

In Confidence

Office of the Minister of Justice and Minister for Courts

Chair, Cabinet Social Wellbeing Committee

Canterbury Earthquakes Insurance Tribunal Bill: Approval for Introduction

Proposal

- 1 This paper seeks agreement to two matters of design relating to the jurisdiction of the Canterbury Earthquakes Insurance Tribunal and to introduce the Canterbury Earthquakes Insurance Tribunal Bill (the Bill).

Executive Summary

- 2 I propose that the Canterbury Earthquakes Insurance Tribunal Bill be approved for introduction.
- 3 Cabinet agreed to establish the Canterbury Earthquakes Insurance Tribunal (the Tribunal) to provide an alternative pathway for policyholders, insured persons, the Earthquake Commission (EQC) and insurers to resolve insurance claims, in respect of residential land or property, relating to the 2010 and 2011 Canterbury earthquakes [SWC-18-MIN-009 and CAB-18-MIN-0065].
- 4 The Tribunal is one of the Government's initiatives aimed at helping speed up the resolution of outstanding Canterbury earthquake-related insurance claims. Seven years on from the earthquakes, the Tribunal will act as a 'circuit-breaker', providing speedy, flexible and cost-effective procedures to assist people to resolve their outstanding insurance claims.
- 5 Following discussions with the Minister for Greater Christchurch Regeneration, I consider clarifications should be made to the jurisdiction of the Tribunal to assist people with obtaining closure around their long-standing earthquake-related claims and ensure, where appropriate, highly legally complex matters remain with the courts.
- 6 Firstly, I propose that the Tribunal should be 'homeowner oriented' and provide an alternative pathway that is aimed at policyholders¹, not insurers or EQC. This will provide people with the feeling that they have some command over their situation, which is

¹ Reference to policyholder when used throughout this paper, includes 'insured person' under the Earthquake Commission Act 1993.

important to help them obtain closure and get on with their lives. To allow for this, I propose:

- 6.1 the Tribunal be a policyholder initiated process where only policyholders can file a claim with the Tribunal;
 - 6.2 where policyholders have filed a claim with the court, claims can be transferred to the Tribunal, on the application of the policyholder or on the Judge's own motion, and where the Judge considers the transfer is in the interests of justice;
 - 6.3 where insurers or EQC have filed a claim with the court, claims can be transferred to the Tribunal, on the application of the policyholder, if all parties agree and where the Judge considers the transfer is in the interests of justice; and
 - 6.4 to rescind the Cabinet decision that eligible claims that are, or have already been, filed elsewhere, for example in the High Court, may be transferred to the Tribunal on agreement of all parties, or on the motion of the Judge [CAB-18-MIN-0065 and SWC-18-MIN-009].
- 7 Insurers and EQC will still be able to file claims in court. Policyholders can also choose to file claims with the courts rather than the Tribunal.
- 8 Secondly, I propose that the Tribunal not be able to consider insurance disputes involving on-sold properties. Issues relating to on-sold properties are still emerging and involve highly legally complex matters that are more appropriately considered by the courts.
- 9 The Bill has been drafted to reflect the proposals in anticipation of your agreement to clarify the jurisdiction of the Tribunal.
- 10 Under Cabinet authorisation to take any detailed policy decisions that may arise during the drafting of the legislation [SWC-18-MIN-009 and CAB-18-MIN-0065], I have also made decisions regarding operational matters relating to the Tribunal. For example, other parties that may have liability in respect of the claim, such as builders, can be joined as a third-party respondent by the Tribunal. These operational decisions are reflected in the Bill.

Policy

- 11 The Bill implements Cabinet's agreement to establish the Tribunal to provide an alternative pathway for policyholders, insured persons, the Earthquake Commission (EQC) and insurers to resolve insurance disputes, in respect of residential land or property, relating to the 2010 and 2011 Canterbury earthquakes [SWC-18-MIN-009 and CAB-18-MIN-0065].
- 12 Legislation is required to establish the Tribunal, and prescribe its jurisdiction, powers, and operating processes. Legislation will also be required to disestablish the Tribunal.
- 13 The Tribunal will be an independent judicial process providing an alternative option that people can consider as a means of resolving their 2010 and 2011 Canterbury earthquake-related insurance claims.
- 14 Once the Tribunal is established, services that are currently available, such as the Residential Advisory Service (RAS), will continue to be available to assist and support people with their unresolved claims.

