

ARTICLE

Legislative Recognition of the Human Right to Accessible Housing in Aotearoa New Zealand

BEN STEWART*

Aotearoa New Zealand is a signatory to a range of international instruments that acknowledge a universal human right to housing. This includes a right to physically accessible housing for disabled and disadvantaged people. Aotearoa New Zealand is currently experiencing a highly publicised housing affordability crisis. It is lesser-known among the general population that there is a second housing crisis that has been largely ignored for decades. The second crisis concerns the inadequate housing stock, which prevents the disabled community from accessing appropriate accommodation. This lack of accessible housing is a clear breach of disabled people's human rights. The government's preferred response to this issue has been to retrofit modifications for disabled people on an ad hoc basis. Evidence suggests that this is a costly and ineffective solution. In addition, the existing problem will worsen: as the size of the elderly population increases, so too will the prevalence of mobility impairments in the community. Consequently, the government's policy approach requires urgent change. This article explores practical solutions to the issue by analysing the legislative approaches from other jurisdictions and previous domestic policy research that the government has seemingly failed to pick up.

I Introduction

This article has two primary purposes. First, this article will argue that Aotearoa New Zealand housing laws and policies do not address the right of disabled people to adequate housing. Secondly, this article will make policy recommendations that Aotearoa New Zealand could adopt to implement this right more effectively.

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Three key sub-issues guide the focus of this article. The first is to define the extent of the human right to accessible housing. The second issue requires an examination of Aotearoa New Zealand's existing legislative and policy framework to evaluate current efforts to uphold this right. Finally, this article will consider the policies of international jurisdictions such as Australia, and Aotearoa New Zealand's own research, to inform a range of appropriate solutions that could resolve the shortcomings in Aotearoa New Zealand's existing legislative framework.

The first section of this article will discuss the current shortage of accessible housing in Aotearoa New Zealand to illustrate the magnitude of this crisis. This first requires the defining of key terms, such as disability and accessible housing, before highlighting the severe lack of accessible housing for disabled people. This article will also briefly comment on the market forces that have led to this shortage—namely, a lack of consumer demand, which has resulted in suboptimal levels of spending in the accessible housing sector.

This article will address the first sub-issue by considering the basis of the human right to housing and the extent to which it affirms the right of disabled people to accessible housing. This involves an analysis of: the Universal Declaration of Human Rights (UDHR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the Convention on the Rights of Persons with Disabilities (CRPD). Disabled people have a human right to accessible accommodation. Governments are required to make provisions to affirm this right, to the extent that the cost is not disproportionately high or burdensome on the government. Having ratified these international agreements, Aotearoa New Zealand is subject to these obligations.

This article will then turn to the second sub-issue by evaluating the effectiveness of Aotearoa New Zealand's housing laws and policies at addressing the nationwide shortage of accessible housing. The analysis will cover the Building Act 2004, the Building Code and relevant policies implemented by various government agencies. Several systemic failures are immediately evident. Most critically, the Building Act and Building Code do not impose any accessibility requirements on residential buildings. In addition, the funding offered to retrofit houses discriminates on the basis of the cause of a person's disability. Aotearoa New Zealand's existing housing laws and policies essentially leave the problem to the private sector and are inadequate at addressing the accessible housing shortage.

The final sub-issue is whether there are any appropriate policy solutions that Aotearoa New Zealand can adopt from other jurisdictions or domestic policy research to better address its human rights obligations. This article first analyses the policies of Australia and the United Kingdom. These jurisdictions were selected because they tend to serve as benchmarks when the Aotearoa New Zealand develops new legislation. Australia is currently in the process of developing federal legislation to address this issue, while the United Kingdom already enforces visitability standards that serve alongside other optional requirements (such as wheelchair access) which can be mandated by local councils. This is a strong legislative response that strikes the balance between needing to improve accessibility regulations and avoiding the imposition of an undue or disproportionate burden on the construction sector. This article then considers local policy suggestions made by the Human Rights Commission (HRC) and CCS Disability Action.¹ In all cases, the policy recommendations were suitable to varying degrees but have been completely ignored in subsequent government policies. This lack of action suggests that these policies may have been considered “disproportionately” expensive, or that there was a lack of political will to prioritise the issue.

1 Historically known as the Crippled Children's Society, formed in 1935 by Rotary New Zealand.

After analysing the approaches taken by various jurisdictions and the suggestions made by domestic researchers, the final section of this article suggests a range of policy recommendations which could help to improve Aotearoa New Zealand's supply of accessible housing. Improved supply would ensure that the government is meeting its obligation to provide physically accessible housing to the disabled community. This article will recommend that Aotearoa New Zealand adopts tiered accessibility standards similar to those used in the United Kingdom. Tiered accessibility would involve a mandatory, baseline level of accessibility. The government should also commit to a leadership role in the accessible housing field by increasing targets for accessible state housing and by making accessibility a priority in the procurement of affordable housing projects. A range of minor measures, such as repairing the discriminatory funding model for retrofitted modifications and establishing a register of accessible properties, will also be discussed.

II Evaluating Housing Needs for the Disabled Community

A Key terms

(1) Disability

The World Health Organisation defines disability as an umbrella term that describes “impairments, activity limitations and participation restrictions” that arise from the interaction between a person and their environment.² For the purposes of this article, it is appropriate to narrow the scope of this definition to people with physical and visual impairments, or chronic health issues that make certain types of houses (such as multi-storey units without a lift) unsuitable to live in. The United Nations Committee on Economic and Social Rights identifies these disadvantaged groups as requiring “some degree of priority consideration in the housing sphere”.³

As of 2013,⁴ “[a]n estimated 14 per cent of the New Zealand population (632,000 people) reported that a physical impairment limited their everyday activities.”⁵ Approximately 168,000 people (four per cent of the population) had a visual impairment.⁶ Another report found that 17 per cent of people with physical impairments and 16 per cent of people with visual impairments are currently in homes that require modification to suit their needs.⁷

2 World Health Organization *World Report on Disability* (2011) at 4.

3 United Nations Committee on Economic, Social and Cultural Rights [UNCESCR] *CESCR General Comment No 4: The Right to Adequate Housing (Art 11 (1) of the Covenant)* UN Doc E/1992/23 (13 December 1991) at [8(e)].

4 The Stats NZ Disability Survey is conducted, and therefore this data is updated, once every decade. The next update is due in 2023. See “Disability Survey 2023: Consultation” (6 September 2021) Stats NZ <www.stats.govt.nz>.

