be provided to them by the landlord.

Ultimately it was felt by some that although they agreed with the proposal at Q5, taking account of RICS guidance was useful but not sufficient on its own. One respondent felt that the only way to get a truly accurate idea of whether the tied rent was fair was to compare it with the Market Rent Only (MRO) lease option.

“[Agree because] rent levels are often set at a level that suits the pub-owning company, doesn’t compensate for the considerable ‘wet rent’ tenants have to pay through inflated tied prices and there is no real transparency of how pubcos calculate the rent level… In the end, however, the Market Rent Only option is the mechanism whereby as tenant can find out what the pub’s rent should be on a completely free-of-tie basis, then compare that to the tied rent plus wet rent. This comparison is vital. The tie is only justifiable if tied rents are commensurately lower than free of tie rents. Currently this is not the case.” (Representative organisation)

RICS themselves provided a response to this question. Overall, they encouraged use and reference to their guidance to ensure fairness and impartiality in rent assessments. However, they pointed out that:

“RICS does not provide specific guidance on rent assessment relating to the Scottish public house sector, but our wider standards ensure professionalism, expertise and consistency in approach.” (RICS)

They therefore suggested that the regulations should not refer to ‘guidance on rent assessment issued by RICS’. Instead they suggested the following wording in relation to RICS guidance and professional standards:

“When preparing the rent assessment statement, a pub-owning business must take into account relevant professional standards and guidance issued by the Royal Institution of Chartered Surveyors (RICS), or ensure that RICS guidance and professional standards are taken into account by the person preparing the rent assessment statement on behalf of the pub-owning business.” (RICS)

Circumstances where a rent review can be requested

Respondents were asked whether they agreed or disagreed that tenants should be allowed to request a rent review in the following circumstances:

- The rent has not been reviewed within the past 5 years.
- The lease is longer than 12 months.
- Where there is a material change in circumstances affecting the pub.
- The tenant is not currently in MRO negotiations

Overall, a majority agreed (either strongly or tend to) with each of these as summarised in the table below, although six disagreed with ‘Where there is a material change in circumstances affecting the pub’. Looking at respondent types, tied pub tenants tended to strongly agree that a rent review request should be allowed across all the circumstances listed, whereas pub-owning businesses were more likely than others to have reservations.

Table 11: Agree or disagree with circumstances whereby tenants should be allowed to request a rent review: summary (Q6)

	Strongly/Tend to agree (N)	Neither agree nor disagree (N)	Strongly/Tend to disagree (N)	Don’t know / No answer (N)
The rent has not been reviewed within the past 5 years	22	2	2	4
The lease is longer than 12 months	21	1	4	4

Where there is a material change in circumstances affecting the pub	22	-	5	3
The tenant is not currently in MRO negotiations	18	2	4	6

The rent has not been reviewed within the past five years

Twenty-two of 30 agreed that tenants should be allowed to request a rent review if the rent has not been reviewed withing the past five years. Nearly all individuals agreed strongly (13 out of 15), with none disagreeing. Looking at respondent types, all six tied pub tenants agreed (all strongly), compared with three out of six pub-owning businesses (one strongly agreed, two tended to agree). Five out of seven representative organisations strongly agreed, with one strongly disagreeing and one not providing an answer.

Table 12: The rent has not been reviewed within the past 5 years (Q6a)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	20	12	8
Tend to agree	2	-	2
Neither agree nor disagree	2	-	2
Tend to disagree	-	-	-
Strongly disagree	2	-	2
Don’t know	1	1	-
Not answered	3	1	2
Total	**30**	**14**	**16**

The lease is longer than 12 months

Again, most agreed that tenants should be allowed to request a rent review if the lease is longer than 12 months. Individuals were more supportive than organisations overall – 12 out of 14 agreed (10 strongly) and none disagreed, whereas although most of the organisations agreed (nine out of 16), four disagreed (three strongly).

Looking at respondent types, support was mainly driven by tied pub tenants, with all six agreeing (five strongly). Pub-owning businesses were more divided overall.

Three agreed (one strongly), two strongly disagreed and one was neutral. Amongst representative organisations, four agreed strongly, two disagreed (one strongly), and one did not answer.

Table 13: The lease is longer than 12 months (Q6b)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	16	10	6
Tend to agree	5	2	3
Neither agree nor disagree	1	-	1
Tend to disagree	1	-	1
Strongly disagree	3	-	3
Don’t know	1	1	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Where there is a material change in circumstances affecting the pub

Most agreed that tenants should be allowed to request a rent review where there is a material change in circumstances affecting the pub. This was driven by individuals, with 13 of 14 agreeing (12 strongly) and none disagreeing. Organisations were much more split. Nine agreed (six strongly) but five disagreed strongly.

There was a difference in views between tied pub tenants and pub-owning businesses on this issue. All tied pub tenants agreed (five strongly), but pub-owning businesses were more likely to disagree than agree. Four disagreed strongly whilst two agreed (one strongly). Amongst representative organisations, five agreed (four strongly), one strongly disagreed and one did not answer.

Table 14: Where there is a material change in circumstances affecting the pub (Q6c)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	18	12	6
Tend to agree	4	1	3
Neither agree nor disagree	-	-	-
Tend to disagree	-	-	-

Strongly disagree	5	-	5
Don’t know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

The tenant is not currently in MRO negotiations

Most agreed that tenants should be allowed to request a rent review if the tenant is not currently in MRO negotiations. Again, this was driven by individuals, 11 of whom agreed (10 strongly), with none disagreeing. Whilst seven organisations agreed (five strongly), two were neutral and four disagreed, all strongly.

Turning to respondent types, it was again tied pub tenants who were most supportive with all six agreeing strongly. Pub-owning businesses were more likely to agree than disagree (three agreed, one disagreed, two neutral) but agreement was less strong with only one agreeing strongly. Representative organisations were also divided – three of seven agreed strongly, two strongly disagreed with one unsure and one not providing an answer.

Table 15: The tenant is not currently in MRO negotiations (Q6d)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	15	10	5
Tend to agree	3	1	2
Neither agree nor disagree	2	-	2
Tend to disagree	-	-	-
Strongly disagree	4	-	4
Don’t know	3	2	1
Not answered	3	1	2
Total	**30**	**14**	**16**

Other circumstances where tenants should be able to request a rent review

A follow-up open-ended question (Q6a) asked for any other suggestions of circumstances where tenants should be able to request a rent review. Suggestions included the following:

- Changes in trading circumstances brought on by external events for example pandemics.
- New laws or guidance that directly impact the business.
- If pub freehold is sold.

Some pub-owning businesses and representative organisations explained why they were sceptical in general about the rent review proposals at Q6. The key concern was that the Tied Pubs (Scotland) Act has no provision relating to non-contractual rent reviews, in their view. They were concerned that including the proposed potential triggers for rent reviews sought to introduce a non-contractual obligation without evidence or an impact assessment.

“The code should not seek to introduce a non-contractual obligation, with no evidence or thorough impact assessment to demonstrate what purpose is being served.” (Pub-owning business)

Another concern voiced by a pub-owning business was that the draft regulations around a change in material circumstances are too open to interpretation and need to be tightened. They believe that tied pub tenants requesting a rent review based on a change in material circumstances should be clearly required in the regulations to provide evidence of impact on trade and for example a written analysis demonstrating there will be a continued decline in trade over the next 12 months. They feel that the regulations as they stand risk encouraging a lot of disputes.

