



Pubs Code
Adjudicator

Consultation on proposals to issue statutory guidance on matters relating to the operation of the Pubs Code

Summary of Responses and Pubs Code Adjudicator
Response

March 2022



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Overview

1. The consultation paper entitled “[Consultation on proposals to issue statutory guidance on matters relating to the operation of the Pubs Code](#)” was published on 29 October 2021 and the period for responses closed on 10 December 2021. This report summarises respondents’ views on the proposals for statutory guidance and sets out the response of the Pubs Code Adjudicator (PCA) and next steps.
2. The PCA was created by Part 4 of the Small Business, Enterprise and Employment Act 2015 (the 2015 Act). The PCA is a corporation sole and an independent office-holder carrying out functions on behalf of the Crown. The PCA’s role is to encourage and enforce compliance with the Pubs Code etc Regulations 2016 (the Code) which came into force on 21 July 2016.
3. The PCA has a statutory power under s.61 of the 2015 Act to publish guidance about the application of any provision of the Code and on the steps that POBs need to take in order to comply with the Code. The PCA must consult any persons she thinks appropriate before publishing statutory guidance. The PCA must take account of that published statutory guidance when carrying out her functions. The consultation asked for views on proposals for the PCA to issue statutory guidance in respect of the offer by a pub-owning business (POB) of a Market Rent Only (MRO) option, with a focus on areas where guidance may assist access to, and effective navigation of, the MRO procedure.
4. There were 20 responses to the consultation received. This included responses from the six regulated POBs and responses from a number of industry representative bodies and groups, as well as individuals. These responses will be published separately, subject to the redaction of information in accordance with data protection requirements and subject to respondent’s confidentiality preferences where appropriate. The PCA thanks all respondents for taking the time to provide detailed and constructive feedback on the issues raised in the consultation. This document summarises some of the key points made by respondents in respect of the matters consulted upon.
5. It was widely agreed amongst respondents that for tied pub tenants, having transparency in the MRO process and consistency in what to expect from the procedure was of benefit in being able to access their rights under the Code. Having considered the responses, the PCA is satisfied that statutory guidance is appropriate in this area. The guidance will provide greater certainty through ensuring greater transparency for tied tenants so that they have more clarity on the parameters of what can be expected from the MRO process and aid consistency of approach from all POBs.

6. For the avoidance of doubt, this document does not constitute guidance under s.61 of the 2015 Act. Statutory guidance will be developed taking into account the responses received to this consultation. Any further consultation, formal or informal, with interested and affected groups will be considered and undertaken by the PCA if considered necessary and proportionate ahead of the publication of any statutory guidance.

Summary of responses

Proposals of rent in the MRO process

1. The consultation sought views on requirements for the POB to provide transparent information in support of a proposed MRO rent offer and what information would be useful in supporting the tenant's ability to understand and negotiate.
2. Overall, there was wide support among respondents for the POB to provide transparent information in support of MRO rent offers. Respondents felt that the information provided should be consistent, complete, meaningful and relevant and that having a clear understanding of the MRO procedure would build confidence in tenants accessing the process. However, not all felt the need for a requirement set out in guidance to provide such information, as some respondents considered that in most cases, POBs already provide clear information to tied tenants on the proposed MRO rent and the methodology for its calculation.
3. All POBs provided a level of information to tied tenants to allow them to make an informed decision. However, as this information was individual for each POB some respondents felt that the process could lack consistency. Some respondents reported some difficulty in obtaining information requested from POBs.
4. Respondents felt that genuinely transparent information on the calculation method of proposed MRO rent will allow a tenant to better understand and scrutinise the offer from the outset of the MRO process and this will help to expedite the procedure.
5. One concern raised in respect of the existing position was that whilst information is available, unrepresented tenants may be less likely to know what specific information can be provided and what would be useful to them, therefore an obligation to provide information up front may benefit this group in particular. However, there was some caution around the risk of

overwhelming or confusing a tenant with too much information. Concern was highlighted around information being provided without need. Some respondents stated that additional information provision should be driven by a clear need for such information and an appreciation of whether it aids tenants or merely adds to the weight of information that they are already given. There was a general consensus amongst POBs that it is important that tenants are able to seek good quality advice in relation to the information they had received.

