



## HOUSE OF LORDS CONSTITUTION COMMITTEE INQUIRY: THE LEGISLATIVE PROCESS

### CALL FOR EVIDENCE: TMA SUBMISSION

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#### **Introduction**

1. The Tobacco Manufacturers' Association (TMA) is the trade association for the UK tobacco industry. The TMA's members are British American Tobacco UK Ltd., Imperial Tobacco Ltd. and Gallaher Ltd. (a member of the Japan Tobacco Group of companies).<sup>1</sup>
2. The tobacco industry supports the employment of approximately 60,000 high value jobs, either directly or indirectly, throughout the UK. Tobacco manufacturers contribute around £12 billion in taxation (excise duties plus VAT) to the Exchequer each and every year, which equates to £400 for every taxpayer in the UK.<sup>2</sup>
3. The tobacco industry invests in the region of £158 million per annum in research and development, much of which is dedicated to next generation products like e-cigarettes. The industry also spends approximately £54 million a year in capital expenditure. For every £1 million spent by the tobacco industry, an additional £1.7 million of spending is supported in the UK economy.<sup>3</sup>

#### **Scope of Response**

4. Of the six sections of the Call for Evidence, the TMA is well-placed to answer questions in regard to four: '*Creating Good Law*', '*Brexit*', '*Public Involvement and Engagement*' and '*Parliamentary Involvement*'.<sup>4</sup> What follows in the remainder of this submission will, therefore, relate to the questions listed in these sections alone.

#### **Creating Good Law**

5. The creation of so-called 'good law', defined as 'law that is 'necessary; clear; coherent; effective; [and] accessible'<sup>5</sup>, is dependent on both the content and context (legislative) of

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<sup>1</sup> <http://www.the-tma.org.uk/about/>

<sup>2</sup> [http://www.the-tma.org.uk/wp-content/uploads/2016/07/TMA-Global\\_Business-Report-A4\\_16pp\\_v10.pdf](http://www.the-tma.org.uk/wp-content/uploads/2016/07/TMA-Global_Business-Report-A4_16pp_v10.pdf)

<sup>3</sup> [http://www.the-tma.org.uk/wp-content/uploads/2016/07/TMA-Global\\_Business-Report-A4\\_16pp\\_v10.pdf](http://www.the-tma.org.uk/wp-content/uploads/2016/07/TMA-Global_Business-Report-A4_16pp_v10.pdf)

<sup>4</sup> <http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf>

<sup>5</sup> <http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf>

the law in question. These two considerations also determine whether a particular piece of draft regulation is 'clear, coherent, effective and accessible'<sup>6</sup> at the point at which it is introduced into Parliament. That is to say, they determine whether the purpose of a draft law is evident; if it fits into the context of existing regulation; if it will achieve its purpose alone or in combination with existing regulations to which it is related; and whether it is comprehensible.

6. In light of the above definitions, the experience of the TMA shows that draft regulations are ordinarily clear and accessible, but all-too-often neither coherent nor effective. In part this is the result of a 'big bills' incentive that is appealing to Ministers and moves them to act. The House of Lords' 2004 report on *Parliament and the Legislative Process Volume I* highlighted this issue.<sup>7</sup> However, it is also the nature of an unreflective pre-legislation process in which the impact of related existing regulations is not assessed in the round.
7. The experience of the tobacco sector between 2010 and 2015 offers a good example of this sort of unreflective pre-legislation process. Successive pieces of tobacco-related legislation were introduced over the course of this period, including a ban on vending machine sales, a prohibition on the display of tobacco products in retail outlets, the interdiction of smoking in cars when minors are present and the introduction of standardised 'plain' packaging. On top of this, the European Union's Tobacco Products Directive, which contains changes such as the prohibition of cigarette packs of fewer than 20 cigarettes, was adopted in this period.
8. No formal process of independent post-implementation impact assessment was carried out to assess the effectiveness of these measures. This cavalier approach to understanding the consequences of legislation is not restricted to regulation concerning tobacco products. The House of Commons' Committee of Public Accounts found in its recent report on *Better Regulation* that 'Once departments have implemented a regulatory decision, they do not do enough to monitor and evaluate its impact.'<sup>8</sup>
9. For example, of the 83 regulatory decisions taken in 2011 within the scope of the Business Impact Target, for which reviews are due in 2016, 'only two reviews have been submitted to the Regulatory Policy Committee (RPC) for scrutiny.'<sup>9</sup> In response to these findings, Michael Gibbons, Chair of the RPC, stated that he is 'concerned about the lack of post implementation policy reviews coming to us [the RPC] for scrutiny - I fear that crucial lessons are not being learned and opportunities missed to elicit best practice for future policy-making.'<sup>10</sup>
10. Clearly, this sort of approach hinders the development of high quality proposals in the pre-legislation phase of regulation development. Without a proper understanding of the impact and effectiveness of existing regulations, it is difficult to create new legislative proposals that are fit for purpose. Moreover, this approach is not supported by the public, of which 61%

