

ARTICLE

Not Sold on the Housing Accords and Special Housing Areas Act 2013: How Housing Legislation in New Zealand Ignores our Pacific People on the Peripheries

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Housing unaffordability in Auckland is an issue that disproportionately affects Pacific people. This article analyses whether the Housing Accords and Special Housing Areas Act 2013 (HASHAA 2013), which was enacted to improve housing affordability in Auckland, is an effective way of improving housing affordability for Pacific people in Auckland. It identifies that the creation of the HASHAA 2013 did not demonstrate an intention to assist Pacific people as the group most in need of affordable housing in Auckland, and that the Auckland Council's interpretation and application of the affordable housing provisions within the Act was significantly flawed. On this basis, it is concluded that the HASHAA 2013 is not an effective way of improving housing affordability for Pacific people in Auckland. Finally, it makes three propositions for legislative reform which have greater potential for improving housing affordability for Pacific People in Auckland than the HASHAA 2013. These propositions are social housing reform, extension of capital gains tax, and incorporating a social right to housing into the New Zealand Bill of Rights Act 1990.

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I Introduction

Auckland is currently experiencing a housing crisis, characterised by an undersupply of housing and a severe lack of affordable homes.¹ The median multiple measure of housing affordability provides that a housing market is severely unaffordable where the median house price divided by the median annual household income (the median multiple) is above 5.1.² Auckland is currently the fourth-least affordable housing market internationally, with a median multiple of 10.0.³ Access to affordable housing in Auckland is lowest among those who are younger, have low income, or “belong to an ethnic group other than New Zealand European”.⁴ In particular, Pacific people in Auckland have been disproportionately impacted by rising housing prices.⁵ In this article, I seek to determine whether the Housing Accords and Special Housing Areas Act 2013 (HASHAA 2013), introduced to enhance housing affordability generally, is an effective way of improving housing affordability for Pacific people in Auckland. If this question is answered in the negative, I will go on to propose ways in which legislative reform can improve housing affordability for Pacific people.

II The Disproportionate Impact of the Auckland Housing Crisis on Pacific People

The Auckland housing crisis has disproportionately affected Pacific people.⁶ By ethnic group, Pacific people in Auckland have experienced the fastest decline in home ownership rate,⁷ have the lowest home ownership rate,⁸ and experience the highest rates of overcrowding.⁹ Between the census surveys of 2001 and 2013, the impact of the housing crisis in Auckland was evident through a decline in home ownership rate across all ethnicities.¹⁰ However, Pacific people in Auckland were particularly affected, experiencing an 8.3 per cent decline of home ownership.¹¹ In comparison, the rate of decline for Māori and Pākehā in Auckland was equal, and less significant than that of Pacific people, at 3.7 per cent.¹² Pacific people in Auckland also have the lowest home ownership rate by ethnicity, with 17.4 per cent owning or partially owning their own home.¹³ In comparison, Pākehā have the highest home ownership rate, at 53.5 per cent.¹⁴ These statistics indicate growing inequality in home ownership by ethnicity, which needs to be addressed through legislation in order to ensure that all Aucklanders, including Pacific people, have their

1 JLR Joynt, P Tuatagaloa and P Lysnar *Pacific People and Housing in Auckland: A stocktake of issues, experiences and initiatives* (Auckland Council, Technical Report TR2016/027, August 2016) at i.

2 Wendell Cox and Hugh Pavletich *13th Annual Demographia International Housing Affordability Survey: Rating Middle-Income Housing Affordability* (Demographia, 2017) at 45.

3 At 45.

4 New Zealand Productivity Commission *Housing affordability inquiry* (March 2012) at 4.

5 Joynt, Tuatagaloa and Lysnar, above n 1, at i.

6 At i.

7 At 11.

8 At i.

9 At 16.

10 At 13.

11 At 13.

12 At 13.

13 At 13.

14 At 13.

essential needs met and have equal opportunities to access adequate and affordable housing.

In addition, Pacific people are overrepresented in household crowding.¹⁵ 24 per cent of Pacific people live in ‘crowded’ households, categorised as needing one extra bedroom to adequately meet the needs of the occupants, and 22 per cent of Pacific people lived in ‘severely overcrowded’ households, categorised as needing more than one additional bedroom.¹⁶ While Pacific people have a cultural propensity for larger family sizes and multi-generational living, this does not equate to a preference for crowded housing.¹⁷ Therefore, the main causal factors for overcrowding can be attributed to the unaffordability of houses for Pacific people in Auckland and lack of housing stock provision which meets the needs of bigger families.¹⁸ Due to the disproportionate impact that the Auckland housing crisis has had on Pacific people, I contend that legislation will need to expressly consider the specific needs and interests of Pacific people, in order to improve housing affordability for them.