6. One respondent felt the tenant should have the same level of information provided to them as the Independent Assessor receives when determining the market rent for a MRO compliant tenancy and questioned why this was not always the case.
7. It was noted that anticipated amendments to the Code aimed at improving the MRO process were imminent and one respondent therefore felt it would be advantageous to postpone introducing guidance in this area.
8. A number of respondents emphasised it would be useful for the POB to provide the tenant with comparable evidence with reasons as to why the transactions might be the same or different. However, this came with the caution that a POB potentially could be selective over statistics provided, leaving the tenant with no access to the full picture related to comparables. Some respondents raised concerns around risks of breaches of confidentiality and GDPR obligations in respect of providing comparable evidence supporting the MRO proposal.
9. Some respondents requested clarity and forecasts around projected trade in forthcoming years, others had stated this was not always feasible as POBs may not have access to data on all areas of costs related to the tenant's business and the PCA does not require the POB to seek this information from the tenant. A respondent felt it would be helpful for the tenant to share their financial accounts, so the POB could ensure assumptions used are reasonable.

Response

10. It is recognised by the PCA that it has been custom and practice for the POB to send a proposed rental figure to the tied tenant alongside the proposed MRO tenancy terms. Further, under amendments to the Code which have been debated in both Houses of Parliament and are expected to come into force on 1 April 2022 the provision of a statement of the proposed rent payable by the tenant in respect of the proposed MRO-tenancy will be a required part of the POB's MRO offer alongside MRO-compliant terms. The PCA notes that there is general support that there be consistency and clarity

in respect of information provided for all tenants across the industry. The PCA considers it important to ensure that tenants know what they can expect and are able to access a consistent minimum level of information regardless of who is their POB. This is to future proof the Code requirements and facilitate efficient progression of the MRO procedure and ensure that tied tenants are properly able to understand the basis of the MRO rent offer in order to compare the MRO option with their tied deal and to negotiate from an informed position. The PCA considers that guidance in this area will support and complement the new statutory requirements for POBs to provide a statement of the proposed rent in a manner consistent with the core Code principles.

11. Based on the information provided by the POB, the tied tenant should be able to understand how the proposed MRO rental figure has been calculated, including the reason for any assumptions involved in the calculation. The information that is provided should be based on this principle. The PCA does not consider it necessary or necessarily desirable that the POB seeks information from the tied tenant at the proposal. The PCA will not introduce guidance requiring a POB to obtain information from the tied tenant which the tenant may hold in order to provide information to the tenant with the statement of proposed rent. The information provided by the POB should evidence and support the MRO rental calculation it has made; it is not intended that there be a tick-box exercise on the part of the POB, nor a burden or requirement on the tied tenant to provide information to the POB.

Removing uncertainty of potential financial barriers in the MRO procedure

Rent payments/ rental deposit

1. The consultation sought views on potential guidance about an incremental approach to reaching an increased rent deposit and/or less frequent rent payments in advance where these are reasonable MRO terms. This is so as to afford clarity and better access to the MRO procedure for a tied tenant and provide stability for the POB in the management of its estate.
2. The majority of POBs said that they already offered an incremental approach to deposit and rent payment in many cases where appropriate. At least one POB recognised that this approach is required under its Code obligations to deal fairly and transparently with its tenants. Other POBs said that an incremental approach to deposits and rent terms are looked at on an individual basis and are agreed by the parties during negotiation where

circumstances require it. One POB agreed that allowing the tied tenant to build up the rent deposit and/or move to less frequent rental payments incrementally is likely to be reasonable and that the tied tenant is generally permitted to do so if they request this.

3. It was noted by some tenant industry representatives that some POBs provide a good level of information clarifying upfront the MRO procedure and the associated costs and proposed changes (although this was not considered consistent across the board). It was raised that consistency in approach between POBs on this issue and minimum standards would be beneficial to tied tenants. It was also submitted that making it clear to a tied tenant that an extended period for any increase in deposit amount is available may allow a tied tenant to better access negotiations.
4. There was a largely positive response to the proposal of guidance on this issue from industry representative groups, with respondents saying where a POB is seeking to introduce more onerous terms into the MRO tenancy, and where those terms are reasonable, then it should take steps to minimise the immediate financial impact by allowing time for the tied tenant build up the deposit or change the rental frequency. It was felt that flexibility in the transition involving challenges to a tied tenant's cashflow could help support a successful transition to MRO.
5. Respondents recognised the challenge that the transition from a tied tenancy to a MRO position could have on the cashflow of the operator and felt flexibility on this could help support a successful transition. A number of respondents stated an incremental approach must be consistent with POBs' Code obligations to deal fairly and transparently with its tenants. Whilst this was already offered by some POBs it was felt more consistency was needed across the POBs to benefit all tied tenants.
6. Some respondents welcomed increased flexibility to support a successful transition to MRO, but considered this should be done on an individual case basis and only agreed where needed and on the strength of the tied tenant's creditworthiness. There was some concern that if a one size fits all approach was taken, then this could result in the tied tenant being presented with an opportunity which would not normally be available in the open market through a free of tie commercial agreement. Some felt that an incremental approach for a tied tenant to build up to these more onerous terms increased the landlord's financial exposure. One respondent expressed a concern that incremental arrangements could encourage a tied tenant to enter what appears to be a discounted position, but which would ultimately still be too great a financial burden at the end of the transition.