“A tied pub tenant would not need to demonstrate that there has been any impact on their trade, and it will simply come down to a matter of opinion of the parties, which we believe will lead to a large number of disputes and subsequent referrals to the Adjudicator. The Adjudicator will then be tasked with having to determine whether there has been a material change in circumstances.” (Pub-owning business)

They added that the Scottish Government ought in their view to look at the way the equivalent regulations for England and Wales have been drafted, which they feel are robust.

From the point of view of tenants and organisations representing their interests, there was a call to ensure safeguards were in place to prevent pub-owning businesses from continually renewing short-term (12 months or less) tied tenancies as a way of preventing tenants attaining the right to request a rent review.

“Safeguards must be in place to ensure that pub-owning business cannot keep renewing a short term tied tenancy to prevent a tenant being able to request a rent review where the lease is 12 months or less.” (Representative organisation)

Changes in circumstances that could allow tenants to request a rent review

Respondents were asked whether they agreed or disagreed that tenants should be allowed to request a rent review if circumstances changed in the following ways:

- Change to local infrastructure.
- Change to local employment.
- Change to local environmental factors.
- Long-term change to the local economic environment.

Overall, the great majority agreed (either strongly or tend to) with each of these as summarised in the table below. Agreement was particularly strong amongst individuals and tied pub tenants, with pub-owning businesses more likely to be divided.

Table 16: Agree or disagree that tenants can request a rent review when the following material change in circumstances occur: summary (Q7)

	Strongly/Tend to agree (N)	Neither agree nor disagree (N)	Strongly/Tend to disagree (N)	Don't know/No answer (N)
Change to local infrastructure	19	5	3	3
Change to local employment	18	6	3	3
Change to local environmental factors	20	4	3	3
Long-term change to the local economic environment	20	4	3	3

Change to local infrastructure

Most agreed tenants should be allowed to request a rent review if there was a change to local infrastructure (19 out of 30 agreed, 16 strongly). Individuals were more supportive overall than organisations. Twelve of 14 individuals agreed (10 strongly) and none disagreed. Only seven of 16 organisations agreed (six strongly); four were neutral and three disagreed (all strongly).

Looking at respondent types, agreement was especially strong amongst tied pub tenants (all six agreed, four strongly). Pub-owning businesses were split - only two agreed (one strongly), two disagreed (both strongly) and two were neutral. Representative organisations tended to agree (four of seven agreed, all strongly).

Table 17: Change to local infrastructure (Q7a)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	16	10	6
Tend to agree	3	2	1
Neither agree nor disagree	5	1	4
Tend to disagree	-	-	-
Strongly disagree	3	-	3
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Change to local employment

Results were fairly similar regarding allowing tenants to request a rent review if there was a change to local employment. Eighteen of 30 agreed overall (16 strongly), and it was individuals rather than organisations who tended to be more in agreement. Eleven of 14 individuals agreed (10 strongly) whereas only seven of 16 organisations agreed (six strongly), with the others either neutral (four), strongly disagreeing (three) or did not provide an answer (two).

The same pattern as previously emerged when comparing respondent types. Five out of six tied pub tenants agreed strongly (the other was neutral). Pub-owning businesses were again divided, with two agreeing (one strongly), two disagreeing strongly and two neutral. Representative organisations tended to agree (four of seven agreed, all strongly).

Table 18: Change to local employment (Q7b)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	16	10	6
Tend to agree	2	1	1
Neither agree nor disagree	6	2	4
Tend to disagree	-	-	-
Strongly disagree	3	-	3

Don’t know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Change to local environmental factors

Most agreed that tenants should be allowed to request a rent review if there was a change to local environmental factors (20 of 30 agreed, 15 strongly). Almost all individuals agreed (13 of 14 with nine agreeing strongly). Organisations were again divided. Seven agreed (six strongly), three disagreed strongly, four were neutral and two did not answer.

All six tied pub tenants agreed, four strongly. Pub-owning businesses were again split, with two agreeing (one strongly), two disagreeing strongly and two neutral. Representative organisations tended to agree (four of seven agreed, all strongly).

Table 19: Change to local environmental factors (Q7c)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	15	9	6
Tend to agree	5	4	1
Neither agree nor disagree	4	-	4
Tend to disagree	-	-	-
Strongly disagree	3	-	3
Don’t know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Long-term change to the local economic environment

Most agreed that tenants should be allowed to request a rent review if there was a long-term change to the local economic environment. The majority (20 of 30) agreed, 17 strongly. Almost all individuals agreed (13 out of 14, with 11 agreeing strongly). No individuals disagreed. Seven of 16 organisations agreed (six strongly) whilst three strongly disagreed, four were neutral, and two did not answer.

All six tied pub tenants agreed, five strongly. Pub-owning businesses were divided, with two agreeing (one strongly), two disagreeing strongly and two neutral. Representative organisations tended to agree (four of seven agreed, all strongly).

Table 20: Long-term change to the local economic environment (Q7d)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	17	11	6
Tend to agree	3	2	1
Neither agree nor disagree	4	-	4
Tend to disagree	-	-	-
Strongly disagree	3	-	3
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Other changes in circumstances

A follow-up open ended question asked for suggestions of other changes in circumstances where a tenant should be allowed to request a rent review. Suggestions were as follows:

- Changes to overheads, in particular utilities – as one tied pub tenant observed, "once they are up they rarely go down".
- Changes in the way the tie is operated from the tenant's perspective, for example delisting of drink products, changes to delivery times.
- Deviation from the business plan, either due to its failure to meet expected returns or due to the pub-owning business changing its plans.
- Forced closure for example, during the Covid pandemic.
- Agreed input and support from pub-owning business not forthcoming.

The key concern voiced regarding the proposals around changes of circumstance was that some felt the changes listed at Q7 lacked enough definition. They believed that each of the changes listed could vary widely in scale and potential impact on business. For example, a change to local employment could range from a large factory closing to a small or medium size office or shop closing, with differing impacts on trade. In their view, this needed to be taken into account and clear definitions for each change in circumstances and when it would trigger the right to a rent review needed to be set out in the regulations.

“These questions are too vague and proper criteria needs to be laid down so it is clear to both parties.” (Representative organisation)

“The circumstances listed are not based on any form of test. For example, what determines a change to local employment? One job loss, a shop closure, a factory closure? It is essential that there is a clear and demonstrable, time-based impact assessment upon a pub business before any of the circumstances can be acted upon.” (Pub-owning business)

It was also queried whether the right would apply to pub-owning businesses as well as tenants. One pub-owning business made the point that economic changes could be positive as well as negative in terms of impact on trade.

“It needs to be considered if the right to request a rent review in the event of a material change of circumstances is only for tenants, or if pub owning businesses would also have this right… If the right went both ways, then in theory a pub could call for a rent review if a large local employer closed, but a pub owning business could also call a rent review to revalue the rent if a large local employer moved into the area.” (Pub-owning business)

Leases that tenant should be able to request a rent review for

The consultation asked whether respondents thought that tenants should be able to request a rent review for new leases or existing leases. Most (23 out of 30) agreed that they should be able to request a rent review for an existing lease. A smaller majority felt they should be able to request a rent review for a new lease (17). Results were fairly consistent across individuals and organisations.

Pub-owning businesses tended not to agree with the proposal regarding new leases (two out of six agreed), but almost all agreed regarding existing leases (five). In contrast, tied pub tenants were mostly in agreement regarding both new leases (four out of six) and existing leases (five out of six). Four out of seven representative organisations agreed regarding new leases and five agreed regarding existing leases.

