

THINKING DIFFERENTLY ABOUT HOUSING



**ENSHRINING HOUSING
AS A HUMAN RIGHT**

Building more ambition
for the future of housing



MESSAGE FROM SHANE RATTENBURY

LEADER OF THE ACT GREENS, MEMBER FOR KURRAJONG

Like education or healthcare, affordable housing is an essential service and key to living a life with dignity. From childhood through to adulthood, housing provides the basis for stability in all aspects of our lives.

For too long, politicians across the nation have treated the government's role in the housing market as providing for private profit, rather than safeguarding our community from the skyrocketing cost of finding and keeping a home.

Now more than ever, in the middle of the most urgent housing crisis in living memory, we need the government to think about housing differently.

This discussion paper relates to our proposed legislation to enshrine housing in the ACT's *Human Rights Act 2004* which would mean that the Government would be required to consider people's human right to have access to safe and affordable housing in developing all legislation and housing programs.

Whilst our Bill won't immediately compel the government to provide a home for everyone in Canberra, it will ensure the government begins to reframe **decisions about housing through the lens of social need rather than private profit.**

In doing so, we hope to set the groundwork for a complete rethink of the government's role in the housing market, providing a starting point for richer, more ambitious discussions about the future of housing and how the government can provide truly affordable homes for people.

Together, I'm confident we can achieve change,



A handwritten signature in black ink, appearing to read 'Shane Rattenbury', written in a cursive style.

Shane Rattenbury

Leader of the ACT Greens



WHY ENSHRINE A RIGHT TO HOUSING?

Right now, more people than ever are struggling to keep a roof over their heads. In Canberra, there are over 3,000 people who can't afford a home on the public housing waiting list. Meanwhile, hundreds of essential workers are locked out of a rental market designed to prioritise profit over a place to sleep.

For too long, politicians across the nation have treated the government's role in the housing market as providing for private profit, rather than safeguarding our community from the skyrocketing cost of finding and keeping a place to call home.

The discussion about treating housing as a human right has been happening nationally and locally, for some time. Many think it's a good idea, but we still haven't yet expressly made it part of ACT law.

Our proposal to enshrine the right to housing in legislation would ensure that current and future Governments consider the new human right when making decisions.

Fundamentally, the aim of this legislation would be to compel the government to start thinking differently about the housing market, reframing decisions about housing through the lens of social need rather than private profit.

Over the long term, we hope this would start a conversation both within and outside government about what level of change is

needed to prioritise people over profit. This could include greater government focus on market interventions or broader provision of publicly owned housing to boost the rental market with affordable places to live.

Stakeholders, including ACT Council of Social Service, have long called on the ACT to enact a right to housing in alignment with international human rights frameworks.¹



IMPACT OF ENSHRINING THE RIGHT TO HOUSING?

Enshrining the right into legislation will require current and future Governments to consider the new human right when making decisions. This will ultimately begin

¹ ACTCOSS, 'Housing and Homeless 2024 Policy Brief', <https://actcoss.org.au/publication/actcoss-and-act-shelter-housing-and-homelessness-election-platform-2024/>

to reframe decisions about housing through the lens of social need rather than private profit.

Noting the scale of the change we are proposing to make, but also the urgency of the housing crisis, this bill breaks down the changes into both immediate and long term reform.

Our proposal will make the Government think about housing in the same way it already does for other human rights. This will mean the Government will need to consider housing as a human right in the following ways:

- ▲ The Attorney-General assesses and signs a compatibility statement to inform the Assembly that Government bills have been assessed for Human Rights Act consistency
- ▲ The Scrutiny of Bills Committee reports to the Assembly on Human Rights Act issues raised by Government and Private bills
- ▲ Considering the reasonable limits provision, which permits justifiable and proportionate limits on Human Rights Act rights
- ▲ Benchmarking the interpretation of rights, including any limits on rights, against international human rights standards
- ▲ Public authority obligations to act in a way that is compatible with human rights; and to give

proper consideration to human rights when making decisions.

The Human Rights

Commissioner has a mandate to review the impact of laws on human rights, monitor the operation of the Human Rights Act and provide human rights education

- ▲ Government annual reports and public authorities to report on the steps taken to implement the Human Rights Act.

