

British Pub Confederation

Standing Up for Pubs and Publicans

Rt Hon Alok Sharma MP
Secretary of State
Department for Business, Energy & Industrial Strategy
3 Whitehall Place
London
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9th December 2020

Dear Alok,

Pubs Code Consultation – remit of further discussions

We are writing regarding the ending of the consultation into the Pubs Code and the promise from BEIS Parliamentary Under Secretary of State, Paul Scully of further discussions between stakeholders and BEIS.

We are deeply concerned at the way this process seems to already be restricted to a list of non-fundamental issues, whilst omitting the fundamental issues – and failings – of the current Pubs Code and its operation.

The list of points over which your Department have stated they are prepared to consult are ones that will not and cannot address the issues that are preventing tenants using the Code and accessing a meaningful Market Rent Only option.

Indeed, it seems instead that there is an agenda to actually avoid the main issues and tinker around the edges, to give the impression of reviewing the Code, whilst actually ignoring the real issues and ignoring, yet again, the concerns of pub tenants and their representative organisations despite these being clearly and consistently expressed to your Department and to the Pubs Code Adjudicator.

This is now a pattern that suggests a wholesale lack of interest in the genuine rights of pub tenants and an institutionalised attitude of ignoring the real intent of the Pubs Code and the fact it is so demonstrably not being delivered. It is also clear that the approach taken (one to avoid giving tenants the simple right to a genuine Market Rent Only option) remains heavily influenced by the regulated pubcos themselves with no parity for tenant representative organisations.

This has been shown starkly by the information revealed through the Freedom of Information request submitted by Chris Wright of the Pubs Advisory Service (a British Pub Confederation member). The BEIS Freedom of Information response FOI2020/26885 exposed that in the 90 days between 1st March and 1st June, when the Government was meeting with pub and hospitality groups to discuss the situation facing pubs and hospitality in the Covid crisis, that you and Paul Scully met with representatives of regulated pubcos and their trade associations **but did not meet with a single representative organisation of tied tenants not funded from or with members including regulated pubcos.**

This alas reflects what happened in 2015, when Ministers and Civil Servants had private meetings with and bowed to pressure from the large pubcos and their trade representatives,



Member organisations:

Campaign for Pubs
Forum of British Pubs/Forum of Private Business
Licensees Supporting Licensees
Guild of Master Victuallers
GMB
Scottish Licensed Trade Association
Fair Pint Campaign
Pubs Advisory Service
Justice for Licensees
Punch Tenant Network
Unite the Union
Protect Pubs
Society for the Preservation of Beers from the Wood

which led to a weakened and wholly inadequate Pubs Code, overseen by the original (and clearly conflicted) Pubs Code Adjudicator.

The tragedy from the point of view of actual pubs and publicans, rather than their investment fund and offshore owners, is that had the Pubs Code been even slightly more effective, then thousands of pubs in this country would not have been exposed as badly as they have to the current crisis caused by the Covid pandemic. The deliberate weakening of the Pubs Code and its ongoing inadequacy will lead to pubs closing permanently, which could have been prevented if tenants had the simple right to a genuine Market Rent Only option promised to them in Parliament but then frustrated in the Pubs Code.

The reality for thousands of publicans owned by the regulated pub companies is that they are in tens of thousands of rent debt to the pub companies that are supposed to be subject to regulation under the Pubs Code. These are huge rent debts that they will never be able to pay off with continuing restrictions and the fact the Government has denied most pubs normal December trade (with many unable to trade at all). The only response so far to this issue has been the weak additional voluntary code of practice for rents, which in the pub sector has shown itself not to be worth the paper it is written on. Organisations representing pubs and publicans (as opposed to the giant pubcos, investment funds and offshore owners) warned the Government that this would be the case and that Government intervention was necessary. Alas and as is par for the course, your Department chose only to listen to the large pubcos and their trade bodies.

The reality is that the points that pub tenants' organisations and tenant members are now being asked to comment on fail to come close to addressing the failure of the Code, neither addressing the root causes of the problem nor making any meaningful change to the current process.

The Pubs Code is (supposedly) based on two principles and neither of these principles are achieved by the Code or the actions Adjudicator, and in the case of the "tied tenant shall be no worse off than the free of tie", the principle is not even clearly understood.

In 2015, whilst the Code was being written, much was made of the "unforeseen consequences", of the Codes implementation and yet the stakeholders of the British Pub Confederation, not only predicted many of those consequences but gave insight into how those consequences could have been avoided. The fact that so many of those proposals were ignored, as BEIS Civils servants instead strove to "balance the needs of business", in other words, as usual, giving in to big business and watering down legislation.

Over the last 5 years, representatives of British Pub Confederation member organisations have met with your Department on several occasions and provided clear and unequivocal evidence of persistent bad business practices. The fact that these concerns appear to have been largely ignored is of great concern to us and even more concern to pub tenants who are being let down by the current situation.

