

This document relates to the Tied Pubs (Scotland) Bill (SP Bill 62) as introduced in the Scottish Parliament on 3 February 2020

Tied Pubs (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by Scottish Parliament officials in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Tied Pubs (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Outline of bill provisions

2. This Bill provides for establishment of a Pubs Code in Scotland to govern the relationship between tenants of tied pubs and their owners, and an adjudicator to enforce the Code. 'Tied' tenants are essentially tenants who are under a contractual obligation to buy some or all of their products from the pub-owning business which owns the pub and which leases it to them.

3. The Bill, which is arranged in four Parts, extends to 26 sections and two schedules.

- Part 1 provides for a Scottish Pubs Code to be contained in regulations made under the new Act, and for the establishment of a Scottish Pubs Code Adjudicator. It also sets out what are referred to as the 'regulatory principles'. The Scottish Ministers, in preparing the code, are to exercise their power in that regard consistently with those principles. Similarly, the adjudicator must act consistently with them in carrying out the functions of the

adjudicator. Provision is also made for review of the Code and the adjudicator's performance.

- Part 2 makes provision in relation to giving effect to the Code. It deals with such matters as investigations and enforcement action by the adjudicator, and the adjudicator's duty to arbitrate in relation to a dispute (or appoint an arbitrator to do so).
- Part 3 deals with interpretation matters, and sets out the meaning of various terms used in the Bill, including 'tied pub', 'stocking requirement' and 'pub-owning business'.
- Part 4, in dealing with miscellaneous provisions, sets out a power to make ancillary provisions. It also covers the procedural treatment of secondary legislation under the new Act, and commencement.
- Schedule 1 relates to the Scottish Pubs Code, and sets out various requirements which must be provided for within the Code, and others for which it may make provision.
- Schedule 2 makes provision about the office of the adjudicator. It covers such matters as status and liability, power to require information, funding and support, accountability, appointment and staffing.

4. Further information about the Bill's provisions is contained in the Explanatory Notes, Policy Memorandum and Financial Memorandum.

Rationale for subordinate legislation

5. The Bill contains a number of delegated powers provisions, described in more detail below. The Bill is of a "stand-alone" nature – it does not amend existing legislation, and the powers contained in the Bill are new, with no existing powers being amended or repealed. The powers are explained in detail in the following paragraphs, but in considering if and how provision should be set out in subordinate legislation rather than on the face of the Bill the Member has had regard to—

- the need to strike a balance between the importance of ensuring full Parliamentary scrutiny of the core provisions of the Bill and making proper use of Parliamentary time;

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- the relatively better position of the Scottish Ministers when compared with an individual Member in making decisions on the best use of public resources to meet objectives;
- the possible requirement to make further provision over time, as the new legislation establishes itself, to ensure that where a need is identified to address practical matters of detail, or to make other refinements so as to assist the effective operation of the Bill, or where other unexpected circumstances arise which require a legislative solution, then these can be readily taken forward by means of subordinate legislation;
- specifically, in relation to this particular Bill, the nature and extent of the matters which the Code is to address being such that it would not be realistic or appropriate to seek to address them on the face of the Bill.

Delegated powers

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

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

6. The Scottish Pubs Code, which is to be set out within regulations, represents an integral part of the overall structure of the new legislation, functioning alongside the new Act itself.

7. Section 1(1), read with section 4(1) and (3), requires the Scottish Ministers, by regulations (in the form of what is referred to as the Scottish Pubs Code) to provide for the imposition of requirements and restrictions on pub-owning businesses in connection with tied pubs.

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8. Schedule 1 (the Scottish Pubs Code) makes provision about the exercise of the power conferred by section 1. It sets out matters which the Code must cover, together with other matters which it may cover.

9. Section 4(1)(a) requires the Scottish Ministers to lay draft regulations (i.e. the Code) before the Scottish Parliament for approval. This is to be done within one year of section 4 coming into force. In that regard, section 25 of the Bill provides that section 4 is to come into force on the day after Royal Assent.

10. In terms of section 4(3), if the Scottish Parliament approves the draft regulations, the Scottish Ministers must then make the regulations contained in the draft.

