

IFR/2

**Submission by the Human Rights
Commission on the**

INFRASTRUCTURE BILL



Transport and Industrial Relations
Committee

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1. BACKGROUND TO THE HUMAN RIGHTS COMMISSION'S INTEREST IN THE BILL

- 1.1 The Human Rights Commission's interest in the Infrastructure Bill relates primarily to the repeal of the Affordable Housing: Enabling Territorial Authorities Act.
- 1.2 *The New Zealand Action Plan for Human Rights: Mana ki te Tangata (the Action Plan)*, which had been developed by the Commission as part of its statutory mandate, identifies the realisation of accessible and affordable housing as a priority action¹. To give effect to this, the Commission undertook to support initiatives to make housing more affordable and accessible for low-income households (prioritising those households with children); to contribute to initiatives to increase the supply of social housing and to diversify social housing options; to support measures to increase access to home ownership; and to encourage measures to address the housing needs of people with disabilities, Maori and Pacific people, older people and refugees.
- 1.4 The Commission is also committed to ensuring that legislation and policy are developed in a manner that is consistent with human rights standards². This includes making submissions to Select Committees in areas which impact on New Zealand's human rights commitments.

2. COMMISSION'S VIEW OF THE PROPOSED AMENDMENTS

- 2.1 The Commission supported the original Bill as housing affordability is a significant component of the human right to an adequate standard of living. It also considered that the requirement in the legislation for community participation was consistent with a human rights approach³.
- 2.2 Given its endorsement of the original legislation, the Commission regrets the decision to repeal the Affordable Housing (Enabling Territorial Authorities) Act. It welcomes the decision to retain the provisions relating to restrictive covenants which make covenants that have a principal purpose of preventing social housing void but is concerned at the proposed amendments which may substantially weaken the original provisions
- 2.3 The Commission's submission addresses:
 - the relevant international standards and the decision to repeal the affordable housing legislation;

¹ Human Rights Commission (2005) 6.3 at 32. The Commission was required to develop the Action Plan pursuant to s.5(2)(m) HRA 1993.

² The long title to the Human Rights Act 1993 describes the Commission's role as providing better protection of human rights in New Zealand in accordance with the UN Covenants and Conventions on Human Rights.

³ A human rights approach to the development of policy and legislation stresses the moral importance of the interests at stake and recognises (among other things) the need for accountability, non-discrimination and the link with agreed human rights norms: Human Rights Commission, *Human Rights in New Zealand Today: Nga Tika Tangata o Te Motu* (2004) at 25

- the decision to retain, but amend, the provisions relating to restrictive covenants and the possible effect of the amendment proposed.

3. THE RIGHT TO AN ADEQUATE STANDARD OF LIVING - HOUSING

3.1 The right to a decent standard of living is universal. Access to adequate housing is considered an essential component of the right as enjoyment of all the other economic, social and cultural rights can depend on it.

3.2 The right to housing is codified as a human right in the Universal Declaration of Human Rights. Article 25(1) states that:

Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

3.3 As the Declaration is essentially a statement of principles, to give it practical effect the rights it contains are refined in a variety of international treaties. Once a State ratifies one of these it is bound to deliver the rights in the treaty to its citizens. The two major treaties (which together with the Declaration itself make up the International Bill of Human Rights) are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR).

3.4 Although the right to housing is found in several international legally binding documents⁴, the most significant is the ICESCR. Article 11.1 states that:

... States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

3.5 To clarify the meaning and scope of the right to housing in the Covenant, the Committee on Economic, Social, and Cultural Rights (CESCR) which monitors the International Covenant on Economic, Social and Cultural Rights, issued General Comment 4 in 1991⁵.

3.6 The General Comment makes it clear that housing should be interpreted in a broad and inclusive sense rather than narrowly or restrictively. It reinforces the fact that the right is inextricably linked to other fundamental human rights and that it must be viewed in conjunction with other human rights in the two International Covenants and other international instruments. It also states that "adequacy" (in the housing context) will be influenced by social,

⁴ See Appendix 1

⁵ The Committee has defined the right to housing as including security of tenure, availability of services and facilities, habitability, affordability, accessibility, location and cultural adequacy: United Nations Committee on Economic, Social and Cultural Rights (1991), *The Right to Adequate Housing: Article 11(1) CECSR General Comment No.4*, Geneva: United Nations (E/1992/23)

economic, cultural and other factors, but that aspects of the right (including affordability⁶ and accessibility⁷) are applicable in any context.

