LEGISLATION DESIGN AND ADVISORY COMMITTEE

18 October 2018

Brett Hudson MP
Governance and Administration Committee
Parliament Buildings
Wellington

Dear Mr Hudson

Canterbury Earthquakes Insurance Tribunal Bill

1. The Legislation Design and Advisory Committee (LDAC) was established by the Attorney-General in June 2015 to improve the quality and effectiveness of legislation. LDAC provides advice on design, framework, constitutional, and public law issues arising out of legislative proposals. It is responsible for the *Legislation Guidelines* (2018 edition), which have been adopted by Cabinet.

2. In particular, LDAC's terms of reference include these dual roles:
   a. providing advice to departments in the initial stages of developing legislation when legislative proposals are being prepared; and
   b. through its External Subcommittee, scrutinising and making representations to the appropriate body or person on aspects of bills that raise matters of particular public law concern.

3. The External Subcommittee of LDAC referred to in paragraph 2b above is comprised of independent advisers, from outside Government, who have been appointed by the Attorney-General. Under LDAC's mandate, the External Subcommittee is empowered to review and make submissions on Bills as introduced, usually those that were not reviewed by LDAC prior to their introduction.[1]

4. The Canterbury Earthquakes Insurance Tribunal Bill was not considered by LDAC prior to introduction. The External Subcommittee has therefore reviewed it and wishes to make the attached submission.

[1] Legislation bids identify whether Bills will be referred to LDAC for design advice before introduction. This is determined when Cabinet settles the Legislation Programme. Generally, significant or complicated legislative proposals are referred to LDAC before introduction. Other legislative proposals with basic framework/design issues, matters relating to instrument choice, issues relating to consistency with fundamental legal and constitutional principles, matters under the *Legislation Guidelines*, or with the ability to impact the coherence of the statute book may also be suitable for referral to LDAC.

5. Thank you for taking the time to consider the Subcommittee's submission.

Yours sincerely

Paul Rishworth QC
Chairperson
Legislation Design and Advisory Committee

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Canterbury Earthquakes Insurance Tribunal Bill

Introduction

1. The Legislation Design and Advisory External Subcommittee (the Subcommittee) has been given a mandate by Cabinet to review introduced Bills against the Legislation Guidelines (2018 edition) ("**the Guidelines**"). The Guidelines have been adopted by Cabinet as the government's key point of reference for assessing whether draft legislation is well designed and accords with fundamental legal and constitutional principles. Our focus is not on policy, but rather on legislative design and the consistency of a Bill with fundamental legal and constitutional principles.

2. This submission focuses on the elements of the Canterbury Earthquakes Insurance Tribunal Bill that appear to be inconsistent with the Guidelines.

Is a new tribunal, in this form, necessary?

3. The bill seeks to respond to a range of complaints which have been directed at the current system, which uses the civil courts and more often the High Court. They include complaints of undue cost, delay and unfair outcomes.

4. It does so by creating a new tribunal and by modifying existing rights and practices. The Guidelines (chapters 12 and 18) express a need for caution in such circumstances. Chapter 18.1 of the Guidelines states in part:

> **A new statutory power should be created only if no suitable existing power or alternative exists that can achieve the policy objective.**
>
> If there is already clear authority in existing legislation, it is inappropriate to grant the same power in new legislation because it would lead to duplication and a lack of certainty in the law. This is particularly true where

only one Act is amended because it may result in an unintended distinction between two provisions (see Chapter 3.3)).

If there is an existing common law power, careful consideration must be given to whether or not it is sufficient. If it is not sufficient, consideration should be given to replacing it with a statutory power. If the intention is to limit or extinguish the common law power, the new legislation must clearly state that (see Chapter 3.6).

If an existing power is relied on to perform a new function created by legislation, that power must be clearly identified in the documentation that supports the legislation along with the reasons why it is considered that the new function can be exercised under it.

5. The bill seeks to offer a new procedure, directed at speedy, flexible and cost effective resolution.

6. It is accepted that this is a legitimate and desirable policy option. But it is important that the new Tribunal be empowered to offer processes that are fair and comport with natural justice. This is particularly so given there are circumstances (discussed below) in which the Bill, if enacted, could result in persons having their disputes directed to the Tribunal without their having consented to that course.

Does the new proposed Tribunal offer fair processes?

Who has access to the Tribunal?

