

# Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019

Prepared by: Nick Griffin, CEO

The Licensees Association

03/12/2020



THE  
LICENSEES  
ASSOCIATION

## EXECUTIVE SUMMARY

### Objective

The Government produced its Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019 in November 2020. The report invited the reactions to the proposals contained within the review by stakeholders to help ensure these achieve the intended effect and avoid unintended consequences.

### Background

The Licensees Association, as a representative body for the independent licensed trade, has prepared this report to meet the request of the Department for Business, Energy & Industrial Strategy (BEIS). The Licensees Association represents the views of the independent operator and is completely free from any landlord influence. The report is seen and approved by the membership in advance of publication.

In writing the report consideration is given to the two overarching principles that underpin the Pubs Code, that of “fair and lawful dealing” and the “no worse off” principles. We note the Government believes that the Code itself is consistent with the principles set out in the Act but that it is not consistently delivering the outcomes the principles are intended to support. We would agree.

We recognise the need for the review to balance the interest of both landlord and tenant and the The Licensees Association is not inherently opposed to the tied leasehold model. We do, however, fully support the right of a tied tenant to ensure they are no worse off than a free of tie tenant by having access to a market rent should they wish.

---

---

# THE GOVERNMENT PROPOSALS

## Scope of the Code

Whilst recognising that the current threshold of 500 is arbitrary we do believe that a level at which a company automatically comes under the scope of the code is required. We welcome the proposal to keep this number under review.

We further welcome the consultation on the timings by reference to which companies come within the scope of the code. Companies can currently, by careful planning, exceed the 500 pub threshold yet not permit code protection to its tenants for periods of time that can exceed the required negotiation period for rent reviews. This alone is detrimental to the ability of the tied tenant to access a market rent and ensure they are no worse off. Consequently we see no justification for a period of longer than six months from exceeding the threshold and for any MRO negotiations that have been started to be allowed to complete.

We believe the Government is right to explore with stakeholders whether tied tenants should have more protection when their landlord sells their pub. This is urgent given the possible fall out of company restructuring as a response to the Covid-19 pandemic.

## Information/advice for tenants

We support the Government's desire to work with the PCA on ways to find out more about new tenants' understanding of their Code rights and what informed their decision to enter into a tied agreement. This is fundamental in ensuring protection and tenant awareness.

We also agree with the Government proposal to not restrict who can provide advice to tied tenants and work with the PCA and representative groups on how to disseminate information to tenants to help them to access appropriate, professional advice. With reference to the Government proposal to consider whether an expert panel approach could increase the availability of independent advice for tied tenants, we would urge that consideration is given to the genuine independence of the bodies that they consider for approach. Representative bodies can and often do receive more income from landlords than they do from tenants and this raises concerns about the genuine independence and objectivity of representative body. This doesn't discount their role and advice in any consultation but it should be considered and weighted when assessing.

We welcome the Government's intention to consult on whether prospective tied tenants should be able to undertake a Parallel Rent Assessment to assess whether, in their view, the proposed tied tenancy meets the 'no worse off' principle. We would immediately urge caution here though. When considering the Independent Assessment rewards when compared to the RICS signed off MRO proposal from the landlord there is a large disparity. This could easily be used to distort the offer to the prospective tenant.

We have some concerns about the investment exception. Whilst appreciating the need for investment and the desire any business to require a return on this investment we do not believe that this should be to the detriment of the tenant who as a consequence will have no recourse to ensuring they have the ability to benchmark their rent and ensure they are no worse off. We need additional benefits to the tenant to be real and quantifiable if they are to be used to justify any exception of a market rent opportunity.

---

---

## MRO process and MRO compliance

In relation to the MRO process and compliance the Government has proposed four actions:

- *consult on possible changes to improve the restrictive timescales in the Code for the MRO process. This may include whether to allow additional time for negotiation;*
  - We support this consultation. Some tenants have reported the use of delays by the landlord and that the tenant is not compensated for lost profits as a consequence of landlord long-grass can-kicking. We consider this a clear omission of the Pubs Code and if the Code is not to be amended urgent concern to the timescales must take place to ensure tenants are not disadvantaged.
- *consult on whether to amend the Code to require the pub-owning business to propose the rent with MRO terms so the tied tenant is able to consider the entire offer being made by the pub-owning business;*
  - Whilst supporting the consultation we would urge caution here. Whilst we support the basic principle we would caveat this with our concern about the veracity of the parallel terms if they include a proposed rent. Considering the independently assessed rents since 2016 we have already noted the large discrepancy between the RICS signed off MRO rent proposal and that of the actual award. We have concerns that a landlord may seek to justify and steer towards a tied rent through the use of inflated parallel FOT rent terms.
- *consult on whether to remove the requirement that terms should not be 'uncommon' or to retain this as a part of the provisions for an MRO proposal to be 'reasonable; and*
  - We welcome the consultation and note that this has been an area of concern to us for some time. We are aware that the use of common terms has been used to justify terms which should be replaced. One such example being the use of indexation by RPI. This is a discredited index which is inflationary to the advantage of the landlord and has been justified as a term because it is historically common.
  - We support the approach of assessing the terms "in the round" and on their own merits as part of the reasonableness test.
- *discuss with stakeholders the implications of making changes to the comparison period and excluding taxes, duties and other unavoidable costs from the Significant Price Increase calculation before consulting on any changes to those provisions*
  - We welcome the consultation. The four-week period one calendar year apart principle is clearly not reliable in some circumstances. Events may make it a poor comparable in certain circumstances and clearly this years pandemic evidences this.

