

Canterbury Earthquakes Insurance Tribunal

Advising agencies	<i>Ministry of Justice</i>
Decision sought	<i>This analysis has been prepared for the purpose of informing final decisions to be taken by Cabinet regarding the proposed Canterbury Earthquakes Insurance Tribunal.</i>
Proposing Minister	<i>Minister of Justice</i>

Summary: Problem and Proposed Approach

<p>Problem Definition</p> <p>What problem or opportunity does this proposal seek to address? Why is Government intervention required?</p>
<p>Around 2 percent of dwelling claims (insurance claims relating to residential homes) stemming from the 2010 and 2011 Canterbury earthquakes are yet to be resolved (numbering around 2,500). These remaining claims are often legally and/or technically complex, and progress toward settlement or resolution can be further hampered by other factors (for example, health or financial difficulties). In addition, some previously-settled insurance claims are being re-opened due to deficient repairs or the discovery of additional damage.</p> <p>Media reports suggest some people perceive existing processes for resolving these insurance disputes, and their outcomes, to be unfair. These perceptions, and the length of time to resolve claims, add to the stress and mental health toll on claimants and may be contributing to a distrust of legal and insurance systems.</p>

<p>Proposed Approach</p> <p>How will Government intervention work to bring about the desired change? How is this the best option?</p>
<p>The Labour Party’s election manifesto included a commitment to help people still experiencing frustration with residual issues from the Canterbury earthquakes, including by establishing a tribunal to quickly and fairly resolve insurance disputes at lower cost to claimants. The tribunal will be an alternative to existing dispute resolution mechanisms, taking an active case management role and a more inquisitorial approach, and including access to mediation services in appropriate cases.</p>

Section B: Summary Impacts: Benefits and costs

<p>Who are the main expected beneficiaries and what is the nature of the expected benefit?</p>
<p>The main expected beneficiaries are claimants, who are expected to have easier and lower-cost access to dispute resolution services, and to settle their claims more quickly in at least some cases.</p>

Resolving outstanding Canterbury earthquake claims is likely to have a secondary monetised benefit for Canterbury society as a whole, as it will generate spending in the region (for example, on construction).

Resolving claims will also reduce the stress and pressure on claimants, improving mental health and wellbeing. Secondary/flow-on monetised benefits will result from fewer claimants accessing mental health and other social services.

The initiative may have non-monetised benefits for the Government and wider society, as it may improve public trust and confidence in the accessibility and responsiveness of the justice system.

Where do the costs fall?

The initiative's implementation and administration will be a monetised cost to Government.

There may be additional monetised costs for insurers and claimants in cases where the tribunal process is used, where those cases may have instead settled informally under the status quo. Where a party then appeals a tribunal decision to the courts, these costs will increase.

The initiative may have non-monetised costs for the Government if it does not achieve its objectives (for example, if it slows down progress toward settlement, costs claimants more, or adversely affects the insurance market). The risk of this outcome may also represent a non-monetised cost.

What are the likely risks and unintended impacts, how significant are they and how will they be minimised or mitigated?

The likely risks and unintended impacts of the proposal (and mitigation methods) are:

- 1) Claims may take just as long, or longer, to be resolved through the new tribunal than under the status quo. This is due to the risk that it will be difficult to ensure sufficient numbers of technical experts are available to produce technical reports. The main cause of existing delays in reaching settlement is the limited availability of structural and geotechnical engineers with sufficient experience, training and qualifications in earthquake recovery work. The need for suitably qualified lawyers (to act as tribunal members, and to act for parties) may also create similar shortages.

This contributes to a more general risk that the key objective of the initiative is not realised, which could in turn undermine public confidence in the ability of the justice system to resolve Canterbury earthquakes disputes. Our analysis (which has been completed on the basis of incomplete and often unsubstantiated evidence) suggests this is a significant risk, especially due to the existing and forecast demand on a limited pool of technical expertise.

To the extent this risk can be mitigated, the main methods of doing so will be in the design of the tribunal's structure, operating processes, and service delivery, ensuring sufficient funding and resourcing is available to progress tribunal cases swiftly, and continuing work to minimise the existing strain on expert resources in Canterbury. Realising the other benefits of the proposal (eg, accessibility, support and guidance for claimants) will also help to bolster public confidence.

- 2) The Tribunal may not be sufficiently resourced to consider the volume of cases it receives. There is little evidence on which to base assumptions around uptake. If this

risk is realised, it is likely to further increase the time taken to resolve claims and the associated stress for claimants, in turn contributing to the risks outlined in para 1).

This risk will be mitigated through the continued availability of existing dispute resolution schemes (such as the High Court Earthquake List and the Insurance and Financial Services Ombudsman). If uptake is greater than estimated, further funding may need to be sought.

- 3) The tribunal takes longer than expected to become operational. This may worsen delays in reaching settlement for claimants who choose to wait for it to become available. The main causes of delay in getting the tribunal up and running are likely to be through the time required to draft and enact legislation, and the time needed to establish the tribunal (for example, getting staff and members trained, housed and ready to receive cases).

The Government can take steps to minimise the risk of delay associated with the legislative process. The Ministry will minimise implementation risks through early and ongoing planning, set-up, and procurement processes.

Identify any significant incompatibility with the Government's 'Expectations for the design of regulatory systems'.

The preferred option generally complies with the Government's 'Expectations for the design of regulatory systems'. There are clear objectives that the option seeks to achieve while remaining flexible and efficient. However, due to time constraints the analysis has not fully determined the nature and underlying causes of the problem or been able to seek comment from affected and interested parties outside Government about the proposed options.

Section C: Evidence certainty and quality assurance

Agency rating of evidence certainty?

Overall, the evidence base is uneven.

We have good information about the number of unresolved claims and their position within the 'settlement process'; it is sourced from routinely-updated data and information owned by agencies and insurers directly involved with those cases. Available evidence on re-opened claims relates only to cases on-hand with the Earthquake Commission (EQC), and does not include those with private insurers, or any estimates of the number of claims that may be re-opened into the future.

