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.

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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

[Redacted]

	Respondent type
☐	Tied pub tenants
X☐	Non-tied tenants (please indicate, if you have previously been a tied tenant and when) [Redacted]
☐	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?

Comments: I believe the Pubs Code has been a huge disappointment for two main reasons.

Firstly, there were problems with the drafting of the Code itself. The Code was delivered late (unlawfully so – although conspicuously without consequences) and during the delay key aspects of the Code itself were altered/weakened, with the result that the real reforms that were the intention of Parliament could be avoided by the POBs.

Secondly, there was the choice of Paul Newby as the Pubs Code Adjudicator. This was rightly challenged from the outset, in no uncertain terms, by Greg Mulholland MP, who had been foremost among the Parliamentary campaigners for statutory regulation and MRO. He pointed out to the then minister Anna Soubry MP the appalling error of appointing Mr Newby, when all the advice, from all sides of the industry, had been to avoid the appointment of somebody with a history in the trade which could create a perception of conflict of interest. It was frankly jaw-dropping the degree to which this sage advice was eventually ignored. Paul Newby, along with many of his colleagues in RICS and of course his POB clients have been at the epicentre of the tied pub model, [Redacted].

These two overarching factors have combined to make the first three years of the Code a disaster for tenants and a success for the regulated POBs. The redrafting of the Code created enough ambiguity to reduce its power. [Redacted]. The result is that the POBs have openly ridden roughshod over the spirit and intention of the Code, and have been allowed to do so effectively unchallenged.

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: Sadly, during the final drafting, enough ambiguity was allowed to enter the Code to allow the POBs to openly flout the intention of fair and lawful dealing. A lack of enforcement from the PCA has exacerbated this problem.

This is largely a result of the watering down of the original draft of the Code which had input from many tenant representative experts. There were attempts during ping pong to undermine the rigour of the Code, with certain members of the House of Lords, who had

connections or sympathies with the POBs, overtly attempting to influence the legislation to the detriment of tenants and the betterment of the POBs. Then during the opaque procedure of the final drafting we saw changes occurring which left the Code ambiguous and open to manipulation and vexatious interpretation. For example, there was a well-publicised attempt to alter the triggers in the final draft so that MRO would only apply if a rent increase was proposed. Protests were raised and this threat was seen off, but other disadvantageous alterations were included in the final draft.

There was no nomination of Deed of Variation (DOV) as the vehicle to deliver MRO and there was the actual removal of the requirement for a Parallel Rent Assessment. The latter was an important safeguard which would have made the MRO process far more transparent, and far more difficult to manipulate, but the POBs advanced the spurious and ridiculous argument that it was unreasonably burdensome and would be too expensive. Unfortunately, policy makers appear to have given this ruse far too much credence and agreed to remove this crucial part of the process. Certain words were also changed throughout the Code (for example “must”/”will” became “may” in several cases) which reduced the force of the Code itself considerably, and other crucial aspects – including the Prime Principle that “a tied tenant should be no worse off than a free of tie tenant – were left somehow ambiguous and open to interpretation and obfuscation

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: The Code is not consistent with this principle as has been shown by the results. Not one licensee who has been through the Code process has ended up benefitting to the point that they are as well off as a genuinely free of tie licensee.

I say this from a position of experience because I operate pubs that have both been subject to the tie, and pubs that are owned by me freehold and are totally and genuinely free of tie. The economic reality is totally different. The tie itself, characterised by limited choice and wholesale prices routinely inflated by as much as 100%, is the single biggest economic challenge faced by any tied licensee. The simplest way to understand this is that gross profit margin for a tied tenant is reduced from the free of tie benchmark of 60%, to about 40%. This is supposed to be offset by other advantages, such as a lower rent, but in reality these other advantages (as has been widely demonstrated – and accepted by four successive Select Committees) do not exist.

If the Code had delivered upon the no worse off principle, it would have resulted in a full transfer of the unfair profit share extracted from each pub under the tie back to the tenant. Those tenants would have been able to buy their drinks at open market prices without restriction, and would have been left paying a fair independently assessed open market rent, with no extra unusual or onerous lease terms. In this way the Code would have created a truly level playing field between formerly tied pubs and their free of tie counterparts.

Crucially this should all have been delivered strictly without the possibility of extra costs or delaying tactics from the POBs. In reality POBs have made the process costly and

interminable, with the result that many licensees have either given up in despair or reached the end of their resources and been forced to accept a poor deal just to bring the process to an end. It is quite simply outrageous that this has been allowed to happen.