Table 21: What kind of leases should a tenant be able to request a rent review for? (Q8)

	All (N)	Individuals (N)	Organisations (N)
New leases	17	9	8
Existing leases	23	11	12
Don’t know	2	1	1
Not answered	4	1	3

Legal right to request rent review vs. existing contractual rent review rights

Respondents were asked whether they agreed or disagreed that a legal right to request a rent review under the code is workable alongside existing contractual rent review rights. Most agreed (19 of 30 with 17 agreeing strongly). Organisations were less likely to agree (six versus 14 individuals) and more likely to disagree (five). No individuals disagreed.

Comparing respondent types, there was a strong divergence in opinion between tied pub tenants, all six of whom agreed strongly, and pub-owning businesses, most of whom (four of six) disagreed, three strongly. Three representative organisations agreed (all strongly), one disagreed strongly, one was neutral and two did not answer.

Table 22: To what extent do you agree or disagree that a legal right to request a rent review under the code is workable alongside existing contractual rent review rights? (Q9)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	17	11	6
Tend to agree	2	2	-
Neither agree nor disagree	1	-	1
Tend to disagree	1	-	1
Strongly disagree	4	-	4
Don’t know	-	-	-
Not answered	5	1	4
Total	**30**	**14**	**16**

A follow-up open-ended question asked respondents to explain the reasons for their answer. Those who agreed cited a perceived imbalance in power and resources that favoured pub-owning companies against tied pub tenants and claimed that the rent review process had been shown in the past to be open to abuse. Legally protected rights to a rent review were therefore required in their view.

“Too often tenants whose pubs have been subject to a material change in circumstances which has impacted negatively on their businesses and currently leasing arrangements have allowed pub-owning businesses ignore this fact. This is contributed to many business failures, as a consequence of which the pub-owning business simply retains the landlord’s deposit and negotiates a tied lease with a new tenant.” (Tied pub tenant)

“The difference in power and resources between the tenant and the pubco is huge and tenants need to have clear rights. Existing rent reviews are frequently done in a

way that disadvantages tenants, who therefore need clear statutory rights to transparency and to fair and impartial treatment including rent calculation." (Representative organisation)

They felt that the legal and contractual rights alongside each other should be workable providing the pub-owning business acts and co-operates in good faith, and that legal and contractual rights do not differ significantly from each other.

"It will be workable unless the pubcos [pub-owning businesses] deliberately prevaricate." (Respondent type unknown)

"As long as the legal rights to request a rent review do not differ too strongly from the existing contractual agreements (i.e. at the end of a lease term if renewing, or at a periodic point in longer leases i.e., every 5 years in a 25-year lease), then there's no reason the code and existing contractual agreements can't work together." (Individual – respondent type unknown)

Those who disagreed cited the potential complexity and cost for pub-owning businesses, with the possibility that existing contractual rent reviews and reviews via rights in the Code could occur simultaneously or close to each other. They felt it may provide advantages to tied pub tenants not available to those with other types of leases.

"Contractual rent reviews are cyclical in nature, usually occurring every five years; therefore, it is possible that a tied tenant could request a non-contractual review, in advance of their contractual review, for example, where there was a material change in circumstances. This would require the pub-owning business to engage in two back-to-back reviews, which would be unworkable and would provide a clear advantage to a tied tenant which would not be available in a commercial or free of tie lease." (Pub-owning business)

Impact of approach to rent reviews on tied pubs sector

An open-ended question (Q10) was asked regarding the perceived impact of the proposed approach to rent reviews on the tied pubs sector. Sixteen respondents provided a substantive response. For pub-owning businesses operating across the UK in particular, the level of impact for them would in their view depend to an extent on how much the new Code differed from the existing voluntary code and the arrangements in England and Wales.

"Most pub owning businesses are already operating under the Voluntary Code or to the same standards as the English/Welsh pubs code, so assuming that the Scottish code broadly codifies the same rights as the English/Welsh code, there is unlikely to be any major impact… If the code is more ambitious/extreme than the English/Welsh code then we are likely to see a greater disruption to the sector." (Pub-owning business)

There was also some concern voiced by a pub-owning business that the new rent review arrangements could lead to continued uncertainty in the sector, impacting on ability to invest and possibly moving more pubs on to management agreements rather than tied leases.

“If the Code were to contain a provision whereby a tenant could request a non-contractual rent review at any point, based on an unsubstantiated list of qualifying statements, this would inevitably lead to a review of any future investments made by pub companies.The proposed provision would also lead to POBs [pub-owning businesses] considering the make-up of their estates, and potentially resulting in them moving pubs into divisions which would not be subject to the ongoing elevated levels of uncertainty.” (Pub-owning business)

“Unless the drafting of the regulations is reconsidered, the approach to rent reviews would offer pub-owning businesses no certainty as to future rental income when entering into a lease with a tied pub tenant. This could therefore heavily impact investment in the sector and would lead to pub-owning businesses looking to adopt alternative business models. Without any conditions to meet, a pub-owning business could be faced with multiple requests for rent reviews at any time from tied pub tenants who would not have to provide any form of proof that a material change in circumstances had occurred.” (Pub-owning business)

They saw it as incumbent on the Scottish Government to properly assess the impact on the sector.

“It is for the Government to establish the sector impact. However, there is a clear absence of a thorough impact assessment relating to the Pubs Act (Scotland) in its entirety. We would contest that this absence is a fundamental flaw in relation to the Act and would therefore recommend that this is undertaken to take full account of the situation.” (Pub-owning business)

Some saw an extra incentive in the proposed approach for pub-owning businesses to treat tenants fairly regarding rents – in other words, the more fairly they are treated, the less scope for tied pub tenants to avail themselves of their rights under the new Code.

“If the pub company is treating its tenants fairly, the code is there to protect tenants, then there won’t be a lot of rent review or MRO requests, because the tenant is happy in the relationship!” (Representative organisation)

Comments from tied pub tenants and representative organisations tended to be positive, however. They felt the rent reviews approach would help ensure a fairer balance between tenants and pub-owning businesses which would ripple through the sector in a positive way.

“It would ensure that tied tenants can expect rent review requests will be dealt with fairly under the terms of the Code and not left to the discretion of pub-owning businesses. This will help to address the imbalances of power between tied tenants

and pub-owning businesses, provide for a healthier tied pubs sector which will benefit communities and consumers." (Representative organisation)

"It will improve practice in the sector and ultimately, will improve the relationship between pubcos and their tenants, something that has long been contentious. The question really should be phrased the other way round: How can it be justified that tenants frequently struggle to get a review of their rent and when they do, are frustrated and denied access to impartial information? It cannot. It is time to have a fairer, more transparent approach to this in Scotland." (Representative organisation)

Providing rent assessment statement within four weeks of request

There was overall strong agreement with the proposal that a rent assessment statement should be provided within four weeks of a request (21 of 30 agreed, 17 strongly). No individuals disagreed; 12 of 14 agreed (10 strongly), one tended to disagree and one did not answer. Organisations were less likely to agree overall but still more likely to agree than disagree. Nine of 16 agreed overall compared with four who disagreed.

Again there was a divergence of views between tied pub tenants and pub-owning businesses, with the former very supportive. All six tenants agreed strongly with the proposal, whereas only two of six pub-owning businesses agreed (one strongly). Four pub-owning businesses disagreed (two strongly). Representative orgnisations were mostly in support (five of seven agreed strongly, one disagreed strongly, one did not answer).

Table 23: To what extent do you agree or disagree with the proposal that a rent assessment statement should be provided within 4 weeks of a request? (Q11)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	17	10	7
Tend to agree	4	2	2
Neither agree nor disagree	1	-	1
Tend to disagree	2	1	1
Strongly disagree	3	-	3
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

A follow-up open-ended question asked respondents to give reasons for their answer at Q11. Sixteen provided a substantive answer. Amongst those who agreed with the proposal, they generally said they could not see any good reason why it should take longer than four weeks to provide a rent assessment statement following a request. There was a perception amongst some that pub-owning businesses could deliberately act slowly on these kind of issues, so a firm deadline was required in their view to prevent this.

