POLICY NOTE

THE SCOTTISH PUBS CODE ADJUDICATOR (MISCELLANEOUS LISTINGS) ORDER 2024

SSI 2024/XXX

The above instrument was made in exercise of the powers conferred by section 4(1)(a) of the Freedom of Information (Scotland) Act 2002, section 15(2)(a) of the Public Services Reform (Scotland) Act 2010, section 2(2)(a) of the Public Records (Scotland) Act 2011 and all other powers enabling them to do so. The instrument is subject to affirmative procedure.

Summary Box

The Scottish Pubs Code Adjudicator is a new statutory body established by the Tied Pubs (Scotland) Act 2021[1]. The Adjudicator will be appointed following a parliamentary resolution.

The purpose of this instrument is to make the Scottish Pubs Code Adjudicator subject to duties on records management and freedom of information similar to other public bodies. It also allows for Scottish Ministers to improve the Adjudicator's efficiency, effectiveness and economy under the Public Services Reform (Scotland) Act 2010[2].

Policy Objectives of the Act

The Tied Pubs (Scotland) Act 2021 received Royal Assent in May 2021. The Act establishes the Scottish Pubs Code Adjudicator. The purpose of the Act is to regulate the relationship between tied pub landlords and tenants through the introduction of a statutory Scottish Pubs Code and the appointment of a Scottish Pubs Code Adjudicator. The role of the Adjudicator is to oversee and enforce the code.

The Adjudicator's powers include:

- arbitration in disputes between the pub owning business and tenants;
- setting criteria for a rent assessor or appointing a rent assessor for market rent only negotiations;
- publishing an investigation policy;
- investigating non-compliance with the code;
- giving advice and guidance on the code and carrying out enforcement actions (which include financial penalties).

The role of the Adjudicator is also to raise awareness of the code and the Adjudicator's role amongst tied tenants and the pub-owning businesses in scope of the code.

[1] https://www.legislation.gov.uk/asp/2021/17/contents
[2] https://www.legislation.gov.uk/asp/2010/8/contents

Policy Objectives of the SSI

The purpose of this instrument is to make consequential and ancillary amendments arising out of the Tied Pubs (Scotland) Act 2021 in time for the regulatory regime coming into force on 7 October 2024.

Policy officials have analysed the reporting requirements for public bodies and identified various pieces of primary legislation that the Adjudicator should be subject to as part of good governance of public bodies. This SSI, together with the Scottish Pubs Code Adjudicator (Duty to Publish Certain Information) Regulations 2024, makes sure the appropriate governance arrangements are in place for the Adjudicator when the regulatory regime is created. The reason for having two SSIs, is that some of the changes to primary legislation need to be made by order and some need to be made by regulations.

Article 2 of this SSI adds the Adjudicator to the authorities listed in schedule 1 and Part 7 of the Freedom of Information (Scotland) Act 2002[3], which makes the Adjudicator subject to the freedom of information requirements set out in that Act. Adding the Adjudicator to the freedom of information requirements will add transparency and impartiality.

Article 3 adds the Adjudicator to the public bodies listed in schedule 5 of the Public Services Reform (Scotland) Act 2010[4], which means the Scottish Ministers may by order make provision under Part 2 of that Act to improve efficiency, effectiveness and economy in the Adjudicator's exercise of public functions. This will help make sure the Adjudicator practices good governance and makes the best use of resources.

Article 4 adds the Adjudicator to the authorities listed in the schedule of the Public Records (Scotland) Act 2011[5], which puts the Adjudicator under a duty to comply with the records management requirements in Part 1 of that Act. Making the Adjudicator subject to this Act will make sure high standards of record keeping are maintained and kept for posterity.

EU Alignment Consideration

This instrument is not relevant to the Scottish Government's policy to maintain alignment with the EU.

Consultation

Given the technical nature of this instrument a formal consultation exercise was not undertaken. An informal and quick consultation took place with the Scottish Licensed Trade Association (SLTA) and the Scottish Beer and Pub Association (SBPA) on the draft SSI in 2023. The SLTA confirmed that they were content with the draft SSI and no reply was received from the SBPA. The draft laying and coming into force dates have since been changed, due to a court action brought forward by two pub-owning businesses. The Scottish Government also informally discussed the proposals with the National Records of Scotland and the Scottish Information Commissioner, both of which were supportive.

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[3] https://www.legislation.gov.uk/asp/2002/13/contents
[4] https://www.legislation.gov.uk/asp/2010/8/contents
[5] https://www.legislation.gov.uk/asp/2011/12/contents

Substantial formal and informal consultation has taken place on the implementation of the Act more generally, specifically on the development of the Scottish Pubs Code.

The Information Commissioner's Office has also been consulted on the proposed package of secondary legislation to implement the Tied Pubs (Scotland) Act as required by Article 36(4) of the UK General Data Protection Regulation. They highlighted a few data protection considerations and advised that the Adjudicator and/or the Scottish Pubs Code will want to include some early thinking about:

- retention – how long will personal data be stored;
- the fields of personal data that might be involved to ensure that it is kept to the minimum necessary for the required purpose.

Impact Assessments

The following Impact Assessments have been prepared for the supporting instruments which will implement the Act:

- Business and Regulatory Impact Assessment
- Child Rights and Wellbeing Impact Assessment (screening)
- Equalities Impact Assessment
- Data Protection Impact Assessment
- Strategic Environmental Assessment (pre-screening notification)
- Fairer Scotland Duty
- Island Communities Impact Assessment (screening)

These impact assessments will be published on the Scottish Government website.

As this is a technical instrument there are no anticipated effects on children, environment, island communities and fairer Scotland. There are potentially privacy impacts in terms of the Adjudicator's duties as data controller under the Freedom of Information (Scotland) Act 2002 and being subject to comply with the records management requirements under the Public Records (Scotland) Act 2011. It is envisaged the Adjudicator will only collect minimal personal data, for example, data pertaining to pub-owning businesses and tied pubs tenants, for the purposes of exercising its duties. However, there are exemptions in the 2002 Act for the disclosure of personal data. The Adjudicator will need to ensure compliance with data protection law once the legislation is implemented. The Scottish Government will provide guidance from the Information Commissioner's Office to ensure privacy is respected. Impacts on business are detailed in the financial effects section below.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed for the following SSIs:

- The Scottish Pubs Code Adjudicator (Duty to Publish Certain Information) Regulations 2024; and
- Scottish Pubs Code Adjudicator (Miscellaneous Listings) Order 2024 (this SSI).

The BRIA is attached and is also available on the Scottish Government website. The Adjudicator will be funded initially through a loan by the Scottish Government and in the longer-term it will be funded by a levy on pub-owning businesses.

Making the Adjudicator subject to duties similar to other public bodies, such as records management and freedom of information will have some limited impact on the Scottish Government and on businesses who will fund the Adjudicator as there will be some minimal additional costs for the pub-owning businesses through levy payments. The additional cost will be on the Adjudicator's office in terms of staff time to prepare a records management scheme and to prepare and issue freedom of information requests. It is anticipated that staff appointed to the Scottish Pubs Code Adjudicator Office will be able to absorb these functions. It provides transparency to Government and pub-owning businesses that the Adjudicator has good governance and is operating effectively and transparency.

Scottish Government
Directorate for Agriculture and Rural Economy

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