

Submission to the Joint Select Committee of Parliament on the Tobacco Control Bill (Tobacco Industry Interference in Health Policy Making)



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Summary

- The Bill will curb, but not extinguish, the tobacco industry's opportunities for policy influence.
- Modest, but vitally important, changes to the Bill can increase compliance with Article 5.3 of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) significantly, protecting tobacco control policy from industry interference.
- Clause 8(1) of the Bill does not restrict the tobacco industry's ability to use third parties – such as business associations – to lobby on its behalf. Further, the Bill's restrictions on lobbying do not extend to MPs and will not extend to all public bodies. Extending the scope of clause 8(1) in line with the Guidelines for Implementation will strengthen the protection of health policy from tobacco industry interference.
- Clause 7(2) seeks to make interactions which occur between public officials and the industry transparent to the public. However, there is a risk that this provision will be interpreted narrowly, and interactions will not be made fully public in line with best practice.
- Clauses 9(3), 10(1) and (2) strengthens the law relating to individual conflicts of interest among public officials and the tobacco industry. However, they do not extend to MPs, which creates opportunities for continuing industry political influence.
- The “disclosure clauses” in the Bill (clauses 25 and 26) do not require the tobacco industry and any organisation working to further its interests to periodically submit information on lobbying and other forms of political activity. Amending the “disclosure clauses” to include tobacco industry political activity will reduce the costs of industry monitoring significantly and further strengthen health policy from tobacco industry interference.

I. Introduction

In this submission, we discuss the Tobacco Control Bill's provisions covering tobacco industry interference in health policy. We begin by describing the importance of comprehensive implementation of the Guidelines for Implementation of Article 5.3 of the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC), which seek to prevent tobacco industry interference in health policy making. We then go on to discuss the strengths and weakness of the Bill in implementing the Guidelines based on [research conducted with the Jamaica Coalition for Tobacco Control](#).¹ Finally, we present recommendations on how the Bill can be strengthened to ensure strong implementation of the Guidelines.

2. Tobacco Industry Interference in Health Policy and the Guidelines for Implementation of Article 5.3 of the WHO FCTC

Jamaica ratified the WHO FCTC in July 2005. Article 5.3 of the Treaty requires parties to insulate the development of public health policies from tobacco industry political influence. The Article is the first of its kind in an international treaty and reflects the decisive role major tobacco companies have played, and continue to play, in disrupting and weakening tobacco control policies and their implementation.

Tobacco industry political influence is widely recognized as a key cause of weak implementation of tobacco control policy internationally.²⁻¹¹ Guidelines for Implementation of Article 5.3 published in 2008¹² contain 34 specific recommendations outlining how parties should meet their obligations under the Article. These focus on enhancing governments' capacity to monitor the industry's political activities, curbing insider political strategies, managing and eliminating conflicts of interest within health policy-making, and prohibiting financial and other forms of support to the industry.

As one of several similar documents adopted at sessions of the Conference of the Parties, the governing body of the FCTC, the guidelines constitute a subsequent agreement under Article 31 of the Vienna Convention on the Law of Treaties 1969 and, therefore, should be taken into account by parties in interpreting their obligations under Article 5.3.

Five common weaknesses in implementing the Guidelines Recommendations

Implementation of the Guidelines in many countries is selective and incomplete.² Measures aimed at preventing industry interference commonly have the following flaws:

- fail to cover all policy actors (including senior policy actors);
- fail to cover all parts of public administration;
- fail to include third parties in prohibitions and restrictions on tobacco industry political activity;
- fail to place the responsibility on tobacco companies to disclose their political activities;

- fail to address efforts by the tobacco industry to strength their structural advantages in policy-making (through, for example, trade and investment agreements).²

Five risks of weak implementation of the Guidelines Recommendations

Gaps in implementation of the Guidelines have potentially far-reaching implications for continuing industry influence in health policy-making. This is because tobacco industry political activity is varied, mutable, and capable of adapting to changing political and institutional conditions, including selective and incomplete implementation of the Guidelines.^{13,14} Five characteristics of this political plasticity are relevant to understanding the industry’s ongoing capacity for political interference.

- Tobacco companies seek out alternative venues to supersede or circumvent health ministries, which is typically the lead department on FCTC implementation and a “veto point” for tobacco industry political activity.^{15,16} This political venue-shopping is carried out to exploit different priorities of decision-makers in different parts of government.^{2,17-19}
- Tobacco companies often substitute one technique for another. This is illustrated by their use of corporate social responsibility (CSR) activities to gain informal access to difficult-to-reach public officials.^{18,20-22}
- Industry actors draw on the support of third parties. This is done either to leverage the greater credibility of third parties or when industry actors are excluded from policy-making processes or are otherwise refused access to policy actors.^{13,14,23,24}
- Industry actors shift the policy focus of existing techniques. One example of this is strategic partnerships. These are now increasingly advocated by major tobacco companies in relation to the illicit trade in tobacco in order to facilitate political access and embed themselves in policy-making networks relevant to tobacco taxation.^{3,13,25}
- Tobacco companies’ efforts to shape trade and investment agreements^{26,27} and embed cost-benefit analysis and risk assessment into policy decision-making^{28,29} illustrate their success in establishing new forms, or levels, of political governance. These strengthen their institutional advantage within health policy-making.²⁷⁻²⁹

