

Can we be free and equal too please?

submission to the Australian Human Rights Commission conversation – private property ownership rights

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# Summary

This submission to the Human Rights Commission (Commission) Review “Free and Equal” 2019 is made as a private citizen on behalf of our family. We life outside of the urban growth boundary of Melbourne in rural Victoria.

In this review, we are interested in the Commission considering the area of human rights and private property home and land ownership. We thank the Commission for providing this opportunity to join the conversation. We wish to advise the Commission that it appears that:

* Private property home and land ownership rights are human rights and there is limited legislative recognition of this in Australia and in Victoria.
* Government land use practice shifts the risk and cost burden of changes in private property home and land use laws from government to private property owners. This does not consider human rights or private property home and land ownership rights.
* The cumulative effect of this practice over time is that many private property home and land owners in rural Victoria experience housing insecurity. It seems that private property home and land owners in urban areas do not.
* Housing insecurity is an area where government should act to reduce and limit need and future demand. For rural private property home and land owners, government can mitigate housing insecurity risk by ensuring land use laws consider human rights and private property home and land ownership rights in the first instance.

We encourage the Commission to continue to work with government at all levels to enshrine human rights protections in all laws. We note the Commission has been aware of Australian citizen priority and concern relating to private property ownership rights protections[[1]](#footnote-1) for some time. For us and many rural people in similar circumstances, we ask that the Commission:

1. Work with government to ensure private property ownership rights are protected by law in the first instance.
2. Recommend changes to law at a local, state and commonwealth level so that private property ownership rights are protected and where these rights are eroded or changed (title, ownership, access, use, amenity, economic value, other) law changes include and provide appropriate compensation to private property owners.
3. Notes these changes shift the burden and risk from citizens who own private property, to makers of policy and law seeking to benefit civil society, and that this shift is appropriate to protect the human rights of all Australian citizens.

## private PROPERTY OWNERSHIP IS A civil and political HUMAN RIGHT.

The ownership of private property is a fundamental common law right and was one of four areas identified as being of concern by the Australian Human Rights Commission in 2014[[2]](#footnote-2). The Australian Law Reform Commission[[3]](#footnote-3) reports concern at the inconsistent application of common law rights both by the Commonwealth and State and Territory governments in Australia. The way governments treat private property ownership rights should not be confused with the obligations imposed by these governments by Human Rights conventions and legislation.

The Universal Declaration of Human Rights is the benchmark document in the history of human rights globally. It was proclaimed in 1948 as the common standard for human rights internationally (www.un.org). With regards to property ownership it states:

Article 12 No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attack

Article 17 1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.

The International Covenant on Civil and Political Rights further clarifies the context and role of property ownership human rights as:

**PART I**

*Part 1 - Article 1*

1.    All peoples have the right of self‑determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2.    All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co‑operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

*Part 111 - Article 17*

1.    No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2.    Everyone has the right to the protection of the law against such interference or attacks.

These declarations do not provide lawful private property ownership protection in Australia because they are international agreements and do not take precedence over Australian national laws.

Australia does not have a national human rights act. It does have the *Australian Human Rights Commission Act 1986*. This Act establishes the role and scope of the Australian Human Rights Commission. This role includes complaints, investigation and conciliation, research and reporting to the Minister on laws that Parliament should make. of unlawful discrimination

In Victoria the *Charter of Human Rights and Responsibilities Act 2006* establishes the rights, freedoms and responsibilities of Victorian people.

20 Property rights

A person must not be deprived of his or her property other than in accordance with law.

To protect citizens from the misapplication of inappropriate law that interferes with private property rights, Section 28 of the Act requires a Statement of Compatability be provided that shows the alliance of the proposed law with human rights, and Parliament is also obliged to show alliance (or not) with human rights. The Act does not require that laws comply with human rights. Division 4 of the Act explains that it is unlawful for a public authority to act, decide or not give proper consideration to relevant human rights.

***Summary: Private property ownership rights are human rights and there is some legislative recognition of this in Australian and Victorian law.***

## private property ownership rights are poorly protected by governments

Private property rights in Australia are recognized in section 51(xxxi) of the *Commonwealth of Australia Constitution Act 1900*, which provides that if the Commonwealth seeks to acquire private property, they must do so on “just terms”.

“The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws”

Victoria does not provide similar protections for citizens private property. For private property in Victoria, the *Land Acquisition and Compensation Act 1986* may provide compensation for limited circumstances where lands are rezoned with the view to being compulsorily acquired, but for the most part the risk, limitation, restriction, deprivation and cost burden of private property access and use changes made by the Victorian government is held and incurred by the owner of private property. This disadvantages private property owners.

Private property ownership rights are explicitly protected by laws of tort and criminal laws. These laws do not protect Victorian private property owners from laws made by the Victorian government, or local government. To challenge the extent to which ownership of private property is or is not lawfully protected is costly, time consuming and complex and occurs through the Victorian Civil and Administrative Tribunal and Courts process. It is beyond the resources and capabilities of most individual private property owners.