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<sup>6</sup> <http://www.parliament.uk/documents/lords-committees/constitution/Legislative-process-2016/Final-Call-for-Evidence-Legislative-process.pdf>

<sup>7</sup> <http://www.publications.parliament.uk/pa/ld200304/ldselect/ldconst/173/173.pdf>

<sup>8</sup> <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/487/487.pdf>

<sup>9</sup> <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmpubacc/487/487.pdf>

<sup>10</sup> <https://www.gov.uk/government/news/rpc-response-to-pac-report>

think it is important to carry out an independent review of previous measures before introducing new ones.<sup>11</sup>

11. A second, broader problem inherent in the pre-legislation phase of the development of regulation stems from the relationships between government departments and arm's-length bodies, such as non-departmental public bodies or publicly-funded charities. The importance of such bodies to the policy making process increased between 2010 and 2015 even as their number declined. This was largely the result of the loss of in-house departmental expertise as a result of central government retrenchment. However, it has led to a situation in which policy development is informally contracted out to other organisations.
12. The Institute for Government discussed this phenomenon in a recent paper. Its author stated that 'some [government] departments are facing up to the fact that sometimes the expertise they need to work up policy is located outside of the department – often in their stakeholder network'.<sup>12</sup> The author highlighted an 'extreme example' of this practice, in which 'the in-house policy function [of one department] was being scaled down to a co-ordinating hub, with much of the detailed policy work being 'bought in' from a network of stakeholders'.<sup>13</sup>
13. This approach to policy making has the potential to introduce serious and concerning problems into the pre-legislation process. The most significant of these is the regulatory capture of government departments that have been denuded of their policy expertise by politically-oriented and often taxpayer-funded campaign groups. For example, anti-alcohol and tobacco lobby groups Balance North East and Fresh (North East), which were awarded £2.8 million in 2013 (to be spent over the course of two years), have 'the primary purpose of campaigning for legislation' and are not 'involved in health provision'.<sup>14</sup> Moreover, information published under the Freedom of Information Act shows that Action on Smoking and Health (ASH) lobbied the Department of Health on 64 separate occasions over the course of a 26 month period on a single issue: standardised tobacco packaging.
14. The influence of minority interests on policy development offers a good illustration of 'public choice' theory economists' concerns about the power of organised pressure groups. Professor Colin Robinson stated in a paper published some years ago that such groups 'have an influence on government policies out of all proportion to the extent to which they represent general opinion. Indeed, they can become a means of forcing minority views on the populace at large through the medium of government'.<sup>15</sup> This is certainly the case in regard to tobacco control measures, which, according to recent polling, are a high priority for no more than 13% of the UK population.<sup>16</sup> In fact, 55% of respondents to the same survey stated that policies to tackle smoking had gone either too far (34%) or far enough (21%).<sup>17</sup>

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<sup>11</sup> Populus (2016)

<sup>12</sup> <http://www.instituteforgovernment.org.uk/sites/default/files/publications/Organising%20Policy%20Making%20-%20final.pdf>

<sup>13</sup> <http://www.instituteforgovernment.org.uk/sites/default/files/publications/Organising%20Policy%20Making%20-%20final.pdf>

<sup>14</sup> <http://iea.org.uk/sites/default/files/publications/files/The%20sock%20doctrine.pdf>

<sup>15</sup> <https://iea.org.uk/publications/research/who-what-and-why>

<sup>16</sup> Populus (2016)

