



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.

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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

Name: [Redacted]

Organisation (if applicable): Punch Tenant Network

Address: [Redacted]

	Respondent type
<input 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: I would have liked to be complimentary but regrettably I feel on balance an opportunity has been lost. Very few of the injustices that caused the creation of the Pubs Code have been addressed not because the regulations were not in place but one is forced to the conclusion that there was a lack of will either in the appointed Adjudicator or in his political masters.

Regrettably there has been insufficient communication between the Tenants with grievances and the PCA. The initial obstacle was in the ill-conceived appointment of a senior Pub related surveyor [Redacted]. Further it became clear that the PCA did not have the skills required to achieve what was necessary, the skills he has are very much rooted in the arbitration field which involves solicitation of views and achieving a "middle way". It was not appreciated that in many cases there is no middle way, no compromise to arrive at – what is required is someone who is decisive and makes decisions. There is no problem with consulting but the pace of decision making, and the lack of clear guidance is a lost opportunity.

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 makes the point that the overarching principle is that all dealings should be both fair and lawful and that is just as it should be.

But the difficulty is in getting any action on enforcement.

it is impossible to ask the PCA if a particular policy or action is in general terms either fair or lawful as the PCA will not comment except on a "Case by case" basis within a specific and confidential referral.

I was expecting there to be energetic and rapid action to give guidance on a number of the practises of the Pub Companies but this was not forthcoming. The late start for the code which was implemented after a large number of unconsulted changes significantly disadvantaged many TPTs who might have been able to apply for their rights earlier. That this was a breach of the Secretary of States Statutory responsibility to deliver the code on time was disappointing.

After an initial period of confusion it soon became obvious that the Adjudicator intended to focus on confidential arbitration cases and not to engage in matters of policy.

An initial consultation on his intentions and criteria for investigations has resulted in him actually achieving no investigations at all in the entire review period. I regard this as

unfortunate as individual confidential arbitrations do little to rebalance asymmetry of knowledge and arguably achieves the opposite.

There was no focus on policy matters nor investigations of any of the matters for which there was clear evidence.

The apparent initial policy was to ignore all the evidence that had been collated in the most extensive consultations in the history of parliament and start with a blank sheet.

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: We believe that the principle of “no worse off” has been corrupted and on a couple of occasions we have noted that the PCA has commuted it into “A tenant achieving MRO should be no worse off than if he remained tied” this appeared on the PCS website (<https://www.gov.uk/government/news/pubs-code-adjudicator-publishes-statutory-advice-on-mro-tenancy-terms>) and in a radio interview that the PCA gave (<https://www.morningadvertiser.co.uk/Article/2017/03/14/Newby-s-radio-comments-on-PCA-role-spark-anger>). While one does not want to read too much into a slip of the tongue it seems to be more than this.

There is limited evidence that the PCA fully understands the principle [Redacted].

In retrospect it is highly regrettable that the concept of the Parallel rent assessment was removed from the Pubs Code on the basis that it was unnecessary due to the introduction of the independent Rent assessment.

The “no worse off principle” focusses on the terms of trade and the differential in transfer price from wholesaler and operator when compared to rent paid and the cost of “commercial and financial advantages” that may or may not exist in the arrangement. What the parallel rent assessment did was examine the outcome of a given quantum of product sales under the tied or the free of tie trading terms.

What seems to be happening now is that a wholly separate free of tie rent assessment is offered to compare with the tied system and in numerous cases there is an assumption that the actual quantum of trade increases when a pub goes free of tie which is patently wrong.

I am lucky enough to have experience of both being tied and being free of tie in the same pub as a result of my POB selling my pub to a property developer who immediately sold it to me. In my experience as a tied tenant I was significantly worse off than I now am as a free of tie tenant and the difference is of the order of over £50,000 per year, only part of this reflects a property yield – there can be no doubt that the tied model yields significantly more than a market property yield without very much being contributed to justify the surplus.

