

TIED PUBS (SCOTLAND) BILL AT STAGE 2

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May I first thank you for the opportunity to comment further on the proposed Tied Pubs (Scotland) Bill.

However, I must again express our disappointment that, in these challenging times, the future of the great Scottish tied pub industry has been dealt a further damaging and wholly unnecessary dose of uncertainty in allowing this Bill through the Stage 1 vote.

The Bill, proposed under the banner of benefiting the tied pub industry, will in fact achieve the exact opposite. The Bill has the potential to deliver a fatal blow to the tied pub model in Scotland. At the very best, it would significantly devalue the tied leased and tenanted model, whilst also having the very real potential of killing off a vital lowcost route of entry for entrepreneurs within Scotland's pub market.

There is simply no evidence supporting this Bill. **This very Committee** in the Stage 1 Report on the Tied Pubs (Scotland) Bill, came to this conclusion in stating:

"That majority were unconvinced that sufficient evidence was presented to the Committee to suggest that the problems described were large-scale or that there were adequate grounds to warrant legislative interference in contractual agreements" (Stage 1 Report on the Tied Pubs (Scotland) Bill, Economy Energy and Fair Work Committee, November 2020)

This position is supported by the Government commissioned Scoping Study from 2016 highlighting the lack of supporting evidence for legislation, stating the following:

"Until the UKG indicated it would legislate on the issue, no robust representations had been made to Scottish Ministers by anyone operating in the tied pub sector in Scotland, including taking any disputes to established dispute resolution schemes (such as the Pubs Independent

Rent Review Scheme (PIRRS) and Pubs Independent Conciliation and Arbitration Service

(PICA))." (Research on the Pub Sector in Scotland - Phase 1 Scoping Study, 2016)

This view was built on further in the findings of the report, concluding:

"The evidence collected did not suggest that one sector of the pub market in Scotland is being unfairly disadvantaged in relation to another." (Research on the Pub Sector in Scotland - Phase 1 Scoping Study, 2016)

Lastly, both the findings of the 2016 Scoping Study and **the conclusions of this very Committee** are backed up by the distinct lack of issues arising out of the existing Voluntary Code. The 4th Annual Report, covering over circa 400 tied pubs,

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published in November 2020 identified no referrals to the dispute PICA-Service during the year, in fact only a single dispute case has been raised since 2016.

The decision to allow the progression of statutory regulation should always be founded on evidence and it is deeply disappointing that this seemingly has not been the case with the proposed Tied Pubs (Scotland) Bill. We are therefore left facing proposed legislation, completely lacking in any substantiated compelling evidence but with very real consequences to those commercial property owners impacted. It is our view that the stark lack of evidence, coupled with the intrusive nature of the proposed Bill, could give rise to questions concerning the legality of any subsequent legislation.

As a Pub Owning Business operating in Scotland, we are now also forced to give serious consideration to any proposed investment in our Scottish tied estate whilst the future landscape created by the passing of this Bill hangs in the balance. We will of course work collaboratively with MSP's through Stage 2 where possible, in the hope that this vital option and route for enterprise and innovation under the tied model is not stunted by this unnecessary regulation.

However, it should be clear that we see the passing of this Bill as a bitter blow for our Scottish pubs at a time when potential investment is critical to enable us all to navigate through this ongoing pandemic. It is our strong opinion that, in the stark absence of supporting evidence that change is required and regardless of any amendments arising from Stage 2, MSP's should give serious reconsideration to the proposed Bill and take the opportunity to vote down this unnecessary proposal prior to any further damage being inflicted.

In addition, we are of the opinion that the underlying principles put forward by MSP's in justifying their support at Stage 1 are already in place for the majority of tied pubs through the existing Voluntary Code. The Voluntary Code already provides a commitment to the following principles across a membership that covers circa 400 tied pubs:

- to abide by its terms and to act at all times in the spirit with which the Code has been compiled.
- act with integrity and honesty at all times and conduct business in a

professional, fair and legal manner.

- be transparent about their terms of business and other dealings, particularly any charges made, or costs passed on and the way in which rent has been assessed.
- offer contracts that are fair, reasonable and comply with all legal requirements.
- deal with complaints in good time and fairly, in accordance with a clearly defined internal dispute mechanism and with access to independent dispute resolution, where appropriate, if such a mechanism fails to resolve the complaint.

There is simply no evidence that this Voluntary Code is not working within the industry; in fact, on the contrary, the reported evidence points very strongly to it

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working well, as demonstrated by the very low number of reported issues across the circa 400 tied relationships it covers. All of this is achieved without any of the potentially disastrous consequences presented by the proposed Bill.

