Campaign for Pubs

Promote, Support and Protect Pubs

Response to the BEIS consultation on the Pubs Code

Introduction

The basis for this consultation - to make changes only within the confines of the existing legislation - is deeply disappointing and not in line with avowed Ministerial intention and the principles on which the Pubs Code legislation was supposed to be based. We would make strong representations that Government does not constrain consideration to the existing legislation.

The current legislation and Code has not protected tied tenants or the nation's pub heritage and buildings as intended. We consider that all of the issues raised during the initial Statutory Review consultation need to be fully addressed but also that the Code and legislation itself is properly discussed.

Furthermore, having reviewed the consultation document and issues with publicans who have commercial skills and experience of the tie, it is very clear that the PCA lacks this expertise and also doesn't have a commitment to delivering the two key principles on which the legislation was based (neither of which are being delivered).

The consultation questions as drafted very deliberately – and cynically – exclude the real issues, the same issues identified continually by the British Pub Confederation (of which the Campaign for Pubs is a member organisation). It avoids the fundamental questions, such as how tenants could be given what they were promised, a genuine Market Rent Only option that cannot be 'gamed' and delayed by POBs. Consequently, the consultation is a phoney consultation, in other words a sham, another example of the PCA wanting to be seen to do something, rather than actually delivering the simple and clear rights promised to tenants.

It is also deeply naive in parts and reflects serious failures in the PCA's engagement and communication processes. None of this is at all surprising, indeed it is all too predictable, but it is disappointing and reflects a continuing refusal of Government and the PCA to acknowledge the truth: **that tenants do not have what they were promised and what Parliament voted for.** The inevitable outcome is that the giant pubcos continue business as usual and many thousands of tenants are not able to take a fair share of the profits that they make from the pub they run and many still face exploitation.

We are only taking part in this partial and inadequate consultation because there is no other means to raise such issues, but we will continue to campaign for the simple rights promised to tenants, including a genuine Market Rent Only option (that Fiona Dickie admitted in person to some of us, that tenants do not have).

Question 1

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

It needs to be clear as to what this proposal is seeking to address:-

(a) to provide prospective tied tenants with more information and understanding about tied agreements prior to signing - this would require much more supporting information and advice to accompany the PRA?; and/or

(b) to ensure that POBs align their tied rents to a fair market rent - this would require a process of validation? Both of these issues were recognised by the Parliamentary scrutiny and numerous debates that led to the Pubs Code. Tied tenancies are unique to pubs, they are not as transparent as a standard tenancy and they carry substantial risk, with significant investment and commitment from a tenant over a number of years.

It is, therefore, critical that tied tenancies are not permitted to be mis-sold, as many still are, on the basis of wholly unrealistic returns. The Pubs Code has failed to stop this.

Whilst a Parallel rent assessment can be a useful tool for checking alignment of a tied rent with a market rent, we do not consider that a parallel rent assessment in itself will provide suitable protection for these issues. This is because any rent/tie that is not independently assessed or freely negotiated by knowledgeable parties gives no assurance as to whether either the market rent or tied rent is appropriate.

We reiterate – as the British Pub Confederation have maintained - that the only way to determine the market rent of a pub is through independent assessment, anything else is a negotiated rent. Rather than just having PRAs, a much more comprehensive package of measures would be required to ensure anything near to an acceptable level of protection for prospective tenants:-

(1) mandatory warning and explanatory narrative provided to all prospective tenants;

(2) details of tenant representatives from whom to obtain advice about how the tie operates prior to signing an agreement;

(3) a genuine – and much more accessible MRO option within a shorter period of commencement of the tied tenancy (see our answer Question 2);

(4) removal of all reference to discounts on highly misleading wholesale barrel prices (these are not true discounts, they were merely less inflated above market prices);

(5) provision of whole tenancy costs including details of the average costs of challenging a rent assessment at arbitration and of dilapidations at the end of an agreement. Given that this remains a concern 5 years after the Pubs Code Regulation was introduced, what is actually needed is to legislate to introduce a genuine, simplified MRO option and delivering what tenants were promised and do not have. This is a simple statutory solution, which would actually deliver the changes intended by the legislation, to properly rebalance risk and reward. This and a strengthened, clearer and simpler Pubs Code is what is needed, rather than fiddling with the deeply flawed and inadequate current Code and introducing even more complicated regulation which is likely to deliver more ambiguity and legal challenge.

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.

We are very concerned about this suggestion. We cannot envisage how such a trial period could operate without "a commercial contract" underpinning it (and as it is, tenancies at will deliver this currently, but with some rights in place).

Any such proposal would need to be some form of commercial agreement as tied tenants are independent businesses, not employees. Furthermore, any trial period undertaken outside the scope of the "commercial agreement" cannot be a trial of the tied "commercial agreement". 3 months is insufficient time to assess the full viability of the business especially for those new to the trade and/or the tied model and in any case, new tenants often have better terms that they are able to get down the line, so any trial can be completely useless in assessing the reality of operating an actual tied tenancy. Further to this, prospective tied tenants may not be in a position to undertake such a trial.

