



## DEBATE PACK

Number 2016-0079, 12 April 2016

# The Pubs Code and the Adjudicator

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This is a debate pack for the Westminster Hall debate on 14 April 2016 initiated by Mr Greg Mulholland (chairman of the all-party Parliamentary Save the Pub group).

It summarises the role of the Adjudicator and why it was thought necessary to create the Pubs Code. It also provides background material on the progress of the legislation to establish the office of the Adjudicator and the Code, together with the recent concerns expressed about the appointment of Paul Newby as the first Adjudicator.

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# 1. Background

The Pubs Code comes into effect on 1 June 2016. The code only applies in England and Wales and affects approximately 13,000 tenants of the six largest pub companies.

The legislation creating the Pubs Code was contained in the *Small Business, Enterprise and Employment Act 2015*. The legislation only outlined the general principles of the Code and the role of the Adjudicator. The sponsoring Department, The Department for Business, Innovation and Skills, will reveal more details of the Code and its operation once it has analysed the responses to two consultation exercises it carried out in October and December 2015. The Code will be laid before Parliament by way of secondary legislation.

It was thought necessary to introduce the legislation creating the Code mainly due to the perceived disparity in negotiating power between individual tenants and the major pub groups. As the Bill progressed through Parliament, Members succeeded in increasing the scope of the proposed powers of the Code. Probably the most important change to the Bill was to introduce the Market Rent Only (MRO) option. This would give tenants greater flexibility in how they operated their pubs by allowing them greater choice on the level of their ties to the pub owners.

During the two consultation exercises, fears were expressed by some Members and tenant groups that the draft regulation published in the consultation document, did not provide as much protection to tenants as Members had envisaged it would. With the Code due to come into operation by late May 2016, concerns have been raised that the Department's final decision on the precise powers in the regulation will only become known very shortly before the Code comes into existence.

These concerns have been further heightened by the recently announced appointment of Paul Newby as the first Pubs Code Adjudicator. During his career as a Chartered Surveyor Mr Newby has personally worked on a number of projects with several of the major pub companies. Furthermore the partnership he worked for is likely to continue to work closely with these companies. Concerns have been expressed that this will create conflicts of interest in his new role when acting as an arbiter between tenants and these companies.

## 2. The Pubs Code

Approximately 13,000 tied tenants of the six largest pub owning companies in England and Wales will be covered by the Pubs Code (the Code) and the Pubs Code Adjudicator (PCA). The Code only applies to companies with 500 or more tied pubs. The PCA's main responsibilities are to:

Arbitrate disputes between a tied tenant and a pub owning company about the Pubs Code and award redress if a breach is proven, including arbitration of rent disputes, which may require the setting of a new rent.

Investigate suspected systemic abuses of the Code and consider which, if any, enforcement measures should be taken.

Consult and issue guidance on the investigation function, including the criteria that the Adjudicator intends to adopt in deciding whether to carry out investigations and whether to use the enforcement powers.

Recommend to the Secretary of State the amount of the levy each year on pub owning companies.

Prepare and publish an annual report of the Adjudicator's activities and prepare an annual statement of accounts for audit by the Comptroller and Auditor General; both will be laid before Parliament by the Secretary of State.<sup>1</sup>

### 2.1 Why was it considered necessary to create the Code and the role of the PCA?

The main issue is the treatment of tied tenants by their large, pub-owning, landlords. Four successive inquiries by the House of Commons Business Innovation and Skills Select Committee, in [2004](#), [2009](#), [2010](#) and [2011](#), identified significant problems within the industry. With a fall in the number of pubs from approximately 70,000 to 50,000 between 1982 and 2014, it was felt that the industry was experiencing considerable difficulties. The main focus of attention was on tied pubs, in particular the treatment of tenants and the share of reward received by pub owning companies. The Select Committee received repeated reports of delay in opening rent review negotiations; lack of transparency in these negotiations; failure to carry out repairs agreed when a tenancy began; verbal agreements being ignored and of harassment of tenants following bereavements. The Committee felt that the problems were primarily due to the inequality of bargaining power in these business contacts. The Committee came to the [conclusion in its 2011 report](#) that the self-regulatory approach had failed and that legislation was necessary.

