

Tied pubs: consultation on a Scottish Pubs Code – Part 2

March 2022

Tied pubs: consultation on a Scottish Pubs Code – Part 2

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Ministerial Foreword

I would like firstly to thank everyone who took part in the first consultation on the Scottish Pubs Code which focused on Market Rent Only leases and guest beer agreements. The detailed responses will be invaluable in refining the code and making it work. The responses to the first consultation are currently being analysed and we will publish the consultation analysis shortly.

This second consultation builds on the first consultation and seeks your views on what else the Scottish Pubs Code should cover. This is likely to be a combination of things the Scottish Government are legally required to do, alongside some areas which we think support the regulatory principles at the core of the code. The consultation also seeks your views on financial penalties for non-compliance with the code, as well as fees and expenses for arbitration under the code.

The Scottish Pubs Code will provide a regulatory framework which aims to re-balance the relationship between landlords and tenants. It should be fair to both landlords and tenants and the Scottish Government is keen for it to be clear and easy to use.

Pubs make a real contribution to the economic and social fabric of Scottish life and I want to see them flourish. I welcome your views on this second consultation on the Scottish Pubs Code.

Ivan McKee MSP

Minister for Business, Trade, Tourism and Enterprise

Glossary of terms

Tied pub: these 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.

Tied pub tenant: these are tenants under leases of tied pubs.

Pub-owning businesses: these are the landlords under leases of tied pubs.

Rent assessment: an assessment of the rent a tenant must pay

Rent review: a review of the rent payable. The frequency of rent reviews is normally set out in the lease.

Responding to this Consultation

We are inviting responses to this consultation by 12 May 2022.

Please respond to this consultation using the Scottish Government's consultation hub, Citizen Space (<http://consult.gov.scot>). Access and respond to this consultation online at <https://consult.gov.scot/agriculture-and-rural-economy/scottish-pubs-code>. You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 12 May 2022.

If you are unable to respond using our consultation hub, please complete the Respondent Information Form to:

Food and Drink Industry Growth Team
Scottish Government
Food and Drink
Saughton House
Edinburgh EH11 3XD

Handling your response

If you respond using the consultation hub, you will be directed to the About You page before submitting your response. Please indicate how you wish your response to be handled and, in particular, whether you are content for your response to be published. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form included in this document.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.gov.scot>. If you use the consultation hub to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so. An analysis report will also be made available.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted,

please send them to the above postal address or by email to:
Tiedpubsconsultation@gov.scot

Scottish Government consultation process

Consultation is an essential part of the policymaking process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.gov.scot>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

Chapter 1: Introduction

Background

1. The Tied Pubs (Scotland) Bill was passed unanimously by the Scottish Parliament on 23 March 2021. It became an Act on 5 May 2021. The Act provides for a Scottish Pubs Code to govern the relationship between pub companies and tied pub tenants and establishes a Scottish Pubs Code Adjudicator to oversee and enforce the code. The aim of the legislation is to ensure that there is a balanced relationship between the position of the business which owns the pub and the tenant. The Act promotes fairness and equitable treatment within commercial agreements.

2. The [Tied Pubs \(Scotland\) Act](#) commits the Scottish Government to lay a Scottish Pubs Code before Parliament by 5 May 2023. The Scottish Government is seeking to deliver a code that is consistent with the regulatory principles set out in the [Act](#):

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

3. The Scottish Pubs Code will be made through secondary legislation and will need to be approved by the Scottish Parliament. The Adjudicator will oversee and enforce the code and can arbitrate in disputes between pub-owning businesses and tenants about whether a pub-owning business has complied with the code.

4. A [Pubs Code](#) for tied pubs has existed in England and Wales since 2016. This only applies to pub-owning businesses owning 500 tied pubs or more.

Purpose of this paper

5. This consultation paper seeks your views on what else the Scottish Pubs Code should contain beyond Market Rent Only leases and guest beer agreements (which were subject to a separate [Scottish Pubs Code Consultation – Part 1](#) earlier this year). This consultation includes proposals for information to be provided to new tenants and at lease renewals, proposals on rent reviews and rent assessments, dilapidations and repairs.

6. The consultation covers proposals for determining the maximum financial penalty which the Adjudicator can apply when a pub-owning business has failed to comply with the code. The consultation also seeks your views on when tied pub tenants should pay arbitration fees and expenses (the Act already deals with the responsibility of pub-owning businesses for arbitration fees and expenses).

7. After all the responses to this consultation have been considered, Ministers will make a final decision on the proposed content of the Scottish Pubs Code. Regulations setting out the whole Scottish Pubs Code will be submitted to the

Scottish Parliament for approval. We are aiming for the code to be in place by the end of November 2022.

What to expect in the consultation document

8. Chapters 2 and 3 set out the Government's proposals on the rest of the Scottish Pubs Code and proposals on financial penalties and fees and expenses for arbitration.

9. Annex A contains draft regulations on the rest of the Scottish Pubs Code.

10. In terms of policy aims, the Scottish Government is intervening here to re-balance the relationship between landlords and tenants. The code should be fair for both parties and it should be straight-forward, unambiguous and easy to use/follow, without unnecessary process.

