



ESSENTIAL ELEMENTS OF SMOKE-FREE LEGISLATION

INTRODUCTION

This resource is intended to assist lawyers, advocates, and government officials involved in developing legislation for tobacco control. It provides a framework for analyzing and drafting smoke-free legislation that reflects FCTC Article 8, the Guidelines for its implementation (“Guidelines”), and lessons learned from a review of smoke-free laws in many countries.

Effective smoke-free legislation fulfills FCTC Article 8 requirements, fully incorporates the Guidelines, which provide direction for developing and successfully implementing Article 8 compliant legislation, and incorporates best practices. Such legislation:

1. defines key terms in accordance with FCTC Article 1 and the Guidelines;
2. applies a ban on smoking in all indoor public places and workplaces, on all means of public transport, and in specified outdoor spaces where a hazard exists due to tobacco smoke exposure;
3. imposes legal duties of compliance on persons in charge of those premises and means of transport, and on smokers;
4. specifies inspection and enforcement authorities, powers, and duties, and the places falling within each authority’s area of responsibility if more than one has inspection/enforcement responsibilities;
5. provides a range of deterrent penalties that are proportionate to the seriousness of the violation and the degree of responsibility of the violator;
6. empowers and enables civil society to make complaints and take legal action to compel compliance with the law;
7. requires the appropriate authority to evaluate the effectiveness of the legislation and its enforcement and make this information publically available; and
8. provides the appropriate authority with broad regulatory power to address implementing details and any other matters necessary or appropriate for effectual implementation of the legislation.

FCTC ARTICLE 8 AND ITS GUIDELINES

Parties to the FCTC recognize that scientific evidence has unequivocally established that exposure to tobacco smoke causes death, disease, and disability. In accordance with this recognition, Article 8 requires Parties to adopt and implement effective measures providing for protection from exposure to tobacco smoke in indoor workplaces, public transport, indoor public places, and, as appropriate, other public places.

The Guidelines contain principles, definitions, and key legislative elements the Parties agree are necessary to afford effective protection from exposure to tobacco smoke, as required by FCTC Article 8. Adopted by consensus, the Guidelines were developed to assist Parties in meeting their FCTC obligations. The Guidelines are based on the strongest and most widely-accepted scientific, health, and engineering evidence and on Parties' experiences.

Parties to the FCTC have a legal obligation to perform their treaty obligations in good faith, in accordance with Article 26 of the Vienna Convention on the Law of Treaties. The Guidelines are a subsequent agreement between the Parties and must be taken into account in interpreting the scope and content of Parties' obligations, in accordance with Article 31 of the Vienna Convention.

Incorporating the Guidelines into domestic legislation will provide the effective universal protection required by FCTC Article 8, minimize loopholes, and facilitate proper implementation of legal requirements.

1. DEFINING KEY TERMS

FCTC Article 1(f) defines "*tobacco products*" as: "products entirely or partly made of the leaf tobacco as raw material which are manufactured to be used for smoking, sucking, chewing or snuffing."¹

The Guidelines provide the elements that should be included in definitions of the following key terms:²

- "*enclosed or indoor*": any space covered by a roof or enclosed by one or more walls or sides, regardless of the type of material used and regardless of whether the structure is permanent or temporary;³
- "*public place*": any place accessible to the general public and any place for collective use, regardless of ownership or right to access;⁴

¹ The FCTC definition can be modified slightly to be sure it covers all tobacco products regardless of the means by which they are consumed, such as by adding at the end : "or by any other means of consumption".

² The definitions below synthesize the definitional elements provided in the Guidelines.

³ Guidelines, para.19.

⁴ Guidelines, para. 18.

- “*workplace*”: any place used by people during their paid or unpaid employment or work, including all associated or attached areas commonly used in or incidental to the course of work, as well as work vehicles; ⁵
- “*public transport*”: all vehicles used for carriage of members of the public, usually for reward or commercial gain; ⁶ and
- “*smoking*”: being in possession or control of a lit tobacco product. ⁷

Integrating the FCTC and Guidelines definitions into domestic legislation is critical for proper interpretation and implementation of the smoking ban required by Article 8. Without these definitions, there is risk that the terms could be interpreted in a manner that is less comprehensive than required by FCTC Article 8.