- 3.7 Unlike the ICCPR which places an absolute and immediate obligation on States to fulfill the relevant rights, implementation of the rights in the ICESCR is progressive and subject to available resources. Effectively this places an obligation on States to move progressively towards the fulfillment of economic, social and cultural rights⁸. While some flexibility is permissible, States are required to move as expeditiously and effectively as possible to give effect to the rights in the Covenant.
- 3.8 It is considered inappropriate for a State to deliberately renege on progress it has made unless it can be "fully justified by reference to the totality of the rights proved for in the Covenant".⁹ This is particularly so in times of severe resource constraints – such as in an economic recession – where vulnerable groups may be effected.¹⁰
- 3.9 With regard to the situation in a time of recession, the Commission draws the Committee's attention to the comments of the Special Rapporteur on adequate housing¹¹. When asked to present his annual thematic report, the Special Rapporteur elected to focus on the impact of the current global housing and mortgage crisis on the right to adequate housing, stating that:

One of the fundamental errors has been to consider housing only as a commodity and an investment asset ... the current crisis represents an opportunity for reflection and to consider how to improve housing systems, policies and programmes so as to ensure adequate housing for all ... it is essential that all actors involved in the housing sector fully recognize the multiple dimensions of housing, which is much more than a mere financial asset, and recognize it as a human right.

Given that the global economic crisis may in many countries see sectors of the population affected by a reduction in their income, States should take all necessary measures to increase the availability of adequate housing options and to keep housing prices affordable.

⁶ Affordable housing is housing which is provided at a cost that does not threaten other basic needs. States should therefore take steps to ensure that housing costs are proportionate to income levels.

⁷ Adequate housing must be accessible to those entitled to it. This includes all disadvantaged groups of society who may have special housing needs that require extra consideration.

⁸ Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights* Wellington (2008) at 47

⁹ Committee on Economic Social and Cultural Rights, *The nature of States parties obligations: General Comment No. 3*, Geneva United Nations (14/12/90) [para 9]

¹⁰ Ibid. [paras 10 & 12]

¹¹ Raquel Rolnik, *Statement of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context: A/HRC/10/7* (9/3/08)

- 3.10 The comments by the Human Rights Council in 2007 on housing as a component of the right to an adequate standard of living¹² are also relevant. Among other things the Council urged States to:

(e) Promote participation in decision-making processes and inclusion of relevant stakeholders in the planning stage of urban or rural development, in particular at the local level, when developing an adequate standard of living and housing;

(f) Promote social inclusion of all members of society at the planning stage of urban and rural development schemes and other human settlements, while renewing neglected areas of public housing, so as to counter social exclusion and marginalization.

- 3.11 The existing legislation is consistent with these goals, particularly the need for territorial authorities to consult with its community when planning a housing development¹³, the attempt to balance the cost of housing against other essential living costs¹⁴ and the recognition that people on moderate incomes were also likely to be affected by housing affordability¹⁵.
- 3.12 Although the Commission considers it is unfortunate that the legislation is being repealed, it also accepts that a complex array of factors contribute to the supply of affordable housing at any one time. As New Zealand currently lacks an adequate supply of affordable housing, the Commission's interest is therefore rather in how the supply of such housing can be increased to ensure the right to an adequate standard of living for more people.
- 3.13 The Commission considers there is an absence of compelling evidence that the Act is counter-productive and will have the effect of reducing the supply of affordable housing. While territorial authorities can require developers to contribute money, land, houses or a mix of these towards affordable housing, they can also provide incentives to off-set the costs¹⁶.
- 3.14 There is no question that an adequate supply of affordable housing is critical and the Commission regrets that the Act is being repealed without anything else being put in its place.

4. USE OF RESTRICTIVE COVENANTS BY DEVELOPERS TO PREVENT CERTAIN TYPES OF HOUSING

- 4.1 In its original submission the Commission supported the creation of a statutory provision that would make a covenant void if its principal purpose was to stop the provision of affordable housing or the development of social housing.