<sup>17</sup> Populus (2016)

15. The consequence of the disproportionate influence of single issue pressure groups like those above is clear: it skews the policy making process and makes it unrepresentative of public, not to mention business, opinion. Furthermore, when minority interests come to dominate the policy making process, as in the examples given above, the ethicality of parliamentary procedures is significantly undermined.
16. A third problem inherent in the pre-legislation phase as it stands at present relates to inter-departmental co-ordination. The Organisation for Economic Co-operation and Development (OECD) states that although the 'initial development of policy proposal is the task of the ministries' and that these 'ministries have the essential expertise in their own domains to prepare policy proposals', it is important that initiating ministries co-ordinate across government because 'most policy cuts-across the domains of more than one ministry.'<sup>18</sup>
17. The National Audit Office (NAO) reported on the level of integration across government in 2013. It found that government departments 'vary in their commitment to integrated working and their ability to work collaboratively.'<sup>19</sup> In the experience of the tobacco industry, there is an extremely poor degree of co-ordination between government departments on the issue of tobacco control policy. Business concerns (via the department formerly known as Business, Innovation and Skills) and enforcement concerns (via HM Revenue & Customs and the Home Office) are given little consideration in policy proposals emanating from the Department of Health.
18. The Government could improve the clarity, coherence, effectiveness and accessibility of draft legislation by:
  - Committing to commission independent reviews of the impact (including the cumulative impact) and effectiveness of existing pieces of related legislation, which can be used to assess the necessity or otherwise of subsequent proposals in the pre-legislation phase;
  - Reviewing the role and funding of arm's-length and other such bodies that are funded by the taxpayer in an effort to determine whether that money could be spent more effectively on in-house expertise;
  - Exploring the option of giving the RPC greater powers, such as those possessed by the Office for Information and Regulatory Affairs<sup>20</sup> in the United States;
  - Implementing rigorous cross-governmental scrutiny processes in the pre-legislation phase of regulation development through the formation and use of inter-departmental working groups; and
  - Putting in place a series of tests that departments must satisfy (internally) before bringing forth new proposals for legislation, such as the 'five tests' approach adopted by the Department for Education.<sup>21</sup>

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<sup>18</sup> <http://www.sigmaweb.org/publications/42742582.pdf>

<sup>19</sup> [https://www.nao.org.uk/wp-content/uploads/2013/03/10091-001\\_Integration-across-government.pdf](https://www.nao.org.uk/wp-content/uploads/2013/03/10091-001_Integration-across-government.pdf)

<sup>20</sup> OECD, *Implementing Regulatory Reform: Building The Case Through Results*

## **Brexit**

19. The wake of British voters' decision to leave the European Union (EU) has highlighted the extent to which the United Kingdom has relied on a transnational institution to develop a great deal of the laws under which the populace now lives. However, Professor Roger Scruton identified some time ago transnational institutions other than the EU, such as the United Nations and the World Health Organisation (WHO), that 'are increasingly exercising their legislative powers, in order to bypass the constraints to which national legislatures are subject.'<sup>22</sup>
20. The WHO's Conference of the Parties (COP), which is due to enter its seventh session and deals only with tobacco policy, offers a good example of the sort of policy influence that unaccountable transnational bodies exercise. This forum is responsible for the development of the Framework Convention on Tobacco Control (FCTC). The FCTC contains provisions that commit voluntary signatories to introduce policies related to, among other things, the supply and demand of tobacco products, environmental protection and the relationship between national governments and tobacco firms.<sup>23</sup>
21. The influence of the WHO over tobacco control policy raises serious questions about accountability and transparency. This is particularly relevant to the pre-legislation phase of policy development because, as Professor Scruton highlighted, the WHO refuses to discuss its tobacco proposals 'with anyone outside of its narrow circle of committed activists.' This, in his view, demonstrates the WHO's 'clear intention to impose its legislation come what may.'<sup>24</sup>
22. The role of undemocratic, unaccountable, opaque transnational institutions as initiators of UK legislation will be reduced as a result of the voters' decision to leave the EU. However, as has been shown above, the EU is not the only transnational body that exerts an influence over UK Government policy. In order to ensure that government policy is entirely transparent, future legislative proposals should:
  - Clearly identify the source of each proposal contained within a given Bill, Act or piece of Secondary Legislation; and
  - Commit to consulting with all relevant stakeholders on all policy proposals that emanate from transnational bodies, especially where such proposals affect a particular industry.