“Pubcos [pub-owning businesses] are known to drag their heels and to do all they can to delay rent assessments, MRO applications and anything else that would allow the tenant to seek a lower/fairer rent. A statutory time period is vital for all these things and in this case, four weeks is fair and reasonable for both sides.” (Representative organisation)

One pub-owning business that agreed with the proposal did however make a case for some leeway in terms of a transitional period, reiterating the concern that pub-owning businesses could be faced with the administrative burden of dealing with a number of requests as soon as the regulations come into effect, for rent reviews and MRO leases.

“Whilst in principle we agree with a 4-week period to respond to a request for a rent review, we feel that there should be some transitional arrangements in this area. Pub-owning businesses could be faced with a number of requests from tied pub tenants as soon as the regulations come into force and a period of 4 weeks would not allow sufficient time to respond to a request made under newly-introduced regulations.” (Pub-owning business)

For those who disagreed with the proposal, mainly pub-owning businesses, the issue was the existing demands on their time. They argued that four weeks may not actually be as reasonable as it may appear to those outside the business. There was agreement however with the idea of having a fixed timescale, but a longer timescale may be necessary to ensure fairness and quality in the process, in their opinion.

“4 weeks (accounting for busy schedules, holidays, unforeseen interruptions) could be a challenging timescale to stick to when considered in the context of pub owning businesses potentially having to deal with multiple requests simultaneously. The code should ensure the process is conducted in a timely manner, but avoid rushing the process to the detriment of its quality or fairness. I would suggest 6 weeks for an initial valuation as the legal timeline (acknowledging that many will be quicker than this), and then conclusion within 12 weeks.” (Pub-owning business)

Others who disagreed made the point that the rent review request would be non-contractual and therefore unexpected for the pub-owning business and not possible to schedule in advance. Four weeks may not be enough time in their view to gather all the relevant information, visit the premises and prepare the assessment without any prior notice.

Length of statutory rent review process

Most (19 out of 30) agreed with the proposed limit of 12 weeks from the date of the tenant's request for the rent review process to conclude. Sixteen agreed strongly. Again, agreement was especially strong amongst individuals (13 agreed, 10 strongly, with one not answering). Four organisations strongly disagreed, six strongly agreed, and four were neutral. Two did not respond.

Reflecting trends elsewhere, tied pub tenants were strongly in agreement whilst pub-owning businesses were more reserved. All six tied pub tenants agreed (five strongly), whereas only one of six pub-owning businesses agreed (strongly). Three disagreed strongly and two were neutral. Of the seven representative organisations, four agreed strongly, one disagreed strongly, one was neutral and one did not answer.

Table 24: To what extent do you agree or disagree with the proposal that the statutory rent review process should take no longer than 12 weeks, beginning from the date of the tenant's request? (Q12)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	16	10	6
Tend to agree	3	3	-
Neither agree nor disagree	4	-	4
Tend to disagree	-	-	-
Strongly disagree	4	-	4
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Respondents were asked to give reasons for their answer to Q12 in an open-ended follow-up question. Fourteen provided substantive responses, although one of these repeated verbatim the answer given at Q11a. Reasons for agreement were very similar to those regarding providing the rent assessment statement within four weeks (Q11). Tied pub tenants in particular wanted to avoid pub-owning businesses 'dragging out' the process, which some suspect they do on occasion. Long delays can affect the operator's business according to some.

"Tenants should not have to wait months for decisions which will materially affect their ability to run a successful business." (Consumer)

Reasons for disagreement were also similar to Q11, with pub-owning businesses especially feeling that the 12 week period was insufficient given their business workload, the unexpected nature of rent review requests, and the need to carry out the process thoroughly in terms of gathering information, making a site visit and so on around other ongoing activities.

“For contractual rent reviews discussions commence at least nine months before the event to allow all parties sufficient time to conduct a thorough assessment. The suggestion of 12 weeks will inevitably lead to disputes and increased referrals due to the insufficient time to adequately assess the review request.” (Pub-owning business)

There was also a call for clarity regarding what happens next if the 12 week limit is reached without agreement between the parties. It was noted that Regulation 15(5) simply states that the process comes to an end.

Referring disputes on rent review and rent assessment to the Adjudicator

Views were mixed on whether disputes on rent review and rent assessment should be referred to the Adjudicator only after dispute resolution processes in the lease have been exhausted. Overall half agreed (16 of 30, with eight agreeing strongly), but around one third (9) disagreed, four strongly. Organisations in particular were more likely to disagree than agree. Five agreed (two strongly), seven disagreed (four strongly), whilst three were neutral.

Looking at respondent type, pub-owning businesses were fairly evenly split. Two of six agreed (one strongly), three disagreed (two strongly) and one was neutral. Tied pub tenants were more in agreement overall. Five of six agreed (three strongly) and one tended to disagree. There was a wide spread of views amongst representative organisations with three of seven in agreement (one strongly), two disagreeing (one strongly) and one neutral. One did not answer.

Table 25: To what extent do you agree or disagree that disputes on rent review and rent assessment should be referred to the Adjudicator only after dispute resolution processes in the lease have been exhausted? (Q13)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	8	6	2
Tend to agree	8	5	3
Neither agree nor disagree	3	-	3
Tend to disagree	5	2	3
Strongly disagree	4	-	4
Don’t know	-	-	-

Not answered	2	1	1
Total	**30**	**14**	**16**

Respondents were asked to give reasons for their answer to Q13 in an open-ended follow-up question. Sixteen provided substantive responses. A key reason for agreement was to avoid overwhelming the Pubs Code Adjudicator with disputes leading to an unmanageable workload and further delays.

“I believe that in order to keep the workload of the Adjudicator manageable then resolution processes should be attempted first.” (Tied pub tenant)

Amongst those who disagreed, some queried whether there would be a substantial role for the Adjudicator in the process and expressed concern that long-standing industry practice could be superseded. Some explained that leases tend not to include rent dispute resolution processes; instead, in cases of dispute, the lease will allow for an independent expert (usually RICS) to be appointed whose decision will be final and binding.

“In the majority of cases leases will not contain a dispute resolution process regarding rent – most leases will instead allow the appointment of an independent expert (typically an expert appointed by RICS) who will then determine the rent payable, with their decision being final and binding on the parties. It would therefore appear that there would be very little for the Adjudicator to arbitrate in the event that a referral was made, and whether it would be appropriate for the Adjudicator to be potentially overriding long-established industry practice.” (Pub-owning business)

This could, in their view, mean there are effectively two rent review processes (RICS expert and the Adjudicator). There was concern over whether it was right that the Adjudicator could overturn the decision of a RICS-appointed expert, and whether RICS would be comfortable with this.

Another concern that emerged was that only allowing referral to the Adjudicator after the rent review/assessment process is exhausted could add significant extra delays to the dispute resolution process. In one respondent’s view, access to the arbitration scheme established by the Act should be possible before all other avenues are exhausted, in order to encourage speedy resolution of disputes.

“We have concerns that allowing all other avenues to be exhausted before referral to the Adjudicator could result in a lengthy dispute resolution process and create significant delays in respect to the resolution. We believe that the statutory arbitration scheme established by the Act should be an option without exhausting all other processes in advance.” (Other organisation)

From the point of view of tied pub tenants and their representatives who disagreed, the concern was raised again about a perceived tendency amongst some pub-

owning businesses to draw out processes deliberately. Allowing earlier referrals to the Adjudicator would help guard against this, in their opinion.

