

## Dealing with smoke infiltration in your home

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## ***Introduction***

Smoke infiltration in the home is a real problem for many Victorians. Quit Victoria is frequently contacted by members of the public who are concerned about secondhand tobacco smoke entering their homes from neighbouring properties but are unsure what they can do about it.

We understand the distress that smoke infiltration in the home can cause. Secondhand smoke is not only unpleasant, it is also harmful to health.

Unfortunately, the current laws concerning smoke infiltration in Victoria are complex. While there are a number of potential avenues for addressing the issue, these avenues are not always easy to navigate.

The information on this page is intended to help members of the public explore the options available to them for addressing the problem.

The options available will depend on the type of housing you live in. The following types of housing are covered on this page:

- Multi-unit housing (such as an apartment building or block of units/flats);
- Public and community housing;
- Rooming houses;
- Single-titled houses (whether rented or owned).

**To work out which type of housing best describes your situation (and which information on this page is likely to be most helpful for you), see the 'quick reference table' further below.**

The information provided on this page is specific to Victoria. For information on addressing smoke infiltration in other parts of Australia, we recommend contacting the Cancer Council in your state or territory.

At Quit Victoria, we have been advocating for law reform in this area for many years. In December 2021, changes to the laws governing owners corporations brought improvements for some residents. However, we believe further reform is essential to ensuring all Victorians are adequately protected from the harms of smoke infiltration. Our recommendations for further reform have been included on this page.

***Please note:*** *The information on this page does not constitute legal advice and should not be relied on as such. If you have concerns about negotiating with your landlord, neighbour, owners corporation or local council, you should consider seeking legal advice specific to your situation.*

## Quick reference table – Which information on this page will be most helpful to me?

As it can be difficult to work out which type of housing best describes your situation, each of the key sections on this page includes a short description of who the information in that section applies to. You should read this description to ensure you are looking at the section most relevant to your needs.

The table below also provides some guidance on which section of this page will be most relevant to you.

<p><a href="#">Section 1 – General information regarding smokedrift</a></p>	<p>Applicable to all types of housing.</p>
<p><a href="#">Section 2 – Addressing smoke infiltration in multi-unit housing</a></p>	<p>The information in this section will be helpful to you if you either own or privately rent a flat, apartment or unit (or other form of housing with shared facilities or common areas, which is governed by an owners corporation).</p> <p>If you are living in a block of flats/apartments/units managed by the government or a community housing provider, the information in this section is unlikely to apply to you. The section on public and community housing (section 3) will probably be more helpful to your situation.</p>
<p><a href="#">Section 3 – Addressing smoke infiltration in a public or community housing complex</a></p>	<p>The information in this section will be helpful to you if you are:</p> <ul style="list-style-type: none"> <li>• living in a public housing complex (managed by the government) or community housing complex (managed by a not-for-profit organisation); <b>and</b></li> <li>• the person you believe is causing the smoke infiltration lives in the same public housing complex (i.e. the same block of units/flats/apartments) as you.</li> </ul> <p>If you are living in a single dwelling (rather than a complex) which is managed by a public or community housing provider, and the person you believe to be causing the smoke infiltration does not live in a property managed by the same housing provider, the section on single-titled housing (section 5) will be more helpful to your situation.</p> <p>If you live in a rooming house managed by a public or community housing provider, the section on rooming houses (section 4) will be more helpful to you.</p>
<p><a href="#">Section 4 – Addressing smoke infiltration in rooming houses</a></p>	<p>The information in this section will be helpful to you if you are living in a property with one or more rooms available for rent, and the smoke infiltration is caused by someone living in another room in the same house. The information in this section will apply to you regardless of whether the rooms are privately leased or the property is managed by a public or community housing provider.</p>

[Section 5 – Addressing smoke infiltration in single-titled housing](#)

The information in this section will be helpful to you if you live in a home situation on its own title, which does not share any common property (and is therefore not governed by an owners corporation). This includes freestanding houses, most terrace houses and most semi-detached houses (as long as there are no shared facilities, such as courtyards or driveways).

If you live in single-titled housing, the information in this section will apply to you regardless of whether your home is privately owned or leased.