2. APPLYING SMOKE-FREE PROVISIONS

To fulfill the FCTC Article 8 obligation of providing *effective* protection from public and workplace exposure to tobacco smoke, it is essential that legislation completely prohibit smoking: ⁸

- in all parts of all indoor public places;
- in all parts of all indoor workplaces;
- on all means of public transportation; and
- in specified outdoor or quasi-outdoor spaces where a hazard exists due to tobacco smoke exposure. ⁹

It should not be necessary for the legislation to list examples of the places and public transport subject to the ban since the Guidelines’ definitions of “public place,” “workplace,” and “public transport” are so comprehensive in their coverage. If it is necessary or customary to provide examples in legislation in a given jurisdiction, however, the legislation should clearly state that any such list is provided for illustrative purposes only and is in no way meant to be exhaustive. ¹⁰

Legislation that does not require completely smoke-free indoor environments, for example, by allowing separate smoking areas or rooms (even those required to meet the most rigorous ventilation standards), has repeatedly been shown to be *ineffective* in protecting against exposure

⁵ Guidelines, para. 20.

⁶ Guidelines, para. 22.

⁷ Guidelines, para. 17.

⁸ Guidelines, paras. 23-24, 27.

⁹ Guidelines para 27 explains that the language “other public places where appropriate” in Article 8 refers to outdoor or quasi-outdoor places and provides that in identifying those places, Parties should consider the evidence as to possible health hazards in various outdoor and quasi-outdoor places. Parties should then adopt the most effective protection against exposure where the evidence shows the existence of a hazard. Studies on outside exposure to tobacco smoke can help with this assessment. One example is Klepeis N.E., Ott W.R., and Switzer P. (2007) "Real-Time Measurement of Outdoor Tobacco Smoke Particles," *Journal of the Air and Waste Management Association*, 57:522-534.

¹⁰ This can be done by using language such as “including but in no way limited to . . .” or other language in conjunction with the list that prevents the list from having a limiting effect.

to tobacco smoke.^{11 12 13 14} As a result, the Guidelines provide that if a Party is unable to achieve 100% indoor smoke-free environments in all indoor public places and workplaces and on all public transport immediately, any exemptions should be minimal and eliminated as soon as possible. Because Article 8 imposes an obligation to continuously remove any exemptions in order to make protection universal, the Guidelines further provide that Parties should strive to eliminate any exemption within five years of entry into force of the FCTC in that country.¹⁵ Where there is not an immediate requirement in domestic legislation for 100% smoke-free indoor public places, workplaces, and public transport, it is important, therefore, for the legislation to require a complete phase-out of any exception by a specified date, within the five-year period.

3. IMPOSING LEGAL DUTIES OF COMPLIANCE

Enforceable smoke-free legislation will not only impose a legal duty on smokers to refrain from smoking where it is prohibited, but will place primary responsibility for compliance on the persons in charge of the premises and means of public transport. The legislation also should specify the obligations of those persons, including a ongoing duty to:¹⁶

- post “no smoking” signs in accordance with requirements specified in regulations (as to content, size, placement, etc.);
- remove ashtrays from all indoor areas and from any outdoor areas where smoking is prohibited;
- supervise observance of legal requirements; and
- take reasonable steps to discourage and stop smoking where it is prohibited, including: asking any person who is smoking to stop; discontinuing service and asking the person to leave if s/he refuses; and, if necessary, contacting law enforcement authorities for assistance.

4. SPECIFYING INSPECTION AND ENFORCEMENT AUTHORITIES, POWERS, AND DUTIES

To establish a comprehensive and coordinated inspection and enforcement system, it is important for legislation to specify:

¹¹ Guidelines, para. 6.

¹² Environmental Tobacco Smoke. ASHRE Position Paper. 2005. Available at http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf.

¹³ E Fernandez et al. Impact of the Spanish Smoking Law on Exposure to Second-Hand Smoke and Respiratory Health in Hospitality Workers: A Cohort Study. Plos One. Available at <http://www.plosone.org/article/info:doi%2F10.1371%2Fjournal.pone.0004244#abstract0>.

¹⁴ Hong Kong Legislative Council Panel on Health Services Findings of Technical Feasibility Study on Smoking Rooms (LC Paper No. CB(2)1324/08-09(05). Available at <http://www.legco.gov.hk/yr08-09/english/panels/hs/papers/hs0420cb2-1324-5-e.pdf>.

¹⁵ Guidelines, para. 24.

¹⁶ Guidelines, para. 31.

- which authority or authorities have inspection powers and duties,¹⁷ and the places falling within each authority's area of responsibility when more than one ministry has inspection responsibilities;¹⁸
- which authority or authorities have the power and duty to undertake legal action to enforce the law;
- the powers of inspectors, including the right to enter the premises subject to the law and to obtain relevant evidence; and
- the mechanisms for coordination if more than one authority or level of government is involved.