Reason for taking power

11. It would not be realistic or appropriate to seek to deal with the extensive range of matters which the Code is to cover (or which it may cover) on the face of the Bill. Much of that is necessarily left to regulations. That approach also ensures there is some flexibility and discretion around how various elements are approached by the Scottish Ministers as they take forward completion of this element of the overall legislative package.

12. At the same time, in providing for how the regulation making power under section 1 is to be exercised, a number of aspects are identified as being of a nature which it is considered essential be addressed under the Code (as distinct from being taken forward at the discretion of the Scottish Ministers). It is therefore stated within the Bill itself, at schedule 1, that the Code ‘must’ make provision in regard to various specified matters. For example, in relation to: compliance with the adjudicator’s recommendations; requiring a pub-owning business to offer to enter into a guest beer agreement with a tied pub tenant in certain circumstances; requiring a pub-owning business to offer to enter into a market rent only lease with a tied pub tenant who asks for such an offer to be made. Other issues are also referred to in schedule 1 in regard to which the Code ‘may’ (but need not) make provision, for example, in relation to: information to be provided by pub-owning businesses to tenants of tied pubs; making further procedural provision in regard to market-rent-only leases.

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13. Given that the effective operation of the Member's Bill is dependent on regulations which are the responsibility of the Scottish Ministers, it is of importance that those regulations are themselves brought into force at an early date. As noted above, section 4(1) makes provision in regard to the timescales for those regulations.

Choice of procedure

14. Section 24(2) provides that regulations under section 1 are subject to the affirmative procedure. The choice of the affirmative procedure reflects the significance of the regulations to be made under section 1. It is anticipated that the Scottish Pubs Code regulations will be complex and lengthy. As noted above, they represent a core element of the overall legislative package, operating alongside the primary legislation itself. It is plain that they should be subject to a higher level of Parliamentary scrutiny, as afforded by application of the affirmative procedure.

Section 4(4) – power to repeal section 4

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: no procedure

Provision

15. Section 4 makes procedural provision in regard to the Scottish Ministers' duty to make the Scottish Pubs Code regulations and appoint the adjudicator. The section 4 provisions are only relevant to the first use of the section 1 power, when the Code is first established. Section 4(4) states that having made regulations under section 1 (establishing the Scottish Pubs Code) and having appointed a person to the office of the Scottish Pubs Code Adjudicator, the Scottish Ministers can then, by regulations, repeal section 4 itself.

Reason for taking power

16. Section 4(4) would enable section 4 itself to be repealed once its requirements have been fulfilled. This power has been taken simply to facilitate tidying of the statute book, so that readers would not have to

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spend time considering a provision which no longer has legal effect. This is something which could perhaps be left to a statute law repeal Bill. However, those are relatively rare and tend not to deal with spent sections within Acts that are otherwise still operative.

Choice of procedure

17. The purpose of this power is simply to facilitate the repeal of a spent section. Ministers have no policy discretion about how to exercise this self-repeal power, and there is nothing therefore to scrutinise in relation to the exercise of the power. It is considered appropriate that it should therefore be subject to no procedure, beyond the bare laying requirement under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

Section 6 – Ministerial guidance to the adjudicator

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

18. Section 5 makes provision for review of the Code, and the performance of the adjudicator, at regular intervals as specified. Section 6(1) enables the Scottish Ministers, as a result of the findings of a review, to give guidance to the adjudicator about any matter relating to the functions of the adjudicator. The adjudicator must then, in carrying out the functions of that office, take into account any such guidance.

Reason for taking power

19. It may be useful for the Scottish Ministers to be able to give guidance to the adjudicator. Such guidance might relate to a range of matters arising from the findings of a review, and the facility to give guidance may be of particular value as the new legislation establishes itself. This provision allows for relatively ‘light touch’ engagement by the Scottish Ministers in relation to follow up on a review, the Scottish Ministers’ power being limited to that of giving guidance, which the adjudicator ‘must take into account’.