Chapter 2: Proposals on the code

Policy approach

11. In terms of policy aims, the Scottish Government is intervening here to re-balance the relationship between landlords and tenants. The code should be fair for both parties and it should be straight-forward, unambiguous and easy to use/follow, without unnecessary process.

12. In drawing up policy proposals, the voluntary [code of practice](#) in Scotland, together with the [England and Wales' Pubs Code](#) have been considered. It should be noted that many of the proposals put forward here are already in the voluntary code, but putting them on a statutory footing will bring them within the remit of the Adjudicator, giving certain enforcement rights to tied-pub tenants.

13. We are proposing to keep the requirements for the Scottish Pubs Code focused, proportionate and high level, to concentrate on issues where legislation is necessary or can deliver real benefits. A proportionate approach seeks to reduce the impact on smaller pub-owning businesses, recognising that the Tied Pubs (Scotland) Act 2021 provides for the code to apply to all tied pub-owning businesses.

14. The draft parts of the Scottish Pubs Code on which we are consulting are at Annex A.

Information and advice to new and renewing tenants

15. There are points in the tenancy cycle where the code could provide further clarity about what is expected of pub-owning businesses and this would allow tenants to be able to make an assessment of returns, risks and rewards (the regulatory principles 2 and 3). The first point is when new tenants enter into a tied pub lease or existing tenants renew their lease (the draft regulations at Annex A use the term “prospective tenants” to refer to both new and renewing tenants).

16. To assist tenants in their assessment of the risks and rewards of tenancy, it is proposed that pub-owning businesses advise tenants to undertake pre-entry training as well as provide information about how they can undertake such training before they enter any lease. We have listened to industry representatives and propose an exemption for experienced tenants.

Question 1: Should pub-owning businesses be required to provide information about pre-entry training to tenants?

Yes

No

Don't know

Please provide any comments

17. A business plan is another key way of assessing whether a pub operated under the lease being offered to the tenant will be a viable business that fairly shares the risks and rewards amongst the parties, fulfilling the third principle. We propose

that pub-owning businesses should be required to advise prospective tenants to prepare a business plan based on independent advice, provide information on sources of independent advice, ask to see any business plan prepared by the tenant and take that business plan into account when negotiating a lease. Previous Scottish Government [research on the pub sector in Scotland](#) has indicated that tenants who took independent financial or legal advice before purchase found the information useful.

Question 2: To what extent do you agree or disagree that the code should require pub-owning businesses to do the following activities in relation to the tenant's business plan?

Activity	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
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						

Please provide any comments

18. Before a tenant enters into a new or renewed lease, or develops a business plan, the pub-owning business should make available certain information, to ensure fair and lawful dealing and also to enable tied pub tenants to make an assessment in relation to second and third regulatory principles (not worse off than if they weren't subject to a tie; and a fair share of risk and rewards between the parties).

19. We have prioritised the information that tenants should receive, recognising that new tenants can find the volume of information given to them at the outset a challenge. This does not prevent pub-owning businesses from routinely providing more information, if they wish to do so.

20. We are proposing that all new tenants and renewing tenants should be given the following information:

- A copy of the draft lease.
- A rent assessment statement.
- Information about:
 - The costs of running the pub, e.g. business rates, fees, service rates and other costs.
 - Any publicly available reports providing benchmarks or information on the cost of running tied pubs.
 - Any advice and support the pub-owning business can provide to tenants and prospective tenants.
 - Any arrangements proposed by the pub-owning business relating to gaming machines at the pub, including details of how income from the machines is to be distributed.
 - Sources of independent advice and support for tenants and prospective tenants.

21. If not already covered in the terms of the draft lease, new and renewing tenants should in addition be provided with information about:

- Processes for dealing with breaches of lease terms.
- Responsibilities and processes for dealing with repairs and dilapidations.
- Any investment proposals relating to the pub.
- Current price list of tied products of services, and any expected changes or discounts.
- Processes for dealing with complaints and disputes arising under the lease.

22. In addition, the following information should be provided to tenants who are new to the pub being leased:

- Description of the pub.
- Description of the pub's licences.
- Information about any enforcement action against the pub in the last two years, for example relating to health and safety, food hygiene, licensing or planning.
- The number of tenants that have taken on the pub over the past 10 years.

Question 3: Please suggest any information requirements which could be added or removed for new and renewing tenants

Please provide any explanation for suggesting the addition or removal of requirements

Rent assessment and rent reviews

23. Rent reviews and rent assessments form another key part of the tenancy cycle. As part of the rebalancing of the relationship between tenant and landlord, the code will exclude lease terms which allow only the pub-owning business to initiate a rent assessment.

24. The proposal is that the pub-owning business should be required to give the tenant a rent assessment statement as part of a rent review process, whether under

a contractual rent review clause or under the statutory right to rent review. Rent assessments should be carried out in line with Royal Institution of Chartered Surveyors (RICS) guidance. The pub-owning business should also advise the tied pub tenant to obtain professional independent advice before rent is agreed, for example from an accountant or a solicitor. The pub-owning business should be able to point tenants to reputable independent organisations and professionals such as the Financial Services Register, Association of Chartered Certified Accountants or trade associations, which do not provide advice to the pub-owning business.