HOW THE RIGHT TO HOUSING IS CURRENTLY PROTECTED NATIONALLY

Australia has an obligation under international law to protect the right to adequate housing but this isn't enough.

The right to housing is enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), a treaty adopted by the United Nations General Assembly in 1966. As a party to this treaty since 1975, Australia has an obligation under Article 11 to take steps to realise the right to adequate housing. It sets out three components of an adequate standard of living: food, clothing and housing.

Broadly, the right to adequate housing is viewed as a 'right to live

somewhere in security, peace and dignity.²

‘Adequate housing’ means more than just a right to shelter. It has been interpreted to include several key elements: adequacy³, protection against forced evictions⁴, prohibition against discrimination⁵, and the provision of emergency housing for vulnerable groups.⁶

For housing to be considered adequate for the purposes of the right to adequate housing, these factors should be taken into account:

- ▲ Legal security of tenure: Adequacy requires a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats;

² Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art 11), 6th sess, UN Doc E/1992/23 (13 December 1991), at [7] (‘General Comment No. 4’)

³ UN CESCR, General Comment No. 4: The right to adequate housing, at [8]

⁴ UN CESCR, General Comment 7: The right to adequate housing: forced evictions, at [3]

⁵ UN CESCR, General Comment No. 4: The right to adequate housing, at [6]

⁶ The Australian National University’s Economic Social Cultural Rights Research Project Report (at ACTESCR_project_final_report.pdf) cites at page 177 for example, ‘Government of South Africa v Grootboom [2000] ZACC 19 where the government was held to have breached the right to housing because its policies had made no provision to facilitate access to emergency accommodation for people whose homes had been demolished. See also Port Elizabeth Municipality v. Various Occupiers [2004] ZACC 7, where the Court refused to order the eviction of people from undeveloped public lands because reasonable provision had not been made for alternative accommodation’

- ▲ Availability of services and infrastructure: Adequacy requires the availability of certain essential facilities, including safe drinking water, heating and lighting, and sanitation;
- ▲ Affordability: Adequacy requires that housing costs do not threaten or compromise the satisfaction of other basic needs;
- ▲ Habitability: Adequacy requires sufficient space and protection from environmental, health and structural hazards;
- ▲ Accessibility: Adequacy requires that housing policies and laws must give priority to the ability of disadvantaged groups to access housing;
- ▲ Location: Adequacy requires that housing must be in a location which allows access to employment, healthcare, education and social facilities; and
- ▲ Cultural adequacy: Adequacy requires that housing construction, building materials and supporting policies must appropriately enable the expression of cultural identity and diversity of housing

There are two different types of obligations under the ICESCR:

- ▲ Obligations with immediate effect. Australia must satisfy ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the

rights⁷, ensure the enjoyment of rights without discrimination, and take 'deliberate, concrete and targeted' steps towards the ensuring the full enjoyment of ICESCR rights.

- ▲ Obligations that may be progressively realised 'with the full use of maximum available resources'.⁸ Progressive realisation is a 'necessary flexibility device, reflecting the realities of the real world'. Elements of the right that may be progressively realised are subject to greater governmental discretion and they might need more time to be implemented than others. If an obligation must be progressively realised, action must still be taken 'as expeditiously and effectively as possible', and measures that are retrogressive to the achievement of an outcome must be properly justified.

Enjoyment of ESCR may be subject to reasonable limitations. Article 4 of the ICESCR provides:

- ▲ The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may

subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

- ▲ The right to adequate housing requires public authorities to refrain from forced evictions. The government must also take reasonable measures to ensure that third parties, such as private landlords, do not carry out forced evictions. Forced eviction means 'the permanent or temporary removal of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection'.⁹
- ▲ The right to adequate housing must be implemented in accordance with the principles of equality and non-discrimination.¹⁰ As a minimum, housing policies and laws must refrain from directly or indirectly discriminating without reasonable justification, but positive measures may also be required

⁷ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (art 2(1)), 5th sess, UN Doc E/1991/23 (14 December 1990), [10] ('General Comment 3')

⁸ ICESCR, art 2; General Comment No. 3, above n 7, [9].

