



Heart
Foundation®

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Heart Foundation response to QUT recommendations on Property Law Review: Smoke-drift

The Heart Foundation welcomes the opportunity to provide feedback on the recommendations in the 2017 Government Property Law Review – Options Paper Recommendations *Body corporate governance issues: By-laws, debt recovery and scheme termination*.

Our feedback is focussed on:

- Recommendation 6 – Smoking
- Recommendation 8 – Standard by-law
- Recommendation 11 – Fines for breaches of by-laws.

The Heart Foundation is Australia's leading heart health charity, dedicated to reducing premature death and suffering from heart, stroke and blood vessel disease (cardiovascular disease).

Smoking is one of the most dangerous risk factors which causes cardiovascular disease in smokers. In addition, exposure to second-hand smoke causes coronary heart disease in non-smokers and is responsible for the deaths and disability of innocent by-standers.

With around 12% of adult Queenslanders smoking daily¹, it's important that body corporate laws protect the 88% who don't smoke from exposure to second-hand smoke. We believe that introducing a by-law is one of the most effective ways to eliminate the health, legal and financial risks associated with smoking in apartment complexes.

We have been approached over many years by people who live in multi-unit housing complexes and are continually exposed to second-hand smoke in their own homes by people in neighbouring properties. The smoke exposure is making them sick and they feel powerless in their own homes. These people have very little recourse with the current laws in Queensland and the inaction of most body corporates.

After unsuccessfully seeking a resolution with neighbours and bodies corporate, we have been approached by people who feel their last resort is to leave their home because of the health impacts of other people's smoke. However, not all of these people have been able to afford to move and are often already living in disadvantage due to their health condition.

We believe that people have a right to breathe clean air, especially in their own homes. Smoke infiltration is both a health hazard and a nuisance. There is no safe level of exposure to second-hand smoke.

See **Appendix 1: Case Study** on John's story, to better understand what it's like to live with heart disease and second-hand smoke. This story demonstrates why we need legislative reform to protect people from second-hand smoke.

Heart Foundation supports recommendation 6: No smoking by-law “by majority”

The Heart Foundation **supports** Recommendation 6 – Smoking, for an amendment of the BCCM Act to allow body corporates to pass and enforce a no smoking by-law (prohibiting smoking in an outdoor area that is part of a lot, including balconies, courtyards etc.); if that by-law is supported by the body corporate.

The Heart Foundation **does not support the “without dissent” requirement**. Our recommendation is that a by-law should be able to be passed by a majority, and not require a unanimous vote, without dissent.

This “without dissent” proposal for Queensland is too restrictive and makes it extremely hard for strata committees to act on smoking and its interference with people’s enjoyment of their lot and common property within a complex.

A great deal of evidence is available to demonstrate the health dangers of exposure to second-hand smoke and in particular in multi-unit housing developments. This evidence is available in the joint position paper on smoke infiltration released by the Cancer Council Australia and the Heart Foundation, *Position Statement – Addressing smoke infiltration in multi-unit housing*².

The benefits of smoke-free legislation in Australia has been clearly demonstrated. With a reduction in environmental exposure, the proportion of tobacco related deaths due to second-hand smoke has more than halved over the past two decades to 2%¹. A significant gap in this legal protection for people remains in their homes in multi-unit housing complexes.

Adding to the body of evidence that smoke-free legislation saves lives, new research in San Paulo, Brazil has confirmed the link between fewer hospitalisations and deaths due to heart attacks following implementation of comprehensive smoke-free laws³.

As demonstrated by the 261 submissions received by the QUT Review on this issue, there is strong public concern about smoke-drift in multi-unit residential lots. Of these submissions, the overwhelming majority (214 submissions) supported giving the body corporate the authority to adopt and enforce a by-law prohibiting smoking on a lot where the smoke drifts from the lot to an adjacent lot. The most commonly cited reason is that the smoke generated in the smoker’s lot does not remain in the smoker’s lot but enters adjacent lots, permeating into carpets, curtains, clothing and furniture^[RF1].