Despite our calls for this Bill still to be voted down at the earliest opportunity, I appreciate that you have sought views on specific areas. Our views on the areas highlighted are, therefore, as follows:

- **Lengthening implementation and review timescales**

If, despite the stark lack of supporting evidence, this Bill does proceed we would strongly urge the Government to implement a further extensive evidence gathering exercise ahead of any steps for implementation. I repeat my earlier comment that the decision to allow the progression of statutory regulation should always be founded on evidence and it is deeply disappointing that this seemingly has not been the case to date with the proposed Tied Pubs (Scotland) Bill. It is our view that this evidence gathering exercise should focus on trying to quantify the evidence that supports the necessity for the proposed Bill. It should be clear that in the absence of strong supporting evidence, statutory regulation in the shape of the proposed Bill should not be considered or indeed allowed to proceed.

- **The removal of elements of retrospection**

If, despite the stark lack of supporting evidence, this Bill does proceed it is our opinion that the Bill should mirror the provisions contained in both the Pubs Code Regulations 2016 across England and Wales as well as those in the Voluntary Code in Scotland. In both cases, protections are afforded to a tenant throughout the life of the tied arrangement with their landlord and also cease when such a relationship ends. The elements of retrospection in the proposed Bill simply do not work and indicate a fundamental lack of understanding by those advocating the Bill.

However, the unworkable nature of this Bill and the fundamental lack of understanding extend much further than just the elements of retrospection. The proposed Bill has the potential to step across property owners Human Rights for peaceful enjoyment of their property. When viewed alongside the lack of supporting evidence and the likely consequences, this presents the very real possibility of any resulting legislation being challenged in the Courts.

- **Measures to ensure that levies on pub companies are proportionate**

Any financial implications of this unnecessary proposal need to be limited.

Our expectation is that the set-up costs will be similar in nature to those witnessed in England and Wales, given the desire to replicate the 2015 Act within Scotland. The setup costs across England and Wales were assessed at £540,000 and so we believe the assumed set-up costs for Scotland are vastly understated within the Financial Memorandum. However, it is also vital to highlight the element of cost inflation which has proven to be the case across England and Wales since the introduction of the statutory legislation as witnessed by the year on year levy

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increases. As of 2020, the total Levy had doubled since its introduction in 2016 from an initial £1.5m to £3m. This is despite a decreasing reported volume of activity.

It is also important to demonstrate the disproportionate nature of the cost of statutory regulation as opposed to the already working Voluntary Code. Again, this has been evidenced across England and Wales. Figures provided via the BBPA indicate that the existing Voluntary Code and associated dispute channels run at a cost of circa £18 per pub, however, under the statutory Code the cost is currently equivalent to £330 per pub and continues to rise year on year. This is shared across circa 10,000 pubs in England and Wales. If this cost was replicated in the Scottish tied pub market it would amount to an astronomical £4,400 per pub.

Ultimately the impact of further cost burdens on the industry will eventually filter through to the end consumer. It is also our strong belief that it is categorically not the time to be further burdening the pub industry with additional costs and/or administrative obligations, especially off the back of a proposed Bill that is unfounded in need and unresponsive with solutions to the unintended consequences witnessed within England and Wales

We are strongly of the belief that the proposed Bill would create an unnecessary financial burden on the Scottish Government at a time when Government spending should be focused on the areas of most need. As outlined above, we do not believe there to be a body of sufficient, in-depth evidence that demonstrates a clear requirement for this costly proposed Government intervention.

• **Application of a threshold**

Notwithstanding our position on the merits of this Bill, the full impact and the associated requirements of the Bill would need thorough consideration ahead of any threshold being determined. However, it is our opinion that without any threshold the proposed Bill will disproportionately burden smaller, artisan tied pub owners as well as creating a significant barrier to any smaller new entrants wishing to step into this model. This concern was also considered when the issue of a threshold was proposed in England and Wales. Vince Cable, then Secretary of State, anticipated in 2012 that the new regime:

“should apply to all pub companies with a tied estate of more than 500 tied leases, thereby targeting the companies with the greatest market power and exempting smaller companies, about whom very few complaints have been received and who, from the evidence received thus far, are widely recognised as behaving responsibly.”

This rationale, again, recognises that Regulation should follow the evidence as well as indicating that analysis of the Code in England and Wales could suggest a threshold.

