

USING LAND FOR HOUSING DRAFT REPORT – SUBMISSION OF THE HUMAN RIGHTS COMMISSION

1. The Human Rights Commission (the Commission) welcomes the opportunity to make some brief comments on the New Zealand Productivity Commission's Using Land For Housing Draft Report. Although a number of aspects of the draft report have human rights implications, this response focuses on three key issues:
 - a. The human right to adequate housing
 - b. The use of restrictive covenants
 - c. Compulsory acquisition of private property

2. At the request of the Ministers of Finance, Housing, and Local Government, and the Minister for the Environment, the New Zealand Productivity Commission is undertaking an inquiry to assess and identify improvements in local and regional authorities' land use regulation, planning, and development systems. These systems are to be reviewed with respect to how they deliver an adequate supply of development capacity for housing.

3. The Draft Report notes that:
 - "Decisions about the use of land are important to the community."
 - "Housing is a basic human need and fundamental to our economic and social wellbeing. It plays a central role in individual and community health, family stability and social cohesion, in the mobility and responsiveness of the labour market, and in productivity and economic development."

These statements are incontrovertible but just as importantly it should be recognized that access to adequate housing is a human right. Something that the New Zealand State has voluntarily agreed to ensure for people in New Zealand.

4. The progressive realization of the human right to adequate housing is an important human rights duty that both central and local government is obliged to respect, protect and fulfil. The duty arises because New Zealand chose to ratify the International Covenant on Economic Social and Cultural Rights (ICESCR) on 28 December 1978. The human right to adequate housing, along with the associated standards, should be clearly referred to in the Final Report to government and should be a guide for policy decisions in this area.

The right to adequate housing

6. The right to adequate housing is set out Article 11 of the ICESCR: "The 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.”

7. The right to adequate housing includes the right to live somewhere in security, peace and dignity. In a General Comment about the meaning of Article 11 the UN Committee on Economic Social and Cultural Rights listed 7 standards that must be met in order for housing to be adequate:
 - *Security of tenure* – Residents should be protected against forced eviction, harassment and other threats including predatory redevelopment and displacement;
 - *Habitability* – Housing must provide residents with adequate space that protects them from cold, damp, heat, rain, wind, and other threats to health, structural hazards, and disease;
 - *Accessibility* – Housing must be accessible to all, and disadvantaged and vulnerable groups, including people with disabilities, must be accorded full access to housing resources;
 - *Affordability* – Housing costs should be at such a level so as not to compromise the attainment of other basic needs. For example, people should not have to choose between paying rent and buying food;
 - *Availability of services, materials, facilities and infrastructure* – Housing must provide access to services essential for health, security, comfort and nutrition. This includes water and sanitation, power and other essential utilities;
 - *Location* – Housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of residents. The physical safety of residents must likewise be guaranteed. Additionally housing must be in a location which allows access to employment, health-care services, schools, child care centres, and other social facilities; and
 - *Cultural Adequacy* – Housing and housing policies must guarantee the expression of cultural identity and diversity, including the preservation of cultural landmarks and institutions. Redevelopment or modernisation programs must ensure that the cultural significance of housing and communities is not sacrificed.
8. As a State party to the international human rights treaties that protect the human right to adequate housing, the New Zealand Government (both local and central) has a duty to respect, protect and progressively fulfill this right. The Government is not required under its human rights obligations to build housing for anyone or to own houses. Its duty is to ensure that all people in New Zealand enjoy their human right to adequate housing. It must do that or it will be in breach of its obligations.
9. The Commission recommends that the Productivity Commission’s final report to government place an emphasis on the need for the right to adequate housing to be progressively fulfilled. The human right to adequate housing should be specifically referred to in the Final Report along with the associated standards. Doing so will guide the work and discussion in this area and lead to an increase in both the economic and social well being of New Zealand.
10. I enclose a copy of a flyer published by the Commission on the right to adequate housing:

