Department for Business, Energy & Industrial Strategy

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 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: Some of the awards alluded to in this response have not been published-there is no good reason for them not to have been published by now, the awards were made months ago, years in some cases, we are constantly told they are due to be published by the PCA, we leave it up to the BEIS to decide what is or is not confidential as by the time the report is finalised they may have been published, some of the award details have been

supplied by our members who were using PAS as advisors / advocates in matters related to PubsCode or MRO.

About You

Name:
Organisation (if applicable): Pubs Advisory Service Ltd
Address: [Redacted]

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

The code was started late by the BEIS in July 2019, it should have been in force by 26th March 2016 (s42 (1) SBEE Act 2015) the delay to the code was unlawful and many tenants were denied an opportunity to use their rights as the statutory deadline was broken. This unlawful delay also pushed forward the pubs code review till 2019 when a review could have happened a year earlier in 2018 if the code had been delivered within the time set by the primary legislation. We can only assume that the delay was deliberate act by the then Minister as it was unlawful and no good reason was ever supplied.

There was no test or sandbox phase for users to try out the code without cost i.e. with dummy agreements and arbitration. We were told by officials and the minister that there was no need for testing because if the code was ever found not to be delivering on the principles, it could be changed at any time under (s47 SBEE Act 2015).

The code had numerous errors which were spotted by many parties early on in 2016 and tenant representatives also supplied detailed reports of "unfair business practices". Despite these inconsistencies and damaging practices undermining the code principles, the PCA refused to use any of its mandatory powers to refer matters to the secretary of state, this is unlawful behaviour by the regulator which damaged reform and upheld the status quo in favour of the pub companies.

Tenants had problems with patently absurd timings in which they have to file a complaint before being allowed adequate time to negotiate, this would not be a problem if the right to refer disputes was based on the principle of reaching “deadlock” but it remains the case that a Tied Pub Tenant has just 14 days to preserve their position after giving the pub company 28 days notice. These inconsistencies in the code are something the PCA can easily refer to the BEIS Minister and have amended, but only if they are of a mind to do so. However, it seems after years of noticing such difficulties with the code and putting out “feelers” they inexplicably failed to take up the opportunity to correct them and instead pointlessly point them out when challenged. It was clear to all parties early on the 14 days deadline was going to cause issues but tenants gave up telling the PCA as they do nothing about it. The PCA seemingly take a perverse delight in watching tenants struggle to deal with a defective process that is obvious to all. The insulting element now is the PCA themselves are telling tenants that any new referral can be put on a hold and stayed whilst you continue to negotiate, this manual workaround is superfluous.

It is for reasons like this (and others) that code has never achieved the objectives laid down by Parliament, and or been allowed by the executives running it, to uphold the principles or reform any wrongdoing. Tenants have had no meaningful reform, three years

have been wasted as tenants tried to navigate their way through a new and novel service that did not deliver. Any "outcomes" for tenants who tried to use their rights have come at a heavy price, so much so that they are demonstrably worse off when accessing their rights or using the PCA service. The PCA interpretation and delivery has ensured anyone using the code will find it detrimental and or costly to pursue.

The PCA had a lot of low hanging fruit within easy reach and failed to pick it.

For example, none of the numerous unfair practices listed in evidence by tenants during the 2013 BEIS consultation (which brought about the code) figured in the minds of the PCA and have not been investigated or addressed by them since taking up the office, they seemed to start with a blank sheet and all memory of the unfair practices laid out in the consultation were silently forgotten.

The PCA himself said the key principle of no-worse-off did not exist before July 2016 - yet it had been a part of RICS guidance for 7 years at that time. The PCA is a fellow of the RICS, [Redacted], in short they were prejudged to the principle from the beginning. The work of valuers in the sector was criticised many times in the run up to legislation as being unfair on tenants.

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 code principles are, under the current executive, for show only, they are not being upheld or (more importantly) enforced. The constant reference to the them by the PCA is simply a "performance" there is no outcome for the breaches or robust tackling of unfair business practices.