Anecdotal evidence of the nature of the problem is well-documented but relatively untested. It comes from those dealing directly with claimants, including the Residential Advisory Service (RAS), EQC, and Southern Response.¹ We have not been able to discuss the problem with private insurers.

We have based some assumptions about how options would work on evidence drawn from analogous initiatives such as the Weathertight Homes Tribunal and existing Government-administered mediation services. However, because we do not have a complete understanding of complainants' and insurers' needs, it is unclear how reliably

¹ The Government-owned company responsible for settling claims by AMI policyholders for Canterbury earthquake damage which occurred before 5 April 2012 (the date AMI was sold to IAG).

that evidence can be used in the Canterbury earthquakes context (for example, to inform assumptions about uptake and claimant satisfaction with outcomes).

Quality Assurance Reviewing Agency:

Ministry of Justice

Quality Assurance Assessment:

The Regulatory Impact Statement meets the Quality Assurance criteria.

Reviewer Comments and Recommendations:

The Ministry of Justice Regulatory Impact Assessment Quality Assurance Panel has reviewed the Regulatory Impact Statement (RIS) prepared by the Ministry of Justice and associated supporting material.

The RIS clearly articulates the options and assesses each against clearly specified objectives. The RIS clearly identifies the lack of consultation with those directly affected - insurers and claimants. This is noted as the result of the time to prepare the assessment. As this is clearly identified, we do not think that it significantly constrains the ability of Cabinet to rely on the RIS for decision making.

Impact Statement: Canterbury Earthquakes Insurance Tribunal

Section 1: General information

Purpose
<p>The Ministry of Justice is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing:</p> <ul style="list-style-type: none">• key (or in-principle) policy decisions to be taken by Cabinet, and• final decisions to proceed with a policy change to be taken by or on behalf of Cabinet

Key Limitations or Constraints on Analysis
<p>Limitations and constraints on the analysis in this document include:</p> <ul style="list-style-type: none">• a lack of empirical evidence about the nature of the problem (available qualitative evidence is anecdotal only, and sourced from or filtered through other Government agencies, news media and advocacy groups, rather than affected parties or their representatives)• gaps in quantitative data, including on the number and scope of existing re-opened claims with private insurers, and• insufficient time to consult and gather information to inform analysis or test assumptions underpinning it

Responsible Manager:
 <p>Ruth Fairhall General Manager, Courts and Justice Services Policy Ministry of Justice</p> <p>Date: 14/2/18</p>

Section 2: Problem definition and objectives

2.1 What is the context within which action is proposed?

Status quo

Unsettled claims:

- 98.5 percent of the 167,677 insurance claims received in relation to residential homes have been settled (as at 31 December 2017). Processes for settling claims, and resolving insurance disputes, have evolved since the earthquakes to deal with an unprecedented number of claims.
- As at 31 December 2017, 2,513 dwelling claims (as well as around 415 residential land claims, at 31 January 2018) remained unsettled. All remaining dwelling claims were 'over-cap'; for over \$100,000 and therefore with private insurers and Southern Response. Not all these claims have been with insurers since the earthquakes; many have only recently been transferred to private insurers (from EQC, when they became over-cap).
- The pathway to settlement is not linear: claims move back and forth between various stages. However, of the remaining over-cap claims, 21% were in construction and had a clear pathway to settlement. In a further 36% of cases, claimants were considering cash settlements. (We note that as insurers categorise their claims information differently, some caution is required when relying on this breakdown.)
- The remaining unsettled earthquake insurance claims tend to be increasingly complex, legally and technically. This complexity increases the time and cost required to settle or resolve disputes (a common example is where parties' experts disagree about the nature or extent of the damage, and/or a novel legal question arises in relation to the insurance contract). The circumstances of some claimants can further complicate and delay resolution – these circumstances may include health and financial difficulties or other priorities.

Re-opened claims

- As at 31 January 2018 EQC had recorded 2,242 claims that were previously settled but had been re-opened (some of which will be transferred to private insurers). Claims are being re-opened for a variety of reasons (including discovery of additional earthquake damage, under-costed work, and deficient repairs). Some of these are likely to be relatively straightforward to resolve. Claims will continue to be re-opened, with a proportion transferring to private insurers as they become over-cap.

Court cases

- As at 31 January 2018, 579 disputes are before the courts. Some of these cases have strong precedent value. The Christchurch High Court Earthquake List (which hears and case manages earthquake disputes) prioritises precedent cases, to assist settlement negotiations in analogous cases.

The Labour Party's election manifesto included a commitment to help people still experiencing frustration with residual issues from the Canterbury earthquakes, including by establishing a tribunal to quickly and fairly resolve insurance disputes.

Anecdotal evidence, news media and advocacy groups have highlighted delays and struggles experienced by some claimants in resolving disputes with their insurers. These issues have increased claimants' stress, financial pressures and/or social needs, on top of

the effects of the earthquakes themselves. In addition, some claimants may be unsatisfied with settlement offers, but are not in a financial or emotional position to take the insurer to court. This outcome can exacerbate delays and/or cause further stress and dissatisfaction with the system (whether or not the offer is accepted).

Most if not all claims (and settlement of those claims) require specialist technical input from geotechnical engineers, structural engineers, and/or quantity surveyors. There is a limited pool of these professionals with the requisite understanding of the Christchurch earthquakes sequence, and the wait times for these experts to become available appears to be a significant cause of delay in resolving claims.

Counterfactual

The counterfactual (that is, the future state where no additional action is taken) is expected to see a significant proportion of remaining claims resolve within the existing system over the next two to three years, based on MBIE estimates that the settlement rate (around 400 per quarter in 2017) will slow. Even where progress toward resolution is being made, claimants are likely to experience continuing frustration or negative effects on their wellbeing during that process.

