

██████████  
Senior Investigation Officer  
Environmental Standards Scotland  
Ìrean Àrainneachdail na h-Alba

**ENVIRONMENTAL**  
**Standards Scotland**  
Ìrean Àrainneachdail na h-Alba

Via email - ██████████

1 September 2022

Dear ██████████,

I would like to thank you for submitting your representation to ESS. I have given careful consideration to the points you have made in your representation, which I have understood as follows:

- In response to bringing your smoke drift concerns to Dundee City Council (DCC), they undertook some actions to approach your neighbour and to inspect both flats involved, but this did not remedy your situation. You have raised concerns that DCC's methods to assess the impacts were not scientific or serious.
- DCC has refused to investigate your case under the statutory nuisance regime of the Environmental Protection Act 1990 ("the EPA 1990"). They consider that the statutory nuisance regime cannot be used for tobacco smoke due to smoking in one's home being considered "reasonable use." You do not believe it is suitable for public authorities to consider smoking at home as "reasonable use" when it can cause detrimental effects on neighbours through smoke drift.
- The unwillingness or inability of the council to carry out enforcement indicates that Scottish legislation is inadequate for dealing with smoke drift.
- A person's right to smoke should not be given greater protection under law than the affected person's right to healthy environment and enjoyment of their residence.

In response to your representation, I have carried out preliminary research into the legal framework relating to tobacco smoking and the statutory nuisance regime. I have liaised with ASH Scotland and the Environmental Rights Centre for Scotland (ERCS) to gain an additional understanding of the nature and extent of smoke drift. Finally, I approached DCC to seek clarifications of their policies and approach to handling smoke drift complaints.

I understand you were given advice from a solicitor at ERCS, who considers there to be no reason for cigarette smoke to be excluded from the statutory nuisance regime. My research to date has not identified any distinct legislation, case law, or government-issued guidance

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which states whether cigarette smoke should be included, or is excluded, from the statutory nuisance regime. I therefore considered that DCC's position might represent general non-compliance with environmental law, and that your case would be within the remit of ESS to investigate.

Having said this, it is important to note that before ESS decides to carry out further work we consider the issues raised with us against our 'criteria for investigation' and our Interim Strategic Plan (available at <https://www.environmentalstandards.scot/about-us/interim-strategic-plan/>). I have set out below a summary of my assessment of the issues you have brought to us against the criteria and interim strategic plan.

**Criterion 1 - *Does the matter arise from a significant or potentially significant incident concerning the environment?***

- No, as the incident concerns human health and not the environment as a receptor.

**Criterion 2 - *Does the matter raise public health concerns?***

- ESS considers "public health" to relate to the health of a community as a whole. For example, widespread air or water pollution. Though there may be more instances of individuals being impacted by smoke drift across Scotland, the issue is unlikely to be at a scale which ESS would assign as a public health issue.

**Criterion 3 - *Is the matter something which seriously affected (or could seriously affect) the welfare of any member of the public?***

- While the health hazards from direct second-hand smoke exposure are known, less is known about indirect exposure to second-hand smoke travelling through the fabric of buildings, known as smoke drift. In view of your individual case, the conditions you have reported (headaches, itchy nose and eyes) are more indicative of discomfort but not significant impacts on welfare.

**Criterion 4 - *Does the matter concern significant alleged neglect or systemic non-compliance?***

- As DCC's position would affect how they approach all smoke drift complaints brought to them, the matter may concern systemic non-compliance. It may also concern neglect if DCC has incorrectly exempted tobacco smoke from the statutory nuisance regime.

**Criterion 5 - *Could the matter undermine public confidence?***

- Given the relatively small number of complaints received by DCC in respect of smoke drift, in my view DCC's approach to this issue is unlikely to undermine public confidence.

**Criterion 6 - Does the matter concern a failure to meet international obligations?**

- The representation notes a right to a healthy environment is based on the UN Human Rights Council (UNHRC) October 2021 resolution which recognises access to a healthy and sustainable environment as a universal right. The European Parliamentary Research Service characterises this resolution as non-binding and states that it “could be a first step towards filling a significant gap in international law.”

In considering the case to ESS’ Interim Strategic Plan, I have made reference to the Strategic Outcome given in Section 5, “Our Approach to Investigating the Most Important Environmental Concerns.”

**Strategic Outcome:** *We have prioritised and investigated the most important matters of concern and identified the action needed to rectify problems and improve compliance and effectiveness.*

- ESS have an obligation to prioritise the “most important matters.” The number of people aggrieved by smoke drift who are unable to seek resolution from DCC (due to DCC’s interpretation of the EPA 1990) appear to be few. DCC has indicated to ESS they receive a complaint in relation to tobacco smoke drift, on average, three times a year. While there may be additional people aggrieved by tobacco smoke drift who do not report to the council, there are still not sufficient indications of a large-scale problem. DCC has indicated most smoke drift issues brought to them are resolved by either sealing entry points, or through engagement with the smoking party.

For the reasons set out above, I do not consider that the issues you have brought to ESS meet our criteria for investigation, except perhaps criterion 4. Additionally, and whilst fully acknowledging that this issue is very important to you, without sufficient evidence to indicate a large scale problem I do not believe that progressing your case is in line with our strategic outcome to prioritise and investigate the most important matters of concern. In light of this, I have decided that no further action should be taken by ESS to investigate the broader area of DCC’s compliance with the EPA 1990.

While I appreciate you may be disappointed that we are not able to intervene in this instance, I do note a potential alternate remedy you may wish to pursue. The Scottish Public Services Ombudsman (SPSO) can review individual cases and decisions by Local Authorities, and determine whether the Council has acted appropriately in their handling of your individual case. Before looking at your case, the SPSO will ask whether you have made an official complaint to DCC and received a response. If you have not yet done this, you could make a complaint to DCC. Public authorities are generally expected to deal with complaints within 20 working days. Should you remain dissatisfied with DCC’s official response to your complaint, it is open to you to contact SPSO at that point. Further details about this process can be found at ([www.spsso.org.uk](http://www.spsso.org.uk)).

Yours sincerely,



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