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: Tenants have not had the principle of no worse off upheld, what is on offer is a service under which tenants who trigger MRO can ultimately swap their unfair tied deal for an inferior free of tie deal with terms agreed by compulsive tenants who were in different positions to those triggering MRO. The costs negate any transfer of profit as required by the legislation and are based in huge uplifts in trade. If believed the uplifts simply indicate that being tied does in fact hold a pub back, so it would seem eminently sensible for the business secretary to allow all pubs to go FOT on demand and allow the sector to grow unfettered by any cap on trade the beer tie imposes. (see question 9)

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: the code needs to be changed parts 1-8 removed to allow for MRO on demand (see question 9)

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? This is rather nonsensical as the start date has no relevance, the code came into force in 21st July 2016 and not 2nd May 2016. We can only respond to the dates the code has been in effect i.e. since July 2016.

Please comment in particular on:

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

Comments: yes but they refuse to use them specifically s47 of SBEE Act 2015 and s40 of the Enterprise Act 2016 - they also show complete ineptitude and are unable to do the job as they lack the required skill set which under arbitration has been the drafting of legal contracts.

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: Before addressing specific issues the level of generality that comes from the PCA office means it is often impossible to engage meaningfully with what they say other than to say that insofar as the principles being raised by them are relevant. We do not consider that these references to the principles by them have any material significance in respect of the particular points in dispute or end the practices that are copied and rolled out by the POB's. PAS have requested specific responses from the PCA in the past and only received expressions of general principles in reply or that we (the PCA) have noted your comments etc. For reform to make progress we require the PCA to condescend to specific and precise wordings when replying to these issues either in the numerous enquires or in the awards they issue under arbitration.

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;** mostly industrial grade gibberish and ignored by tenants and POB alike - tenants have learned POB's will ignore the guidance when it suits them. Further when tenants have got in touch they have been turned away, however any allegation is for the arbitrator to determine on the provision of evidence and whether the allegation is upheld. It is not for a PCA caseworker to arbitrate the dispute as has happened more than once.
- **investigating non-compliance with the Code;** in short - woeful, the investigations budgets were unspent between Jul 2016 March 2018 the PCA

could find nothing to investigate in over 21 months despite 10 years of evidence on file having adopted an unreasonable policy of a “blank sheet”. The budget was returned in full to the POB’s. Despite finding nothing in the previous periods, inexplicably the PCA doubled the investigation budget to over £600,000 for 2018 -2019 and at the time of writing it is not known how much of it has been spent or returned. [Redacted] supplied with a large dossier of evidence. [Redacted]. It is not known what happened to the intelligence [Redacted] and no tenant was subsequently contacted by anyone from the PCA picking up on [Redacted] case files [Redacted]. This makes of mockery of the PCA asking tenants to continue to supply evidence. Tenants clearly went out of their way and engaged with the relevant people appointed by the PCA and there was no outcome or reply. Seemingly, having now seen the intelligence on file the project has been abandoned and the evidence left gathering dust. But still the calls for more evidence are trotted out by Mr Newby to give the false impression that the PCA is listening and acting when patently they are not, we can only assume he is locked into a futile search for anyone who can say like him or think he has done a good job and give credibility to his appointment.

In another recent example, tenant representative groups very clearly set out how POB’s were using dilapidations as a means of putting tenants into a position of financial weakness before entering into negotiations on a new tenancy, again the PCA did not started a formal investigation which would be sensible but has inexplicably set up a working group headed by the BBPA, the same association who represent the POB’s who are carrying out the unfair practices that tenants are complaining to the PCA about. It is not explained why this is not a formal investigation but it does seem to be another case of putting out endless “feelers” and pigeon hole-ing issues into “talking shops” hoping the parties will get tired, run out of resources and negotiate something without the need for the PCA to ever lift a finger and use its powers. [Redacted].

- **where non-compliance is found, requiring publication of information, imposing financial penalties or making enforceable recommendations;** The publication of awards is piecemeal and not clear on what basis it is being made, however the awards do show that if tenants do get to the end of a referral without caving in, that POB’s are serially non-compliant. However, there is no penalty for the POB in pursuing this common tactic and the time used up in challenging it has simply penalised the tenants as any eventual MRO is non back-datable. The net effect is tenants spend longer on their tied deal than was envisaged. The effect of any reform is also watered down by this process. Large fines for repeat breaches of the code would we say have an effect but this is theoretical as it has never been used in the last 3 years. It is another example of the PCA having decent powers they refuse to use,

tenants wonder what is the point in having a PCA with powers if they are never used.