5 Statistics New Zealand *Disability Survey: 2013* (17 June 2014) at 5.

6 At 6.

7 Stats NZ *Disability and housing conditions: 2013* (2016) at 9–10.

(2) Accessible housing

A person's level of impairment is determined by their disability and their physical environment.⁸ A purpose built, accessible home will allow a disabled person to live a more independent and fulfilling life, compared to a dwelling that does not take that person's needs into account.⁹

It is important to clarify what constitutes accessible housing in this context. Here, it is appropriate to adopt the Lifemark Standards which are currently used in Aotearoa New Zealand. Lifemark was established by CCS Disability Action, and its primary purpose is to certify and promote accessible housing in Aotearoa New Zealand.¹⁰ A three-star Lifemark rating is approximately equivalent to a liveable house, offering baseline levels of accessibility.¹¹ A four-star rating is designed for ageing in place, allowing for future adaptations "at minimal cost", while a five-star rating is awarded to homes that are "fully accessible now".¹²

B Housing outcomes for the disabled community in Aotearoa New Zealand

Recent media coverage has highlighted the human tragedy behind the lack of accessible housing in Aotearoa New Zealand. In one case, a seven-year-old boy with cerebral palsy was forced to sleep in an uninsulated garage with his mother and sister.¹³ A social worker described the clearly unsuitable living situation as life-threatening.¹⁴ His mother was offered a number of inaccessible state houses, including motel units with stairs, before the issue was expedited by then then-Associate Minister of Housing, the Hon Kris Faafoi MP.¹⁵ Unfortunately, this example is not an uncommon experience in Aotearoa New Zealand. In June 2020, there were 930 people on the waiting list for an accessible state house.¹⁶

There is currently no government-held data available to identify the scale of this issue. Mr Faafoi was unable to provide any data about the number of fully accessible state houses when interviewed about the case of the boy with cerebral palsy. Kāinga Ora—Homes and Communities (Kāinga Ora) is currently undertaking a project to gather data about the disabilities and housing requirements of public housing clients, but this is a relatively narrow segment of the overall housing sector.¹⁷ Consequently, it is necessary to rely on third-party estimates to evaluate the scale of this problem. Drawing on their accreditation statistics and comparative international data, Lifemark has estimated that only two per cent of new houses in Aotearoa New Zealand would have a three-star rating.¹⁸ Additionally, Lifemark estimates that 8,000 accessible homes will need to be built annually for a decade to meet the existing shortfall. Prefab New Zealand, a non-profit group that

8 World Health Organization, above n 2, at 4.

9 At 4.

10 CCS Disability Action *Joint briefing to Hon Phil Twyford, Minister of Housing* (13 November 2017) at 5.

11 At 11.

12 Lifemark *Lifemark Design Standards Handbook* (April 2012) at 6.

13 Lisa Owen "Boy with disability living in garage, as family waits on Housing NZ for home" (23 June 2020) RNZ <www.rnz.co.nz>.

14 Owen, above n 13.

15 Owen, above n 13.

16 Owen, above n 13.

17 Kāinga Ora – Homes and Communities *Accessibility Policy 2019 – 2022* (2019) at 19.

18 CCS Disability Action, above n 10, at 1. This methodology was confirmed by email correspondence with Lifemark General Manager, Geoff Penrose.

advocates for increased prefabricated construction, forecasted that there will be an undersupply of 240,000 accessible homes by 2039.¹⁹

Within the private sector, disabled people face barriers with both renting and buying homes. Given the lack of appropriate housing supply, disabled people experience “major difficulty” when attempting to purchase a home that is suitable for their needs.²⁰ The same is true in the rental market, where there is the added perception that landlords view disabled people as difficult tenants.²¹ Moreover, the shortage of accessible housing is likely to continue to worsen as the proportion of elderly people in the population increases. Many elderly people require similar accessibility modifications, such as handrails and ramps, meaning that the overall demand for accessible homes will increase.²²

III Accessible Housing as a Universal Human Right

This section will outline the scope of the universal human right to accessible housing. It does not intend to suggest that any new policy must realise these rights immediately. This would be unrealistic and unachievable in the short term. Likewise, it is unrealistic to expect the government to immediately implement recommendations made by the United Nations General Committees. Such recommendations are included to create a benchmark by which to compare the existing regulatory regimes of Aotearoa New Zealand.

A *The human right to adequate housing*

The human right to adequate housing was formally recognised in the 1948 UDHR.²³ The right to adequate housing was later affirmed in art 11(1) of the ICESCR, which states:²⁴

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.

In 1991, the United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) found that there was a “disturbingly large gap” between the affirmation made in the ICESCR and what was occurring in practice.²⁵ The UNCESCR went on to make several general comments intended to assist states to properly uphold the right to adequate

19 Bev James and others “Doing Better – A review of beyond New Zealand Building Code research and traction through residential building accessibility and energy efficiency tools” in Bev James and others (eds) *Doing Better in Residential Dwellings: Going Beyond the Code in Energy and Accessibility Performance* (BRANZ, Report ER27, 1 December 2017) Annex B at 19–20.

20 Ripu Bhatia “‘Barrier after barrier’ as disabled community locked out of housing” (16 May 2019) Stuff <www.stuff.co.nz>.

21 Eleanor Wenman “‘Easy’ tenants pushing out disabled renters” (2 February 2018) Stuff <www.stuff.co.nz>.

22 Statistics New Zealand *How will New Zealand’s ageing population affect the property market?* (April 2013) at 9.

23 *Universal Declaration of Human Rights* GA Res 217A (1948), art 25(1).

24 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).

25 UNCESCR, above n 3, at [4].

housing. First, the UNCESCR emphasised that the right to housing should not be construed narrowly: it should be the “right to live somewhere in security, peace and dignity”.²⁶ The UNCESCR then outlined aspects of “adequate housing” that are universal across all states, independent of economic and social factors. These universal characteristics are: legal security of tenure; availability of services and infrastructure; affordability; habitability; suitability of location; cultural adequacy; and accessibility.²⁷ Regarding accessibility, the UNCESCR explicitly stated that disadvantaged groups must be granted “full and sustainable access to adequate housing resources”.²⁸ Listed examples of “disadvantaged groups” include the physically disabled, the elderly and persons with persistent medical problems.²⁹ The UNCESCR recommended that these groups are granted “some degree of priority consideration in the housing sphere”, and that domestic housing laws and policies must fully account for their “special housing needs”.³⁰

B Adequate housing and disabilities

People with disabilities are often unable to fully enjoy their right to adequate housing.³¹ The UNCESCR noted that people with disabilities are “often denied the opportunity to enjoy the full range of economic, social and cultural rights recognized in the [ICESCR]”, even in relatively wealthy countries.³² Critically, it was highlighted that over-reliance on free market forces without adequate government intervention will always produce instances of “unsatisfactory results for persons with disabilities”.³³ There is a need to regulate market forces to prevent arbitrary constraints on the ability of disabled people to participate fully in society.³⁴ This advice is particularly relevant in Aotearoa New Zealand, given the preference of successive governments for light-handed regulation since major reforms in the 1980s.

Common barriers to full enjoyment include a lack of physically accessible design, ongoing discrimination, institutional hurdles, lack of access to the labour market, low income and a lack of social housing.³⁵ The United Nations has identified insufficient physical accessibility as a key issue that has resulted in the ongoing marginalisation and exclusion of disabled people.³⁶

These barriers are addressed in the CRPD. The CRPD shifts the paradigm for disability human rights away from forcing disabled people to accept inconsistent and discriminatory treatment and towards entitling them to live full and independent lives.³⁷ Article 5 of the CRPD requires all states to take “all appropriate steps to ensure reasonable

26 At [7].

27 At [8].

28 At [8(e)].

29 At [8(e)].

30 At [8(e)].

31 Office of the United Nations High Commissioner for Human Rights *The Right to Adequate Housing* (Fact Sheet No 21/Rev 1, November 2009) at 23.