All levels of government in Australia make laws, implement them and enforce them. In doing this, government is fulfilling its obligation to support civil society, support the economy and provide essential infrastructure for public and private enterprise[[4]](#footnote-4). Where government require law which are assumed to benefit civil society, the burden of risk and cost for the implementation of these laws **should** be met by government, on behalf of civil society. In the case of private property law in Victoria, the entire risk and cost burden of laws imposed through the Victorian Planning Provisions by the Victorian and local government appears to be currently held by individual private property owners.

***Summary: the Victorian Planning Provisions shifts the risk and cost burden of changes in land use law over time from government to private property owners. Victorian law requires government considers human rights, but this does not seem to occur.***

## When government ignores human and private property ownership rights it creates housing insecurity in rural areas

***The Victorian Planning Provisions govern land use planning across Victoria. They define, describe and prescribe land use purposes for specified geographic areas. In most rural areas, they ignore historic and actual settlement patterns, which means the land use purposes specified differs from the actual land use in most areas. Land use planning governance in Victoria*** ***ignores human rights. It has a direct and detrimental impact on the human rights and housing security for rural private property owners.***

Land use across Victoria is guided by:

1. The Planning and Environment Act (1987)(Act)
2. The Victorian Planning Provisions and
3. Local government planning schemes.

The Planning and Environment Act recognizes a private property owner as the person who is the registered title holder of land. It does not recognize existing use of land. It does not recognize a private property owner as having any rights, including human rights. This act outlines the requirements and processes of the Victorian Planning Provisions and local government planning schemes. It does not require either of these to recognize rights of private property owners or human rights.

The Victorian Planning Provisions provide a standard coordinated framework for the use of Victorian land in accordance with the Act. They do not recognize existing use of land. They do not recognize private property owners as having any rights, including human rights.

Local government planning schemes apply regulations and prohibitions to local geographic areas. They do not recognize existing use of land. They do not recognize private property ownership rights, or human rights.

The Act requires local government planning schemes take into account significant social, economic and environmental effects of planning scheme amendments. How or if local government to does this is not measured, monitored or evaluated.

The actions of local government in Victoria is guided by the Local Government Act 1989. This Act does not recognise private property ownership or human rights.

CASE STUDY:

In 2014, Nillumbik council prepared an amendment to the Nillumbik Planning Scheme, amendment C086. This amendment changed “Makes editorial and 'policy neutral' updates to Clause 21 of the Local Planning Policy Framework”. There was no public exhibition of the amendment. There was no panel oversight of the amendment. The explanatory report to the Minister for Planning (Victoria) advised the Minister that the amendment “will not be any detrimental environmental, social or economic effects” and “will not increase the risk to life, property, community infrastructure or the natural environment from bushfire”[[5]](#footnote-5). The amendment changed part 21.05 of the Nillumbik Planning Scheme and altered more than 30 per cent of the text in this part. It was endorsed by the Minister for Planning in February 2014. Changes to the text included (noting that blue denotes new text):

* Limit the development of new dwellings and buildings on rural allotments below the minimum subdivision size, unless exceptional circumstances apply.
* Restrict subdivision and the development of buildings on lots in rural areas to maintain landscape qualities.
* Protect all waterways within the Shire from disturbance and pollution caused by inappropriate land use, development and works including dam construction.
* Where a permit is required …. seek to apply conditions requiring the protection of native vegetation (eg. fencing off remnant vegetation).

The direct effect of the change caused by C086 is to create housing insecurity and uncertainty for all rural Nillumbik private property owners and residents as the revision ignores:

* private property ownership and use rights.
* existing settlement patterns across rural Nillumbik, where 80 per cent of residents and private property owners have and mostly live on land that is smaller than the lot size imposed on them by the planning scheme.
* rural Nillumbik’s landscape being one of the most bushfire prone places in the world[[6]](#footnote-6)
* new dwelling building includes the re-building of a home lost in bushfire (or other disaster event)
* a core objective of Nillumbik council being to improve the overall quality of life of people in the local community[[7]](#footnote-7).

***The Nillumbik Planning Scheme does not provide rebuild certainty and existing use protection to rural private property owners should their home be destroyed in a bushfire (or other disaster event). The risk of housing loss by fire in rural Nillumbik is high. The likelihood of risk realisation is inevitable. This creates housing insecurity for rural Nillumbik private property owners. After the 2009 bushfires the Victorian government made temporary permit exemptions available. Permanent changes to the Nillumbik Planning Scheme are required to provide housing security to rural private property owners and more appropriately recognise property ownership and housing security human rights.***

***Summary: The*** ***cumulative effect of Victorian and local government land use legislation, regulation, decision and actions is that many private property home and land owners, particularly in rural areas like Nillumbik, experience housing insecurity. These levels of government do not consider existing land use, human rights and private property home and land ownership rights.***

## Housing inSecurity is widespread across rural victoria and is a direct result of poor protection of human rights over time

In the case study provided, housing insecurity impacts more than 3,000 homes in rural Nillumbik, which is where our family lives, and up to 13,000 people. The issue is more widespread in Victoria.

