

*These notes refer to the Small Business, Enterprise and Employment Act 2015 (c.26) which received Royal Assent on 26 March 2015*

# **SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT ACT 2015**

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## **EXPLANATORY NOTES**

### **COMMENTARY ON SECTIONS**

#### **Part 4: THE PUBS CODE ADJUDICATOR AND THE PUBS CODE**

##### **The Pubs Code Adjudicator**

##### *Section 41: The Adjudicator*

262. This section legally establishes the office of Pubs Code Adjudicator. The section also gives effect to Schedule 1.

##### *Schedule 1: The Pubs Code Adjudicator*

#### **Part 1: The Pubs Code Adjudicator**

##### **Status**

##### *Paragraph 1 – Legal status*

263. The Adjudicator has the legal status of a ‘corporation sole’. Being a corporation sole will ensure that the Adjudicator is able to enter contracts, and to sue and be sued, in his or her capacity as an office holder rather than any individual capacity.

##### *Paragraphs 2 and 3 – Appointment of the Adjudicator to represent the Crown*

264. The Adjudicator is appointed by the Secretary of State and acts on behalf of the Crown.

##### **Deputy Adjudicator**

##### *Paragraphs 4 and 5– Appointment of a Deputy Adjudicator*

265. If the Secretary of State wishes, he/she may appoint a Deputy Adjudicator to carry out any of the Adjudicator’s functions. This should provide flexibility if the Adjudicator is, for example, absent through illness or occupied with other functions.

##### **Terms of office etc**

##### *Paragraphs 6 and 7 – Period in office and how it may end*

266. The Adjudicator and Deputy Adjudicator, neither of whom are civil servants, may each be appointed for up to four years and may then be appointed for one or two further terms of up to three years each. Either can resign by giving written notice to the Secretary of State; or the Secretary of State may dismiss either of them for being unable, unwilling or unfit to perform their official functions.

## **Remuneration**

### ***Paragraph 8 – Remuneration decisions***

267. Although the Adjudicator may pay remuneration, allowances and payments related to pensions to the Adjudicator and Deputy Adjudicator, the amounts are controlled by the Secretary of State.

## **Staff**

### ***Paragraph 9 – Secondments***

268. The Adjudicator is not permitted to appoint staff directly but may make arrangements for staff to be seconded to serve as members of the Adjudicator's staff. Before doing so, the Adjudicator must obtain the Secretary of State's approval of his policy as regards the number of seconded staff, any payments made to or in respect of their secondment and the terms and conditions on which staff are seconded.

## **Conflicts of interest**

### ***Paragraphs 10 and 11 – Arrangements for when the Adjudicator, Deputy Adjudicator or any of their staff have an interest that may conflict with their duties***

269. The Adjudicator must make and publish procedural arrangements for dealing with conflicts of interest. If both the Adjudicator and, if appointed, Deputy Adjudicator are unable to act due to a conflict of interest, the Adjudicator may require the Secretary of State to appoint an acting Deputy to deal with the matter where the conflict arises. Because sections 48(5)(b) and 50(4)(b) would enable the Adjudicator to appoint someone else to act as arbitrator in a dispute where the Adjudicator may have a conflict of interest, these paragraphs are primarily intended to assist in relation to other functions of the Adjudicator, such as investigations.

## **Validity of acts**

### ***Paragraph 12 – Appointment errors***

270. If there has been a fault in the way the Adjudicator, Deputy Adjudicator or acting Deputy Adjudicator has been appointed, that does not impair the validity of what they do in their appointed roles.

## **Application of seal and proof of documents**

### ***Paragraphs 13 and 14 – Use of the Adjudicator's seal***

271. These paragraphs set the conditions for the application of the Adjudicator's seal to a document and the correct treatment of such a document: it is to be received in evidence and treated as duly executed unless this is shown to not be the case. The seal itself has to be certified as authentic by the Adjudicator's signature or the signature of someone authorised by the Adjudicator.

## **Accounts**

### ***Paragraph 15 – Financial reporting***

272. This paragraph requires the Adjudicator to produce a statement of accounts for each financial year, to be approved by the Comptroller and Auditor General and then laid before Parliament by the Secretary of State.

## **Incidental powers**

### ***Paragraph 16 – Aiding the work of the Adjudicator***

273. This paragraph allows the Adjudicator to do anything that will help with his/her work.

## **Assistance from the Secretary of State**

### ***Paragraph 17 – Help with resourcing***

274. The Secretary of State may provide staff, premises and other facilities to the Adjudicator and may decide whether or not to do so at a charge.