32 UNCESCR *CESCR General Comment No 5: Persons with Disabilities* UN Doc E/1995/22 (9 December 1994) at [1].

33 At [12].

34 At [12].

35 Office of the United Nations High Commissioner for Human Rights, above n 31, at 23.

36 At 23.

37 Leilani Farha *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/72/128 (12 July 2017) at [3].

accommodation is provided” to people with disabilities.³⁸ Article 9 requires the “identification and elimination of obstacles and barriers to accessibility”, with specific reference to housing.³⁹ Article 19 ensures that people with disabilities have the right to choose their place of residence freely, and that they have a range of accommodation options to suit their needs.⁴⁰ The CRPD puts the burden on lawmakers to actively facilitate the full enjoyment of the human rights of disabled people by removing unnecessary barriers such as inaccessible housing.⁴¹ Signatories to the CRPD have a general obligation to “adopt all appropriate legislative, administrative and other measures” to implement the rights recognised in the Convention.⁴² Signatories are also compelled to modify or abolish existing laws that are discriminatory towards people with disabilities.⁴³

In this context, reasonable housing are those that contain the “necessary and appropriate modification[s]” to ensure that a disabled person is able to enjoy their home fully without “imposing a disproportionate or undue burden” on the state.⁴⁴ To ensure that the likelihood of implementation remains as high as possible, it is critical that policy recommendations do not impose a disproportionate or undue burden on the housing sector. In practical terms, this would suggest that Lifemark four- and five-star ratings are appropriate where they can be implemented without a “disproportionate” financial burden. Where financial resources are restricted, an accessible three-star home could be considered “reasonable accommodation”. To balance these issues, the CRPD helpfully suggests a clear starting point: a legislative framework that establishes national accessibility standards that can be easily monitored and enforced.⁴⁵ This is a crucial step towards affirming the right to adequate housing and will be discussed at length in the remainder of this article.

C Recognition of rights in Aotearoa New Zealand

Aotearoa New Zealand has ratified both the ICESCR and the CRPD, imposing legal obligations on the government to uphold these agreements.⁴⁶ The ICESCR and the CRPD establish progressive rights, requiring the government to take active steps towards the full realisation of the stated rights as rapidly as available resources will allow.⁴⁷

The government has completed mandatory periodic reports that outline its implementation of both the ICESCR and CRPD.⁴⁸ Since 2014, the CRPD has recommended

38 *Convention on the Rights of Persons with Disabilities* GA Res 61/106 (2006), art 5(3).

39 Article 9(1).

40 Article 19.

41 Farha, above n 37, at [39]–[41].

42 *Convention on the Rights of Persons with Disabilities*, art 4(1)(a).

43 Article 4(b).

44 Article 2, definition of “Reasonable accommodation”.

45 United Nations Committee on the Rights of Persons with Disabilities *General comment No 2 (2014) – Article 9: Accessibility* UN Doc CRPD/C/GC/2 (22 May 2014) at [28].

46 Office of the United Nations High Commissioner for Human Rights “Ratification Status for New Zealand” UN Treaty Body Database <[binternet.ohchr.org](http://internet.ohchr.org)>.

47 Human Rights Commission *Human Rights in New Zealand 2010* (2010) at 206.

48 United Nations Committee on Economic, Social and Cultural Rights *Fourth periodic report by New Zealand under articles 16 and 17 of the Covenant, due in 2017* UN Doc E/C 12/NZL/4 (17 August 2017) [*Fourth periodic report*]; and United Nations Committee on the Rights of Persons with Disabilities *Combined second and third periodic reports submitted by New Zealand under article 35 of the Convention pursuant to the optional reporting procedure, due in 2019* UN Doc CRPD/C/NZL/2-3 (11 October 2019) [*Combined second and third periodic reports*].

that “consideration be given” to ensuring new residential dwellings are accessible to the disabled community.⁴⁹ However, recent iterations of these periodic reports suggest this is not a priority. In 2017, the government indicated that it is focused on resolving the housing affordability crisis, with no discussion of housing accessibility in its ICESCR report.⁵⁰ The 2019 CRPD report outlines that the government supports universal design implementation and discusses how KiwiBuild would consider using universal design in the future.⁵¹ Leilani Farha, the former United Nations Special Rapporteur for adequate housing, noted this underwhelming plan of action, and drew the following conclusion from her 2020 visit to Aotearoa New Zealand:⁵²

While New Zealand has ratified various international human rights treaties obliging all bodies exercising government authority to respect, protect and fulfill the right to adequate housing, there is insufficient expression of this right in law, in related policy and programmes, and in their implementation.

The government is failing to ensure adequate provision of accessible housing to the disabled community, resulting in many disabled people living in unsuitable homes or without a home.

IV Housing in Aotearoa New Zealand: the Legal Framework

This section will analyse the legislative framework set out in the Building Act and the Building Code to identify its shortcomings with respect to accessible housing. It will then summarise the existing relevant policies of the various government agencies involved in supporting the disabled community. The purpose of this exercise is to identify gaps in the system that will be addressed later in this article.

A *The Building Act and the Building Code*

The Building Act provides for the regulation of building work and the licensing of building practitioners, and establishes performance standards for buildings.⁵³ The performance standards must ensure that “people who use buildings can do so safely and without endangering their health”.⁵⁴ They also ensure that “buildings have attributes that contribute appropriately to the health, physical independence, and well-being of the people who use them”.⁵⁵

The broad scope of the statutory purpose allows for an interpretation that includes the human right to adequate housing. Buildings that are not physically accessible threaten the

49 United Nations Committee on the Rights of Persons with Disabilities *Concluding observations on the initial report of New Zealand* UN Doc CRPD/C/NZL/CO/1 (31 October 2014) at [20].

50 *Fourth periodic report*, above n 48, at [195].

51 *Combined second and third periodic reports*, above n 48, at [101]–[103].

52 Leilani Farha *End of Mission Statement: Visit of the Special Rapporteur on the right to adequate housing to New Zealand* (Office of the United Nations High Commissioner for Human Rights, 19 February 2020) at [13]. The scope of Farha’s criticism encompassed New Zealand’s high rate of homelessness, housing inaccessibility and unaffordability, substandard living conditions and a lack of security of tenure.

53 Building Act 2004, s 3(a).

54 Section 3(a)(i).

55 Sections 3(a)(ii) and 3(a)(iv).

health and safety of disabled people. For example, a bathroom that is not specifically designed for the needs of disabled people may increase the risk of falls. In this way, non-inclusive designs clearly undermine the physical independence and well-being of a disabled person. If a home is designed without wheelchair ramps, a disabled person might lose their ability to move freely without assistance. This inaccessibility is also likely to have a negative effect on the person's well-being and self-worth.⁵⁶

However, residential housing is not legally required to meet any minimum accessibility thresholds. In practice, the Building Act requires that buildings accessible to members of the public must make "reasonable and adequate provision" for people with disabilities.⁵⁷ This requirement is not extended to private houses.⁵⁸ The Act also establishes the Building Code, which sets out "functional requirements" that buildings must comply with.⁵⁹ Clause D1 sets out accessibility standards with the objective of "ensur[ing] that people with disabilities are able to enter and carry out normal activities and functions within buildings".⁶⁰ This standard only applies to buildings covered by s 118, which again excludes private buildings such as residential housing.⁶¹ Additionally, cl G1 of the Building Code intends to "ensure people with disabilities are able to carry out normal activities and processes within buildings", in the specific context of personal hygiene.⁶² As with cl D1, this standard does not apply to residential housing.⁶³

The Building Code can be met by using Acceptable Solutions. The Ministry of Business, Innovation and Employment (MBIE) has produced documents which outline approved construction methods that, "if followed, must be accepted by a building consent authority".⁶⁴ New Zealand Standard 4121:2001 (NZS 4121) is an Acceptable Solution for the accessibility requirements set out in the Building Act for public buildings.⁶⁵ The purpose of NZS 4121 is to provide guidance for making buildings accessible and "fully usable".⁶⁶ Compliance with NZS 4121 ensures that public and private spaces are designed with the necessary dimensions to allow disabled people to access facilities.⁶⁷ As NZS 4121 does not apply to residential housing, the practical application is fairly limited.