“In my experience pubcos will string the process out which causes distress and uncertainty to the tenant, they should be able to refer to an adjudicator early in the process.” (Tied pub tenant)

Further comments on rent reviews and rent assessments

Respondents were offered the chance to make any further comments on what they thought the Code should cover regarding rent reviews and assessments (Q14). Six of 30 respondents offered substantive comments.

Tied pub tenants wanted to see more justification of costs and assumptions by pub-owning businesses. One expressed a desire for transparency and detail around how pub-owning businesses define a reasonably efficient operator (REO) as used by them as a benchmark for assessing rents. They also wanted to see pub-owning companies provide a breakdown of wages in their assessment.

“Currently POB use a reasonably efficient operator as their bench mark, however they do not provide details of what a reasonably efficient operator is, what the actual wage break down is ie between kitchen, bar staff, cleaning, management etc do not break down or how many staff per shift to achieve the figures they are quoting.” (Tied pub tenant)

Other comments and suggestions included:

- Ability for financial damages to be awarded to tenant if it can be shown that the pub-owning company deliberately or negligently provided unrealistic estimates of profits, costs and turnover.
- The Code must set out a clear and simple right to trigger the Market Rent Only (MRO) lease request option (some felt this right had been ‘watered down’ in England and Wales).
- The Code should require independent rent assessment decisions to be published.
- Provide further clarity on the dates at which the reviewed rent becomes payable for example is it the point the new rent was determined, when the rent was assessed or the date the tenant applied?

Repairs and dilapidations, Flow Monitoring Devices and gaming machines

Repairs and dilapidations

An open-ended question (Q15) was asked inviting comments on the proposals on repairs and dilapidations. Thirteen respondents provided a substantive response. Overall, dilapidations were considered an important and contentious issue

particularly by tied pub tenants and their representatives. Some took the opportunity to reiterate historical concerns about dilapidations and the way that dilapidations bills are sometimes used unfairly against tenants by pub-owning companies, in their view.

“The whole issue of dilapidations has long been a worry for tenants and must be resolved, to stamp out the way that dilapidations bill are routinely used to fine and abuse tenants (both through the threat of large dilapidations charges and then the actual levying of excessive and unjustified charges).” (Representative organisation)

One respondent went into specific detail about the things they felt were unfair and needed to be completely ruled out in relation to dilapidations. They stated that pub-owning businesses should never be permitted to do the following:

- Charge estimated costs for dilapidations instead of actual costs expended to complete the works.
- Charge for dilapidation works that are not completed.
- Charge outgoing tenants for dilapidations where a refurbishment is now planned by the pub-owning business prior to the next substantive let.
- Let a pub to a new tenant where a previous tenant has been served a dilapidations survey and the work has not been completed by either the business or previous tenant, leaving the new tenant liable for the previous tenant’s dilapidations, even though in many/most cases the pub-owning business will have charged the previous tenant for the works.
- Charge substantial dilapidation amounts on a “just in case” basis for example £5,000 or £10,000 if a current certificate for heating systems is not provided at exit, “just in case” works are later required.
- Charge for works to improve the condition of the pub, where the specific dilapidated item or area condition at letting has not been clearly identified in a photographic schedule of condition.
- Include “Put and Keep” conditions in leases, where a tenant is expected to substantially improve the condition of the pub beyond the condition it was in at the commencement of lease.
- Charge for any degradation of condition due to a pub-owning business failing to promptly complete their repair obligations, or as a consequence of deferred repairs that are the business’s liability for example internal decoration that has become degraded from water damage due to the pub-owning business failing to properly maintain the roof.

From the perspective of pub-owning businesses, a concern was raised that the arbitration process was potentially open to abuse whereby a tenant could raise a dispute knowing the pub-owning business would incur heavy costs. This could in their view be used by an unscrupulous tenant as leverage to negotiate or avoid their obligations regarding dilapidations. They felt there needed to be absolute clarity around the use of the arbitration process in order to avoid this risk.

One pub-owning business questioned the policy rationale for the draft regulation around dilapidatons and repairs, claiming that it:

“[I]ntroduce[s] a further test into whether the landlord is entitled to enforce breaches of the repairing covenant over and above the well-established legal tests for no stated policy reason.” (Pub owning business)

In their view there is:

“No evidence of any imbalance in the bargaining power of parties to deal with dilapidations. Both parties are able to instruct professionally qualified building surveyors to act and advise and reach an appropriate settlement.” (Pub owning business)

Moreover, they felt that the relevant regulation as drafted (Regulation 17) was inadequate as it does not offer a definition, in their opinion, of a repair and dilapidations clause. They argued that in practice, while it is easy to identify a covenant to repair:

“…a claim for dilapidations and a schedule of dilapidations will almost always include other elements such as breaches of the covenant to decorate, reinstatement of alterations (whether or not consent was given to the alteration), removal of personal belongings and breaches of the covenant to comply with statutory compliance such as legislation on fire safety, gas safety, asbestos etc. Without a definition it is unclear what is caught by Regulation 17 and what is not.” (Pub-owning business)

Another perceived issue identified by pub-owning businesses was a risk the Adjudicator could receive a large number of referrals regarding dilapidations disputes as leases in their experience do not usually include dispute resolution clauses.

“It should be noted that few leases include express dispute resolution clauses regarding dilapidations. The primary route to resolving dilapidations is often contained outside of the lease and therefore there is a risk that a large number of referrals could be made to the Adjudicator in this area based on the current drafting of the regulations.” (Pub-owning business)

Flow Monitoring Devices

Respondents did not want pub-owning businesses to rely fully on Flow Monitoring Device readings in deciding whether to take action against a pub. Almost all agreed that additional evidence be required before a pub-owning business can take action as a result of a reading from a Flow Monitoring Device (26 of 30). No-one disagreed.

Table 26: Should additional evidence be required before a pub-owning business can take action as a result of a reading from a Flow Monitoring Device? (Q16)

	All (N)	Individuals (N)	Organisations (N)
Yes	26	13	13
No	-	-	-
Don't know	1	-	1
Not answered	3	1	2
Total	**30**	**14**	**16**

A follow-up open-ended question asked for any further comments on the proposals for Flow Monitoring Devices (Q17). Fourteen respondents provided substantive comments, all voicing opposition to the exclusive use of Flow Monitoring Devices to monitor tenants. Several expressed the opinion that they were not accurate enough to rely on solely when deciding whether to take action against tenants.

"It has been proven on a number of occasions that flow monitoring is not an accurate measure… this can not be used to fine people unless physical evidence can be provided i.e. photos of stock being delivered by a 3rd party." (Tied pub tenant)

Some respondents felt that the arrangements in the existing voluntary code worked well and should be incorporated into the new Code.

"The Code should adopt the same principles as the current Voluntary Code of Practice, which is working well." (Pub owning business)

Some felt the devices were especially inappropriate for a free of tie lease for example MRO lease.

"If a pub negotiates a free of tie lease then flow monitoring devices will not be relevant. However for remaining tied leases further evidence should be necessary as in the past these devices have proved to be inaccurate." (Tied pub tenant)

Others went further and questioned the entire practice of using Flow Monitoring Devices with tied pub tenants. In their view it could lead to unfair consequences for tenants, as one respondent detailed.

"Draconian levels of fines are imposed on the basis of deeply questionable information (it has been shown that the systems are not sufficiently reliable). Appeals are often not heard properly or at all. Fines are even imposed when tenants have run out of beer and tenants have had to buy beer from other sources,

including local breweries or wholesalers, to be able to open and trade!" (Representative organisation)

Gaming machines

Most agreed that gaming machines should be covered by the Code (17 out of 30). However, organisations were relatively divided on the issue – eight agreed and six disagreed.