This section will also be helpful if you live in public or community housing that is not part of a complex (i.e. not part of a block of flats/units/apartments), and the person you believe to be causing the smoke infiltration does not live in a property managed by the same housing provider. If you have the same housing provider as the person you believe to be causing the smoke infiltration, section 3 will be most helpful to you.

If you live in a rooming house, and the smoke infiltration is caused by someone living in another room in the same house, this section will not apply to you. The section on rooming houses (section 4) will be most helpful to you.

# 1. **General information regarding smoke infiltration**

## (a) **The health hazards of secondhand smoke**

When raising the issue of smoke infiltration with a neighbour, landlord or owners corporation it can be helpful to clearly explain the health hazards of secondhand smoke. It can also be important to refer to evidence of the harms of secondhand smoke when participating in formal avenues of dispute resolution (e.g. through Consumer Affairs Victoria, or the Victorian Civil and Administrative Tribunal).

Quit Victoria has a detailed [fact sheet on secondhand smoke](#) which may assist.

Further information is also available on the [‘Tobacco in Australia: Facts and Issues’ website](#).

Key points to note about the health hazards of secondhand smoke are:

- There is no safe level of exposure to secondhand smoke. Even brief periods of exposure can cause harm.<sup>i</sup>
- There are at least 250 chemicals in secondhand smoke that are known to be toxic, and over 50 known to be carcinogenic.<sup>ii</sup>
- Scientific evidence has firmly established that secondhand smoke exposure causes serious disease in both adults and children.

## (b) **How smoke infiltration occurs**

Smoke infiltration occurs when secondhand smoke enters the home from an external area (for example, where an individual smokes on their own property, resulting in secondhand smoke drifting into a neighbour’s home).

In multi-unit housing in particular, common smoke infiltration entry points can include windows, elevator shafts, shared hallways, holes in walls, pipes and electric outlets, as well as shared air spaces and ventilation systems.<sup>iii</sup> Smoke infiltration can also be distributed through heating and air conditioning systems. The extent of smoke infiltration can be dependent on factors such as distance, ventilation, temperature, wind and buoyancy between indoor and outdoor air.<sup>iv v</sup>

Research demonstrates that involuntary secondhand smoke exposure can be reduced, but not eliminated, through modifications to existing units.<sup>vi</sup> Since many factors can impact the level of smoke infiltration between individual units in shared living arrangements, policies which ban smoking completely are the most effective way to ensure that residents in multi-unit housing are not exposed.<sup>vii</sup>

## **(c) Gathering evidence of smoke infiltration**

The ability to provide some evidence demonstrating smoke infiltration in the home can be really helpful in addressing the problem. In Victoria, there are no guidelines on the type of information required to prove that smoke infiltration is occurring in any given case, however we suggest keeping track of smoke exposure using a diary, which clearly documents the following:

- Who is alleged to be causing the smoke infiltration (if known);
- The frequency (date, time and duration) of the smoke infiltration;
- The volume (extent, degree or intensity) of smoke entering the home; and
- How the smoke has interfered with the use and enjoyment of the home (e.g. smell, physical or health effects, odour removal or cleaning required, or any other impact on use and enjoyment of the property).

It is helpful to keep a written record of any verbal discussions with neighbours, landlords or owners corporations (including the date of the discussion, what was said and by whom). It is also a good idea to keep receipts relating to any costs incurred as a result of the smoke infiltration (e.g. costs associated with cleaning or odour removal).

## **2. Addressing smoke infiltration in multi-unit housing**

### **Does this section apply to me?**

The information in this section may be helpful to you if you live in a flat, apartment or unit (or any other type of property with shared facilities or common areas, which is governed by an owners corporation). The information will apply to you regardless of whether you privately own or privately rent the property.

If you are living in a block of flats/apartments/units managed by the government or a community housing provider, the information in this section is unlikely to apply to you. The section on public and community housing ([section 3](#)) will be more helpful to your situation.

If you live in a rooming house, this section will not apply to you. The section on rooming houses ([section 4](#)) will be most helpful to you.

### **What is an owners corporation and what does it do?**

Privately owned flats/apartments/units in multi-unit developments are generally governed by an owners corporation. An owners corporation is usually made up of the owners of each apartment/unit (or each 'lot').

