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Dear Mr Rattenbury,

**Submission in response to the Greens Discussion Paper: Thinking Differently About Housing:
Enshrining Housing as a Human Right; and
Feedback on the circulation draft Human Rights (Housing) Amendment Bill 2024**

The ACT Human Rights Commission welcomes the opportunity to provide a submission in response to the proposal to enshrine a right to housing in the *Human Rights Act 2004* (**the HR Act**) and to provide specific feedback on the circulation draft Human Rights (Housing) Amendment Bill 2024 (**the draft bill**).

The Commission strongly supports the introduction of a right to housing into the HR Act. As stated by the President and Human Rights Commissioner in her introduction to the Commission's most recent Annual Report, the Commission is committed to the expansion of the HR Act to:

include socio-economic rights such as to the rights to health and to housing. These rights are enshrined in the *International Covenant on Economic, Social and Cultural Rights* – a UN treaty ratified by Australia in 1975. The cost-of-living crisis underscores the importance of these rights for the maintenance of an inclusive community that respects everyone's rights. The Commission will continue to advocate for the inclusion of these rights during my term as Human Rights Commissioner.¹

The right to housing is a fundamental prerequisite for the realisation of many of the human rights already protected by the HR Act. Without a safe, affordable and accessible home a range of other human rights are jeopardised: for people with disabilities, for people experiencing or escaping family and domestic violence, for children in situations of risk, for young people exiting foster care, for rehabilitation purposes, and in fact for the entire Canberra population – including those in crisis housing, student accommodation, renters and homeowners.

Rather than respond to the suggested discussion questions, this submission instead addresses key themes raised by the questions. It also attaches some case studies for illustrative purposes.

Economic, social and cultural (ESC) rights & the right to housing in international law

As summarised in the Discussion Paper, the right to housing is protected in the *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**) as a part of the right to an adequate standard of living. The right to housing is also protected in various ways in other important human rights treaties to which Australia is a party. Examples include article 27(3) of the *Convention on the*

¹ ACT Human Rights Commission, [Annual Report 2023-2024](#), p. 14.

Rights of the Child and articles 28(1) and 28(2)(d) of the *Convention on the Rights of Persons with Disabilities*². However, because the right to housing is protected most comprehensively in the ICESCR, it is appropriate to see the right situated in the ICESCR as being the primary source at international law if introduced into the HR Act.

Australia is a party to the ICESCR and it is legally binding under international law. Consequently, every person within Australia has these human rights. The ICESCR is one of two key conventions³ intended to give binding effect to the 1948 *Universal Declaration of Human Rights*, which makes no distinction between civil and political, and economic, social and cultural (ESC) rights. Civil and political rights and ESC rights have equal status under international law. One set of rights should not be prioritised over the other and they are dependent on each other. In 1993, the *Vienna Declaration and Programme of Action*⁴ expressed the widely accepted position:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

The rights currently protected in the HR Act therefore cannot be separated from the full suite of ESC rights Australia is obliged to protect. The Commission is keen to see full domestic protection of all human rights, including ESC rights. In the absence of a comprehensive federal Human Rights Act, the ACT has been an Australian leader in the legislated protection of human rights and to remain so should move toward this goal.

Although we support the full incorporation of ESC rights, the Commission also supports any proposed step to incrementally protect ESC rights through a staged approach, in this case, by enshrining the right to adequate housing. The HR Act has now been in effect for over 20 years and has continued to evolve to better protect human rights for Canberrans. The HR Act already protects aspects of other ESC rights, including the right to education and the right to work. In addition, the recent introduction of the right to a healthy environment has incorporated an evolving human right that intersects with the civil and political rights framework as well as ESC rights.

As discussed in more detail below, the ACT has also been a leader in adopting and implementing legislation that has the effect of protecting the right to housing, albeit through a patchwork of legislation and strategy and policy documents. A right to adequate housing in the HR Act would frame and highlight the progress the ACT has already made and ensure a future trajectory toward further protection of the right. In addition, by incorporating the right to adequate housing within our HR Act, the ACT can continue to demonstrate human rights leadership in the housing field.

² Other examples include aspects of the right to housing protected in the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination against Women*.

³ With the other being the *International Covenant on Civil and Political Rights*, to which Australia is also a party.

⁴ UN Doc A/CONF. 157/23 (12 July 1993) at [5].