⁹ Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions, 16th sess, UN Doc E/1988/22 (20 May 1997) [3] ('General Comment No. 7').

¹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (art 11), 6th sess, UN Doc E/1992/23 (13 December 1991), [6]

to ensure equality in the effective enjoyment of housing rights.

There is an immediate obligation on governments to take 'deliberate, concrete and targeted' steps towards progressively realising the right to adequate housing, including:

- ▲ Developing a coordinated and comprehensive housing strategy, which addresses structural problems and prioritises the needs of the most vulnerable groups in the community;¹¹
- ▲ Putting in place mechanisms to ensure that progress towards securing the right to adequate housing can be monitored effectively;¹² and
- ▲ Ensuring that vulnerable groups are able to effectively participate in decision-making processes and the development of policies which affect them.¹³

The following elements of the right to adequate housing have also been interpreted to give rise to obligations of immediate effect:

¹¹ Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions, 16th sess, UN Doc E/1988/22 (20 May 1997) [12] ('General Comment No. 7').

¹² Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions, 16th sess, UN Doc E/1988/22 (20 May 1997) [13] ('General Comment No. 7').

¹³ Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions, 16th sess, UN Doc E/1988/22 (20 May 1997) [127] ('General Comment No. 7').

- ▲ Protection against forced eviction;¹⁴
- ▲ Prohibition against discrimination;¹⁵ and
- ▲ Access to emergency accommodation for vulnerable groups.¹⁶

The right to adequate housing does not mean that the government will be required to:

- ▲ Build housing for the entire population;
- ▲ Provide housing free of charge to all who request it;
- ▲ Fulfil all aspects of this right immediately;
- ▲ Either assume full responsibility itself or leave completely to the unregulated market to secure this right for all; or
- ▲ Implement this right in exactly the same way in all circumstances or locations.¹⁷

¹⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 7: The Right to Adequate Housing (art 11.1): Forced Evictions, 16th sess, UN Doc E/1988/22 (20 May 1997) [8] ('General Comment No. 7').

¹⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations (art 2(1)), 5th sess, UN Doc E/1991/23 (14 December 1990), [2] ('General Comment 3').

¹⁶ See, eg, Government of South Africa v Grootboom [2000] ZACC 19.

¹⁷ Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, UN Doc E/CN.4/2002/59(1 March 2002) [26] ('Report of Special Rapporteur on Housing').

DOMESTIC LEGISLATION ON THE HUMAN RIGHT TO HOUSING

The right to an adequate standard of living, including rights to food, clothing and housing, is touched on indirectly in Australian law by a range of legislative measures and schemes, including food and clothing standards and safety legislation, taxation and residential tenancies laws.

There is currently no Commonwealth Human Rights Act, however a Labor-led Parliamentary Joint Committee on Human Rights recently recommended the Commonwealth Government legislate a Human Rights Act.¹⁸

These recommendations are under consideration by the Federal Parliament. Bodies like Amnesty International are calling on the Albanese Government to legislate a Human Rights Act to protect all our human rights – including our right to housing.¹⁹ So is the Australian Human Rights Commission.²⁰

The right to housing would be part of Australian domestic law if the

¹⁸ Inquiry into Australia's Human Rights Framework, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000210/toc_pdf/InquiryintoAustralia'sHumanRightsFramework.pdf

¹⁹ Amnesty International, Human Rights Act, <https://www.amnesty.org.au/campaigns/human-rights-act/#:~:text=Australia%20is%20the%20only%20liberal%20democracy%20in%20the,bas is%20of%20their%20age%2C%20sex%2C%20di sability%2C%20or%20race.>

²⁰ AHRC, A National Human Rights Act for Australia, <https://humanrights.gov.au/human-rights-act-for-australia>

National Housing and Homelessness Plan Bill 2024 (No 2) were supported. The bill has been referred to the Senate Standing Committee on Economics.

STATES AND TERRITORIES

Some housing rights are partially protected in policy and legislation of the ACT but nothing explicitly protects the right to access adequate housing.

The Residential Tenancies Act 1997 imposes obligations on landlords to provide premises which are fit for habitation, reasonably clean, in a reasonable state of repair and is reasonably secure and to maintain the property.