## **Exemption from liability for damages**

### ***Paragraph 18 – Protection against most claims for damages***

275. This paragraph protects the Adjudicator, Deputy Adjudicator and any staff from claims for damages by third parties, except where they have acted in bad faith or in breach of human rights. In the absence of this protection it might, for example, be possible for a pub tenant or pub-owning business to claim against the Adjudicator in the tort of negligence in relation to some advice given by the Adjudicator or the way the Adjudicator had carried out an investigation. The Government intends that the Adjudicator should not be required to spend time and funding in dealing with such claims. The Adjudicator will be subject to the normal public law duties and constraints of a public authority.

## **Part 2: Information powers of the Pubs Code Adjudicator**

### ***Paragraph 19 – Requirement to provide information***

276. [Part 2](#) describes the Adjudicator's powers to require information and documents. Paragraph 19(1) allows the Adjudicator to require them for the purposes of an investigation under Section 53. This power will be exercisable against pub-owning businesses and others, but only once an investigation has commenced. Paragraph 19(2) allows the Adjudicator to require information from pub-owning businesses for the purposes of monitoring whether a pub-owning business has followed an earlier recommendation. This information could be used to help decide whether to commence an investigation. Paragraph 19(3) allows the Adjudicator to require documents and other information for the purposes of exercising any functions conferred on the Adjudicator by the Pubs Code in relation to parallel rent assessments and the market rent only option (see sections 42(5) and 44(1)(b)).
277. In each case the Adjudicator may require a person to provide documents or other information, including orally. Paragraph 19(8) protects information that could not be required to be provided in civil proceedings, such as information subject to legal privilege.

### ***Paragraphs 20 to 22 – Offences***

278. [Paragraphs 20](#) and [21](#) create offences, punishable by a fine, for intentional failure to comply with a requirement to provide information (subject to a defence of reasonable excuse) and for knowingly providing false information.

### **Part 3: Amendments of legislation**

#### **Paragraphs 23 to 26 – Amendments of legislation**

279. Paragraphs 23 to 25 insert references to the Pubs Code Adjudicator, Deputy Pubs Code Adjudicator and member of staff of the Pubs Code Adjudicator in legislation relating to holders of a public office.
280. Paragraph 26 inserts a reference to the Act into Schedules 14 and 15 to the Enterprise Act 2002. This has the effect of applying the provisions concerning disclosure of information in Part 9 of that Act to information which may be obtained by, or may be useful to, the Adjudicator in the exercise of the Adjudicator's functions under this Act.

### **The Pubs Code**

#### **Section 42: The Pubs Code**

281. Subsections (1) and (2) of this section provide that the Secretary of State must make regulations, to be known as the Pubs Code, within one year of this section coming into force, which will be two months after this Act receives Royal Assent – see section 165(3)(d)(i). The Pubs Code, which applies to England and Wales, must set out the practices and procedures which pub-owning businesses must follow when dealing with their tied pub tenants.
282. The Code is intended to ensure that pub tenants with an alcohol tie to a pub-owning business – as described in section 68 – are treated fairly. The Code's purpose is to provide such tenants with increased transparency and fair treatment in their dealings with their pub-owning business, particularly in regard to rent assessments. This Act provides them with the right to take disputes on issues covered by the Code to the Adjudicator. The Code imposes obligations on pub-owning businesses with tied pub tenants, and everything else in this Part relates to that – for example, the Adjudicator's arbitration and enforcement powers relate to whether the pub-owning business has complied with its obligations in the Code.
283. The Secretary of State must seek to ensure that the Pubs Code is in line with the principles of fair and lawful dealing and that tied tenants should be no worse off than if they were not bound by any product or service tie (subsection 3).
284. Subsection (4) sets out what the Pubs Code may cover; for example, the Code can set out requirements relating to the information which pub-owning businesses must provide to their tied tenants and can require pub-owning businesses to provide rent assessments to their tied tenants in certain circumstances. The Government plans to set out in the Code, following consultation, different rent assessment periods in situations where different amounts of substantial capital investment have been made, extending the rent assessment interval beyond the usual five years where it is appropriate to do so. This would have the effect of deferring the Market Rent Only option for that period until the next rent assessment (unless a significant price increase as set out in section 43(6)(c) or a trigger event beyond the tenant's control as set out in section 43(9) take place. The Code will also set out the safeguards that must be met for an extended rent assessment interval to apply.
285. As some tenants make payments linked to the pub's turnover rather than a fixed rent, the Pubs Code can also require pub-owning businesses, in certain circumstances, to provide an assessment of any money payable by the tenant in lieu of rent (subsection (4)(b)(ii)).
286. The Pubs Code may also require pub-owning businesses, in certain circumstances, to provide parallel rent assessments to their tied tenants (subsection (5)). As set out in section 72(1) a "parallel rent assessment" will be defined in regulations.