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Choice of procedure

20. As noted, this power might be used to enable ‘light touch’ engagement by the Scottish Ministers, in the circumstances outlined above. Guidance does not have the force of law, so requiring the Parliament to scrutinise guidance would not be an effective use of Parliamentary time.

Section 11(3) – power to define permitted maximum financial penalty payable by pub-owning business for failure to comply with code

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

21. Part 2 of the Bill, in making provision as to how the Code is to be given effect, enables the adjudicator to take a range of enforcement actions, which includes the imposition of a financial penalty. This can be done if, having carried out an investigation, the adjudicator is satisfied that a pub-owning business has failed to comply with the code (section 9). Under section 11, a financial penalty is not to exceed the permitted maximum. The Scottish Ministers are required (under section 11(3)) to define the permitted maximum by regulations. In terms of section 11(4) such regulations can define the permitted maximum either by specifying it as an amount or by setting out the methodology by which it is to be determined.

Reason for taking power

22. It is considered appropriate that the matter of defining a permitted maximum be left to secondary legislation, ensuring flexibility if there is felt to be a need to adjust it over time. This is felt to be a matter which is best left to the Scottish Ministers to determine, as part of the wider work to be done by them in relation to giving effect to the Code.

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Choice of procedure

23. This power is concerned with providing for the setting of a permitted maximum for any financial penalty imposed on a pub-owning business under section 9, relating to a breach of the code. While the negative procedure might often be appropriate for powers of this sort, we are dealing here with a sanction to be applied to some sizeable companies, and it is likely therefore that the maximum penalty may be a fairly large sum. On that basis it is considered that the higher level of scrutiny afforded by the affirmative procedure is appropriate, given that the power could be used to pave the way for substantial fines to be applied. The same considerations apply whether the permitted maximum is defined by specifying it as an amount, or by setting out a methodology for its determination.

Section 14(3) – power to make provision about ‘excluded terms’ under the Code in context of arbitration

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

24. Section 14 deals with the adjudicator’s duty to arbitrate. The adjudicator must act as arbitrator where the dispute is between a tied-pub tenant and a pub-owning business, and if it ‘is about whether the business has complied with a term of the code, other than an excluded term’. Section 14(3) states that ‘excluded term’ means ‘a provision of the code that regulations made by the Scottish Ministers state cannot be the subject of arbitration before the adjudicator.’

Reason for taking power

25. In essence, the adjudicator can only be involved with what might be described as a pure pubs code dispute, between a tied-pub tenant and a pub-owning business, as to whether the business has complied with a term of the Code. As previously noted, the Code will be extensive. The detail of the terms to be contained in it remains a matter to be settled at a later date. But not all of those terms are likely to warrant engaging the arbitration

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mechanism set up under the Bill. It is considered appropriate therefore that the Scottish Ministers should be given some flexibility around this aspect, and to be able to specify within regulations terms of the code that cannot be the subject of arbitration before the adjudicator.

Choice of procedure

26. The facility for arbitration represents a core element of the Bill. It is important therefore that if some of the code's terms are to be excluded, by means of regulations, from that process then there should be an opportunity for full consideration of such regulations. For that reason, provision is made under the Bill for the application of the affirmative procedure in relation to regulations made under section 14(3).

Section 17(1) – power to provide for fees payable by tied - pub tenant in certain circumstances relating to arbitration

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

27. Sections 14 to 18 make provision for arbitration. In relation to specified circumstances in which the adjudicator, or a person appointed by the adjudicator, is the arbitrator (see section 17(2)), section 17(1) provides that the Scottish Ministers must by regulations provide for a fee to be paid to the adjudicator by a tied pub tenant. Section 17(3) further provides that such regulations can, in particular, prescribe the fee to be paid, circumstances in which a tenant need not pay a fee, and circumstances in which a fee is to be refunded.

Reason for taking power

28. It is considered appropriate that the matter of providing for a fee to be paid, and associated matters, be left to secondary legislation. This will also provide flexibility if there is felt to be a need, over time, to adjust the level of fee to be paid, or to make other changes to the circumstances in which it need not be paid or is to be refunded. This is felt to be a matter which is

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best left to the Scottish Ministers to determine, as part of the wider work to be done by them in relation to giving effect to the Code.