The proposed list of issues to be discussed is as follows:

Scope

Consult on shortening the timings by reference to which companies come within the scope of the Code.

Informed decision making

Consider and 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

Significant Price Increase

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.

Market Rent Only

Possible changes to improve the restrictive timescales in the Code for the MRO process. This may include whether to allow additional time for negotiation.

Whether to amend the Code to require the pub-owning business to propose the rent with MRO terms so the tied tenant can consider the entire offer being made by the pub-owning business.

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

Arbitration process

The creation of tailored dispute resolution rules to improve the arbitration process and increase transparency in relation to arbitration outcomes

Explore scope for an alternative to the High Court as the arbitration appeal route to make this a more accessible option for parties and consult on proposed changes accordingly

Whilst many of these points are worthy of discussion, in that they touch on improvements to the process, they completely fail to address the root cause of the problem which is the lack of clarity and ease in which the way a tenant can achieve the Market Rent Only option (and the fact that tenants do not have the right .

So, the reality is that this further consultation is deliberately omitting the central issues and it seems deliberately avoiding the real underlying problems with the current situation facing tenants. This makes it a phoney consultation and one that by design cannot address the real issues facing tenants. This is unacceptable.

We need, once again, to remind you of the reality of the right promised to tenants, the genuine Market Rent Only option, which is what Parliament intended and what Ministers promised they would deliver. The Market Rent Only option is, very simply, the right to trigger an independent rent review to determine the rent according to the market at the time and without any product or supply ties. Tenants of the regulated pub companies were supposed to be given this right, at certain trigger points, and be allowed to pay this market rent from within four months of triggering the right, with no other changes to their lease. As you must know, this is nothing like the so-called 'Market Rent Only' option that ended up in the fudged and watered-down Pubs Code.

The Market Rent Only clause voted into parliament in 2015 was to provide a simple transfer from a tied agreement to a free of the agreement, through the severing of tied terms with all other terms in the tied agreement remaining the same. This process was clean, simple and workable and included no requirement for the costly and ineffective arbitration process that is

now being consulted over. So rather than tinkering around with unnecessary arbitration that should never have been put into the process, rendering it inaccessible and interminable, we need genuine MRO.

Ministers and civil servants gave assurances (including in writing) that pubcos would not be allowed to 'game' and delay the system, yet then conspired with the pubcos and their representatives to alter the draft Code and Market Rent Only option to give them carte blanche to do exactly that, indeed worse than that created the opportunity for them to do so by allowing the pubcos to force tenants to go to arbitration, with the Pubs Code Adjudicator then (conveniently) taking months and months, often well over a year, to do this effectively denying tenants the right to go MRO.

This has been explained to BEIS Ministers by our Chair, Greg Mulholland, who as you know introduced the original Market Rent Only clause to Parliament, so you cannot possibly credibly claim that the current so-called market rent only process is what parliament intended, when it is demonstrably not. This point was indeed acknowledged by the current Pubs Adjudicator when Deputy Pubs Adjudicator pressed on this matter at a meeting with Confederation representatives in Birmingham in October 2018. Greg explained what the Market Rent Only option was intended by Parliament as above and Fiona Dickie confirmed that this was not what is in the Pubs Code (and that the PCA could only oversee the Code as it was drafted).

So alas Ministers did not abide by the promise they made to Parliament, to implement the will of Parliament and watered down the Market Rent Only option and the whole Pubs Code, in a way that alas is all too common when the Government s only listen to vested interests, in this case (as with the loophole deliberately created in the Beer Orders) the large pub-owning companies.

So the points that your Department are asking will have no material impact on the effects of the Code, other than in a very superficial way and in some instances the points raised are inaccurate, demonstrating worrying lack of understanding as to the current processes.

We have listed below the 10 points that are vital for further discussion, if the Pubs Code is to work in the way Parliament intended:

1. **The definition of the Market Rent Only Option** – in reality, tenants do not have the genuine MRO option that Parliament intended, and this must be part of any honest consultation over the Pubs Code. Tenants were promised – and need – the simple right to trigger an independent rent review and then to have the legal right to pay the independently assessed market rent within four months of that trigger point. Anything else is not the Market Rent Only option, merely negation and interminable and unnecessary arbitration over a pubcos (inflated) free-of-tie rent offer, a fundamentally different thing.
2. **MRO to be achieved by deed of variation rather than new agreement** – the Market Rent Only option (any MRO option, including the weak one) should operate on the basis of a deed of variation of the existing lease, with all other terms remaining the same. This was the original intention and the will of Parliament – the severing of tied terms with an (independently assessed) open market rent. The Pubs Code is silent on the issue and therefore it can be easily implemented into the secondary legislation, removing the major reason for costly referrals and arbitrations, which would be beneficial also for the Pubs Code Adjudicator and office, who have shown over the last three years they cannot cope

with the workload associated with the many unnecessary and deliberately drawn out arbitrations.