***Section 43: Pubs code: market rent only option***

287. This section provides for a Market Rent Only option to be offered to tied tenants of pub-owning businesses covered by section 70(1)(a), i.e.: existing tenants of the business but not to prospective tenants who are negotiating to take on a tenancy or licence.
288. Pub-owning businesses will be required, in circumstances to be specified further in the Pubs Code, to offer their tied tenants the right to pay no more than a ‘market rent’ and to release them from all product or service ties, other than for the insurance of the tied pub. These circumstances must include the renewal of the pub’s arrangements for renting or taking a licence or with regard to any of its tie arrangements; rent reviews or reviews of the assessment of money paid by a tenant in lieu of rent; a significant and unexpected price increase in a tied product or service; or a ‘trigger’ event. A ‘trigger’ event will also be defined in the Pubs Code but must be one which is beyond the tenant’s control, not reasonably foreseeable and one having a significant impact on the level of trade that could reasonably be expected at the tied pub.
289. Subsection (2) has the effect that a tenancy or licence will be ‘MRO-compliant’ if the rent is either one agreed between the pub-owning business and the tied tenant that is in accordance with the MRO procedure or, failing such agreement, a market rent which it would be reasonable to pay for occupation of the particular premises based on the five assumptions set out in subsection (10)(a) and (b).
290. Subsection (4) says that a tenancy or licence will be ‘Market Rent Only compliant’ if it complies with the description of terms and conditions to be set out in the Pubs Code. However, it must not contain any unreasonable terms or conditions, must not be a tenancy at will and must be considered together with any contractual arrangement between the tied tenant and the pub-owning business that relates to the tenancy, licence or alcohol tie.

***Section 44: Market rent only option: procedure***

291. This section outlines the procedure, to be detailed in the Pubs Code, for the Market Rent Only (MRO) option to be exercised. It makes clear that the Pubs Code may confer relevant functions on the Adjudicator (subsection (1)(b)); provides for the tied tenant to notify the pub-owning business when it considers that circumstances have arisen that entitle it to a MRO offer; specifies a negotiation period before the next stage of the procedure takes place, during which the two would be expected to try to agree a rent for a MRO-compliant tenancy; requires the appointment of an independent assessor at the end of the negotiation period to determine the market rent within a specified reasonable period; requires that appointment to be made jointly by the tied tenant and the pub-owning business or, if they cannot agree, by the Adjudicator; and may require the Adjudicator to set criteria for someone to qualify as an independent assessor for these purposes.
292. The Pubs Code may also specify that the independent assessor has to determine the market rent in accordance with specified documents – for example, the Code may specify guidance produced by the Royal Institution of Chartered Surveyors.
293. Subsection (4) allows the Pubs Code to specify the circumstances when the MRO procedure should be treated as having come to an end. The Code may also provide for tenancy, licence or other contractual agreements in force when an MRO option procedure is initiated to continue until that point (subsection (3)).

***Section 45: Market rent only option: disputes***

294. The Secretary of State may by regulations empower the Adjudicator to resolve disputes relating to a Market Rent Only option offer.
295. He may also by regulations give the Adjudicator authority to determine whether a proposed tenancy or licence meets the requirements for being MRO-compliant, whether

an independent assessor's determination of the market rent has been made in accordance with the Pubs Code, and whether any other required MRO procedure has been followed. These regulations may also specify circumstances in which the Adjudicator has the authority to decide the market rent of a pub tenancy or licence.

296. The provisions in sections 43 and 44 are separate from the arbitration provisions in sections 48 to 52; nothing in the latter applies to the former, though there may be some similarities in the provisions made under sections 43 and 44.

#### ***Section 46: Review of the Pubs Code***

297. This section states that the Secretary of State must carry out an initial review of the Pubs Code by 31 March following the second anniversary of it coming into force; and further reviews every 3 years after that. Once a review has been completed, the Secretary of State must, as soon as practicable, publish a report of the review's findings and lay a copy of the report before Parliament. This is in line with the Government's better regulation objective that all regulations should be reviewed as to their effectiveness and whether they are achieving their objectives (subsections (1) to (4)).
298. Subsection (5) specifies that reviews of the Pubs Code must look at how far the principles at section 42(3) have been met and whether the Pubs Code should be revised to reflect these principles more fully.