7. A preliminary point is that the Tribunal's processes are not available for all. For example, the Act will not apply if ownership of the property has been transferred under an agreement for sale and purchase following the relevant event (clause 8(3)).

8. Yet such transfers have often occurred, sometimes to an associated trust and sometimes following an open market sale. It is unclear why the exclusion is proposed, and in particular why there should be unequal rights if a person has, by assignment as part of an agreement for sale and purchase, acquired the same rights as the original insured.

Natural justice protections in the Tribunal

9. The modifications to existing law and practice made by the Bill are significant:

    a. The tribunal must comply with natural justice (clause 20(3)) yet that does not *"… require the tribunal to use or allow the use of experts unless, in the tribunal's opinion, it is necessary to do so."* (cl 20(4)). But in the civil jurisdiction experts may be used by a party as of right, provided that the relevance / admissibility requirements of the Evidence Act 2006 are met.

    b. Clause 25(3) mandates permanent forfeiture of the right to object where an expert adviser is acting on the basis of a conflict of interest that was disclosed by an expert adviser initially, and his or her appointment was then agreed to. In contrast, at common law, certainly insofar as the right to an impartial tribunal is concerned, not objecting initially does not

always result in a permanent waiver. This less rigid approach allows the courts, usually on appeal, to evaluate bias which becomes apparent only during the course of a hearing.

While the impartiality of a tribunal is not the same as the impartiality of an expert, given the importance of an expert witness a similar approach ought to be taken. That could be achieved by amending clause 25(3) by adding "… information that was disclosed as giving rise to the…" between the phrase "the conflict" in clause 25(3) – which would clarify that for a conflict of interest to be waived the conflict must have been fully disclosed so as to allow an informed decision to be made.

Clause 25(3) also has potential to prevent a person from challenging an expert when the threshold for experts and their evidence in Schedule Four of the High Court Rules is not met.

c. Clause 33(1)(a) provides that settlements reached at mediation are confidential unless otherwise agreed. But the default position under the common law position is that, while the contents of a mediation or settlement conference are usually confidential, the actual result reached is not. Clause 44(7)(b) allows the tribunal to record the agreed terms of a settlement, but only where the parties request it. That appears to require both parties to agree. It is not clear why the general default rule should be displaced, such that one of the parties can disclose the outcome only if the other agrees. That could have the effect of preventing transparency of outcomes in the Tribunal.

d. Clause 41(4) allows the tribunal to determine a claim on the papers, but before deciding to determine a claim in that manner it must give the parties *"a reasonable opportunity to comment."* In contrast, a substantive civil claim is almost invariably determined on the papers only where the parties consent.

Where a person may be heard on an issue, then more common language affords the opportunity *"to be heard"*, not merely *"to comment".*

e. Clause 45 prescribes when costs may be awarded. The considerations are narrower than those considered by the civil courts and also do not enable costs to be awarded when they fall within an insurer's liability under a policy of insurance. The latter issue could be addressed by adding a further subsection (5) to clause 45 that states for the avoidance of doubt clause 45 does not limit any ability to order costs under clause 44 – where, for instance, there is an express or implied contractual right for an insured to costs from the insurer.

Other issues

10. It is unclear how decisions of the tribunal will sit in terms of precedent, and whether it will be bound by existing precedent.

11. These types of issues assume more moment because of the unfettered fiscal jurisdiction of the tribunal. This is not a similar situation to the Disputes Tribunal, which has speedy and flexible processes but in the context of a fiscal limit confining it to modest claims.

12. It is accepted that there is a need to address the outstanding earthquake claims and how they are resolved. But a new tribunal must serve the objectives of fairness (addressed separately below), as well as speed, cost-effectiveness and flexibility.

Fairness and natural justice

13. Clause 3 sets out the purpose of the Bill as follows:

> The purpose of this Act is to provide speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes.

14. There is no mention of the provision of "fair" services in this purpose statement.

15. That is so despite a number of other clauses in the Bill requiring procedures that are fair and that comply with the requirements of natural justice (ie. procedural fairness). We refer in particular to:

    a. Clause 11(1), which provides that the tribunal can add or remove parties if it "considers it necessary for the fair and speedy resolution of a claim";

    b. Clause 12(3)(c), which provides that claimants who seek to bring claims to the tribunal must "include sufficient information and supporting documentation to fairly inform other parties and the tribunal of the substance of the claim being brought";

    c. Clause 20(3), which provides that the tribunal "must comply with the principles of natural justice" when managing claims;

    d. Clause 37(3), which provides that the tribunal "must comply with the principles of natural justice" when managing the adjudication of claims (including at hearings).