If the Pubs code delivered a true Market rent only agreement by simply severing the tied

terms and nothing else then an independent open market rent assessment would move the terms significantly toward the tenant in terms of profit. It seems clear to me that this fact is well understood by the PoBs which is why they are making it as difficult as possible for tenants to access their rights.

The entire battle that led up to the Pubs Code was based on a huge body of evidence that said the PoBs were unfairly exploiting their position of power and they are fighting hard to retain the right to continue to do so.

It is a requirement that the PCA should be able to recognise this [Redacted].

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: I cannot help but conclude that there needs to be more certainty. Either a TPT has a working relationship with a PoB where the tenant is happy to exchange some business degrees of freedom or there is not. When there is not then the TPT should be free to request to sever the tie at any time without specific trigger and this should result in a parallel rent assessment where a TPT can clearly see how his business would fare under each arrangement. He should then be in a position to make a decision. The responsibility of the POB should be to encourage the TPT to remain tied because of the benefits doing so brings but this should not be done by making the implications of breaking the tie excessively onerous. When PoBs discover that their responsibility is to ensure their TPTs are both happy and profitable then accepting a purchasing obligation in return for positive value is quite acceptable

The pubs code does not seem to acknowledge that it exists as a consequence of serial abuse of a privilege and the solution to the issue lies in PoBs truly acknowledging their responsibility to contribute to a partnership instead of enforcing onerous terms.

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: I was of the view originally that a suitably motivated PCA with the right attitude would be able to utilise his powers to achieve good progress. However, I am now less certain. I was surprised to hear they the PCA and His deputy in formed a PAS delegation that the PCA has no powers to adjudicate, but only to arbitrate.

This came as a shock, because it implies no sense of proactivity. We cannot approach the adjudicator to ask for an opinion on the fairness or lawfulness of a particular action – he only prepared to arbitrate [Redacted] in individual cases – this is shockingly wasteful as a clear statement of what is or in not fair and lawful would inform most situations but if there were exceptional circumstances then the adjudicator may be approached to make a judgement.

[Redacted]

An adjudicator who is prepared to get out and mix it a bit would be very welcome and would be a breath of fresh air to a very stifled industry.

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:

I would love to be able to report that the PCA has achieved something well and if I close my eyes and ignore the 2.8 years it took to achieve the guidance on sediment and waste I can report that the long delayed guidance is very much what we originally requested and at last does the required job in addressing [Redacted] that has plagued our industry – I note that the guidance only applies to the regulated PoBs and the same [Redacted] continues in the unregulated sector unabated.

Having said that, there is a new problem which is that every single Pub rental offer currently being advertised on regulated POB websites with a view to recruiting new TPTs do not comply with the PCA guidance despite the fact that the PoBs have had notice since last November exactly what the PCA was proposing to implement.

I see no sign of the PCA making any attempt to exercise his powers in rectifying this clearly unfair and unlawful business practise.

In the particular case of the Punch Tenant Network became aware of this [Redacted] being perpetrated throughout the industry with regard to beer duty exemption on undrinkable cask ale and the regulatory requirements to communicate information clearly to “Customers, for example the publican” so that those parties were made fully aware of the drinkable element of the containers supplied so that the TPT can make sensible business decisions on pricing and their expectations of revenue.

This matter was of such significance that we immediately engaged with Trading standards and later with HMRC [Redacted].

In order to preserve evidence PTN made a number of submissions to the SBEE act committee stage broadly identifying that the only way to ensure fairness and lawfulness in matters such as these was to have an engaged and committed Adjudicator empowered to investigate and intervene to clarify matters of policy such as these.

these submissions can be found here:

<https://publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/memo/sb48.htm>

<https://publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/memo/sb73.htm>

<https://publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/memo/sb72.htm>

In the first submission it was made clear that the only way that this kind of issue could be resolved would be through the intervention of a committed and independent adjudicator prepared to work with the industry to resolve issues such as these that are widespread through the industry.

PTN had engaged with the Industry and their Lobbying organisation the BBPA in 2015 and was making progress in early 2016 before the PCA office was commenced operations. Some significant progress had begun as you can see in the following reports in the Morning Advertiser.