The lack of basic accessibility standards in residential housing is problematic as the government is relying exclusively on private sector developers to provide accessible homes. The private sector take-up has been low, which has often been blamed on a lack of demand for accessible housing.⁶⁸ The lack of regulation has resulted in a dearth of

56 Ilan Wiesel "Living with disability in inaccessible housing: social, health and economic impacts" (study and final report, University of Melbourne, 2020) at 38–39 and 50.

57 Section 118(1).

58 Schedule 2.

59 Section 16.

60 Building Regulations 1992, sch 1 cl D1.1(c) (emphasis omitted).

61 Building Act, s 118 and sch 2.

62 Building Regulations, sch 1 cl G1.1(c) (emphasis omitted).

63 Building Act, s 118 and sch 2.

64 Ministry of Business, Innovation and Employment "Acceptable Solutions and Verification Methods" (1 December 2021) Building Performance <www.building.govt.nz>.

65 Ministry of Business, Innovation and Employment *New Zealand Building Code Handbook* (3rd ed, 14 February 2014) at 14; and Building Act, s 119.

66 Standards New Zealand *NZS 4121:2001 Design for Access and Mobility – Buildings and Associated Facilities* (2001) at 7.

67 At 7.

68 Kay Saville-Smith, Ruth Fraser and Nina Saville-Smith *Getting Universal Design into New Builds and Major Renovations* (BRANZ, Report ER19, 1 December 2016) at 14.

research investment into accessible design solutions. This has created a “vicious cycle”, whereby the lack of innovation and research is used to justify the argument that it is unrealistic to insert accessible design requirements into the building regulations.⁶⁹

Looking ahead, NZS 4121 illustrates that there is an existing mechanism for setting out and enforcing residential accessibility requirements. There is a strong argument that this type of amendment is consistent with the purpose of the Building Act. This existing standard could be developed further into an appropriate mandatory standard for private dwellings that is not unduly costly or burdensome, and insert that standard into the existing building regulations. This article will later explore the regulatory approaches in other jurisdictions to establish what this could look like in practice.

B *Government policies*

There are a range of government agencies tasked with ensuring that disabled Aotearoa New Zealanders can fully participate in society. This section will outline the policies of Kāinga Ora, the Ministry of Health and the Accident Compensation Corporation (ACC). These agencies are designed to alleviate the shortage of accessible housing. This analysis is intended to highlight systematic shortcomings in their policies that need to be addressed.

(1) Kāinga Ora

Kāinga Ora is the Crown entity tasked with acting as a public housing landlord and an urban development partner.⁷⁰ Kāinga Ora is required to contribute to “sustainable, inclusive, and thriving communities” that provide people with “good quality, affordable housing choices that meet diverse needs”.⁷¹ Additionally, they must support tenants to “lead lives with dignity and the greatest degree of independence possible”.⁷² These objectives and operating principles require Kāinga Ora to ensure that disabled social housing tenants are adequately housed by providing accessible homes that allow them to live independently and with dignity.

Kāinga Ora’s accessibility policy is constructed around three outcomes: increasing the number of homes that meet universal design standards; meeting the needs of individual customers; and improving the level of information about customer needs and accessibility of Kāinga Ora homes.⁷³ Implementation of this policy will involve a review of their universal design standards, with a commitment to at least 15 per cent of new builds meeting these standards.⁷⁴ Disability Rights Commissioner, Paula Tesoriero, recently criticised this target in the media. She stated that the target should be higher in order to at least meet existing demand.⁷⁵

Due to a lack of available data, it is not clear how many more accessible state houses are urgently required. The only statistics currently available reveal that at the end of 2019,

69 James and others, above n 19, at ii.

70 Ministry of Housing and Urban Development *Kāinga Ora Homes and Communities Factsheet* (18 May 2020) at 1.

71 Kāinga Ora – Homes and Communities Act 2019, s 12(1)(a).

72 Section 14(1)(b)(ii).

73 Kāinga Ora – Homes and Communities, above n 17, at 4.

74 At 7.

75 Checkpoint “Housing NZ’s accessible homes goal should be much higher - Disability Rights Commissioner” (24 June 2020) *Radio New Zealand* <www.rnz.co.nz>.

there were 3,964 modified homes (the level of modification is not recorded), an increase from 3,630 in 2017.⁷⁶ There was a decrease in the number of modified homes from 2015 to 2017, but this may also be attributed to a decrease in the overall public housing stock over the same period.⁷⁷

(2) Ministry of Health and the ACC

The Ministry of Health provides funding to disabled people for residential modifications that improve accessibility.⁷⁸ To qualify for funding, a person must have a disability that will last for more than six months, and the disability must stop them from doing everyday tasks.⁷⁹ This funding is typically used to fit handrails, ramps and lifts, widen doorways, convert bathrooms into wet rooms and lower kitchen benches.⁸⁰

Funding is available for modifications over \$200 and is capped at \$15,334.⁸¹ If modifications cost more than \$8,076, the Ministry will means-test the client, which may result in a partial payment for any modification costing over \$8,076.⁸² Modifications during the period in which a disabled person occupies a dwelling are estimated to cost the government between \$30,000 and \$35,000.⁸³ Funding is not granted if the modifications are considered to be “short-term”—that is, if the modifications have a useful period of less than two to three years.⁸⁴

Funding is also provided under the ACC scheme.⁸⁵ This funding is exclusively available to those with an accepted ACC claim (that is, for disability resulting from an accident).⁸⁶ Funding through ACC is not subject to the same limits as that through the Ministry of Health. This creates an inequity in the system, whereby the level of funding a person receives to modify their home depends on the cause of their disability.⁸⁷ In the decade ending in 2010, the Ministry of Health spent an average of \$4,194 per person on modifications.⁸⁸ Over the same period, ACC’s average spend on modifications per person totalled \$11,078.⁸⁹ This is an unfair and discriminatory system that should be fixed urgently.

76 Letter from Rachel Kelly (Manager Government Relations) regarding the number of modifications made to housing to make them appropriate for disabilities (23 March 2020) (obtained under Official Information Act 1982 request to the Ministry of Social Development).

77 Alan Johnson “State Housing in Aotearoa New Zealand: What future after National?” (2017) 3(2) Whanake: the Pacific Journal of Community Development 42 at 43.

78 Ministry of Health “Housing modifications for disabled people” (25 February 2019) <www.health.govt.nz>.

79 Ministry of Health “Am I eligible for Ministry-funded support services?” (14 January 2019) <www.health.govt.nz>.

80 Ministry of Health, above n 78.

81 Ministry of Health, above n 78.

82 Ministry of Health, above n 78.

83 Kay Saville-Smith and James Saville *Getting Accessible Housing: Practical Approaches to Encouraging Industry Take-up and Meeting Need* (Centre for Research, Evaluation and Social Assessment, August 2012) at [3.22].

84 Ministry of Health, above n 78.

85 Accident Compensation Corporation *Housing Modification (HMOD) and Housing Assessment (HMA) Services: Operational Guidelines* (February 2021) at 3.