An owners corporation will generally exist wherever there are common areas or shared facilities in a development (e.g. shared driveways, stairwells, courtyards etc). You are likely to be a member of an owners corporation if you own a flat, apartment or unit (or other type of property with shared facilities – such as a townhouse with a shared driveway). Similarly, if you privately rent a flat, apartment or unit, your landlord is likely to be a member of an owners corporation (and the owners corporation rules discussed below will apply to you as an occupant of the property).

It is the responsibility of an owners corporation to manage common property (such as gardens, driveways, stairways, lifts, foyers etc). Owners corporations are also responsible for addressing complaints made by residents, and enforcing the owners corporation rules. Further information regarding the role of an owners corporation is available from [Consumer Affairs Victoria](#).

In Victoria, the powers and responsibilities of an owners corporation are set out in the *Owners Corporations Act 2006* ('the OC Act'). Each owners corporation will also have a set of rules applying to all owners and occupiers living in the development. Owners corporations can either create their own set of rules, or adopt the 'Model Rules' which are set out in the *Owners Corporations Regulations 2018*.

The Model Rules will operate as the default set of rules applying to a development, wherever an owners corporation has not adopted its own rules (either at all, or with respect to a particular issue addressed in the Model Rules).

If you are living in multi-unit housing, the first step towards tackling smoke infiltration is to obtain a copy of the owners corporation rules applying to your residence. An owners corporation is required to keep a record of the owners corporation rules, and must make the rules available to a property owner for inspection on request (free of charge – although a reasonable fee can be charged for providing a copy of the rules).<sup>viii</sup> If you are renting a property that is governed by an owners corporation, you can obtain a copy of the rules from your landlord. A copy of the rules must also be registered with Land Use Victoria. You can find more information on the [Land Use Victoria website](#).

## **What do the Model Rules say?**

A copy of the [Model Rules is available online](#) (see Schedule 2 of the Regulations).

Model Rule 1.4 came into effect on 1 December 2021, and specifically addresses smoke infiltration. It states:

*'A lot owner or occupier in a multi-level development must ensure that smoke caused by the smoking of tobacco or any other substance by the owner or occupier, or any invitee of the owner or occupier, on the lot does not penetrate to the common property or any other lot.'*

## Multi-level developments

In light of Rule 1.4, it is clear that in *multi-level* developments governed by the Model Rules, an owner or occupier cannot allow smoke to drift from a lot to common property or any other lot within the development.

Note that Rule 1.4 is not limited to tobacco smoke. It appears to cover smoke from other substances (e.g. cannabis) and also aerosol (emissions) from electronic cigarettes.<sup>ix</sup>

If you are experiencing smoke infiltration in a multi-level development and the Model Rules apply to your building, you should first discuss your concerns directly with your neighbour (where appropriate), your owners corporation manager, or owners corporation committee. You should point out that the smoke infiltration amounts to a breach of Rule 1.4. The owners corporation might be able to resolve the matter by writing to or speaking with the person involved.

If the issue remains unresolved, there are additional steps you can take (these are detailed further below).

An owners corporation in a multi-level development can also adopt its own rules regulating or prohibiting the drifting of tobacco smoke.<sup>x</sup> However, it is important to bear in mind that any rules created by an owners corporation cannot be inconsistent with the Model Rules.

### **What about an owners corporation in a multi-level development with its own set of rules?**

If you live in a multi-level development and your owners corporation has adopted its own set of rules, you will need to read the rules carefully and check whether they specifically address the issue of smoke infiltration. If there is no specific rule addressing smoke infiltration, Model Rule 1.4 (discussed above) will apply.

As noted above, an owners corporation in a multi-level development can adopt its own rule regulating or prohibiting the drifting of tobacco smoke.<sup>xi</sup> However, any rules created by an owners corporation cannot be inconsistent with the Model Rules. If an owners corporation in a multi-level development has adopted a rule which permits the drifting of smoke from a lot to another lot or common area, it is likely to be invalid on the basis that it is inconsistent with Model Rule 1.4. In such circumstances, Model Rule 1.4 would apply instead.

### **What about single-level developments?**

Unfortunately, Rule 1.4 only applies to multi-level developments and cannot be relied upon by residents of single storey developments.



