Department for Business, Energy & Industrial Strategy

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: [Redacted]
Organisation (if applicable): British Beer and Pub Association
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)
☐	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

Question 1

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

Comments: It is not clear from the consultation what is the specific problem that the proposal for Parallel Rent Assessments (PRAs) is seeking to resolve. There is no evidence presented of how prospective tenants are being affected, and it is our view that there is no issue here that warrants the requirements for a PRA.

A prospective tenant clearly has the freedom of choice before entering an agreement, and still needs to take their own professional advice before doing so. The level of pre-entry information and training that has already been implemented under the Code has proven to be successful in ensuring that prospective tenants are well-informed before making a decision about whether or not to enter into an agreement.

There is a cost and complexity to undertaking PRAs that does not justify the exercise, in order to present a theoretical option to a tenant that isn't available. A requirement for a PRA would likely create confusion for prospective tenants and add extra unnecessary burdens for PubCos. While a PRA figure might work as an aid to transparency in theory, our concern is that setting out a hypothetical outcome to prospective tenants would be both difficult to explain and very likely to generate arguments and disputes. There is also the question of how a PRA could then be challenged by a prospective tenant or their advisors.

The fair dealing and no worse off principles are not equal considerations at entry for prospective tenants. The proper focus for them will be on the tied terms and the rent. Where a prospective tenant chooses to pursue a tied tenancy, the Code already equips them with the information to understand and assess the tied terms and rent offered - in the form of the Schedule 1 information specified for the purposes of a new agreement and the Schedule 2 and information specified for the purposes of a rent proposal or rent assessment proposal. There is no suggestion in the consultation that these existing Code provisions covering pre-entry training, pub-specific information and business plans, and the evidence required in support of the tied rent assessment, are failing to ensure that prospective tenants receive transparent information about the tied tenancy they are considering.

Requiring PubCos to complete PRAs would also prolong and complicate the induction process, resulting in delays for tenants and additional costs for all parties. One specific problem with determining a PRA is the suggestion of a "notional free-of-tie tenancy" and what this means. Defining this, on a consistent and meaningful basis, would create problems and be a complicated process in itself. We are not aware of any evidence to justify these additional burdens.

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: As with Question 1 and the proposal for Parallel Rent Assessments, it is not clear what issue this proposal is seeking to resolve.

Prospective tenants already have freedom of choice before entering into an agreement. This decision will be market-led already, and their decision will take account of any offer of trial periods or break clauses that the PubCo might choose to include as part of their package.

Trial periods are one of the ways in which some PubCos already tailor their offer to prospective tenants and indeed provide a point of difference with other companies. "Encouragement" or mandating trial periods (or similar) for all would add unnecessary complexity; those PubCos that already chose to do so, as part of their offer to new tenants, have made a commercial decision. That should remain a voluntary decision, to be taken by PubCos.

Importantly, the commercial reality is that it is not in a PubCo's commercial or reputational interest to keep a licensee running a pub if, for example, they've decided they want to leave the pub, or the business is not performing. Our discussions with those BBPA members covered by the Code confirmed that trial periods or break clauses are in regular use already – but those are commercial decisions and there is no evidence to suggest it should be mandated through Government intervention.

There could also be a number of unintended consequences in mandating this. For example, we would point out that it would be unlikely that either a new licensee or a PubCo would invest in the business if there was a lengthy mandated trial period. This would obviously result in any necessary investment being delayed. Another example would be the resulting impact this might have on Temporary Management Agreements (TMAs) or Tenancy At Will agreements (TAWs) which are already subject to code practices.

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: Again, it is not clear from the consultation what issue this proposed change is seeking to resolve.

That said, we feel that a three-month period is likely overly optimistic to enable a newly-regulated PubCo to prepare itself and implement any additional processes and resources that it will need for Pubs Code compliance.

However, it does raise the question of whether here should be a timebound moratorium on some of the Code's provisions being applicable for unregulated tied pubs being bought by a regulated PubCo.