25. The rent assessment statement should contain at least the following information:

- Proposed rent.
- Methods, assumptions and disregards used to calculate the proposed rent.
- A profit and loss forecast for the next 12 months.
- Any other information, or sources of information relied upon to assess the proposed rent.

26. This information should enable tenants to make an assessment about whether there is a fair share of risk and reward.

Question 4: We are proposing that pub-owning businesses during the rent review process provide the following information as a minimum as part of the rent assessment statement: the new rent; methods, assumptions and disregards used to calculate the rent; a profit and loss forecast for the next 12 months; and any other information or sources used to assess the proposed rent. Should anything be added or removed from this list?

27. In the [Pubs Code for England and Wales](#), rent assessments must be carried out in accordance with RICS guidance. We are proposing to take a similar approach here in order to ensure a professional and consistent quality of rent assessment is assured.

Question 5: 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)?

Yes

No

Don't know

Please explain your answer

28. It is proposed that the code explicitly enables tenants to ask for a rent review (and a rent assessment as part of that) if a rent review has not taken place in the past 5 years or where material circumstances affecting the pub change. The pub-owning business should not be required to undertake a rent review for short-term agreements (less than 12 months) or where Market Rent Only (MRO) negotiations are underway. This statutory right to rent review will sit alongside any existing contractual right to rent review in the tied-pub lease.

Question 6: To what extent do you agree or disagree that tenants should be able to request rent reviews in the following circumstances?

Circumstance	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
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						

Please suggest other circumstances, if any, where tenants should be able request rent reviews.

Question 7: To what extent do you agree or disagree that tenants can request a rent review when the following material change in circumstances occur?

Circumstance	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
Change to local infrastructure						
Change to local employment						
Change to local environmental factors						
Long-term change to the local economic environment						

Please tell us what other circumstances, if any, should be taken into account ?

Question 8: What kind of leases should a tenant be able to request a rent review for? (select all that apply)

- New leases
- Existing leases
- Don't know

29. Some leases contain a contractual requirement to have a rent review, typically half-way through a term, with a 5 year lease term being common. The code makes certain terms in leases connected with rent reviews unenforceable e.g. a term which provides for rent assessment only to be initiated by the pub-owning business (see more on this below). We propose that under the code a rent review can be requested by the tenant where the contractual period of the lease is 12 months or more and where one hasn't taken place in the past 5 years, or where material circumstances affecting the pub change.

Question 9: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Please explain the reasons for your answer

Question 10: What would be the likely impact of this approach to rent review on your business or on the tied pubs sector?

30. In order to provide certainty to both tenants and pub-owning businesses, it is proposed to set out timescales for rent reviews and rent assessments. We propose that the rent assessment process should be no longer than 4 weeks and the whole rent review process should be no longer than 12 weeks from the date of the tenant's request. This matches our approach to Market Rent Only leases, where we consulted on a 8 week time period for negotiation, and 4 weeks for an independent rent assessment to be carried out by a Royal Institution of Chartered Surveyors (RICS) member assessor.

Question 11: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Please explain the reasons for your answer

Question 12: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree
Disagree
Don't know

Please explain the reasons for your answer

31. Tied pub leases can include processes for how the tenant and the pub-owning business should resolve disputes. We are proposing that disputes about the provisions in the code on rent assessment and rent review can only be heard by the Adjudicator once those contractual dispute resolution processes have been exhausted. This will allow the tenant and pub-owning business to resolve their issues using mechanisms already agreed in the lease. Where it is not possible to resolve matters that way, the Adjudicator can provide arbitration for these issues.

Question 13: 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?

Strongly agree
Tend to agree
Neither agree or disagree
Tend to disagree
Disagree
Don't know

Please explain the reasons for your answer

Question 14: What else, if anything should the code cover on rent reviews and rent assessment?

Repairs and dilapidations

32. Repairs and dilapidations have been raised as possible areas which would benefit from inclusion in the code. We recognise that responsibilities between tenants and landlords vary depending on the type of tied pub lease/tenancy agreement. We have already proposed that information provided to new tenants and for new leases should include processes and responsibilities for dealing with repairs and dilapidations. We would encourage the tenant to deal with any issues relating to the cost or effectiveness of repairs as a result of dilapidations with their landlord in the first instance, and seek to resolve any disputes directly with the company.

33. We propose that the code will include a requirement that when enforcing repairs and dilapidations clauses in a tied-pub lease, pub-owning businesses must act fairly and reasonably. A failure to deal with repairs and dilapidations fairly and reasonably could be referred to the Adjudicator for arbitration, but only after any dispute resolution processes provided for in the lease have been exhausted.

Question 15: Do you have any comments on the proposals on repairs and dilapidations?