Prior to 1 December 2021, owners corporations in single-level developments could adopt their own rules addressing smoking. However, due to amendments made to the OCA in 2021, it appears this may no longer be the case. The OCA sets out the matters about which an owners corporation can make rules.<sup>xii</sup> In 2021, the OCA was amended to specifically state that owners corporations in *multi-level developments* can make rules regulating or prohibiting the drifting of tobacco smoke. However, the OCA unfortunately does not give a similar power to owners corporations in single-level settings.

As a result, residents in single storey developments are unlikely to be able to rely on owners corporation rules to address the issue of smoke infiltration.

#### **Quit recommends legislative change**

Quit Victoria recognises that the distinction between multi-level and single-level developments in the Model Rules and the OCA is problematic.

Smoke infiltration can have an impact on residents living in all forms of multi-unit housing. Residents in single-level developments quite often live just as close to each other as those in multi-level developments. They often share walls, ventilation intakes and common areas.

Quit would like to see both the Model Rules and the OCA amended to ensure residents of single-level developments are also protected from the harms of secondhand smoke exposure. We recommend Rule 1.4 be extended to apply to single-level developments, and the OCA be amended to ensure owners corporations in single-level developments also have the power to make their own rules regulating or prohibiting the drifting of smoke.

### **What if my neighbour/owners corporation refuses to take action to stop the smoke infiltration?**

As explained above, if you believe your neighbour is in breach of the owners corporation rules, it might be best to first discuss the issue directly with your neighbour (if appropriate), or your owners corporation. When discussing the issue, it is helpful to:

- clearly explain that secondhand smoke is a known health hazard, and provide details about how the smoke is affecting you; and
- point out that you believe the neighbour is in breach of the owners corporation rules.

It is a good idea to keep a written record of the verbal discussions you have with your neighbour/owners corporation, and follow up any discussions with an email/letter summarising your concerns.

If negotiations with your neighbour and your owners corporation fail and the issue remains unresolved, you might like to take the following action:

- **Lodge a formal complaint with the owners corporation.** The *Owners Corporation Act 2006* and the Model Rules require a person making a complaint to their owners corporation to use an approved form.<sup>xiii</sup> You can obtain a copy of the form from your owners corporation (an owners corporation must provide a copy on request), or via the [Consumer Affairs website](#). The process for resolving complaints is set out in the Model Rules (where applicable) or will otherwise be set out in the owners corporation rules applying to your residence. Further information about making a complaint to your owners corporation can be found on the [Consumer Affairs website](#).
- **Conciliation/mediation with Consumer Affairs Victoria or DSCV.** Consumer Affairs Victoria and the Dispute Settlement Centre of Victoria ('the DSCV') can conduct a conciliation or mediation to help resolve the dispute, however they cannot make a binding decision on the matter.<sup>xiv</sup> It is possible to lodge a complaint directly with Consumer Affairs or the DSCV (without first lodging a formal complaint with the owners corporation), however they may require that attempts be made to resolve the issue privately before becoming involved. [Further information on lodging a complaint with Consumer Affairs or the DSCV](#).
- **Apply to the Victorian Civil and Administrative Tribunal.** If the smoke infiltration remains an issue, it is possible for an owner or occupier to apply to the Victorian Civil and Administrative Tribunal (VCAT) to have the matter resolved. An owners corporation can also apply to VCAT on behalf of a lot owner or occupier. VCAT can make a binding decision about the smoke infiltration, and can impose a financial penalty for a breach of the owners corporation rules.<sup>xv</sup> [Further information about the VCAT process](#).

You may wish to seek legal advice about making an application at VCAT. If you are facing economic or social disadvantage, do not feel confident about making an application yourself and cannot afford a private lawyer, your local Community Legal Centre (CLC) might be able to assist. [Further information about how to get in touch with a CLC](#).

### ***3. Addressing smoke infiltration in a public or community housing complex***

#### **Does this section apply to me?**

Many people who are experiencing economic or social disadvantage live in public housing (managed by the government) or community housing (managed by not-for-profit organisations).

