

# **TIED PUBS (SCOTLAND) ACT 2021**

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## **EXPLANATORY NOTES**

### **THE ACT**

#### ***Schedule 2: Scottish Pubs Code Adjudicator***

#### **Part 1: Status and Liability**

##### **Legal personality**

76. Paragraph 1 confirms that the adjudicator has a distinct legal personality which is separate from any person holding the office. This will, for example, allow the adjudicator to enter contracts, and to sue and be sued, in that capacity (as the holder of the office) rather than in an individual capacity.

##### **Exclusion of Crown Status**

77. Paragraph 2(1) confirms that the adjudicator does not act on behalf of the Crown (and therefore is not a civil servant) and sub-paragraph (2) states that any staff seconded to the adjudicator are not to be classed as civil servants simply by virtue of working for the adjudicator.

##### **Exemption from liability for damages**

78. Paragraph 3 protects the adjudicator and seconded 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 tied tenant or pub-owning business to claim against the adjudicator for negligence in relation to advice given or the way the adjudicator had carried out an investigation.

#### **Part 2: Powers**

##### ***Chapter 1: Power to require information***

##### **Imposition of requirement**

79. Paragraph 4 gives the adjudicator power to require information and documents.
80. The statutory limits on the extent to which the adjudicator can require information do not limit the adjudicator's ability to ask for information to be provided voluntarily on any matter, at any time.

##### **Offence of failing to comply with requirement and of providing false information**

81. Paragraphs 5 and 6 create offences, punishable on conviction by a fine<sup>1</sup>, for intentional failure to comply with a requirement to provide information (subject to a defence of having a reasonable excuse) and for knowingly providing false information. A failure

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<sup>1</sup> On summary conviction, the maximum fine is the "statutory maximum", which was £10,000 at the time of Royal Assent.

to provide information in the way specified will be considered as a failure to comply with a notice requiring the information to be provided.

## **Chapter 2: Other Powers**

### **Powers to advise on the code and issue guidance**

82. Paragraph 7 allows the adjudicator to give anyone advice about any aspect of the code. This power is likely to be exercised with a view to encouraging compliance with the code, but could also, for example, be used to advise prospective tenants about the code. This is a power and not a duty, so the adjudicator has discretion regarding whom to advise, and how.
83. Paragraph 8(1) provides that the adjudicator may publish guidance on the practices and procedures of the adjudicator, the application of the code and what pub-owning businesses must do to comply with it, and anything else related to the code. For example, this would enable the adjudicator to give general guidance about the application of a particular provision of the code (the Pubs Code Adjudicator for England and Wales has published a number of such guidance documents on its website). Sub-paragraph (2) requires the adjudicator to follow his or her own guidance, in the interests of consistency.
84. Sub-paragraph (3) states that the adjudicator must consult any organisation or person considered to be appropriate before issuing any guidance. This makes it possible for the adjudicator to conclude that it is not appropriate to consult with anyone, if (for example) the guidance reflects practice that is already well-established and uncontroversial. Should the adjudicator decide to consult, it is left to the adjudicator to decide whom to consult.

### **General powers**

85. Paragraph 9 allows the adjudicator to do anything that will help with performing the functions of the role, even if it is not mentioned in the earlier paragraphs of the schedule. This is to avoid the schedule being interpreted as an exhaustive list of powers and so leading to an unintended narrowing of the adjudicator's room for manoeuvre.

## **Part 3: Funding and other support**

### **Chapter 1: Assistance from the Scottish Ministers**

#### **Loans and other assistance**

86. Paragraph 10 enables the Scottish Ministers to make loans to the adjudicator. This may, for example, be needed at the time of establishing the adjudicator, before the levy on pub-owning businesses has been imposed and collected.
87. Paragraph 11 allows the Scottish Ministers to provide staff (including on a seconded basis, see notes on paragraph 24 of schedule 2 below), premises, facilities or other assistance to the adjudicator and may decide whether or not to do so at a charge. This would allow the Scottish Government, for example, to offer the adjudicator and relevant support staff space within existing premises, supported by existing administrative and IT services etc.

## **Chapter 2: Levy funding**

### **Annual levy on pub-owning businesses**

88. The adjudicator is to be funded primarily<sup>2</sup> by means of a levy on pub-owning businesses.
89. Paragraph 12(1) specifies that the levy for any particular financial year is payable by any person (legal or natural) who is or was a pub-owning business during that financial year. Accordingly, a business that ceased to qualify as a pub-owning business mid-way through the year would still be liable to pay the levy.
90. Paragraph 12(2) states that the adjudicator can only impose a levy in a financial year if the Scottish Ministers have given their approval. Requiring the consent of Scottish Ministers ensures that the levy is subject to a level of scrutiny and accountability and cannot be determined solely by the adjudicator.