Overall we have a situation where the best people can hope for is a “better deal” than they were on before, usually delivered after an inexcusably long delay, at enormous expense, with worse lease terms and with no backdating. What is worse these “better deals” are being held up as success stories by both the PCA and the Government. [Redacted]

The truth is, a “better deal” is not good enough. Anything short of the real, full redress as defined by the “prime principle” of “no worse off” is actually a good deal for the POB, compared with what the tenant was actually entitled to expect. The tenant is simply being abused a little less than they were previously.

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 fundamental thing that needs to change is a cognitive shift on the part of policy makers. They need to understand that the POBs are entirely resistant to the Code and cannot be trusted to co-operate. Yet the PCA and the government still treat them, [Redacted], with undue respect and credulity.

They will need to be compelled to adhere to the Code, and this will only occur with clarification of key principles in the Code itself, and with strict oversight from an impartial PCA who is ready and willing to investigate wrongdoing and to impose strict penalties.

MRO should be deliverable by a simple DOV severing tied terms. Most tied leases already contain exactly that provision so it is perfectly possible.

There should be a strict time limit, and a fixed cost. The breaching of time limits should place a burden on the POB, not the tenant who should be entitled to sever tied terms and pay the independently assessed rent after a strict time period has elapsed. The only dispute should be over rent, and decisions on that front should (and can) be delivered quickly.

Crucially MRO needs to be available to ALL tied tenants, no matter the size of the POB. It is worth revisiting primar legislation to achieve this. The 500 de minimus is an outrageous loophole which has left thousands of pubs in a continued position of extreme jeopardy and hardship, some of whom (such as the wonderful [Redacted]) were sold off in the time that elapsed between the Nov 2014 vote and the Code actually being implemented in the summer of 2016. This was a spiteful act by regulated POBs, who knew full well how devastating it would be to the pubs concerned to lose their forthcoming Code protection.

Given the relatively low take up of MRO it would be reasonable at this point to offer MRO on demand. The evidence suggests there will be no floodgates situation. If the POBs

dispute this notion then it would constitute tacit acknowledgement of the fact that they have been very effectively stifling applications for MRO with their own tactics.

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?

[Redacted]

Please comment in particular on:

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

Comments: I am unclear on this matter as he has not actually attempted to exercise any powers until very recently with the conveniently timed (ie. during the statutory review) new investigation into Heineken and stocking requirements.

We were led to expect a regulator with real teeth, with quasi-judicial powers that they would be ready to use. We seem to have something far short of that. When campaigners have questioned the matter of his actual powers in the past we have been given the strong (always regretful of course) impression that his powers as an Adjudicator are not as we

hoped.

Personally I am still unclear whether that is the case, but it is good to finally hear confirmation that he does in fact have the power to fine POBs for breaches of the Code as we were led to believe. It makes one wonder which other powers have been held in check all this time, while the POBs have been given chance after chance to get their houses in order.

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 can honestly say that I believe virtually nothing has been done well. We have seen no actual adjudication at all, just endless, confidential arbitrations, and no investigation either until the very recent announcement regarding Star Pubs and their stocking requirements.

The lack of investigation is particularly inexcusable given that the PCA has been presented with multiple issues which clearly warranted proper investigation. To name but a few these include the 72 pint issue, the use of L&T Section 25 notices to avoid the Code, the endemic use of delaying tactics and scaremongering to disincentivise MRO take up, the misuse of the term MRO and the truly appalling abuse of dilapidations. Incredibly, as regards the last in that list, the solution proposed by the PCA was to set up a working group and to give control of that group [Redacted]. For complete clarity this means the very POBs that were abusing dilapidations claims in the first place. This absolutely beggars belief.

We have seen nothing but serial, inexcusably drawn-out arbitrations over the past three years, with universally unsatisfactory outcomes, and with no rulings setting any meaningful precedents that would actually provide clarity or benefit tenants.

All genuine problems and grievances that that have been raised by tenants have invariably been batted back to the POBs for them to provide some kind of solution, in a deeply unsatisfactory process which appears to have amounted to little more than a continuation of the failed self-regulation that dogged the sector in the long years leading up to statutory regulation.

Meanwhile, tenant campaigners who have brought perfectly legitimate grievances to the PCA's attention have been decried and demonised as vexatious pests, and publicly dismissed as "a few loud voices". This is outrageous when you consider that each and every of the grievances raised by tenant campaigners have since been proven to be real and justified.

It is telling that the one issue upon which the PCA has now finally decided to launch an investigation – that of stocking requirements – was raised directly by tenants within the first three months of the PCA's term in office.

