



NSW Government's proposed strata law reforms

Submission from Cancer Council NSW

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Cancer Council NSW is the leading cancer charity in NSW. Our vision is *Together we will beat cancer*. A priority in achieving this vision is preventing cancer by enabling people to lead healthy, cancer-smart lifestyles.

Secondhand tobacco smoke is a cause of cancer and any level of exposure is unsafe. Reducing the community's exposure to secondhand smoke is therefore a priority for Cancer Council NSW.

Overview

Most NSW adults (93%) do not permit smoking inside their home,¹ yet many continue to experience home-based exposure to secondhand smoke because neighbours' smoke penetrates their home. Residents of multiunit housing are especially susceptible to neighbours' smoke because the smoke can easily drift between smoking and non-smoking parts of the building.² Cancer Council NSW is frequently contacted by owners and residents of strata schemes seeking advice on what can be done to stop secondhand smoke from entering their home.

Cancer Council NSW commends the NSW Government for considering the problem of secondhand smoke in strata schemes as part of strata law reform in NSW. Overall we support the Government's proposal to note that secondhand smoke can be considered to be a nuisance or hazard and to develop a model by-law to deal with smoking. However, we note that the current drafting is weak and amendments are required to increase the potential of NSW strata law to effectively deal with secondhand smoke in NSW strata schemes in a fair and timely manner.

In 2015 Cancer Council NSW conducted research to estimate the prevalence of smoke-free by-laws in NSW strata schemes by examining by-law documentation for a random sample of 1,308 strata schemes.³ We found that while NSW strata schemes can adopt by-laws to restrict smoking, few strata schemes had done so, with just 5% of our sample restricting smoking at all and fewer than 1% banning smoking building-wide.

Subsequent interviews conducted by Cancer Council NSW with owners (n=16) and tenants (n=4) of NSW strata schemes, as well as industry professionals (n=3), identified possible reasons for this low uptake of smoke-free by-laws in NSW strata schemes.⁴ Specifically, interviewees described the following barriers to adopting smoke-free by-laws in strata schemes:

- The lack of legislative support for managing the issue of secondhand smoke;
- The competing priorities in strata schemes;
- The costs associated with drafting a smoke-free by-law;

- The challenges associated with achieving 75% owner support;
- The need for residents to raise the contentious issue of smoking with their neighbours; and
- The limited rights of tenants.

Cancer Council NSW believes that strata law reform in NSW provides an opportunity to address these barriers to better enable strata communities to negotiate fair and timely solutions to secondhand smoke-drift.

Internationally, recognition of the health risks associated with secondhand smoke exposure in multiunit housing is increasing. In a small number of foreign jurisdictions governments have taken action to better manage the problem of secondhand smoke-drift in this setting. In the United States a number of state governments specifically address the issue in relevant residential laws.⁵⁻⁹ These laws tend to do one or more of the following:

- Confirm that secondhand smoke-drift can be considered to be a nuisance or a hazard;
- Confirm that by-laws can be made to restrict smoking in both common areas and residential units; and/or
- Mandate that landlords disclose to all potential tenants rules about where smoking is and is not allowed on the property.

Consistent with Cancer Council NSW's 2012 submission in response to the discussion paper *Making NSW No. 1 Again – Shaping Future Communities*, we continue to support a legislative approach that gives strata schemes responsibility for negotiating the management secondhand smoke. To facilitate this approach Cancer Council NSW recommends four specific amendments to the draft *Strata Schemes Management Bill 2015*. As set out below, we believe that these recommendations would:

- Increase the Bill's potential to ease processes for the local management of secondhand smoke in NSW strata schemes;
- Make strata living more enjoyable for residents; and
- Help bring NSW strata law in step with the scientific evidence on the harms of secondhand smoke.

Recommendations in summary

1. That the note to S. 153 (c) of the draft *Strata Schemes Management Bill 2015* be strengthened by:
 - a. Improving clarity that secondhand smoke can be considered a nuisance or hazard; and
 - b. Providing clearer guidance on what factors might be considered in determining whether a particular instance of secondhand smoke-drift is in fact a nuisance or hazard.
2. That S. 136 of the draft *Strata Schemes Management Bill 2015* explicitly state that by-laws can be made in relation to smoking behaviour.

3. That the proposed tenant representative, provided for at S. 33 of the draft *Strata Schemes Management Bill 2015*, be granted the right to vote on matters relating to residents' health and safety, including the issue of smoking.
4. That the level of agreement required among the owners corporation, provided for at S. 141 of the draft *Strata Schemes Management Bill 2015*, be reduced to a simple majority for matters that affect the health and safety of residents.

Cancer Council NSW recommendation 1

That the note to S. 153 (c) of the draft *Strata Schemes Management Bill 2015* be strengthened by:

- a. Improving clarity that secondhand smoke can be considered a nuisance or hazard; and
- b. Providing clear guidance on what factors might be considered in determining whether a particular instance of secondhand smoke-drift is in fact a nuisance or hazard.

