

Position Statement: Addressing smoke infiltration in residential settings

September 2022

Recommendations

Quit Victoria and Cancer Council Victoria recommend the following actions be taken as a priority:

1. The *Owners Corporations Act 2006* (Vic) and the Model Rules be amended to ensure residents of single-level multi-unit developments are afforded the same level of protection from the harms of smoke infiltration as residents of multi-level developments.
2. The *Residential Tenancies Act 1997* (Vic) be amended to clarify that smoke infiltration constitutes both a 'nuisance' and an interference with a tenant's right to quiet enjoyment of the property.
3. Consideration be given to embedding cessation support into the routine support provided by housing providers and/or tenancy managers to social housing tenants, in order to encourage quit attempts and prevent failed tenancies for both smoking and non-smoking tenants.
4. The *Public Health and Wellbeing Act 2008* (Vic) be amended to specifically state that smoke infiltration onto another property constitutes a 'nuisance'.

1.0 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.

As the use of electronic cigarettes (e-cigarettes) continues to increase, Quit Victoria anticipates there will be increasing concern from members of the public about secondhand e-cigarette aerosol similarly entering their homes.

Throughout this document, the term 'smoke infiltration' is used to refer to the drifting of smoke or aerosol caused by:

- (a) The smoking of a tobacco product (including cigarettes, cigars and waterpipes); and
- (b) The use of an e-cigarette.

Smoke infiltration in the home can understandably cause residents significant distress. Exposure to secondhand smoke is not only unpleasant, it is also harmful to health. It is therefore unsurprising that smoke infiltration in residential settings has been flagged as a national public health priority. Most recently, Australia's draft National Tobacco Strategy (2022-2030) includes an action item for state and territory governments to consider regulatory approaches to encourage smoke-free homes (including for public housing and multi-unit housing).¹

Unfortunately, the current laws concerning smoke infiltration in Victoria fail to adequately protect many Victorians from the harms of secondhand smoke exposure. In particular, more needs to be done to ensure those living in single-level multi-unit housing and those living in high density housing not covered by owners corporation laws are protected from exposure to secondhand smoke and e-cigarette aerosol.

2.0 HEALTH IMPACTS OF SMOKE INFILTRATION IN THE HOME

Exposure to secondhand tobacco smoke is much more than just an inconvenience. The health risks of secondhand tobacco smoke exposure are widely documented. Detailed information regarding the health effects of secondhand smoke is available via the [Tobacco in Australia: Facts & Issues website](#).

It is important to understand that there is no 'safe' level of exposure to secondhand smoke. Even brief periods of exposure can be harmful. Exposure to secondhand smoke has immediate adverse effects on the cardiovascular system, and is also a known cause of lung cancer and coronary heart disease.² Non-smokers with long-term exposure to tobacco smoke have an estimated 20-30% higher risk of developing lung cancer than non-smokers who are not exposed.³

Children are particularly susceptible to the effects of secondhand smoke. Secondhand smoke exposure is associated with an increased risk of low birthweight, sudden infant death syndrome (SIDS), and childhood cancers such as leukaemia, brain cancer and lymphoma.⁴ Given their vulnerability to the health effects of secondhand smoke, the protection of children from secondhand smoke exposure in

¹ A copy of the draft National Tobacco Strategy is available from the Australian Government Department of Health at: <https://consultations.health.gov.au/atodb/national-tobacco-strategy-2022-2030/> See in particular, action item 10.4.

² US Department of Health and Human Services. The health consequences of involuntary exposure to tobacco smoke: A report of the surgeon general. Atlanta, Georgia: US 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. Available from: http://www.cdc.gov/tobacco/data_statistics/sgr/sgr_2006/index.htm

³ As above.

⁴ As above.

the home is therefore essential to upholding the rights of the child set out in the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁵

Whilst evidence regarding the health impacts of exposure to secondhand e-cigarette aerosol is not as definitive as the evidence relating to secondhand tobacco smoke, exposure to e-cigarette aerosol is unlikely to be harmless. A comprehensive systematic review of the global evidence has found there is conclusive evidence that e-cigarette use results in increased airborne particulate matter in indoor environments.⁶ Increases in propylene glycol, glycerol, nicotine and volatile organic compounds (VOCs) have also been detected after significant indoor e-cigarette use.⁷ It is therefore unsurprising that the use of e-cigarettes is now prohibited in legislated smokefree areas across all Australian states and territories.

Detailed information regarding the chemicals in e-cigarette aerosol is available via the [Tobacco in Australia website](#).