In addition, a ‘tail’ of cases involving higher legal and technical complexity and more complex or comprehensive claimant needs will continue to slow in their resolution. In these cases, the uncertainty and lack of closure are likely to have an increasingly adverse impact on claimants’ mental health and wellbeing, and make it harder to get on with their lives. In the context of the status quo, this ‘tail’ is also likely to contribute to a perception that the dispute resolution system as a whole is failing or inadequate.

EQC expects its backlog of re-opened claims to be resolved by mid-2018, excluding those which move to litigation. New in-flows of re-opened claims are difficult to forecast, and we have no data on re-opened claims being managed by private insurers, so can make no estimates about the counterfactual in respect of those claims.

The counterfactual would see small numbers of new cases (existing and yet to be re-opened) continue to enter the court process, with existing resolution timeframes expected to continue or increase slightly (taking into account the higher legal and technical complexity of remaining unsettled claims, as outlined above).

2.2 What regulatory system, or systems, are already in place?

We have assessed options that sit across the insurance and dispute resolution systems. We have outlined below the key features of this regulatory landscape.

Canterbury Earthquake List

The judiciary established a special *Canterbury Earthquake List* in May 2012 in the Christchurch High Court, to manage and expedite the disposal of earthquake-related cases. The List encourages early identification of issues and exchange of expert reports to encourage parties to acknowledge the strengths and weaknesses of their cases earlier. Approximately 93% of cases disposed to November 2017 settled before trial. The List prioritises cases that have precedent value: clarifying these legal issues enables a raft of other cases to settle. Earthquake appeals are generally expedited.

As at 31 January 2018, there were 512 active Earthquake List cases on hand (and an additional 67 active cases on hand in the Christchurch District Court).

Residential Advisory Service

Insurers established the *Residential Advisory Service* (RAS) in May 2013 to help homeowners facing challenges getting their earthquake-damaged homes repaired or rebuilt. It is now fully funded by MBIE, and provides:

- free independent legal and technical assistance to residential property owners (legal assistance is provided by Community Law Canterbury);
- free 'second-opinion' advice from RAS' technical panel of experts (structural engineers, quantity surveyors and geotechnical engineers); and
- since November 2016, a 'brokering' service. Homeowners can have a face to face meeting with a broker to talk through issues regarding their claim. The broker can call a round-table meeting with key individuals involved in the claim who have authority to settle.

RAS was due to wind up in December 2017. The Government recently announced \$0.7m additional funding for RAS, extending it to July 2018. MBIE advise that if demand for RAS remains strong and funding is made available, further extensions are possible.

Other mechanisms

Some insurers offer access to independent *private mediation*. Complaints about EQC can be made to the *Parliamentary Ombudsman*. Remedies are also available through financial service providers' dispute resolution schemes. For example, the *Insurance and Financial Services Ombudsman* can consider complaints about member insurers relating to breaches of contract, statutory obligations or industry code, and non-compliance with relevant industry practice. It has accepted 198 earthquake-related complaints for consideration to date, but its jurisdiction is limited to disputes below \$200,000 (this limit is waived by Southern Response). As most of these options are insurer-funded, claimants may perceive they are not sufficiently independent.

Various *social services* are also funded or part-funded by the Government to assist claimants struggling with earthquake-related issues.

Government agency involvement

MBIE provides ongoing operational support and oversight for RAS. MBIE has stewardship responsibility for the financial markets regulatory system, including oversight of the approved dispute resolution schemes and the regulator (the Financial Markets Authority), and policy responsibility for insurance contract law. It is commencing a review of a number of aspects of insurance contract law, including whether there should be greater regulation of insurers' conduct. If the Christchurch earthquake experience reveals evidence of issues with insurers' conduct, this will be taken into account in that review. MBIE also houses the Government Centre for Dispute Resolution (the lead adviser to government on dispute resolution and steward for the overall dispute resolution system), and administers mediation services in other contexts, including for weathertight homes disputes.

The Department of Prime Minister and Cabinet (Greater Christchurch Group) has a leadership, oversight and brokering role in relation to Christchurch regeneration and Canterbury earthquake-related issues, and has recently become responsible for reporting on the progress to resolve insurance claims.

The Treasury monitors the performance of EQC and Southern Response, and manages the relationship between those organisations and the Minister of Finance and the Minister

Responsible for the Earthquake Commission.

The Ministry of Justice supports the Christchurch High Court Earthquake List and the courts in general. It also administers the Weathertight Homes Tribunal, among other tribunals.

Fitness for purpose

The overall fitness-for-purpose of the dispute resolution and insurance systems in the Canterbury Earthquakes context has not been formally assessed, although the extent of Government involvement means that monitoring provides a relatively good understanding of the status quo.

Government intervention may be warranted to preserve the trust in and integrity of those systems, which already includes core government functions (such as the courts) and other Government-administered initiatives.

2.3 What is the policy problem or opportunity?

The counterfactual (as described in section 2.1 above) is problematic on two key levels:

- Insurance claims remaining unresolved, beyond seven years after the Canterbury earthquakes, adds to the stress and mental health toll on claimants. The scope of this harm is relatively confined (to homeowners with unsettled or reopened insurance claims), but its nature and scale has significant personal impact for many of those affected.
- The continued existence of unresolved claims appears to be contributing to public distrust of and disillusionment with dispute resolution and insurance systems. The scope is broad (affecting Cantabrians in particular, but potentially also wider society, industries and government). The nature and scale of this problem are unclear and difficult to measure.

Evidence of the underlying causes of these problems is largely anecdotal, but fairly well documented. The underlying causes of delay in reaching settlement include:

- Insufficient numbers of qualified and experienced technical experts

Both claimants and insurers need advice from experts to make progress with settlement. In contrast to earlier claims, where settlements were based on estimates and indicative technical advice, the more complex claims now being considered require detailed design advice from experts. There is a limited pool of structural and geotechnical engineers with sufficient experience, training and qualifications in earthquake recovery work. The High Court, EQC, RAS and Southern Response all report that one of the main causes of delays in reaching settlement is the limited availability of experts. The specialist nature of this work, and requirement to produce reports to a high standard in a timely way, may limit the ability to bring on board new experts to remove the bottleneck. Anecdotal evidence also suggests that bringing parties' experts together to narrow or resolve the issues in dispute is a key catalyst for settlements.

