



Pubs Code and Pubs Code Adjudicator: statutory review

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-statutory-review

The closing date for responses is 22 July 2019.

Please return completed forms to:

Pubs Code Review Team
Department for Business, Energy and Industrial Strategy
1st Floor, Orchard 3, 1 Victoria Street, London SW1H 0ET

Email: PCAreview@beis.gov.uk

Personal / Confidential information

Please be aware that we intend to publish all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential

Comments: [Click here to enter text.](#)

About You

[Redacted]

	Respondent type
<input checked="" type="checkbox"/>	Tied pub tenants
<input type="checkbox"/>	Non-tied tenants (please indicate, if you have previously been a tied tenant and when)
<input type="checkbox"/>	Pub-owning businesses with 500 or more tied pubs in England and Wales
<input type="checkbox"/>	Other pub owning businesses (please describe, including number of tied pubs in England and Wales)
<input checked="" type="checkbox"/>	Tenant representative group
<input type="checkbox"/>	Trade associations
<input type="checkbox"/>	Consumer group
<input type="checkbox"/>	Business representative organisation/trade body
<input type="checkbox"/>	Charity or social enterprise
<input type="checkbox"/>	Individual
<input type="checkbox"/>	Legal representative
<input type="checkbox"/>	Consultant/adviser
<input type="checkbox"/>	Trade union or staff association
<input type="checkbox"/>	Surveyors
<input type="checkbox"/>	Other (please describe)

Questions

Part A: The Pubs Code

Question 1

How well do you think the Pubs Code has operated between 21 July 2016 and 31 March 2019? What evidence do you have to support your view?

Comments: The Pubs Code has operated in a highly ineffective way due to Pubco obstruction and a highly ineffective Pubs Code Adjudicator. My evidence is as follows: personal experience as a [Redacted] tied tenant having attempted MRO, faced an unreasonable position from [Redacted] and made a subsequent Regulation 50 complaint which was dealt with appallingly by the PCA; hearing about other personal experiences from tenants, and a significant number of lawyers and representatives acting for tenants; the PCA's own "Verification" report published in summer 2017; Parliamentary scrutiny and discussions; the low MRO completion rate; the very lengthy delays to arbitrations; the complexity of the arbitrations that the PCA has published; the loopholes and lack of comprehensive coverage; the significant errors of implementation leading to the PCA removing a Statutory Advice Note after it had been in place for two years. The errors on the Advice Note were highlighted by my case and [Redacted] allowing [Redacted] to thwart my MRO attempt – still the matter is not fully resolved over two years later.

Question 2

To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? What evidence do you have to support your view?

Comments: The Pubs Code itself is consistent with these principles insofar as it extends. The reasons why it was introduced remain extant: to protect tenants from these large companies, to protect community pubs and to open the market to smaller brewers and suppliers. The need to address these issues is amplified greatly by the obstructive Pubco response to the implementation of these principles. Pubcos have clearly evidenced themselves that they cannot be left, without Regulation, to treat their tenants fairly and lawfully, to protect community pubs and to open up the market to smaller brewers and suppliers. It is the omissions and loopholes being exploited by Pubcos and a highly ineffective Pubs Code Adjudicator that has undermined the effectiveness of the Pubs Code. My evidence sources are as question 1. My suggestions for improvement are provided at question 4.

Question 3

To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie. What evidence do you have to support your view?

Comments: As for question 2, I consider that the Pubs Code is consistent with the no worse off principle insofar as it extends. However, the limitations of the Code, Pubco obstruction and a highly ineffective Pubs Code

Adjudicator has impacted upon the achievability of this principle. The no worse off principle needs more specific provision to work effectively:- (1) the backdating and MRO vehicle issues need to be fully prescribed so Pubcos have less scope and incentive to use obstructive and delaying tactics; (2) tenants should be given the option of taking issues of contention direct to a Court instead of the PCA; (3) the tied and MRO rent valuation process needs reviewed and, on a case basis, should be subject to a wider pool of valuers, and review or appeal through a PCA arbitration or preferably a Court.

Question 4

What, if anything, do you think needs to change to make the Pubs Code operate more effectively and/or better support the principles?