86 At 3.

87 Farha, above n 52, at [49].

88 Saville-Smith and Saville, above n 83, at [3.22].

89 At [3.22].

Given the lack of accessible housing, providing funding to retrofit accessibility modifications is a critical service. It is also an incredibly inefficient solution. In the long run, it would be significantly more cost-efficient to increase the stock of new accessible housing than it would be to retrofit existing houses. Consequently, this type of funding should not be viewed as a primary policy tool to address this systemic problem. Rather, it should be utilised to ease the current problem until greater changes in the Building Code and planning rules are made to address the lack of accessible housing.

C Conclusion

The legislative and policy framework that underpins the housing market in Aotearoa New Zealand is woefully inadequate to address the lack of accessibility in the residential market. The Building Act and Building Code make no provisions for mandatory standards of any kind for residential housing. There is a systemic lack of data identifying the size of the problem, which prevents meaningful policy from being developed. Commitments to build 15 per cent of state houses with universal design represent a best guess as to the supply required in the immediate short-term. Rather than addressing systemic issues that lead to the shortage of new accessible housing, the government appears to prefer to fund retrofitted modifications on an ad hoc basis. This approach is incredibly economically inefficient. Urgent reform is required at both a legislative and ministerial policy level to address the shortage of accessible houses in the market.

V Alternative Policy Approaches

This article has emphasised the need for Aotearoa New Zealand to substantially increase the availability of accessible housing. Accordingly, section V will establish whether there are any policy measures that Aotearoa New Zealand should implement to address this issue. To do so, this section will first analyse the main policy tools used to address accessible housing in Australia and England. It will then examine policy recommendations made by Aotearoa New Zealand researchers.

A International policy solutions

(1) Australia

Like Aotearoa New Zealand, Australia has not addressed the issue of disability as broadly and promptly as the United Kingdom. A 2010 regulatory impact statement found that approximately 96 per cent of new homes in the state of Victoria lacked visitability and adaptability features.⁹⁰ Since then, federal and state legislators have made significant steps towards improving housing outcomes for the disabled community. These steps offer valuable guidance to the Aotearoa New Zealand government about politically attainable levels of accessibility regulation.

The Australian Federal Parliament is entitled to make legislation concerning disability rights under s 51 of the Australian Constitution, which empowers the Federal Parliament to legislate “with respect to ... external affairs”.⁹¹ The courts have interpreted “external

90 Victorian Department of Planning and Community Development *Visible and Adaptable Features in Housing: Regulatory Impact Statement* (2010) at 25.

91 Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict c 12, s 51(xxix).

affairs” to include the implementation of international obligations stemming from instruments such as treaties, including the CRPD.⁹² Importantly, federal legislation concerning disability rights will invalidate any inconsistent provisions within State legislation.⁹³

At a federal level, the Disability Standards 2010 set out the general requirements for access to buildings.⁹⁴ Like the Building Act in Aotearoa New Zealand, these regulations do not apply to most private dwellings because they exclude homes and apartments unless they are available for short-term rent.⁹⁵ Each state has relevant building legislation that give effect to the Building Code of Australia, which provides technical provisions through the National Construction Code (NCC).⁹⁶ Individual States are then able to provide additional regulations as required for their local communities.⁹⁷

Presently, the Australian Capital Territory, New South Wales, South Australia and Victoria have used planning laws to implement some form of accessibility regulations.⁹⁸ For example, Victoria has introduced planning provisions that require at least 50 per cent of new builds to be designed with an accessible entrance, hall, bedroom and bathroom.⁹⁹ A similar scheme exists in New South Wales. The state has published an “Apartment Design Guide” intended to assist developers in complying with local council planning regulations.¹⁰⁰

The NCC in Australia is similar to that of Aotearoa New Zealand. It provides for disability standards that could hypothetically be applied to residential homes if there was enough political willpower.¹⁰¹ This idea has much more traction in Australia. In 2010, the federal government launched voluntary liveable design guidelines and a Strategic Plan to advance national dialogue on universal design.¹⁰² The Strategic Plan stated the federal government’s aim that by 2020, all new homes would be built to universal design.¹⁰³ Whilst this target was not met, the government is working towards implementing amended design standards by 2022.¹⁰⁴ The NCC 2022 public comment draft (published in May 2021) includes performance requirements based on the Livable Housing Design Guidelines created by Livable Housing Australia, which set out three levels of accessibility specification: silver, gold and platinum.¹⁰⁵ The draft NCC 2022 includes a modified version

92 *The Commonwealth of Australia v The State of Tasmania* (1983) 158 CLR 1 [*The Tasmanian Dam Case*] at 106.

93 Commonwealth of Australia Constitution Act, s 109.

94 Disability (Access to Premises — Buildings) Standards 2010 (Cth), s 1.3.

95 Section 2.1(1).

96 Victorian Building Authority “Building regulatory framework” <www.vba.vic.gov.au>.

97 Victorian Building Authority, above n 96.

98 Australian Building Codes Board *Accessible Housing Options Paper* (September 2018) at 6.

99 Victorian Department of Environment, Land, Water and Planning *Victoria Planning Provisions* (Victoria State Government, 2020) at [55.07–7] and [58.05–1].

100 New South Wales Department of Planning and Environment *Apartment Design Guide: Tools for improving the design of residential apartment development* (July 2015) at 11.

101 Australian Building Codes Board *National Construction Code Series 2015: Volume One* (January 2015) at 190–210.

102 Livable Housing Australia *Livable Housing Design Guidelines* (2012); and Australian Department of Social Services *National Dialogue on Universal Housing Design: Strategic Plan* (July 2010).

103 Australian Department of Social Services, above n 102, at 2.

104 Australian Building Codes Board “Accessible housing” <www.abcb.gov.au>.

105 Australian Building Codes Board *NCC 2022 Public Comment Draft: Supporting Information* (May 2021), at 15–16; and Australian Building Codes Board, above n 98, at 7–8.

of the Livable Housing Design Guidelines silver standard as a mandatory performance requirement.¹⁰⁶ The silver standard provides:¹⁰⁷

- (1) A safe, continuous, step-free pathway from the street entrance and/or parking area to a dwelling entrance that is level (Note: this does not apply for blocks steeper than 1:14.)
- (2) At least one level (step-free) entrance into the dwelling to enable home occupants to easily enter and exit the dwelling.
- (3) Internal doors and corridors that facilitate comfortable and unimpeded movement between spaces.
- (4) The ground (or entry) level has a toilet to support easy access for home occupants and visitors.
- (5) The bathroom and shower is designed for easy and independent access for all home occupants.
- (6) Bathroom and toilet walls are built to enable grabrails to be safely and economically installed (immediately or in the future).
- (7) Where installed, stairways are designed to reduce the likelihood of injury and also enable a safe pathway.

The Australian Building Codes Board has said that it will also publish a separate voluntary gold standard in 2022 that will “sit outside of the NCC”.¹⁰⁸ The gold standard provides for (in addition to the Silver standard requirements):¹⁰⁹

...

- (8) The kitchen space is designed to support ease of movement between fixed benches and to support easy adaptation.
- (9) The laundry space is designed to support ease of movement between fixed benches and to support easy adaptation.
- (10) There is a space on the ground (or entry) level that can be used as a bedroom.
- (11) Light switches are located at heights that are easy to reach for all home occupants.
- (12) Occupants are able to easily and independently open and close doors.

