



Consultation on proposals to amend the Pubs Code

Response form

The consultation is available at: <https://www.gov.uk/government/consultations/options-to-amend-the-pubs-code>

The closing date for responses is 5 September 2021, 23:45.

Please return completed forms to:

Pubs Code Team
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

Email: pcareview@beis.gov.uk

Please be aware that we intend to publish all responses to this consultation, subject to redactions we may make for legal reasons.

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

Name: Pubs Code Adjudicator

Organisation (if applicable): Pubs Code Adjudicator

Address: 4th Floor, 23 Stephenson Street, Birmingham, B2 4BJ

	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 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 checked="" type="checkbox"/>	Other (please describe)

Questions

Question 1

What are your views about Parallel Rent Assessments for prospective tied tenants? Please provide the reason(s) for your answer.

Comments:

The PCA would caution against further complexity and volume of the information provided to prospective tied tenants unless the benefits clearly justify this. The benefits are less apparent when the prospective tenant can effectively walk away from the tied offer and choose another premises with a different arrangement. The PCA is aware that the volume of information presented at the outset can be a challenge for tenants, and it is not clear how more information about a notional free of tie arrangement will be understood at that point in time. This would be better assessed if the form and content of the Parallel Rent Assessment was understood, including the extent to which it would be prescribed by the Code.

The PCA considers it may be more beneficial to focus on the suitability and compliance of the information in the Rent Proposal under Part 3 of the Code, as well as ensuring it is supported by sufficient and accurate information to enable a prospective tenant to understand the tied offer and make an informed decision. Further areas of useful focus are the availability of suitable and affordable legal advice for tenants and the sustainability and use of the business plan at the outset and through the life of the tenancy. The PCA can see how a rent assessment based on a notional free of tie tenancy may be beneficial as a comparison tool for more sophisticated tenants. This information may help a prospective tenant determine whether they would be “no worse off” under the tied deal than if they were taking a free of tie tenancy on the same pub (in accordance with the core Code principle). It also provides a direct opportunity for the POB to deliver on this principle. But for many tenants this could cause further confusion and be additional information on which they would need to seek professional advice, increasing time and costs.

Question 2

What are your views about encouraging a trial period – for example 3 months - to help a prospective tied tenant to familiarise themselves with the running of a new tied pub before entering into a commercial contract? Please provide the reason(s) for your answer.

As this approach is voluntary, we are interested to hear stakeholders' views about the incentives for both pub-owning businesses and tenants in agreeing this sort of trial arrangement. We would particularly welcome comments from individual tied tenants who completed a trial period prior to signing their tied agreement and what they thought had worked well and what could have been better. We would also be interested in hearing from pub-owning businesses about whether they have arrangements in place, or planned, to allow prospective and new tied tenants a trial or opt-out period before finalising a tied arrangement.

Comments:

The PCA does not hold evidence on which to form a view about the operation of this voluntary approach. The PCA would, however, wish to understand whether and how the Code would apply for the duration of any trial period and its regulatory obligations.

Question 3

What are your views about reducing the current 6-month period in the previous qualification period? Do you think that a 3-month period in the previous financial year would be appropriate or would you support a different period? Please provide the reason(s) for your answer.

Comments:

The PCA would support a reduction in the qualification period to cover three months in the previous financial year. This would help to ensure TPTs have the protection of the Code within a reasonable timeframe, removing the potential for a maximum 18-month qualification period. The PCA would welcome a strengthening of provision in regulation 45 of the Code to enable the PCA to obtain information from prospective POBs and ensure compliance with the notification requirements of regulation 45.

Question 4

What are your views about a requirement for the landlord selling the pub to notify the PCA of any tied tenant(s) with extended protection? Should the PCA be informed when extended protection has ended? Please provide the reason(s) for your answer.

Comments:

The PCA would support this notification requirement. Currently the PCA receives no information about the number of tied tenants who are protected by the Code by virtue of extended protection, or the duration. Nor does the PCA have the power to request this information. There is no Code duty on the POB to notify the PCA when tied pubs are sold, including the identity of the purchaser, which for the purpose of extended protection will be a POB. Again, the PCA has no power to request this information and is therefore unable to properly identify those entities for the purposes of regulation. Such information will assist the PCA in forming its view on risk or impact in determining what is proportionate regulation in this area and whether further provision for tenants with extended protection would be of benefit.