Cancer Council NSW supports the inclusion of a note at S. 153 (c) to clarify that secondhand smoke that penetrates common property or residential lots can be considered a nuisance or a hazard. However, the current drafting of this clause is vague and ambiguous, especially in its use of the words "*depending on the circumstances in which it occurs*". Cancer Council NSW proposes two options for strengthening this note.

Option 1:

Our preference, and also the option most aligned with evidence on the harms associated with secondhand smoke exposure, is to remove the clause "*depending on the circumstances in which it occurs*" and to change the note to state that any penetration of smoke-drift into common property or a residential lot is a nuisance or a hazard. The note would then read:

"The penetration of smoke from smoking into a lot or common property causes a nuisance or hazard and interferes unreasonably with the use or enjoyment of the common property or another lot."

Option 2:

The second option, which is stronger than the current drafting, is to remove the clause "*depending on the circumstances in which it occurs*" and to add guidance on what factors should be taken into account in considering whether a particular instance of smoke-drift is in fact a nuisance or a hazard*. As an example, the note could then read:

"The penetration of smoke from smoking into a lot or common property may cause a nuisance or a hazard and may interfere unreasonably with the use or enjoyment of the common property or another lot. In considering whether smoke is a nuisance or a hazard, factors such as the frequency of the smoke-drift and the circumstances of the

* Note: Consistent with the scientific evidence on the negative health consequences caused by secondhand smoke exposure, Cancer Council NSW's position is that any level of secondhand smoke exposure is a hazard.

aggravated party (for example, whether they are housebound, have children who are exposed to the smoke, or are in poor health) may be considered.”

Regarding how frequently smoke-drift must be experienced to constitute a nuisance, Utah Civil Code at S. 78B-6-11-1101 (3) is helpful in that it provides the following guidance:

“A nuisance... includes tobacco smoke that drifts into a residential unit a person rents, leases, or owns, from another residential or commercial unit and the smoke... drifts in more than once in each of two or some consecutive seven day periods.”⁷

Rationale

Secondhand smoke exposure in strata schemes is a nuisance and *any* amount of exposure is a hazard.

A 2014 evidence review by the U.S. Surgeon General concluded that there is no safe level of exposure to secondhand smoke.¹⁰ The review found conclusive evidence that secondhand tobacco smoke causes cancer, respiratory and cardiovascular diseases in adults, as well as sudden infant death syndrome, low birth weight, lower respiratory tract illness, middle ear disease and asthma in children.¹⁰ Legislative recognition that exposure to secondhand smoke is a hazard is needed in order to bring NSW strata law in line with the scientific evidence on the harms of secondhand smoke exposure.

Secondhand smoke-drift in strata schemes is also a nuisance; it has a negative impact on residents' use and enjoyment of common property and residential lots. Interviews conducted by Cancer Council NSW with residents and owners of NSW strata schemes found that residents who are exposed to unwanted secondhand smoke are regularly required to keep windows and doors shut to block out smoke. Exposure to secondhand smoke in strata schemes was also found to adversely affect respondents' health (i.e. by aggravating existing health conditions), lifestyle (i.e. by inhibiting use of balconies), comfort (i.e. by producing an odour), relationships (i.e. by placing additional stress on relationships), and home cleanliness (i.e. from smoke being deposited on clothing and linen).

NSW court cases provide further evidence that secondhand smoke-drift in strata schemes is a nuisance and a hazard, with two NSW adjudicators ruling to restrict smoking after accepting that smoke-drift via air conditioning was a nuisance¹¹ and that smoke-drifting from a neighbouring courtyard was a hazard.¹²

Cancer Council NSW recommendation 2

That S. 136 of the draft *Strata Schemes Management Bill 2015* be amended to state that by-laws can be made in relation to smoking behaviour.

Cancer Council NSW recommends fixing the current power of owners corporations (i.e. in the case of existing strata schemes) and developers (i.e. in the case of new developments) to make by-laws about smoking into the draft *Strata Schemes Management Bill 2015* at S. 136 (1). This recommendation is in addition to the planned introduction of a model by-law to deal specifically with smoke-drift. S. 136 (1) would then read:

“By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots of the common property and lots of a strata schemes, including in relation to tobacco smoking”

Utah Code at S. 57-8-16 (7B) provides a useful example of this approach, stating that by-laws may provide for:

“restrictions regarding the use of the units may include other prohibitions on, or allowance of, smoking tobacco products”⁶

Rationale

Implementing 100% smoke-free polices is the most effective way to protect non-smoking residents from secondhand smoke.^{13;14} In NSW developers and owners corporations have the authority to restrict smoking in this way, however Cancer Council NSW research shows that few strata schemes have done so and that one reason for low uptake may be low awareness among stakeholders that by-laws can be adopted to restrict smoking.