III The Housing Accords and Special Housing Areas Act 2013 (HASHAA 2013)

A Did the HASHAA 2013 intend to improve housing affordability for Pacific people?

The recent National-led government contended that the primary cause of the housing crisis was a shortage of land for housing.¹⁹ The HASHAA 2013’s purpose, “to enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts ... identified as having housing supply and affordability issues”,²⁰ follows this assumption. The Act enables the Council and the Housing Minister to create Special Housing Areas, and legally empowers Councils to take more permissive approaches to housing development consents in these areas.²¹

Despite Pacific people being disproportionately affected by the Auckland housing crisis, they were not referred to once within the Housing Accords and Special Housing Areas Bill which created the HASHAA 2013, nor the three readings or in committee debate of the Bill. Furthermore, the select committee report which made recommendations to the Bill did not acknowledge the concerns raised by one submitter that the Bill would not improve housing affordability for Pacific people.²² While it is possible for legislation to produce positive outcomes for a specific group without expressly highlighting them, I

15 At 17.

16 At 17.

17 Rosemary Goodyear, Angela Fabian and J Hay *Finding the crowding index that works best for New Zealand* (Statistics New Zealand, Working Paper No 11-04, 2012) at 15.

18 Rosemary Goodyear and Angela Fabian *Housing in Auckland: Trends in housing from the Census of Population and Dwellings 1991 to 2013* (Statistics New Zealand, December 2014) at 83.

19 Laurence Murphy “The politics of land supply and affordable housing: Auckland’s Housing Accord and Special Housing Areas” (2016) 53 *Urban Studies* 2530 at 2543. See also Alex Tarrant “Best way to address housing affordability is boosting land supply, Building & Construction Minister Smith says after govt data details affordability struggles in Auckland” *interest.co.nz* (online ed, New Zealand, 10 May 2017).

20 Housing Accords and Special Housing Areas Act 2013, s 4.

21 Murphy, above n 19, at 2540.

22 Mea’ole Keil “Submission to the Housing Accords and Special Housing Areas Bill” at 1.

contend that not considering Pacific people within the entire creation of the HASHAA 2013 indicates that this Act did not intend to improve housing affordability for them.

Furthermore, the concept of “affordable housing” has been criticised as only catering to middle-income earners, as issues of housing affordability have moved up the income distribution.²³ This is exemplified by the Median Multiple, the measure used to determine whether an area is experiencing housing affordability issues under the HASHAA 2013.²⁴ Under this measure, a housing market is considered affordable if the median house price is three times the median annual household income, and severely unaffordable if this rate is more than five times the median annual income.²⁵ However, the annual median personal income for Pacific people in Auckland is \$18,900; significantly lower than the annual median personal income for Auckland as a whole at \$29,600.²⁶ This means that “affordable housing” according to the Median Multiple will be achieved when it meets the needs of middle-income households, even though the housing market will remain unaffordable for those on low incomes, including many Pacific people. By using the median multiple to conceptualise housing affordability, and seeking to “enhance housing affordability” on these terms, the HASHAA 2013 does not demonstrate an intention to assist Pacific people as the group most in need of access to affordable housing.

B Did the HASHAA 2013 improve housing affordability for Pacific people?

Prior to the HASHAA 2013, the ‘effect-based’ approach of the Resource Management Act 1991 (RMA 1991) governed development consents.²⁷ This meant the negative impacts of the proposed development had to be investigated by the local Council, and these impacts mitigated by the developer, before the development could go ahead.²⁸ If the Council perceived that a proposed development would have a negative impact on housing affordability in the area, the Council could require the developer to mitigate this by providing affordable housing in addition to the development, or making a financial contribution to the council for the provision of affordable housing.²⁹ However, the National-led government considered that these “inefficient” and “overly regulatory” RMA 1991 processes created too many risks for developers seeking to build homes, thereby discouraging housing production and intensifying the housing crisis and housing affordability issues.³⁰ With the creation of the HASHAA 2013, the “effects-based” approach of the RMA 1991 was curtailed, enabling a fast-tracked planning process in Special Housing Areas.³¹

However, merely consenting to the production of more houses does not guarantee that these houses will be affordable, or that housing affordability within Auckland as a whole will improve.³² Under the HASHAA 2013, a housing development is not required to

23 Melanie Brebner “Auckland’s Housing Affordability Problem” (2014) 18 NZJEL 207 at 209.

24 At 211.

25 Cox and Pavletich, above n 2, at 1.

26 Joynt, Tuatagaloa and Lysnar, above n 1, at [3.4.4].

27 Murphy, above n 19, at 2537.

28 At 2537.

29 John Clemo “Affordable Housing under the Resource Management Act 1991: *Infinity Investment Group Holdings Ltd v Queenstown Lakes District Council*” (2011) 9 BRMB 44.

