



Neil Bibby
Member of the Scottish Parliament for West Scotland Region

Gordon Lindhurst MSP
Convener
Economy, Energy and Fair Work Committee
By email

19 February 2021

Tied Pubs (Scotland) Bill at Stage 2: notes on amendments

Dear Gordon

Ahead of the Stage 2 proceedings on the Tied Pubs (Scotland) Bill, this letter outlines the background to, and purpose and effect of, the amendments lodged in my name. I have included a list of the amendments that I have lodged at the Annexe.

Amendment 1: extending the date by which the Scottish Ministers must seek to make the code and appoint an adjudicator (section 4)

The purpose of this amendment is to extend the date by which the Scottish Ministers must have: a) laid in draft the regulations containing the draft code before the Scottish Parliament; and b) appointed a person to the office of Scottish Pubs Code Adjudicator.

The Bill currently allows one year for the code and adjudicator to be put in place. However, the Minister has been clear that the Scottish Government wants a longer period, for practical reasons, to draft, consult and introduce the code, and to identify and appoint an adjudicator. The amendment therefore increases the maximum period to two years.

As I noted when I wrote to the Committee previously, concerns have been raised with me by the licensed trade about the potential negative impacts of a lengthy interim period, where the Bill had been passed by the Scottish Parliament but would not be in force. The principal concern is that such a lengthy period could allow a pub-owning business to take steps to avoid the code by restructuring their business and making changes to contractual arrangements. I have alerted the Scottish Government to the trade's concerns and I understand that sectoral representatives

have discussed the issue directly with the Minister. In that regard I was reassured by the Minister's comments to the Committee on 21 January 2021, when he wrote:

"The extension of the implementation period reflects the importance of getting the code right and also of proper consultation. As I have said to stakeholders, this does not mean that the process will necessarily take the full two years."

But I understand, and support, the Scottish Government's reasons for seeking this amendment to the Bill, and I am happy to have lodged the amendment in my name.

Amendments 2 and 3: extending the periods of review of the code and adjudicator's performance (section 5)

The purpose of amendments 2 and 3 is to extend the review periods provided for in the Bill, for the first review of the code and adjudicator's performance, and then for each subsequent review.

The Bill currently requires the Scottish Ministers to prepare a report reviewing the operation of the code and the adjudicator's performance as soon as is practicable after each review period. The first review period, after one year, is set as beginning once the code and adjudicator are in place and ending on 31 March of the following year. The Bill provides for subsequent review periods to begin on 1 April and end on 31 March two years later.

However, the Minister's view was that these periods were too short, and that a longer period was required to assess the effectiveness of the code and the adjudicator's performance. The Minister told the Committee in a letter on 21 January:

"The purpose of extending the review periods is initially to allow the code to bed in and subsequently to avoid an almost constant process of review without space to let any arrangements run for a period of time before being subject to review."

Following discussion with the Minister, I understand the reasons for seeking these amendments and am happy to lodge them in my name. Amendment 3 changes the first review period so it ends on 31 March two years after the code and adjudicator are in place. Amendment 2 changes the subsequent cycle of review periods to every three years.

Amendment 4: requiring the adjudicator to take account of a tenant's behaviour has part of an investigation (section 13)

The purpose of this amendment is to require the adjudicator to take account of the actions and behaviour of a tied pub tenant as part of any investigation into an alleged non-compliance with the code by a pub-owning business.

Section 13 of the Bill requires the adjudicator to publish a statement about their investigation policy. That statement must include: the criteria that the adjudicator will adopt in deciding whether to carry out an investigation; the practices and procedures

that the adjudicator will follow in carrying out an investigation; the criteria that the adjudicator will adopt in deciding whether to take enforcement action and, if so, what type of action to take; and the criteria the adjudicator will use in setting the amount of any financial penalty imposed.

The Bill does not prevent the adjudicator from taking account of the behaviour of tenants as part of any investigation. However, the Minister is of the view that, to best ensure the Bill is proportionate and fair for both tenants and pub-owning businesses, that a requirement to take account of a tenant's actions and behaviour should be on the face of the Bill. Again, following discussions with the Minister, I agree that this is a helpful clarification, and am happy to lodge amendment 4.

Amendments 12 and 13: changing the court which will hear appeals against financial penalties and recovery of investigation costs (sections 10 and 12)

The Bill gives the adjudicator the power to impose a financial penalty on a pub-owning business if an investigation concludes that a business has failed to comply with the code. The Bill also allows the adjudicator to require the payment of their investigation costs, either from a pub-owning business, should they be found in breach of the code, or from a person (for example, a tenant), if a complaint is found to be vexatious or wholly without merit. In both instances the Bill provides for the penalty/cost recovery to be appealed to the Sheriff Appeal Court.

During Stage 1, the Scottish Courts and Tribunal Services stated in evidence that it would be more appropriate for such appeals to be heard by the sheriff, and not by the Sheriff Appeal Court.

Following liaison with the Scottish Courts and Tribunal Services and the Scottish Government, I have lodged amendments to that effect.