#### ***Section 47: Inconsistency with Pubs Code etc***

299. Subsection (1) of this section provides a power for the Secretary of State to make regulations about terms of tenancies or other agreements between pub-owning businesses and tied pub tenants. The regulations might provide that terms which are inconsistent with the Pubs Code would be void or unenforceable. The regulations might also cover terms which would penalise the tied tenant for requiring a pub-owning business to behave in accordance with any provision of the Pubs Code the pub-owning business is bound to comply with; or which say that a rent assessment or fee in lieu of rent due for a tied tenancy may only be initiated by the pub-owning business or that a rent or fee assessment may conclude only that the amount payable is to be increased.
300. Subsection (3) allows the regulations to make provision about terms of agreements entered into before the regulations come into force.
301. Any agreement between a pub-owning business and a tied pub tenant is void to the extent that it prevents or penalises the tenant from referring a dispute to the Adjudicator for arbitration in accordance with section 48; and the agreement is unenforceable if it is an arbitration agreement that is inconsistent with sections 50 and 51, covering arbitrations, or with regulations covering the award of costs against a tied tenant in respect of an arbitration, made under section 51(7).
302. Subsection (6) states that subsections (4) and (5) apply to terms in agreements made before – as well as after – this section comes into force.

### **Arbitration by Adjudicator**

#### ***Section 48: Referral for arbitration by tied pub tenants***

303. The aim of this section is to provide a statutory right of arbitration for a tied pub tenant against a pub-owning business. A tenant may refer a dispute for arbitration by the Pubs Code Adjudicator if it relates to an allegation that the business has failed to comply with the Pubs Code.
304. Subsections (3) and (4) provide that certain provisions in the Pubs Code may be stated to be arbitrable and certain provisions stated to be not arbitrable. The intention is that a tenant would be allowed to refer to arbitration only on key points of the Code. If the Code does not differentiate between arbitrable and non-arbitrable provisions, then a tied



tenant may refer a dispute as to whether a pub-owning business has failed to comply with any provision of the Code to the Adjudicator (subsection (5)).

305. Subsection (5) specifies that where a tied pub tenant refers a dispute to arbitration, the Adjudicator has to act as arbitrator or appoint another person to do so. In most circumstances, the Adjudicator is expected to arbitrate such disputes. The Adjudicator could appoint another person where a conflict of interest may exist (for example, where the Adjudicator has previously advised on or investigated an issue which is relevant to the dispute) or where the Adjudicator does not have enough time to act as the arbitrator.

#### ***Section 49: Timing of referral for arbitration by tied pub tenants***

306. This section sets out the period within which a tied tenant may refer a dispute to the Adjudicator. Subsection (2) specifies that a tied tenant may not refer a dispute to the Adjudicator until a period of 21 days has passed after the date on which the tenant notified the pub-owning business, in writing, of the alleged breach of the Code. The 21-day period is to allow the parties a reasonable time to try to resolve the dispute at this point without the need to resort to arbitration.
307. The exception to subsection (2) is where a tenant alleges that the pub-owning business has failed to produce a parallel rent assessment within the period specified by the Adjudicator (subsection (3)). In that instance, the tied tenant may refer the dispute to the Adjudicator no earlier than the day after the date by which the Adjudicator specified the assessment should be provided.
308. No dispute may be referred to the Adjudicator for arbitration once 4 months have elapsed since the earliest date it could have been referred (subsection (4)).

#### ***Section 50: Arbitration commenced by pub-owning businesses***

309. This section applies where a pub-owning business has commenced arbitration under an arbitration agreement (for example one contained in a tenancy agreement), where the matter relates to a dispute which the tenant could have referred to the Adjudicator under section 48. The effect of the section is to require (in circumstances described in subsection (3)) the Adjudicator to arbitrate a dispute which relates to a breach of the Pubs Code where the arbitration has been commenced by the pub-owning business under an arbitration agreement.
310. Subsection (4) requires the Adjudicator to arbitrate a dispute (or appoint another person to do so) if the parties agree under the arbitration agreement that the Adjudicator should be the arbitrator, or if the tenant wishes the Adjudicator to arbitrate (even if the pub-owning business does not want the Adjudicator to be appointed to arbitrate).
311. If the tenant wishes the Adjudicator to arbitrate, but the business does not agree, the tenant must give notice as set out in subsections (5) to (7). The tenant must notify the pub-owning business and the Adjudicator in writing within 21 days of the arbitration having been commenced by the pub-owning business.
312. Subsection (6) sets out the time limit for giving a notice where, under an arbitration agreement, a third party has been charged with appointing the arbitrator but the tenant wishes the arbitrator to be the Adjudicator. In these circumstances the tenant must inform the pub-owning business and the Adjudicator of this within 21 days of being notified of the appointment of the proposed arbitrator by the third party.