There was a clear divergence in opinion between pub-owning businesses, who were generally opposed (one of six agreed, five disagreed) and tied pub tenants who were mainly supportive (five agreed, one unsure). Representative organisations were also overwhelmingly supportive (five agreed, one disagreed, one unsure).

Table 27: Should gaming machines be covered by the code? (Q18)

	All (N)	Individuals (N)	Organisations (N)
Yes	17	9	8
No	7	1	6
Don't know	3	3	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Seventeen respondents provided substantive responses to the follow-up open-ended question on gaming machines (Q19). Amongst those who agreed that gaming machines should be covered by the Code, the perception was often that some pub-owning businesses had operating gaming machine ties unfairly in the past. Clarity and protection for tenants was therefore needed to ensure fairness.

"At the very least, tenants should be allowed to operate gaming machines on a free-of-tie basis or a tied basis and any difference in overall pub rent between the two must be transparently and honestly presented at the outset of tenancy discussions and annually, but we would prefer a ban on the machine tie and think it is long overdue." (Representative organisation)

Another respondent highlighted perceived ongoing problems in England and Wales regarding gaming machines since introduction of their Code. In their view there was an opportunity for the Scottish Government to learn from this and ensure the provisions around gaming machines dealt with the perceived unfairness as intended.

“The plight of gaming machines has been subject to numerous enquiries as far back as 2004, it is another area of unfairness which needs tackling once and for all. All rents should be proposed without gaming machines. As it currently stands pub companies in England game the legislation by hiking up the rent for pubs who say they will not take their landlords machines. The pub company should be prevented from double quoting on a tied rent, they are only allowed to submit one rent offer which does not include machines.” (Respondent type unknown)

Pub-owning businesses that did not agree tended to say they were unaware of any problems with gaming machines and tied tenancies.

“There is no evidence to suggest that gaming machines are a cause of any issue. It’s with this in mind that we are concerned that intervention is being considered when there is no issue to address.” (Pub owning business)

Some worried that the main motivation for proposing to cover gaming machines in the Code was to replicate the approach in England and Wales, which they thought was flawed and had led to confusion.

“We are uncertain on what purpose the inclusion of this proposal is trying to serve, other than replicating what is included within the England & Wales (E&W) Code. The gaming machine approach in E&W is fundamentally flawed; rent proposals are now offered with no machine tie as it isn’t legally allowed. However, tenants then opt into a machine agreement as this reduces the fixed rent which simply creates further administration for all concerned.” (Pub-owning business)

It should be noted that this view contrasts sharply with the perspective offered in the earlier quote suggesting that some pub-owning businesses in England and Wales are ‘gaming’ the new regulations around gaming machines.

Other terms the Code should prevent from being enforced

Respondents were asked an open-ended question about what other terms, if any, they felt the Code should prevent pub-owning businesses from enforcing (Q20). Ten respondents provided substantive responses. There was some concern that a list of proscribed terms was unnecessary in the case of MRO leases and could impede commercial negotiations. It was felt that the general prohibition of unreasonable terms contained in the Act (section 5(2)(d) of Schedule 1) was sufficient on its own.

One representative organisation presented a detailed list of terms they felt should be prohibited. This is presented verbatim below:

- Any term either preventing an otherwise assured automatic renewal of lease or allowing the ending via irritancy of an existing lease, because a tenant takes up their right to MRO or any other right provided to them under the statutory code.
- Any term which allows the pub company to charge dilapidations where either a schedule of condition was not provided on entry to the pub, or where the schedule

of condition was incomplete and did not provide photographic evidence of the condition upon entry of the item being charged under dilapidation.

- Any term which requires a tenant to return the pub in a better condition than it was when they took possession, so called “Put and Keep” leases, where a pub company can lease the pub in poor condition, and then require the tenant to “Put” it into ‘Good Condition”, “Keep it that way” and in effect then hand it back to the pub company at end of lease in substantially better condition than it was received.
- Any term which prohibits the tenant from selling or transferring shares in their limited company, particularly where no effective change of beneficial ownership is involved and such a transfer (i.e., to a holding company with the same ownership) is proposed purely for tax/cost/accounting efficiency.
- Any term which allows for the ending of a lease or tenancy unilaterally by the pub owning company with 3 or 6 months’ notice, as such a term would in effect be used as ‘retaliatory eviction’ and result in tenants being unable to take up MRO or exercise other rights under the code.
- Any term requiring continued machine tie after the code has been implemented.
- Any term limiting the use of any residential property attached to the site to only occupancy by the tenant or manager. Tenants must be able to maximise income for the asset they are leasing and should be able to utilise such property for short term lets, holiday lets, staff accommodation, or any other legal use which is commercially viable for the tenant.
- Any term allowing the pub company to refuse selling tied products that are held and distributed by the pub company to some tenants but not others, in effect allowing the pub company to put some tenants at a commercial disadvantage to their competitors, by supplying popular products to one tenant while refusing to sell such products to other tenants. This can and is creating significant market distortion within some pub company estates.

Another representative organisation suggested that there should be no restrictions on what contractors tenants can use.

“Tenants are independent businesses and must be not obliged to use providers (with any such obligation invariably having a kick-back benefit to the pub-owning company!).” (Representative organisation)

Other items to include or remove from the Code

An open-ended question (Q22) sought views on what else, if anything, to include or remove from the Scottish Pubs Code. Fifteen respondents provided substantive answers. Comments and suggestions included:

- Very important to get the MRO lease option right in order to avoid issues seen in England and Wales.
- General concerns about the regulatory burden the Code is placing on the sector at a time of economic difficulty.

- Some doubt from the pub-owning business side about the overall need for regulation, visited in detail in the first consultation particularly around the Business Regulatory Impact Assessment (BRIA).
- Ensuring a robust role for the Adjudicator for example the Adjudicator should issue regular reports and assessments of the behaviour of pub owning businesses and their compliance with the Code (and the spirit of the Code).
- Robust performance management of the Adjudicator for example performance targets for the time it takes to conclude cases.
- Work to ensure good tenant awareness of the Code – one representative organisation cited evidence of low awareness of the existing voluntary code which they felt may explain why there were no referrals under it.
- Obligation on pub-owning businesses to use and provide actual costs where possible in P&L reports for rental offers rather than rely on industry-standard estimates.

Arbitration and financial penalties, fees and expenses

Parts of the Code not appropriate for arbitration

Respondents were asked for their views on what other parts of the Code would not be appropriate for arbitration (Q21). Seven provided a substantive response. Suggestions included:

- Disputes not specifically pertaining to the lease, the rent, or the property itself for example, brands being sold, the internal retail offer, gaming machines etc.
- Anything in the lease which already has a mechanism provided for third party dispute resolution is not appropriate for arbitration by the Adjudicator.
- Business Development Manager training, appointment and duties of a code compliance officer and the annual code compliance report. According to one respondent (pub-owning business), these are non-arbitrable in England and Wales as the Adjudicator is already able to ensure these are undertaken properly. They contended that “[n]one of these matters directly affect tied pub tenants and without this exclusion there is the potential for a vexatious complaint [i.e. made deliberately to cause annoyance] to be made.”
- The MRO lease option should not include arbitration. According to one respondent (representative organisation), this is because “[t]he whole point of the Market Rent Only option is that it allows the tenant the right to have an independently assessed market rent, on a free of tie basis and to pay that and only that to the pub-owning company and to have the right to do so in a fixed time period from the date of triggering the right.” There should therefore be no need for arbitration regarding rents.