## **Public Involvement and Engagement**

23. Widespread engagement in the pre-legislation phase is essential to the development of 'good law'. However, the tobacco sector has encountered significant barriers to engagement from some government departments. The reluctance of government departments to engage with the tobacco sector is counterproductive, because it contains a range of business types – from tobacco manufacturers to product designers, wholesalers

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<sup>21</sup> <https://quarterly.blog.gov.uk/2013/07/12/the-policy-tests-transforming-policy-in-the-department-for-education/>

<sup>22</sup> <https://iea.org.uk/publications/research/who-what-and-why>

<sup>23</sup> [http://www.who.int/fctc/WHO\\_FCTC\\_summary\\_January2015\\_EN.pdf?ua=1](http://www.who.int/fctc/WHO_FCTC_summary_January2015_EN.pdf?ua=1)

<sup>24</sup> [http://www.who.int/fctc/WHO\\_FCTC\\_summary\\_January2015\\_EN.pdf?ua=1](http://www.who.int/fctc/WHO_FCTC_summary_January2015_EN.pdf?ua=1)

and retailers – that are able to provide regulators with a significant amount of information on the impact a measure is likely to have. Tobacco manufacturers also have the resources to commission in-depth economic, social and opinion-based research on issues of interest to legislators.

24. However, the process of pre-legislation engagement with the tobacco sector is limited by the insistence of some departments of state that they cannot engage with the tobacco sector as a result of the UK's obligations as a signatory to the WHO's FCTC. This is an entirely voluntary agreement that has no basis in English or Scottish law. Article 5.3 of the FCTC states that 'In setting and implementing their public health policies with respect to tobacco control, Parties shall act to protect these policies from commercial and other vested interests of the tobacco industry in accordance with national law.'<sup>25</sup>
25. Article 5.3 of the FCTC relates to public health policy only and it does not require complete disengagement from the tobacco sector. As a result, tobacco manufacturers and other related organisations, such as retail groups, should be consulted at the outset of any regulations intended to affect tobacco products. In the absence of this sort of widespread consultation, any subsequent policy proposals will not benefit from a balanced, well-rounded evidence base.
26. The Government could improve engagement with the tobacco sector, as well as any other sensitive sector, by:
  - Depoliticising its approach to the tobacco sector by issuing guidance to government departments that they are free to engage with this sector on issues unrelated to public health policy; and
  - Committing to engage with all interested stakeholders on a transparent basis, which would include the publication of meetings with official transcripts and a record of any actions decided upon.

### ***Parliamentary Involvement***

27. The sovereignty of Parliament was a crucial issue in the debate about the UK's membership of the EU. However, the information cited above in relation to the influence of other transnational organisations on the British legislative process raises wider issues about the sovereignty of the UK's principal law making body. That 'Parliament is central to the legislative process', as the present Call for Evidence suggests, is a questionable assertion. A range of organisations – including transnational bodies, think tanks, charities, lobby groups and government departments – shape the legislation of this country to an unprecedented degree. This denudes Members of Parliament of their principal function: to be the source of all UK legislation.
28. The way in which such groups use parliamentary institutions marginalises MPs to an even greater degree. A good example of the sort of malfeasance that has come to dominate to a significant degree the legislative process is the (mis)use of the powers of Peers in the House

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<sup>25</sup> [http://www.who.int/tobacco/wntd/2012/article\\_5\\_3\\_fctc/en/](http://www.who.int/tobacco/wntd/2012/article_5_3_fctc/en/)

of Lords. Specifically, the practice of the ‘Christmas treeing’ of Bills during their passage through the House of Lords, in which internally consistent regulatory proposals are adorned with often unrelated amendments that benefit particular groups or special interests.<sup>26</sup>

29. Clearly, this practice is undemocratic and fundamentally undermines the influence of elected MPs in the pre-legislation phase of regulation development. The ‘riders’ that are added to Bills by Peers acting on behalf of special interest groups do not benefit from pre-legislative scrutiny, discussion or debate. Greater independent scrutiny of Lords acting on behalf of such interests is required if this practice is to be eliminated or, at the very least, made entirely transparent.