#### ***Section 51: Arbitration: supplementary***

313. Subsections (1) and (2) provide that the tenant must pay a fee for making a referral for arbitration to the Adjudicator under section 48 or where the tenant has given notice that the Adjudicator should be appointed, as mentioned in section 50(3)(b). The fee must be specified in regulations. Subsection (3) specifies that the regulations may provide for the fee to be returned to the tenant in certain specified circumstances

- 314. Except where specified otherwise in these provisions, subsection (5) requires that any arbitration carried out by the Adjudicator or by someone appointed by the Adjudicator must be conducted in accordance with the rules issued by the Chartered Institute of Arbitrators or the rules of another dispute resolution body specified by the arbitrator.
- 315. The pub-owning business that is party to the arbitration is required by subsection (6) to pay the fees and expenses of the arbitrator except where the arbitrator considers the referral made by the tenant to be vexatious.
- 316. Subsection (7) states that the Secretary of State may by regulations make provision about how much the tenant should pay towards the costs of an arbitration. Costs of an arbitration include the pub-owning business's costs as well as the tenant's own costs. The regulations may provide that the costs faced by the tenant can be limited and the specific circumstances in which the tenant may be required to pay costs above that limit.

### ***Section 52: Information about arbitration***

- 317. This section enables the Adjudicator to obtain information on an arbitration carried out by an alternative arbitrator appointed by the Adjudicator. This is designed to help the Adjudicator carry out its functions, such as preparing annual reports and providing advice and guidance on the Pubs Code. Subsection (2) states that the Adjudicator may enforce this requirement through civil proceedings.

## **Investigations by Adjudicator**

### ***Section 53: Investigations***

- 318. Once the Adjudicator has published guidance about investigations (as set out in section 61), the Adjudicator may investigate whether a pub-owning business has failed to comply with the Pubs Code or has failed to follow a recommendation made by the Adjudicator after a previous investigation. As set out in section 69(7), the Adjudicator's powers to investigate a pub-owning business do not apply to those which qualify as pub-owning businesses only because they have bought a pub with extended protection, as defined in section 69(4).
- 319. The Adjudicator's powers to require someone to provide information for an investigation are set out in Part 2 of Schedule 1.
- 320. The Adjudicator has no similar power to require people to provide information for the purpose of deciding whether to commence an investigation, except for the powers in Part 2 of Schedule 1 which allow the Adjudicator to require pub-owning businesses to provide information about whether they have complied with a previous recommendation. This limit on the Adjudicator's information gathering powers does not prevent the Adjudicator from making contacts and receiving information voluntarily, so far as this is permitted by the general law.
- 321. It is not intended that the findings of an investigation need be limited to the possible breaches, or possible failure to follow a recommendation, that gave the Adjudicator reasonable grounds for suspicion as referred to in subsection (1).

### ***Section 54: Investigation reports***

- 322. This section requires the Adjudicator to publish a report at the end of an investigation.
- 323. Subsection (2) specifies that an investigation report must specify any findings and any action taken or proposed. The report does not have to disclose the identity of the pub-owning business in question. This is because there may be cases where the Adjudicator considers that the objectives of the Pubs Code can be effectively achieved whilst dealing with the relevant pub-owning business privately. If the Adjudicator does choose to identify the pub-owning business in an investigation report, the business must be given an opportunity to comment on a draft of that investigation report before it is published.



324. Where an investigation finds that a pub-owning business has failed to comply with the Pubs Code, and that failure has affected a particular tenant, the finding of the investigation will not constitute a determination of liability of the pub-owning business to that tenant on which the tenant can rely. The tenant would need to make its own claim against the pub-owning business in order to obtain a remedy.

### ***Section 55: Forms of enforcement***

325. If the Adjudicator concludes following an investigation that a pub-owning business has failed to comply with the Pubs Code or has not followed a previous recommendation, the Adjudicator may make recommendations under section 56, require information to be published under section 57 or impose financial penalties under section 58. The Adjudicator may impose one or more of these enforcement measures. If more than one pub-owning business is the subject of an investigation, the Adjudicator may choose to impose different enforcement measures on different businesses and this may include choosing not to impose any enforcement measures on one or more businesses (subsection (2)).