16. To better align the purpose statement in clause 3 with these subsequent clauses, and thereby to achieve an internally coherent statute that gives better recognition to a fundamental value to our legal system in the form of natural justice,[2] we **recommend** amending clause 3 as follows:

> The purpose of this Act is to provide fair, speedy, flexible, and cost-effective services for resolving disputes about insurance claims for physical loss or damage to residential buildings, property, and land arising from the Canterbury earthquakes.

[2] LDAC Guidelines (2018 edition) at chp 4.5 and 18.6.

17. Consequential amendments will be needed to other clauses which reference the language of the purpose provision, for example clauses 20(1) and 37(1).

Inclusion of appropriate natural justice safeguards in transfers from the courts to the Tribunal

18. Clause 16(1) of the Bill provides for the transfer of proceedings relating to an insurance claim in dispute from the District Court or the High Court to the tribunal in two situations, the second of which is "on the Judge's own motion". Subsection (2) of clause 16 goes on to provide that:

> (2) An order to transfer proceedings may be made under subsection (1) only if—
> (a) the proceedings meet the eligibility criteria for a claim under section 9; and
> (b) the Judge making the order believes that the transfer is in the interests of justice.

19. As clause 16(2) is presently worded, it would appear open to a Judge, on their own motion, to make an order to transfer proceedings to the tribunal without hearing from the parties.

20. In our view, that would be inconsistent with the principles of natural justice, which recognise that persons (both natural and legal) whose rights or interests are uniquely or specially affected by a decision should be provided with advance notice of the proposed decision and a reasonable opportunity to be heard on it, before the decision is made.[3] We note in this regard that the High Court has held in relation to the own motion power that is conferred on courts in section 120 of the Credit Contracts and Consumer Finance Act 2003 that:[4]

> [56] … A court should exercise its power on its own motion only in the clearest of cases. The court should not do so if it does not have the relevant evidence before it and where the creditor has not had the opportunity to address the issue. …
>
> [Our emphasis by underlining]

21. In other words, absent good reason to the contrary – which we do not see here – an own motion power should not be exercised without the parties affected having the opportunity to address it.

22. To resolve that natural justice issue, we **recommend** amending clause 16(2) as follows:

> (2) An order to transfer proceedings may be made under subsection (1) only if—
> (a) the proceedings meet the eligibility criteria for a claim under section 9; and
> (b) the parties have been provided with an opportunity to be heard on the proposed transfer; and
> (c) the Judge making the order believes that the transfer is in the interests of justice.
>
> [Amendments by way of insertions highlighted in the underlined text]

23. Similar to clause 16, clause 28 of the Bill provides for the transfer of proceedings relating to an insurance claim in dispute from the tribunal to the District Court or the High Court if the tribunal considers that it is more appropriate for a court to decide the claim for any or all of the

[3] LDAC Guidelines (2018 edition) at chp 4.5 and 19.1.
[4] *Real Finance Ltd v Setefano* [2016] NZHC 2293, (2016) 23 PRNZ 711 per Mallon J.

three stated reasons. Again, there is no express requirement to hear from the parties before any order is made.

24. However, that requirement may be implicit if the exercise of the power conferred in clause 28 is intended to be constrained by clause 20(3).

25. We suggest that the Bill is worded to expressly address this issue, for the reasons that we have set out in paragraphs 19-21 above in relation to clause 16(2).

26. Accordingly, we **recommend** amending clause 28 by adding a new subsection (1A) as follows:

> (1A) An order to transfer proceedings may be made under subsection (1) only if the parties have been provided with an opportunity to be heard on the proposed transfer before the order is made.

Conclusion

27. While the provision of a new Tribunal is recognised as a legitimate and appropriate policy option, the Subcommittee has the concerns recorded in this submission about the details of the proposal.

28. Thank you for taking the time to consider the Subcommittee's submission. The Subcommittee wishes to be heard on this submission.

Yours sincerely

Professor Geoff McLay

Chairperson
Legislation Design and Advisory External Subcommittee