The Housing Assistance Act 2007 includes among its objects:

- ▲ Maximising the opportunities for everyone in the ACT to have access to housing that is affordable, secure and appropriate to their needs and
- ▲ Facilitating the provision of housing assistance for those most in need.

While the measures outlined above provide some level of housing protection, they do not fundamentally change the system and give effect to the right to housing.

CONCERNS ABOUT THE HOUSING HUMAN RIGHT?

While there may be concerns raised that enshrining a right to housing will result in a dramatic increase in

litigation against public authorities, we do not believe this to be likely.

While speaking of economic, cultural and social rights more broadly, the ACT ANU Economic Social Cultural Rights Research Project Report identified that there have been only two reported instances of the direct right of action being used since it commenced in 2009.²¹

Additionally, there is unlikely to be an increased burden on budgetary decision-making processes. Public authorities are already required under section 40B of the Human Rights Act to give proper consideration to human rights when making decisions about resource allocation.

Express consideration of the right to housing will provide a clearer framework to ground the Government's commitment to provide services in the area of housing, in the same way it is already called upon to do for health care, education and, shortly, the environment.

We share the view of the ANU Report authors, that the ACT community is entitled to expect that public authorities respect their human rights, including economic, social and cultural rights, in the way

²¹ DFAT, Fifth Report Under the International Covenant on Economic, Social and Cultural Rights, <https://www.dfat.gov.au/sites/default/files/final-icescr-report-appendix-1.pdf>

in which public money is spent and resources are allocated.



HOW DO OTHER COUNTRIES DO IT?

Human rights-based housing policies make a difference. In 2008, Finland introduced a human-rights based policy aimed at ending homelessness. It focussed on placing community members in stable, long-term accommodation, rather than short-term accommodation. Today, there are almost no rough sleepers in Finland.

The human right to housing is expressly protected in various domestic jurisdictions (including Belgium, Portugal, Spain, the Netherlands, Finland, Switzerland, India, Argentina, and Russia).

The South African Bill of Rights provides that:²²

- ▲ Everyone has the right to have access to adequate housing.
- ▲ The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
- ▲ No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.



Other countries have recognised the right to adequate housing through legal (i.e., primarily enforced through the courts) or programmatic approaches (i.e., progressively realised through government policy).

²² Constitution of South Africa, section 26.

The Honourable Kevin Bell AO KC provided a global snapshot as follows:²³

In 1996, South Africa introduced a justiciable right to housing into their Constitution. This compels the State to take reasonable measures within their available resources to progressively realise South Africans' right to adequate housing. In practice, however, courts have limited this right through their interpretation of the Constitution.

Court rulings have focused on the protection of existing tenure (e.g., protections against displacement) and responses to the immediate needs of people living in crisis situations.

In contrast, Finland has pursued a programmatic approach to housing rights. The Finnish Constitution requires public authorities to 'promote the right of everyone to housing' but provides limited actions through the courts. Instead, the right to housing is primarily realised through other constitutional provisions (e.g., the right to life that requires the provision of emergency shelter in conditions that pose a risk to life and personal safety) or through the implementation of domestic policy. Successful programmatic approaches to housing rights require strong political will and a coordinated approach to housing and welfare policy, led by the national government.

²³ Kevin Bell AO KC, Housing and Human Rights, <https://percapita.org.au/housing-and-human-rights-the-hon-kevin-bell-ao-kc/>

In Canada, international human rights obligations created a foundation for a coordinated national housing strategy, involving a coalition of provincial and city leaders alongside the Federal government after decades of decentralisation. In 2019, the

National Housing Strategy (NHS) Act legislated “the progressive realization of the right to adequate housing as recognized in the International Covenant on Economic, Social and Cultural Rights”



HAVE YOUR SAY ABOUT HOUSING AS A HUMAN RIGHT

This discussion paper starts a conversation about getting the government to think differently about the housing market and treat it as an essential service for people, rather than a commodity for profit.

The questions below are intended to prompt the community to provide their own ideas and feedback.

Share your thoughts on our draft legislation to enshrine housing as a human right by emailing rattenbury@parliament.act.gov.au by Friday the 28th of February 2025.