7. Some respondents raised that greater clarity was required around what might be deemed circumstances in which a POB would not be expected to offer an incremental build up, and that without this it would potentially invite disputes.
8. In respect of a potential minimum build up period, there was no consensus on an appropriate amount of time. There were a range of potential minimum periods suggested – from 6 to 24 months, or until the first rent review. However, many felt any flexibility needed to be agreed by both parties and carried out on a case-by case basis. Some considered the length of the transition period should depend on the rental value of the pub, the increased deposit and the proposed length of the term. Some respondents felt that specifying a minimum period could create a divide between MRO and other free of tie tenants, putting prospective MRO tenants in the better position which, they submitted, was not the intention of the Code.
9. At least one respondent noted the finding in *Punch Partnerships (PTL) Ltd and Ors v The Highwayman Hotel (Kidlington) Ltd* [2020] EWHC 714 in respect of the PCA’s powers to direct the terms of a MRO tenancy. There was concern expressed by at least one respondent that if guidance were given providing that there should be an incremental approach except in “exceptional circumstances” that this could differ from the test in the legislation as to the lawfulness of any term.

Response

10. The PCA recognises that a number of POBs offer as part of negotiations some incremental build up in respect of more onerous lease terms where it is considered appropriate. This practice reflects the particular nature of the MRO arrangement whereby contracting parties move from one type of agreement to another, but remain consistently in an ongoing commercial relationship.
11. The PCA considers that there is benefit in there being clarity for tied tenants about the approach that will be taken to some of the upfront costs that may be involved in a MRO option. This clarity and consistency will allow for better business planning and knowing what to expect may assist tenant confidence in accessing the MRO procedure.
12. The Pubs Code statutory framework does not give an arbitrator who finds a MRO proposal is non-compliant the power to order specific terms to be included by the POB in its MRO revised response. The arbitrator can identify that an offer is unreasonable because it includes or does not contain a particular term, but cannot order a particular term must be included in a proposed MRO tenancy in the revised response (*Punch Partnerships (PTL) Ltd and Ors v The Highwayman Hotel (Kidlington) Ltd* [2020] EWHC 714). The PCA is empowered to publish guidance about the application of any

provision of the Code, steps that POBs need to take to comply with the Code, or any other matter relating to the Code, which the PCA must take into account when carrying out her functions.

13. Where the issue arises as part of an arbitration referral the PCA, or alternative arbitrator appointed by the PCA, is required under the Code to determine whether the terms and conditions of a MRO proposal are unreasonable. Reasonableness is to be considered in all the circumstances of the case, including looking at terms both individually and in combination. Publishing guidance about when a MRO offer may be unreasonable is within the power of the PCA, and it is to the benefit of the industry that there is clarity on the approach that should be taken to determining unreasonableness.
14. Each case referred to the PCA for arbitration will be considered on its own facts, however it is appropriate that the PCA set out guidance on certain issues which must be taken into account when determining unreasonableness and which can result in a finding that a MRO proposal is non-compliant.
15. The PCA intends to produce statutory guidance on how a POB's approach to offering a period of transition in respect of an increased deposit or less frequent rental payments will be a relevant factor in assessing alleged unreasonableness of the MRO offer. All comments about the need for flexibility and concerns about a potential minimum build up period are understood and should be balanced against the benefit to all parties of having clarity as far as possible about the approach to reasonableness so that a tied tenant can understand how a potential transition period may be calculated for them if they seek the MRO option. The PCA expects that in the majority of cases it is likely to be unreasonable for the POB to offer no transition period at all.

Dilapidations

1. The consultation sought views on guidance about terminal dilapidations during the MRO procedure.
2. The majority of groups representing tenants detailed that they did not support the insistence of completion of terminal dilapidations as a condition of granting a MRO tenancy. Respondents noted if the pub is in a poor state and condition then there are several avenues of redress to the POB in either the tied lease, or new MRO tenancy, to ensure that the tenant takes steps to remedy any breaches. Obligations upon either party within existing agreements should be fully met at all points during the term. Therefore, the MRO process should be independent of this. Some respondents considered that dilapidations are a contractual issue which are in place both before and after the creation of a

MRO tenancy and should not be used as a method of prohibiting MRO completion.