In 2016 there are 142,997 privately owned homes across Victoria zonedas “**Rural**”[[8]](#footnote-8) by the Valuer General Victoria. These homes have been lawfully purchased and passed down, built, insured, and occupied in accordance with the historical settlement patterns and contexts of the areas and communities they locate in dating back over the last 150 years. Rates and taxes on these properties are paid to government. These homes are located outside of city and township boundaries in rural areas of Victoria.

Up to seventy per cent[[9]](#footnote-9) of these homes are located on land which is smaller than the zone and schedule land size minimum specifications imposed on them by the Victorian Planning Provisions[[10]](#footnote-10). Many of these homes sit within geographic areas vulnerable to disaster including extreme bushfire events, flood, drought and erosion. Changes to land use law over time has cumulative and negative impacts on all owners of rural land. At no time since their imposition have land use laws provided any compensation to owners of land (and homes) for the negative and cumulative effects of the regulatory changes imposed. These people may all experience housing insecurity which is directly attributable to the lack of alignment between actual rural settlement patterns and the regulatory burdens imposed on rural residents and owners through land use laws. These laws limit rights and entitlements of current and future land use, including the right to rebuild homes and infrastructure in the event of loss.

***Summary: In rural Victoria, housing insecurity appears to be a risk created by laws that do not consider land settlement and existing use, human rights or private property home and land ownership rights. It may affect up to half a million rural Victorians. These same restrictions, limitations and imposts do not seem to exist in urban areas.***

## There is not enough social housing infrastructure to address the most extreme forms of housing insecurity so avoiding housing insecurity in the first instance sould be encouraged.

Homelessness and housing stress are currently the most extreme forms of housing insecurity. The Australian, states and territories government response to extreme housing insecurity is social housing infrastructure[[11]](#footnote-11). From the 2016 Census Estimating Homelessness 2016, the Australian Bureau of Statistics[[12]](#footnote-12) estimates 116,427 Australians were experiencing homelessness, including 24,817 Victorians, 15,244 (roughly 60 per cent) of whom were estimated to be aged under 34 years. The rate of homelessness in Victoria is estimated to be 41.9 per 10,000 population. The Australian Housing and Urban Research Institute (AHURI) estimates a further 315,000 Australians are experiencing housing stress, which means that more than 30 per cent of income is spent on rent. In totality, AHURI considers there is a current shortfall in the social housing infrastructure market of 430,000 homes and a forecast need for 730,000 homes over the next 20 years. Of these 166,000 are estimated to be needed in Victoria (127,500 in greater Melbourne, and 38,500 in the rest of Victoria).

***Summary: when considering housing insecurity, social housing infrastructure and homelessness:***

* ***there appears to be an undersupply of social housing in Australia and Victoria now;***
* ***this undersupply is longstanding;***
* ***significant and substantive policy and funding change and action appears to be required to address existing and future social housing forecast needs;***
* ***it is not clear that there is significant and substantive policy and funding change and action occurring to address undersupply now and into the future;***
* ***efforts to discourage growth in demand for social housing should be supported; and***
* ***the risk of housing insecurity in rural Victoria can be reduced by changing land use law – this should be supported.***

1. Rights and Responsibilities 2014, Discussion Paper, Tim Wilson, Human Rights Commissioner, Australian Human Rights Commission. [↑](#footnote-ref-1)
2. Rights and Responsibilities 2014, Discussion Paper, Tim Wilson, Human Rights Commissioner, Australian Human Rights Commission [↑](#footnote-ref-2)
3. Traditional Rights and Freedoms, Encroachments by Commonwealth Laws (ALRC Report 129), Australian Law Reform Commission, www.alrc.gov.au [↑](#footnote-ref-3)
4. The Role of Government in Australia, Dr Nicola Henry, La Trobe University, January 2012, The Australian Collaboration of National Community Organisations [↑](#footnote-ref-4)
5. Nillumbik Planning Scheme Amendment C86 Explanatory Report [↑](#footnote-ref-5)
6. Nillumbik Shire Council, www.nillumbik.vic.gov.au [↑](#footnote-ref-6)
7. Local Government Act 1989 (Victoria) Section 3C [↑](#footnote-ref-7)
8. https://www.propertyandlandtitles.vic.gov.au/valuation/council-valuations [↑](#footnote-ref-8)
9. Nillumbik Council Planning Team (October 2018) [↑](#footnote-ref-9)
10. https://www.parliament.vic.gov.au/publications/research-papers/download/36-research-papers/13746-planning [↑](#footnote-ref-10)
11. Lawson, J., Denham, T., Dodson, D., Flanagan, K., Jacobs, K., Martin, C., Van den Nouwelant, R., Pawson, H. and Troy, L. (2019) *Social housing as infrastructure: rationale, prioritisation and investment pathway*, AHURI Final Report No. 315, Australian Housing and Urban Research Institute Limited, Melbourne, https://www.ahuri.edu.au/research/final-reports/315, doi:10.18408/ahuri-5314001. [↑](#footnote-ref-11)
12. Australian Bureau of Statistics, Census 2016, <https://www.abs.gov.au/AUSSTATS/> Estimating Homelessness 2016 [↑](#footnote-ref-12)