The Pubs Code in England and Wales covered a scope of circa 10,000 tied pubs and applied a threshold of 500+ tied pubs. Applying this ratio to the circa 750 tied pubs in Scotland would suggest an equivalent threshold of 38+ tied pubs. However, it should remain clear that our opinion is that the proposed Bill places wholly unnecessary burdens on any tied pub owning business regardless of size.

- **Court Appeal Process**

The evidence provided by the Scottish Courts and Tribunal Service is a further example of the proposed Bill simply not working. This also highlights the fundamental flaws within the analysis used as part of the Financial Memorandum that accompanies the Bill.

- **Guest Beer Agreement**

Whilst we assume the intention might be to create a route to market for smaller brewers, the proposal is ill-conceived and will more than likely cause significant risk to smaller brewers. The reality is that this option would be used to maximise commercial benefit and so would see most pubs opting to elect higher volume products such as Tennents Lager rather than smaller, regional products. This is extremely unlikely to help smaller brewers, arguably restricting their routes to market further.

In addition, the likely effect on pub owning companies withdrawing pubs from the tied leased and tenanted market will also further restrict opportunities for smaller brewers who are already working well under the SIBA (Society of Independent Brewers) Beerflex scheme. This model already brings a wide range of choice compared to independent Free of Tie pubs with recent SBPA data finding, on average, leased and tenanted pubs to have a wider range of beers on offer than independent free house operators.

It is our belief that these provisions should be removed entirely from any proposed Regulation.

- **MRO option**

The inclusion of the Market Rent Only option in the proposed Bill has the very real potential to permanently damage the tied leased and tenanted pub model in Scotland. Additionally, given the absence of any significant supporting evidence, this element also raises serious questions of legality given the clear intrusion into existing commercial contracts. This provision needs to be removed entirely.

The uncertainty that MRO creates for any landlord or investor will simply lead to significant devaluing, and a move away from operating within the tied pub model in Scotland. The unilateral ability to disrupt a commercial relationship at any point simply presents too much risk for any landlord or investor. This will not only significantly limit investment into this sector but also kill off a low-cost entry to entrepreneurs into the Scottish pub market. This is to the detriment of tenants, prospective tenants, customers and the communities these pubs serve.

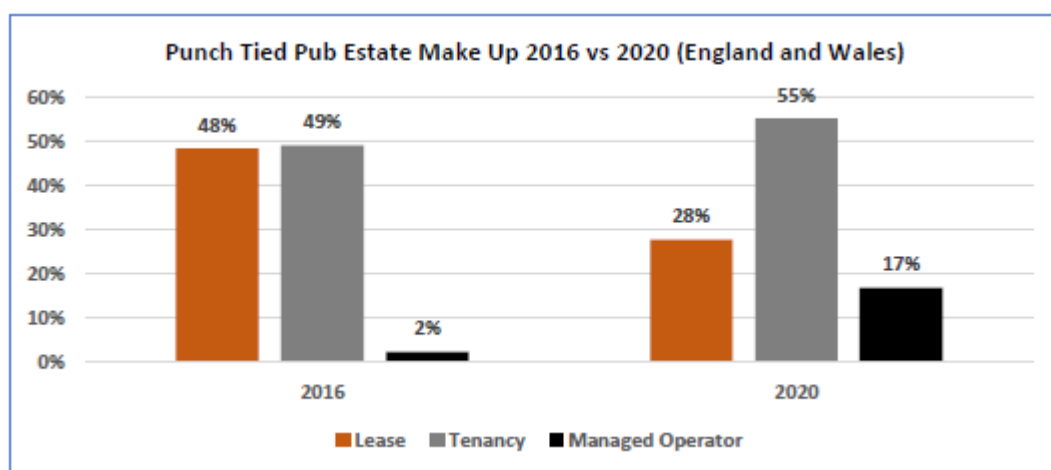
The MRO option available in place across England and Wales attempts to balance this commercial risk to a landlord by having event led MRO triggers. However, even

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with the ability for a tied pub tenant to explore MRO being limited to specific trigger events, the risk presented has still led to significant shifts within the tied pub market. With pub owning businesses looking to more commercially secure managed operating models, as well as significantly reducing the investment made with existing publicans, in light of potential MRO triggers.

The MRO option, in any form, makes the tied leased and tenanted model a significantly less attractive model for a landlord to invest in. The result of pubs with higher trading potential being operated within other operating models and the stifled appetite for investment has led to significant devaluing of the tied leased and tenanted model, with those remaining being limited in both profit and investment potential.

This impact can be seen by the changing shape of the Punch estate since the introduction of the Code in England and Wales as shown below, with a significant move away from long leases in favour of unprotected tenancy agreements and the emergence of managed operator style agreements.