Minimising policy risks and comprehensive implementation of the Guideline Recommendations

The above characteristics of industry influence underline the importance of comprehensive implementation of Article 5.3 and its guidelines. Selective or incomplete implementation of specific guideline recommendations simply preserves opportunities for industry influence. These opportunities have a cumulative and mutually reinforcing effect on the industry’s ability to build consensus within government and legislatures against policy change and implementation.²

3. The Strengths of the Tobacco Control Bill in implementing Article 5.3

Present Implementation of Article 5.3

Historically, government efforts to implement Article 5.3 have been poor. Our [research](#) suggests that formal compliance with the Guidelines is currently 4.8 on a scale of 0-26 or just 18%.

Key Guideline Recommendations have not yet been acted on. Presently, the Government has failed to act on several key Guideline Recommendations which are critical to effective health policy in Jamaica. These include those aimed at: direct lobbying; restricting the “revolving door” between politics and the tobacco industry; banning tobacco industry “corporate social responsibility” outright; requiring tobacco companies to disclose evidence of their efforts to influence Jamaican politics.

Article 5.3 and the Tobacco Control Bill

The Tobacco Control Bill represents a major improvement on Article 5.3 implementation. Our [research](#) suggests that it will increase the government's compliance to 18 or 69%.¹ However, *the Bill will curb, but not extinguish, the tobacco industry's opportunities for policy influence.*

The Bill is particularly strong in relation to tobacco industry CSR (Recommendations 6.2-6.4 of the Guidelines) and some institutional conflicts of interest such as political funding (Recommendation 4.11) and government subsidies (Recommendations 7.1-7.3). CSR is widely understood to be a political tactic used to gain access to policy elites, build political constituencies, and tie tobacco companies, misleadingly, in the public imagination to social and economic development.^{18,20-22,30,31} The Bill's restrictions on tobacco industry sponsorship will effectively prohibit tobacco companies from using CSR to influence policy, as well as banning contributions to political parties, elected representatives and candidates for public office. Equally, clause 9(3)(a) of the Bill covers tax exemptions and other benefits to tobacco companies (also see [here](#) for a brief discussion of the implications of clause 9(3)(b) for tobacco industry divestment).

Further, Recommendations 3.1, 3.2 and 3.3 of the Guidelines urge governments to avoid partnerships, non-binding agreements, and voluntary arrangements with the tobacco industry as well as advocating that they refrain from becoming involved with or endorsing tobacco industry youth and public education initiatives and voluntary codes. Recommendation 3.4 urges governments to refrain from accepting assistance from the tobacco industry in developing tobacco control policies. Clause 9(1) of the Bill will effectively implement these recommendations in full. Given the threat that partnerships and offers of assistance in policy development pose to strong public health policies going forward, it is vital that this clause is passed into law in its entirety.

4. The Weaknesses of the Tobacco Control Bill in implementing Article 5.3

Restrictions on Government-Industry Interactions

Recommendation 2.1 of the Guidelines encourages parties to limit the effectiveness of tobacco industry lobbying by restricting interactions with the industry only when and to the extent strictly necessary to enable them to effectively regulate the tobacco industry and tobacco products. This is addressed by clause 8(1) of the Bill, which states that “a person who acts on behalf of or for the benefit of a public body which has responsibility for tobacco control” shall not interact with a “person in the tobacco industry in furtherance of a business activity, except where it is strictly necessary so to do.”

In the modern era, the industry lobbies officials across government departments (including customs and excise, trade, and finance departments) to influence the taxation of tobacco products and trade and investment agreements.^{2,24,27} It also uses third parties - such as general business associations - to lobby on its behalf.^{2,24}

The Bill does not cover these key forms of lobbying. This is partly because of how the “tobacco industry” is defined in clause 2 of the Bill - i.e. “tobacco manufacturers, wholesale distributors, importers, and exporters of tobacco products.” This definition does not cover third parties. Further, only officials acting “on behalf of” or working for “the benefit of” a “public body which has responsibility for tobacco control” are subject to the restrictions. This may potentially exclude persons working outside of health-related departments, with whom the tobacco industry is keen to engage (see, for example, [here](#)).

Transparency of Government-Industry Interactions

Clause 7(2) of the Bill seeks to make interactions which occur between public officials and the industry transparent to the public in line with Recommendation 2.2 of the Guidelines. This is necessary to ensure that the Jamaican public can call out the industry when it seeks to influence health policy. The clause also states that “the Minister shall ensure that all records and documents relating to the interactions and communications between the Government and the tobacco industry be made available to the public.”