The Tribunal will provide speedy, flexible and cost-effective processes

- 15 The primary objective of the Tribunal is to provide speedy, flexible and cost-effective procedures for the resolution of insurance claims relating to the 2010 and 2011 Canterbury earthquakes.
- 16 These objectives have guided the development of the Bill to provide processes that are easily accessible and flexible enough to meet the needs of the differing circumstances of each claim. For example, the Bill provides that the Tribunal will be able to:
- 16.1 take a proactive approach to case-management, for example, by holding case management conferences; setting timeframes for providing information; and convening a conference of experts;
 - 16.2 direct parties to mediation, which will be fully funded and may assist to resolve the dispute or narrow down the points at issue;
 - 16.3 appoint independent expert advisors to assist the Tribunal with technical aspects of claims; and
 - 16.4 award costs, for example, if a party causes unreasonable delay during the Tribunal process.
- 17 As agreed by Cabinet, there will be no fee to access the Tribunal, enter mediation, or for any expert advisors appointed to assist the Tribunal. No fees are set out in the Bill, however, the Bill provides a regulation-making power that would allow Cabinet to introduce fees in the future, if desired.

The Tribunal's jurisdiction is focused on 2010 and 2011 Canterbury earthquake-related residential insurance claims

- 18 The Tribunal can consider disputes about residential insurance claims for physical loss or damage arising from the 2010 and 2011 Canterbury earthquakes. The Bill defines the Canterbury earthquakes as the earthquakes on 4 September 2010, 26 December 2010, 22 February 2011 and 13 June 2011, along with any aftershocks occurring up until 31 July 2011.
- 19 The Tribunal will be a circuit-breaker for these long-standing, unresolved insurance claims, providing people with much needed closure to get on with their lives. Claims relating to other major insurance events, such as the Kaikōura earthquake will not be able to be heard by the Tribunal. This reflects the specialist focus and timely resolution of Canterbury earthquake-related claims envisaged by Cabinet.

Claims will be decided in accordance with the law, including application of the Limitation Acts

- 20 The Tribunal will decide claims in accordance with existing law and the terms of the relevant insurance contracts. This includes the application of the Limitation Acts 1950 and 2010, which provide a defence to claims where the limitation period has expired.
- 21 The Tribunal will apply the same legal rules that apply in court. This includes the power to award general damages where appropriate.

Proposed clarifications to the Tribunal's jurisdiction

22 I propose to make the following clarifications to enable the Tribunal to be more 'homeowner oriented,' providing some closure to policyholders and to ensure that, where appropriate, highly legally complex matters remain with the courts.

23 The Bill has been drafted to reflect these clarifications in anticipation of your agreement to the following proposals.

I propose that only policyholders, not insurers or EQC, can apply to bring a claim to the Tribunal

24 The 2010 and 2011 Canterbury earthquakes generated insurance claims in relation to over 167,677 residential properties. Seven years on, approximately two percent of these claims remain unresolved. Many of these claims are complex and do not have a clear pathway to settlement.

25 The length of time taken to resolve these insurance claims have left people weary, and frustrated and has impacted on peoples' mental health and wellbeing. It is important that people feel they have some control over the uncertainty of their situation, helping them to obtain closure and get on with their lives.

26 In consultation with the Minister for Greater Christchurch Regeneration, I consider that the Tribunal needs to be 'homeowner oriented' – an alternative pathway that is clearly aimed at policyholders, not insurers or EQC. To ensure this, I propose that only policyholders be able to apply to bring a claim to the Tribunal.

27 As the Tribunal is an alternative pathway, people can still use informal settlement negotiation processes or choose to file their insurance claims in the court rather than the Tribunal. The courts will remain available for insurers and EQC to file claims.

I propose that policyholders be able to apply to transfer eligible claims from the courts to the Tribunal

28 The ability to actively manage claims between the courts and the Tribunal will help speed up overall resolution rates. It is therefore also important to ensure people can choose to access the Tribunal where claims were filed in the courts before it was established.²

29 Cabinet has agreed to enable transfers from the court to the Tribunal. However, I consider the ability to transfer claims needs to better reflect a policyholder initiated process.

30 Therefore, I propose to rescind the Cabinet decision that eligible claims that are, or have already been, filed elsewhere, for example in the High Court, may be transferred to the Tribunal on agreement of all parties, or on the motion of the Judge [CAB-18-MIN-0065 and SWC-18-MIN-009].

31 This decision will be replaced by an approach that allows eligible claims to be transferred from the courts to the Tribunal where:

31.1 the policyholder has filed the claim with the court, on their application, or on the Judge's own motion; and

² Due to concerns that insurers might use the Limitation Acts as a defence to proceedings for claims filed more than six years after the earthquakes, some claimants presumptively filed claims with the High Court in 2017 to preserve their rights.

31.2 an insurer or EQC has filed a claim with the court, on application by the policyholder and where all parties agree.

In all cases the court must consider the transfer is in the interests of justice before making an order.

32 This approach balances the rights of both parties, and ensures that policyholders have a way to access the Tribunal, and its benefits, even if the insurer or EQC has filed a claim in the court first.