The office of the PCA owes its very existence to the same licensee campaigners now being disparaged in this way. We have been treated with open scepticism and mistrust, and have been expected to provide new evidence for issues that have long since been

accepted as reality by successive Select Committees and the many MPs who voted the Code through in the first place.

The PCA is meant to be a champion for downtrodden tenants, and should be listening to their concerns attentively, not actively undermining their credibility and motives when they bring forward genuine concerns and real issues.

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: My impression is that guidance has been weak and slow, and in some cases very poor. Several guidance notes have had to be corrected. Notoriously, one guidance note mis-stated the prime principle itself so that it meant almost the opposite of what it should have meant. [Redacted].

Most recently, fundamental procedural advice relating to the delivery of MRO was withdrawn following a high profile, well-documented, tenacious and very costly legal challenge from [Redacted]. The costs and burden of time and effort incurred by [Redacted] were totally unacceptable, and were purely a result of the utter intransigence of the PCA. That in itself is an outrage, but so too were the implications of the poor, and now withdrawn advice which has seemingly led to detriment for every MRO applicant to date, by allowing POBs to mire tenants in unfair, spurious, and it seems possibly unlawful, negotiations regarding tied rents. This is absolutely fundamental stuff and should have been clearly interpreted and prescribed by the PCA from the very start, yet the ongoing response of the PCA to [Redacted] successful challenge is a total refusal to engage or elaborate at all.

Investigations, as mentioned above have been non-existent until the recent Star Pubs issue which is regarded by many tenants as nothing more than soft-target window dressing for the sake of this very statutory review. The levies raised from the POBs for investigations could have been spent on multiple issues over the past few years. After all, the POBs hold most of the information the PCA needs regarding almost any issue and they could have been compelled to part with it. Instead, however, the PCA saw fit to return the full amount of the levy funds to the POBs themselves for the first two years, and we now hear that the 3rd year sum is also to be returned. This is frankly shocking.

Where non-compliance has been found it seems that there has been insufficient transparency and a lack of meaningful enforcement. I am unaware of any financial penalties or enforceable recommendations, except for the ruling on the 72 pint issue which was admittedly good, although it did nothing directly to provide any redress for the

substantial historic losses to tenants who have been misled about cask ale GP margins and have also been seriously overcharged on rent.

The argument, as ever seems to have been that these things take time. The reality is that time works only to the favour of the POBs and is in fact the enemy of tenants. The executives at both [Redacted] and [Redacted] will no doubt be very pleased that the PCA gave them enough time to successfully engineer an escape from their dire predicament. The many tenants who were sacrificed in the interim because time was used as a weapon against them will be devastated.

There appears to be a serious aversion on the part of the PCA to make any enforceable rulings at all. Instead the burden has been openly placed upon tenants themselves, with the PCA suggesting that it will be legal challenges by tenants that set precedents on the various key issues. This is utterly outrageous. Very few tenants have the resources or sheer stamina to pursue a risky and burdensome legal challenge against their POB, and they simply should not be expected to do so. This is the role and responsibility of the PCA.

Arbitrations have occurred but have been unforgivably interminable, and the results have generally not been made public, and appear to have resulted in no useful or enforceable precedents.

Question 6

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

Comments: I have no detailed knowledge or experience of this area, but it is clear that the Code has failed to provide the low cost solution we were led to expect.

Tenants quickly discover that they need expensive expert help from professionals such as solicitors and their own surveyor, because the POBs have been allowed to mire them in drawn out and draining arguments over technical lease terms.

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

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[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

regulations. If you think changes are needed to the regulations, please explain why and how you think they should be changed.

Comments: I would like to make the point here that the main central problem I see with the Code itself is that it has allowed the lease terms to become a bone of contention.

A simple DOV, severing tied terms, would leave only the rent to be determined. This is something for which the PCA is at least qualified.

However once lease terms come into the equation you need to consult experts in contract law. The PCA does not have the required expertise for this and neither, it seems (because some have openly admitted as such), do the independent experts who have recently been called upon to help with the PCA's backlog of work.

The POBs have made hay pursuing spurious and vexatious arguments about the terms of each new MRO lease, and they have been given free rein to do so.

The Code must be simplified to the point that the only debate is about MRO rent. DOV should be the vehicle, and time limits should be strict. Any breach or delay should incur cost only for the POB.

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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;**
- **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 failure of the Code and the PCA has imposed a heavy cost on the tenants, but also on society as a whole.