- Frustrated and vulnerable claimants

A range of claimant-related factors may also be impeding progress towards settlement. These include caution and disinclination to accept settlement offers at face value or without expert advice; financial inability to seek advice or progress their claim; expectations going beyond legal entitlements; and health, age, financial, language, or other vulnerabilities (24% of RAS' greater Christchurch cases involve claimants who self-identify as vulnerable).

- The requirement for a ‘tiebreaker’ or an impending deadline

Claimants and insurers in novel or complex disputes may often wait for court decisions in precedent cases before making an offer or settling. Litigated claims often settle in the ‘shadow of the court’ – 93 percent of cases disposed via the High Court’s Earthquake List settled prior to a hearing or judgment. RAS’ brokering service also provides evidence that a third party can assist to bring parties closer to settlement.

In addition to the compounding effects of these delays on claimants’ and the public’s trust and confidence in the system, anecdotal evidence and results of Insurance and Financial Services Ombudsman investigations suggest the complexity of insurance contracts and their legal implications contributes to claimants’ and the public’s lack of understanding, feelings of powerlessness or unfairness, and dissatisfaction with insurance settlement and dispute resolution processes and outcomes.

We do not have comprehensive information about the extent to which insurer behaviour might be delaying the settlement of claims. RAS observes that while there have been isolated incidents where insurers have caused delay, insurers do not appear to be deliberately delaying settlement.

2.4 Are there any constraints on the scope for decision making?

The Labour Party’s election manifesto committed to establishing a tribunal to help resolve insurance disputes. The manifesto identified several of that tribunal’s features, including a ‘fast track’ approach to resolution, limited appeal rights, and an inquisitorial focus.

Given the emphasis on improving timeliness and the concern that claims are still unresolved years after the earthquakes, any initiative to assist in resolving these disputes needs to be implemented as soon as possible in order to meet its intended objectives.

All the options analysed in this RIS have interdependencies and connections with ongoing work to support claimants and help resolve insurance disputes. Key work areas are identified and discussed above in section 2.2.

2.5 What do stakeholders think?

The primary stakeholders are:

- homeowners with unresolved insurance claims, whose interest is primarily personal and financial
- insurers, whose interest is primarily financial
- the Government, whose interest is regulatory (in respect of both civil justice and insurance markets), financial, and tied to its earthquake recovery and Canterbury regeneration responsibilities.
- Cantabrians, whose interest is personal and financial.

We have no information about whether the problems identified affect Māori in particular.

We have gathered information about the status quo and problems from Government agencies, EQC and Southern Response. Consultation on the options has been limited to Government agencies. No direct consultation has occurred with claimants or private insurers. Any legislation required to progress initiatives is likely to involve select committee consideration, which will provide the opportunity for the public to submit views on the initiative.

Section 3: Options identification

3.1 What options are available to address the problem?

The options we have considered in the analysis below are:

1) Enhanced status quo

This non-regulatory option would provide a flexible package of resourcing to increase capacity for services in the current system (including, for example, extending the funding and/or brokering role of RAS; improving personal support for claimants; providing additional funding for legal advice and representation; increasing the availability of experts; and/or expediting court proceedings). Further work would be required to identify specific unmet needs and resource requirements.

The option would aim to build on and evolve the range of services already available, targeting resources where they are most needed to support claimants to progress and resolve remaining and re-opened claims.

2) Mediation

The government could fund or part-fund a dedicated mediation service for claimants and insurers. Parties could agree to be contractually bound to any settlement reached. If mediation failed to produce a settlement, parties could choose to take their claim to a different dispute resolution mechanism, such as court.

This option would aim to provide greater access to a lower-cost, less stressful alternative route to resolve insurance disputes. It would provide an independent third party to narrow the issues in dispute and guide settlement discussions.

3) Expanding financial dispute resolution schemes

All insurers are required to belong to one of the four approved financial dispute resolution schemes. Most belong to the Insurance and Financial Service Ombudsman (IFSO). These schemes could be amended to increase their capacity to deal with insurance issues. This could be done by amending their terms of reference (for example, raising the \$200,000 cap on the IFSO's jurisdiction). Insurers belonging to each scheme would need to agree to the changes, or regulations would need to dictate the changes.

This option would open up an alternative, potentially underused dispute resolution mechanism.

4) 'Weathertight Homes' tribunal model

This option would create a tribunal for resolving disputes, influenced by the approach taken in the Weathertight Homes Tribunal (WHT). The tribunal may refer appropriate cases to mediation before determining the dispute. The tribunal would have investigative powers and flexible procedure, but would be required to actively case manage disputes with the aim of speedy and fair resolution of issues truly in dispute. Timeframes would be set for stages of the proceeding. The tribunal would apply existing law, in relation to the terms of the relevant contract/s.

5) 'Equity and good conscience' tribunal model

This option would also create a tribunal for resolving disputes, with active case management and set timeframes for stages of the proceeding. However, the tribunal's decisions would be based on equity and good conscience as the overriding considerations. This means that the terms of the insurance contract would not necessarily be determinative.

None of these options address the shortage of technical expertise, which (as noted in section 2.3 above) has been cited as a key cause of delay in resolving disputes. Our initial work to identify options determined that increasing the supply of experts may not be feasible in the short term. Constraints include finding suitably experienced and qualified experts and significant time delays for them to develop competence (with an associated risk that reports do not meet required standards in the meantime). MBIE is currently exploring how the existing pool of technical experts in Christchurch could be used more efficiently, to help alleviate these delays.

3.2 What criteria, in addition to monetary costs and benefits, have been used to assess the likely impacts of the options under consideration?