The information in this section will be helpful to you if you are:

- (a) living in a public housing or community housing complex (i.e. a block of flats/units/apartments, or other type of housing complex with shared facilities and/or common areas); and
- (b) the person you believe is causing the smoke infiltration is living in the same public housing complex as you.

The information in this section only applies if you have the same landlord as your neighbour. If you are living in a single-titled dwelling (not a flat/unit/apartment) which is managed by a public or community housing provider, the information in this section is unlikely to be helpful to you (as you probably don't have the same landlord as your neighbour). The section on single-titled housing ([section 5](#)) will be more helpful to your situation.

If you live in a rooming house, the section on rooming houses ([section 4](#)) will be more helpful to you.

#### **What is the main avenue available for residents in a public or community housing complex?**

For residents living in a public or community housing complex, the main avenue for addressing smoke infiltration is to rely on rights set out in the *Residential Tenancies Act 1997* ('the RTA').

The RTA governs most residential landlord-tenant relationships in Victoria. Because the relationship between a public housing resident and their housing provider is essentially a landlord-tenant relationship, the RTA will usually apply.

#### **Resident's right to 'quiet enjoyment' of the property**

The RTA states that a landlord has a duty to take 'all reasonable steps' to ensure that their tenant has 'quiet enjoyment' of their premises.<sup>xvi</sup>

Each tenant also has a duty to not to:

- use or permit their apartment/unit to be used in a way that causes a ‘nuisance’; or
- use or permit their apartment/unit and common areas to be used in a way that causes ‘interference with the reasonable peace, comfort or privacy of any occupier of a neighbouring premises’.<sup>xvii</sup>

### **Quit recommends legislative change**

Quit Victoria would like to see the RTA amended to specifically state that smoke infiltration constitutes both a ‘nuisance’ and an interference with a tenant’s right to quiet enjoyment of the property.

In the absence of any Victorian court or tribunal decisions on the issue, such an amendment would provide both landlords and tenants with helpful clarification (and therefore minimise the likelihood of parties ending up in a lengthy dispute process). This is especially important in circumstances where a tenant’s health may be at risk.

An amendment confirming that smoke infiltration amounts to a ‘nuisance’ and an ‘interference with quiet enjoyment’ would reflect community expectations, and current evidence of the harms associated with even low levels of secondhand smoke exposure. It would also be consistent with recent amendments to the *Owners Corporations Act 2006* and associated regulations applying to multi-level housing (discussed further above in section 2), which appear to recognise smoke infiltration as an unacceptable interference with an apartment owner/occupier’s right to enjoy the property.

The terms ‘quiet enjoyment’, ‘nuisance’ and ‘unreasonable interference’ are not defined in the RTA, and we are not aware of any Victorian court or tribunal decisions specifically considering smoke infiltration under the RTA.<sup>xviii</sup> However, given the very clear evidence around the health consequences of secondhand smoke exposure (and the evidence suggesting that even brief periods of exposure can cause harm), it would seem reasonable for a tenant to argue that smoke infiltration amounts to a nuisance or interference with his/her right to quiet enjoyment. The inclusion of a new Model Rule addressing smoking in multi-level developments (discussed further above under [‘section 2’](#) in relation to multi-unit housing) also lends support to the idea that smoke infiltration in the home should be considered a nuisance and a barrier to quiet enjoyment. As noted above, detailed information regarding the health effects of secondhand smoke exposure can be found [here](#). A tenant may therefore be able to argue that a housing provider has a duty to take ‘all reasonable steps’ to put a stop to smoke infiltration in the tenant’s apartment/unit. In many cases, it would be ‘reasonable’ to expect a housing provider to raise the issue with the tenant causing the smoke infiltration, and insist that they stop. Since a

tenant has a duty not to cause a 'nuisance,' if the tenant causing the smoke infiltration refuses to cooperate, the housing provider can take action against them for breach of the tenant's duties under the RTA.

### **What if my housing provider refuses to take action?**

For residents in public or community housing, the first step towards addressing smoke infiltration is often to discuss the issue directly with the neighbour (if appropriate) and/or housing provider. It can be helpful to keep a written record of these discussions, and follow up with an email or letter outlining how the smoke infiltration is impacting you, and what type of action you would like to be taken.