30 Murphy, above n 19, at 2537 and 2540.

31 At 2540.

32 Particularly if no further restrictions are placed on the acquisition of houses by property investors, both local and overseas. See Kenneth Palmer “Housing Accords and Special Housing Areas Act 2013—a fast track process to enhance housing supply” (2013) 10 BRMB 76 at 79.

contain affordable housing.³³ By October 2017, 3,157 houses had been completed in Special Housing Areas, of which just 580 were classified as affordable, with only 98 available for sale to the wider public.³⁴ Under s 15(4) of the Act, affordable housing:³⁵

... may include, without limitation, criteria defined by reference to median house prices, median household income, individual income, the median multiple ... or any other matter relevant to affordability as it applies to the district in which the special housing area falls, the special housing area, or part of the special housing area.

The approach adopted by the Auckland Council Planning Committee has been to require 'affordable housing' in Special Housing Areas to be sold at or below 75 per cent of the Auckland median house price.³⁶

I contend that there are three major weaknesses to the Council's market-based approach to affordable housing. First, 75 per cent of the Auckland median house price is currently estimated at \$633,750.³⁷ Using the Median Multiple measure, this house price is categorised as 'severely unaffordable' for median income households in Auckland.³⁸ As previously discussed, this price will be even less affordable for Pacific people, who have a lower median personal income than all other ethnicities in Auckland.³⁹ Therefore, the 'affordable housing' created under the HASHAA 2013 will only be affordable to high income earners; who are most likely to be Pākehā,⁴⁰ and most likely to already own their own home, and who are thereby least in need of it. Secondly, following a market-based approach means that the price of affordable housing increases as the median house price increases.⁴¹ Since the HASHAA 2013 was enacted, the price of affordable housing has increased by approximately \$200,000; a rate which Pacific people on low income will be unable to keep up with.⁴² Albeit slightly cheaper than the median house price, 'affordable housing' is proportionally over-inflated, thereby remains unaffordable and inaccessible to those most in need of it, such as Pacific people. Finally, this affordable housing provision only requires that housing is initially sold by developers at the prescribed rate — it does not protect the sale price being raised beyond 75 per cent of the median house price in subsequent sales.⁴³ This temporary provision of 'affordable housing' will be particularly

33 Housing Accords and Special Housing Areas Act, s 14(1)(d).

34 Susan Edmunds "Fewer than 100 'affordable' houses built under Auckland Housing Accord" (10 October 2017) Stuff <www.stuff.co.nz>.

35 Housing Accords and Special Housing Areas Act, s 15(4).

36 Ministry of Business, Innovation and Employment *Auckland Housing Accord: Third Quarterly Report for the Fourth Accord Year* (1 April to 30 June 2017) at 12.

37 Wendell Cox and Hugh Pavletich *15th Annual Demographia International Housing Affordability Survey: Rating Middle-Income Housing Affordability* (Demographia, 2019) at 37.

38 See Cox and Pavletich, above n 2, at 1. According to my own working: the 'affordable housing' price of \$633,750 divided by the median annual household income for Auckland (\$94,400) equals a Median Multiple of 6.7.

39 Joynt, Tuatagaloa and Lysnar, above n 1, at [3.4.4].

40 See Statistics New Zealand *2013 QuickStats: About income* (September 2014); and Statistics New Zealand *Home ownership by individuals* (2013 Census QuickStats about housing, 18 March 2014). Median personal income is highest amongst those who identify as European and 'Other ethnicity' (including New Zealander) at \$30,900 and \$37,100, respectively, compared with the median personal income for Pacific people of \$19,700. Similarly, home ownership is highest among Europeans, at 56.8 per cent of all home owners, compared with Pacific people at 18.5 per cent.

41 Ministry of Business, Innovation and Employment, above n 36, at 12.

42 At 12.

43 Murphy, above n 19, at 2542.

attractive to property investors and speculators, who will recognise an opportunity to make a significant profit in the on-sale. Given the optional nature of affordable housing under the HASHAA 2013, and the Council's market-based application of affordable housing, I contend the Act is not an effective way of improving housing affordability for Pacific people in Auckland.