3. It was commented that dilapidations can be a financial lever through which a POB can exert influence over a tied tenant, and action to standardise the treatment of dilapidations to ensure equal treatment of tied tenants would be welcomed.
4. A number of POBs submitted that they already do not insist on the completion of terminal dilapidations as a condition of a MRO tenancy. One POB said it considered it important that the condition of the premises and the associated liabilities in breach of the existing agreement are acknowledged by both parties, so a survey should be carried out. Other POBs commented that they currently prepare a schedule of dilapidations to assess statutory compliance to be completed in an agreed time or permit the tenant to carry out the dilapidations accruing on its previous tied lease over the term (or part of the term) of the MRO lease. One POB commented on the need for a reasonable and proportionate balance between facilitating the tenant to exercise their Code rights and meeting the requirements on the landlord in terms of public safety and protection of the premises in the longer term.
5. Many respondents considered the handling of pub dilapidations should be flexible, noting the extent of any dilapidations, which could vary greatly in relation to the condition of the property and that there should be consideration given to the potential length of the MRO lease.
6. It was felt by some respondents that to ensure good estate management, a landlord should be satisfied that the property is in a safe, legal and compliant state before proceeding to enter into another contractual arrangement in the form of a MRO agreement. With this in mind, some respondents felt the option should be there to make it a condition of completion, where there were serious compliance issues that needed to be remedied, irrespective of the type of agreement being entered into.
7. Comments on the approach to statutory compliance in respect of the MRO process were mixed. Some respondents considered statutory compliance should not be a condition of entry into the MRO process on the basis it is a completely separate matter and should be dealt with as such. However, others considered it reasonable for a responsible landlord to require statutory compliance ahead of a new agreement. A number of respondents submitted that there is a difference between repairs/dilapidations and statutory compliance liabilities and that these differences should be acknowledged. They noted the legal requirements around statutory compliance, and raised concerns around potential criminal liability issues if a tenancy were granted on a property that was not compliant with statute. It was highlighted by some that tenants should always have up to date compliance documentation as part of

their tenancy responsibilities. One POB said it was not aware of any recent challenge by a tied tenant to the requirement for statutory compliance.

Response

8. It is relevant that the existing tied tenancy will contain rights for a landlord to deal with repairs and dilapidations, and the landlord will also have rights under any new MRO tenancy that may be entered into. The PCA considers guidance in this area will assist in the consistent application of the Pubs Code across all POBs. Guidance on this issue is intended to be consistent with the principle that the Pubs Code supports the expectation that as a matter of good estate management the condition of the premises will be managed effectively throughout the tied tenancy and it makes provision for a schedule of condition to be updated and reviewed at appropriate points in the tenancy. The PCA recognises that there are different kinds of repairs and/or compliance issues that may be relevant.
9. The PCA is minded to proceed with guidance on the basis that if a POB requires completion of terminal dilapidations as a condition of entering into a MRO tenancy the PCA may consider that this is unreasonable, unless there is a compelling reason for the requirement. For example, it would not be expected that a POB propose or enter into any arrangement where there is a real risk that it may result in a breach of the criminal law.

Transparency and fair dealing with decisions in respect of the Landlord and Tenant Act 1954 in connection with the MRO process

1. The consultation sought views on increasing transparency around the statutory renewal process for pub leases where this interacts with the MRO process, including requiring POBs to keep a written, contemporaneous, record of when a decision concerning opposing renewal of a tied tenancy is taken and making it clear that a business development manager should not give the tied tenant information which is not consistent with the POB's recorded decision on whether to oppose a lease renewal (where all such conversations are to be recorded in accordance with Code duties).
2. Some respondents reported concerns from tied tenants that attempting to exercise Code rights would ruin the relationship between them and the POB, that they would lose support from the POB and have detrimental terms imposed upon them. Responses reported a concern about POBs potentially opposing tenancy renewal if tied tenants sought the MRO option. One

respondent considered that the perception that it is a reaction to MRO is damaging to the individual tied tenant and also to confidence of all other tenants in requesting MRO.