Flow monitoring devices

34. Flow monitoring devices measure the amount of beer sold by the tied pub tenant. This can show variances between the amount purchased from the pub-owning business and the amount sold and can indicate that the tied pub tenant is or is not buying beer from outside of tied arrangements. The [voluntary code of practice](#) requires that additional evidence must be secured, on top of readings from Flow Monitoring Devices, before the pub-owning business penalises their tied pub tenant for any breach of tie. We propose that the code will also make provision for this.

Question 16: Should additional evidence be required before a pub-owning business can take action as a result of a reading from a Flow Monitoring Device?

Yes

No

Don't know

Question 17: Do you have any comments on the proposals on Flow Monitoring Devices?

Gaming machines

35. We propose that pub-owning businesses should not be able to make it a mandatory requirement of a tied-pub lease that a tenant has to lease gaming machines. This would not prevent a tied pub tenant from agreeing voluntarily to accept such terms in the lease or in a separate agreement with their pub-owning business or another supplier of gaming machines. This should increase tenant choice and increase access to a range of gaming machine suppliers, providing tenants with greater flexibility to adapt their pub to suit their local conditions. This policy will not apply to existing leases, only to new leases entered into after the code is put in place.

Question 18: Should gaming machines be covered by the code?

Yes

No

Don't know

Question 19: Do you have any comments on the proposals on gaming machines?

Restriction on enforcing certain terms of agreement

36. The Scottish Pubs Code is required by the [Tied Pubs \(Scotland\) Act 2021](#) to prohibit the pub-owning business from enforcing certain terms of agreement. These terms are:

- a term under which a tied-pub tenant is prevented from, or can be penalised for, taking action to enforce the code,
- a term which provides that a rent assessment in relation to the tied pub—
 - (i)may be initiated only by the business,
 - (ii)may only determine that the rent is to be increased,

(iii) may not determine that the rent is to be reduced.

Question 20 – What other terms, if any, should the code prevent pub-owning businesses from enforcing?

Requirement to provide information to Adjudicator

37. We are proposing that pub-owning businesses should be required to notify the Adjudicator that they are captured by the definition of “pub-owning business” in the Act and the code, to keep the Adjudicator informed of any structural changes in the business such as mergers or acquisitions, and also inform the Adjudicator if they cease to be a pub-owning business. This will provide clarity about which businesses are covered by the legislation, in the absence of a readily available identifier for pub-owning businesses.

Requirement to comply with Adjudicator’s directions

38. Under the [Tied Pubs \(Scotland\) Act 2021](#), the Scottish Pubs Code is required to set out that a pub-owning business must comply with a direction issued by the Adjudicator. Such directions can be issued as a result of an investigation which has found that a pub-owning business has not complied with the code. A direction could, for example, direct the business to do, or stop doing something or to publish information relating to the investigation in a certain way by a specific date.

Terms of the code excluded from arbitration

39. The [Tied Pubs \(Scotland\) Act 2021](#) allows for disputes about whether a pub-owning business has complied with a part of the code to be brought forward for arbitration. Arbitration can be carried out by the Adjudicator or by someone the Adjudicator appoints. The [Tied Pubs \(Scotland\) Act 2021](#) allows parts of the code to be excluded from arbitration. It is proposed that only aspects of the code which might result in disputes between tenants and landlords are suitable for arbitration. The intention is to exclude the following terms of the code from arbitration because they concern the relationship between the pub-owning business and the Adjudicator and should not result in disputes between tenants and landlords:

- Requirement to comply with Adjudicator’s directions following an investigation.
- Information to the Adjudicator by pub-owning businesses.

Question 21: What other parts of the code, if any, would not be appropriate for arbitration?

Other comments on the code

40. As mentioned before, we are seeking to keep the content of the Scottish Pubs Code focused, proportionate and high level. Further guidance could be produced by the Adjudicator at a later date.

41. The operation of the code will be subject to a review 2 years after it comes into effect.

Question 22: Is there anything else that should either be included or removed from the Scottish Pubs Code?

Chapter 3: Proposals on financial penalties and fees and expenses for arbitration

Financial penalties

42. The Act provides for the Adjudicator to take enforcement action when they are satisfied that a pub-owning business has failed to comply with the code. This will support the Adjudicator in enforcing the code. The enforcement action might include imposition of a financial penalty on the business. Scottish Ministers are required to define the permitted maximum for such a penalty by regulations and they can do this either by specifying the maximum by an amount or by setting out a methodology by which it is to be determined. Appeals can be made to the sheriff about the imposition and amount of the penalty.

43. Since the penalties will be imposed on pub-owning businesses of widely varying size and turnover, it does not seem fair to specify the permitted maximum as a set amount since that could have a disproportionate impact on smaller pub-owning businesses. Our intention therefore is to define the financial penalties by setting out a methodology for calculation of the penalty. To ensure that businesses are impacted equally, the proposal is for the permitted maximum to be set as a percentage of the pub-owning business's annual turnover. Where the business is part of a wider pub-owning group, then the percentage will apply to the annual turnover of the group.

44. Where the business has published accounts within the past 12 months, the annual turnover will be determined by reference to those accounts. Where no accounts have been published within the last 12 months, the annual turnover will be determined by reference to the business's monthly turnover during that period.