Question 5

What are your views about a Parallel Rent Assessment at the rent assessment or lease (or licence) renewal stage for tenants with extended protection? What type of information should be set out in a PRA? Should there be a right to refer disputes related to the PRA to the PCA and, if so, on what grounds? Please provide the reason(s) for your answer.

The Government would in particular welcome evidence in respect of the number of tenants and pub companies dealing with matters related to extended protection in order to help decide whether this is a proportionate measure.

Comments:

The PCA considers it proportionate to first improve information about extended protection numbers, timing and experiences to consider how to regulate under current arrangements before reaching a considered view on any further measures. Significant change to the Code to include new concepts such as a PRA should be introduced carefully, with transitional provision considered. The introduction of significant new arrangements may have an impact on the PCA's levy amount and methodology in future years. The PCA's preferred approach is to consider ways to improve information gathering and regulation of existing extended protection rights.

Question 6

What are your views about the examples set out above and what might work or what might not work? Do you have other suggestions on how the MRO process could be changed using existing powers? Please provide the reason(s) for your answer.

Comments:

The PCA has previously indicated that the current timetable makes it more likely protective referrals for arbitration will be made. The PCA welcomes further time for the POB and TPT to negotiate before making an arbitration referral. However, this must not exacerbate the existing disparity in negotiating strength between the parties. The PCA considers a clear and settled statutory timetable is best able to avoid confusion for TPTs and mitigate the risk of deadlines being inadvertently missed and/or the POB exerting pressure on the TPT to extend the process. The PCA foresees potential problems with this which adds to the delay in completing the MRO process and enabling the appropriate comparison between the tied and free of tie deal that the Code expects.

If the negotiation period can be extended by mutual consent, the PCA would wish to see a clear end date to focus minds and mitigate the risk of a POB exerting its influence unfairly to secure repeated extensions. The PCA would want there to be clarity as to how mutual consent to extensions would be recorded and demonstrated to the PCA in the event of a referral for arbitration. This is important to enable the PCA, or alternative arbitrator appointed, to establish they have jurisdiction to arbitrate. The PCA would also want to see clarity over how many times an arbitration referral could be made if there is scope for the POB to make a number of proposals during an extended negotiation period. Currently each 'subsequent proposed tenancy' sent during the negotiation period creates a separate right of referral to the PCA. There would need to be clarity as to what constitutes the POB's 'formal MRO proposal' in the examples given, on which a referral to arbitration could be made. The interaction with the Independent Assessor timetable would also need to be clear.

The PCA would caution against proposals which provide for TPTs to be able to identify factors relevant to the question of reasonableness in their MRO notice (should they choose to do so). This could have the effect of making the process of giving a MRO notice

more complex, time consuming and advice-dependent, therefore deterring a TPT from pursuing their MRO rights. It may also give rise to unhelpful argument from the POB as to its use or lack of use by the TPT. In reality it will likely be another reason the TPT will need professional advice and drive-up costs. The PCA would wish to see completion of an MRO notice remain a straightforward process. Any additional complexity may either deter a TPT completely or become a matter on which they would wish to take advice. As the notice must be received by the POB within 21-days of the MRO event, this could put undue pressure on the TPT. The POB is already under a Code duty to consider, and satisfy itself of, the reasonableness of its MRO proposal. Where the TPT raises reasonableness factors, the PCA would be concerned if this led to a POB exclusively focusing, or unreasonably relying, on those factors which the TPT had identified.

Question 7

What are your views about requiring the inclusion of rent in an MRO proposal? Please provide the reason(s) for your answer.

Comments:

The PCA considers it is helpful for a TPT to be able to consider the proposed rent alongside the proposed terms. The PCA can see how this encourages more meaningful negotiation, and that this already happens in practice, as a TPT cannot easily consider the two in isolation when deciding what is acceptable to them. The PCA considers that to ensure transparency and TPT understanding, the POB should provide sufficient information to the TPT to make it clear how the figure has been reached. The PCA considers that if the proposed rent is subject to the same test of reasonableness as is currently required on the tenancy terms, this will lead to increased dispute and delay. The PCA would wish to see that she has discretion, as regulator, to prescribe how the POB must go about proposing the rent to ensure there is fair and lawful dealing. The right of referral to an Independent Assessor might also be brought forward where a TPT is agreeable to the proposed terms, as currently the TPT and POB must wait 28 days into the negotiation period to make this referral. The PCA considers better negotiation over the rent may be achieved by placing transparency requirements on the POB, including bringing forward the time at which information in Schedule 3 should be provided, to encourage more meaningful negotiation earlier in the process.