The ICESCR source of the relevant obligation states:⁵

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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The Committee on Economic, Social and Cultural Rights (**the CESCR**) has issued a number of key General Comments relevant to the right to adequate housing as embedded in this broader right to an adequate standard of living. The word “adequate” in this context is key: adequate housing is more than just shelter – it is a recognition that a house is a home and that a home is a fundamental prerequisite for the enjoyment of a range of other human rights. The 1991 CESCR General Comment No 4⁶ has been central to the development and understanding of the right at international law, including the concept of adequacy:

the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.⁷

General Comment No 4 outlines seven key factors to determine adequacy of housing, these being:

- (a) legal security of tenure:** the right to adequate housing includes protection against forced evictions except in the most narrow of circumstances, noting this aspect of the right to housing applies to all forms of housing⁸. Certain decisions of the CESCR under the Optional Protocol to the ICESCR have interpreted this right as including a requirement to ensure that where state-initiated evictions do take place, they must not render those evicted homeless and potentially including a requirement to offer alternative adequate accommodation;⁹
- (b) availability of services, materials, facilities and infrastructure:** this includes facilities essential for health, security, comfort and nutrition – such as safe drinking water, cooking and washing facilities, adequate heating and sanitation such as garbage disposal services and site drainage;¹⁰
- (c) affordability:** this aspect of the right is a major challenge in the ACT and across Australia and includes an obligation to ensure that the costs associated with housing should not be

⁵ ICESCR, article 11(1).

⁶ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant)*, UN Doc E/1992/23 (13 December 1991).

⁷ Ibid at [7].

⁸ So may include, for example, consideration of legislating protections for those facing mortgage foreclosure in circumstances where foreclosure may lead to homelessness. See *Guidelines for the Implementation of the Right to Adequate Housing: Report 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* UN Doc A/HRC/43/43 at [34] and following.

⁹ See discussion in Hohmann, J., “A Right to Housing for the Victorian Charter of Human Rights and Responsibilities? Assessing Potential Models under the *International Covenant on Economic, Social and Cultural Rights*; the *European Social Charter*; and the *South African Constitution*” (2022) 48(2) *Monash University Law Review* 132.

¹⁰ General Comment No 4 at [8](b).

at such a high level as to threaten other basic needs, for example food, clothing and health. This aspect of the right may also require protections against unreasonable rent increases and a requirement for the state to assist with housing subsidies or access to social housing for those who cannot afford to access housing in the private markets;¹¹

- (d) habitability:** there is an obligation to ensure housing adequately protects from the weather and factors such as damp, cold and heat. There is also a general obligation that housing is of a standard that protects from threats to health and is structurally safe. There is also an important and evolving discussion as to whether this aspect of the right to adequate housing also encapsulates protection from internal threats in the home, such as violence perpetrated in the home – a position the Commission would support;¹²
- (e) accessibility:** this aspect of the right is also an aspect of the right to equality and is an obligation to ensure housing is available and meets the special needs of those with disability, mental illness, age and other factors we in the ACT would consider protected attributes under our *Discrimination Act 1991*. This obligation also extends more generally to those living in disaster prone areas and also to ensuring access to land for those who are homeless or otherwise living in poverty to ensure a secure place to live in peace and dignity.¹³ The “access to land” component may also be relevant to the rights of Aboriginal and Torres Strait Islander peoples;¹⁴
- (f) location:** adequate housing includes an obligation that the location enables access to employment, health care services, schools and childcare. This aspect also includes an obligation not to locate housing on sites proximate to pollution sources that might threaten health;¹⁵
- (g) cultural adequacy:** this aspect of the right includes a recognition that cultural identity and diversity should not be inhibited by housing. This aspect recognises that cultural dimensions of housing may be preserved even while ensuring access to modern technological facilities. For example, in the ACT context this may mean a recognition that housing may be multi-generation in certain communities or may mean social housing policies should recognise and facilitate access to housing that allows for traditional kinship care obligations of Aboriginal and Torres Strait Islander families.¹⁶

The Commission considers that any right to housing incorporated into the HR Act should be drafted in a way to incorporate the above obligations sourced from the ICESCR. For this reason, the Commission would like to see the formulation of the right in the draft bill strengthened so as to fully reflect the internationally recognised ICESCR right. In particular, the Commission is of the view that the right should reflect the wording of that provision as closely as possible. We expand on this under the heading regarding the draft bill below.

¹¹ Ibid at [8](c).

¹² See for example, Hohmann (2022) at 143. See also the attachment to this submission.

¹³ General Comment No 4 at [8](e).

¹⁴ Hohmann (2022) at 143.