### **Amount of levy**

91. Under paragraph 13, the adjudicator can decide what proportion of the levy will be imposed on each pub-owning business in each financial year. If the adjudicator charges different pub-owning businesses different amounts, the differences must be based on the expenses the adjudicator has incurred, or expects to incur, dealing with relevant matters. Sub-paragraph (7) confirms that “expenses” includes the payroll of the adjudicator and any staff. In this way, a pub-owning business that is regularly accused of breaching the code, thus generating a significant case-load for the adjudicator, is liable to be charged more than a business that maintains good relations with its tenants and does not generate work for the adjudicator.
92. Sub-paragraph (5) requires the adjudicator to take account of non-levy income when setting the levy rate (or rates). This is to ensure that the levy provides necessary funding only. The sub-paragraph also allows the adjudicator to take account of estimated expenditure when setting the levy rate (or rates).
93. Sub-paragraph (6) states that the adjudicator must publish details of the levy, including the rate (or rates) set, and an explanation of how the rate-setting was done, including how variations among the workload generated by different pub-owning businesses were used to decide the different rates those business must pay. This will ensure transparency in the total levy amount, the separate amounts for each pub-owning business, and the methodology used.

### **Liability to pay**

94. Paragraph 14 makes pub-owning businesses liable to pay the rates set if they are generally liable to pay the levy in the relevant year and have received a charging notice. So, for example, a business that had ceased to be a pub-owning business before the year in question would not be liable to pay the levy even if it had received a charging notice. Under sub-paragraph (2), a charging notice may specify not just how much is to be paid but also when and how it is to be paid.

### **Rebate**

95. Paragraph 15 confirms that any surplus funds held by the adjudicator at the end of a financial year may be repaid (in full or in part) to the relevant pub-owning businesses.
96. This prevents the adjudicator building up more funds than are needed to operate the adjudicator’s office and meet its expenses and ensures that pub-owning businesses have a financial incentive to reduce the number of complaints to the adjudicator.

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<sup>2</sup> Some funding may also come via fees and/or payments from tenants (such as via fees payable for requesting a Market Rent Only lease, and costs of arbitration and investigation processes, in certain circumstances).

## **Appeals**

97. Under paragraph 16 the imposition and/or amount of the annual levy on a pub-owning business may be appealed to the sheriff. Under existing legislation, the sheriff's decision may be further appealed to the Sheriff Appeal Court.

## **Part 4: Accountability**

### **Accounts and audit**

98. Paragraph 17 requires the adjudicator to keep proper accounts and gives the Scottish Ministers power to give directions as to the form of those accounts. A copy of the accounts must be sent to the Auditor General for Scotland. This makes the adjudicator subject to sections 21 and 22 of the Public Finance and Accountability (Scotland) Act 2000<sup>3</sup>, which includes requirements relevant to the auditing of accounts by the Auditor General for Scotland (for example, that accounts must be sent to the Auditor General no later than 6 months after the end of the financial year to which the account relates).

### **Annual report**

99. Paragraph 18 requires the adjudicator to publish an annual report after each financial year and send it to the Scottish Ministers (this may mean that the first annual report covers a shorter period than one year, depending on when the office of adjudicator is established). The Scottish Ministers must lay a copy of each annual report before the Scottish Parliament. This will bring the report to the attention of the Parliament (including to relevant committees) and allow further scrutiny as appropriate.

### **Information to Scottish Ministers**

100. Under paragraph 19, the Scottish Ministers can require information from the adjudicator to assist them in carrying out their functions under the Act. This is a general power which will help to ensure the appropriate accountability of the adjudicator.

## **Part 5: Appointment and terms and conditions**

### **Appointment and tenure**

101. Under paragraphs 20 and 21, it is for the Scottish Ministers to appoint the adjudicator, but they must first secure the Scottish Parliament's approval of their choice. Each person (including an individual who holds another office) may be appointed to the office on a maximum of three occasions, whether or not consecutive. An individual's period of appointment is for a maximum of 4 years on the first occasion, and 3 years on later occasions, making an overall maximum of 10 years (whether consecutive or not) (see paragraphs 20(4) and 21(3)(b)).
102. Paragraph 20(2) requires Ministers to be confident that any person appointed as adjudicator will be impartial in balancing the interests of tied pub tenants and pub-owning businesses.

### **Defect in appointment**

103. Paragraph 22(1) states that if there has been a defect in the appointment of the adjudicator, that does not invalidate anything they have done in their role. However, under sub-paragraph (2), once Ministers are aware of a defect in the appointment, they must remove the adjudicator from office as soon as possible. An individual removed in this way may be immediately reappointed, provided the Parliament agrees to that, and the reappointment is to be considered as a continuation of the original appointment (see

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<sup>3</sup> Public Finance and Accountability (Scotland) Act 2000 (asp 1). Available at: <https://www.legislation.gov.uk/asp/2000/1/contents>.

sub-paragraphs (3) to (5)). This ensures that a defect in an individual's appointment and its subsequent correction does not affect the number of times the individual may be appointed or the total duration the individual may serve.

### **Remuneration and other terms and conditions**

104. Paragraph 23 provides for the adjudicator to be paid salary, allowances and pension payments, subject to such constraints as may be determined by the Scottish Ministers.
105. Paragraph 24 states that other terms and conditions of the adjudicator's appointment, not covered by schedule 2, may be determined by the Scottish Ministers. For example, this could include issues relating to working location, patterns and hours (such as flexible and/or part time working arrangements).

### **Part 6: Staff**

#### **Secondees**

106. Paragraph 25 allows the adjudicator to arrange for staff to be seconded to work as members of the adjudicator's office, and to be paid either by the organisation from which they are seconded, or by the adjudicator (sub-paragraph (2)). Secondment arrangements must be approved in advance by the Scottish Ministers (sub-paragraph (3)).