We have equally weighted the criteria against which we have analysed the options. They are:

1) Efficiency

- The option can be implemented sufficiently quickly to be of benefit to claimants.
- The option enables earthquake-related (insurance) disputes to be settled quickly and is not likely to cause settled claims to be re-opened. This includes the impact of the option on claimant behaviour – for example, those already on the settlement pathway – and the risk of creating a perverse incentive for them to stop settlement discussions and wait for a different resolution option.
- The option provides value for money through an appropriate and proportionate response to the issues (from a claimant and government perspective).

2) Independence and fairness

- Disputes are managed and resolved in accordance with applicable law and natural justice.
- All dispute resolution functions are, and are seen to be, carried out in an objective and unbiased way.
- The option treats all claimants fairly, including claimants who have already settled their claims.

3) Effectiveness

- The option can respond to the needs of a wide range of claimants and claims.
- The option delivers durable resolutions between claimants and insurers.

4) Accountability

- There is public confidence in the dispute resolution process.
- There are mechanisms to ensure accountability and transparency.

5) Unintended outcomes minimised

- The option does not generate unintended outcomes.
- In particular:
 - The option does not reduce confidence to enter contracts governed by NZ law.
 - The option does not reduce the availability of insurance in New Zealand (both in terms of price increases that reduce accessibility of insurance and willingness of reinsurers to provide reinsurance to the New Zealand insurance market).

The main interrelationships and potential trade-offs to be considered are between aspects of efficiency (speedy implementation and resolution of claims, and value for money), effectiveness (meeting the needs of a wide range of claimants and claims, and more broadly meeting the objectives of the policy) and independence and fairness (natural justice, objective and unbiased resolution, equitable treatment with previously settled claims).

3.3 What other options have been ruled out of scope, or not considered, and why?

We initially considered encouraging or otherwise increasing the use of private arbitration as a further option. We ruled this out before in-depth analysis because:

- the costs for claimants are likely to be higher than for court (as similar legal representation and technical expertise expenses are required, and the arbitrator also needs to be paid for);
- arbitration is likely to preserve the significant power imbalances between claimant homeowners and insurers (and is better suited to disputes where both parties are well-resourced and experienced with the type of dispute to be arbitrated); and
- mechanisms for accountability, transparency, and precedent-setting are limited, as arbitration is conducted in private with very limited appeal rights.

Section 4: Impact Analysis

Marginal impact: How does each of the options identified at section 3.1 compare with the counterfactual, under each of the criteria set out in section 3.2?

Key:

- ++** much better than doing nothing/the status quo
- +** better than doing nothing/the status quo
- 0** about the same as doing nothing/the status quo
- worse than doing nothing/the status quo
- much worse than doing nothing/the status quo

	Efficiency	Independence and fairness	Effectiveness	Accountability	Unintended outcomes minimised
Enhanced status quo	<p>+</p> <p>Could be implemented relatively quickly, following more thorough research as to the nature and underlying causes of the problem.</p>	<p>0</p> <p>Would maintain current standards of independence and fairness (but would not address any perception that the current system may be inadequate or unfair).</p>	<p>+</p> <p>While this option would not provide any new avenues for resolving disputes, following work to better determine the nature and underlying causes of the problem this option would allow additional resources and assistance to be directed where they are most needed.</p>	<p>+</p> <p>Would not affect transparency and accountability. Additional resources may improve public confidence in the process if outcomes improve for claimants, but on its own the option may be perceived as little (or nothing new) being done to address the problem.</p>	<p>0</p> <p>Unlikely to have unintended consequences as no new services or settings would be delivered.</p>

	Efficiency	Independence and fairness	Effectiveness	Accountability	Unintended outcomes minimised
Mediation	<p>+</p> <p>Likely to support quicker and more satisfactory resolution of claims, but would be costlier to Government than the status quo. It is likely to represent value for money for claimants seeking an independent arbiter, and may save court time and resources if the issues in dispute are narrowed or resolved before court proceedings.</p> <p>This option could be implemented relatively quickly as legislation would not be required.</p>	<p>0</p> <p>Would preserve procedural fairness of current court-based resolutions. May be more independent and fair than informal resolution processes under the status quo, as mediators provide an unbiased ‘tiebreak’ and would be bound to uphold procedural fairness.</p> <p>Some claimants who have already settled may feel aggrieved that this option was not available to them.</p>	<p>+</p> <p>Likely to be more accessible and flexible than formal dispute resolution mechanisms available under the status quo.</p> <p>An independent mediator focused on resolving issues by agreement is likely to improve the resolution rate and satisfaction with, and durability of, outcomes.</p> <p>Southern Response’s experience with mediation suggests it works well to help resolve insurance disputes.</p>	<p>+</p> <p>Likely to increase public confidence overall. The details of the mediation and settlement would be private, but parties are not obliged to settle and court remains an open option. The administering agency could also produce anonymised reporting on outcomes reached.</p>	<p>0</p> <p>Unlikely to have significant unintended outcomes, as existing law will be applied. Similar (government-funded) initiatives may be expected after future natural disasters.</p>
Expanding financial dispute resolution schemes	<p>0</p> <p>Likely to improve timeliness, but it’s not clear that claimants’ satisfaction with the resolution process or outcome would be improved.</p> <p>Secondary legislation and/or industry consultation would be required to implement this option, so it is unlikely to be operational immediately.</p>	<p>0</p> <p>Decisions are binding on insurers, but not on claimants.</p> <p>Resolution processes are conducted procedurally fairly. However, as schemes like the IFSO are funded by insurers, it may be perceived as less independent than other mechanisms under the status quo.</p>	<p>0</p> <p>The dispute resolution process can be tailored to the claim. Resolutions to date appear durable, although it is unclear this trend would continue through larger volumes of claims (particularly for more technical disputes), especially as claimants are not bound by decisions. It is also not clear if the schemes would have the expertise to manage these highly complex claims.</p>	<p>0</p> <p>The claim process is public and aligned with contract law, but the individual resolution process and decision are confidential.</p>	<p>-</p> <p>As insurers are required to be part of one of the approved schemes and do not have appeal rights in respect of their decisions, expanding those schemes’ jurisdictions (especially in relation to more technical disputes) will likewise raise insurers’ risk. This may increase the price of insurance and/or reinsurance.</p>