In recent research involving interviews with owners and tenants of strata schemes and industry professionals, Cancer Council NSW found that respondents expressed uncertainty about the power of owners corporations to make by-laws that restrict smoking. Despite there being other situations where the behaviour of residents is restricted (e.g. from playing loud music and from hanging washing on balconies), respondents reported being unsure whether rules could be adopted to stop people from smoking in residential lots. Specific examples of uncertainty among owners, tenants and strata management include:

“I honesty had no idea what I was going to do at that point because I never came across this situation before.” (tenant)

“I was just googling desperately trying to find some information on smoking in apartment blocks, just some information of how to deal with it.” (owner)

“He [the strata manager] said ‘well, you can’t tell people what they can and can’t do in their own home, even if she is renting.” (owner)

Clearly articulating by-law making powers with regards to smoking in relevant legislation would reduce uncertainty among key stakeholders and aid the adoption of by-laws that restrict smoking in NSW strata schemes. Cancer Council NSW notes that specifying particular matters for which by-laws can provide for is not unique as the draft *Strata Schemes Management Bill 2015* states that by-laws can provide for lot occupancy limits.

Cancer Council NSW recommendation 3

That the tenant representative, provided for at S. 33 of the draft *Strata Schemes Management Bill 2015*, be granted the right to vote on matters that affect the health and safety of residents including, but not limited to, the issue of smoking.

Cancer Council NSW supports the establishment of a tenant representative at S. 33 of the draft *Strata Schemes Management Bill 2015*. However, we recommend extending the involvement of the tenant representative to include voting on motions of the strata committee that affect the health and safety of residents.

Rationale

Exposure to secondhand smoke in strata schemes is a health risk for owners and tenants alike. Yet Cancer Council NSW research has identified that tenants are less able than owners to resolve problems relating to secondhand smoke exposure in strata schemes.

Our research found agreement among tenants, owners and industry professionals that tenants of strata schemes are disempowered to act on their own interests. Interview respondents explained that tenants' lobbying for a solution to manage the problem of secondhand smoke-drift (such as for a smoke-free by-law) was often ignored or dismissed. Specific examples of respondents' views of the limited power of tenants in strata schemes include:

"It seems that strata, they're not prepared to talk to anyone except landlords, and that kind of leaves us with, well what do we do?" (tenant)

"It's harder [for tenants] to get anything done, they can't act on their own interests" (real-estate agent)

"We only have a relationship with the landlords. So technically we can't actually take correspondence from...tenants. We basically have to say 'there that's nice dear please speak to your property manager'" (strata managing agent)

Tenants also face barriers to achieving alternate (although suboptimal) solutions to secondhand smoke exposure, such as moving house. One tenant described his family being stuck living in the strata scheme where they were being exposed to secondhand smoke because his landlord would not approve waiving the 'break fee' associated with ending the lease agreement early.

Cancer Council NSW believes that tenant involvement in decision making on issues that affect health and safety is warranted since exposure to health risks in strata schemes is the same for tenants as it is for owners. Tenant participation is especially important in strata schemes with a higher ratio of tenants to owners as in such schemes those voting may not reside in the scheme and may therefore be unaffected by the day-to-day health impacts of the living environment.

Cancer Council NSW recommendation 4

That the level of agreement required among the owners corporation, provided for at S. 141 of the draft *Strata Schemes Management Bill 2015*, be reduced to a simple majority for matters that affect the health and safety of residents.

Consistent with our 2012 submission, Cancer Council NSW urges the NSW Government to reduce the level of agreement required for a resolution of the owners corporation to a simple majority for matters that affect residents' health and safety.

Rationale

A special resolution is currently required in order to change the by-laws of an existing strata scheme (provided for at S. 141 of the draft *Strata Schemes Management Bill 2015*). As set out at S. 5 of the draft *Strata Schemes Management Bill 2015*, this means that to adopt a new by-law or to change an existing by-law 75% of votes must be cast in favour of the by-

law. Cancer Council NSW contends that this requirement fails to provide a fair and balanced framework for resolving disputes about issues that impact the health of residents.

Requiring a special resolution of the owners corporation to adopt a by-law to manage secondhand smoke-drift disadvantages residents seeking to live in a healthier, smoke-free environment. We believe procedures for managing issues that concern health and safety, such as procedures for adopting a by-law to address secondhand smoke-drift, should balance the rights of all parties and should allow for a timely resolution. Reducing the level of agreement required by the owners corporation to a simple majority for matters of health and safety would ease the process and reduce barriers for addressing secondhand tobacco smoke-in strata schemes.

Further consultation

Cancer Council NSW supports the NSW Government's plan to introduce a model by-law dealing with secondhand smoke-drift and requests to be consulted on the drafting of this by-law. Cancer Council NSW is in an ideal position to provide valuable input on the development of this by-law since we regularly support strata schemes to adopt by-laws that address smoking and recently conducted a content analysis of 68 smoking related by-laws.

Cancer Council NSW also offers to support the NSW Government in educating the NSW community about the implications of the new strata laws with regards to addressing secondhand smoke-drift. Our *Achieving Smoke-free Apartment Living* resource provides information and guidance on how to address secondhand smoke in strata schemes and is freely available to the public. It will be revised to reflect updates to NSW strata law. We would welcome government support in helping to disseminate this resource to key stakeholders.

We hope that the NSW Government will consider our recommendations for amendments to the draft *Strata Schemes Management Bill 2015* in ongoing deliberations of NSW strata law reform.

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