Question 8

What are your views about removing the requirement that terms should not be 'uncommon'? Please provide the reason(s) for your answer.

Comments:

Determining exhaustively, and at any given time, what are uncommon terms in the free of tie market is a difficult task, including for experts who often need to be engaged for this purpose. This leads to costs and delay and often without sufficient merit. It has also led to POBs not offering terms they might otherwise agree to in light of the commonness test. The commonality test does, however, offer important safeguards where there is a difference in negotiating strength between the parties. Reasonable terms can be wide-ranging and may depend on the circumstances of the case. This is a broad test and could

lead to further disputes about the extent to which a term being uncommon in free of tie tenancies in the market makes that term unreasonable. The PCA has seen examples where a POB seeks to include unique and novel terms that are not otherwise found in free of tie arrangements outside the MRO process. The PCA would be concerned if POBs were able to seek to introduce novel MRO terms, unfairly weighted in their favour but which a TPT may not be able to effectively challenge, exposing them to risks that would not otherwise arise. Even where they do, it could result in more protracted disputes about reasonableness (including through arbitration) where the TPT does not have equal negotiating strength or often the resources.

The PCA does, however, recognise that the commonality test is difficult for a TPT to argue given expert evidence is often required. The PCA would support identifying and specifying the core classes of terms that characterise free of tie tenancies, for which the commonality test would then apply. Experts appointed in individual arbitration cases have been able to identify such terms and could support the identification of core terms. This would help to ensure a compliant MRO tenancy bears the hallmarks of a free of tie tenancy in the market while reflecting that the TPT has an existing relationship with the POB.

Question 9

What are your views on amending the definition for the ‘comparison period’? Please provide the reason(s) for your answer including, where available, views and evidence on whether pub-owning businesses are adopting a 13-month pricing period and the impact this has on business planning.

Comments:

The PCA has received limited intelligence as to the operation of this provision and no arbitration referrals in relation to the Significant Increase in Price gateway. As such the PCA has no considered view on the need for amendment. The PCA would be keen to ensure, however, that any changes do not cause undue confusion for tenants as to their Code rights.

Question 10

What are your views on excluding taxes and duties from the significant price increase calculations? Please provide the reason(s) for your answer.

Comments:

As above in response to Question 9.

Question 11

What are your views about excluding other unavoidable costs from the significant price increase calculations? Please provide the reason(s) for your answer.

Comments:

As above in response to Question 9.

Question 12

Do you think there should be an alternative appeal route to the current High Court or should the latter be retained? Please provide the reason(s) for your answer.

Comments:

The PCA would of course wish to see arbitrations providing finality to disputes, so work to ensure the arbitration process works efficiently is welcome. The PCA recognises there may be circumstances in which a POB or TPT wish to pursue an appeal. To date, the only appeals that have been pursued have been by POBs, likely to be in particular because of the exposure to costs. Indeed, TPTs may be exposed to costs where appeals are brought by the POB and have led to TPTs not wanting to play any part at all in the appeal as a result. This could have the effect of limiting access to justice. The PCA recognises that the formality of the High Court and greater need to incur costs of professional representation might be intimidating for a TPT. The PCA would support an alternative appeal route that would be more accessible to TPTs including in relation to cost and complexity and more fairly balance the access to appeal rights as between the parties. Such changes would have the effect of making it easier for POBs to also pursue their appeal rights, although the POBs are already well-resourced to follow the existing appeal route and so the impact of this is unclear. The PCA has recently made it a requirement for POBs to notify her of any arbitration appeal, so this is currently monitored in her regulatory capacity.

Question 13

If you believe that the appeal route should be changed, what do you think it should be changed to? Are there other ways to make an appeal more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

Comments:

The PCA would welcome any changes to the appeal route which improve the ability and confidence of TPTs to pursue their appeal rights as appropriate.

Question 14

Are there any other ways that could be adopted to make the appeal route more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

Comments:

As noted above, the PCA recognises the benefits of making the appeal route more accessible to TPTs. With costs likely to be a concern for TPTs, it would be useful to consider any means by which their exposure to costs can be capped. The PCA wishes to focus her efforts primarily on steps to ensure POBs provide compliant proposals and act in a Code compliant manner, reducing the potential for disputes in the first place. But where disputes do arise, the PCA wishes to see POBs resolving those fairly and efficiently with TPTs, making arbitration a last resort.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

Yes

No