	Efficiency	Independence and fairness	Effectiveness	Accountability	Unintended outcomes minimised
'Weathertight homes' tribunal model	<p>0</p> <p>May speed up resolution of difficult claims through the combination of mediation and tribunal determinations, but will take time, and require significant financial investment from the Government, to establish. It will cost less than court for claimants to access.</p>	<p>0</p> <p>Would maintain standards of independence and fairness. Some claimants who have already settled may feel aggrieved that this option was not available to them. It would be open for claimants who have filed proceedings in court to transfer their claim to the tribunal.</p>	<p>+</p> <p>Likely to improve the accessibility and uptake of dispute resolution via an independent third party, which will help to encourage resolution and satisfaction with results. A tribunal could use more flexible processes than the court (including mediation), with similarly durable resolutions.</p>	<p>+</p> <p>Would likely improve public confidence, if it improves the timeliness of and satisfaction with outcomes. Accountability mechanisms would be built into the tribunal's design. Decisions would be made public, with limited appeal rights (to the courts) provided.</p>	<p>0</p> <p>Unlikely to have significant unintended outcomes, as existing law will be applied. Similar (government-funded) initiatives may be expected after future natural disasters.</p>
'Equity and good conscience' tribunal model	<p>-</p> <p>May speed up resolution, but will take time and money to establish, and may create significant flow-on costs (through legal challenges, and in insurance markets and the wider economy – see note 1 below).</p>	<p>-</p> <p>Would be independent and fair within the bounds of its objectives and process. However, these depart in some aspects from general principles of procedural fairness. This option may produce more favourable outcomes for claimants than the status quo, which would be unfair to settled claimants and to insurers (which have insured the relevant property on the basis of existing contract and insurance law).</p>	<p>0</p> <p>Would be flexible and responsive to claimants, but potentially at the expense of durable resolutions (as insurers are likely to file appeals or other legal challenges where they do not agree with the basis for the decision).</p>	<p>-</p> <p>May improve public confidence in the dispute resolution process in the short term, but is likely to reduce it in the long term given the flow-on consequences and costs (related to legal challenges and risks to the insurance market and wider economy – see note 1 below).</p>	<p>--</p> <p>Decision-making based on equity and good conscience (which may be at odds with established law and the insurance agreement) is likely to have significant unintended effects (see note 1 below). If claimants consider this option will produce better outcomes than the status quo, any existing progress toward settlement may be brought to a halt with claims lodged in the tribunal instead.</p>

Note 1: If 'equity and good conscience' were the only or primary bases for the tribunal's decision-making, the terms of individual insurance contracts would not be determinative. This is likely to be viewed as interfering with the sanctity of freedom of contract, which would create uncertainty in existing similar contracts, and future commercial dealings. These effects would be felt most quickly in the insurance market. The perceived risk of future similar government interventions may increase the cost of insurance.

Section 5: Conclusions

5.1 What option, or combination of options, is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

The analysis table above indicates mediation best meets the assessment criteria. The Ministry’s preferred option would be to progress mediation alongside the enhanced status quo option. These options would complement each other, providing a more accessible independently arbitrated resolution process, and targeted support for those who need it in order to feel comfortable and ready to engage in the resolution process. As they do not require establishing legislation, these options could be implemented (and subsequently refined) relatively quickly. Additional work to determine where resources and support would be best directed could also be completed quickly, and ongoing quantitative and qualitative monitoring would indicate whether re-direction and refinement were necessary.

The Government’s commitment to establishing a tribunal is likely to mean its preferred approach will be to progress a tribunal influenced by the approach taken in the Weathertight Homes Tribunal.

Because of this work’s urgency, we have not consulted external stakeholders about their views. Insurers have publicly expressed reservations about the tribunal proposed in the Labour Party’s manifesto. We do not have evidence of claimants’ or the wider public’s views about the establishment of a tribunal.

5.2 Summary table of costs and benefits of the preferred approach

Below, we have summarised the costs and benefits of both the Government’s proposed approach and our preferred option. Due to time constraints and decisions about which option the Government will likely progress, the values of most costs and benefits we expect to be monetised have not been determined. We have categorised the relevant affected parties’ costs as low, medium or high, in the context of likely costs under the counterfactual.

Government approach: ‘Weathertight Homes’ tribunal model

Additional costs of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Insurers and claimants	<p>Legal and technical expenses in reaching resolution will increase in cases where the more formalised tribunal process is used instead of informal settlement negotiations under the status quo.</p> <p>This assumes the uptake of the tribunal option is greater than the current uptake of court-based dispute resolution, based on the proposed absence of filing fees; anecdotal evidence that insurers and claimants are motivated to resolve disputes; evidence from analogous tribunals; and our understanding of the likely complexity of cases and the tribunal’s proposed operating model.</p>	Low (monetisable)	Low-medium
Government	<p>The Government will fund the implementation and operation of the initiative.</p> <p>Assumptions include no fees for accessing the tribunal; uptake in around 1000 of the on-hand claims, which are to be resolved within 3.5 years; all cases accessing mediation and technical assessment reports; around 75% of cases settling via mediation or otherwise before the substantive tribunal hearing; and each member being able to deal with around 40 cases per year. These assumptions are based on the same evidence as identified above, and on the current and projected numbers of unsettled and re-opened claims and the likelihood that claims already on the ‘settlement pathway’ will continue without diverting to the tribunal.</p>	Withheld in accordance with 9(2)(f)(iv): Confidentiality of advice	Medium-high
Total monetised cost		Withheld in accordance with 9(2)(f)(iv): Confidentiality of advice	Medium
Non-monetised costs		See risks in section 5.3 below.	Low