When then Housing Minister the Hon Nick Smith MP was criticised in 2016 over the declining home ownership rates of Pacific people, he responded that the government was not to blame and that the data just confirmed broader social statistics including that Pacific people have lower income and lower educational achievement in comparison to other ethnic groups in Auckland.⁴⁴ The implication of this statement is that the government expects housing affordability to decline for Pacific people, and people with low incomes or low educational achievement, but accepts no obligation to intervene and improve access to affordable housing for these groups. While the government enacted the HASHAA 2013 to "enhance housing affordability",⁴⁵ it did not intend this to assist low income groups, nor has it had that effect. Given the declining social housing stock and limitations of social housing to only serve those in "extreme need",⁴⁶ there is a significant risk the HASHAA 2013 has placed many Pacific people, who are already vulnerable to declines in housing affordability, into a no-man's land between extreme need and middle income, thereby leaving them without any legislative provision to assist them in accessing affordable housing.

IV What is Needed to Improve Housing Affordability for Pacific People in Auckland?

Due to the correlation between high incomes and increased home ownership rates,⁴⁷ one approach to improving housing affordability for Pacific people could focus on increasing the median income of Pacific people. If the gap between the annual median personal income for Aucklanders in general and the annual median personal income for Pacific people in Auckland was closed, Pacific people would be in a better position to compete in the housing market. However, as the median house price in Auckland is categorised as "severely unaffordable" even for middle-income households,⁴⁸ reducing income inequalities alone will not resolve housing affordability issues for Pacific people. In contrast, greater competition within the housing market will push Auckland house prices further up, so established owners and speculators will remain in the best position to afford housing.⁴⁹ I contend that improving housing affordability for Pacific people in Auckland requires an approach which regulates and undermines housing market speculation, rather than following it.⁵⁰ Implementing social housing reform, extending capital gains tax, and

44 "Smith deflects blame over Pasifika home ownership" *The Dominion Post* (online ed, Wellington, 10 June 2016) at 2.

45 Housing Accords and Special Housing Areas Act, s 4.

46 Brebner, above n 23, at 213.

47 Statistics New Zealand *Changes in home-ownership patterns 1986–2013: Focus on Māori and Pacific people* (2016) at 31. In 2013, "home-owners aged 25 to 54 years generally had higher personal incomes than non-home owners. Māori and Pacific home-owners in this age group received around 1.7 to 1.8 times more income than those who did not own their dwelling".

48 Cox and Pavletich, above n 2, at 45.

49 Shane Malva "The Imminent Ruin of the Auckland Housing Crisis: Social Resistance Against the Financialisation of Housing" (2016) 31(6) *New Zealand Sociology* 10 at 22.

50 At 29.

recognising a right to housing in statute have the potential to achieve this, and in doing so will provide a more effective way of improving housing affordability for Pacific people than the enactment of the HASHAA 2013.

V Proposed Legislative Reform

A *Improving housing affordability for Pacific people in Auckland through social housing reform*

The current approach to social housing is prescribed by the Housing Corporation (Social Housing Reform) Amendment Act 2016, which enables the Minister to enter into social housing transactions on behalf of the Housing New Zealand Corporation (HNZC).⁵¹ The Hon Paula Bennett MP introduced the Bill, with the disclaimer that transfers of social housing would be to community housing providers (CHPs).⁵² She considered that this reform would be beneficial to those who require social housing, on the basis that CHPs would be in a better position than HNZC to tailor social housing to the needs of the local community.⁵³ One of the objectives of the social housing reform was to increase the supply of affordable housing, “especially in Auckland”.⁵⁴ However, opposition members expressed concern that the Act would make it easier for the Government to transfer social housing to private developers, who would prioritise profit over affordable housing objectives and the needs of people who require social housing.⁵⁵ These concerns have since been realised in *State Housing Action Inc v Minister of Housing*, which confirmed that the Minister was not required to consider whether transferring social housing properties to private purchasers would improve housing affordability or the provision of social housing.⁵⁶ In this case, the Minister’s decision to sell 1,124 HNZC properties and release them from social housing obligations was held to be lawful.⁵⁷

I contend that the current approach to social housing undermines the potential of the HNZC to improve housing affordability for people on low income, including many Pacific people. By transferring social housing to the private market and releasing it from its social housing obligations, social housing stock is reduced. This means that fewer people who are unable to afford housing in the private market and require social housing are able to access it. For example, social housing is currently only available to those in “extreme need”, and the nation-wide waiting list for social housing is in excess of 5,000, largely driven by housing demand and unaffordability in Auckland.⁵⁸ The United Nations Committee on Economic, Social and Cultural Rights has criticised this limited provision of social housing, and has called on the government to “ensure that its enactments and

51 Housing Corporation (Social Housing Reform) Amendment Act 2016, s 50B(1)(a).

52 (18 August 2015) 707 NZPD 5893.