The impact of this shift is a significant devaluing of the leased and tenanted model, with limited opportunities for publicans to invest and build equity in their business due to decreasing opportunities to take on long lease agreements.

This shift is all driven out of a commercial landlord's and investor's desire for business certainty and retaining control of its own commercial assets. The proposed Bill in Scotland will result in a much greater shift than that seen across England and Wales. This will undoubtedly have a negative impact on the business opportunities available to any entrepreneurs looking for the traditionally low-cost entry into the pub market that the tied leased and tenanted model currently offers.

It is therefore, in the interests of preserving the tied leased and tenanted model within Scotland that we believe this option should be removed entirely from any proposed Bill. The inclusion of MRO in any form will be at the severe detriment to the very model this proposal is looking to benefit.

• Clarity on the exact income that tied pub tenants receive

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Providing clarity on the exact income for a tied pub tenant will vary from pub to pub. This is due to differing levels of profitability of pubs based on location, differing lease terms, trading style, characteristics and style of operation.

Analysis can be obtained of averages as has been provided by both the

SBPA survey demonstrating an estimated average income for tied tenants of £44,240 as well as showing that 96% of the tenants surveyed earned above £18,200.

Any tied pub is assessed as to potential profitability when placed on the open market as part of assessing the level of rent being sought. This rent assessment will be conducted by RICS Chartered Surveyors and is often assessed with the rent being equivalent to 50% of the potential profit. The remaining 50% reflects the achievable profit for the average tenant. Across the Punch estate, the average rent for tied pubs in Scotland equates to £35,438, given the above it stands to reason that the average assessed profit figure also equates to £35,438.

A prospective tied pub tenant will assess the risk and reward of an opportunity available on the market and decide whether the opportunity is worth pursuing. The realisation of potential profit is not a guarantee, it is a risk that the prospective tenant, having sought professional advice and produced a business plan, has decided to take on. This is a hallmark of the leased and tenanted model; the element of risk and reward offered to prospective publicans. Operators looking for more secure income/less risk may choose differing operating models such as salaried managerial roles for example. It is also important to state that, despite the ongoing pandemic, we are still seeing a high number of open market enquiries across our available tied pubs in Scotland. This does not suggest an industry model that is in need of Regulation.

- **Reasons for the divergence of views of tied pub tenants on the need for the Bill**

The real question here is if there really is a divergence of views from tied pub tenants. To answer this question the committee should look into the real quantitative evidence and the identity of those supporting this Bill. Many of whom are not tied pub tenants themselves but simply voice their agenda on the topic. Whilst these few individuals claim to represent the views of tied tenants, in truth they are very often simply looking to further their own agendas against the tied pub model. It has been seen across England and Wales that the arguments emanating from a few voices seek to provide a polarised view when in truth they do not represent the majority of tied pub tenants. In fact, the lack of vocalised support for this Bill from the silent majority of tied pub tenants in Scotland is very apparent. This is not a surprise given the stark lack of disputes being seen under the existing Voluntary Code.

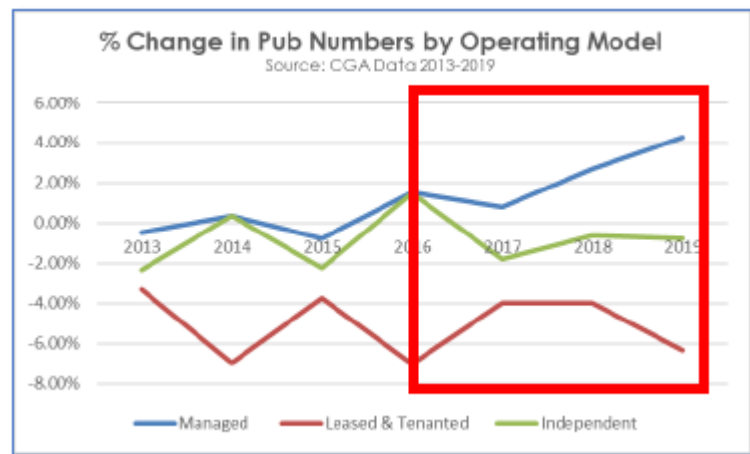
Quite simply, aside from the unquantified arguments from those pushing their own agendas, there is quite simply not a divergence of views from tied pub tenants and neither is there a need for this unnecessary and unsubstantiated proposal.