14/01/2016 <https://www.morningadvertiser.co.uk/Article/2016/01/14/Profit-fears-over-undrinkable-beer-from-the-Punch-Tenant-Network>

20/01/2016 <https://www.morningadvertiser.co.uk/Article/2016/01/20/Industry-reacts-to-profit-fears-over-undrinkable-beer>

04/03/2016 <https://www.morningadvertiser.co.uk/Article/2016/03/04/Undrinkable-beer-spat-Enterprise-releases-information-about-saleable-pints>

07/03/2016 <https://www.morningadvertiser.co.uk/Article/2016/03/07/Undrinkable-beer-fears-Punch-confirms-it-will-follow-Enterprise-s-lead>

After the initial declarations and with the Brewery PoBs in a serious quandary as to how to proceed as any unilateral change might be an admission of culpability the whole movement toward resolution of this issue stopped awaiting the arrival of the PCA who would lay down how things were to be dealt with.

The delay in the start of the Adjudicator was a problem but On 17th August 2016 PTN first engaged with the PCA office having allowed a few weeks of the initial confusion to settle and we raised a concern that we felt POBs were going to seek to avoid compliance with Schedule 2 5c of the code. Our approach was made on the assumption, now possibly proved to be erroneous that the PCA and his staff had studied the status quo ante and the reasons and motivations as to why the office was created and would therefore be in some way motivated to intervene with advice and, where necessary, guidance when the well documented practises of the PoBs were reported.

Our expectation was that given his wide knowledge of the industry and his deep engagement with PoBs and TPTs the PCA would welcome an initial project such as this one where the lawfulness and fairness of the situation were clear and the industry had already begun to make remedial moves. It should have been a huge opportunity for the PCA office to get off to a good start with a big win based on existing law and regulations. The mailchain¹. Attached documents the initial exchanges in August in 2016 where PTN provided the PCA office with a dossier full of evidence, confirmed that the PCA office has accessed it and we awaited further response based on their evaluation of the dossier. It was very surprising when around December at the same time as [Redacted] was announced it seems that the PCA had determined that nothing in the dossier represented any unfairness or unlawfulness.

This was a major surprise but we could not dwell upon it as [Redacted] was now urgent and it was an immediate concern to PTN members as to what the extent of the “brewery stocking requirement” might be and whether the wholesale transfer of pubs from one POB to another with a totally different business model constituted a trigger under the code. We got no response from the PCA but were forced to appeal to the minister for clarification to which we got no response. ([Redacted]) Eventually the PCA responded to the effect that the matter would be dealt with on a “case by case” basis which was no help to anyone – we are totally unsurprised that the PCA has now, almost 3 years later announced an enquiry into whether Heineken were in breach of the Pubs Code by attempting to impose excessive stocking conditions on tenants. It is a great pity that this enquiry is necessary after many tenants have had their businesses disrupted and have incurred huge costs where some proactive engagement at the outset would have laid down clear ground rules which could have been helpful to all.

after the Heineken matter came to a stop we had reports from TPTs who had engaged with the PCA at various roadshow events and had asked him about the cask ale sediment issue and the PCA had said that he “was aware of it and was looking into it”. We misinterpreted this to mean that “The PCA was aware of the problem and was looking into it” not that he had looked into it and had decided it was not an issue.

We returned to the issue in December 2017 hoping that the matter was approaching some resolution to be told that this was not the case but a meeting was suggested.

As we had noted the appointment of a deputy to the Pubs Code Adjudicator we suggested that we would be willing to meet with the deputy – this meeting was rejected and a meeting with officials offered.

PTN finally agreed to meet with the deputy adjudicator and would not object if the PCA himself was in attendance.

The deputy adjudicator was provided with the exact same archive of evidence as had been provided to the PCA initially prior to the meeting on February 1st 2018.