Choice of procedure

29. This power is concerned with providing for the fee to be paid to the adjudicator by a tied pub tenant, together with circumstances in which no fee need be paid, and where a fee can be refunded. Given that one of the main planks of the Bill is to facilitate arbitration before the adjudicator, it is of some importance that this could not be thwarted as a consequence of being made prohibitively expensive. It is considered appropriate therefore that the exercise of this power is subject to the affirmative procedure, thereby ensuring close parliamentary involvement in the setting of fees.

Section 17(4) – power to require a tied pub tenant to pay adjudicator expenses of arbitration in certain circumstances

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure

Provision

30. The power under section 17(4) enables the Scottish Ministers to make regulations under which a tied pub tenant is to make payment of expenses to the adjudicator in respect of the expenses of an arbitration (in certain circumstances). Section 17(6) further provides that such regulations can deal with a range of matters, for example, specifying the circumstances in which a tenant may be required to make a payment in respect of expenses.

Reason for taking power

31. In line with the approach taken in regard to regulations under section 17(1), it is considered appropriate these matters be left to secondary legislation. This will also provide flexibility if there is felt to be a need, over time, to make adjustments in regard to any of the issues referred to within

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section 17(6). This is felt to be a matter which is best left to the Scottish Ministers to determine, as part of the wider work to be done by them in relation to giving effect to the Code.

Choice of procedure

32. On an application of the same rationale as pertains to regulations under section 17(1), the affirmative procedure is considered appropriate here.

Section 23 – power to make ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative procedure if adding to, replacing or omitting any part of the text of an Act, otherwise negative procedure

Provision

33. Section 23 enables the Scottish Ministers by regulations to make any ancillary provision they consider appropriate (including modifying any enactment) so as to give full effect to the new Act or any provision made under it.

Reason for taking power

34. As with any new piece of legislation, the Bill may give rise to a need for a range of ancillary provision. While the Member has given careful consideration to the provisions of the Bill, it does represent a sizeable piece of legislation, which also requires significant engagement on the part of the Scottish Ministers to ensure that it can be fully and effectively operated. This power ensures that issues of an ancillary nature which may arise can be dealt with effectively by the Scottish Ministers.

35. Inclusion of this power avoids any later need for primary legislation to deal with such matters. That might, otherwise, be necessary even where

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the subject matter is of no major consequence and is concerned with a matter which is clearly within the scope and policy intention of the Bill.

Choice of procedure

36. Regulations made under this section which contained a provision which added to, replaced or omitted any part of an Act would be subject to the affirmative procedure. Otherwise, regulations made under this section would be subject to the negative procedure. That approach is typical for ancillary powers of this type and reflects the fact that the Parliament should be able to carefully scrutinise any amendments to primary legislation, while ancillary changes to subordinate legislation are likely to be of a more technical nature and so merit a lesser degree of parliamentary scrutiny.

Section 25 – power to make provision in regard to commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no further procedure

Provision

37. Section 25(1) specifies those provisions of the new Act which are to come into force on the day after Royal Assent. Section 25(2) goes on to state that the other (remaining) provisions are to come into force on such day as the Scottish Ministers may by regulations appoint.

Reason for taking power

38. A number of the Bill's provisions are to come into force immediately following Royal Assent. It would not however be possible to commence all of the Act at that point. In particular, a period of time will be required to address what requires to be done in relation to the provisions in the Bill which deal with the Code, and establishment of the office of the adjudicator. These matters are covered by sections 1 and 2 together with the schedules, and Part 2 of the Bill, which relates to giving effect to the Code. Rather than fix a period of time after which these provisions are commenced automatically, it is considered more practical to have them

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commenced at a date of Ministers' choosing. In practice, this will need to be no later than about a year after Royal Assent, by which time Ministers are obliged (by section 4(1) of the Bill) to lay a draft of the Pubs Code regulations and appoint an Adjudicator, given that the Adjudicator cannot carry out the functions of that office until these provisions are in force.

Choice of procedure

39. As is generally the case for commencement regulations, the default laying requirement applies, as provided for by section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010.

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