45. The turnover that will be taken into account for these purposes is income receivable (after deduction of trade discounts, VAT and other taxes) in respect of:

- provision of products and services as part of the business's ordinary activities in the UK
- gifts, grants, subsidies or membership fees receivable in the course the business's ordinary activities in the UK
- rent, or money in lieu of rent, payable for land in the UK.

46. We propose to set the maximum penalty as 1% of turnover. This allows for a significant penalty if required but the Adjudicator is able to impose a smaller penalty where they consider this appropriate.

Question 23: 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?

Yes

No

Don't know

Please explain your answer

Question 24: Do you have any comment on the proposed method for determining the turnover of the business?

Fees

47. Tied pub tenants who submit a dispute for arbitration under the code will need to pay a fee to the arbitrator (the Adjudicator or someone appointed by them). Pub-owning businesses will also be liable, in most situations, to pay for the arbitrator's reasonable fees and expenses. Under section [17\(1\) to \(3\) of the Act](#), Scottish Ministers must provide for a fee to be paid to the Adjudicator, or a person appointed by the Adjudicator, by a tied-pub tenant who submits a dispute for arbitration.

48. Requiring tenants to pay a fee for arbitration will support enforcement of the code and provide recognition that arbitration brings costs. We want fees to be fair and proportionate and set at a level that discourages vexatious or minor disputes being brought forward but does not prevent the submission of necessary requests for arbitration. We have considered relevant comparators. The equivalent fee for arbitration under the Pubs Code for England and Wales, which was set in 2016, is £200. Given inflationary pressures, we have concluded that the fee should be £250 and this should be payable at the time the dispute is submitted for arbitration.

Question 25: Do you think that the fee for a tenant to submit a dispute for arbitration should be set at £250?

Yes

No

Don't know

Please explain your answer

Expenses

49. As mentioned earlier, pub-owning businesses will be liable, in most circumstances, to pay for the arbitrator's reasonable fees and expenses. However, the Adjudicator can, on request from the pub-owning company, relieve the pub-owning business of liability for reasonable fees and expenses and make the tenant liable instead. [Section 16 of the Act](#) deals with these matters.

50. Under [section 17\(4\) to \(6\) of the Act](#), the Scottish Ministers may also specify, in legislation, circumstances when a tenant is required to make a payment to the Adjudicator in respect of the expenses of an arbitration. This is on top of any fee, which the tenant must pay. In doing so, the Scottish Ministers can set a limit on the amount the tenant would normally be required to pay and specify circumstances when that limit might be exceeded. The Adjudicator would still have discretion under section 16(3) of the Act, at the request of a pub-owning business, to relieve the business of liability for fees and expenses and make the tied-pub tenant liable for reasonable fees and expenses to the extent the Adjudicator considers appropriate.

51. If we were to use the powers in section 17(4) to (6) of the Act, we consider the appropriate approach to be as follows:

- Specify in regulations that the tenant is required to make a payment in respect of the expenses of an arbitration where the arbitration has resulted in an award in favour of the pub-owning business;
- Set a limit on the amount of expenses a tenant would ordinarily be required to pay. We would be interested to hear views on whether such a limit should be set and if so, at what level;
- Specify that the tenant is required to pay expenses in excess of that limit where an arbitrator has decided under section 16(2) of the Act that the pub-owning business has no liability for fees and expenses, on account of the dispute having been submitted to the arbitration by the tenant vexatiously.

Question 26: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Question 27: What limit might be set for the amount of expenses a tenant would ordinarily be required to pay? Please give reasons.

Question 28: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Question 29: Do you have any other comments on the proposals around fees and expenses?

Question 30: Please let us know if you have any other comments in relation to either set of proposals (the Scottish Pubs Code or on financial penalties, fees and expenses)

Annex A: Draft Scottish Pubs Code Regulations 2022
(Provisions in grey text have already been consulted on through Annex A of the [Scottish Pubs Code Consultation – Part 1](#))

Draft Regulations laid before the Scottish Parliament under section 24(2) of the Tied Pubs (Scotland) Act 2021, for approval by resolution of the Scottish Parliament.

D R A F T S C O T T I S H S T A T U T O R Y I N S T R U M E N T S

2022 No.

LANDLORD AND TENANT

The Scottish Pubs Code Regulations 2022

Made - - - - - ***

Coming into force - - - ***

The Scottish Ministers make the following Regulations in exercise of the powers conferred by sections 1 and 14(3) and schedule 1 of the Tied Pubs (Scotland) Act 2021⁽¹⁾ and all other powers enabling them to do so.