At the meeting the Deputy Adjudicator had no difficulty in understanding the issue and embarked on a process which did not constitute an “Official Investigation” but which after a glacial consultation process resulted in Binding Guidance effective on July 1st 2019. This final outcome some 1048 days after we first formally brought the matter to the attention of the PCA is a source of some mixed satisfaction as it the terms of the guidance which is almost exactly what we asked for at the outset.

However it is a source of some dismay that the wholly unnecessary 2.8 year delay means that every single rent assessment that has been concluded during the entire period of the PCA’s existence is non-compliant with his own legally binding guidance and as his guidance reflects only existing legislation excluding the pubs code.

One is therefore forced to conclude that the performance of the PCA has been woefully inadequate in the matter of ensuring fair and lawful dealing for TPTs and a very large number of TPTs are now suffering with unfair and unlawful trading terms brought about by his failure to act expeditiously on his watch.

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 given advice that he has been forced to withdraw on the basis that it was legally flawed and in the process hundreds of tenants have been unable to or discouraged from accessing their rights.

As far as I can tell the PCA has not yet investigated anything at all and I note that he has recently returned a further £800,000 of funds earmarked for investigations to PoBs as he could not find anything to investigate,

as he has not investigated ANYTHING any discovery of non compliance has been as a result of a referral, no enforceable recommendations have been made and no financial penalties imposed.

I understand the PCA has also failed to discern any unfair business practices placing him under an obligation to report to the secretary of state.

Considering the wealth of all of these matters that exist it is astonishing how nothing has resulted.

I understand the PCA has specialised in arbitrating but his arbitrations have been tortuous and lacking in outcomes. [Redacted]

Question 6

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

Comments: I am not sure if the attempt to provide a low cost service works as one gets what one pays for and a highly formal process is very expensive and as it can be appealed to the high court anyway it seems a little pointless.

It seems to me that much more proactivity on setting a framework of what is allowed and not allowed would help in reducing the need for disputes.

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: 1) a serious review of the skills required to do this job is needed. It is by its nature a very challenging role [Redacted].

2) I do not think there would be overmuch harm to move to an MRO on demand model without triggers. The triggers were only there to avoid wholesale take-up but now there will be more circumspection.

Even if not the less well equipped will rush headlong into ill advised action which will optimise the cycle. If a TPT is unsuccessful as a free of tie tenant then it is a much less complicated managed exit.

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: The parallel rent assessment should be brought back.

The impact assessment did not factor in a PCA who would be both incapable but also inactive,

There needs to be a full re-examination of the impact of the tied model on the economics of the industry. It cannot be right or good for the industry that a dry broker such as a non brewing POB can command a duty exclusive margin in the high 60% which means that excluding duty the PoB books gross profits approaching three times the revenue of the brewer. This is bad for the industry as it results in excessive disguised profits being taken out of the industry by investment companies who are much more responsive and astute than any government department. The pub industry already pays around 33% of turnover direct to government and in the tied sector another tranche of value is abstracted by investment companies seeking a guaranteed profit secured by the tie. If the tie were broken there would be less incentive for the big hedge fund based trades [Redacted] and more cash would remain in the industry which would offer a better return to breweries and pub operators alike.

The present situation is very unhealthy and little will change in the industry while it continues.

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

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.

I feel that it is a great shame that the vocal agents of change in this process are frequently marginalised and demeaned by the PCA and his office.

It is more than a little irritating to be constantly referred to as one of a “few loud voices” implying that if not for our interventions the industry would be in good shape.

The “Few loud voices” are without exception responsible for anything that has happened in this industry to benefit tied tenants. There has been no significant input from bodies referred to as “Tenants Representatives” who have for the past decade been happy to occupy positions of influence in the industry making an imperceptible impact on the interests of the tenants they pretend to represent.

It would be a significant change if the PCA were to reach out to the source from which almost all pressure for reform in the industry has come and tried to harness the energy that exists. For some reason these parties are denigrated and regarded as of no account because they are volunteers who do not work on a professional basis.

Very little reform would have been achieved in this industry without the intervention of these ad hoc individuals and groupings and just because they do not conform to the frame of reference of the PCA does not detract from their influence and potential to achieve real benefits in this beleaguered industry.