30. Another example of malfeasance in the pre-legislation phase can be seen in the operation of all-party parliamentary groups (APPGS). An investigation into APPGS in 2011 concluded that they have been ‘comprehensively invaded by vested interests seeking to buy access to our legislators.’<sup>27</sup> No more successful example of this phenomenon exists than the APPG on Smoking and Health, the secretariat of which is provided by ASH, the anti-smoking charity.<sup>28</sup> ASH uses this forum and the small coterie of MPs that belong to it to disseminate lobbying materials and policy proposals, which are set out in an extensive manifesto<sup>29</sup>, to all MPs. In other words, the APPG on Smoking and Health provides ASH with a platform to manipulate the pre-legislation phase of the parliamentary process.

31. Parliament and parliamentarians especially should be concerned about the disproportionate influence that such groups exercise over the pre-legislation process. There is significant scope for improvement in regard to the degree of scrutiny that these bodies are subjected to. In order to improve the level of scrutiny and degree of involvement of MPs at this stage of the legislative process, Parliament should:

- Increase the number of MPs required to form an APPG on any issue and amend APPG rules to require a higher minimum level of attendance from MPs to constitute a quorum;
- Consider banning outside groups from providing the secretariat function for APPGs;
- Regularly review the influence of transnational bodies, lobby groups and other external organisations on the legislative agenda; and
- Establish and publish (on an annual basis) a list all organisations that have influenced the introduction Bills, Acts or pieces of Secondary Legislation.

## **Conclusion**

32. In the House of Common’s Reform Committee’s 2009 report *Rebuilding the House*, the authors concluded that the ‘legislative process is already significantly influenced at all

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<sup>26</sup> The term ‘Christmas Tree Bill’ was coined in the United States to describe such practices in the Senate. For more information, please see: [http://www.senate.gov/reference/glossary\\_term/christmas\\_tree\\_bill.htm](http://www.senate.gov/reference/glossary_term/christmas_tree_bill.htm)

<sup>27</sup> <http://www.robinfenwick.org.uk/2012/12/15/3488/>

<sup>28</sup> [https://iea.org.uk/wp-content/uploads/2016/07/DP\\_Sock%20Puppets\\_redesigned.pdf](https://iea.org.uk/wp-content/uploads/2016/07/DP_Sock%20Puppets_redesigned.pdf)

<sup>29</sup> <http://ash.org.uk/information-and-resources/reports-submissions/reports/smoking-still-kills/>

stages by public opinion, organised through interest and pressure groups.’<sup>30</sup> This statement requires significant revision. The legislative process is significantly influenced by professional interest and pressure groups, which all too often obscure public (not to mention business) opinion. s

33. Such groups demand exclusivity in order to marginalise the influence of legitimate business and other organisations on the legislative process. This is particularly significant in the pre-legislation phase of policy development, because it is at this point that the objectives and delivery mechanisms of legislation are decided upon. The adoption of Article 5.3 illustrates the success of anti-smoking lobby groups’ in achieving an unparalleled degree of exclusive influence over the tobacco control policy making process.
34. The ability of government departments to scrutinise the policy proposals of arms-length bodies and other influential organisations, such as transnational bodies, charities and lobby groups, has been significantly degraded as a result of cuts to their in-house policy-specific expertise. This has reduced the quality of legislation emanating from government departments. This is further hindered by the lack of co-ordination between government departments, which reduces the Government’s understanding of the real impact of policy proposals on businesses and other sectors of the economy.
35. Parliament and parliamentarians’ centrality to the pre-legislation phase of regulation development is hindered by the influence of unelected, unaccountable bodies. This unwarranted influence places into question the sovereignty of Parliament as a law making body.
36. In order to rectify these problems, the Committee should seriously consider the proposals set out above, which would go some way to redressing the issues of concern set out in this submission. A representative from the TMA would be happy to give evidence in person to help inform the Committee’s deliberations. For further information, please contact Mr Giles Roca, Director General of the TMA, at [groca@the-tma.org.uk](mailto:groca@the-tma.org.uk).

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<sup>30</sup> <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmrefhoc/1117/1117.pdf>