DISCUSSION QUESTIONS:

Q1. Do you think the Human Rights Act 2004 (ACT) should include a human right to access to adequate housing, and why or why not?

Q2. What do you think about the date of commencement?

The draft Bill proposes to commence on the later of 1 January 2026 and the day after notification.

We think this is sensible because sometimes legislation takes a long time to make its way through the various Parliamentary processes, so it might be that if the Bill is passed after a very long time in the Assembly, 1 January 2026 has passed by then. If it moves more swiftly than that through the process, we are of the view that it is not unreasonable to expect the ACT Government to be already able to meet the immediately realisable aspects of the right.

Q3. Do you think that the right should be expressed as simply as it is in the Bill? Do you think that both aspects of “access” and “adequacy” should be incorporated?

The right is expressed a single statement: **27D Right to housing**

1. Everyone has the right to have access to adequate housing.

Other rights in the Human Rights Act 2004 are expressed in different ways with varying levels of complexity. The right to a healthy environment is simply that and has no further elaboration, whereas the right to education consists of a child’s right to free and appropriate school education, and the right of all people to further, vocation and continuing education. The right to work additionally incorporates other work-related rights relating to unions.

So, the right can be broken into detailed components (see Human Rights Act 2004, s 27A); the right can be incorporated into a cluster of related rights (see s 27B); or you can have the right as a single statement (as above; see also HRA, uncommenced new s 27C (in the Human Rights (Healthy Environment) Amendment Act 2024 (Healthy Environment Act), s 6)).

Q4. Are there other components to the right that you think should be immediately realisable? The Bill leaves progressive realisation to implication and reading-in via notes and sources of international law. What do you think about this approach and what are alternatives you prefer?

The Bill includes three immediately realisable aspects to the right. This means that these three components take effect as soon as the Bill passes. It uses the word “include” because it is intended to be a non-exhaustive list. It reads:

New section 27 D (2) Immediately realisable aspects of this right include the following:

- (a) everyone is entitled to enjoy this right without discrimination;
- (b) no-one may be unlawfully or arbitrarily evicted from their home;
- (c) no-one may have an essential utility service to their home unlawfully or arbitrarily withdrawn

Paragraph 2(a) provides for the right of every person to have access to adequate housing without discrimination. While the guarantee of non-discrimination is already established in section 8 of the Human Rights Act 2004, this clarifies that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation.

Paragraph 2(b) establishes the right not to be unlawfully or arbitrarily evicted from one’s home. The right reflects the interpretation given to article 11(1) of the ICESCR relating to the prohibition against forced evictions and is modelled on s 26(3) of the Bill of Rights in the Constitution of the Republic of South Africa 1996.

Paragraph 2(c) establishes the right not to have an essential utility service to one’s home unlawfully or arbitrarily withdrawn. Sub-section (3) provides that the definition of an ‘essential utility service’ means a utility service defined in the Utilities Act 2000. This provision broadens article 11(1) of the ICESCR and reflects current ACT practice in relation to the provision of essential utilities.

Q5. What do you think is an appropriate timeframe for a review of the operation of the right to access to adequate housing?

The Bill proposes a new section be added to the Human Rights Act 2004, which will review how the right to housing has been operating:

44 Review of right to housing

- (1) The Minister must review the operation of section 27D (Right to housing).
- (2) The Minister must present a report of the review to the Legislative Assembly as soon as practicable after the end of 5 years after this section commences.
- (3) This section expires 6 years after it commences.

We consider the five-year period to be reasonable as it will be sufficiently long enough to allow results to emerge and to make decisions in a review. The presented version of the right to a health environment was also five years so this provision mirrors that timeframe..

Q6. What could a right to housing look like? How could it be expressed?

Q7. What does 'access to adequate' housing mean to you?

Q8: Should the Bill set out other obligations on the Government?

For example:

- ▲ a requirement that the Government widely consult on the development of housing legislation and design and the delivery of housing programs and that the consultation should specifically include certain groups including Aboriginal and Torres Strait Islander people, people with disability and young people. The consultation would need to be culturally accessible.
- ▲ a right to be provided with temporary housing in extreme climate events, for example, the 2003 ACT Bushfires.