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: It is unclear what this information would be used for by the PCA. If it is solely for the purpose of resource planning within the PCA, it is already made aware on a quarterly basis of the numbers of pub disposals, and whether these have been disposed to a regulated PubCo or not. A requirement to provide specific details of each individual pub does not seem to serve any useful purpose, yet would create both additional work for the PubCos providing it and the PCA to record and monitor.

Any tenants that operate a disposed pub will have already been advised of their extended protection by their disposing PubCo; there is no evidence to suggest this isn't happening or that such tenants are unaware of their extended protections. In discussion with BBPA members that are regulated PubCos, it was re-confirmed that any such tenant is advised of their extended protections.

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: Again, it is unclear what the issue is that this proposal is seeking to resolve, or what evidence has been presented of an issue.

A requirement to present a PRA to a tenant with extended protection presents the same difficulties as set out in the answer to Q1, notably the additional cost and burden, and the potential for confusion. However, in this scenario any such tenant no longer has a right to MRO, and therefore there is no strong rationale for the need for a PRA.

The aim of extended protection is to ensure that the tied rent coming out of regulation would be fair because it was concluded under schedule 2 rules. There is no indication that this is not being afforded to tenants with extended protection.

Any pubs that are covered by extended protection will very likely also be covered by the Pub Governing Body's voluntary code, and therefore have access to the Pubs Independent Rent Review Scheme (PIRRS) if there is a need.

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: Firstly, we would make the point that the Pubs Code is not solely about MRO and the operational success of the Code should not be judged by the number of MRO agreements that have been granted. MRO is simply one element of many that are there to ensure that licensees get a fair deal – it absolutely does not mean that an MRO deal is always the best option for licensees or something that every licensee would wish to take up. That a number of licensees are looking at MRO and choosing the lower cost, lower risk, high support of continuing their lease with a supply agreement proves that the legislation is working - as it means that licensees are able to see that they are no worse off and are choosing to remain on their supply agreement. MRO provides PubCos with the opportunity to explain the benefits of the model to tied tenants and provide them with a choice.

We have no strong preference for either of the examples presented. They key aspect that needs to be addressed is the elimination or reduction in the need of tenants to make referrals solely as a means to reserve their positions

The Code applies a number of timescales in order to incentivise parties to complete the MRO process efficiently. When the legislation was drafted, it was envisaged this process would run openly and co-operatively alongside their tied rent assessment. At the time the legislation was consulted on in 2014, the Government envisaged a dispute resolution process founded on in-house mechanisms in the first instance and access to independent and industry fora, before escalating more serious matters to the PCA for formal arbitration (albeit with safeguards to ensure that access to the PCA was not frustrated). This policy is reflected in the longer timescales for referral in respect of non-MRO disputes.

There is an increasing sense that some tenants' advisors are "gaming" the MRO process, in order to make money from spurious referrals. This is not only preventing PubCos from taking the time to negotiate with licensees, but also distorting the numbers of referrals and ultimately adding to the PCA's workload.

The main aspect that needs to be addressed is the elimination or reduction in the numbers of tenants making referrals solely as a means to reserve their positions. This could be achieved

- in terms of amendment to the 14-day period for making referrals provided under

regulation 32(4) of the Pubs Code to provide for a longer period for discussion and negotiation between the parties prior to the commencement of arbitration proceedings and;

- amendment to regulation 32(3) of the Pubs Code to require intimation of not only the intention to make a referral before that referral is made, but also the perceived deficiencies in the MRO offer the PubCo has issued.

We therefore believe there needs to be a more reasonable time limit, and there needs to be some kind of filter or sift applied to referrals prior to arbitration commencing, plus a limit on the costs for which PubCos are liable in order to discourage vexatious or otherwise unmeritorious referrals.

We would suggest that there is potential for a hybrid option, with more time at the outset for negotiation by both parties and therefore a greater opportunity to come to an agreement without the shadow of arbitration hanging over it. For example, no referrals to be allowed within the first 28 days of negotiation.