- **arbitrating disputes under the Code.** It is currently a damaging long-winded process which is highly detrimental and effectively adds insult to injury. In most cases the PCA Mr Newby is replaced by similar RICS or CiARB members who also have backgrounds like his own who then go on to bring in legal advisors to help them with the regulations causing more delays and costs heaped on the tenants. This underlines a problem for disputes arising from the code, they are seemingly ill suited to be decided by arbitrators like Mr Newby whose experience is solely in arbitrating commercial rents. It is not really his area of expertise or that of the people he then appoints, who are uncomfortable and out of their depth and have to get in further legal expertise. [Redacted]. We have to wonder why they are being paid if they are unable or unwilling to arbitrate and then recruit people from similar backgrounds and experiences to Mr Newby.
- The PCA in acting as arbitrator has allowed appeals which breached the rules of the arbitration and was successfully challenged six times over their conflict when trying to stand as an arbitrator. PCA Mr Newby is a member of CIARB but refused to stand down despite being found in breach by the CIARB presidents panel. [Redacted].

Question 6

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

Comments: There have been no financial penalties issued to the POB, the tenants have suffered the true cost of the failure to uphold the principles or seek changes to the loopholes in the code. Delays to accessing rights and MRO arbitrations mean tenants can stay tied often for years longer than was envisaged, there is no backdating so lost time can never be recovered and is never penalised.

Part C: Pubs Code Regulations

Question 7

There are two sets of regulations that relate to the Pubs Code: The Pubs Code etc Regulations 2016[1] and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016[2].

You may have commented on some of these provisions in response to questions in parts A and B of this consultation[3], 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: The code needs to be changed to stop avoidance and flouting, the easiest and low cost way to meet the principles given the lack of enforcement by the PCA is to change the code to MRO on demand.

[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 Assessments[4] 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; The tenant bears the full cost by virtue of delay to accessing a free of tie deal.

redistribution of income from pub companies to tenants; this was a core element (principle) of the code and should have been done from day one. Quite why it is being considered now is bewildering, the PCA should have measured it yet instead they indicate they don't know how to and or have no idea if tenants are receiving adequate transfer of profit under the code. This point is so fundamental to the reform that the failure to capture this data in the last three years is clear evidence of the gross dereliction in public duty to uphold reform.

changes in industry structure or ownership status; the PCA should be monitoring and investigating all sales by the *big 6* to ensure they are not simply supplying the tied pubs they once owned by proxy i.e. under a new pub company who holds less than 500 pubs. The situation seems inevitable therefore we propose that the limit of 500 is removed.

wider industry trends such as employment and investment. the PCA should be monitoring and investigating all models that have the potential to avoid the code such as self employed contractor manager or "manchise" models, TAW's who have been operating for over 12 months and any one with a franchise e.g. when the POB is no longer members of the British Franchising Association.

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 BEIS has not followed up on its own impact statement (BIS Impact Assessment) which outlined a transfer of profit to the tenant as key to any reforms. Tenant's expect this to be upheld first, quite why it is not being measured or monitored is as stated above of concern and would go a long way to explaining why the PCA is not making a difference to tenants, they are, for the last three years indifferent to the financial outcome stemming from any award, guidance or action as to the tenants total costs in accessing rights through the process of arbitration or as a transfer of profit.

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[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:

Four successive Select Committee Inquiries, in 2004, 2009, 2010 and 2011 identified significant problems within the industry. Mainly the treatment of tenants, unfair business practices and the share of reward. The lack of transparency in negotiations and disclosure of information was also key. Such problems occur in these situations due to inequality of bargaining power. Given the evidence, Parliament considered there was an equity/fairness reason to intervene in this market and establish statutory regulation. A self-regulatory approach had been tried and found wanting by the Select Committee in 2011 and the Government in 2012.

In essence almost all PCA referral cases are on the same basic issue, that is to say when someone wants new tyres for their car, is it common or reasonable to expect them to take a new car to get new tyres and have nothing to show for trading in the older car?