When specifying which authority or authorities are charged with inspections, it is advisable to consider what inspection systems already exist and whether smoke-free inspections should be added to them. These might include inspection systems for hygiene and sanitation, occupational health and safety, fire safety, business licensure, and any other relevant systems.¹⁹ It is important, however, to consider how well-functioning those existing inspection systems are, how well-resourced the inspection agencies are, and how strong the political will is within the agencies to carry out inspection duties.²⁰

5. PROVIDING A RANGE OF PENALTIES

Legislation should provide a range of penalties that are sufficiently large to deter noncompliance and proportionate to the seriousness of the violation and the degree of responsibility of the violator.²¹ The legislation should incorporate a range of penalties, which should increase for repeat violations, including:²²

- fines;
- business or operating licensure sanction, especially for flagrant or repeated violations;
- public notification of violations, with the associated costs levied against the violator(s);²³ and
- criminal penalties, if appropriate in the jurisdiction.

6. EMPOWERING AND ENABLING CIVIL SOCIETY

Legislation should provide members of the public and civil society organizations with the authority to initiate complaints and legal action to compel compliance with the law. This would

¹⁷ As provided in the Article 11 and 13 Guidelines, these duties should include investigating and resolving complaints.

¹⁸ Guidelines, para. 37, recommends the use of inspectors/enforcers at the local level, where possible.

¹⁹ Guidelines para. 36.

²⁰ Discussion and agreement by the relevant authorities is an important step before assigning inspection and enforcement duties to them in the legislation.

²¹ Guidelines, paras. 32.

²² Guidelines, paras. 33 and 34.

²³ This penalty is not included in the Article 8 Guidelines but is in other FCTC Guidelines. Adverse publicity can be an effective deterrent.

include, as appropriate, action against the government if it fails to fulfill its inspection or enforcement duties.

7. REQUIRING EFFECTIVENESS EVALUATION

The Guidelines highlight the importance of monitoring and evaluating smoke-free measures.²⁴ Imposing a duty on the responsible authority or authorities to track compliance rates and evaluate the overall effectiveness of the inspection and enforcement program and of the legislative provisions will help ensure these activities are undertaken and sustained. Evaluation data can then be used to identify any barriers to compliance and/or enforcement as well as any areas where the law and the inspection and enforcement system may need strengthening. Evaluation information should be readily available to the public.

8. GRANTING THE APPROPRIATE AUTHORITY SUFFICIENTLY BROAD REGULATORY POWER

The appropriate authority should be granted power to address a broad range of matters in regulations, including, but not limited to:

- adding any outdoor public places and workplaces where smoking is banned;
- if the legislation provides lists of examples of indoor public places and workplaces or forms of public transport where smoking is banned, adding examples to any such lists;
- specifying all aspects of signage requirements and elaborating any other duties imposed on persons responsible for the premises and means of public transport; and
- addressing any other matter necessary or appropriate for implementing the law.

Care should be taken to avoid implying limitations on regulatory power, such as by explicitly granting only some powers and presenting them in an exhaustive manner.

ADDITIONAL LEGISLATIVE PROVISIONS

Including the following provisions can be helpful in preventing or resolving interpretation issues, ensuring the ability of the strongest possible smoke-free legislation to emerge in a country, and facilitating civil society's role as an active partner in monitoring.

- *Statement of rights*

Such a statement might articulate the right of all workers to be equally protected from exposure to tobacco smoke in the workplace and the right of all members of the public to be free from exposure in indoor public places and in outdoor public places where an exposure hazard exists. This could be helpful in providing context for interpreting any specific provision.

²⁴ Guidelines, paras. 46-48.

- ***Sub-national authority to enact stronger measures***

Where applicable, providing sub-national jurisdictions with clear authority to enact and implement measures that are stronger or more protective than the measures provided in the national legislation will allow the strongest smoke-free legislation to emerge in a country. Stronger sub-national legislation can then create pressure to strengthen national legislation. Care should be taken to ensure that language used in the legislation does not inadvertently restrict sub-national jurisdictions' ability to enact and implement stronger measures.

- ***Public access to relevant information***

Providing the public with the right to ready access to inspection and enforcement reports and monitoring and evaluation information will help civil society play a robust monitoring role.

- ***Waiver of fees and cost recovery for public interest litigation***

Providing for waiver of court fees and recovery of litigation costs can enable civil society to exercise any authority granted it to initiate legal action to compel compliance.

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