3.0 SMOKE INFILTRATION IN MULTI-UNIT HOUSING

Research conducted in Australia and overseas suggests that people living in multi-unit housing are more likely to be exposed to secondhand smoke than those living in separate housing.⁸

In Victoria, privately owned flats, apartments or units in multi-unit developments are generally governed by an 'owners corporation', made up of the owners of each apartment or unit. The powers and responsibilities of an owners corporation are set out in the *Owners Corporations Act 2006* ('the OC Act'). Each owners corporation also has a set of rules applying to all owners and occupiers living in the development. Owners corporations can either create their own rules, or adopt the 'Model Rules' which are set out in the *Owners Corporations Regulations 2018* (Vic) ('the OC Regulations'). The Model Rules are contained in Schedule 2 of the OC Regulations.

2021 Amendments to the OC Act and Regulations -

On 1 December 2021, Model Rule 1.4 was introduced to specifically address the issue of smoke infiltration in multi-unit developments. Model Rule 1.4 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.'

Schedule 1 of the OC Act sets out the matters about which an owners corporation can make its own rules. In December 2021, Schedule 1 was also amended to make it clear that owners corporations in

⁵ Section 17(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) states: 'Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.'

⁶ Banks E, Yazidjoglou A, Brown S, Nguyen M, Martin M, et al. Electronic cigarettes and health outcomes: systematic review of global evidence. Report for the Australian Department of Health. Canberra: National Centre for Epidemiology and Population Health, 2022. Available from: <https://www.anu.edu.au/news/all-news/e-cigarettes-are-harmful-and-addicting-youth-report?msckid=9bb6457ecf4711ecab7a8dfe76a500cd>.

⁷ Soule EK, Maloney SF, Spindle TR, Rudy AK, Hiler MM, et al. Electronic cigarette use and indoor air quality in a natural setting. *Tobacco Control*, 2017; 26(1):109–112. Available from: <http://www.ncbi.nlm.nih.gov/pubmed/26880745>. See also: Chen R, Aherrera A, Isichei C, Olmedo P, Jarmul S, et al. Assessment of indoor air quality at an electronic cigarette (Vaping) convention. *J Expo Sci Environ Epidemiol*, 2018; 28(6):522–529. Available from: <https://www.ncbi.nlm.nih.gov/pubmed/29288255>

⁸ See, for example, Bonevski B, Paul C, Jones A, Bisquera A, and Regan T. Smoky homes: Gender, socioeconomic and housing disparities in second hand tobacco smoke (SHS) exposure in a large population-based Australian cohort. *Preventive Medicine*, 2014; 60:95–101. Available from: <https://www.ncbi.nlm.nih.gov/pubmed/24380792> See also, Holmes LM, Llamas JD, Smith D, and Ling PM. Drifting Tobacco Smoke Exposure among Young Adults in Multiunit Housing. *Journal of Community Health*, 2019. Available from: <https://www.ncbi.nlm.nih.gov/pubmed/31535264>

multi-level developments have the power to make rules regulating or prohibiting the drifting of tobacco smoke from a lot.⁹

While the 2021 amendments referred above represent a positive step towards protecting Victorians in multi-level developments from the harms of secondhand smoke exposure, it is important to note that the amendments apply only to residents of *multi-level* developments¹⁰ and cannot be relied upon by residents of single-level developments.

The situation for residents in single-level developments –

Prior to the introduction of the 2021 amendments, owners corporations in single-level developments could adopt their own rules addressing smoking (by relying on the more general rule-making powers in Schedule 1 of the OC Act, such as the power to make rules regarding the ‘health, safety and security of lot owners, occupiers and guests’). However, following the amendment to Schedule 1 referred to above, this is unlikely to be the case.

As a result, residents in single-level developments are now unlikely to be able to rely on Victoria’s owners corporation laws to protect themselves and their guests from smoke infiltration.

Quit Victoria and Cancer Council Victoria recommend urgent legislative change –

The distinction between multi-level and single-level developments in the Model Rules and the OC Act 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 Victoria and Cancer Council Victoria urge the Victorian Government to amend the Model Rules and the OC Act to ensure residents of single-level developments are also protected from smoke infiltration.

We recommend Rule 1.4 be extended to apply to single-level developments, and Schedule 1 of the OC Act be amended to ensure owners corporations in single-level developments also have the power to make their own rules regulating or prohibiting smoke infiltration.

4.0 SMOKE INFILTRATION IN RENTAL PROPERTIES

The *Residential Tenancies Act 1997* (Vic) (‘the RTA’) applies to most Victorian tenants living in rental properties. The RTA does not contain any specific provisions regarding the issue of smoke infiltration, however it does contain general provisions regarding tenants’ rights and responsibilities.

Under the RTA, a landlord has a duty to take ‘all reasonable steps’ to ensure that their tenant has ‘quiet enjoyment’ of the premises they live in.¹¹ Each tenant also has a duty not to:

- Use or permit their apartment or unit to be used in a way that causes a ‘nuisance’; or

⁹ See section 138 and Schedule 1 of the OC Act.

¹⁰ The term ‘multi-level’ is not defined in the OC Act or Regulations. It is therefore unclear whether this term refers to any multi-unit development containing a building with more than one level (such as complex of two-storey townhouses), or whether the 2021 amendments apply only to apartment complexes.