Expected benefits of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Claimants	<p>The initiative is expected to encourage the resolution of insurance disputes, resulting in earlier settlement or resolution in at least some outstanding cases and therefore modest monetised benefit for those claimants (corresponding monetised costs to insurers may be less significant if the amount to be paid has been set aside in advance).</p> <p>This assumes at least some claimants use the tribunal option, and that the operating model and resourcing mean the tribunal can deal with its caseload quickly. Assumptions are supported by analogous tribunals' caseloads and timeframes, and SME input into the tribunal's design and resourcing/funding requirements.</p>	Low (monetisable)	Medium
Insurers and claimants	Insurers' and claimants' expenses in reaching resolution may modestly decrease where the tribunal is used instead of court under the status quo, and will significantly decrease if their dispute is resolved through mediation. This expectation is based on our understanding of the key drivers to resolution and settlement and the tribunal's proposed operating model.	Medium (monetisable)	Medium-high
Claimants and Government	Secondary monetised benefits will result from smaller volumes of, and less intensive, mental health and other social service requirements for claimants when the tribunal process is less stressful and quicker to achieve progress. This expectation is based on our understanding of claimants' situations under the status quo and the expected benefits outlined above.	Low (monetisable)	Medium
Claimants	Non-monetised benefits will result for claimants in cases where the tribunal process is less stressful and/or quicker to achieve progress than the process they would have used under the status quo. This is most likely in respect of cases that would have ended up in court, or spent significantly more time in protracted informal negotiations (based on our understanding of the effects on parties of the court process, and of claimants' situations under the status quo).	Low-medium (non-monetisable)	Medium
Canterbury (society)	Resolution of unsettled claims is likely to have a secondary monetised benefit for Canterbury society as a whole, as it will improve business confidence and generate spending in the region (for example, on construction). We can credit benefit to the initiative based on the expectation that more cases will be resolved, and earlier, than under the status quo.	Low-medium (monetisable)	Low-medium
Government and wider society	Public trust and confidence in the justice system will improve or be maintained more effectively than under the status quo, creating secondary/flow-on non-monetised benefits for both the Government and society. This is based on the expectation that more cases will be resolved, and earlier, than under the status quo, and the assumption that wider society is interested and invested in improving outcomes for claimants in Canterbury.	Low-medium (non-monetised)	Low-medium
Total monetised benefits		Low-medium	Medium
Non-monetised benefits		Low-medium	Low-medium

Ministry's preferred approach: Mediation and enhanced status quo (targeted provision of extra support)

Additional costs of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Government	<p>The Government would fund the implementation and operation of mediation and enhanced support services. (Some of the cost of providing targeted services may be seen to constitute a transfer of existing health and social services costs.)</p> <p>This is based on the assumption that mediation would be used in respect of around 1,000 claims, based on the current and projected numbers of unsettled and re-opened claims and the likelihood that claims already on the 'settlement pathway' will continue without diverting to mediation.</p>	Around \$10m over 5 years for the set up and delivery of mediation, plus additional funding for case management and targeted services and support.	Medium-high
Insurers and claimants	<p>Legal and/or technical expenses to reach resolution would increase in cases where mediation is used instead of informal settlement negotiations under the status quo.</p> <p>This assumes the uptake of mediation will include claimants who would not otherwise have progressed their claims to formal resolution mechanisms under the status quo. This assumption is based on anecdotal evidence that claimants feel existing dispute resolution mechanisms are inaccessible, and the fact that the proposed mediation services would be funded.</p>	Low (monetisable)	Low-medium
Total monetised cost		Around \$10m, plus additional costs.	Medium

Expected benefits of proposed approach, compared to taking no action			
Affected parties	Comment	Impact	Evidence certainty
Claimants and insurers	<p>This option is expected to encourage the resolution of insurance disputes, resulting in earlier settlement or resolution in many of the remaining cases (and therefore modest monetised benefit for claimants). Additional savings for parties (eg, for legal advice and/or representation, and expert reports) will occur in cases using mediation where court proceedings would otherwise have been filed, or where the resolution process would have been significantly more protracted.</p> <p>These expected benefits are based on assumptions that the targeted support element of the option will assist at least some claimants not currently on track to settlement into the mediation process, and that mediation services will be resourced to allow all claims entering the process to be dealt with more efficiently than existing resolution options.</p>	Medium (monetisable)	Medium

Claimants and Government	<p>Secondary/flow-on monetised benefits will result from smaller volumes and less intensive mental health and other social service requirements for claimants, as:</p> <ul style="list-style-type: none"> the mediation process is expected to be less stressful and/or quicker to achieve progress for many claimants with outstanding claims (especially those who would otherwise have filed court proceedings), and additional support will help claimants reduce or better manage their stress (although some of this saving may be seen to constitute a transfer to the costs to Government of providing targeted services). This expectation is based on our understanding of claimants' situations under the status quo and the principles and purposes of mediation. 	Low (monetisable)	Medium
Claimants	<p>Non-monetised benefits will also result for claimants in the same circumstances as described above (that is, cases where mediation is less stressful, more empowering and/or quicker to achieve progress than the process they would have used under the status quo, and where additional support helps claimants to reduce and/or manage earthquake-related stress or other health and wellbeing issues). This is likely in respect of many unsettled claims (based on our understanding of the effects of court proceedings on parties, claimants' situations under the status quo, and the principles and purposes of mediation).</p>	Medium (non-monetisable)	Medium
Canterbury (society)	<p>Resolution of unsettled claims is likely to have a secondary monetised benefit for Canterbury society as a whole, as it will improve business confidence and generate spending in the region (on both construction and living costs).</p> <p>This benefit can be credited to the initiative based on the expectation that more cases will be resolved, and earlier, than under the status quo.</p>	Low-medium (monetisable)	Low-medium
Government and wider society	<p>Public trust and confidence in the justice system will improve or be maintained more effectively than under the status quo, creating secondary/flow-on non-monetised benefits for both the Government and society.</p> <p>This is based on the expectation that more cases will be resolved, and earlier, than under the status quo, and the assumption that wider society is interested and invested in improving outcomes for claimants in Canterbury.</p>	Low-medium (non-monetised)	Low-medium
Total monetised benefits		Low-medium	Medium
Non-monetised benefits		Medium	Medium

5.3 What other impacts is this approach likely to have?

There is potential for other impacts stemming from risks we have identified in the policy analysis process, in respect of both the Ministry's and the Government's preferred options. The benefits outlined in the table above are all contingent on these risks.