### ***Section 56: Recommendations***

326. If the Adjudicator concludes that a pub-owning business has failed to comply with the Pubs Code, the Adjudicator can recommend what the pub-owning business should do to comply with the Pubs Code. The Adjudicator is then required to monitor whether recommendations are followed (subsection (2)) and report on this in the annual report under section 62. For the purposes of monitoring, pub-owning businesses can be required to provide information to the Adjudicator (see Part 2 of Schedule 1).
327. Recommendations are likely to be used in circumstances where the breach of the Pubs Code is less serious. They may also be used alongside a requirement to publish information or the imposition of financial penalties for more serious breaches of the Code. There is no express sanction for failure to comply with a recommendation, but failure to show that a recommendation has been followed could trigger a new investigation (see section 53) or be taken into account when considering what sanction to impose following a future investigation.

### ***Section 57: Requirements to publish information***

328. If the Adjudicator concludes that a pub-owning business has failed to comply with the Pubs Code, then the Adjudicator may require the pub-owning business to publish information about the Adjudicator's investigation. The Adjudicator will need to inform the pub-owning business in writing of the information required to be published, the manner in which it must be published and the time by which it must be published (subsection (2)). For example, the Adjudicator could require publication by press release, through the pub-owning business's annual report or website or through a newspaper advertisement. If necessary, the Adjudicator may take further legal steps to enforce his/her ruling (subsection (3)).

### ***Section 58: Financial penalties***

329. The Adjudicator may impose a financial penalty on a pub-owning business if, following an investigation, the Adjudicator concludes that the business has failed to comply with the Pubs Code. This penalty may not exceed the maximum penalty (see subsection (6)). The Adjudicator imposes a financial penalty by giving the pub-owning business written notice of the reasons for the penalty, the amount of the penalty, the period within which it must be paid and how it must be paid (subsection (2)).
330. The pub-owning business could appeal to the High Court against the imposition of the penalty or the amount of a penalty (subsection (3)). Subsection (5) states that financial penalties would be paid into the Consolidated Fund and so would not be used to support the Adjudicator's activities.

331. Subsection (6) states that the Secretary of State must make regulations specifying the permitted maximum financial penalty or how it is to be calculated.

### ***Section 59: Recovery of investigation costs***

332. This section provides that the Adjudicator may require a pub-owning business to pay some or all of the costs of an investigation if the Adjudicator finds that the pub-owning business has failed to comply with the Pubs Code or failed to follow a recommendation.
333. Subsection (2) states that where a person has made a complaint which was found to be vexatious or wholly without merit, the Adjudicator may require that person to pay some or all of the costs of a resulting investigation.
334. The Adjudicator must provide notice in writing to the person who is required to make a payment, informing them of the requirement to pay costs, the reasons for imposing the requirement, the amount to be paid, the time period within which it must be paid and how it must be paid (subsection (3)). The person required to pay may appeal against the decision or the amount to the High Court.

## **Advice and guidance by the Adjudicator**

### ***Section 60: Advice***

335. This section allows the Adjudicator to give tenants and pub-owning businesses, whether generally or individually, advice about any aspect of the Pubs Code. It also allows the Adjudicator to give advice to organisations that represent the interests of tied pub tenants and pub-owning businesses. This power is likely to be exercised with a view to encouraging compliance with the Pubs Code.

### ***Section 61: Guidance***

336. Subsection (1) provides that the Adjudicator must publish guidance on the criteria for deciding whether to carry out investigations, the practices and procedures for investigations, the criteria for using enforcement powers, and the criteria for deciding the amount of financial penalties. This ensures that guidance is available before the Adjudicator exercises its investigatory powers.
337. The Adjudicator may also publish additional guidance about the practices and procedures the Adjudicator intends to follow when carrying out other functions and about any matter relating to the Pubs Code. For example, this would enable the Adjudicator to give general guidance about the application of a particular provision of the Pubs Code (subsections (2) and (3)).
338. Subsection (4) states that the Adjudicator must consult as appropriate before issuing any guidance. The Adjudicator must provide initial guidance covering the topics set out in subsection (1) within 6 months of section 41 coming into force.