¹¹ Section 67 of the RTA.

- Use or permit their apartment or 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.’¹²

Unfortunately, the terms ‘nuisance’, ‘quiet enjoyment’ and ‘unreasonable interference’ are not defined in the RTA, and there do not appear to be any Victorian court or tribunal decisions specifically considering smoke infiltration under the RTA. The application of these general provisions to the issue of smoke infiltration therefore remains unclear, leaving tenants and landlords uncertain about what (if any) action can be taken to address the issue.

Smoke infiltration in social housing -

Like other tenants, Victorian social housing tenants who are experiencing smoke infiltration must currently rely on general provisions regarding tenants’ rights and responsibilities in the RTA (discussed above). The lack of clarity regarding the application of these general provisions to the issue of smoke infiltration is of particular concern for social housing tenants.

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). Research from Victoria and overseas indicates that residents of public and community housing have much higher smoking rates than the general population.¹³ Higher rates of smoking mean that people living in social housing tend to be disproportionately affected by the health inequalities resulting from smoking (and exposure to secondhand smoke).¹⁴

While there has been some progress towards ensuring Victorians living in privately owned multi-level developments are protected from exposure to secondhand smoke, Quit Victoria and Cancer Council Victoria remain concerned that Victorians living in social housing (i.e. public and community housing) are not currently afforded this same level of protection, despite often living in high-density multi-unit settings.

¹² Section 60 of the RTA.

¹³ See 2020 Victorian Public Housing Residents Survey, published by the Victorian Government. August 2021. Available from: [Public housing resident survey 2020 results.pdf](#)

See also, Jackson SE, Brown J, Cheeseman H, Arnott D and Titmarsh R. Smoking in social housing among adults in England, 2015-2020: A nationally representative survey. *BMJ Open*, 2022. 12:e061013. Available from: <https://bmjopen.bmj.com/content/12/7/e061013>.

¹⁴ Joint report published by Action on Smoking and Health (ASH UK) and Housing Learning and Improvement Network (Housing LIN). Smoking and social housing: Supporting residents, addressing inequalities. May 2022. Available from: [ASH-Housing-LIN-Smoking-and-Social-Housing-May-2022.pdf](#)

Quit Victoria and Cancer Council Victoria recommend legislative and policy change –

Quit Victoria and Cancer Council Victoria urge the Victorian Government to amend the RTA 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 tobacco 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 above), which appear to recognise smoke infiltration as an unacceptable interference with a lot owner/occupier’s right to enjoy the property.

In addition, social housing providers should be encouraged to introduce smokefree policies for tenants, staff and visitors which prohibit smoking and vaping in lots or common areas of social housing developments.

Though a tenant’s right to a smokefree home should be paramount, Quit Victoria and Cancer Council Victoria recognise the importance of preventing failed tenancies for both smoking and non-smoking tenants living in social housing. We believe that providing tenants who smoke with access to smoking and vaping cessation services is crucial for encouraging quit attempts and supporting tenancy sustainment. We therefore recommend that consideration be given to embedding cessation support (such as referrals to Quitline) into the routine support provided by housing providers and/or tenancy managers to social housing tenants.

5.0 SMOKE INFILTRATION IN SINGLE-TITLED HOUSING

Single-titled housing refers to any home situated on its own title, that does not share common property (and is not part of an owners corporation). This type of housing includes freestanding houses on their own block of land, and most semi-detached houses and terrace houses.

Residents in single-titled housing who are impacted by smoke infiltration coming from a neighbouring property can make a complaint to their local council. This is the case regardless of whether the home is privately owned or leased (although the general ‘nuisance’ provisions in the RTA will also apply to a tenant who is leasing single-titled housing, as discussed above).

Local councils are responsible for investigating complaints regarding 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 knowingly allow a nuisance to exist or originate from a property owned or occupied by them.¹⁵ The term ‘nuisance’ under the PHW Act refers to things that are ‘*dangerous to health or offensive*’.¹⁶ Unfortunately, there do not appear to be any Victorian court or Tribunal decisions specifically considering whether smoke infiltration amounts to a nuisance under the PHW Act.

¹⁵ Section 61 of the PHW Act.

¹⁶ Section 54 of the PHW Act.

Quit Victoria and Cancer Council Victoria recommend legislative change –

For similar reasons outlined above in relation to the RTA, Quit Victoria and Cancer Council Victoria recommend that the PHW Act be amended to specifically state that smoke infiltration onto another 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. This reluctance means that residents in single-titled housing who are impacted by smoke infiltration are often left without any avenue for adequately addressing the issue. Although a local council has an obligation to investigate a nuisance complaint under the PHW Act, if the Council determines that a nuisance does not exist, it is not obligated to take the matter further and there does not appear to be any avenue for a resident to seek review of the determination under the PHW Act.