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<sup>1</sup> [Pubs Code Adjudicator Appointment Brief](#) Prepared by Lisa James and Sarah Magnell Saxton Bampfylde, BIS, July 2015

## 2.2 Which legislation created the Code and post of PCA?

Part 4 of the [Small Business, Enterprise and Employment Act 2015](#) created both the post of PCA and the Pubs Code he would enforce. The Code will govern the relationship between large pub-owning businesses (those that own 500 or more tied pubs) and their tied tenants with the independent Adjudicator enforcing the Code. The full details of the Code and Adjudicator's administration will be introduced through secondary legislation following the Government's consideration of responses to two [consultation exercises](#) which ended on 18 January 2016.

The Bill was amended a number of times during its passage through the House in order to increase the rights of tied tenants. Perhaps the most important amendment concerned the Market Rent Only (MRO) option. Originally, the Bill did not give tenants the automatic right to choose a free-of-tie agreement. However, during its Report stage an amendment, tabled by Greg Mulholland, to make the MRO option a key part of the new regulatory regime was agreed to.

More in depth information on the progress of the legislation through Parliament is available in Library Briefing Paper 7074 [Pub companies, pub tenants and pub closures: introducing statutory regulation \(2014-15\)](#).

## 2.3 When will the final version of the Code be published and the regulations bringing it in come into force?

The Act provided an indication of what the Code would contain but the details of the Code and precise powers of the Adjudicator would be established by secondary legislation. Draft regulations were published as part of the consultation exercise in October 2015. The Pub Code will be published by the end of May 2016 and come into effect from 1 June 2016.

## 2.4 Details of the operation of the Pubs Code

Concerns have been raised that the draft regulation included in the consultation documents is not as supportive of tenants as Parliament intended in the *Small Business, Enterprise and Employment Act 2015*. The issue has been raised in Parliament in both oral and written questions. [Early day motion 1323](#) details the principal concerns felt by a number of Members. Primarily these concerns are focused on the MRO option.

The Department for Business, Innovation and Skills has not yet published its response to the two consultation exercises which concluded on 18 January 2016 and has yet to produce a final version of the Code.

Members have expressed concerns that as the Code is due to come into operation from the 1 June 2016 tenants will not have enough time to prepare for the new system.

### 3. The Pubs Code Adjudicator (PCA).

The announcement that Paul Newby had been appointed PCA was made during the [Third Reading debate of the \*Enterprise Bill\*](#), by the Minister for Small Business, Industry and Enterprise, Anna Soubry.

The manner of the announcement was subsequently criticised by several Members in an [Urgent Question debate](#) the following morning. Fairly typical of this criticism was Bill Esterson's contribution:

The way the Minister announced the appointment yesterday- as part of the shambolic proceedings on the Enterprise Bill and Sunday trading did not exactly inspire confidence. She announced it in an intervention of all things on Third Reading. If nobody had mentioned the pubs code on Third Reading the announcement would not have been made even then.

The Minister stated:

Yesterday, a press release was prepared for publication today. I took the opportunity, as you know, Mr Speaker, to tell the House first – I thought that was a courtesy to the House – and I did so in intervening on the hon. Member for Leeds North West because I thought he had a proper interest in pubs and that he might be in some way grateful, but we live and learn.

During the Urgent Question debate, strong concerns were expressed that Mr. Newby would not be considered impartial by pub tenants in his arbitration with the pub companies. Amongst those questioning the appointment was Greg Mulholland who commented:

In the past five years he has acted for Enterprise Inns, Marston's and Punch Taverns. The very companies he is currently acting for are bullying and coercing tenants into signing away their rights or forfeiting pubs. His company is actively involved in selling off pubs. How can he possibly be trusted to be impartial, given that for 20 years his salary has been dependent on those he must now adjudicate on and potentially impose financial penalties on? There is a clear conflict of interest, which appears to render this process extremely dubious at the very least.