¹² Human Rights Council, *Adequate housing as a component of the right to an adequate standard of living* Resolution 6/27 (14/12/07)

¹³ S.5(a)(ii) AHETA Act 2008

¹⁴ S.4(b) AHETA Act 2008

¹⁵ S.4(a)(i) AHETA Act 2008

¹⁶ Explanatory note, Infrastructure Bill 63-1 (2009) at 10

- 4.2 The Commission noted that it had been approached on a number of occasions when attempts were either about to be made, or had been made, to use planning legislation and/or restrictive covenants to prevent land or housing being used for social purposes. As recently as last month, for example, the Commission appeared before a council in a planning hearing involving a variation to a district scheme which would effectively prevent people requiring supported living arrangements from living in certain areas.
- 4.3 Although the underlying purpose for the imposition of a covenant is frequently discriminatory, the discrimination can be difficult to establish under the Human Right Act (HRA). This is because although s.53 of the HRA makes it unlawful to discriminate against someone in accessing land or accommodation because of their disability or employment status¹⁷, restrictive covenants are often not overtly linked to a prohibited ground of discrimination. For example, a covenant might restrict sale to HCNZ (rather than beneficiaries) or only stipulate that family homes or domestic dwellings could be built in a particular area (which could eliminate group homes for people with intellectual disability¹⁸). While covenants worded in this way may appear to be indirect discrimination, the experience of the Commission is that this, too, can be difficult to address under the HRA.
- 4.4 Indirect discrimination is said to occur when an apparently neutral requirement or condition impacts negatively on one of the groups it is unlawful to discriminate against¹⁹. While it may be possible to establish that a restrictive covenant that excludes HCNZ as a potential purchaser indirectly discriminates against some of the groups covered by the HRA, this will not always be the case.
- 4.5 The definition of employment status which is the ground most relevant in this context only applies to people on a benefit. People on low incomes who make up a significant proportion of HCNZ clients are not a group specifically identified in s.21 - even though the reason for adding employment status to the unlawful grounds of discrimination in 1993 was to address discrimination on socio-economic grounds and protect people who might otherwise suffer discriminatory treatment because of poverty²⁰.
- 4.6 Although difficult to define, socio-economic status (or social origin) is seen as an integral element of legislation designed to ensure a more just and equitable society. It is found in various international human rights instruments (including the ICCPR and the ICESCR), is included in human

¹⁷ Employment status is defined as being unemployed or in receipt of a benefit: s.21(1)(k) HRA

¹⁸ There are a significant number of cases on this point in the United States. See, for example, *Gregory v State* 495 A.2d 997 (RI1985); *Harbour v Normal Life* 454 So.2d 1208 (La. Ct. App.1984) or *Vienna Bend Subdivision Homeowners Assoc. v Manning* 459 So.2d 1345 (La. App.1984).

¹⁹ Section 65 HRA

²⁰ Ministry of Justice, *Review of the Human Rights Commission Act 1977* (1987)

rights legislation in a number of countries²¹ and incorporated by reference to regional human rights instruments in others²².

- 4.7 In Ireland the authors of a report for the Department of Justice identified the same difficulty that the Commission has encountered in addressing the discriminatory effects of restrictive covenants. They describe socio-economic status as creating significant obstacles to equality of opportunity, equality of outcomes and equality of participation and go on to note that ...

*In most countries overt discrimination on the basis of social origin or socio-economic status is rare. However ... discrimination on the basis of socio-economic status/social origin is linked with, and underpins, discrimination on the more widely covered grounds such as disability and race ... [many of these groups] also experience a higher risk of poverty and social exclusion.*²³

- 4.8 In the absence of a comprehensive definition of socio-economic status in the HRA it can be difficult for the Commission to address discriminatory practices such as the use of restrictive covenants to prevent the development of affordable and social housing. The Commission was therefore very supportive of the decision to create a statutory provision that would void discriminatory covenants.

- 4.9 The Commission was also pleased that the wording in the Bill was changed so that it was not necessary for a prohibited use to be "a principal purpose" of the covenant²⁴. Section 30(1) of the Affordable Housing: Enabling Territorial Authorities Act now reads:

A covenant over land is void if one of its purposes is to stop the provision of affordable housing or social housing on the land.

- 4.10 Although the intention is to repeal the Act, the Commission is pleased to note that a provision relating to restrictive covenants will be inserted in the Property Law Act 2007 (PLA) - albeit in a modified form. If passed in its present form, section 227A PLA will read as follows:

A covenant concerning land is void if a principal purpose of the covenant is to stop the land being used for housing for -

(a) people on low incomes; or

²¹ Australia prohibits discrimination on the ground of "social origin" and in Canada human rights and equality legislation refers to "social condition" which includes socio-economic status. Related grounds such as "being in receipt of public assistance" and "source of income" are also covered in a number of Canadian jurisdictions.