3. Overall, the response from industry representative bodies was that greater transparency would be a positive step. However, there was concern that such requirements would not in themselves instil confidence in tied tenants given the interaction between the Landlord and Tenant Act 1954 (the 1954 Act) and the Code. Some respondents were concerned that POBs may simply record decisions to take back pubs as a matter of course in each case, in order to show a paper trail and to evidence intention, which would be detrimental for all tied tenants.
4. One respondent considered that the Parliament knowingly and deliberately did not attempt to alter how the 1954 Act applied to regulated pub tenancies via the Code. It was noted that POBs are entitled to change their operating models in response to the Code (for example by taking more pubs into management), but as with all material conversations between tied tenants and POBs, a full record of discussions about such action must be accurately kept.
5. Some respondents questioned whether a requirement to record decision-making around the decision to oppose a lease renewal was necessary (because the burden of proof is placed on the landlord in the 1954 Act process to demonstrate firm intentions and to satisfy the Court that those intentions are genuine) or whether it was within the PCA's powers to require such records to be kept or shared.
6. One POB considered that a requirement to create a record of decision-making would be an unreasonable burden and commented that it is too simplistic to say that the decision to oppose renewal in order to operate a pub under management is made on a particular date so any evidence would necessarily be lengthy and contain many documents. In contrast, at least one POB said that they already keep a written contemporaneous record of when decisions around opposing renewals of a tied tenancy are made. Another noted that POBs should be maintaining documentary evidence of decision-making in this area anyway in anticipation of any application to the Court, as in order to resist a lease renewal they may need to prove the relevant ground through reliance upon detailed evidence before the County Court.

Response

7. The PCA recognises that the 1954 Act permits a landlord to oppose a lease renewal on a number of grounds, and that the Code does not stop a POB from exercising those rights. The PCA wishes to give confidence to tied tenants in exercising their rights under the Code, without concerns of being subjected to detriment as a result. As such the PCA encourages

transparency in POB's dealings with their tied tenants in order to allay such fears and increase tenant confidence.

8. The Code prohibits a POB from subjecting a tied tenant to any detriment because they exercise or attempt to exercise any right under the Code. A suspected breach of this requirement may be the subject of an arbitration or of regulatory action by the PCA. The PCA expects that POBs will keep full and accurate records of their decision-making around Code issues and produce such records when requested by the PCA as part of the exercise of the PCA's functions. The PCA is minded to consider the issue of guidance emphasising that in any investigation or arbitration which involves allegations of a POB subjecting a tied tenant to detriment on the ground that they exercised or attempted to exercise a Code right, the PCA expects the POB to be able to evidence its position and the reasons for decisions having been made which are compliant with the Code. The PCA would have regard to a lack of contemporaneous evidence of a decision when determining a Code breach.

MRO rent – considering disregards for tenant's improvements

1. The consultation sought views on a requirement that a POB provide information to a tied tenant, and to the Independent Assessor (IA) if relevant, about its position in respect of tenants' improvements in connection with the MRO rent. The consultation sought views on whether this would assist in tied tenant understanding and in reducing undue delay and potential uncertainty in the MRO process.
2. The majority of respondents felt that requiring a POB to be clear as to how it is treating tenants' improvements in any MRO rent proposal would be positive and assist in tenant understanding. Respondents generally agreed that POBs should provide this information to the IA. It was commented that this would provide more information that the tied tenant can use to assess the offer, and potentially speed up the MRO process at both the initial consideration and IA stage (where needed).
3. There was the suggestion made that it should also be made clear to the tied tenant by the POB why the information is being presented. Some considered that clarity would be most useful at the stage that any improvements were agreed and not once the investment had been made, as this may lead to uncertainty as to how the spend would be treated by the POB.

4. Some respondents said this information was already provided, with some POBs already informing tenants at the start of the process how they will treat improvements and making the position clear to the IA. It was questioned whether this is a current and large-scale issue for tenants. Some considered that any regulatory intervention in this area is restrained by the absence of express inclusion of any assumption in s.43(10) of the 2015 Act that improvements carried out by the tenant are to be disregarded when establishing the “Market Rent”.
5. There appeared to be wide support for some amendment to the assumptions involved in the assessment of MRO “Market Rent” set out in s.43(10)(a) of the 2015 Act to potentially include disregarding tenants’ improvements.

Response

6. The PCA is aware that information in this area is being provided by some POBs. However, there is benefit to tied tenants in consistency across the industry. A tied tenant having an informed understanding of whether and how a POB has taken into account the value of any tenant’s improvements is likely to aid transparency in the process and assist tied tenants in understanding how the proposal is calculated and better compare the MRO option with a tied deal.
7. Requiring that clear information is provided to the tied tenant as part of the MRO rent proposal and providing guidance on information to be provided to IAs is not restrained by the wording in s.43(10) of the 2015 Act and is within the PCA’s powers.
8. The PCA intends to exercise her power to issue statutory guidance specifying information that a POB should provide to a tied tenant with the MRO rent proposal. The PCA also intends to issue statutory guidance about information the PCA expects in most cases will likely be information relevant to the IA’s rent determination in this area and as such should be provided to the IA.