This system appears to be analogous to the Lifemark standards established by CCS Disability Action in Aotearoa New Zealand.

The options paper initially presented to legislators proposed three legislative options: implementing most of the silver standard (five out of seven requirements, specifically, points (2)–(6) of the silver standard listed above); the entire silver standard; or the gold

106 Australian Building Codes Board, above n 105, at 15–16.

107 Australian Building Codes Board, above n 98, at 19–20.

108 Australian Building Codes Board, above n 105, at 16.

109 Australian Building Codes Board, above n 98, at 20–21.

standard.¹¹⁰ The paper noted that while the gold standard is recommended as a minimum by many disability advocates, it is likely to be a disproportional response to the lack of accessible housing, given the costs it would impose on construction.¹¹¹ By providing for the gold standard, but only mandating a modified silver standard, the NCC 2022 public comment draft is a clear attempt to strike an appropriate balance between these levels of accessibility specification.

The 2021 Regulatory Impact Assessment estimated increased costs of between \$3,847 and \$5,748 from implementing the silver standard in new builds (depending on the dwelling type).¹¹² The highest level of standards assessed (Gold +) would impose costs of between \$15,000 and \$40,000.¹¹³ Apartments are significantly more expensive to design in this manner. For example, applying the silver standard to an apartment would cost approximately \$5,784, compared to \$3,874 for a standalone house.¹¹⁴ This large discrepancy is likely due to the cost of the additional floor space required to accommodate accessibility features. However, a 2018 report estimated the costs of retrofitting existing homes to meet the same standards are substantially larger: averaging at \$77,000 for the lowest level of regulation and \$215,000 for the gold standard.¹¹⁵ This evidence strongly justifies the necessity of regulating standards for new homes as soon as possible to reduce the need for cost-inefficient modifications to existing homes in the future.

The approach to accessible social housing in some Australian states is substantially bolder than in Aotearoa New Zealand. In New South Wales, 50 per cent of all new housing built by the New South Wales Land and Housing Corporation must have gold level accessibility features.¹¹⁶ Houses constructed using New South Wales' affordable housing initiative funding must be constructed to the silver standard, and 2,200 of these homes were built in 2017.¹¹⁷ The Queensland Department of Housing and Public Works aims for 50 per cent of all social housing to achieve gold or platinum standards.¹¹⁸ The Australian initiatives highlight that the current Aotearoa New Zealand goal of building 15 per cent of Kāinga Ora homes in accordance with full universal design, with no fixed timeline, is not ambitious enough.

(2) United Kingdom

The United Kingdom government considers an “accessible home” to be one that meets four main criteria: level access to the main entrance, a flush threshold, wide doorways and a toilet at entrance level.¹¹⁹ These criteria are essentially equivalent to the “visitable” standard of accessibility. In 2018, nine per cent of homes met this threshold, and

110 At 18–21.

111 At 17.

112 The Centre for International Economics *Proposal to include minimum accessibility standards for housing in the National Construction Code Decision Regulation Impact Statement* (February 2021) at 150.

113 At 150.

114 At 150.

115 Australian Building Codes Board, above n 98, at 28.

116 Australian Network for Universal Housing Design and Rights and Inclusion Australia *Report on the achievements by the States and Territories towards the National Disability Strategy with regard to accessible housing* (2 October 2017) at 2.

117 At 2.

118 At 2.

119 United Kingdom Ministry of Housing, Communities and Local Government *English Housing Survey 2018–19: Accessibility of English Homes* (9 July 2020) at 1.

10 per cent had been altered to some degree to improve accessibility for people with disabilities.¹²⁰

Accessible housing requirements are set out in the Building Regulations 2010. From 2015, all new dwellings and those undergoing material alterations must comply with the requirements set out in M4(1).¹²¹ A home meeting this standard must have an accessible entrance, accessible sanitary facilities and at least one habitable room.¹²² The Building Regulations also make provision for two additional categories of home: M4(2) houses are “accessible and adaptable”,¹²³ and M4(3) houses are wheelchair user dwellings.¹²⁴ An M4(2) home must be suitable for a range of occupants, such as elderly people with reduced mobility,¹²⁵ whereas an M4(3) house must be suitable for an occupant in a wheelchair to make use of the entire home.¹²⁶

M4(2) and M4(3) building code requirements are optional for all new homes, or they can be implemented into a local plan once local authorities have met their statutory obligations by evaluating the need and viability of this change.¹²⁷ The Greater London Authority has made this change, requiring 90 per cent of homes to meet M4(2) standards, and 10 per cent of homes to meet M4(3) standards.¹²⁸

The United Kingdom policy is better than Aotearoa New Zealand’s policy at ensuring that the supply of accessible housing is made available to disabled people. Councils administer social housing in England, with some councils implementing a choice-based letting scheme.¹²⁹ This scheme allows prospective tenants to select houses they would like to live in—and in many cases, only disabled people can apply for the limited stock of accessible houses. A Kāinga Ora report found that most social housing providers in England are aiming for approximately 30–60 per cent of new dwellings to meet accessibility standards to broaden the choice of their disabled clients.¹³⁰ There are also numerous accessible housing registers that allow disabled people to easily find suitable homes.¹³¹

(3) Conclusion

Aotearoa New Zealand’s existing regulatory framework lacks in comparison to the existing legislation in the United Kingdom and the proposed legislation in Australia. However, the United Kingdom approach is achievable in the Aotearoa New Zealand context. This approach would not be overly burdensome on the housing sector. It would not require wholesale design changes that restrict the choices of the majority of consumers,

120 At 1.

121 Government of the United Kingdom *The Building Regulations 2010: Access to and use of Buildings Approved Document M* (NBS, October 2015) at 1.

122 At 3.

123 At 10.

124 At 23.

125 At 10.

126 At 23.

127 Jane Simpson “Standards for accessible housing in England” (3 May 2018) RIBA <www.architecture.com>.

128 Greater London Authority “Policy 3.8 Housing Choice” Mayor of London—London Assembly <www.london.gov.uk> at [3.48].

129 Government of the United Kingdom “Council housing” <www.gov.uk>.

130 Kāinga Ora – Homes and Communities, above n 17, at 46.

131 Accessible Property Register “About Us” <www.accessible-property.org.uk>; and Greater London Authority “The London Accessible Housing Register” (2021) Mayor of London—London Assembly <www.london.gov.uk>.

and it would ensure the genuine recognition of disability rights. Australia is willing to actively investigate very similar reform proposals. Aotearoa New Zealand should follow this path in the immediate future.

B *Local advocacy*

(1) 2019 building system legislative reforms and the 2020 election

In 2019, MBIE began “the most far-reaching [reforms] since the current Building Act was introduced in 2004”.¹³² This project was intended to improve the quality of product and occupational regulations, and discuss building insurance, building levies and alterations to Building Act penalties.¹³³ It is surprising that MBIE did not discuss accessibility regulations, particularly given the recent developments in the sector that had occurred in Australia. The HRC noted this failure to consider accessibility. It wrote to MBIE to suggest that the review of the Building Act should include the development of a regulatory framework that introduces universal design to the housing sector.¹³⁴ MBIE noted several submissions on this theme in the “out of scope” responses section of its report, which were not discussed further.¹³⁵ Following this, the then-Minister for Building and Construction, the Hon Jenny Salesa MP, stated that “accessibility is not currently part of the reforms to the Building Act”.¹³⁶

Omitting accessibility regulations from the Building Act review was a missed opportunity to enact meaningful change prior to the 2020 general election. The HRC was correct in outlining that the current status quo in Aotearoa New Zealand is infringing upon the human rights of disabled people.¹³⁷ A Building Act review is a logical forum to begin attempting to form a tangible solution to this problem. This recommendation will be discussed further in the following section, to explore which specific changes to the Building Act could have the most significant impact.