The PCA have shown no evidence and failed to demonstrate that they have changed the market for tenants in their last three years of operation. The unfair dealing and practices undertaken by the Pub Companies remain the norm and the transfer of profit (rebalancing rewards) is nowhere to be seen. The years of inquiry in Westminster established a robust evidence base for change which has been ignored when the PCA went live. The PCA instead started off with a blank sheet, all previous transgressions ignored or dismissed and the “learning” began from scratch, this is unreasonable, perverse and shows clear pre-judgement by the regulator.

The MRO event triggers in the code were only drafted in a staged way to stop a flood of tenants using the code on day one, the trigger arrangement cuts a large bit of slack to the POB’s. It is clear when looking at the figures that no such flood has occurred therefore it seems appropriate to now remove the MRO event triggers as all tenants have the right at some point and the flood threat has gone. Perversely the BBPA, on behalf of POB’s, are saying the low numbers taking up MRO show the code is no longer needed or that tenants are happy to stay tied - this is [Redacted] designed to stop reform dead in its tracks. The acid test is to remove the triggers and barriers to MRO and then the trade and Government can see just how happy tied tenants are to remain tied.

A typical tied tenant making an MRO request at their last rent review (i.e. with 5 years to run) can expect the process to take well over a year (so they have already lost 1 year trading as an MRO tenant) only to be faced with a revised MRO proposal that might be equally as unreasonable and require another referral the decision of which may be then unlawfully allowed to be appealed - end result is that the POB can drag it on for ever and

no tenant will see genuine MRO - only deal left on offer is a horse traded deal of a FOT agreement at an inflated rent that can not be challenged.

Even when awards look good things are still bad, for example a PAS member got an award which identified that their claim was valid and they had won their case, the problem was that the vehicle of a new agreement was not reasonable and directed that the MRO should be executed via a deed of variation applied to the existing agreement. The arbitrator said they would need to draft up the terms and would get in help to do this (see answer to Q5 - c). Then the arbitrator being out of their depth quit the arbitration and told the parties that someone else would be appointed to finish off the case. But as we stand today [Redacted] months have gone by since the award was issued and still no-one has been appointed and no work has begun on the deed of variation. The tenant is under duress and wants to get on with their life; a competent lawyer could do a deed of variation to sever any tied terms in less than a day. These type of repeat referrals raise many questions, such as why do arbitrators take on cases if they knew they couldn't see it through to the end and or were out of their depth skill wise, why can no-one be appointed to step in in a reasonable amount of time there are after all thousands of arbitrators in the UK. The competence issue underlines why the original arbitrator didn't give a full award and split it up into two- parts, they tried to do one bit and facing the problem of doing the rest did a runner. The claimant and us are at a loss as to why the PCA couldn’t supply a comprehensive award in the first place covering all the terms etc and why should the tenant then suffer even more lost opportunity, it's quite clear the PCA are unable to provide a full end to end service in a reasonable amount of time and go on to recruit even more people unsuited to completing the task but all of whom appear similar to Mr Newby in background. The Arbitration Act is very clear, that the PCA must adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined. This has not happened in many cases. It's worth noting that the usual amount of time for an award to be handed down in the high court is 3 months, many of the PCA awards are taking far in excess of that, even years in a couple of cases.

Most lawyers we hear from say the PCA has bitten off more than they can chew and are baffled by the decisions and delays but it does make sense when you peel back the layers. This comes from trade lawyers and those expert in arbitrations, [Redacted].

One of the Independent Assessors used by the PCA has said in a web blog that the code is full of loopholes. Another arbitror brought into a case told the parties they were deeply unsatisfied with the appointment process and it was obvious they were struggling with the matter at hand. Another arbitrator brought in told us that the PCA are “still finding their way” this, in June 2019. If it's that obvious to the legal profession then why is it not obvious to the PCA or BEIS. [Redacted].

It seems the only time a minister visited the PCA head office was in Jan 2017 by Margot James MP, when she reported back to the house she said there had been widespread flouting of the code by pub companies. Given the appalling outcomes for tenants in the last 3 years the flouting seen by her just 6 months into the service beginning was clearly

allowed to continue and proliferate unchecked by the BEIS or actions of the PCA. [Redacted].