Penalty for non-compliance with the Code

Half (15 of 30) did not think that 1% of turnover should be the maximum penalty for a pub-owning business or group that has failed to comply with the Code.

Organisations were particularly opposed (two agreed vs. 11 disagreed). Individuals were more evenly split – five agreed, four disagreed and four were unsure.

Pub-owning businesses were more opposed overall than other respondent types (all six disagreed). Tied pub tenants were also more likely to disagree than agree (three vs. one).

Table 28: Do you think that the maximum penalty for a pub-owning business or group that has failed to comply with the code should be 1% of turnover? (Q23)

	All (N)	Individuals (N)	Organisations (N)
Yes	7	5	2
No	15	4	11
Don't know	5	4	1
Not answered	3	1	2
Total	**30**	**14**	**16**

Respondents were asked to explain their answer to Q23. There were 17 substantive replies, 16 from those who had either answered no or don't know. Several felt that the maximum penalty should be substantially higher, possibly up to 10% of turnover.

"Should be higher at 10% to act as a real deterrent to breaking the code." (Consumer)

"It should be a minimum of 1% not a maximum. The Adjudicator must have the power to levy greater fines where they are warranted or it will not deter such behaviour." (Representative organisation)

Some tied pub tenants suggested it should not only be more substantial but also not linked to turnover, which might encourage some pub-owning companies to arrange things in such a way that they divide their turnover streams in order to be liable for smaller penalties.

"It needs to be more substantial and not linked to turnover as all the pubcos will do is start creating companies for rent payments to go in and then another for beer payments to go in to divide their turnover streams." (Tied pub tenant)

There was also a suggestion that the minimum penalty could be variable depending on the frequency of Code violations in order to deter repeat breaches. Another suggestion was to base the penalty on the monetary benefit gained by the breach.

There were significant concerns voiced by pub-owning businesses that any penalty should apply to the turnover in terms of the Scottish pub business only. Some pub-owning businesses responding to the consultation had various other divisions not linked to the trade in Scotland, and it was felt to be fair to look only at the turnover of the relevant part of the business when looking to set penalties based on a percentage of turnover. Looking at, for example, the entire group's turnover was felt to be unfair.

"I agree with the 1% figure, but if the Scottish code is only to apply to pubs in Scotland, then it should only apply to turnover generated in Scotland. Otherwise any breach of a Scottish code could result in a fine on turnover generated on sites in England & Wales, where they may have been no breach of the English/Welsh code (in the event of any major differences between legislation)." (Pub-owning business)

Fee for submitting a dispute to arbitration

Most (23 of 30) agreed with the proposal to set the fee for a tenant to submit a dispute for arbitration at £250. This was fairly consistent across individuals and organisations, and across respondent types. All six tied pub tenants agreed; four pub-owning businesses agreed with only one disagreeing and one unsure. Similarly five representative organisations agreed, one disagreed and one did not answer.

Table 29: Do you think that the fee for a tenant to submit a dispute for arbitration should be set at £250? (Q25)

	All (N)	Individuals (N)	Organisations (N)
Yes	23	12	11
No	3	1	2
Don't know	1	-	1
Not answered	3	1	2
Total	**30**	**14**	**16**

A follow-up question asked respondents to explain their answer. Sixteen provided a substantive response. As most respondents agreed with the fee, most comments expressed general approval and a sense that the fee was not prohibitive but enough to discourage frivolous submissions.

"It is not a small sum and tenants should be aware this is not a free service." (Consumer)

“This seems a reasonable upfront fee which should allow the regulator’s office to have proper due diligence as a service firewall to sift out complaints so only viable cases proceed to arbitration.” (Respondent type unknown)

“Due to inflationary pressures and cost headwinds, the £250 fee is sensible.” (Pub-owning business)

The point was also made here that the Adjudicator needs to be proactive in identifying ‘serial non-compliance’, as one respondent put it. That means in their view being alert to repeated similar cases arising with the same players involved and seeking out other potential victims rather than waiting for them to come forward. In these cases where victims are actively sought out, the fee should not be charged.

“If the issue being put forward is repeat and/or a carbon copy it warrants an immediate investigation under which the Arbitrator should not charge the tied pub tenant (TPT) and the Regulator should move swiftly to investigate suspected serial non-compliance… They should not wait until more victims come forward, they should seek them and the evidence out as a matter of routine… The service needs to be very proactive in stamping out non-compliance not simply allow victims to come forward and be dealt with on a case-by-case basis then going back to a blank sheet mentality after each case is concluded which is a major failing of the English / Welsh regulator’s office.” (Respondent type unknown)

Tenant expenses where there is an award in favour of the pub-owning business

Respondents were quite evenly divided on whether a tenant should be required to pay towards the expenses of an arbitration where the arbitration has resulted in an award in favour of the pub-owning business. Overall 12 agreed (seven strongly) and 13 disagreed (nine strongly). Organisations were more likely than individuals to agree (eight organisations agreed vs. four individuals).

Looking at respondent types, pub-owning businesses were most in agreement (five of six agreed, all strongly). Tied pub tenants had more mixed views (three of six tended to disagree; two agreed, one strongly; one was neutral).

Table 30: To what extent do you agree or disagree that a tenant should be required to pay towards the expenses of an arbitration where the arbitration has resulted in an award in favour of the pub-owning business? (Q26)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	7	1	6
Tend to agree	5	3	2
Neither agree nor disagree	2	1	1

Tend to disagree	4	3	1
Strongly disagree	9	5	4
Don't know	-	-	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Respondents were asked in an open-ended question (Q27) for their views on what the limit might be on the amount of expenses tenants would ordinarily be required to pay. Seventeen gave a substantive response. Some reiterated the point that payments should be set at a level that discourages disputes brought deliberately to cause annoyance but not genuine ones.

"A level should be set to ensure that a balance is struck between valid tenant disputes and those who would use arbitration purely as a vehicle to gain more favourable lease terms." (Pub-owning business)

The point was also made that weeding out claims without merit at the earliest stage possible was an essential job for the service administrators to avoid further unnecessary costs to all parties further along the process.

"Tenants have already paid to use the service, if their complaint is without merit this could be tackled at the application stage by the service administration. The issues are binary, no invalid complaint should be allowed to proceed and or expose the Tenant or POB to further costs. The point of an arbitration service is to be low cost and avoid risk. The service needs to operate a firewall to ensure it does not allow Tenants to find out much later that their interpretation of the Code was wrong." (Respondent type unknown)

Only a minority of respondents offered a figure. Some suggested £2,500 to £5,000. This was felt to be sufficient to deter disputes brought deliberately to cause annoyance and ensure tenants were committed, whilst not being too prohibitive.

"There needs to be limit for costs associated that's not prohibitive to making an appeal but [it] has to be enough to ensure the tenant is committed i.e. £2500 max." (Tied pub tenant)

Others suggested much smaller maximum amounts, from £100 to £750.

Tenant liabilities for expenses in excess of ordinary limit

Although most agreed that a tenant should be required to pay expenses in excess of any ordinary limit where an arbitrator has decided that the pub-owning business has no liability on account of the dispute having been submitted for arbitration by

the tenants deliberately to cause annoyance, views were fairly divided with 15 of 30 agreeing and seven disagreeing.

Pub-owning businesses were particularly likely to agree (five of six agreed, all strongly). Tied pub tenants were less enthusiastic, with three agreeing (one strongly), two disagreeing (one strongly) and one neutral.