(2) Making disability rights real

Against this context of government inaction, the Independent Monitoring Mechanism of the CRPD released its third report, *Making Disability Rights Real*.¹³⁸ The report identified housing accessibility as a critical issue requiring urgent political attention.¹³⁹

132 Ministry of Business, Innovation and Employment *Building system legislative reform: Discussion paper* (April 2019) at 5 (emphasis omitted).

133 At 7.

134 Letter from Paula Tesoriero (Disability Rights Commissioner, Human Rights Commission) to the Building Policy Team at the Ministry of Business, Innovation and Employment regarding the Human Rights Commission’s submission on the Building System Legislative Reform (13 June 2019) at [14].

135 Ministry of Business, Innovation and Employment *Building System Legislative Reform Programme: Summary of submissions* (August 2019) at 77.

136 Mandy Te “Accessibility and universal design not part of Building Act reforms” (22 October 2019) Stuff <www.stuff.co.nz>.

137 Farha, above n 52, at [12].

138 *Making Disability Rights Real, Whakatūtu Ngā Tika Hauātanga: Third report of the Independent Monitoring Mechanism of the Convention on the Rights of Persons with Disabilities* (June 2020).

139 At 14.

The report made a range of bold policy recommendations, such as ensuring that all new houses are built to universal design standards, and requiring Kāinga Ora to commit to retrofitting or replacing all existing housing stock within the next 10 years.¹⁴⁰ These are exceptional policies that would make a significant difference in remedying the existing shortage of accessible housing. However, the lack of political impetus on this issue suggests that bold and aspirational policies will be passed off as too expensive and difficult to implement. For this reason, these two policy recommendations from the Independent Monitoring Mechanism report are adapted in this article's final recommendations to be easier and quicker to implement.

The report also made other minor recommendations that address specific issues raised in this article. These recommendations will be adopted in the following section. These include remedying the discriminatory funding model for retrofitted modifications,¹⁴¹ completing an accessibility audit of state housing to determine the existing need,¹⁴² and redesigning NZS 4121 to provide the construction sector with clear guidance moving forward.¹⁴³

(3) CCS Disability Action

In 2017, CCS Disability Action provided the then-Minister for Housing, the Hon Phil Twyford MP, with a joint briefing, recommending urgent action to improve the supply of accessible housing.¹⁴⁴

The briefing recommended that Lifemark standards be included in the KiwiBuild programme.¹⁴⁵ This inclusion could have resulted in the construction of 100,000 affordable homes that achieved the Lifemark three-star accessibility rating. KiwiBuild potentially offers high-volume procurement opportunities that could be leveraged to rapidly stimulate demand for accessible design. The influx of funds would help to get the private sector out of the existing innovation chasm, and improve the private sector's knowledge of—and familiarity with—accessible design. For this reason, KiwiBuild procurement policies will be discussed further in the final section of the article.

The joint briefing also recommended that all social and affordable housing should achieve Lifemark four- and five-star ratings.¹⁴⁶ Kāinga Ora currently aim to ensure that 15 per cent of social housing meets universal design standards. It is likely that the economic cost of ensuring that the entire social housing stock achieves a Lifemark four-star rating would be considered an “undue burden” on the government. This is due to the relatively high cost of retrofitting existing homes and the diminishing marginal returns that would arise from creating accessible homes for people who do not need the additional features. Concerns about an undue burden is the likely justification for the alternative approach taken by New South Wales and Queensland. Both states have aimed to provide accessible housing in 50 per cent of their social housing stock. So, implementing such a compromise is also appropriate in Aotearoa New Zealand.

140 At 28–30.

141 At 28–30.

142 At 75.

143 At 118–119.

144 CCS Disability Action, above n 10, at 1–2 and 4.

145 At 2.

146 At 2.

Additionally, CCS Disability Action recommended that a Lifemark three-star rating become a minimum requirement for all housing.¹⁴⁷ This should be adopted as a long-term goal by the government. Attempting to achieve this in the short term would require immense public spending, slow down other attempts to resolve the wider housing crisis and exceed the obligations of the government under the CRPD. A more pragmatic approach would introduce a minimum standard for all new builds and material alterations to rapidly improve the supply of accessible housing in the short-term. This approach would ensure accessibility improvements in existing housing stock in the long-term, as older houses would undergo material renovations to bring them in line with the new standards. This approach is similar to the current United Kingdom approach and will be discussed in relation to the Aotearoa New Zealand regulatory system in the final section of the article.

VI Policy Recommendations

A *Building Code reforms*

Aotearoa New Zealand has significant scope to improve its building regulations to better serve the disabled community. This article proposes that Aotearoa New Zealand adopts a similar approach to that of the United Kingdom, with a mandatory base-level accessibility requirement that does not impose an undue burden on the construction industry. An additional two levels of accessible design requirements should also be developed, which could then be imposed by local councils when and where appropriate. The most cost-effective and pragmatic approach would be for the government to work with Lifemark to develop the accessible design requirements based on its existing star rating accreditation system. This will help to ensure that there is consistency across the sector. This may involve re-writing the existing NZS 4121, or establishing a new set of standards exclusively designed for residential use. Developing and testing a range of acceptable solutions prior to launching the standards is essential to minimise any potential construction delays at a time where increasing the supply of housing is imperative.

This article recommends the introduction of three new standards. The first standard should set out a mandatory level of accessibility, which should include access to a bathroom and bedroom—similar to the M4(1) standard in the United Kingdom and the existing three-star Lifemark rating. It should be noted that this stops short of a universal design standard. However, the government is currently attempting to address a desperate shortage of housing supply, and imposing stricter accessibility regulations may be a disproportionately expensive burden on developers which could slow any such developments. An M4(1) equivalent standard is an appropriate compromise supported by international precedents. Mandatory standards at this level will enable disabled people to participate socially, stay with friends and family, and would substantially reduce the cost of the necessary modifications if disabled people want to move into the home on a permanent and independent basis.

The second standard would impose a higher level of accessibility, roughly equivalent to the Lifemark four-star rating and the English M4(2) standard. This would offer a higher level of accessibility and reduce the costs of potential modifications even more significantly in the future. The final standard would set out requirements for full universal design, allowing full wheelchair access to the entire home, as seen in the United Kingdom

147 At 2.

M4(3) standard. Although not mandatory, developing two additional standards would be a clear signal to the market that the government is committed to addressing this issue. This will also likely stimulate investment into research and development of new accessibility solutions and raise public awareness, which should empower local councils to impose higher standards where appropriate.

Once the new standards are developed, minor amendments to the Building Act and Building Code would be required. Section 118 of the Building Act, which previously excluded residential homes from accessibility requirements, clearly requires amendment. By removing the explicit exclusion of residential homes, the relevant accessibility standards would apply to all new residential buildings and any major alterations that require a building consent. This provision is important as it will increase the rate at which retrofitting occurs, reducing the lag in accessible design uptake that occurs due to housing stock inertia. To ensure that this does not impose undue burdens on homeowners, it would be pragmatic for the government to establish an exemption from the new standards for financially insignificant alterations. The Building Code will also need to be updated to include the mandatory accessibility standards that are addressed in the first recommended standard. Compliance with the new standards will be assessed by council building inspectors, who should also be empowered to certify homes that meet the higher accessibility standards.