¹⁵ General Comment No 4 at [8](f).

¹⁶ Ibid at [8](g).

Immediately realisable obligations and progressive realisation in the ACT context

As explained succinctly in the discussion paper, ESC rights are subject to two different types of obligations: those that are immediately realisable and those that are subject to progressive realisation. It is the view of the Commission that in addition to the immediately realisable rights specifically articulated in the discussion paper, each one of the seven key factors identified above by the CESCR reflects a core obligation with immediately realisable aspects, particularly in the context of the ACT. The CESCR had made the following observation:

the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the [ESC] rights is incumbent upon every State party.¹⁷

In addition, it is clear there are also immediate procedural obligations – for example, ensuring there is a housing strategy in place, that there are participation rights in relation to the development of that strategy and that consideration is given to existing legislation and policies to ensure adherence.¹⁸

Thankfully, many of these immediately realisable core obligations are already being met legislatively in the ACT. As our case studies highlight,¹⁹ there is still some way to go toward full realisation in practice. Nevertheless, the ACT should be proud of its leadership in legislating for some of the most robust protections for the right to housing in Australia. Current protections in the ACT include:

- Introduction of positive duty obligations to the *Discrimination Act 1991* requiring the ACT government and business to take reasonable and proportionate steps to eliminate discrimination in relation to all protected grounds under the Act. This includes in the provision of accommodation, and with respect to “accommodation status” and other attributes such as disability, age, irrelevant criminal record, immigration status, relationship status, religious conviction, sex and sexuality.
- Recent reforms to residential tenancy legislation to protect against arbitrary evictions through the removal of “no cause” evictions.
- The ability to regulate for minimum housing standards for rental properties including in relation to physical accessibility, energy efficiency, safety and security, sanitation and amenity.²⁰
- Consumer and other protections in relation to utilities, including strict regulation as to when there may be disconnections, and oversight by the ACAT as the ACT Energy and Water Ombudsman.

¹⁷ CESCR, *General Comment No 3: The Nature of States Parties’ Obligations (Art 2(1))*, UN Doc E/1991/23 (14 December 1990) at [10].

¹⁸ See article 2(1) ICESCR, General Comment No 3 and General Comment No 4 at [12]: “the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost inevitably require the adoption of a national housing strategy”.

¹⁹ See attachment.

²⁰ Division 2.5 in the *Residential Tenancies Act 1997* – with the important proviso that though there are also standards contained within the Act and in building regulations, the current regulated standards under the Act only pertain to standards for ceiling insulation for which see Part 3 of the *Residential Tenancies Regulation 1998*.

- The existence of an ACT Housing Strategy and Implementation Plan which sets out a roadmap with goals that if achieved will make positive steps toward the full realisation of the right to housing.

Given many of the immediately realisable aspects of the right to housing are already legislatively protected in the ACT, we do not foresee that the introduction of the right to adequate housing will significantly increase litigation or complaints to the Commission. It is our view that such action will largely overlap with what we are already seeing in this space. In addition, we foresee that the right will very likely be used for individual and systemic advocacy (rather than litigation) by the community and the broader non-profit sector.

Nevertheless, it is important to have a clear articulation of the right to housing with the HR Act. This includes for the purpose of ensuring future legislative compatibility with the right to housing (including the progressive realisation of the right) and to overtly mandate public authorities to consider the right to housing when making discretionary decisions and when developing policies and practices. In other words, the inclusion of the right to housing within the HR Act will be a strong tool for the purpose of ensuring the compliance of future legislation and policy with the right. Given existing frameworks and systems for ensuring human rights compatibility already exist, this is unlikely to be an onerous burden.

Most rights in the HR Act may be limited in accordance with section 28 of the HR Act and this extends to ESC rights. The ability to limit human rights in this way is appropriate and in the ESC rights context, this is recognised in article 4 of the ICESCR. The right to adequate housing will therefore be able to be limited by ACT government action, although such limitations must be reasonable, “set by laws” and be demonstrably justified in a free and democratic society. In particular, the proportionality test must be satisfied.

In this regard, there are certainly obligations which are immediately realisable and where there remains important work to do in the ACT, particularly given what has been described as a housing crisis in Australia. This includes among other things:

- Insufficient protections against arbitrary evictions for occupants, particularly those who have been living in their homes for extended periods of time and for occupants living in social and community housing.
- Barriers to social housing including a requirement for applicants to demonstrate they are capable of independent living, a practice excluding certain types of applicants with disability from accessing long term accommodation with security of tenure.²¹
- The pursuit of forcible evictions by social housing providers solely for rental arrears.²²

²¹ Housing Assistance Public Rental Housing Assistance Program (Housing Needs Categories) Determination 2011 (No 2) – see Supplementary Principles for the Priority Needs Housing category.