3. **The MRO rent to be backdated** – Pub-owning companies must not be able to delay and game the right to the Market Rent Only option. This was promised by Ministers and Civil Servants, please refer correspondence at the time. So, part of this (as envisaged by Parliament and then cynically watered down in collusion with the pub-owning companies) must be that the tenant has the legal right to pay the market rent from the point of trigger. The current situation, whereby the pub-owning company has a strong incentive to drag out the process for as long as possible, to stop the tenant having their legal right to pay the market rent, is so obviously and self-evidently a fundamental flaw which allows the POB to delay the process as long as they like to their own advantage. That this was allowed in the first place shows the extent of the collusion between the Government and the pub-owning companies and their trade association.
4. **Trigger events to be consulted on** – Regulation 7 - “unforeseen event is almost impossible to achieve and yet the most common is the opening of competition that is unexpected and damaging to business.
5. **The Independent Assessment Stage** – The most important stage of the process and yet the list of IAs is getting smaller and the “independence” has not improved. One of the IAs acts almost wholly for one of the largest POBs and acts as an IA whilst also representing them as an “expert witness”.
6. **Tenants at Will (TAWs)** – there should be a discussion about the position of Tenants at Will. TAWs are currently used as a stop gap, but this allows the pubcos to exploit this, leaving TAWs in place deliberately to avoid having to give the publican their legal rights to fair dealing and to their rights under the Pubs Code.
7. **Retail agreement to be covered by the Code** – the move to quasi managed operations has seen proliferation of appallingly abusive operations in which tenants are exploited mercilessly through inaccurate and in cases seriously questionable stock deductions. It is disappointing that this is something that is seemingly ignored by the Pubs Code Adjudicator and BEIS Ministers and civil servants.
8. **Dilapidations** – Further clarity required for this deeply exploitative area of abuse. Already covered by the 1927 Landlord and Tenant act, this is a vital area, recognised even by Paul Newby as being a serious issue that has yet to be resolved, yet we hear nothing from the current Pubs Code Adjudicator or from BEIS about action to tackle what is well known to be a key areas of exploitation and downright abuse of pub tenants. The one thing that the Code has addressed is the issue relating to Brulines and therefore a similar stand-alone regulation concerning Dilapidations can easily be done.
9. **Clarity on renewals** – The renewal process crosses over into the 1954 L & T Act and there needs further clarity on how the interaction works.
10. **Nothing to address enforce the 2nd Principle of Fair and Lawful Dealing** – the Government choose to have this as a key principle, yet currently it has no practical application and many examples of clearly unfair (and in some cases legally questionable)

dealing by pub-owning companies has been largely ignored by the PCA and entirely ignored by BEIS. So if this – and frankly the integrity of Government promised and the Pubs Code – is to be upheld, we now need to see legislative clarity of what this means for tenants and with key examples of what constitutes unfairness and with a clear commitment to meaningful action from the Pubs Code Adjudicator, something we have seen very little of, other than challenging Star/Heineken over their breaches of the code when it comes to stocking requirements,. In reality, the unfair treatment of many tenants is far more serious than issue and revolved around the ongoing unfairness of the tied pubco model and the fact that the model means taking far more than is fair or substance from pub profits, leaving many tenants unable to make a living – which was exactly what the Government legislation to tackle, then caved in and failed to do so!

These points are easily implemented, the majority through secondary legislation and will address many if not all the issues that have left pubs in this Country, horribly exposed.

Furthermore, we have seen that many of these proposals, are likely to be implemented by Scotland, who at things stand are well aware of the shortcomings of the legislation and system in England and Wales and we hope, will learn from these (and not give in to the pubcos in doing as happened in Westminster in 2015 when the Pubs Code and MRO option were watered down, rendering them of little use to tenants and thus reneging on the proposed Ministers made to Parliament.

The British Pub Confederation welcomes the opportunity to work with the Government to make sure that the Pubs Code, which promised so much and has deliver so little. We remain disappointed that habitually your Department, Ministers and civil servants and the PCA office are so comfortable dealing with the representatives of the large pubcos, investment funds and offshore owners and so reluctant to involve the organisations who actually represent pub tenants. We urge you to change and will continue to hold you and your department when you do not.

We look forward to hearing from you and we hope, listening to pub tenants and their representative organisations, rather than just the large pubcos and their representative groups.



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Chair
British Pub Confederation
Campaign for Pubs



Ian Cass
Vice-Chair
British Pub Confederation
Forum of British Pubs



Inez Ward
Vice-Chair
British Pub Confederation
Justice for Licensees

cc Darren Jones MP, Chair, BEIS Select Committee
Fiona Dickie, Pubs Code Adjudicator
Charlotte Nichols MP, Chair, All Party Parliamentary Pub Group