In accordance with section 24(2) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

PART 1

General

Citation and commencement

1. These Regulations may be cited as the Scottish Pubs Code Regulations 2022 and come into force on ***.

General interpretation

2.—(1) In these Regulations—

- “the Act” means the Tied Pubs (Scotland) Act 2021,
- “adjudicator” means the Scottish Pubs Code Adjudicator,
- “beer” and “cider” have the meanings given in section 1 of the Alcoholic Liquor Duties Act 1979,
- “code” means the Scottish Pubs Code as set out in these regulations,
- “gaming machine” has the meaning given in section 235 of the Gambling Act 2005,
- “group undertaking” has the meaning given by section 1161 of the Companies Act 2006,

⁽¹⁾

“landlord of a pub” includes any person who is a group undertaking in relation to the person who is actually the landlord,

“pub” means premises—

(a) in respect of which a premises licence within the meaning of section 17 of the Licensing (Scotland) Act 2005 has effect, and

(b) in which the main activity (or one of the main activities) carried on is the sale of alcohol to members of the public for consumption on the premises,

“pub-owning business” means the landlord under the lease of a tied pub,

“stocking requirement” means a contractual obligation which—

(a) requires that some of the beer or cider (or both) that is to be sold in the pub is produced by the landlord,

(b) does not require the tenant to procure that beer or cider from a particular supplier, and

(c) neither prevents the tenant from, nor penalises the tenant for, selling in the pub beer or cider that is produced by a person other than the landlord (although a contract term may impose restrictions on such sales),

“tied pub” means a pub which is being leased to a tenant who is subject to a contractual obligation which—

(a) requires that some or all of the alcohol to be sold in the pub be supplied by—

(i) the landlord of the pub, or

(ii) a person nominated by the landlord, and

(b) is not a stocking requirement.

(2) References in these Regulations—

(a) to a pub-owning business include a person who has been a pub-owning business,

(b) a tied-pub tenant include a person who has been the tenant under the lease of a tied pub.

The regulatory principles

3. In relation to their duties under this code, pub-owning businesses are required to act in accordance with the regulatory principles set out in section 3(3) of the Act—

(a) the principle of fair and lawful dealing by pub-owning businesses in relation to their tied-pub tenants,

(b) the principle that tied-pub tenants should not be worse off than they would be if they were subject to neither a product tie nor a service tie,

(c) the principle that any agreement between a pub-owning business and a tied-pub tenant should fairly share the risks and rewards amongst the parties.

Tied-pub tenant not to suffer detriment

4. A pub-owning business must not subject a tied-pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under this code.

Disputes

5.—(1) Disputes between a tied-pub tenant and a pub-owning business about whether the business has complied with a term of this code may be submitted to the adjudicator for arbitration under sections 14 to 18 of the Act.

(2) But pub-owning businesses and tenants are to use their best endeavours to resolve such disputes informally.

Terms of the code excluded from arbitration

- 6.** The following terms of this code cannot be the subject of arbitration before the adjudicator—
- (a) regulation [7] (requirement that pub-owning businesses provide information to the adjudicator), and
 - (b) regulation [8] (requirement to comply with adjudicator's direction following an investigation).

Requirement to provide information to the adjudicator

- 7.** A pub-owning business must—
- (a) as soon as reasonably practicable after the commencement of this code, inform the adjudicator that the business is a pub-owning business for the purposes of this code,
 - (b) keep the adjudicator informed of any structural changes to the pub-owning business, for example, mergers or acquisitions, and
 - (c) inform the adjudicator if the business ceases to be a pub-owning business for the purposes of this code.

Requirement to comply with adjudicator's directions following an investigation

- 8.** A pub-owning business must comply with a direction given by the adjudicator under section 9(2) of the Act.

Restriction on enforcing certain terms of agreement

- 9.** A pub-owning business is prohibited from enforcing the following terms in a lease or other agreement—
- (a) a term under which a tied-pub tenant is prevented from, or can be penalised for, taking action to enforce the code,
 - (b) a term which provides that a rent assessment in relation to the tied pub—
 - (i) may be initiated only by the business,
 - (ii) may only determine that the rent is to be increased,
 - (iii) may not determine that the rent is to be reduced.

PART { }

Information and advice to prospective tied-pub tenants

Definitions relevant to this Part

- 10.** In this Part, “prospective tenant” includes an existing tenant seeking to renew the lease of a tied-pub.

Pre-entry training for prospective tenants

- 11.—**(1) Before entering into a lease with a prospective tied-pub tenant, a pub-owning business must—
- (a) advise the prospective tenant to complete appropriate pre-entry training, and
 - (b) give the prospective tenant information about providers of such training.
- (2) “Appropriate pre-entry training” means training which includes material on—
- (a) how a tied-pub operates, and
 - (b) a tied-pub tenant’s obligations and responsibilities.
- (3) A pub-owning business is not required to give advice and information about appropriate pre-entry training to a prospective tenant who—
- (a) is currently, or
 - (b) has within the past three years ending on the day the lease is proposed to start, been,

a tied-pub tenant.

Information to be provided to prospective tenants

12.—(1) Before entering into a lease with a prospective tied-pub tenant, a pub-owning business must provide to the prospective tenant—

- (a) a draft lease,
- (b) a rent assessment statement meeting the requirements set out in paragraphs (2), (3) and (4) of regulation [14], and
- (c) information about—
 - (i) any business rates, fees, service rates and other costs associated with the operation of the pub which are the responsibility of the tenant,
 - (ii) any publicly available reports analysing the trading costs of tied pubs in the United Kingdom, including the costs of the agreements under which such pubs are occupied,
 - (iii) any arrangements proposed by the pub-owning business relating to gaming machines at the pub, including details of how income from the machines is to be distributed,
 - (iv) any advice and support the pub-owning business can provide to tenants and prospective tenants, and
 - (v) sources of independent advice and support for tenants and prospective tenants.