There are strong levels of support for smoke-free policies in multi-unit housing by non-smoking residents. A compilation of surveys of residents found that between 61-82% of non-smoking multi-unit residents supported a ban on smoking in the building compared to between 16-41% of smokers. When preferences of smoking and non-smoking residents are combined, support for a complete smoking ban in apartment buildings ranges from 41-64%⁴.

A recent review of the scientific literature shows that there is sufficient evidence to support action to prohibit second-hand smoke exposure in multi-unit housing⁵.

Examples from other jurisdictions

Both NSW and WA have enacted and implemented legislation to allow strata committees to pass by-laws about smoking as a nuisance or hazard. Both have options that allow a majority decision.

NSW legislation

NSW is the most recent state to enact new strata laws that restrict smoke-drift, defining smoke as a nuisance or hazard. The *NSW Strata Schemes Management Regulation 2016*⁶ commenced on 30 November 2016.

This NSW law gives strata committees the authority to ban smoking by introducing a smoke-free by-law, by majority decision. A vote of 75% in favour is required at a general meeting of all owners eg. the annual general meeting. The owners' corporation can change existing by-laws or create new ones for the better enjoyment or management of the strata scheme.

The owners' corporation must decide by special resolution at a general meeting to make or change a by-law. This means no more than 25 per cent of votes are cast against the motion at a general meeting of the owners' corporation⁷. After adopting the model by-law, the owners' strata committee can then enforce it with a 'notice to comply' and ultimately seek an order in the Tribunal.

NSW also allows some protection for residents in schemes without a smoking by-law. Those who are being negatively affected by smoking may be able to take action under the Act. The Act requires owners, occupiers and other persons to not create a nuisance or hazard for other residents.

If smoke is unreasonably interfering with a resident's use or enjoyment of the common property or their lot, this can be considered a nuisance or hazard. A resident can then apply for strata mediation. If mediation is not successful, they may then apply to the Tribunal for assistance.

WA legislation

Many strata companies in WA rely on Schedule One by-law 1(2)(a) of the WA Strata Titles Act (1985) to prohibit smoking in common areas. This by-law requires owners and occupiers to use and enjoy the common property in such a manner as not unreasonably to interfere with the use and enjoyment thereof by other owners, occupiers, residents or their visitors. Common areas of a strata property include foyers, corridors, stairwells, pool areas, gyms, barbecue areas and elevators.

Further restrictions to prohibit smoking within lots (including on balconies and private courtyards), can be added through a by-law under Schedule One. This requires that the by-law is passed without dissent.

We understand that no Schedule One by-law has been implemented in WA so far because it is extremely difficult to get 100% support from owners and occupiers for a Schedule One by-law to be approved.

An alternative is for the Strata Company to adopt a Schedule Two by-law to ban smoking on all common property, and to ban smoking in individual units (including on balconies and in courtyards) where it causes a nuisance or interferes with the peaceful enjoyment of another owner or occupier.

The by-law on smoking must be drafted and proposed as a special resolution. A special resolution is passed when supported by at least 50% of the votes and opposed by no more than 25% of the votes.

The value of each vote is calculated based on the unit entitlement of each lot. There are different requirements for strata schemes that have only 3, 4 or 5 lots. If the special resolution passes, the strata company should provide notice to tenants of the terms of the new by-law, including any applicable penalties and exemptions.

Heart Foundation supports Recommendation 8: Standard by-laws

The Heart Foundation **supports** Recommendation 8 that the BCCM should be updated to include example by-laws covering topics including smoking. We recommend that strata committees are provided with examples of smoking by-laws that allow the option for a 100% smoke-free by-law. The NSW Government provided example by-laws to support strata committees⁸ and a sample WA by-law is provided in Appendix 2.

We also **recommend** that owners and tenants be given further support from the Queensland Government to enact smoke-free by-laws, by providing a toolkit similar to NSW -

https://www.cancercouncil.com.au/wp-content/uploads/2016/11/16083_CC_CAN1035_AchievingSmokeFreeAptLiving_WEB.pdf.