Pub closures are still occurring at a shocking rate, at tremendous cost to the economy and the public purse, as the POBs have ramped up their aggressive tactics in order to avoid the Code, very much in the manner of “cornered beasts”.

As in my own case, the use of Section 25 notices under the L&T Act has exploded, exactly as tenant campaigners predicted. This would be a very valid subject for an investigation in itself. The PCA could have demanded that the POBs reveal the extent to which they are using this tactic to game and avoid the Code. I even submitted a complaint about the issue in [Redacted] 2017 following my experience of having to fight a S25 on my pub. The PCA told me personally that it was something that concerned him. Yet nothing has happened at all, and my complaint received no formal response, other than an acknowledgment of receipt.

[Redacted]

[Redacted]. This consolidation of power is very worrying from a competition point of view, and poses real danger to our burgeoning independent craft beer sector, who are already

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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

feeling the pinch and are struggling to find a route to market. Several have already succumbed to corporate buy outs.

The loss of idiosyncratic tenant-controlled pubs and the move to homogenised managed outlets is also very worrying for anyone who cares about the “soul” of our institutional pub sector. The pub industry is a unique and wonderful asset for the nation, beloved of the domestic population who rely on pubs as a vital and increasingly scarce secular meeting place. They are the envy of other countries, and consistently among the top listed attractions for foreign visitors. However the special nature of many pubs is being wilfully stripped out by POBs in the rush to remove them from the scope of the Code.

A disinterested manager is no replacement for a live in licensee running their own idiosyncratic business. The range of homogenous products found on the bars of chain pubs are nothing compared to the diversity of wonderful independent beers available to a free of tie operator

In many cases, rather than simply being spoiled in this way the pubs themselves are actually erased from the community altogether, as they are sold off for alternative use, often quite mercilessly in face of community protest.

The “Protect Pubs” organisation records and archives news stories illustrating many such cases every week.

This is an ongoing cultural and economic catastrophe on a massive scale. Every pub that is lost represents a huge economic hit to each local economy (pubs are estimated to contribute an average of £80-£100K to their local economy), but is also a blow to the well-being of the local population. Pubs provide valuable social services which lighten the load on public services by combating loneliness and isolation and promoting social cohesion. They do this not only at no cost to the public purse, but whilst actually contributing greatly in terms of taxes raised. The cost to the Exchequer of the loss of one quarter of our pubs since the Millennium is incomprehensible. It is a catastrophe that was very largely produced by unchecked corporate greed and abuse, and is all the worse for being very largely avoidable.

The failure of the Code and the PCA has escalated this catastrophe in recent years. It is imperative that Government stems this problem through a multi policy approach, and the PCA should be reconceived to be at the forefront of this mission.

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: I was denied access to the Code process completely because [Redacted] issued me with a Section 25 notice at their earliest opportunity. This was far too easy for

them, and has proven a popular tactic for all of the POBs. It requires investigation and action from the PCA but there has been nothing at all on this front despite Paul Newby acknowledging it as a major concern.

I had to enter into a legal battle with [Redacted] in order to retain my pub. I was successful but at great cost. I had to agree to give up my old lease and enter a new type of lease involving quarterly rent in advance and an increased deposit. I had to complete a dilapidations schedule, which was unduly demanding, and find money to settle every outstanding account whilst still finding funds for the upfront payments going forward.

I had to find £50K in liquid funds in order to complete this process. That would be beyond the reach of most licensees and would result in them leaving their pub.

I eventually retained my business on new free of tie terms at the cost of a 40% rent increase ([Redacted] originally wanted an increase of around 80%). I had no recourse to the independent rent assessment that would have given me a fairer rent, and had to settle for what I could “horse trade” directly with the [Redacted] executives. My inflated rent is now being used as a comparable in local MRO cases, and is therefore enabling POBs to justify inflated rent bids.

The outcome was therefore not ideal, on several fronts, yet it was worth it for me for two main reasons.

Firstly, even given the enormous cost and increased rent, my business is more viable going forward. I have access to an unrestricted range of drinks and I can buy them from wherever I choose at a fair open market price. This is the whole point of the MRO option, and from my own experience I can confirm that it is transformative to a pub’s prospects. The fact that it was worth me spending £50K to get FOT status and paying 40% more rent going forward shows just how much profit is extracted from each pub under the terms of a tied agreement.

Secondly, I fought for my pub because I genuinely love it, and my community needs it. It would have been a travesty to see my pub homogenised into a bland chain entity, and it would have been a major blow to the community. Yet this is what is constantly being done to countless other communities, week in week out. It is causing horrendous damage and it needs to be stopped.

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.

Click here to enter text.