²² In a 2023 report by the Special Rapporteur, recommendations included in relation to the element of “affordability” that “States should enact legislation to shield tenants from evictions due to non-payment of rent. Evictions should be a last resort, adhering to principles of reasonableness and proportionality.” See *Report 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*, UN doc. A/78/192, 15 August 2023 at [97].

In respect of progressive realisation, the ACT will be required to continue to move toward the full realisation of the right and to avoid regressive steps – for example through the reduction of shelters and crisis accommodation for those experiencing homelessness or the decrease in the proportion of social, community and affordable housing. In this respect the discontinuation of the volunteer dependent programs “Safe Shelter” in 2022 and the “Sleep Bus” in 2025 has reduced the overnight shelter options for people sleeping rough. This could be considered a retrogressive step, meaning there is an obligation on the ACT government to take steps to fund alternatives.

The progressive realisation obligations may be used by the community as advocacy tools, particularly when providing feedback to the development of housing strategies and frameworks and in assessing the merits of future housing initiatives.

Specific feedback on the draft Human Rights (Housing) Amendment Bill 2024

In order to better reflect the right to adequate housing as enshrined in the ICESCR, the Commission makes the following recommendations.

- **Proposed s 27D(1):** we recommend removing the words “*have access to*” so as to better reflect the source of the human right as the ICESCR, to which Australia is a party. It is the view of the HRC that “have access to” is an unnecessary and undesirable qualification on the scope of the right. The language used in the consultation draft bill is identical to that proposed by the ANU ESCR Research Project Report. That project expressly based its model on the ESC rights as partially protected in the South African Constitution. Although we agree that the human rights protected by the South African Constitution are to be admired, it is important to understand that the ANU model amendment bill also included a series of additional protections that are not included in the current Draft Bill, such as a proposed section 28A to require the Territory to progressively realise all ESC human rights.

Given the source of the new right ought to be the ICESCR, we are of the view that the right to housing should reflect the wording of that provision as closely as possible so as not to cause interpretative difficulties. Importantly, international human rights jurisprudence has developed significantly since the ANU ESCR Project report due to a series of CESC decisions on individual complaints following the coming into force of the Optional Protocol to the ICESCR in 2013. This jurisprudence has provided valuable guidance on the content and nature of the right to adequate housing. It is our view if the words “have access to” are retained, there is a risk courts and tribunal will distinguish the ACT right from the right under international law and jurisprudence on it, including this developing CESC jurisprudence, and take an unduly restrictive interpretation of the right.

- **Proposed s 27D(2):** we recommend against including a list of “immediately realisable” rights within the right itself. Our preference is for the legislation to make it clear that any list of immediately realisable obligations are merely examples and this would best be done by moving such a list into a note following the section rather than incorporating it within the right itself. The problem with including a list of examples such as this is that it may potentially be used by the courts and tribunal to narrow the features of this right that are immediately realisable. On the other hand, we recognise that providing concrete examples does enable advocates and members of the public to better understand the concepts

involved and to use those examples in advocacy. We therefore encourage retention of examples, but in note form only.

- **Proposed s 27D(3):** if a list of immediately realisable rights remains, we strongly recommend against a definition of “essential utility service” that is linked to the *Utilities Act 2000* as currently appears in the draft 27D(3). We are against any definition within the HR Act being linked to another statute, particularly where that might inform the content of an internationally recognised human right, which should be interpreted consistently with international law as it evolves.

The Commission is strongly encouraged to see consultation legislation introducing a right to adequate housing being circulated. The Commission considers there is strong support in the community for inclusion of such a right and the consolidation of the various disparate protections of the right to housing. The Commission also thinks the introduction of a right to housing at this stage will nicely align with the election commitments of the current government to work towards implementing ESC rights into the HR Act. We hope that the discussion paper and the consultation draft legislation encourages a greater awareness of the benefits of incorporating a right to adequate housing in the community and leads to the incorporation of another important ESC right with the HR Act thereby cementing the ACT’s existing leadership in moving toward the full realisation of the right to adequate housing and a more comprehensive human rights framework.

Should you wish to discuss this submission, the contact in our office is Naomi Reiner Gould, who may be reached on 6205 2222.

Yours sincerely



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