53 (18 August 2015) 707 NZPD 5893–5894.

54 Housing Corporation (Social Housing Reform) Amendment Act, s 50D(1)(f).

55 (18 February 2016) 711 NZPD 9172–9174.

56 *State Housing Action Inc v Minister of Housing* [2016] NZHC 2924, [2017] 2 NZLR 281 at [58] and [61].

57 At [66].

58 Isaac Davison “Queue for social housing passes 5000, driven by demand in Auckland and Christchurch” *New Zealand Herald* (online ed, Auckland, 21 July 2017).

policies guarantee the right to adequate housing for everyone, including for all those in need of social housing”.⁵⁹

As Pacific people are disproportionately impacted by declining housing affordability in Auckland, they are most likely to require social housing, and therefore are also disproportionately impacted by its decline.⁶⁰ The limited availability of social housing also means that demand for housing in the private market continues to exceed supply, perpetuating the steep rise of the market price of housing. In order to improve housing affordability for Pacific people in Auckland, it is necessary for the Government to invest in more social housing and retain it. Social housing provision will be adequate when it meets the needs of all Aucklanders who cannot afford housing in the private market, including low and middle-income households, rather than just those in the greatest need. Providing adequate social housing will also undercut the price of housing in the private market, therefore housing affordability will improve overall.⁶¹

In addition to ensuring affordability needs are met, the government must ensure that the design and size of social housing properties meet the physical needs of Pacific households. The 2013 census recorded that 46 per cent of Pacific people in Auckland were living in overcrowded households, the highest of all ethnic groups.⁶² A primary cause of overcrowding among Pacific households is the lack of diversity of housing in Auckland; the majority of houses are designed to meet the needs of the standard Pākehā nuclear family of two adults and two children.⁶³ As Pacific people tend to have larger family sizes and have a cultural preference for multigenerational living, it is difficult to find houses which meet their needs, and they are forced to live in small, overcrowded households.⁶⁴ In order to improve housing outcomes for Pacific people in Auckland, it is essential that social housing properties are diverse and cater to the specific needs of Pacific households.

Finally, the emphasis on social housing to improve housing affordability and outcomes for Pacific people will require changes to the way in which social welfare providers operate, to ensure that the many Pacific people who utilise these services are respected. The current provision of social welfare is neither culturally sensitive nor empathetic to families in need, who are dehumanised and treated as ‘problems’ to be regulated from a distance.⁶⁵ By having to constantly ‘prove’ the intensity of their deprivation and that they are deserving of assistance, welfare recipients are left feeling victimised, embarrassed and ashamed at the hands of the state agencies which are meant to help them.⁶⁶ In this context, high interest fringe lenders can seem an easier, friendlier solution than dealing with a non-profit government agency. In addition, many institutional interventions designed to assist welfare recipients in fact patronise and stigmatise them.⁶⁷ For example, welfare recipients are commonly required to attend financial literacy programs, which assumes they have brought this situation on themselves through incapable management

59 *Concluding observations of the Committee on Economic, Social and Cultural Rights—New Zealand E/C12/NZL/CO/3* (2012) at [22].

60 Corazon Miller “Social housing cost \$16b” *New Zealand Herald* (online ed, Auckland, 30 June 2017).

61 Malva, above n 49, at 23.

62 Joynt, Tuatagaloa and Lysnar, above n 1, at [3.3.3].

63 At [4.2].

64 At [4.2].

65 At [4.6] and [4.11].

66 At [4.6] and [4.11]. See also Hulita Fe’iloaki ‘Ofa-He-Lotu Tauveli “Poverty, home and belonging among two Pacific families in Auckland” (MSc Thesis, University of Auckland, 2015) at 132.

67 Joynt, Tuatagaloa and Lysnar, above n 1, at [4.6].

of their finances, and reinforces the idea they are ‘undeserving’ beneficiaries of the state.⁶⁸ In contrast, people on low income are usually highly aware of the importance of carefully managing their money, and simply do not have enough income to meet all their basic needs; a difficult financial conundrum coined as “heat or eat”.⁶⁹ In order to encourage Pacific people to utilise increased social housing provision and improve housing affordability for them, it will be necessary to redress previous instances of victimisation by the State, promote more equal power relations between welfare agencies and recipients, and remove the personal, social and institutional stigmas against receiving social welfare.