## **Adjudicator's reporting requirements**

### ***Section 62: Annual Report***

339. This section provides that the Adjudicator must publish an annual report after the end of each reporting period and send it to the Secretary of State (subsections (1) and (4)). The first reporting period will begin when section 41 comes into force (i.e. when the Adjudicator is established) and end on 31st March. Subsequent reporting periods are each twelve-month period after that.
340. The annual report must include summaries of arbitrations and investigations conducted by the Adjudicator, the use of enforcement powers, and cases where the Adjudicator has exercised functions in relation to the offer of a Market Rent Only option the provision of parallel rent assessments by pub-owning businesses under the Pubs Code. Where the

use of enforcement powers has included recommendations, the report should include an assessment of whether these have been followed (subsections (2) and (3)).

341. Each annual report should therefore contain information which is useful to the Secretary of State in reviewing the Adjudicator under section 65, as well as to users of the Pubs Code generally. Subsection (5) requires that the Secretary of State lay a copy of the report before Parliament.

## **Funding of Adjudicator**

### ***Section 63: Levy Funding***

342. The Adjudicator is to be funded primarily by pub-owning businesses through the levy provided for in this section, though some fees and/or costs payments may come from tenants (see sections 42(5)(b) and 51(2)). In addition, the Adjudicator may recover the cost of investigations where a person's complaint was found to be vexatious or wholly without merit (section 59(2)).
343. This section enables the Adjudicator to require pub-owning businesses to pay an annual levy towards the Adjudicator's expenses. It will be for the Adjudicator to decide when to impose a levy, and for how much, but the levy must be approved by the Secretary of State and the Adjudicator must publish an explanation of how the amounts have been decided (subsections (1), (2) and (8)).
344. Subsection (5) enables the Adjudicator to require pub-owning businesses to pay differing amounts based on criteria reflecting the time and expense the Adjudicator expects to incur in dealing with matters relating to these pub-owning businesses. The intention is that once the Adjudicator is functioning it will be easier to determine, based on evidence, which pub-owning businesses – or which types of pub-owning business activity – are creating the most work for the Adjudicator and determine a funding model which reflects this.
345. Any surplus funds held at the end of a financial year may be repaid by the Adjudicator to pub-owning businesses (subsection (9)).

### ***Section 64: Loans by Secretary of State***

346. This section enables the Secretary of State to make loans to the Adjudicator. This is envisaged only in limited circumstances, for example at the time of establishing the Adjudicator and before the Adjudicator has imposed and collected the levy on pub-owning businesses.

## **Supervision of Adjudicator**

### ***Section 65: Review of Adjudicator and guidance from Secretary of State***

347. The Secretary of State is required to review the Adjudicator's performance after an initial period of approximately two years, and every three years thereafter (subsections (1)-(2)). Following a review, the Secretary of State must publish a report of the findings and lay a copy before Parliament (subsection (6)). These requirements are in line with the Government's better regulation objective that all regulators should be reviewed as to their effectiveness and whether they are achieving their objectives.
348. Subsection (4) specifies that a review of the Adjudicator must consider how effective the Adjudicator has been at enforcing the Pubs Code.
349. Subsection (7) provides that the Secretary of State may issue guidance to the Adjudicator following a review. For example, the Secretary of State might consider that enforcement powers should be exercised differently or that the Adjudicator should be more active in giving advice or guidance.

### ***Section 66: Abolition of Adjudicator***

350. The Secretary of State may by regulations abolish the Adjudicator. The Secretary of State may do so if a review by the Secretary of State (under section 65) finds that the Adjudicator has not been sufficiently effective in enforcing the Pubs Code or that there is no longer a need for the Adjudicator to enforce the Code, or if the Code itself is revoked.

### ***Section 67: Information to Secretary of State***

351. The Secretary of State will be able to require information from the Adjudicator to assist him/her in carrying out a review or other functions under the Act.

## **Supplementary**

### ***Section 68: Tied Pub***

352. This section defines a “tied pub” as premises occupied under a tenancy or licence, with a premises licence to sell alcohol for consumption on the premises and where that is also the main activity or one of the main activities, and where the tenant has a contract for some or all of their alcohol to be supplied from the landlord or the group undertaking to which the landlord belongs or someone nominated by the landlord or the group undertaking.
353. Subsections (6)-(8) define a ‘stocking requirement’. This is relevant for when a tied pub chooses the Market Rent Only option (see sections 43-45). Section 43(4)(a)(ii) stipulates that a MRO-compliant tenancy or licence must not include any product or service tie (other than one relating to insurance of the pub). Subsection (6) makes clear that a stocking requirement is not a tie. Thus subsection (7) allows pub-owning businesses that are breweries to impose a stocking requirement on tenants and licensees with MRO-compliant tenancies or licences. The stocking requirement applies only to beer and cider produced by the pub-owning business, and the tenant must be able to buy the beer or cider from any supplier of their choosing. The stocking requirement also allows the pub-owning business to impose restrictions on sales of competing beer and cider in line with prevailing competition law, so long as the restrictions do not prevent the tenant from selling such products.