²² Most EU countries (including the UK and Northern Ireland) are affected by Art.14 of the European Convention on Human Rights which prohibits discrimination on the ground of social origin.

²³ *Extending the Scope of Employment Equity Legislation: Comparative Perspectives on the Prohibited Grounds of Discrimination* Department of Justice, Equality and Law Reform, Dublin (2004)

²⁴ The Committee recommended the phrase be amended to ensure a broader range of covenants was captured by the legislation. Commentary from the Select Committee on Affordable Housing: Enabling Territorial Authorities Bill at 9.

(b) people with special housing needs; or

(c) people whose disabilities mean that they need support or supervision in their housing

- 4.11 While the specific provisions in ss(2) have been retained²⁵, the change to ss(1) could limit the scope of the provision if the legislation does not clarify that both rental housing (in the sense of social housing) and home ownership for people on low to moderate incomes (i.e. affordable housing) will be protected - for example, ensuring that a developer cannot impose a covenant requiring only houses over a certain price to be constructed in a particular area.
- 4.12 Re-introducing the requirement that the covenant must be for a "principal purpose" means that covenants will not be void even if they have a purpose of stopping the land being used for the purposes in ss.(1) if the purpose is not a "principal purpose". It will therefore be possible to have a covenant that superficially may not seem to prevent the land being used for the purposes in ss(1) but which could nevertheless still have that effect. For example, the stipulation in para 4.3 that only family homes or domestic dwellings can be built in a particular area could impact adversely on group homes for people with intellectual disability but may not meet the requirements of s.227A(1)(b) or (c) as the developer could argue that the restriction is simply to ensure that the land is not used for commercial purposes.
- 4.13 The Commission therefore recommends that if the Affordable Housing: Enabling Territorial Authorities Act is repealed, s.227A PLA should be reworded to ensure that a covenant will be void if **one** of its purposes is to stop the land being used for housing for social purposes - i.e. the criteria outlined in ss(2).
- 4.14 The Commission also recommends clarifying that covenants will be rendered void if their purpose is to undercut the provision of rental housing (in the sense of social housing) or home ownership for people on low to moderate incomes.

5. SUMMARY OF THE COMMISSION'S POSITION

- 5.1 The supply of affordable housing is critical to the right to an adequate standard of living. The Human Rights Commission regrets that the Affordable

²⁵ Section 30(2) reads as follows:

Without limiting the covenants that are void under subsection (1), covenants to the following effect are void:

- (a) a covenant that the transferee will not directly or indirectly convey the land to Housing New Zealand Corporation, any other central or local government body, or a private body that may facilitate the occupation of housing on the land by persons selected by the corporation;
- (b) a covenant that the transferee will not directly or indirectly convey the land to Housing New Zealand Corporation, a subsidiary company of Housing New Zealand Corporation, any other central or local government body, or a private body that provides housing to tenants on a subsidised basis;
- (c) a covenant that the transferee will not directly or indirectly convey the land to a central or local government body or a private body for the purposes of public or institutional housing.

Housing: Enabling Territorial Authorities Act is being repealed without anything else being put into place to ensure provision of the right.

- 5.2 The Commission recommends that the wording of s.227A of the PLA is amended to ensure that a restrictive covenant will be rendered void if one of its purposes (rather than its principal purpose) is to stop the provision of the type of housing outlined in ss.(1),(b)and (c).

Appendix 1

The following international treaties, declarations and commitments address the right to an adequate standard of living:

UNITED NATIONS

Universal Declaration of Human Rights (1948) (articles 1, 2, 25)

The Universal Declaration asserts the *fundamental equality and dignity* of each human being in its first article. Its second article, known as the *principle of non-discrimination*, means in the context of the right to housing that every individual and group in society has the same entitlement to housing, regardless of gender, age, race, ethnicity, religion, political or other opinion, national or social origin, property, etc. This article especially supports the equality with regard to housing of traditionally disadvantaged groups, such as racial minorities and women. Additionally, in article 25(1), the Universal Declaration also states the right of each person to an *adequate standard of living*. This standard includes the right to housing.

International Covenant on Economic, Social and Cultural Rights (1966) (articles 2, 3, 11)

The International Covenant compels all contracting states to take steps towards the full realization of the listed economic, social, and cultural rights. It also affirms the *equal right of men and women to enjoy these rights*, specifically stating the right to an adequate standard of living, including housing.