Comments: There are a number of things that need to change: (1) tenants should not be restricted only to the option of a PCA arbitration for dispute resolution. The service has been slow, has not delivered definitive resolutions or precedents of the type that a Court would, the current Pub's Code Adjudicator has been proven as unqualified to Judge significant legal issues with the PCA adopting a fundamentally incorrect legal position on rent dispute clauses prior to the withdrawal of the PCA Statutory Advice Note in place from July 2017 to June 2019. That error impacted adversely upon tenants in relation to the PCA's consideration of the choice of MRO vehicle at mid-term MRO applications. Further, the PCA process can, in any case, be appealed to a Court at significant further time and cost which can render it pointless especially if a POB appeals against a tenant of limited funds and whilst financial backdating of MRO is not assured. Few individual tenants can take those risks. It is these deficiencies - delays and errors to dispute resolution and uncertainty on backdating - that, in a nutshell, is how the

Pubcos and the PCA have rendered the current process to be ineffective. The PCA Regulator function should be separated from individual case dispute resolution and tenants should have the option to take any issue to a properly organised fast-track, low cost PCA arbitration or, if they prefer, to go direct to a Court as they could with other contract disputes. This would provide tenants with much more weight to resolve obvious obstructions and enable precedent to be more definitively established. The PCA as Regulator should concentrate on producing legally correct and specific Statutory Advice and Guidance to make the implementation of the Code principles easier; they should be involved in protecting Pubs more strategically; and they should be investigating significant issues of unfair business practice. The PCA should also focus on building relations with all stakeholders. Relations between tenant representatives groups and the PCA are appalling. I have personal experience of a PCA not willing to engage constructively or at all which resulted in the significant errors on the now withdrawn Advice Note being in place for two years; (2) backdating arrangements need to be prescribed in the Pubs Code to dis-incentivise Pubcos from obstruction and delay - these provisions exist in rent review clauses in most Tied agreements and commercial leases so it is an alien concept not to have such provision so that obstruction and delay are not manufactured to the benefit of one party; (3) Pubcos should not be able to propose the same unreasonable terms in case after case – unless otherwise agreed by both parties a simple DOV should be the standard MRO vehicle for mid-term rent reviews or MRO triggers. Lease renewal terms should be agreed by a Court as part of the Landlord and Tenant Act process - it should not be a separate PCA arbitration process. Statutory Advice and Guidance should be plentiful and specific. (4) the rent review process needs to be overhauled. The pool of pub valuers is too small and there is evidence of conflicted interests; the understanding and implementation of the process is also inconsistent. There needs to be an evidence-based rent review/appeal preferably to a Court as there is at lease renewal under the Landlord and Tenant Act. Consideration should be given to a break clause without penalty for a tenant in circumstances where they consider that

payment of a new rent is likely to be unachievable. (5) the coverage of the Pubs Code needs to be considered alongside the wider strategy of pub protection - whether MRO should be available on demand to ensure the fair implementation of the no worse off principle across the industry; whether sub-500 POBs should comply; whether more protection should be offered to tenants at lease renewal; whether the preservation of pubs as tenanted entities, as opposed to large corporate managed groups, should be a priority for the benefit of communities and the smaller industry brewers and suppliers.

Part B: The Pubs Code Adjudicator

Question 5

How effective do you think the Pubs Code Adjudicator has been between 2 May 2016 to 31 March 2019 in enforcing the Pubs Code?

Please comment in particular on:

a) Whether the PCA has sufficient and proper powers to enforce the Code effectively.

Comments: The PCA should be best placed to advise on the sufficiency of their powers. The PCA is already required to report to the Secretary of State on significant issues of unfair business practice. I consider that it says everything about the PCA that there are so many significant issues of unfair business practice and that they have not investigated or reported anything to the SoS. The PCA should not have exclusive power to resolve Pubs Code disputes [Redacted]. Tenants should have the option to take a dispute direct to a Court. This would resolve a lot of issues more quickly and definitively.

b) How effective the PCA has been in exercising his powers. What has been done well and what do you think could be done differently.

Comments: The only thing that appears to have been done well by the PCA is the Statutory Guidance on the saleable contents of a barrel of beer. The implementation of that has, however, still to be tested. This was an issue raised by a Tenant representative and was firstly rejected by the PCA. The PCA has failed in every other respect as listed below.

c) How effective the PCA has been in enforcing the Code. In particular, how effective has the PCA been in undertaking the following:

- giving advice and guidance;
- investigating non-compliance with the Code;

- **where non-compliance is found, requiring publication of information, imposing financial penalties or making enforceable recommendations; and**
- **arbitrating disputes under the Code.**