In essence the PCA is supported by BEIS and they have tried to make their particular version of reform work but apparently can't implement it and rely upon claimants caving in to let them off the hook in making any decision. This happened through a combination of overly complex long-winded processes delivered on a case by case basis, [Redacted] refused to investigate widespread well known historical damaging practices and by failing to listen to tenants when they approach the service. [Redacted], and as stated above that service was found wanting by Government which is why we have the code.

These are just some of the issues:

- Breach of section 40 of the Enterprise Act 2016 by the PCA.
- Failure of policy, the code has yet to deliver reform and or make the changes required.
- Failure to clarify to pub tenants binary issues.
- PCA caseworker firewall denying cases and tenants the right to proceed (regulation 50 complaints).
- Independent Assessors not having to follow RICS / MRO when deciding on market rents and the rents “appeal” process.
- Referral process pushing the code out of reach for average tenants and running down their time as a FOT pub.
- Code avoidance models and Tenancy At Will abuses.

Between 2017-18, the House of Commons Business, Energy and Industrial Strategy Committee held an inquiry into the PCA, to review the operation of the Code and the performance of the Adjudicator. The inquiry concluded with the Committee writing to the Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy[1] to express concerns that, two years after the code had come into force, it had not delivered the level playing field between tenants and pubcos that was intended by the UK Parliament. The letter highlighted allegations and concerns that pubcos were thwarting the legislation and indicated that the Committee would support further legislative change if there were no immediate signs of progress.

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[1] Letter from Rachel Reeves MP, Chair of the House of Commons’ Business, Energy and Industrial Strategy Committee, to the UK Parliamentary Under Secretary of State for Business, Energy and Industrial Strategy (3 July 2018).

On 24 January 2018 a House of Commons Westminster Hall debate was held on the Pubs Code. The debate was led by Adrian Bailey MP and highlighted a number of concerns about the ineffective operation of the code and the dissatisfaction of many tied tenants. The Parliamentary Under-Secretary of State for Business, Energy and Industrial Strategy, Richard Harrington MP, took part in the debate and acknowledged that there were problems with the implementation of the code. Some commentators (including some MPs) called for two key changes to the Code to address some of these issues—

i) amend the MRO definition to make it clear that the tenant has a right to pay an independently assessed market rent, and only that rent, to the pubco; and

ii) stating that a Deed of Variation must be preferred in MRO cases (rather than brand new tenancy agreements being demanded) with the only changes being the severing of tied terms and rent being independently assessed.

It is clear the PCA and BEIS have had their chance to do it their way, but would not change the code or use the tools despite knowing full well the code was not delivering the reform that was required. They followed instead the previously rejected self regulation model and have tried to impose it again on tenants but this time under the cloak of a statutory regulation, it cannot be a surprise when it does not work again. This body of evidence shows we have unqualified people who are pre-judged to reform, carrying out reform with inadequate supervision, there is no meaningful adherence to the policies concern about the outcomes or investigations into damaging practices. It is little wonder the code does not work for tenants and the trade is no further forward.

Tenants we speak to are understandably very unwilling to sit politely and give PCA / BEIS another 3 years to try and get the right people or right terms of reference in place, so to make up for lost time and make good on the damage caused by the existing implementation of the code since 2016 we propose the following changes to the code to stop any further watering down by incompetent or deliberate action;

MRO on demand - product ties to be severed via a deed of variation to the existing tied agreement - coupled with the right to an open market rent review with any FOT rent supplied by the POB by a Parallel Rent Assessment.

The Government can in implementing the above save all the costs in manning the PCA office, there is no need for arbitrators or independent assessors, it will be self policing. Tenants can access the courts should the law not be followed by any POB's. This will be far cheaper than the alternative which has seen tenants losing years of MRO or racking up huge bills in being forced to take (or horse trade) a new agreement whilst the PCA work to encourage a culture that was prevalent under self regulation.

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

It was started far too late and we have been told the result would not be backdated to the start of the three year period, this was discussed in parliament debate but ignored by BEIS ministers.

https://www.morningadvertiser.co.uk/Article/2018/07/18/Pubs-code-review-considered-for-early-2019-by-Richard-Harrington