### ***Section 69: “Pub-owning business”***

354. Subsection (1) defines a “pub-owning business” as the landlord of 500 or more tied pubs. For the purpose of this calculation any pubs owned by a group undertaking in relation to the landlord are included in the figure (subsection (2)).
355. Subsections (3)-(7) cover circumstances a) in which a tied pub is sold by a pub-owning business to a new owner who does not own 500 or more tied pubs or b) when a tied pub is protected by the Pubs Code and Adjudicator by virtue of being owned by a pub-owning business but then the business no longer qualifies as a pub-owning business – for example, through selling sufficient pubs to drop below the 500 tied pub threshold. In both these circumstances the tied pub would have “extended protection” and its owner would be considered a “pub-owning business” under this legislation, in respect of that pub until the pub’s next rent review or until the end of the tenancy/licence, whichever is sooner. A business that is a pub-owning business solely because of these circumstances would not be covered by sections 43-45 (Market Rent Only option) or sections 53-59 (Investigations) but would be covered by all the remaining sections of this Part of the Act, including those relating to parallel rent assessments and arbitrations.
356. Subsection (8) allows the Secretary of State by regulations to expand the remit of the Pubs Code and Adjudicator to cover group undertakings rather than just the individual pub-owning business concerned. In this way they would ensure the legislation is sufficiently flexible to encompass adequately any parent or subsidiary companies.

357. Subsection (9) allows the Secretary of State by regulations to amend the number of tied pubs, the qualifying period for categorisation as a pub-owning business and the method of calculating the number of tied pubs. This is intended as a safeguard against unforeseen changes in circumstances or pub-owning business behaviour. Any changes would require approval by both Houses of Parliament through the affirmative resolution procedure, following consultation.

***Section 70: “Tied pub tenant”, “landlord”, “tenancy” and “licence”***

358. This section clarifies that a “tied pub tenant” includes someone negotiating for a prospective tied tenancy, that “tenancy” covers different kinds of tenancy, licence and leasing agreements, including a tenancy at will, and that “landlord” refers to the immediate landlord or licensor, not to a person or organisation that leases premises to a pub-owning business, i.e. a superior landlord.
359. The definition of “tenancy” in the Act includes a tenancy under which a fee is paid instead of rent (for example, a fee related to turnover, as is the case with some pub franchises).

***Section 71: Power to grant exemptions from the Pubs Code***

360. As there may be circumstances where it is necessary to exempt from the Pubs Code dealings between a specified pub-owning business or pub-owning business of a specified description with a particular type of tenant, or in relation to particular types of pub premises, this section gives the Secretary of State a power to make appropriate regulations. Also, the regulations may set out circumstances in which a tied pub fitting a specified description is not counted for the purpose of calculating whether a business is a pub-owning business under this legislation
361. The Government intends to use this power to introduce regulations to exempt tenancies at will and temporary agreements that are genuinely short-term from coverage by the Pubs Code. The Government will consult on what the maximum duration of such an agreement should be in order to qualify for the exemption.
362. The Government also intends to use this power to exempt franchised pubs from the Market Rent Only provisions (sections 43 to 45) and will consult on the appropriate definition of a franchise pub for this purpose.

***Section 72: Interpretation: other provision***

363. This section provides for the definition of “the Adjudicator”, “arbitration agreement”, “financial year”, “independent assessor”, “market rent”, market rent only option”, “MRO procedure”, “MRO-compliant”, “parallel rent assessment”, “product or service tie”, “product tie”, “the Pubs Code”, “service tie” and “stocking requirement”.

**Regulations under this Part**

***Section 73: Regulations under this Part***

364. This section sets out the Parliamentary procedure which attaches to regulations which may be made under this Part. All regulations are subject to the affirmative procedure, except for the regulations under section 66(1)(c) which allow for the abolition of the Adjudicator if the Pubs Code has been revoked and not replaced.
365. Subsection (3) states that the hybrid instrument procedure in the House of Lords will not apply, even if any regulations made under the power to grant exemptions from the Pubs Code would otherwise apply to them, were it not for this subsection.