Comments: The PCA has been highly ineffective measured by: their own analysis of significant problems and poor MRO completion rates; my personal experience of using their service and hearing the experiences of other Tied tenants and their representatives; the PCA's substantive errors on the now withdrawn Statutory Advice Note on Rent Dispute Clauses and a lack of specific and unambiguous Statutory Advice and Guidance more generally; the complexity of their arbitrations; the slow speed of their consideration and decisions; their failure to investigate any of the major issues that have arisen time and time again; their failure to address obvious Pubco obstruction in case after case; their appalling relationship with tenant representatives. Indeed, I would go as far to say that there is substantial evidence of irregularity which should be investigated and I can provide evidence of this. In terms of the specific areas mentioned: (a) giving advice and guidance - appallingly bad. The Statutory Advice on Rent Dispute Clauses had to be withdrawn 2 years after implementation because it was completely legally incorrect affecting thousands of tenants and the PCA has not even so much as acknowledged the scale of the problem that has caused. The Advice on MRO proposals is incomplete and highly ambiguous. The preparation of Statutory Advice and Guidance should have been the key area of priority for the PCA to provide clarity to the industry and to inform dispute resolution for this new legislation. (b) investigating non-compliance with the Code - no investigations have taken place whilst significant problems have been multiple and evidenced aplenty. (c) where non-compliance is found, requiring publication of information, imposing financial penalties or making enforceable recommendations - no investigations have taken place despite fundamental problems identified and evidenced; and (d) arbitrating disputes under the Code - the PCA Award on my own dispute was legally incorrect and led to the withdrawal of the PCA Advice Note on Rent Dispute Clauses following significant representations. No

redress has been proposed by the PCA so it looks as though the matter will end up in Court. Decisions are generally too slow. Substantive issues of principle are being addressed time and time again in individual arbitrations because there is virtually no meaningful Statutory Advice or Guidance or precedents. Tenants can go through years of arbitration for the PCA simply to conclude that the POB MRO proposal is non-compliant and the POB must produce another one which requires further arbitration – there is no definitive resolution of the dispute to enable parties to move on in the process. Whilst it is low cost for tenants to apply for a PCA Arbitration (£200), tenants require £10s of thousands for legal fees or expert knowledge because the PCA seem not to have a definitive position on anything.

Question 6

Do you think the regulations relating to costs, fees and financial penalties should be amended? If so, how and why?

Comments: I do not feel suitably aware of custom and practice in this area to comment.

Part C: Pubs Code Regulations

Question 7

There are two sets of regulations that relate to the Pubs Code: The Pubs Code etc Regulations 2016¹ and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016².

You may have commented on some of these provisions in response to questions in parts A and B of this consultation³, but please provide any additional views on the regulations. If you think changes are needed to the regulations, please explain why and how you think they should be changed.

Comments: My comments are above. I do not feel suitably aware of custom and practice on fees, costs and penalties to comment on this aspect.

¹ <https://www.legislation.gov.uk/uksi/2016/790/contents/made>

² <https://www.legislation.gov.uk/uksi/2016/802/contents/made>

³ Some elements of the Regulations are covered by review provisions in the SBEE Act 2015, for example, Parts 2 to 10 of the Pubs Code etc Regulations 2016 make up the Pubs Code and must be reviewed under s.46 review provision in the SBEE Act. The review of the Adjudicator set out in s.65 of the SBEE Act states that the review may consider whether it would be desirable to amend regulations about costs, fees and financial penalties.

Part D: Impact Assessment and other information

Question 8

The review will consider the key assumptions made in the Impact Assessments⁴ which were published alongside the legislation and regulations. This will include wider impacts, non-monetised impacts or unintended consequences of the changes made. Specifically, we plan to consider any related impact on:

- **costs to businesses and potential pub closures;**
- **redistribution of income from pub companies to tenants;**
- **changes in industry structure or ownership status; and**
- **wider industry trends such as employment and investment.**

We welcome any evidence to support the analysis of these areas, or if there are any other elements of the Impact Assessments you think we should consider revisiting as part of this review.

Comments: In my view the core impact is upon tenants, communities and the beer and associated market (particularly small suppliers) of not having any Regulation upon Pubcos activities with regard to the tie. It is a closed market leading to competition issues, and abuse of individual tenants and consumers. Self-regulation failed leading to the Pubs Code. In this respect, the Pubcos obstruction to this legislation has, in my view, made the case for its necessity as Pubcos will not act lawfully and fairly or in the interests of the market and communities of their own accord or even in the hands of a weak and ineffective Pubs Code Adjudicator.

⁴ <https://www.parliament.uk/documents/impact-assessments/IA15-002.pdf>
<https://www.legislation.gov.uk/ukdsi/2016/9780111146330/impacts>
<https://www.legislation.gov.uk/ukdsi/2016/9780111146323/impacts>

Part E: Other comments

Question 9

Please add any points that you feel you have not been able to make in response to the earlier questions.

Comments: Nothing to add.

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Nothing to add.