B Improving housing affordability for Pacific people in Auckland through extension of capital gains tax

The Organisation for Economic Co-operation and Development (OECD) observed that the lack of a capital gains tax in New Zealand exacerbated inequality, undermined housing affordability, and “reinforce[d] a bias toward speculative housing investments”.⁷⁰ As high-income earners hold most of their income in capital gains, their wealth is advanced by the lack of capital gains tax.⁷¹ Meanwhile, low to middle income earners suffer from the lack of capital gains tax, as they are less likely to own property from which to make a tax-free capital gain, and the redistributive potential of taxation to them is reduced.⁷² On the basis of these observations, the OECD strongly recommended the implementation of a capital gains tax in New Zealand.⁷³

The New Zealand government has addressed these concerns to some extent with the introduction of the Taxation (Bright-Line Test for Residential Land) Act 2015.⁷⁴ The bright-line test provides that capital gains made through selling residential land within two years of buying it are taxable, unless the property is the person’s main home.⁷⁵ As houses bought and sold within a short period are now subject to tax, the test removes some of the bias in favour of market speculation, thereby slowing the rapid progression of house prices.⁷⁶ However, I contend that this change is too incremental overall, and that the exclusion of the main home from the bright line test significantly reduces its potential to address inequality and improve housing affordability in Auckland.⁷⁷

Under the main home exception to the bright-line test, high-income earners who can afford to own a home in Auckland continue to have their wealth advanced.⁷⁸ This is because home-owners are able to utilise their home for the dual purpose of living there, and investing in an asset which confers greater financial benefits than other (taxed) assets.⁷⁹ In comparison, low to middle income earners who cannot afford to own a home

68 At [4.6]. See also Tauveli, above n 66, at 32.

69 Joynt, Tuatagaloa and Lysnar, above n 1, at [4.6].

70 *OECD Economic Surveys: New Zealand* (June 2013) [OECD 2013] at 22. See also *OECD Economic Surveys: New Zealand* (April 2011) [OECD 2011] at 77.

71 OECD 2013, above n 70, at 22.

72 At 22.

73 At 24.

74 Michelle Tustin “Legal Interventions to Meaningfully Increase Housing Supply in New Zealand Cities with Housing Shortages” (2017) 48 *VUWLR* 133 at 158.

75 Taxation (Bright-Line Test for Residential Land) Act 2015 ss CB 6A(1) and CB 16A(1).

76 Tustin, above n 74, at 158.

77 At 158.

78 Julie Cassidy and Clinton Alley “Capital Gains Tax: Lessons From Across the Ditch” (2012) 18 *NZBLQ* 97 at 122.

79 At 157.

can only utilise the place they live for that singular purpose, and are limited in their ability to make tax-free profits in other areas.⁸⁰ As Pacific people in Auckland have the lowest home ownership rate by ethnicity and a rapidly declining home ownership rate,⁸¹ they fall into the latter group of people who are not favoured by the bright-line test.

In order to improve housing affordability for Pacific people in Auckland, the bias towards home owners, and thereby high-income earners, through the ‘main home’ exception needs to be removed. By extending capital gains tax to the main home, the fairness of the bright-line tests application and the redistributive potential of taxation will be improved. Furthermore, the extension of a capital gains tax will reduce the desirability of a house as an asset, therefore the artificial inflation of house prices will be reduced, improving housing affordability.⁸²

C Improving housing affordability for Pacific people in Auckland through recognising a social right to housing in domestic law

The International Covenant on Economic, Social and Cultural Rights (ICESR); the International Convention on the Elimination of All Forms of Racial Discrimination; and the United Nations Convention of the Rights of the Child are the primary sources of New Zealand’s international law obligations to ensure the right to housing. While these treaties are in force and ratified in New Zealand, the right to housing they prescribe is not enforceable or judiciable until it is incorporated into New Zealand statute. I contend that the right to housing is a fundamental human right which should be incorporated into the New Zealand Bill of Rights Act 1990 (BORA 1990), in order to promote greater equality in access to adequate and affordable housing in New Zealand. Through incorporating this right into the BORA 1990, Parliament will be obliged to act consistently with this right rather than following the popular vote, and the courts will be able to act as a check on Parliament if the right is breached.⁸³ By recognising a right to housing in New Zealand law, housing affordability for Pacific people in Auckland will be improved, and they will be provided with protection from any future enactments with the potential to negatively impact housing affordability.