I propose that the Tribunal should not consider issues involving on-sold properties

33 Following discussions with the Minister for Greater Christchurch Regeneration, I propose that the Tribunal should not consider insurance disputes involving on-sold properties.

34 The issues emerging from on-sold property disputes are novel and many are highly complex, with no clear precedent. As such, claims involving on-sold properties are more appropriately considered by the courts.

35 People who have purchased a property after physical damage or loss has occurred, will not be eligible to make a claim to the Tribunal relating to that loss or damage.

Impact analysis

36 A Regulatory Impact Statement (RIS) was prepared in accordance with Cabinet requirements and submitted to Cabinet alongside the paper seeking policy approval in February and March 2018 [SWC-18-MIN-009 and CAB-18-MIN-0065]. The Ministry of Justice's RIS Quality Assurance Panel considered that RIS met the Quality Assurance criteria.

37 The Regulatory Impact Analysis requirements apply to the two proposals in this Cabinet paper restricting the claims, and claimants, that come within the Tribunal's jurisdiction. The Ministry of Justice's *Impact Summary: Canterbury Earthquakes Insurance Tribunal – detailed design* (Impact Summary) is attached.

38 The Ministry of Justice's RIS Quality Assurance Panel has reviewed the Impact Summary: prepared by the Ministry of Justice and considers that the information and analysis **partially meets** the Quality Assurance criteria.

39 As is clearly explained in the Impact Summary, officials did not have an opportunity to consult on the proposals. The lack of consultation has compounded the lack of data, which means Cabinet faces some significant unknowns, particularly in relation to the proposal set out in Part A. The Impact Summary clearly draws the limitations and constraints to Cabinet's attention and cautions decision-makers against placing too much reliance on the analysis in it. The candour of this Impact Summary sufficiently offsets the lack of data and consultation to enable the QA Panel to assess it as partially meeting the Quality Assurance criteria.

40 The QA Panel notes that, to some extent, the lack of consultation can be remedied during select committee consideration of the Canterbury Earthquakes Insurance Tribunal Bill.

Compliance

- 41 The Bill complies with the following:
- 41.1 the principles of the Treaty of Waitangi;
 - 41.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 41.3 the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);
 - 41.4 the principles and guidelines set out in the Privacy Act 1993;
 - 41.5 relevant international standards and obligations.
- 42 Only allowing policyholders to apply to the tribunal creates an inequality of access to the tribunal. There is an expectation that regulatory systems treat all parties proportionately, fairly and equitably. However, any potential impact on insurers or the EQC is effectively mitigated as the Bill does not affect the ability for insurers or EQC to access justice through the courts and therefore complies with the LAC Guidelines on the Process and Content of Legislation (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Gender implications

- 43 The proposals in this paper have no gender implications, so gender analysis has not been undertaken.

Consultation

- 44 The following Government agencies were consulted on the Bill and this paper: the Ministry of Business, Innovation and Employment and the Treasury. The State Services Commission was consulted in relation to the remuneration provisions for the Tribunal Chairperson and Members. The Department of Prime Minister and Cabinet (DPMC) has been consulted, including the Greater Christchurch Group. The Policy Advisory Group in DPMC has been informed.
- 45 Consultation has been undertaken with government caucus and confidence and supply partners.

Binding on the Crown

- 46 The Bill will bind the Crown.

Creating new agencies or amending law relating to existing agencies

- 47 The Bill establishes a new tribunal. The Official Information Act 1982 does not apply to courts and tribunals.

Allocation of decision making powers

- 48 The Bill establishes a new tribunal as an alternative pathway to the courts. It will be a decision-maker for disputes between policyholders or insured persons and EQC, or other insurer, relating to insurance claims for damage caused by the 2010 and 2011 Canterbury

earthquakes. The Tribunal will not consider issues involving on-sold properties. The Tribunal may join other potentially liable parties to the dispute where necessary.

- 49 Decisions of the Tribunal can be appealed on questions of fact and law to the High Court, with leave of the High Court. Second and subsequent appeals can be made on questions of law, with leave of the appellate Court.
- 50 Policyholders, insurers and the Earthquake Commission can still file claims about their insurance disputes with the courts or access any other dispute resolution services that are available

Associated regulations

- 51 The Bill contains standard regulation-making powers to ensure the Act can be given full effect. These include regulations:
- 51.1 to prescribe fees payable for the Tribunal (if any);
 - 51.2 to make rules for tribunal procedures; and
 - 51.3 for any other matters necessary for administration or for giving full effect to the Act.
- 52 Regulations are not needed to bring the Bill into operation. The fee-making power is a future-proofing measure and fees do not need to be set to bring the Bill into operation. The policy intent is that no fees will be charged to access the Tribunal at this time.