- Both options may exacerbate the current strain on technical expertise, and potentially create similar strain on lawyers, if uptake of the service is high and more disputes require technical input. This risk is higher in respect of the tribunal option, which is likely to require a longer and more intensive period of input.
- Increasing strain on lawyers and technical experts may extend existing resolution timeframes in court proceedings. This effect could be heightened further by appeals from tribunal decisions, but is likely to be offset at least to some extent by fewer claims being filed in court (and instead being filed in the tribunal).
- If the initiative does not achieve its objectives (eg, if the resolution process takes longer than court or does not achieve a greater or faster resolution rate than under the counterfactual), it risks creating both monetised costs for insurers and claimants (for legal and technical input), and non-monetised costs for the Government and wider society (stemming from the public's trust and confidence in the initiative and the system in general). The perceived risk of this outcome may itself represent a non-monetised cost.

This risk may be greater in respect of the tribunal option, as it will require legislation to establish and the more formalised process is likely to require more time on average to reach resolution. Assumptions underpinning this possibility are that the tribunal applies a thorough case management and decision-making process analogous to similar tribunals, and that the complexity of issues will mean cases naturally take some time to resolve. It is also underpinned by the limited pool of legal and technical experts, who can only deal with a certain number of cases at a time.

- There is a risk of some monetised cost to society if the cost of insurance increases in response to any Government intervention.
- There is also a risk that the initiative will create expectations for future Government intervention if an event of similar magnitude were to occur. This risk is relatively low, given the exceptional nature of the Canterbury earthquakes and the number of people affected, and because lessons learnt in responding to them will be applied in future.

5.4 Is the preferred option compatible with the Government's 'Expectations for the design of regulatory systems'?

The preferred option generally complies with the Government's 'Expectations for the design of regulatory systems'.

There are clear objectives that the option seeks to achieve while remaining flexible and efficient.

However, due to time constraints the analysis has not fully confirmed the underlying cause of the problem or been able to seek comment from affected and interested parties about the proposed options.

Section 6: Implementation and operation

We have completed sections 6 and 7 in relation to only the Government's preferred option.

6.1 How will the new arrangements work in practice?

The initiative will require legislation to establish and govern the powers and processes of the tribunal.

Subject to further detailed design and final Cabinet decisions, the Ministry will lead the development, implementation and administration of the tribunal, with input from MBIE, which will implement and administer the mediation and technical assessment report aspects of the initiative. Funding will be allocated accordingly. The Ministry has significant experience establishing tribunals, and MBIE's expertise in the Christchurch context and dispute resolution generally will contribute to ensuring outcomes are delivered. MBIE also has expertise and significant experience in delivering mediation services. MBIE and the Ministry jointly administer the Weathertight Homes dispute resolution scheme, which will influence the tribunal's design.

6.2 What are the implementation risks?

Implementation risks reflect the general risks discussed above in section 5.3. The key risks are that:

- it will be difficult to ensure sufficient numbers of technical experts are contracted or otherwise available to produce technical reports. Relatedly, the tribunal may exacerbate the current strain on technical expertise, if uptake is high for claims not currently on the settlement pathway and therefore more disputes require technical input. If this occurs, further delay is likely in resolving claims, which will contribute to the overarching risk that the tribunal does not meet its objectives. If the proposed tribunal itself retains a pool of technical experts, this risk is correspondingly greater.
- depending on final funding and policy decisions, it may be difficult to ensure sufficient numbers of tribunal members are appointed.
- if the tribunal option increases the number of claimants who actively progress their claims, it will both create additional demand for lawyers and reduce their availability (because prospective members of the tribunal are likely to be lawyers based in Christchurch with experience in the earthquakes context).
- on a more general level, the option's potential uptake is uncertain and cannot be more accurately determined if the tribunal is to be operational as early as possible. This risks over- or under-calculation of funding and sub-optimal system design.
- the tribunal becomes operational later than expected, resulting in further delays for claimants who wish to use the option.

Funding and design decisions will take account of the uncertainties underlying these risks, and a cross-agency implementation plan will be developed following Cabinet decisions about the policy and alongside the legislative process.

Work to mitigate these risks will be able to be undertaken throughout the legislative process. In particular, to the extent possible, set-up and procurement processes will be undertaken prior to enactment, so the initiative is operational as soon as possible.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

The administering agency or agencies would measure the uptake and success of the tribunal via standard monitoring processes, legislative reporting requirements and collection and analysis of data generated via case management systems. Key performance indicators will include the tribunal’s caseload, timeframes through case stages, case settlement rate, and other statistical and qualitative information. These will be measured against those in other dispute resolution settings (including court). MBIE will contribute to this monitoring with information on mediation services and technical assessments.

7.2 When and how will the new arrangements be reviewed?

A cross-agency (Ministry and MBIE) performance monitoring plan will be developed alongside the detail of the legislation and implementation plan. It will include the use of existing data analysis tools, and regular qualitative self-evaluation within and across the tribunal and administering agencies. Optional feedback loops for claimants and insurers using the tribunal could also be included.

The establishing legislation may require the tribunal to annually report on its activities.

Should monitoring or feedback highlight persisting and serious problems with the tribunal’s operation, the administering agency could lead a review of its relevant settings and underlying assumptions (with input from interested agencies, organisations and individuals as appropriate). Given the urgent and potentially short lifespan of the tribunal, there may be practical limitations on the ability to review the initiative or take any remedial action.