Where negotiations with a housing provider or neighbour are unsuccessful, a tenant might be able to serve a 'notice of breach of duty' on the housing provider requesting they take action within seven (7) days. [Further information about serving a notice of breach of duty.](#)

If a housing provider does not take action within the required timeframe after receiving the notice, a tenant can apply to have the matter heard before VCAT. VCAT can make an order requiring the housing provider to take action to prevent the smoke infiltration. [Further information about the VCAT process.](#)

## **4. Addressing smoke infiltration in rooming houses**

### **Does this section apply to me?**

The information in this section will be helpful to you if you are living in a property with one or more rooms available for rent, and the smoke infiltration is caused by someone living in the same house. This information in this section will apply regardless of whether the rooms are privately leased or the property is managed by a public or community housing provider.

### **What is a rooming house?**

A rooming house is a property with one or more rooms available for rent. Residents of a rooming house have an individual agreement with the owner/manager of the property. They usually have their own room, but share communal facilities like bathrooms, kitchens and laundries. Where a rooming house has four or more occupants, it will generally be governed under special 'rooming house' provisions in the RTA.<sup>xix</sup>

There are two main avenues for residents of rooming houses to address smoke infiltration:

- 1) Relying on house rules;
- 2) Relying on resident's rights set out in the RTA.

## Rooming house rules

A rooming house operator can create rules relating to the use and enjoyment of facilities and rooms.<sup>xx</sup> Your rooming house operator must provide you with a copy of the rules before you move in.<sup>xxi</sup> If the rules applying to your rooming house do not specifically address the issue of smoking, you may be able to rely on more general rules, such as those relating to activities that cause a 'nuisance' or hazard to health etc. Alternatively, you could suggest to your rooming house operator that they create rules specifically regulating or prohibiting smoking in common areas or rooms. A rooming house operator is required to take all reasonable steps to ensure the house rules are followed by all residents.<sup>xxii</sup>

A resident in a rooming house can apply to VCAT to have the house rules changed, if the rules are unreasonable.<sup>xxiii</sup> If the rules applying to your rooming house permit residents to smoke, you might be able to argue that the rule should be declared invalid on the basis that it is unreasonable.

## Right to quiet enjoyment under the *Residential Tenancies Act 1997*

Under the RTA, each resident in a rooming house has an obligation not to do (or allow visitors to do) anything in or near the rooming house which '*interferes with the privacy and peace and quiet of the other residents or their proper use and enjoyment of the rooming house.*'<sup>xxiv</sup>

Similarly, where residents share a room, a rooming house operator has a duty to take all reasonable steps to ensure that a resident of a shared room does not do anything that '*interferes with the privacy, peace and quiet of, or the proper use and enjoyment of the room by other residents of the room.*'<sup>xxv</sup>

We are not aware of any Victorian court or tribunal decisions which specifically consider smoking in rooming houses, however given the serious health risks of secondhand smoke exposure it would be reasonable to expect that smoke infiltration into a private room or into common areas could amount to an interference with a resident's peace and proper enjoyment of the rooming house.

You can find out more about the [rights of rooming house tenants](#) (and how to enforce them).

## A rooming house as an 'enclosed workplace'

When staff or volunteers are present, common areas of a rooming house will be considered an 'enclosed workplace' under the *Tobacco Act 1987*. Enclosed workplaces in Victoria are required to be smokefree.<sup>xxvi</sup>

## **5. Addressing smoke infiltration in single-titled housing**

### **Does this section apply to me?**

The term 'single-titled housing' describes any home situated on its own title that does not share any common property (and is therefore not part of an owners corporation). This includes freestanding houses on their own block of land, and most semi-detached houses. Most terrace houses would also fall under this category, as they are generally not governed by an owners corporation (as long as there are no shared facilities, such as courtyards or driveways).

If you live in single-titled housing, the information in this section will apply to you regardless of whether your home is privately owned or leased.

This section will also be helpful if you live in public or community housing that is not part of a complex (i.e. not part of a block of flats/units/apartments), and the person you believe to be causing the smoke infiltration does not live in a property managed by the same housing provider.

If you live in a rooming house, and the smoke infiltration is caused by someone living in another room in the same house, this section will not apply to you. The section on rooming houses ([section 4](#)) will be most helpful to you.