A much more effective alternative would be to include a MRO on demand option and break clause between years 1 and 2 of any new tied contract. This would give tenants the opportunity to review actual outturn in year 1 against forecast outturn in the rent assessment proposal. This would create real incentive for POBs to ensure a viable tied deal from the outset (which is what the Pubs Code was supposed to do, but due to being so watered down and compromised, it has not).

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.

We consider that the Pubs Code should apply in full to all tenants of the large pubcos. We also believe that all such tenants should have access to the independent assessment of market rent, to prevent exploitation (whether through the tie or simply through excessive rents).

Particular protection is needed for tied tenants as it is the nature of the tied agreement that gives rise to the need to protect tenants.

We also believe that the Pubs Code and right to MRO should apply to all companies with 500 or more pubs, not 500 or more tied pubs (and would like to see a consultation about extending the Code to companies with fewer pubs, to stop what has happened with the sale of pubs from larger POBs to smaller companies specifically to avoid the Pubs Code).

Notwithstanding this, if a pub owner reaches the current limits at any point they should immediately be required to comply with the Code.

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.

[When you say 'landlord' do you mean pub owner? Landlord is not a sensible word to use in this consultation, as it could be taken to mean the POB (or another free hold owner who may let it to a POB, as happens in a small number of cases) or the pub tenant (who is often called the pub 'landlord). So the intention of this question is not clear.]

As above, we believe that the Pubs Code should apply in full to all tenants of pub companies that own 500 or more pubs (of any sort, not just tied pubs). Particular protection is needed for tied tenants as it is the nature of the tied agreement that gives rise to the need to protect tenants.

In any case, in reality, extended protection is of very limited value without the right to MRO and is somewhat of an irrelevance within the wider context of the inherent failure of tied tenancies. It is unclear what the PCA do with such notifications so we would ask what the point would be and what action the PCA would take? As with so much of this, if we had a Pubs Code process that worked as intended, this kind of less than important question would not need to be asked.

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.

We cannot see how a PRA and/or referral process to the PCA would be useful without a right to MRO. We are also unclear how this would operate in relation to the rent dispute clause in the lease.

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.

Fundamentally, the Pubs Code has failed to deliver the protections to tied tenants and tied pubs that tenants were promised and that Parliament intended.

Furthermore, POBs have adjusted their working practices to seek to avoid this regulation: by gaming provisions of the Pubs Code to make it difficult for tied tenants to obtain a market rent only option at all, by threatening detrimental terms of any news lease, by reducing their long leaseholds and by increasing 3-5 year tenancies and by imposing quasi-franchise type agreements. These strategies do not protect publicans, our pub heritage and buildings as originally intended by Parliament and are simply a means of protecting the commercial interests of POBs.

Many tied tenancies remain inherently unfair and tenants need a genuine Market Rent Only option (which we would favour being on-demand, but in any case must not be able to be thwarted by the POB, as currently happens).

In terms of the existing MRO process, the PCA has failed fully to grasp and capitalise upon the existing strength of the Code to remedy the single biggest issue of incentivising POBs to co-operate and expedite the transfer to MRO if requested by a tenant. This could be improved by utilising:-

(a) rent review reconciliation clauses within existing leases which fall outside the remit of the MRO process and so attract the potential for Regulation 50 detriment if POBs use delaying tactics and refuse to recompense tenants as is a contractual right if a tied rent is selected; and

(b) using Parallel Rent Assessments to calculate profits lost by tenants due to delays. The PCA refuses to engage constructively with tenants on these issues despite the admission of related errors on the interpretation of the Pubs Code.

The Pubs Code has so many significant failures that it is difficult to envisage substantive and meaningful improvement without changing the existing process as follows:-

(1) whilst product ties remain lawful, all tied agreements need to have the MRO option available to the tenant as a core protection;

(2) there needs to be effective arrangements for a tenant to recover lost profit where a MRO is not completed by a Rent Review Date;

(3) Regulation 50 detriment proceedings should be able to continue beyond the end of the tied agreement;

(4) the tenant should have the option to refuse PCA arbitration and take a matter direct to a Court as per other commercial disputes.

(5) a genuine MRO option needs to be freely available as a right for all tenants covered by the Pubs Code. As in Scotland, this could be on demand in order to impact on the ongoing abuse of the tie by pub owners.

Question 7

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

It is important to make clear that the current MRO option in the Pubs Code is not a genuine Market Rent Only option as voted for in the House of Commons and promised by Ministers. A genuine Market Rent Only option, as voted for in November 2014, is a simple right for a tenant to opt to go free-of-tie and to pay an independently assessed market rent, with no other changes to the lease and with the right for the tenant to operate such a lease from 90 days of giving notice to the pubco (with the pubco unable to delay or thwart this). So that is what is really needed.

However, within the confines of the current Pubs Code, an 'MRO offer' should include the proposed rent to enable any meaningful consideration of the option. The MRO rent proposal should be reconciled to the tied offer. Both rent assessments should show full tenant and POB profit for the premises.