B Central government procurement

The commitment to develop accessible state housing in Aotearoa New Zealand falls well short of that in Australia. It is critical that the Aotearoa New Zealand government takes a leadership role to ensure that accessible design becomes a mainstream element of the construction sector. Kāinga Ora should immediately aim to ensure that at least 50 per cent of new homes are built to the maximum level of accessibility (full universal design), in line with the approach in New South Wales. Alongside the new mandatory requirements, this goal will ensure that the needs of all state housing tenants are adequately met. In addition, this will rapidly stimulate demand for the products and architectural services required to implement full universal design. This will lead to increased product development and supply chain improvement, and help to cement accessible design as a mainstream element of residential construction in Aotearoa New Zealand.

The government should take the same approach to procurement for KiwiBuild, which is often contracted out to third party developers.¹⁴⁸ The current Government Procurement Rules require that government agencies try to achieve “public value, and drive innovation and performance”.¹⁴⁹ Public value is not a strictly financial measure—it involves using procurement to achieve good quality outcomes that have social and economic benefits.¹⁵⁰ This can clearly be interpreted to include the benefits that are associated with accessible design. Consequently, Kāinga Ora could require that private sector bids to develop KiwiBuild homes must commit to developing a certain standard of house above the mandatory accessibility requirements. This commitment would help to stimulate the supply of affordable accessible homes in the short term and help to make accessible design a mainstream concept.

148 KiwiBuild “About us” (24 May 2021) <www.kiwibuild.govt.nz>.

149 New Zealand Government Procurement *Government Procurement Rules* (4th ed, Ministry of Business, Innovation and Employment, Wellington, 2019) at 10 (emphasis omitted).

150 At 11.

C Additional government measures

There are a range of relatively minor changes that could be made to support the more significant legislative and policy changes suggested above. These are set out below.

First, there is a shocking lack of data available in Aotearoa New Zealand regarding the accessibility of Aotearoa New Zealand housing stock. The government cannot adequately address this issue without understanding the scope of the problem. Fixing this issue could involve commissioning a study or requiring households to undergo an inspection (like the 2019 healthy homes standards).¹⁵¹ Realistically, this issue could also be resolved in a cost-effective manner by introducing housing accessibility questions in the next census.¹⁵²

Secondly, the government should improve the consumer information available to disabled people who are searching for a suitable home. It would be most efficient to require real estate and letting agencies to establish a register of available accessible properties. This register would allow consumers to filter properties by accessibility levels, in the same manner as for the price or the number of bedrooms, making it substantially easier for disabled people to locate appropriate accommodation. Eventually, this change will also provide a general indication of the quantity of accessible housing available within local housing stock.

Thirdly, there should be no discrepancy in funding from the Ministry of Health and ACC for disabled people seeking to modify their home. It is unacceptable that the current system financially disadvantages those who did not become disabled in an accident. The solution to this issue is to increase funding for the Ministry of Health. The government should only fund retrofitted modifications in specific instances where a disabled person has an urgent need—for example, a family that, without retrofitted modifications, would otherwise be unable to locate a suitable state house. It is very cost inefficient, and funding is better spent on other solutions discussed in this article.

Finally, to encourage residential development above the mandatory standards, the government should provide funding to local councils to discount building consent fees for applications that include certification of a higher accessibility level. This financial incentive may encourage people who are engaging in smaller private developments (such as constructing a first home) to investigate the feasibility of including universal design in their home designs. This financial incentive should be complemented by government-funded demonstrations that clearly explain the long-term benefits of accessible design. Although the rights of disabled people are the focus of this article, it would be pragmatic for these demonstrations to also focus on the benefits of accessible design for the ageing population, to ensure that most consumers are able to identify a self-interest that justifies an investment into accessibility features.

VII Conclusion

This article has argued that Aotearoa New Zealand legislation and government policies do not adequately address the right of disabled people to accessible housing. Despite ratifying both the ICESCR and the CRPD, Aotearoa New Zealand is not currently upholding

151 See Phil Twyford “Standards to make homes warm and dry released” (press release, 24 February 2019).

152 The next census is due to occur in 2023.

these explicit human rights obligations and there is no clear plan to remedy the issue. This article therefore suggested a range of policy solutions taken from international examples and domestic research that could be implemented to improve the existing situation.

This article then analysed the existing statutory and policy framework in the housing sector, to determine the extent to which the law currently addresses the human right to accessible housing. It is very clear that the law fails to address this issue sufficiently. Without any mandatory standards in the Building Act or Building Code, or flexibility for councils to impose standards in areas of high demand, the government has pinned its hopes entirely on the private sector to supply accessible housing. This reliance on the private sector has led to hugely inefficient government spending on retrofitted modifications, and commitments to build more accessible state homes without any tangible data to assess the true scope of the need for it. Reform in this area is an urgent priority.

This article then turned to the approach of other jurisdictions and existing policy research to establish which policies could be adopted into the Aotearoa New Zealand context. The United Kingdom approach strikes an appropriate balance that affirms the rights of disabled people without imposing an undue burden on the remainder of the housing sector. Domestically, key stakeholders such as the HRC have previously suggested reforms to the Building Code and improved government leadership. This article adopts these solutions and other relevant recommendations, such as the need for a single standard of accreditation, into a final suite of policy recommendations.

To conclude, this article identifies a range of pragmatic policy solutions that should be implemented as soon as feasibly possible to ensure that disabled people are able to enjoy their human right to accessible housing. This article recommends the immediate adoption of the United Kingdom model of varying levels of accreditation into the Building Code, with a basic level of accessibility required in all new builds and material renovations. These standards should be based on the existing Lifemark framework to ensure consistency. The government should also ensure that at least 50 per cent of social housing is built to Lifemark four-star requirements, and tailor KiwiBuild procurement rules to promote the uptake of accessible design to rapidly ease the shortage of accessible housing. A range of minor measures are also suggested, including improving the available data to assess the scope of the problem, remedying the funding discrepancy for modifications, and discounting building consent fees to encourage developers to build above the new mandatory accessibility requirements.

The combination of recommendations still falls short of absolute recognition of the human right to accessible housing, which will still be disappointing to the disabled community. However, these policy recommendations are intended to address the existing issue without being seen to impose an undue burden on the housing sector—which would give politicians an immediate excuse to ignore this issue.

Arguably, there has never been a better opportunity for rapid action. The Labour government holds an outright majority in Parliament, giving them immense power to resolve this issue. Recognising this, the HRC called on the incoming government to

act on 39 human rights issues that require urgent attention, including housing accessibility.¹⁵³ The sentiments of this article are aptly summarised by Human Rights Commissioner, Paul Hunt, who stated: “Now it’s time for the government to take these commitments seriously and do everything in its power to deliver for everyone”.¹⁵⁴

153 Human Rights Commission *Ko Ō Tika, ko Tō Reo: Your Rights, Your Voice* (October 2020) at 4–9.

154 Eleisha Foon “Plea for reform: ‘Human rights create fair societies’” (29 October 2020) RNZ <www.rnz.co.nz>.