Further to this we note the concerns of the Government around accepting that an MRO proposal can only be achieved by the use of a new agreement. Whilst believing a deed of variation would be our preferred approach we do recognise that on occasion there may be the need of a new agreement and we should not therefore be prescriptive. Some landlords have previously insisted that it is their prerogative to choose between DoV or new

---

---

agreement and consequently the option of DoV was effectively removed as an option. This is not a negotiation its a fait accompli and we urge this is kept under constant review by the PCA.

### Arbitration process

We support the Government consulting on the creation of tailored dispute resolution rules to improve the arbitration process and increase transparency in relation to arbitration outcomes. We further support the exploration of an alternative to the High Court as the arbitration appeal route to make this a more accessible option for parties. We would point to the success of the sub 500 group PICAS and PIRRS procedures as possible solutions.

We also support the publication of awards as considered appropriate by the PCA. It would be our preferred option to allow for redacted publication of all awards.

### Pubs Code Adjudicator

The Government has proposed five actions:

- *encourage the PCA to increase awareness among stakeholders of how it addresses alleged non-compliance and to publicise where its action short of investigation has resolved issues. It will ask the PCA to retain such evidence it may come across of persistent poor behaviour by pub-owning businesses where it considers its existing powers are insufficient to enforce the Code.*
    - We welcome this move and feel confident that the PCA is already dealing with the substantial elements of the proposal. We believe non-compliance and resolution should be publicised to firstly ensure prospective tenants can take poor behaviour into consideration and secondly to allow existing tenants to recognise and benchmark poor behaviour with the expected result that publicity will lead to improved behaviour over time from landlords.
  - *ask the PCA to identify and publish performance measures and report annually on these;*
    - Key Performance Indicators (KPI) are one part of the tool kit that will allow prospective tenants to judge the behaviour and suitability as a business partner of the landlord. We support this.
  - *ask the PCA, in developing its approach to stakeholder communications, to consider the findings of the review to ensure all parties have an opportunity to contribute their views and that end-users are able to shape how information is provided;*
    - We welcome the reviews desire to ensure the PCA allows all parties to contribute in considering the findings of the review. We would also urge the PCA to ensure proper consideration is taken of the genuine independence of the contributor and appropriate weighting applied.
  - *ask the PCA when engaging external arbitrators to consider the required experience and knowledge of the Code and any training requirements; and*
    - We welcome this guidance from government. We would also note that the use of external arbitrators is welcomed by The Licensees Association when taking into account the limited number of industry specialist arbitrators and the possibility of conflicts of interest.
-

- 
- *when a suitable legislative opportunity arises, enable the PCA to recruit its own staff to ensure it is appropriately resourced to fulfil its duties.*
    - We support this proposal. In doing so we note the workload the PCA has been under has resulted in delays at times and any move to ensure appropriate levels of resource allied to expected workload will assist all parties.

## **Impact assessments for the Pubs Code and associated regulations**

When considering the initial review covers only three years since the introduction of The Pubs Code and the Pubs Code Adjudicator we must factor in many will not have had a review or renewal of their agreement and consequently not had the opportunity to assess its efficacy in delivering the primary principles. Having noted this we believe the review is welcome in its interim nature.

We would urge Government to keep many of the matters discussed in their report and noted above under continued review with a further report to be produced in 2023 allowing for the effects of the pandemic and a full rent review cycle to be considered.

A further review will also allow for greater evidence in relation to some of the claims and counter claims of pub closures. It is our belief that the code has not led directly to pub closures but prefer an evidenced approach. It will also allow for a greater understanding of the income redistribution and moves by Pubcos to move towards agreements that allow the to avoid MRO (5 year agreements, managed houses, contracting out etc)

## **Conclusion**

The Licensees Association welcomes the review and report that the Government has produced. We believe that the proposals contained within it will go some way to developing the application of the Pubs Code and the office of the PCA.

We will happily be involved in future consultations as recommended and believe we are well positioned to comment for our members and the wider independent sector. We are free from any landlord influence, funded solely by operators, and our perspective will reflect this.

We do also believe that the report has also missed the opportunity to go further. This is particularly highlighted in failing to deal the clear omission to compensate tenants for lost profit through the award of an MRO postage review date. We would urge that this is redressed.

---