25 August 2017

Dear Sir / Madam,

Consultation on the Montevideo Roadmap 2018-2030 on NCDs as a sustainable development priority

I am writing on behalf of the Law & Non-Communicable Diseases Unit, or Law & NCD Unit, which is based in the School of Law and Social Justice at the University of Liverpool, in the UK, and which conducts research into how legal instruments can be used as tools for the prevention of NCDs and more specifically on how effective, evidence-based policy interventions can be designed to control them. Beyond our body of academic publications and other academic activities in this field, we have participated in several major policy initiatives intended to promote the implementation of the WHO Global Action Plan on the prevention and control of NCDs 2013-2020.

The Law & NCD Unit welcomes the opportunity to contribute to this consultation. Agreeing that progress has been insufficient and highly uneven, we sincerely hope that the Montevideo Roadmap 2018-2030 will help galvanise political will within and beyond government and lead to the implementation of more effective and comprehensive NCD prevention strategies. NCD prevention does remain a priority for sustainable development.

Our response focuses on three main points:

- The importance of adopting a “human rights approach” to NCD prevention and control
- The importance of “providing sound advice about the interaction between the legal environment and NCDs”
- The importance of avoiding any “real, perceived or potential conflicts of interest”

The importance of adopting a “human rights approach” to NCD prevention and control

The Road Map hardly refers to human rights. This seems to be a missed opportunity. There is one reference to “the highest attainable standard of health”, but no mention of “the right to the highest attainable standard of health”. The only place where the rights of individuals are mentioned is at the very end of the document: “Ultimately, the aspiration of the 2030 Agenda is to create a just and prosperous world where all people exercise their rights and live in dignity and hope” (at paragraph 37).
The Montevideo Road Map could provide an opportunity to flesh out what the “human rights approach” identified by WHO as an overarching principle of NCD prevention and control entails. In effect, the WHO Global Action Plan 2013-2020 identifies the adoption of “a human rights approach” as one of its nine overarching principles: “It should be recognized that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being, without distinction of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, as enshrined in the Universal Declaration of Human Rights” (on page 12). Similarly, the WHO Commission on Ending Childhood Obesity referred specifically to the Convention on the Rights of the Child in its final report (on pages 8, 10 and 40). However, neither of these documents provides any details on the advantages of this approach and how it could be used by Member States in the development, implementation, monitoring and evaluation of their NCD prevention and control strategies.

As we have argued in a forthcoming report that the Law & NCD Unit was commissioned to write for UNICEF on Food Marketing and Children’s Rights, “a human rights approach” to NCD prevention offers significant benefits in terms of accountability, empowerment, legitimacy and advocacy. It draws attention to the legally binding obligations of Member States to ensure that the right to the highest attainable standard of health and other related rights are effectively upheld. In particular, in the NCD prevention context, these other related rights include: the right to food, the right to life, the right to play, the right to privacy, the right to information, the right to education, and the right to non-discrimination.

Furthermore, a human rights approach to NCD prevention and control calls for an enquiry into how the right to the highest attainable standard of health and other human rights can be used to counter the arguments put forward by business actors. Human rights provide a powerful tool and should increasingly be invoked by public health policymakers to develop and defend effective, evidence-based NCD prevention strategies with the imperative of ensuring a high level of public health protection in all policies.

Finally, business actors themselves have a responsibility under the United Nations Guiding Principles on Business and Human Rights to ensure they do not violate human rights. The tobacco, the alcohol, the food and other related industries (e.g. the advertising industry) should therefore ensure that their marketing practices respect the rights enshrined in national, regional and international human rights instruments. Where business actors fail to fulfil this responsibility, States must take all necessary measures to facilitate the enjoyment of human rights. This includes the positive duty to regulate, as incumbent in the obligation to protect and fulfil the right to the highest attainable standard of health and other related rights.

In light of the growing attention of UN agencies and human rights bodies for the relationship between human rights and the NCD agendas, the omission of the Montevideo Road Map to firmly place human rights at the heart of NCD prevention and control strategies appears all the more so as a major omission.

**The importance of providing sound advice about the interaction between the legal environment and NCDs**

Paragraph 19 of the Montevideo Road Map consultation focuses on the key role of the WHO “in providing sound advice about the interaction between the legal environment and NCDs”. In particular, it is suggested that the WHO will “promote policy expertise to develop NCD responses in order to achieve
the SDGs” and, “with other relevant actors”, “scale up and broaden work integrating legal issues into country support”.

Paragraph 19 concludes by encouraging the UN Inter-Agency Task Force on NCDs “to explore the possibility of establishing a UN Commission on NCDs and the Law”.

The Law & NCD Unit warmly welcomes the recognition that law has an important role to play in the prevention and control of NCDs. Law can be a powerful vector of socio-economic change and offers the potential to make our environments less conducive to the consumption, in particular, of tobacco, alcohol and unhealthy diets. The question is not so much whether law has a role to play in the prevention and control of NCDs, but how legal instrument should be used to do so.

The Montevideo Road Map proposes a range of activities to “scale up and broaden work integrating legal issues into country support”. Examples of what should be prioritised to support NCD interventions include:

- providing evidence;
- tracking legal challenges;
- comparing laws and legal claims across jurisdictions;
- developing model laws; and
- assisting countries in responding to legal challenges, including through support in implementing model laws, data and evidence gathering and tracking impact.

The Law & NCD Unit fully supports efforts that will promote a better understanding of how law can help prevent and control NCDs, noting in particular the need for comparative legal research and for the provision of more bespoke legal country-level support.