The Minister responded:

Mr Newby has represented not just pub trade companies but tenants. He has 30 years' experience effectively representing both sides.... I met him at the end of the procedure, as the House would expect. His was one of three names put forward, quite properly, in a full open and fair process.

Subsequently a number of Members have sought further information from the Minister on her comment in the Urgent Question debate that:

Mr Newby will start his work full time on 2 May. He has actually already started work. He has been very helpful to my officials in

making sure that we have the pub code up and running and ready to come before this house.

The issue of impartiality, both actual and perceived, has been raised by several of the organisations' representing tenants including The British Pub Confederation, probably the largest representative of tied tenants in the sector. Within Parliament, [Early day motion 1269](#) summarises the main concerns felt by a number of Members.

### 3.1 Who is the PCA?

Mr Newby will commence full time work as the PCA on 2 May 2016. A Department for Business, Innovation & Skills [press release](#) provided the following background details on Mr Newby

From 1969 to 1977 Paul Newby attended Solihull School, where he is now a Governor, with primary responsibility for the school's property endowment. Subsequently in Sheffield he obtained an Honours Degree in Urban Land Economics, graduating in 1981. Paul qualified as a Chartered Surveyor in 1983, and was appointed a Fellow of the Royal Institution of Chartered Surveyors (RICS) in 1993. He has worked in private practice for more than 30 years, the majority of that time in the public house, hospitality and leisure markets. Paul qualified as a Member of the Chartered Institute of Arbitrators in 1996, and has been a member of the RICS President's panels of Arbitrators and Independent Experts since 2001 and 2003 respectively. He is an RICS Registered Valuer and an RICS Accredited Mediator, a co-author and panel member of PIRRS and served on the BIIBAS Code of Practice Benchmarking Committee from 2010 to 2015.<sup>2</sup>

### 3.2 The PCA appointment process

The executive search agency Saxton Bampfylde was responsible for conducting the administration of the recruitment exercise. Its 18 page [Appointment Brief](#), which was sent to all applicants, contained within it a section raising the issue of conflicts of interest. Section 7 of the brief is reproduced in full below:

#### **Conflicts of Interest**

If you or a family member have any personal or business interest or potential conflict of interest with the activities of the Pubs Code Adjudicator you will be expected to declare this. Any conflict will not prevent you going forward to interview, but may be explored with you during the selection process. You will also be required to uphold the standards of conduct established by the Committee on Standards in Public Life, also known as the Nolan principles.

Each candidate had to complete the following section:

#### **Potential or Actual Conflicts of Interest**

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<sup>2</sup> [Pubs Code Adjudicator appointed](#), BIS, 10 March 2016

Please give details of any business or other interests or any personal connections you or a family member may have which, if you are appointed, could present a conflict of interest holding this role. These could include financial interests or share ownership, membership of societies, activities, associations or employment of a partner or friend in the particular field in which the public body operates.

Any potential or actual conflicts of interest detailed here will not prevent you going forward to interview but may, if appropriate, be explored with you during your interview to establish how you would address the issue(s) should you be successful in your application. If there are no potential conflicts of interest, please write “none”.

The interview panel comprised

- Olivia Grant - a Public Appointment Assessor appointed by the Commissioner for Public Appointments
- Katherine Courtney – Enterprise Director for the Department of Business, Innovation and Skills
- Lewis Shand Smith – Chief Ombudsman for Ombudsman Service, as the Independent Panel Member

Ms Grant was on the panel as the representative of the [Commissioner for Public Appointments](#) who regulates ministerial appointments to national and regional public bodies. The Commissioner does not make appointments himself; he has a legal duty to audit public appointments and to ensure appointing Departments follow the principles of merit, fairness and openness. The [press release announcing the appointment of the Pubs Code Adjudicator](#) states that the appointment was “made in accordance with the code of practice for the Office of the Commissioner for Public Appointments (OCPA)”.<sup>3</sup>

From information supplied by the Minister during the [Urgent Question debate](#) on 10 March 2016 and subsequent written questions it is known that seven candidates reached the final interview and the Panel passed a final shortlist of three to the Minister for her to make the final selection.