Table 31: To what extent do you agree or disagree that a tenant should be required to pay expenses in excess of any ordinary limit where an arbitrator has decided that the pub-owning business has no liability on account of the dispute having been submitted for arbitration by the tenants vexatiously [i.e. deliberately to cause annoyance]? (Q28)

	All (N)	Individuals (N)	Organisations (N)
Strongly agree	9	3	6
Tend to agree	6	4	2
Neither agree nor disagree	4	2	2
Tend to disagree	2	1	1
Strongly disagree	5	2	3
Don't know	1	1	-
Not answered	3	1	2
Total	**30**	**14**	**16**

Further comments on proposals for fees and expenses for arbitration

Respondents were asked for any other comments on the proposals around arbitration fees and expenses. Eight offered a substantive response. Most comments reiterated points already made about the importance of ensuring fees dissuade claims made deliberately to cause annoyance whilst not deterring genuine ones.

"We consider such a provision to be important to seek to act as a deterrent or "brake" on unmeritorious referrals which are not in the best interests of the tenant, pub-owning business or adjudicator and may simply create an unnecessary time and cost burden for all stakeholders." (Pub-owning business)

"Any fee charged in the above circumstances should be kept at a reasonable level which would not endanger the viability of the tenants business." (Tied pub tenant)

One respondent stated that they felt it was important for arbiters to be transparent about any potential conflicts of interest they may have.

“There also needs to be a declaration from the arbitrator if they do business with the pubco presently or have done so in the past as more and more in Scotland there is a huge conflict of interest between valuers.” (Tied pub tenant)

Conclusions

The overarching challenge, as with the first consultation, is balancing the views of pub-owning businesses and tied pub tenants. This is especially the case in relation to proposed triggers for rent reviews, which businesses often felt were not well enough defined, posing a potential risk to their business in terms of certainty around future rental income.

For tied pub tenants, concerns were mainly around fees and expenses in relation to disputes. The key challenge that emerged here in their view was pitching expenses at a level that discourages claims made deliberately to cause annoyance but not genuine ones and is acceptable to tenants and businesses alike.

Pre-entry requirements

- Respondents of all types agreed that pub-owning businesses should be required to provide information about pre-entry training to tenants. Information provided about the pub's past and prospective future performance should be impartial and accurate.
- Most proposals for tenant business plans were supported across respondent types. The exception was around taking into account the tenant's business plan when negotiating the lease. Pub-owning businesses felt that tenant business plans should not supersede long-standing industry practice around preparation of profit and loss reports for new tenants.
- From the tied pub tenants' point of view, the priority was access to impartial, consistent and accurate information and advice around drawing up a business plan. It was felt this would benefit everyone by enabling plans to be based on realistic and reliable information.

Rent review process

- The profit and loss forecast emerged as an issue causing some tension between tied pub tenants and pub-owning businesses. Tenants wanted it to be fully transparent and based on actual figures, site-specific is possible. Pub-owning businesses were more keen to use industry-standard data citing how difficult it was, in their view, to create accurate forecasts as so much depends on the individual tenant's performance.
- Tied pub tenants felt there was a need for more information on industry benchmarking and how it is used to calculate the rent. Some were concerned about the quality of industry data. They wanted actual sales and costs data to be used if possible and felt over-reliance on industry data risked a 'one size fits all' approach to reviewing and setting rents.
- Most supported the proposal to require taking into account RICS guidance on rent assessment when preparing the rent assessment statement. Some tied pub tenants felt that RICS surveyors were sometimes too close to pub-owning businesses, however.

- Overall, most supported proposals regarding circumstances where a rent review can be requested. Pub-owning businesses' main concern was that including the proposed potential triggers for rent reviews sought to introduce a non-contractual obligation without evidence or an impact assessment.
- Most agreed with the proposed changes in circumstances that would trigger the right to request a rent review, but pub-owning businesses wanted to see clear definitions around some of the changes for example what exactly would count as a 'change to local employment' significant enough to trigger the right to request a rent review?
- Most across all respondent types agreed that tenants should be able to request a rent review for existing leases, but pub-owning businesses were less supportive than tied pub tenants regarding new leases.
- Tied pub tenants agreed that a legal right to request rent review was workable alongside contractual rent review rights, but pub-owning businesses tended to disagree. Tenants felt the legal right was necessary to counter a perceived imbalance of power in the landlord's favour. Pub-owning businesses were put off by the potential cost and complexity.
- Most agreed with the proposed time periods for rent reviews (rent assessment statement should be provided within 4 weeks of a request, and the statutory rent review process should take no longer than 12 weeks). Tied pub tenants were especially supportive as they were keen to prevent processes from being drawn out by landlords.
- Views were mixed on when to allow disputes to be referred to the Adjudicator. Some felt that other avenues should be exhausted first in order to avoid the risk of overburdening the Adjudicator with cases, whereas other felt that not allowing early access to arbitration risked building in long delays to the dispute resolution process.

Repairs and dilapidations, Flow Monitoring Devices and gaming machines

- Dilapidations was generally acknowledged as a long-running source of tension between tenants and landlords that needed to be addressed. Pub-owning businesses wanted the arbitration process to safeguard against cases brought by unscrupulous tenants looking to avoid their obligations around dilapidations and repairs. Tied pub tenants, on their part, voiced historical concerns about dilapidations bills being used unfairly against tenants by landlords.
- There was a general recognition that Flow Monitoring Devices were not always accurate. It was felt that action should not be taken against tenants purely on the basis of their readings.
- Most felt that gaming machines should be covered by the Code. Tied pub tenants especially did not want to see rents proposed that included gaming machines.

Arbitration and financial penalties, fees and expenses

- Half of respondents did not think that 1% of turnover should be the maximum penalty for a pub-owning business or group that has failed to comply with the Code. Those who disagreed felt it should be higher in order to be more of a deterrent.
- Pub-owning businesses operating across jurisdictions felt that penalties should be based only on the turnover of the part of the business running the pub business in Scotland, not the organisation as a whole.
- The proposed £250 fee for submitting a dispute to arbitration was broadly acceptable across respondent types.
- Regarding tenant expenses where arbitration results in an award in favour of the landlord, pub-owning businesses were most in agreement that tenants should be required to pay towards arbitration expenses, tied pub tenants less so. Regarding a limit to expenses payable by the tenant, again the issue was striking a balance between discouraging cases and brought deliberately to cause annoyance and encouraging genuine ones.
- The picture was similar regarding views on whether tenants should be required to pay expenses in excess of any ordinary limit where an arbitrator has decided that the pub-owning business has no liability on account of the dispute having been submitted for arbitration by the tenants deliberately to cause annoyance.

Technical appendix

Method

1. The data was collected by online survey designed and scripted by the Scottish Government and hosted on Citizen Space.

2. The consultation survey was open to all – customers, tied pub tenants, representative organisations and pub-owning businesses.

3. 30 valid responses were received via the online consultation.

4. The consultation was live from 17 March to 12 May 2022.

5. Respondents to internet self-completion surveys and consultations are self-selecting and complete the survey without the assistance of a trained interviewer. This means that the consultation is not representative of any particular group.

6. All research projects undertaken by Progressive comply fully with the requirements of ISO 20252, the GDPR and the MRS Code of Conduct.

Data processing and analysis

7. Raw data was imported into Progressive's SNAP analysis software package. Responses were checked for completeness and sense, and for campaign responses.

8. A computer edit of the data carried out prior to analysis involves both range and inter-field checks. Any further inconsistencies identified at this stage are investigated by reference back to the raw data on the questionnaire.

9. Responses to open-ended questions were spell and sense checked. There were too few to code and group into a codeframe, so they were read by a member of the executive team and key themes and quotes identified for each question.

10. A SNAP programme was set up with the aim of providing the client with useable and comprehensive dataset. Cross breaks were discussed with the client in order to ensure that all information needs are met.

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