**Comparative legal research.** It would be extremely valuable to set up a database of all legal measures that have been taken to prevent and control NCDs, which could be searched by country, by determinant, by type of interventions (taxation, labelling, marketing, procurement… ) – with details as to the history of the legislative provision in question – identifying in particular whether it has been challenged and if so before which court/tribunal/dispute settlement body. In particular, comparative legal research is paramount – and should seek – to identify, analyse and better respond to the legal arguments often put forward by business actors against regulation that may negatively affect their profit margins.

The importance of **building legal capacity** at regional or country level is increasingly well understood and has received support from WHO and other public health actors (including several NGOs). For example, the McCabe Centre for Law and Cancer based in Australia conducts a legal training and capacity-building program on NCD prevention and control, with a focus on achieving coherence across health, trade, investment, investment and sustainable development. The program has had participants from over 80 countries, drawn from a wide range of sectors including Ministries of Health, Commerce/Industry/Trade, Foreign Affairs, Revenue and Customs, Police, Planning, Justice/Attorney-Generals/Solicitor-General’s Offices, Office of Prime Minister/President, Ombudsperson's Offices, independent regulators, civil service commissions, civil society, academia, and WHO country offices. Similarly, the Law & NCD Unit has developed training courses on the regulation of food marketing to children for the WHO and several of its regional offices, as well as training courses on Law and NCD Prevention; and it has provided bespoke training at country-level to facilitate the implementation of the WHO Recommendations on the marketing of foods and non-alcoholic beverages to children, working with a broad range of actors both within and beyond government.
It is now time to scale up such activities that offer real potential to implement the many interventions that Member States have undertaken to implement to prevent and control NCDs and therefore contribute to more sustainable development. To scale up, it is necessary to “train the trainers” and ensure that more fellow lawyers become interested in the intersection between law and NCD prevention and control. This requires a long-term view: law schools need to offer courses at undergraduate and postgraduate levels; funding should be made available for postgraduate research focused on this intersection, prioritising interdisciplinary research projects incorporating both a law and public health component. The WHO and other relevant agencies should also reflect on their placement policy: many students, including some with legal expertise, would be interested in spending time working for the WHO on a voluntary basis; however, most of them are unable to finance their stay, due to the lack of support offered for accommodation or other living expenses.

By contrast, the Law & NCD Unit is very sceptical of two suggestions put forward in the Montevideo Road Map: firstly, the use of “model laws” and, secondly, the establishment of a UN Commission on NCDs and the Law.

The idea of “model laws” is often promoted by actors who do not have any legal training. It is seen as a quick fix: develop a legal text that can then be used as a template in different jurisdictions. We know that there is no quick fix, particularly in the current climate of strained resources and limited political will. Model laws wrongly suggest that there could be a one-size-fits-all approach. This seems to oversimplify the difficulties of devising culturally-sensitive legislation and ignore the fact that laws have to fit within different legal systems which themselves fit within legal cultures – of which model laws are unlikely to be cognizant. This is particularly problematic in light of the fact that implementation mechanisms will vary significantly from one Member State to another, as will sanctions for infringements. It therefore seems far more effective to invest resources in ensuring that experts on the legal aspects of NCD prevention work directly with the lawyers in a given country on its NCD prevention and control strategy, or specific aspects of this strategy. The comparative database mentioned above could provide an extremely valuable tool to this effect, by facilitating comparisons between similar legal systems. Furthermore, the problem is not merely one of legal capacity: Member States often know what they need to achieve: they have committed to a broad range of measures to prevent NCDs and promote sustainable development. Many WHO documents provide guidance as to what is required to ensure that such commitments are met; but without political support, there can be no effective implementation. Model laws will not change the problem of lack of political will. Robust legal comparisons between various laws and legal processes could prove more useful to identify the obstacles that Member States are likely to face and the opportunities that they have when regulating the tobacco, the food or the alcohol industries.

Similarly, the establishment of a **UN Commission on NCDs and the Law** is unlikely to be an effective use of resources. Even assuming 1) that we elicit who would be competent to set up this UN Commission; and 2) that we find appropriate people to sit on it, the need for such a Commission remains controversial. Resources should primarily be allocated to the implementation “on the ground” of the commitments that Member States have already made to reduce the burden of NCDs. Many legal issues relevant to the prevention and control of NCDs are known and have been discussed in academic and policy fora. Publications are multiplying on the topic. These discussions should continue. They do not, however, require that a UN Commission should be set up to re-invent the wheel.
The importance of avoiding any “real, perceived or potential conflicts of interest”

Finally, and briefly, the Law & NCD Unit welcomes the acknowledgement that “public health objectives and private sector interests can, in many cases, conflict” and that it is necessary to “develop coordinated and coherent policies and strengthen evidenced-based regulatory frameworks”. However, it is concerned that the Montevideo Road Map remains extremely unclear as to what would constitute a “real, perceived or potential conflict of interest” and should accordingly be avoided.

It is understandable to try and “align private sector incentives with public health goals” where this is indeed feasible. However, the Road Map merely recognises the fundamental and irreconcilable conflict of interest between the tobacco industry and public health, (“we will continue to implement tobacco control measures without any tobacco industry interference”), without addressing the question of the relationship of the health sector with the food and the alcohol industries. The suggestion that a commission should be established “to address the commercial determinants of health that have a bearing on the prevention and control of NCDs” may only serve a useful public health objective if it does address this difficult question: namely, whether, and if so to which extent, these two industries could be considered “partners” in the prevention and control of NCDs – bearing in mind that merely disclosing conflicts is not the same as avoiding conflicts of interest.

Please do not hesitate to contact me if you would like to discuss any of the points I have raised in this response.

Yours faithfully,

Amandine Garde