(2) If not already included in the draft lease, a pub-owning business must in addition to the information set out in paragraph (1) provide a prospective tenant with information about—

- (a) processes for dealing with breaches of lease terms,
- (b) responsibilities and processes for dealing with repairs and dilapidations,
- (c) any proposal for the pub-owning business to invest in the pub,
- (d) the current price list for tied products or services, and any expected changes or discounts to these prices, and
- (e) processes for dealing with complaints and disputes arising under the lease.

(3) Where the prospective tenant has not previously leased the pub in question, the pub-owning business must in addition to the information set out in paragraphs (1) and (2) provide the prospective tenant with—

- (a) a description of the pub,
- (b) a description of the licences currently applicable to the pub, and
- (c) information about—
 - (i) any enforcement action against the pub in the last two years, for example, relating to health and safety, food hygiene, licensing or planning, and
 - (ii) the number of tenants who have occupied the pub during the past ten years.

Prospective tenants to prepare business plan

13. Before entering into a lease with a prospective tied-pub tenant a pub-owning business must—

- (a) advise the prospective tenant to prepare a business plan taking into account the information provided under regulation [12], and to seek independent advice to do so,
- (b) provide the prospective tenant with information on independent providers of business plan advice,
- (c) ask to see a copy of the prospective tenant's business plan, and
- (d) take the prospective tenant's business plan, if provided, into account when negotiating the lease.

PART { }

Rent assessment and rent review

Rent assessment

14.—(1) When a rent review process is initiated under the terms of an existing tied-pub lease or under regulation [15], the pub-owning business must provide the tied-pub tenant with a rent assessment statement.

(2) The “rent assessment statement” must set out—

- (a) the proposed rent,
- (b) the methods, assumptions and disregards used to calculate the proposed rent,
- (c) a profit and loss forecast for a 12 month period beginning on the date the proposed rent is payable, and
- (d) any other information or sources of information relied upon to assess the proposed rent.

(3) When preparing the rent assessment statement a pub-owning business must take into account guidance on rent assessment issued by the Royal Institute of Chartered Surveyors, or ensure that guidance is taken into account by the person preparing the rent assessment statement on behalf of the pub-owning business.

(4) Where possible, the profit and loss forecast mentioned in paragraph (2)(c) is to be based on actual costs relevant to the pub in question or to a pub in the same vicinity.

(5) When offering a rent assessment statement to a tied-pub tenant in connection with a rent review, a pub-owning business must—

- (a) advise the tenant to seek independent advice, and
- (b) provide the tenant with information about sources of independent advice.

Rent review

15.—(1) A pub-owning business must, at the request of a tied-pub tenant, review the rent payable in respect of the tied-pub lease where—

- (a) the contractual period of the lease is 12 months or more, and
- (b) (i) the rent has not been reviewed within the past five years ending on the date of the tenant’s request, or
- (ii) there has been a material change in circumstances affecting the pub.

(2) But a pub-owning business need not review the rent payable where the tied-pub tenant has separately requested an MRO lease and that request is in a negotiation period or rent assessment period as mentioned in regulations [] to [].

(3) When reviewing the rent payable in response to a request under this regulation, a pub-owning business must—

- (a) provide a rent assessment statement under regulation 14 within 4 weeks beginning on the date of the tenant’s request, and
- (b) assess the proposed rent as the rent likely to be paid on the open market by a willing tenant to a willing landlord—
 - (i) for a lease in the same terms as the existing lease, other than the rent payable, and
 - (ii) on the basis of reasonable assumptions and disregards of the sort likely to be negotiated on the open market between a willing tenant and a willing landlord.

(4) Where the proposed rent after review under this regulation differs from the current rent, the rent may change only by mutual agreement of the pub-owning business and the tied-pub tenant.

(5) If mutual agreement to change the rent has not been reached within 12 weeks beginning with the date of the tenant’s request, the rent review process under this regulation comes to an end.

(6) For the purposes of this regulation, “a material change in circumstances” includes—

- (a) a change to the local infrastructure,

- (b) a change to local employment,
- (c) a long-term change to the local economic environment, or
- (d) a change to local environmental factors.

Disputes about rent assessment and rent review

16. Disputes about regulations [14 and 15] may be referred to the adjudicator for arbitration under regulation 5 only after any dispute resolution processes provided for in the tied-pub lease have been exhausted.

PART { }

Miscellaneous

Repairs and dilapidations

17.—(1) A pub-owning business must act fairly and reasonably—when enforcing any repairs and dilapidations clauses in a tied-pub lease.

(2) Disputes about regulation 17(1) may be referred to the adjudicator for arbitration under regulation 5 only after any dispute resolution processes provided for in the tied-pub lease have been exhausted.