The use of restrictive covenants over land

11. The Productivity Commission's issues paper sought comment on whether restrictive covenants were restricting the development capacity of land for housing. Views were mixed with most objections to such covenants being their exclusionary effects. In the Draft Report there is very helpful and concise discussion of the benefits of covenants and of the problems they can create. It is noted that the Property Law Act provides the High and District Courts with the power to modify or extinguish covenants. However it is thought that the courts are likely to favour private rights over any public interest in modifying or extinguishing a covenant. The Draft Report concludes its consideration of covenants by noting: "Covenants are a type of property right, but in some circumstances there is a public interest in restricting or controlling these rights." The Commission agrees with that statement.
12. In 2009 the Property Law Act (PLA) was amended to include section 277A. It says:

277A Certain covenants void

 - (1) 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
 - (b) people with special housing needs; or
 - (c) people whose disabilities mean that they need support or supervision in their housing.
13. The requirement that the covenant must be for a "principal purpose" means that such covenants will not be void even if they have the object of preventing the land being used for these purposes provided the purpose is not a principal purpose. At the time this change was made to the PLA the Commission recommended that the section be reworded to ensure that a covenant will be void if one of its purposes was to prevent such use of the land. The Commission also recommended that a covenant should be void if its purpose was to undercut the provision of rental housing (in the sense of social housing) or home ownership for people on low or moderate incomes. The Commission considers this is still a matter that needs to be remedied. It is neither economically or socially desirable that covenants created by private developers are used to foil this type of the use of land for housing. Such covenants could have implications for the fulfilment of the right to adequate housing.
14. Section [55](#) of the Human Rights Act creates an exception to the prohibition in section [53](#) on discrimination in the provision of land, housing and other accommodation. The exception allows for a difference in treatment by reason of age (and also for other non-pertinent reasons) for accommodation in a hostel or other establishment such as a retirement village. Whether this permits the placing of a restrictive covenant on land to ensure that it can only be sold to people in a particular age group is not something that has been tested before the Human Rights Review Tribunal or the Courts. The better view is that it is unlikely that Parliament intended the exception to be used to allow this to happen. For such a practice to be lawful it would be necessary to establish such a covenant was permissible as a measure to ensure equality. Generally speaking that is not likely to be the case as measures to ensure

equality are designed to remedy disadvantage related to one of the prohibited grounds of discrimination. If properly designed the need should diminish and the measure should only last until the issue it is designed to address is substantially resolved. The indefinite lifespan of covenant means they are not the most appropriate means for ensuring equality.

15. The lack of clarity about the use of such covenants is an undesirable situation.
16. In the last 5 years the Commission has received four complaints or enquiries about covenants restricting purchase of land and homes to those aged 55 or more. It has also received two complaints about covenants excluding people with disabilities and one about restrictions based on the ethnicity of would be purchasers.
17. A discussion with Land Information New Zealand about what it sees as its role as being when covenants that appear to be likely to lead to unnecessary restriction being placed over the use of land might provide further information about what should be the policy response to such covenants.

Compulsory Acquisition

- 18 We note that some of the Commission's findings and recommendations relate to powers of compulsory acquisition of private property, including Maori land. In particular finding 10.7 states: "*circumstances exist in which the economic and societal harms that result from a housing shortage should be considered sufficient to justify the compulsory acquisition of land for the construction of housing.*"

- 19 The Human Rights Commission urges extreme caution if any extension of current legislative powers governing compulsory acquisition of private property is to be considered. The right to be free from arbitrary deprivation of property as outlined in Article 17 of the Universal Declaration of Human Rights and the right to be free from arbitrary or unlawful interference with the family or home as per Article 17 of the International Covenant on Civil and Political Rights (ICCPR) need to be taken into account and applied. Taking people's homes against their wishes cuts to the very heart of property ownership and property related human rights. It is worth noting that section 29 of the 1297 version of the Magna Carta is still in force in New Zealand. It states:

'No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, [nor condemn him] but by lawful judgment of his Peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either Justice or Right.'

This passage underscores the strong emotional bond that people have with their homes and property. This is a relationship that is not always compensable by the payment of money or other redress.

- 20 The Human Rights Commission has unfortunately witnessed the detrimental impact that interference with property rights can have on individuals. This includes compulsory acquisition of private land as well as actions short of acquisition that effectively limit use of private land or alienate owners from their properties (for

example section 124 notices issued under the building Act because of danger emanating from adjacent council owned land). We would welcome the opportunity to talk to you in more detail about these matters and the contents of this submission generally.

Yours sincerely,

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Chief Human Rights Commissioner