(1) New Zealand’s obligations at international law

New Zealand is a signatory to the ICESR, which demonstrates a recognition by the New Zealand Government of “the right of everyone to an adequate standard of living for himself and for his family, including adequate ... housing”, and obliges the Government to “take appropriate steps to ensure the realization of this right”.⁸⁴ New Zealand is also a signatory to the International Convention on the Elimination of All Forms of Racial Discrimination, which obliges the Government to:⁸⁵

80 OECD 2011, above n 70, at 72.

81 Joynt, Tuatagaloa and Lysnar, above n 1, at 12 and 13.

82 Tustin, above n 74, at 157.

83 Joss Opie “A Case for Including Economic, Social and Cultural Rights in the New Zealand Bill of Rights Act 1990” (2012) 43 VUWLR 471 at 493.

84 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 11(1).

85 International Convention on the Elimination of All Forms of Racial Discrimination 660 UNTS 195 (opened for signature 21 December 1965, entered into force 4 January 1969), art 5(e)(iii).

... undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone ... to equality before the law, notably in the enjoyment of the following rights ... [including] [t]he right to housing.

The United Nations has also specified that the right to housing encompasses more than just shelter, and that the seven standards of security of tenure, habitability, accessibility, affordability, availability of services and infrastructure, location, and cultural adequacy must be met to realise the right.⁸⁶ However, Parliament is not obliged to take into account the right to housing until it is codified.⁸⁷ Furthermore, the right to housing is not judiciable, therefore the Courts cannot consider instances in which this right may have been breached.⁸⁸

The New Zealand Government's lack of compliance with its international legal obligations and inaction in relation to implementing the right to housing into statute has been raised in various United Nations committee reports. In 2012, the Committee on Economic, Social and Cultural Rights called on the New Zealand Government to "ensure that its enactments and policies guarantee the right to adequate housing for everyone".⁸⁹ In 2016, the Committee on the Rights of the Child drew particular attention to the disproportionate number of Pasifika and Māori children being deprived of the right to adequate housing.⁹⁰ In this instance, the Committee urged the New Zealand Government to take immediate action by "improving housing conditions, especially for Māori, Pasifika, and children living in poverty",⁹¹ to "[i]ntroduce a systemic approach to addressing child poverty, in particular Maori and Pasifika children",⁹² and to "[s]trengthen its social protection mechanisms and intensify its efforts to provide safe and adequate housing to all children".⁹³ Due to the failure of the Government to ensure adequate and affordable housing for Pacific people in Auckland, and Parliament's introduction of retrogressive legislation such as the HASHAA 2013 and the Housing Corporation (Social Housing Reform) Amendment Act, I contend that it is necessary to codify the right to housing within the BORA 1990 in order to improve housing affordability for Pacific people in Auckland.

(2) Incorporating a right to housing within the BORA 1990

The right to housing is a fundamental human right and should be recognised as such through its inclusion in the BORA 1990. Recognising a right to housing would give rise to two important changes. Parliament would be obliged to consider the right and enact consistent legislation, and the Court would have jurisdiction to consider and remedy potential breaches of the right.⁹⁴

86 Office of the United Nations High Commissioner for Human Rights *UN Habitat: The Right to Adequate Housing* Fact Sheet No 21/Rev 1 (November 2009) at 3–4.

87 Opie, above n 83, at 481.

88 At 493.

89 *Concluding observations of the Committee on Economic, Social and Cultural Rights—New Zealand*, above n 59, at [22].

90 Committee on the Rights of the Child *Concluding Observations on the fifth Periodic Report of New Zealand* CRC/C/NZL/CO/5 (30 September 2016) at [35].

91 At [31(b)].

92 At [36(a)].

93 At [36(c)].

94 Opie, above n 83, at 493.

First, the BORA 1990 provides that the preferred interpretation of an enactment shall be that which is consistent with the Act,⁹⁵ and that the Attorney-General has an obligation to report to Parliament where any provision in a Bill appears to be inconsistent with the Act.⁹⁶ Therefore, the inclusion of a right to housing within the Act will make it more likely that the right will be expressly taken into account by Parliament, and that it will have the ability to substantively influence policy decisions.⁹⁷ For example, the right will limit the ability of political parties to create housing policy which is favourable to high earners and home-owners (at the expense of many Pacific people who can't afford their own home) in order to win the home-owner vote.⁹⁸ I believe that this assurance of a social right to housing will also help to shift political and societal conceptualisation of the home from an opportunity for financial gain to a basic and essential psychological need which should be accessible, affordable, and adequate for all New Zealanders.⁹⁹ Furthermore, if Parliament enacted legislation inconsistent with the right, the Court could make a declaration to that effect and require Parliament to either modify the policies to ensure consistency, or expressly override the right.¹⁰⁰ This provides a necessary restraint on Parliament's power to dismiss or diminish the right to housing.¹⁰¹

This brings us to the second major change enabled by the inclusion of the right to housing in the BORA 1990: the justiciability of the right.¹⁰² As the rights in the BORA 1990 are justiciable, the Courts would have jurisdiction to consider potential breaches of the right to housing, and provide remedies such as declarations or damages if there was a breach.¹⁰³ As the group that has been most marginalised in relation to access to affordable housing in Auckland, I contend that Pacific people would greatly benefit from the recognition of a fundamental and justiciable right to housing.