Gaming machines

18. A pub-owning business must not enter into a new tied-pub lease which places a mandatory requirement on a tied-pub tenant to purchase or rent gaming machines from—

- (a) the pub-owning business, or
- (b) a supplier nominated by the pub-owning business.

Flow monitoring devices

19.—(1) A pub-owning business must not subject a tied-pub tenant to detriment or impose any liability on a tied-pub tenant as a result of any reading taken from a flow monitoring device unless the condition in paragraph (2) is satisfied.

(2) The condition is that there is additional evidence in connection with the purchase and stock of alcohol at the tied pub.

(3) A “flow monitoring device” means a device which is at the tied pub at the direction of the pub-owning business—

- (a) to measure the amount of alcohol being sold by the tied pub tenant, and
- (b) for the purposes of verifying that the tenant does not sell alcohol at the tied pub in contravention of the terms of the tied-pub lease or any other contractual obligation.



Tied Pubs: Consultation on a Scottish Pubs Code – Part 2

Respondent Information Form

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://www.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (without name)
- Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Consultation questions

Question 1: Should pub-owning businesses be required to provide information about pre-entry training to tenants?

Yes

No

Don't know

Question 2: To what extent do you agree or disagree that the code should require pub-owning businesses to do the following activities in relation to the tenant's business plan?

Activity	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
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						

Please provide any comments

Question 3: Please suggest any information requirements which could be added or removed for new and renewing tenants

Please provide any explanation for suggesting the addition or removal of requirements

Question 4: We are proposing that pub-owning businesses during the rent review process provide the following information as a minimum as part of the rent assessment statement: the new rent; methods, assumptions and disregards used to calculate the rent; a profit and loss forecast for the next 12 months; and any other information or sources used to assess the proposed rent. Should anything be added or removed from this list?

Question 5: 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)?

Yes

No

Don't know

Please explain your answer

Question 6: To what extent do you agree or disagree that tenants should be able to request rent reviews in the following circumstances?

Circumstance	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
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						

Please suggest other circumstances, if any, where tenants should be able request rent reviews.

Question 7: To what extent do you agree or disagree that tenants can request a rent review when the following material change in circumstances occur?

Circumstance	Strongly agree	Tend to agree	Neither agree or disagree	Tend to disagree	Strongly disagree	Don't know
Change to local infrastructure						
Change to local employment						
Change to local environmental factors						
Long-term change to the local economic environment						

Please tell us what other circumstances, if any, should be taken into account ?

Question 8: What kind of leases should a tenant be able to request a rent review for? (select all that apply)

- New leases
- Existing leases
- Don't know

Question 9: 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?

- Strongly agree
- Tend to agree
- Neither agree or disagree
- Tend to disagree
- Disagree
- Don't know

Please explain the reasons for your answer

Question 10: What would be the likely impact of this approach to rent review on your business or on the tied pubs sector?

Question 11: 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?

- Strongly agree
- Tend to agree
- Neither agree or disagree
- Tend to disagree
- Disagree
- Don't know

Please explain the reasons for your answer

Question 12: 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?

- Strongly agree
- Tend to agree
- Neither agree or disagree
- Tend to disagree
- Disagree
- Don't know

Please explain the reasons for your answer

Question 13: 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?

Strongly agree
Tend to agree
Neither agree or disagree
Tend to disagree
Disagree
Don't know

Please explain the reasons for your answer

Question 14: What else, if anything should the code cover on rent reviews and rent assessment?

Question 15: Do you have any comments on the proposals on repairs and dilapidations?

Question 16: Should additional evidence be required before a pub-owning business can take action as a result of a reading from a Flow Monitoring Device?

Yes
No
Don't know

Question 17: Do you have any comments on the proposals on Flow Monitoring Devices?

Question 18: Should gaming machines be covered by the code?

Yes
No
Don't know

Question 19: Do you have any comments on the proposals on gaming machines?

Question 20 – What other terms, if any, should the code prevent pub-owning businesses from enforcing?

Question 21: What other parts of the code, if any, would not be appropriate for arbitration?

Question 22: Is there anything else that should either be included or removed from the Scottish Pubs Code?

Question 23: 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?

Yes
No
Don't know

Please explain your answer

Question 24: Do you have any comment on the proposed method for determining the turnover of the business?

Question 25: Do you think that the fee for a tenant to submit a dispute for arbitration should be set at £250?

Yes

No

Don't know

Please explain your answer

Question 26: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Question 27: What limit might be set for the amount of expenses a tenant would ordinarily be required to pay? Please give reasons.

Question 28: 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?

Strongly agree

Tend to agree

Neither agree or disagree

Tend to disagree

Disagree

Don't know

Question 29: Do you have any other comments on the proposals around fees and expenses?

Question 30: Please let us know if you have any other comments in relation to either set of proposals (the Scottish Pubs Code or on financial penalties, fees and expenses)

More about you

Which of the following describes you, (please select the response which best describes you)

- tied pub tenant – one tenancy
- tied pub tenant – multiple tenancies
- Pub-owning business
- Brewery

- Representative organisation
- Other organisation
- Consumer
- Other – please state

Are any of your tied pubs located in (select all that apply)

- Islands
- Cities/towns
- Rural settings



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