- **The level of investment put on hold due to the pandemic**

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Whilst clearly the pandemic continues to have a monumental impact on our business, in the absence of Government intrusion or intervention, we would stand ready to recommence our investment in our business once we emerge on the other side. However, this Bill will create, and has already created, significant uncertainty around any potential return on investment into the Scottish tied pub industry. On average Punch invest over £1million each year into our Scottish pubs, creating local jobs and supporting local economies as a consequence. As a direct result of the Bill being proposed, we immediately paused the majority of this investment programme. The tied model allows pub owning businesses to invest in pubs with an element of the return being achieved through increased tied beer sales, providing a mutual benefit to both landlord and tenant in growing a business.

The proposal to allow tied tenants to move away from the tie, through Market Rent Only (MRO), creates uncertainty for a pub owning business planning to invest. This will inevitably lead to investment being focused on more secure operating models such as managed houses. This can be seen by both the changing shape of the Punch estate in the face of Regulation in England and Wales as well as the recent CGA data on operating models.



This is something that, prior to the Bill being proposed, actually represented a competitive advantage to our Scottish publicans in comparison to the regulated tied pubs within England and Wales.

The Bill will also result in a changing make-up of the Scottish pub estate, with traditional leased and tenanted pubs being moved across to more secure operating models for investment. As above, the evidence of this has already been seen in England and Wales since the introduction of the Pubs Code etc. Regulations 2016.

This will result in a lack of entrepreneurial pub opportunities in Scotland as well as devaluing whatever remains of the leased and tenanted estate. Those pubs that do remain leased and tenanted will generally be let on shorter tenancy agreements with less investment incentive or opportunity for either party. An element of this has been witnessed in England and Wales since the introduction of the Pubs Code. Prior to its introduction in 2016 the Punch estate had an average substantive agreement length of over 10 years, this has since reduced by circa 20%.

Aside from investing in existing businesses, Punch had also been reviewing acquisition opportunities across the UK. Acquisitions within the pub sector are generally accompanied by significant transformational investment, often breathing new life into closed pubs or revitalizing those facing closure. The proposal of the Bill directly led to this activity being paused in Scotland whilst the review is undertaken.

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Given recent events, investment into the pub market will be even more of a key factor in determining the survival of traditional pubs. The introduction of the Bill will prevent this from taking place and in turn, see many businesses suffer from the inability to invest securely into the future of a tied pub business.

- **Support received by non-tied pub tenants from their landlords during the pandemic**

The support offered to our tied pub estate during the pandemic has been critical to their survival. Quite simply, tied pubs are surviving because of the support provided by the pub owning landlords. Our focus throughout has been to navigate a course for both Punch and our tied publicans to come through this pandemic together. At present we are providing discretionary rent concessions of 75% across all of our tied pubs. Across the whole of the pandemic, including periods of reopening, Punch has provided discretionary rent support equivalent to over 45% of the total rent due for that period. This rent support is in addition to supporting our tied estate in beer destruction, providing assistance with ensuring COVID safe environments, as well as access to significant levels of training, advice, and guidance. This pandemic has really shone a light on the mutual interests the tied model creates. The tied model creates a business relationship with much greater partnership and collaboration compared to any other operating model.

It should be of interest to note that the level of support provided to our nontied estate has not been to this level. As with the support received from our own commercial landlords, this has focused on cash flow support in terms of rent payment deferral and amended payment cycles. This difference is due to the differing commercial relationship, our primary focus on sustaining our tied estate, and the limitations of our own finite resources.

- **Whether an MRO option is applicable in other sectors, and if so, what impact has it had**

Aside from the Pubs Code within England and Wales, we are unaware of any other sector which includes an MRO option. It is quite plausible that the unilateral ability for one party to break or significantly alter a commercial contract limits the appeal of such arrangements. It may be that any such previous sectors have suffered the very same fate that we envisage the tied pub model will suffer as a direct result of the proposed Bill. This proposal has the very real potential to permanently damage the sector it is claiming to protect

We are grateful for the opportunity to outline our concerns with the proposed Bill. However, it is our view that the proposal is looking to provide treatment to an illness despite, even after a thorough examination, there being simply no sign of symptoms. The side effects of which, however, through unintended consequences, would cause lasting irreparable damage to the Scottish pub industry and likely kill off the tied pub model within Scotland.

We would, therefore, regardless of any amendments as a result of Stage 2, strongly call for the proposal to be voted down by Government at the earliest opportunity and recognise the conclusions already formed by this very committee. The existing

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Voluntary Code already provides the principles of fairness recognised in the Stage 1 vote through an existing solution already evidenced as workable within the tied pub industry. In addition, the retention of the Voluntary Code would avoid the dangerous unintended consequences presented by the currently proposed Bill.