### **What is the main avenue available for residents in single-titled housing?**

The main avenue for residents in single-titled housing to address smoke infiltration is by making a complaint to the local council. This is the case regardless of whether the house is privately owned or leased. Although a tenant who is privately leasing a single-titled house might be able to raise the issue of smoke infiltration with their landlord, a landlord will generally be limited in the action they can take against a person living in a neighbouring property (unless both parties share the same landlord).

Local councils are responsible for investigating complaints of certain offences contained in the *Public Health and Wellbeing Act 2008* ('the PHW Act'). Under the PHW Act, it is an offence for a person to cause a 'nuisance' or to knowingly allow a nuisance to exist or originate from a property owned or occupied by them.<sup>xxvii</sup> The term 'nuisance' under the PHW Act refers to things that are '*dangerous to health or offensive*'. A thing will be considered 'offensive' if it is '*noxious or injurious to personal comfort*'.<sup>xxviii</sup>

We are not aware of any Victorian court or tribunal decisions specifically considering whether smoke infiltration amounts to a nuisance under the PHW Act. However, given the current evidence regarding the health effects of secondhand smoke exposure (and the specific use of the words ‘dangerous to health’ in the PHW Act), it would be reasonable to argue that smoke infiltration clearly amounts to a ‘nuisance’.

### **Quit recommends legislative change**

For similar reasons outlined above in relation to the RTA, Quit Victoria would like to see the PWH Act amended to specifically state that smoke infiltration onto a neighbouring property constitutes a ‘nuisance’.

It is our experience that local councils are often reluctant to take action to stop smoke infiltration, due to a perceived lack of certainty around whether smoke infiltration can amount to a nuisance within the meaning of the PHW Act.

## **What steps should I take when making a complaint to my local council?**

If you are experiencing smoke infiltration while living in stand-alone housing, you might want to discuss the issue directly with your neighbour first (if appropriate). It is a good idea to keep a written record of the verbal discussions you have with your neighbour/owners corporation, and follow up any discussions with an email/letter summarising your concerns.

If informal negotiations with your neighbour fail, you can consider getting in touch with the Dispute Settlement Centre of Victoria (‘the DCSV’). The DCSV is a free and confidential mediation service. A trained and impartial mediator provided by the DCSV can provide assistance with resolving the matter (although they cannot order your neighbour to take action). [Further information about the services provided by the DCSV.](#)

If the matter remains unresolved, you might then decide to lodge a formal complaint with your local council.<sup>xxx</sup> Information on how to go about lodging a complaint should be available on your local council’s website.

Your local council has an obligation to investigate the complaint, and determine whether or not they think a nuisance exists.<sup>xxx</sup> Where a council decides that a nuisance exists, they have a duty to take action to fix the problem ‘*as far as reasonably possible*’.<sup>xxxi</sup> If the local council considers that a nuisance exists, it should write to the person responsible for the nuisance (or the owner or occupier of the property if that person cannot be found), setting out what the council wants done about it and the timeframe in which it must be done. If the person refuses to comply with the council’s request, the council can take the matter to the Magistrates’ Court.<sup>xxxii</sup> If the Court agrees that the smoke infiltration amounts to a nuisance, it can order the person to comply with the council’s request.



Although a local council must investigate a nuisance complaint, if the Council determines that a nuisance does not exist, it is not obligated to take the matter further.

### **What if I'm not satisfied with the response from my local council?**

If your local council refuses to investigate your complaint within a reasonable time, you may be able to take the matter directly to the Magistrates' Court. It is a good idea to seek legal advice before bringing your case before the Magistrates' Court, as there could be costs and expenses involved.

As an alternative to bringing your case before the Magistrates' Court, you could contact the Victorian Ombudsman regarding your local council's refusal to take action. The Ombudsman might also be able to assist if you believe your local council has incorrectly decided that the smoke infiltration you are experiencing does not amount to a nuisance.