We would also suggest that if changes are to be made to the MRO process steps in terms of timescales and deadlines, these should be "stress tested" first using real life cases to ensure that by seeking to address existing concerns, new problems are not inadvertently created.

Finally, whilst we welcome the Government reviewing the MRO process as part of this consultation, we hope any resulting changes will not result in unintended consequences or create any new opportunities for dispute. The principle of 'no worse' off is a fundamental, yet complex, element of the Code - we would argue that rather than consult on this principle in a fragmented way, the Government would be better to wait until the second statutory review period next year and consider this as part of its wider review. Fundamentally all parties want an MRO process that is simple, clear, provides certainty and works for everyone.

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: All of the currently regulated PubCos already include rent with an MRO proposal, therefore the proposed change is not necessary.

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: We are of the view that the requirement should be retained. We have concerns that the removal of the requirement has the potential to open the floodgates to a large range of unique and unrealistic requests. This in turn would increase the number of disputes and referrals.

Whether or not terms are uncommon or not should be reflected in the broader

"reasonableness" debate, but we would suggest that much greater clarity is provided as to what is "reasonable".

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: It is our view that the definition should be amended to ensure a 12-month comparison period. It is unclear why the current 13-month period was established, and possibly an unintentional outcome of drafting. It has the effect of preventing annual introduction of any cost increases, thereby unnecessarily complicating the process for both tenants and PubCos.

The Code describes four circumstances (or MRO trigger events) under which a tied tenant may request an MRO proposal – one of which is where there has been a significant increase in the price of a tied product or service. Since coming into force, this has presented difficulties for PubCos to implement, as the significant price increase threshold and period - as it stands - fails to reflect the commercial realities of extrinsic price increases for products, ingredients and commodities.

It cannot be right that by applying an 'expected' annual increase each year, regulated PubCos subject themselves to a significant increase in price due to the 'comparison period' of 13 months. Evidence from our members is that the result of this is that price changes move forward by four-weeks each year to ensure the tenant is not appearing to get two annual price increases in the same period (i.e. a 13-monthly cycle for price increases). In addition it could be argued that PubCos are artificially subsidising the tenant's business by not passing on costs which competitors would be passing on to their customers. We would suggest that this was not what Parliament intended should happen.

It is also worth highlighting that under free market policy principles - and for unregulated PubCos - additional costs associated with such externalities may freely be passed onto the licensee and ultimately the consumer, who, in turn, can make an informed decisions on purchasing. This principle has been lost under the Code.

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: While excise duty and VAT are excluded from the significant price increase calculation, other tax increases are not. No allowance is made for any other tax price increases – such as the 'sugar tax' which was announced by the Government in 2016 and introduced in 2018.

It is our view is that it is both fair and sensible to have such taxes, tariffs and duties excluded. We believe that it was not the original policy intention to include such price increases, and it remains unreasonable to have such taxes and duties within scope. Such

excluded costs should include any that arise as a result of supply chain taxes e.g. potential future carbon taxes or other environmental taxes.

An ‘extrinsic increase’ should not be considered a significant increase in price, and therefore we would welcome changes to these provisions to enable PubCos to pass on extrinsic price increases to tenants provided that they are not using this to increase their profit margin. We would suggest the same clauses used in the ‘trigger event’, clause 7(6) of the Code, can also be used in the significant increase in price clauses.

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: It is our view that unavoidable costs should also be excluded. One way of achieving this would be to use sector specific inflation data from ONS quarterly reports rather than the broader indictor of CPI.

We also suggest that PubCos should have the ability to challenge unforeseen increases that are cited as being trigger events.

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: Our members are independently seeking their own legal advice on this question, and will respond accordingly in their own response to the consultation.

Any changes to the appeals process should we considered in the round, alongside any changes that might be made to the dispute resolution process more generally.

We would recommend that any alternative appeal route should not be within the control of the PCA.

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: Same position at Q12.

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: Same position at Q12.

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