The Heart Foundation supports Recommendation 11: Fines for breaches of by-laws

The Heart Foundations supports Recommendation 11 that the BCCM Act should allow bodies corporate to issue a fine of up to two penalty units to lot owners and occupiers who continue to breach particular by-laws after receiving a contravention notice.

It's important that once smoking by-laws are enacted, that they can be upheld and people held accountable if they do not comply with the by-laws.

Health effects of second-hand smoke

Scientific evidence about the dangers of second-hand smoke is unequivocal⁹. There are at least 250 chemicals that are known to be toxic or carcinogenic in second-hand smoke. The US Surgeon General has reported that there is no known safe level of exposure to second-hand smoke¹⁰.

Smoking is a major cause of heart attack, stroke and peripheral vascular disease and is the largest single preventable cause of death. More than 3,700 Queenslanders die annually from smoking¹, equal to around 10 large aircraft crashes a year.

Exposure to second-hand smoke is known to increase the risk of coronary heart disease among non-smokers. Brief exposure can quickly affect the cardiovascular system. Even 30 minutes of exposure can affect blood and vascular function to almost the same level as the effect on an active smoker⁹.

Smoking is classified as a human carcinogen by the International Agency for Research on Cancer and there is conclusive evidence that exposure to second-hand smoke is a cause of lung cancer in non-smokers¹¹.

Children exposed to second-hand smoke are at increased risk of asthma, lower respiratory chest infections, middle ear infection, low birth weight, SIDS and fire injuries⁹.

Current legislation is inadequate

The current law in Queensland means that very little can be done if the smoke from a neighbouring lot or balcony drifts into others' windows and doors. Given the protection of non-smokers in public areas and workplaces, there is little reason not to extend protection to people living in multi-unit housing.

The Heart Foundation is advocating for change to the law, as the current dispute resolution process does not specifically prohibit smoke-drift from one lot to another. It does provide that the occupier must not cause a nuisance or hazard, or unreasonably interfere with the use or enjoyment of another lot in the scheme. But the onus is on the person alleging nuisance to prove the smoke is unreasonable interference and under the current legislation, this may be difficult, if not impossible.

So the current law leaves non-smokers with little option but to close their doors and windows, or leave their property, to avoid exposure to second-hand smoke. However, this seems an unreasonable penalty for the non-smoker and is interfering with their use or enjoyment of their lot.

Law reform is also needed to remove the contradiction whereby there is no ban on smoking within 5m of an entrance to multi-unit residential accommodation; but there is a ban on smoking within 5m of the entrance to non-residential buildings such as shops, banks, clubs, pubs and offices. However, if the entrance of a multi-unit residential building is through a shop or office, then smoking is banned within 5m of the entrance.

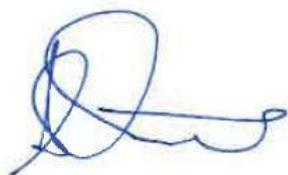
Second hand smoke is hazardous to people, and the arbitrary designation of a building type as multi-unit residential doesn't make the second-hand smoke less dangerous.

Heart Foundation Recommendations

The Heart Foundation recommends that Queensland legislation and regulation is amended to:

1. Reform the BCCM Act to empower body corporates to enact a by-law so they can restrict or prohibit smoking to make their properties 100% smoke-free, by majority decision and not without dissent. This would include the use of all smoking products, including electronic cigarettes.
2. Reform the BCCM to require that strata committees be provided with examples of by-laws that include the option for a 100% smoke-free by-law. The NSW Government provided example by-laws to support strata committees⁸ and a sample WA by-law is provided in Appendix 2.
3. Reform the BCCM to allow bodies corporate to issue fines to lot owners and occupiers who continue to breach a particular by-law after receiving a contravention notice.
4. Require the Queensland Government to support owners and tenants in Queensland to enact smoke-free by-laws, by providing a toolkit similar to NSW - https://www.cancercouncil.com.au/wp-content/uploads/2016/11/16083_CC_CAN1035_AchievingSmokeFreeAptLiving_WEB.pdf
5. Provide a dispute resolution service for smoke-drift through the Commissioner for Body Corporate and Community Management so that owners and occupiers who do not have the benefit of a by-law making their property smoke-free have recourse.
6. Require the Queensland Government to publicise details of smoke-drift laws, people's rights and body corporate powers to raise awareness about and promote the passing of by-laws for public health benefits.
7. Record complaints to monitor progress and inform future considerations around property law.
8. Reform the *Tobacco and Other Smoking Products Act 1989* to extend the ban on smoking within 5m of building entrances to include multi-unit residential accommodation.

Yours sincerely



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- ⁶ http://www.fairtrading.nsw.gov.au/ftw/About_us/Have_your_say/Reform_of_strata_laws.page (Accessed 7 April 2017).
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- ¹¹ International Agency for Research on Cancer (2004). *Tobacco Smoke and Involuntary Smoking*. IARC Monographs on the Evaluation of Carcinogenic Risks to Humans, Vol 83. Lyon, France: IARC; 2004.

APPENDIX 1: CASE STUDY

John lives with heart disease and second-hand smoke

John had a heart attack at 56. His doctor advised him that he must now eat healthily, exercise each day and live a smoke-free life. John is at risk of another heart attack because he has already had one. He had significant heart damage and hadn't been able to get back to work yet.

John moved to a unit complex after his heart attack because he found the large garden in his family home was too big to manage now. He enjoyed living at the unit with his wife Mel and they quickly settled in. He enjoyed walking each day and relaxing with a cup of tea on his balcony on his return. Their grandchildren aged 2 and 3 visited often.

A new neighbour moved in and things quickly began to deteriorate for John. Unfortunately the new neighbour smoked on the balcony everyday. John began to feel nauseas from the smoke on a daily basis and it made him feel breathless. He and Mel began to use their balcony less and they felt upset. They asked the neighbour if he would please not smoke on the balcony because it made John sick. The neighbour refused and said he had a right to smoke there.

John and Mel then went to their body corporate to get help but found that without 100% of the owners agreeing, they couldn't get a by-law through. Even if the body corporate had passed such a by-law, John learned that it would likely be unenforceable.

John was becoming stressed about the conflict with neighbours and owners which led to feelings of depression. He went out walking less and less. They kept their unit closed up most of the day because of the smoke and he sat and watched television. He rarely went onto his balcony and his health began to deteriorate. His daughter no longer wants her children to visit their place because of the smoke. Without regular exercise, depression and the daily exposure to second-hand smoke, John is at greater risk of having another heart attack.

APPENDIX 2: Example by-law enacted in Victoria Park, Perth, WA

New Schedule 2 By-Law 16

16. Tobacco

16.1 Pursuant to section 42 and items 3 and 7 in Schedule 2A of the Act and for the benefit of all proprietors, occupiers and visitors, proprietors and occupiers shall not cause or allow the smoking of any tobacco product on common property and will take all reasonable steps to ensure their visitors do not cause or allow the smoking of any tobacco product on common property.

16.2 Pursuant to section 42 and item 3 in Schedule 2A of the Act and for the benefit of all proprietors, occupiers and visitors, proprietors and occupiers shall ensure that the smoking of any tobacco product on their lot does not interfere with the peaceful enjoyment of or cause a nuisance to a proprietor or occupier of any other lot or to visitor to any other lot.

16.3 Pursuant to Section 42A(1) of the Act and subject to Section 42A(2) of the Act, the Penalty for a breach of this by-law shall be the maximum amount prescribed, from time to time, for the purposes of sections 423A(1) and 103I(4) of the Act.

16.4 If there is any conflict between this by-law and any other by-law, this by-law shall prevail to the extent of that inconsistency.