Amendments 225, 226 and 227: arbitration time limit (section 15)

As part of my discussions with the Minister following stage 1, we discussed the arbitration process, which is open to both tenants and pub-owning businesses. It was noted that, while the Bill sets out the circumstances in which a tenant can refer a dispute to arbitration (including that a referral cannot be made until 21 days after a tenant notifies a pub-owning business of an alleged breach, or later than four months after the 21st day), it does not set a time limit within which a tenant must notify a pub-owning business of an alleged breach of the code.

It is therefore conceivable under the Bill as it currently stands that an issue could be notified to a pub-owning business and then submitted for arbitration long after the alleged breach has actually occurred. This could lead to uncertainty for pub-owning businesses about, and difficulty in responding to, potential disputes.

Amendment X addresses that issue by providing for a six-month window for notification from the date of the failure to comply. Importantly, the clock for notification will not start to run where a tied pub tenant was not aware of the failure.

Amendments X and X are consequential amendments which ensure that the provisions that provide clarity on how the existing 4-month periods are calculated also apply to the new 6-month periods.

Amendment 214: time limit on initiating an investigation (section 13)

During the stage 1 debate, the Minister stated that the Government wants to address the retrospective aspects of the Bill to ensure that tenants and pub-owning businesses do not remain subject to, and are not able to take action under, the code indefinitely after the end of a lease.

I have had detailed discussions with the Minister on this issue and I thank him and his officials for their collaboration. We focussed our attention on the aspects of the Bill under which action can be taken. The issue of time limits on arbitration is dealt with in the amendments I have set out above in relation to section 15. Amendment X focuses on another part of the Bill under which action can be taken – the investigation process. The amendment requires the criteria contained in the statement of investigation policy prepared by the adjudicator to contain time limits within which investigations are to be initiated.

Section 13 requires the adjudicator to publish the details of their investigation policy. That statement must include the criteria the adjudicator will use when deciding whether to investigate and set out the practices and procedures that will be followed by the adjudicator when investigating. The statement must also include criteria relating to enforcement decisions and actions and the setting of levels of financial penalties. I outlined above a quite separate amendment to section 13 which requires the adjudicator to take account of the actions of tied-tenants when setting the investigation criteria.

This amendment also amends section 13 to require the investigation criteria to include time limits.

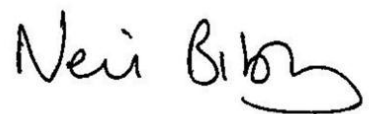
Conclusion

I have approached stage 2 in a collaborative fashion and have been in regular liaison with the those in the licensed trade, and with the Minister and his team in the Scottish Government, and I thank everyone I have engaged with for their constructive approach. We share a desire for the Bill to be passed, and for it to be as fair, proportionate and robust as possible.

I believe that this approach has ensured that the amendments I have lodged have been subject to consultation and discussion, and that they carry support.

I hope this letter is helpful to the Committee and I look forward to participating in the stage 2 proceedings on 23 February 2021.

Yours sincerely,



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Amendments lodged by Neil Bibby MSP at Stage 2 of the Tied Pubs (Scotland) Bill

Section 4

Neil Bibby

- 1** In section 4, page 2, line 2, leave out <1 year> and insert <2 years>

Section 5

Neil Bibby

- 2** In section 5, page 2, line 34, leave out <2> and insert <3>

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- 3** In section 5, page 2, line 37, leave out <1 year> and insert <2 years>

Section 13

Neil Bibby

- 4** In section 13, page 5, line 27, at end insert—

<() The adjudicator must, in drawing up the criteria mentioned in paragraphs (a), (c) and (d) of subsection (1), have regard to the impact the behaviour of tied-pub tenants may have on compliance with the code by pub-owning businesses.>

Section 10

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- 12** In section 10, page 4, line 13, leave out <Sheriff Appeal Court> and inset <sheriff>

Section 12

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- 13** In section 12, page 5, line 14, leave out <Sheriff Appeal Court> and insert <sheriff>

Section 15

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- 225** In section 15, page 6, line 19, leave out subsections (2) and (3) and insert—

<(1A) But a dispute may be submitted to arbitration under this section only if—

(a) the tenant notified the business of the alleged failure to comply with the code that is the subject of the dispute within the period specified in subsection (1B), and

(b) the dispute is submitted within the period of 4 months beginning with the day falling 21 days after the business was notified.

(1B) The period referred to in subsection (1A)(a) is the period of 6 months, beginning with—

(a) the day on which the alleged failure to comply with the code occurred,

(b) where the alleged failure was a continuing one, the day on which the failure ceased, or

(c) the day on which the tenant became, or could reasonably be expected to have become, aware of the alleged failure, if later than the day mentioned in paragraph (a) or (as the case may be) (b).>

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226 In section 15, page 6, line 27, leave out <(2)(b)> and insert <(1A)(b) or the 6 month period mentioned in subsection (1B)>

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227 In section 15, page 6, line 29, after <4> insert <or (as the case may be) 6>

Section 13

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214 In section 13, page 5, line 27, at end insert—

<() The criteria mentioned in subsection (1)(a) must include time limits, which may be set by reference to the suspected failure to comply with the code or otherwise, after the expiry of which an investigation may not be initiated.>