Question 8

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

If all terms are subject to the test of being "reasonable", then "uncommon" terms would appear to be a subset protection. It should, therefore, make very little difference to the consideration; but offers an example of what could be unreasonable.

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.

We have no strong views on this matter as, in reality, this small change will add very little to the protection of tenants.

This is relevant to all of the points raised in this consultation as none of the changes proposed will lead to the substantial level of change required to protect tenants and our pub heritage.

We would make the further point that the current tests and narrow definitions for MRO triggers is a significant weakness of the Code. This is not better highlighted by the fact that even the devastating impacts of Covid on the sector did not provide an automatic right to a rent review and did not trigger the right to MRO option, when it clearly should have done and when the original MRO clause as voted for by the House of Commons would have delivered.

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.

Variations in product prices, whether from taxation or direct product cost, significantly impact upon the viability of tied agreements so we would not be in favour of excluding any aspect to the detriment of risk carried by tenants. Furthermore, we would be opposed to any further complication or weakening to these already complicated and weak provisions.

In any case, the whole subject of beer duty adds a significant complication (and indeed abuse) of the tie by large pub-owning companies. So we would wish to see a full and proper examination of this before any decisions are made.

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.

This proposal reflects a complete misunderstanding of the concept of commercial risk and the tie.

With the tie, pub owners (in this case POBs) carry the risk of market supply cost increases and they also benefit from decreases in market supply costs. Tenants carry the same risk in respect of wages and all the other costs associated with tenanting a pub. Indeed, one of the main fundamental flaws with the tie is that tied prices are way in excess of market prices and tend to drift even higher as a tenancy matures because POBs apply annual product increases regardless of whether prices in the market have actually increased.

The provision within the Code to limit tied increases is to protect tenants from POBs abusing or passing this risk to tenants through excessive product increases. Given this background, it makes no sense whatsoever to seek to enable POBs to pass on market price increases but to retain market price decreases.

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.

Yes, although the reality is that no appeal to the High Court would be needed if the Pubs Code process worked as intended. The point of having a statutory adjudicator was supposed to be that adjudication would have legal force, meaning that the process would resolve issues and be legally binding.

The sad truth is that the very name ‘Adjudicator’ is a sham, for the PCA is not really a statutory adjudicator at all and does not actual make legally binding adjudications, as was envisaged and as is clearly sensible; we have instead Pubs Code arbitrator, which is a different thing altogether.

Tenants have been badly let down by this less than honest legislation (which was never establishing an ‘adjudicator’ at all) so further primary legislation is needed, to actually give the PCA genuine powers to adjudicate on disputes.

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.

The Appeal route to the High Court is prohibitive for most tenants and an alternative, through the Tribunal Service, may be an option.

However, more importantly the PCA arbitration process is often a blockage to satisfactory resolution and the right to bypass the PCA and take a dispute direct to a Court would be advantageous.

The PCA has a poor reputation for timely, definitive, reasonable and fair decision-making so there are huge advantages to using the Court system from the outset. This is the normal course of action with non-Code commercial disputes

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.

See the answer to question 12. We need a genuine statutory adjudicator who will make legally binding adjudications.

What is needed most of all is for the BEIS Ministers to stop hiding behind the PCA and to acknowledge that tenants have not been given what was promised to them, by BEIS Ministers and civil servants and that legislation is needed to deliver this – and a genuine Market Rent Only option and a Pubs Code Adjudicator that actually adjudicates!

Conclusion

This phoney and partial consultation on the Pubs Code misses the real issues and the reality that the current Pubs Code and legislation doesn't deliver either of the principles on which legislation was based, nor has it rebalanced risk and reward as was intended when the legislation was promised then introduced.

The tie (which means tenants being forced to buy only from the pub-owner at inflated above market prices) can only ever be justified if the rent is commensurately lower than the market rent, to compensate. Nothing else can deliver the principle that the tied tenant should not be worse off that the free-of-tie tenant.

It is very odd that a Government that claims to be in favour of free market continues to allow the current operation of a skewed and controlled market, dominated by a few large companies (including non-brewing investment companies) who together operate a deeply questionable business model and impose remarkably similar artificial pricing on tenants (who are banned from buying direct from brewers/suppliers, on the open market and are fined if they do so).

So we call for a genuine consultation, which properly looks into this, as well as legislation to deliver what was promised to tenants and campaigners - this means a simple right to all tenants covered by the Pubs Code to an independent assessment of their market rent and the right to pay

this with no product and supply ties, within 90 days and with no other changes to the lease, nor with any ability for the pub-owning company to thwart or delay this.

We also equally strongly believe that the clear discrimination of tenants on MRO agreements during the Covid-19 pandemic shows that all tenants of the larger companies must be protected under the Pubs Code and indeed all tenants should be given some protection from such discrimination and exploitation. Otherwise the ongoing existence of the tie cannot be justified and must be reviewed.