[Further information on the role of the Victorian Ombudsman.](#)

**Last updated: February 2022**

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- <sup>i</sup> U.S. Department of Health and Human Services. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, Coordinating Center for Health Promotion, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 2006.
- <sup>ii</sup> Campbell, MA, Ford, C, & Winstanley, MH. Ch 4. The health effects of secondhand smoke. 4.2 What is in secondhand smoke? In Scollo, MM and Winstanley, MH [editors]. *Tobacco in Australia: Facts and issues*. Melbourne: Cancer Council Victoria; 2017. Available from <http://www.tobaccoinaustralia.org.au/chapter-4-secondhand/4-2-what-is-in-secondhand-smoke>
- <sup>iii</sup> Kraev TA, Adamkiewicz G, Hammond SK, Spengler JD. Indoor concentrations of nicotine in low-income, multi-unit housing: associations with smoking behaviours and housing characteristics. *Tob Control*. 2009;18(6):438-44. Epub 2009/08/15.
- <sup>iv</sup> King BA, Travers MJ, Cummings KM, Mahoney MC, Hyland AJ. Secondhand smoke transfer in multiunit housing. *Nicotine Tob Res*. 2010;12(11):1133-41. Epub 2010/10/05.
- <sup>v</sup> Hewett MJ, Sandell SD, Anderson J, Niebuhr M. Secondhand smoke in apartment buildings: renter and owner or manager perspectives. *Nicotine Tob Res*. 2007;9Suppl 1:S39-47. Epub 2007/03/17
- <sup>vi</sup> Bohac DL, Hewett MJ, Hammond SK, Grimsrud DT. Secondhand smoke transfer and reductions by air sealing and ventilation in multiunit buildings: PFT and nicotine verification. *Indoor Air*. 2011;21(1):36-44. Epub 2010/09/18
- <sup>vii</sup> King BA, Travers MJ, Cummings KM, Mahoney MC, Hyland AJ. Secondhand smoke transfer in multiunit housing. *Nicotine Tob Res*. 2010;12(11):1133-41. Epub 2010/10/05.
- <sup>viii</sup> See section 146 of the *Owners Corporations Act 2006* (Vic).
- <sup>ix</sup> Consumer Affairs Victoria has stated it believes Rule 1.4 'is broad enough to capture both tobacco smoke and e-cigarette smoke'. See 'Outcome of Consultation: Owners Corporations Amendment Regulations 2021' (29 November 2021). Please contact Consumer Affairs Victoria or Quit Victoria for a copy of this document.
- <sup>x</sup> Section 138 and Schedule 1 of the OCA.
- <sup>xi</sup> Section 138 and Schedule 1 of the OCA.
- <sup>xii</sup> See section 138 of the OCA.
- <sup>xiii</sup> Section 152 of the OCA.
- <sup>xiv</sup> Section 160 and 161 of the OCA.
- <sup>xv</sup> Sections 165 and 166 of the OCA.
- <sup>xvi</sup> Section 67 of the RTA.
- <sup>xvii</sup> Section 60 of the RTA.
- <sup>xviii</sup> Smoke infiltration has been considered by Courts and Tribunals in other jurisdictions. These cases may provide some limited guidance. See, for example, *Owners Corporation SP 49822 v May & Ors (Strata & Community Schemes)* [2006] NSWCTTT 739 (6 November 2006). See also *Admiralty Towers* [2014] QBCCMCmr 264 at [46] and *Norbury v Hogan* [2010] QCATA 27.
- <sup>xix</sup> Section 3 of the RTA.
- <sup>xx</sup> Section 126 of the RTA.
- <sup>xxi</sup> Section 124 of the RTA.
- <sup>xxii</sup> Section 127(2) of the RTA.
- <sup>xxiii</sup> Section 128 of the RTA.
- <sup>xxiv</sup> Section 113 of the RTA.
- <sup>xxv</sup> Section 122 of the RTA.
- <sup>xxvi</sup> Section 5A of the *Tobacco Act 1987*.
- <sup>xxvii</sup> Section 61 of the PHW Act.
- <sup>xxviii</sup> Section 54 of the PHW Act.
- <sup>xxix</sup> Section 62 of the PHW Act.
- <sup>xxx</sup> Section 62 of the PHW Act.
- <sup>xxxi</sup> Section 60 of the PHW Act.
- <sup>xxxii</sup> Section 197 of the PHW Act.