Other instruments

- 53 In addition to the regulations mentioned above, the Bill also contains a provision to empower the Governor-General, to make rules regulating the practice and procedure of the District Court or High Court in proceedings under this Act. Rules may be made only with the agreement of two or more members of the Rules Committee.

Definition of Minister/department

- 54 The Act will be administered by the Ministry of Justice. The Bill does not contain a definition of the Ministry of Justice or the Chief Executive of the Ministry of Justice.
- 55 Mediation services will be provided by the Ministry of Business, Innovation and Employment. Part 1 of the Bill contains a definition of 'chief executive', which is the chief executive of the department responsible for mediation services under the Act. 'Department' is defined as the department with the authority of the Prime Minister that is responsible for the administration of mediation services, which is the Ministry of Business, Innovation and Employment at this time.
- 56 Cabinet Office is satisfied with the definitions of 'chief executive' and 'department'.

Commencement of legislation

- 57 The commencement date for the provisions of the Bill are staggered to allow adequate time for Tribunal Members to be formally appointed before the Tribunal can start accepting claims. Provisions relating to appointment of Tribunal Members and staff come into force the day after Royal assent.

58 The remainder of the provisions will come into force on a date set by Order in Council, which is currently expected to be in mid-March 2019. Any provisions that are not brought into force by Order in Council, will come into force on 25 March 2019. This is to enable sufficient time after the Bill's enactment for the setup of any systems necessary to implement the Tribunal.

Parliamentary stages

- 59 **s9(2)(f)(iv)** [REDACTED]
- 60 The Bill should be introduced by 9 August 2018 and enacted, if possible, by the beginning of February 2019. This will enable establishment of the Tribunal in March 2019.
- 61 To meet this timeframe, I propose that the Select Committee be required to report back to the House of Representatives within four months, rather than the usual six months.
- 62 I propose that the Bill be referred to the Governance and Administration Committee.

Publicity

63 I will issue a press release following the introduction of the Bill.

Proactive Release

64 On introduction of the Bill, I intend to release all Cabinet papers, including this paper, and all substantive advice that I have received regarding the Tribunal, with any necessary redactions under the Official Information Act 1982. Releasing these documents will provide more information to the public about the intent of the Tribunal and how it will operate.

Recommendations

The Minister of Justice recommends that the Committee:

- 1 **note** that **s9(2)(f)(iv)** [REDACTED]
- 2 **note** that the Bill establishes the Canterbury Earthquakes Insurance Tribunal, which will provide an alternative pathway for policyholders, insured persons, the Earthquake Commission and insurers to resolve disputes related to 2010 and 2011 Canterbury earthquake-related insurance claims in respect of residential land or property;
- 3 **note** that Cabinet authorised the Minister of Justice and the Minister for Courts to take any detailed policy decisions that may arise during the drafting of the legislation, in consultation with the Minister for Greater Christchurch Regeneration where necessary. Decisions regarding the operation of the Tribunal have been made under this authorisation and are reflected in the Bill;
- 4 **agree** that the Tribunal be 'homeowner oriented' by ensuring it is a policyholder and insured person only initiated process where they, not insurers or EQC, can file a claim with the Tribunal;
- 5 **agree** that eligible claims can be transferred from the court to the Tribunal:

- 5.1 where policyholders have filed a claim with the court, on the application of the policyholder or on the Judge's own motion, and where the Judge considers the transfer is in the interests of justice;
- 5.2 where insurers or EQC have filed a claim with the court, on the application of the policyholder, if all parties agree and where the Judge considers the transfer is in the interests of justice;
- 6 **rescind** the Cabinet decision that eligible claims that are, or have already been, filed elsewhere, for example in the High Court, may be transferred to the Tribunal on agreement of all parties, or on the motion of the Judge [CAB-18-MIN-0065 and SWC-18-MIN-009];
- 7 **note** that policyholders, insured persons, insurers and EQC can still file claims with the courts;
- 8 **agree** that the Tribunal not consider insurance disputes involving on-sold properties as these are more appropriately considered by the courts;
- 9 **note** that the above policy decisions have been reflected in the Bill;
- 10 **note** that on introduction of the Bill, officials will release Cabinet papers and substantive advice that I have received relating to the Tribunal with any necessary redactions;
- 11 **approve** the Canterbury Earthquakes Insurance Tribunal Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 12 **agree** that the Bill be introduced by 9 August 2018;
- 13 **agree** that the Government propose that the Bill be:
- 13.1 referred to the Governance and Administration Committee for consideration;
 - 13.2 reported back to the House within four months;
 - 13.3 enacted by the beginning of February 2019.

Authorised for lodgement

Hon Andrew Little

Minister of Justice