The United Nations Committee on Economic Social and Cultural Rights (CESCR) has elaborated on the rights contained in the International Covenant in documents known as General Comments. In general, the content of the general comments reflects a movement toward an interpretation of the right to housing with a broader and deeper reach. The most significant General Comments are:

General Comment No. 4 (1991)

This General Comment expands on the provisions of article 11(1), and includes a holistic conception of the right to housing and more specific standards for the *definition of adequacy*.

The right to housing is also cross-referenced in other General Comments by the Committee. For example:

General Comment 5 (1994) (paragraphs 15, 22 and 33)

Addressing the rights of persons with disabilities, this General Comment refers to the effects of disability-based discrimination on housing (paragraph 15). It is necessary to ensure that *persons with disabilities* have access to adequate food, accessible housing and other basic material needs (paragraph 22), as well as support services to assist those people in increasing their independence in daily life and exercising their rights (paragraph 33).

General Comment 6 (1995) (paragraph 33)

This General Comment on the economic, social and cultural rights of *older persons* recalls the International Plan on Ageing's emphasis on the psychological and social

importance of housing for the elderly in addition to its physical significance as shelter (paragraph 33).

General Comment 14 (2000) (paragraphs 11 and 43)

This General Comment concerns the right to the highest standard of *health* and emphasizes the interdependence of this right and other human rights. The right to health includes not only sufficient and timely health care, but also underlying determinants of health, such as access to safe and potable water, adequate sanitation, an adequate supply of safe food, nutrition and housing, and healthy occupational and environmental conditions (paragraph 11). It follows that state obligations relating to the right to health include ensuring access to basic shelter, housing and sanitation and an adequate supply of drinking water (paragraph 43).

The following documents also contribute to international standards on the right to housing:

International Labour Organization Convention No. 97 on Migration for Employment (1949) (article 6 iii)

The International Labour Organization (ILO) is a United Nations specialized agency that articulates international labour standards in the form of binding Conventions and non-binding Recommendations. This convention guarantees the *equal treatment of lawful immigrants* to a member state and that state's own nationals with regard to accommodation. In total, some 37 ILO conventions and recommendations mention in one respect or another, the subject of housing.

Convention Relating to the Status of Refugees (1951) (article 21)

This convention requires ratifying states to accord refugees treatment as favourable as possible, and not less favourable than that accorded to aliens generally in the same circumstances, with regard to housing.

Convention on the Elimination of All Forms of Racial Discrimination (1965)

This convention compels States to prohibit and eliminate racial discrimination in all forms and ensure the right of everyone to equality before the law, notably in the enjoyment of economic, social and cultural rights, including the right to housing.

Convention on the Rights of People with Disabilities (2008)

The convention asserts the right of disabled persons to live with their families or with foster parents, subjected to no unnecessary differential treatment or living conditions.

ILO Recommendation No. 162 concerning Older Workers (1980) (section II, paragraph 5(g))

This recommendation states that older workers must enjoy equality of opportunity and treatment with other workers without age discrimination, including access to housing, social services and health institutions, particularly when this access is related to occupational activity or employment.

Convention on the Elimination of All Forms of Discrimination against Women (1979) (article 14)

This convention guarantees the right of *rural women* to adequate living conditions, particularly housing.

Declaration on the Right to Development (1986) (article 8.1)

This declaration urged states to undertake necessary measures at the national level for the realization of the right to development and ensure equality of opportunity with regard to access to social resources and other needs, including housing.

Convention on the Rights of the Child (1989) (article 27)

This convention requires governments to take appropriate measures to assist parents and others responsible for the child to implement the right to an adequate standard of living, particularly with regard to housing

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) (article 43)

The right of migrant workers to access to housing, including social housing systems, and to protection against exploitation with respect to rents is guaranteed in this convention.

United Nations Draft Declaration on the Rights of Indigenous Peoples (1994) (article 22)

Though not yet adopted, this declaration mentions housing rights three times. Indigenous peoples have the right to special measures for improvement of their economic and social conditions, including in the area of housing. Indigenous peoples also have the right to determine, plan and administer housing and other programmes affecting them. Similarly, indigenous peoples also have the right to autonomy in matters relating to their own internal and local affairs, including housing, as well as ways and means for financing those affairs.