There have been questions about what actions the Minister should have undertaken in satisfying herself about potential conflicts of interest for the PCA post before making the appointment. The [Code of Practice for Ministerial Appointments to Public Bodies](#) outlines the principles and essential requirements for making ministerial appointments to the boards of public bodies.

There is nothing in the Code specifically about looking into potential conflicts of interest. Ministers can, if they wish, be closely involved throughout the recruitment exercise or may choose to allow their departmental civil servants to administer the initial recruitment phases without detailed intervention. To a considerable extent it is up to the

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<sup>3</sup> [Pubs Code Adjudicator appointed](#), Department for Business Innovation and Skills, 10 March 2016

individual Minister to decide on their degree of involvement in the various stages of the process. Anna Soubry made clear in the Urgent Question statement that she did not meet Mr Newby until his name was submitted to her as one of the three shortlisted candidates.

A number of Members have continued to ask questions on what Mr Newby disclosed in his application on potential conflicts of interest. Perhaps the most detailed response so far is to Bill Esterson's written question of 21 March 2016 [32012](#)

To ask the Secretary of State for Business, Innovation and Skills, pursuant to the Answer of 18 March 2016 to Question 30688, if he will publish the interests submitted by Mr Paul Newby when he applied for the role of Pubs Code Adjudicator

To which the Minister responded

The appointment panel satisfied itself there were no conflicts of interest when they made recommendations to ministers in relation to the appointment of the Pubs Code Adjudicator.

The Department does not intend to publish any information provided by candidates during this appointment process.

In due course and as is usual practice, the Adjudicator's office will publish a register of interests.

## 4. Press comment on the Pubs Code and Adjudicator

The Publicans [Morning Advertiser](#) has an archive of articles on the Pubs Code and the role of the Adjudicator. These articles date back to the original Select Committee regulatory investigations and covers the subsequent developments up to the present time.

In a [press release](#) on 10 March 2016 the GMB union which represents some tied pub tenants criticised the appointment of Mr Newby to the role of Adjudicator.

Steve Kemp GMB National Officer said: "This appointment of Paul Newby is the 'mother of all stitch ups'. A person who has close links to the pub companies Enterprise Inns and Punch Taverns is bizarre and totally unfathomable.

An adjudicator is someone who needs to be impartial and without baggage closely linked to the pub companies as Mr Newby does as a director of Fleurets, a company that has Enterprise and Punch as clients.

The Government has failed miserably at the first hurdle and GMB calls on the Government to undo the first stitch and re appoint somebody much more suitable to the job of adjudicator."

Following some of the comments on Mr Newby's appointment and the issue of conflicts of interest the [Royal Institute of Chartered Surveyors](#) issued on 16 March 2016 the following press release:

Statement regarding the appointment of Paul Newby as Pubs Code Adjudicator

By the very nature of the role, the adjudicator's office will need someone with past experience in this field of valuation and Paul's professional history has seen him represent both pubcos and tenants at various junctures in his career. As Paul Newby will no longer continue in his role with Fleurets, there should not be a risk of this posing a conflict of interest in his execution of his new post.

An RICS spokesman has said: "Chartered Surveyors are expected to demonstrate the highest professional standards and act within the RICS Code of Conduct at all times. We have no reason to believe that Paul Newby is failing to meet these standards. On the evidence that we have seen to date, this does not appear to be an issue of conflict."

On 15 March 2016 the British Pub Confederation, which represents tenant organisations, sent a detailed letter to Sajid Javid the Secretary of State for Business, Innovation and Skills, which raised points of concern and condemned the appointment. The Confederation considered the appointment to be a conflict of interest and have raised a number of detailed issues connected to it.

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