There is a risk that this provision will be interpreted narrowly, partly because of how the tobacco industry is defined in the bill, partly because it does not explicitly extend to all parts of government, and partly because the passage in 8(2) which notes that interactions should be “documented” does not spell out that they should be recorded and minuted. Other countries have introduced protocols, which ensure that all interactions are recorded and minuted and, importantly, that minutes of interactions are made publicly available for inspection.³²

Conflicts of Interest and Parliamentary Representatives

MPs are not included in the Tobacco Control Bill's provisions, which aim to manage conflicts of interest in public administration.

Clause 9(3)(b) of the Bill provides that a person “employed with a public body” shall not “invest in the tobacco industry or any related ventures”. Further, clause 10(1) of the Bill notes that a

person "employed with a public body" shall not "engage in any occupational activity, which may create a conflict of interest". Neither provision covers MPs because of how "public bodies" are defined in the Bill - i.e. as "a ministry or department of Government, including a statutory body or authority, a government company, and an agency designated as an executive agency under the Executive Agencies Act."

Tobacco Industry Transparency and Industry Monitoring

Recommendations 5.2 and 5.3 of the Guidelines urge governments to require the tobacco industry and any organisation working to further its interests to periodically submit information on lobbying and other forms of political activity and for a register of tobacco industry lobbyists (broadly defined) to be created. These recommendations are central to facilitating cost-effective monitoring of the tobacco industry's political activities. Clauses 25 and 26 of the Bill - which cover the industry's disclosure requirements – fail to cover the industry's political activities.

5. Recommendations to protect Health Policy from the Tobacco Industry Interference

Our [research](#) suggests that modest, but vitally important, changes to the Bill can increase compliance significantly to 20 or 77%.

Restrictions on Government-Industry Interactions

Strong implementation of Article 5.3 would require minor amendments to clause 8(1) so that it includes persons acting on behalf of the tobacco industry and all public officials. This could be achieved as follows:

“a person who acts on behalf of or for the benefit of **a public body, the activities of which have an effect on tobacco control**, shall not, whether in the person's individual capacity or otherwise interact in any manner whatsoever, with a person in the tobacco industry **or any entity working to further its interests** in furtherance of a business activity, except where it is strictly necessary so to do, in order to ensure the effective regulation of the tobacco industry, a tobacco product or relevant product.”¹

Transparency of Government-Industry Interactions

To ensure implementation of Article 5.3 at best-practice level the Bill should, ideally, include a provision empowering the Minister to introduce a Protocol governing interactions between representatives of the tobacco industry and public officials and how they are made transparent.

Ideally, the protocol should apply to all public officials, including government ministers, MPs and

¹ We note for the sake of completeness that the proposed form of words would not include interactions with MPs.

their staff and civil servants. Similar protocols introduced elsewhere³² limit all interactions (meetings, telephone conversations, correspondence) between tobacco industry representatives (which includes those working to further the interests of the industry) and all public officials to technical matters relating to the implementation of tobacco control policy. Further, in line with best-practice the protocol should:

- limit meetings (including digital meetings and conference calls) to industry actors named in advanced in writing;
- require a pre-determined agenda for all meetings (including digital meetings and conference calls);
- stipulate that interactions are recorded and minuted (and that minutes include the method of interaction, the names of the parties and individuals involved, the matters discussed, and decisions taken, and any follow up activity planned or anticipated);
- ensure that meetings take place on official premises and that a lawyer is present;
- mandate that the public is given full and free access to all relevant information regarding interactions, including dates, those in attendance, and minutes;
- prohibit all side meetings, hospitality or meetings at social events.

An alternative would be to amend clause 8(2) to specify that all interactions shall be "**transparent and recorded and minuted**" and for clause 7(2) to be amended to ensure that interactions across public bodies are made fully transparent:

“Pursuant to subsection 1(c) the Minister shall ensure that all records and documents relating to interactions and communications between public bodies and the tobacco industry and those working to further its interests are made freely accessible to the public.”

Conflicts of Interest and Parliamentary Representatives

Implementation of Article 5.3 at best-practice level would require amendment of all individual conflict of interest provisions in the Bill so that they include persons "**employed with a public body and elected representatives**". Alongside this a definition of "elected representatives" would need to be included in the interpretative provisions of the Bill (clause 2), which covers all MPs and local government elected representatives.

Transparency in Health Policy-Making and Effective Monitoring

Amending clauses 25 and 26 of the Bill - which cover the industry's disclosure requirements – so that they extended to the tobacco companies' political activities would represent a highly effective, cost efficient means of strengthening the ability of public officials, civil society, and the Jamaican public to monitor the industry's efforts to influence Jamaican politics.

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