The potential for a justiciable right to housing to improve housing affordability can be identified through consideration of the case *Lawson v Housing New Zealand*.¹⁰⁴ In this case, Lawson applied for judicial review of Housing New Zealand's decision to impose a market-based rent on social housing properties, in contrast to the previous income-based rent. Lawson argued that this decision breached her right not to be deprived of life,¹⁰⁵ on the basis that she was being denied access to housing, a necessary of life, as she was no longer able to pay rent.¹⁰⁶ This argument was unsuccessful. The Court held that her proposed interpretation of the right under s 8 was "unduly strained",¹⁰⁷ that inadequate or unaffordable housing that is harmful but has non-fatal results is not covered by the right,¹⁰⁸ and finally that New Zealand's international obligations in relation to the right to housing could not be judged by the Court.¹⁰⁹ In contrast, if a right to housing was

95 Bill of Rights Act 1990, s 6.

96 Section 7.

97 Opie, above n 83, at 499.

98 Jonathan Barrett "'The Castle Doctrine' and Preferential Tax Treatment of Owner-occupied Property" (2016) 22 NZJTL 255 at 272.

99 At 257.

100 Opie, above n 83, at 502.

101 At 516.

102 At 479.

103 At 479.

104 *Lawson v Housing New Zealand* [1997] 2 NZLR 474 at 494.

105 Bill of Rights Act 1990, s 8.

106 *Laws of New Zealand* Right Not to be Deprived of Life (online ed) at [75].

107 *Lawson*, above n 104, at 495 as cited in Opie, above n 83, at 492.

108 *Laws of New Zealand*, above n 106, at [75].

109 *Lawson*, above n 104, at 498–499 as cited in Opie, above n 83, at 493.

incorporated into the BORA 1990 and therefore made justiciable, the effect of Housing New Zealand's decision on housing affordability could have been considered further by the Court. The Court would have been able to analyse whether Housing New Zealand's decision constituted a retrogressive measure in relation to the right to housing, and whether Lawson's right to housing had been breached.¹¹⁰ Consideration of how a justiciable right to housing would have changed the Court's analysis in the *Lawson v Housing New Zealand* case demonstrates the way in which this right could improve policy decisions which may affect housing affordability in Auckland, including for Pacific people, by providing an important check on Parliament.

VI Conclusion

Housing unaffordability in Auckland is an issue that disproportionately affects Pacific people. In this article, I have analysed whether the HASHAA 2013, which was enacted to improve housing affordability in Auckland, is an effective way of improving housing affordability for Pacific people in Auckland. First, I identified that the creation of the HASHAA 2013 did not involve consideration of Pacific people in Auckland, and I concluded that it did not demonstrate an intention to assist Pacific people as the group most in need of affordable housing. Rather, the HASHAA 2013 focused on meeting the housing affordability needs of middle-income families. Secondly, I analysed the Auckland Council's interpretation and application of the affordable housing provisions within the Act. I concluded that the Council's market-based approach to affordable housing was significantly flawed, and that the Act was not an effective way of improving housing affordability for Pacific people in Auckland. Thirdly, I considered what is required to improve housing affordability for Pacific people in Auckland and made three proposals for legislative reform which I contend would be more effective in achieving these ends than the HASHAA 2013. I proposed social housing reform to improve (and retain) the supply of affordable housing in Auckland and the introduction of a capital gains tax to improve the redistributive power of tax. This would also remove the current tax-preferential treatment of home-owners. Lastly, I proposed that a social right to housing be incorporated into the BORA 1990. This would oblige Parliament to consider the right when enacting legislation and give the courts jurisdiction to consider and remedy potential breaches of the right. These proposed reforms have the potential to provide a more effective means of improving housing affordability for Pacific people in Auckland. Compared to the HASHAA 2013, they provide necessary regulation and subversion of the market, rather than following it, and promote a radical reconceptualisation of housing as a social right, rather than an opportunity for financial gain.

110 Opie, above n 83, at 493.